

ORIGINAL

IN THE SUPREME COURT OF OHIO

Squire, Sanders & Dempsey L.L.P.,

Plaintiff-Appellant,

v.

Givaudan Flavors Corporation,

Defendant-Appellee.

Case No. 2009-1321

Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District

Court of Appeals Case No. 92366

**APPELLEE GIVAUDAN FLAVORS CORPORATION'S
MEMORANDUM IN OPPOSITION TO JURISDICTION**

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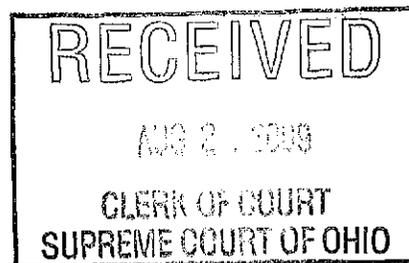
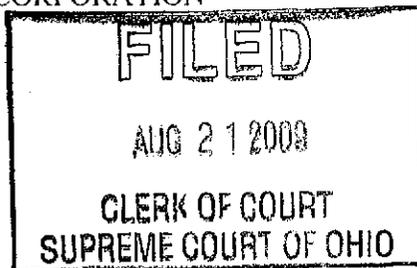


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INTRODUCTION

Appellant Squire, Sanders & Dempsey L.L.P. (“SSD”) asks this Court to accept jurisdiction to create a self-protection exception to the Ohio testimonial privilege statute (R.C. 2317.02). But, as recently as July 1, 2009, this Court reiterated its consistent rejection of judicially-created waivers, exceptions, and limitations of the testimonial privilege statute and again confirmed that any “exception to [the statutory] privilege is a matter for the General Assembly to address.” *Roe v. Planned Parenthood Southwest Ohio Region*, 2009-Ohio-2973, ¶ 48, 2009 WL 1886628 (Ohio, July 1, 2009). Accordingly, SSD’s appeal does not raise an issue of public or great general interest.

Review also is unnecessary because SSD’s attacks on the Court of Appeals’ decision are completely unfounded and contrary to well-established Ohio law. SSD’s Memorandum in Support of Jurisdiction (“SSD’s Memo”) fails to rebut (or even mention) *Roe, supra*, which confirmed just three weeks earlier that the Court of Appeals correctly declined to recognize a judicial self-protection exception to the statutory privilege.

Moreover, the Court of Appeals correctly held that the trial court’s failure to conduct an evidentiary hearing or an *in camera* review regarding any materials protected solely by the common law attorney-client privilege was reversible error. SSD asserts that the common law attorney-client privilege is inapplicable because it is involved in a dispute with Appellee Givaudan Flavors Corporation (“Givaudan”), its former client. But the mere existence of a dispute between SSD and Givaudan does not trigger any automatic waiver of the common law attorney-client privilege. Thus, the trial court must apply the implied waiver analysis.

Finally, SSD claims that the purported self-protection exception also applies with equal force to work product material. However, as with the common law attorney-client privilege, the mere existence of a dispute between SSD and Givaudan does not trigger any automatic or

blanket waiver of work product protection. The Court of Appeals correctly held that the trial court's failure to conduct an evidentiary hearing or an *in camera* inspection was reversible error.

In summary, the Court of Appeals correctly ruled that, on remand, the trial court must conduct an evidentiary hearing or an *in camera* review and determine (a) whether Givaudan has waived the statutory privilege in the manner set forth in R.C. 2317.02, (b) whether Givaudan has waived the common law privilege in accordance with the test in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), and (c) whether SSD is entitled to any of the requested work product in accordance with applicable law.

Accordingly, this Court should decline to accept jurisdiction.

SSD DOES NOT RAISE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

The proposed question of whether this Court should create a self-protection exception to the testimonial attorney-client privilege statute does not raise an issue of great or public importance. Indeed, this Court already has answered this question multiple times, including most recently on July 1, 2009, in *Roe*, 2009-Ohio-2973 at ¶ 48.

In *Roe*, this Court once again confirmed that any "exception to the [R.C. 2317.02 statutory] privilege is a matter for the General Assembly to address." *Id.* Moreover, in *Roe*, this Court cites and quotes its decision in *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 13 (2006), in which this Court explicitly declared that it "has consistently rejected the adoption of judicially created waivers, exceptions, and limitations of testimonial privilege statutes." Indeed, in *Jackson*, this Court explained that it was not properly within a court's function to fashion or permit judicially-created departures from such statutes. To the contrary, noting that the General Assembly has chosen to define the limits of the statutory

attorney-client privilege, this Court stated emphatically, “It is not the role of this court to supplant the legislature by amending that choice.” *Id.*

Although the Court of Appeals made its decision in the instant case prior to the release of *Roe*, it nonetheless correctly followed *Jackson* and appropriately deferred to the legislature. Now, with the issuance of *Roe*, it is even more apparent that the decision at issue is neither novel nor otherwise worthy of this Court’s review. Yet without any mention in its brief, let alone acknowledgment of this Court’s recent decision in *Roe*, SSD insists that the absence of a self-protection exception will lead to “wide-ranging and perverse” consequences for both law firms and clients. SSD’s Memo at 3. These are policy arguments, not legal authority, and they further illustrate the wisdom of this Court (and of the Court of Appeals below) in letting the legislature determine whether to amend the privilege statute. *Roe*, 2009-Ohio-2973 at ¶ 52 (“public policy arguments [in connection with permissible disclosures under R.C. 2317.02] . . . should likewise be addressed by the General Assembly, not the judiciary”).

SSD also suggests that Givaudan’s disclosure of otherwise protected information pursuant to a “self-protection exception” would not result in “the outside world having access to [it].” SSD’s Memo at 4, 11. But SSD has not presented any controlling legal support for that contention. In fact, throughout this litigation, Givaudan has invited SSD to identify legal authority establishing that the disclosure of privileged information to SSD (which currently has no attorney-client relationship with Givaudan) and/or SSD’s subsequent use of such privileged information would not result in a waiver of protected status beyond the confines of the instant matter or present a danger that such status would be lost or undermined with respect to outside parties. To date, SSD has not located any controlling authority that the disclosure of protected information by SSD to experts, non-party witnesses, jurors, observers in open court, and other

such persons would not effectively obliterate Givaudan's privilege or render it worthless.¹ Of course, whether or not a self-protection exception would preserve Givaudan's privilege as to everyone but SSD, the decision whether to create the exception still belongs solely to the legislature.

Finally, SSD urges this Court to judicially create a self-protection exception based on the Restatement (Third) of Law Governing Lawyers. But SSD does not and cannot explain why the American Law Institute should supplant the role of the Ohio legislature.

In short, it is undisputed that the Ohio testimonial privilege statute currently does not include a self-protection exception. The question of whether to create one remains a matter for the General Assembly, not for this or any other Ohio court. The Court of Appeals correctly deferred to the legislature, and no public or great general interest compels this Court to weigh in yet again. This Court should decline to accept jurisdiction over this issue.

STATEMENT OF THE CASE AND PERTINENT FACTS

SSD's attempt to place itself in the role of victim is belied by uncontroverted facts. As explained to the courts below, Givaudan discovered that its former counsel, SSD, intentionally and knowingly transmitted (and collected payment for) invoices for legal services containing massively-inflated billing entries, as well as personal expenses for vacations, luxury hotels, airfare, and meals that were entirely unrelated to Givaudan matters. *See, e.g.*, Appx.² at 4.

¹ *Stern v. Daniel*, a 1907 decision from Washington, hardly provides any definitive authority under Ohio law, much less any of the other jurisdictions in which the underlying litigation is pending. *Netzley v. Nationwide Mut. Ins. Co.*, a 38-year-old Ohio decision, addressed the discoverability of privileged documents in the context of joint representation and says nothing about the issue at hand.

² "Appx." refers to the Appendix filed with SSD's Memo.

More specifically, SSD intentionally marked up the time recorded by individual timekeepers on particular tasks and transmitted false legal invoices to Givaudan. So far, Givaudan has discovered that SSD intentionally inflated the time recorded on hundreds of separate billing entries, in some instances by more than 400%. It was also undisputed below that SSD partners and other timekeepers billed Givaudan for a wide range of personal expenses. As just one of dozens of examples, SSD partner Alan Briggs billed Givaudan for a personal trip to New York with his wife, including a stay at a luxury hotel. This trip was unrelated to any Givaudan matter. Despite many opportunities below, SSD has never disputed the personal nature of this trip and many other personal charges discovered (but already paid for) by Givaudan.

Shortly after Givaudan discovered SSD's improper expenses, the Wall Street Journal reported on "a string of crimes relating to lawyers' accounting of expenses." Ashby Jones, *Manhattan Lawyer Disbarred Over Billing*, Wall Street Journal, Sept. 25, 2008, at B10. In particular, the article outlined the disbarment of a partner at Sullivan & Cromwell for billing personal and other inappropriate expenses to clients and a guilty plea to mail fraud by a lawyer at Latham & Watkins LLP. To their credit, these firms immediately notified the authorities upon discovery of the improper billing. In contrast, SSD denied responsibility and refused to take immediate and appropriate steps to deal with the dishonesty of its attorneys and staff. SSD instead decided, as a matter of litigation strategy, to use the threatened or actual disclosure of attorney-client and work product information as a bludgeon to force Givaudan to pay intentionally fabricated and improper bills.

Specifically, SSD had for several years represented Givaudan in the defense of mass tort product liability litigation, which litigation remains active throughout the United States and is

being handled by new defense counsel. *See Appx.* at 3-6. In response to Givaudan's unwillingness to pay excessive and erroneous billings, SSD has sought to pressure Givaudan to acquiesce or risk disclosure of privileged and work product information concerning the pending product liability claims. For example, in July 2008, shortly after Givaudan had discovered and called attention to new evidence of billing misconduct, SSD filed a motion to compel the disclosure of admittedly privileged and work product protected information.

On October 28, 2008, the trial court summarily granted SSD's motion to compel without conducting any *in camera* review of privileged and work product documents, without conducting any implied waiver analysis for information protected solely by the common law attorney-client privilege, and without identifying any good cause for work product discovery. *Appx.* at 23, 26. The trial court's order required Givaudan to produce privileged and work product documents and instructed Givaudan's former chief legal officer and Givaudan's current General Counsel to provide deposition testimony about privileged and work product matters. The trial court's order also appeared to permit SSD to use privileged and work product information in its possession.³ *Id.* at 29-32.

³ SSD intentionally mischaracterizes and disguises two critical aspects of its motion to compel, which motion is the subject of this appeal. *See* SSD's Memo at 6. First, SSD's motion to compel did not merely demand discovery of communications between Givaudan and SSD, but also sought disclosure of communications between Givaudan and its other former and current attorneys. *See Appx.* at 4-6 and fn. 5, *infra*. As just one example of the deleterious effects resulting from the trial court's order, Givaudan would have been required to disclose many privileged and work product protected communications between and among itself and its new defense counsel, Morgan Lewis. Those documents, as a matter of law and by SSD's own admission below, are not discoverable. Second, contrary to SSD's claim, and as suggested by the title of the motion to compel, SSD only sought discovery from Givaudan; it did not seek court authorization "to use and rely upon items already in [SSD's] possession." SSD's Memo at 6. However, the trial court's order below purported to grant this extraordinary relief without giving Givaudan any opportunity whatsoever to address the issue. The Court of Appeals reversed the trial court's order without relying on these two errors. However, they alone would mandate the reversal of the trial court's order. *See, e.g., State ex rel. Dann v. R&J Partnership,* (...continued)

Givaudan appealed. On June 8, 2009, the Eighth District Court of Appeals reversed the trial court order in relevant part. *See id.* at 1. On July 22, 2009, SSD sought this Court's review.

ARGUMENT IN OPPOSITION TO SSD'S PROPOSITION OF LAW

SSD concedes that the documents and information covered by this appeal are privileged and that Givaudan has not waived any privilege. SSD's Memo at 8. However, SSD's proposition of law, if adopted, would automatically permit a law firm to disclose privileged and highly sensitive communications and information solely on the ground that the law firm and its former client happen to have a dispute.

Faced with this untenable circumstance, the Court of Appeals disagreed with SSD and, among other things, ruled that: (a) there is no self-protection exception to the statutory attorney-client privilege, (b) there is no automatic waiver of the common law privilege, and (c) there is no automatic waiver of work product protections. Appx. at 9-26. More specifically, the Court of Appeals ruled that the trial court committed reversible error in summarily granting SSD's motion to compel without conducting an evidentiary hearing or an *in camera* review. *Id.* at 10, 20, 23, 26.

As demonstrated below, the Court of Appeals' decision is correct and SSD's proposition of law is incorrect as a matter of well-established Ohio law. Further review by this Court is unnecessary.

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Ltd., 2007-Ohio-7165, ¶ 30 n.4, 2007 WL 4615956 (Ohio Ct. App. 2 Dist., Dec. 28, 2007) (where a plaintiff does not move for a specific relief, even "[t]he fact that the . . . defendants and the trial court addressed a non-existent issue does not provide a basis for awarding the [plaintiff the] . . . relief it never sought. Moreover, even if [plaintiff is correct about entitlement to that relief] . . . , it would be unfair to grant the [plaintiff] . . . relief under a statute that its motion failed to invoke"); *see also* Civ. R. 7(B)(1).

A. The Court Of Appeals Correctly Ruled That There Is No Self-Protection Exception To The Statutory Privilege

SSD claims that the statutory attorney-client privilege set forth in R.C. 2317.02(A)⁴ is subject to a self-protection exception. SSD's Memo at 8-14. However, the Court of Appeals correctly stated that, "under *Jackson v. Greger*, supra, R.C. 2317.02(A) provides the exclusive means by which privileged testimonial communications directly between an attorney and a client can be waived, i.e., the client expressly consents or the client voluntarily testifies on the same subject." Appx. at 15.

As the Court of Appeals observed, "SS&D strenuously argues that the rule announced in *Jackson v. Greger*, supra, . . . [is] completely inapplicable herein since this matter involves communications between a client and his former counsel and *Jackson* . . . involved [a] situation[] where the defendant sought to obtain communications between a client and a different attorney or firm." Appx. at 21. In other words, even though the statute uses both "waived" and "except" (i.e., "except that the attorney may testify by express consent of the client"), SSD argues that there is a distinction between waivers and exceptions to R.C. 2317.02.

⁴ R.C. 2317.02(A)(1) provides: "The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute."

The Court of Appeals properly rejected this argument: “R.C. 2317.02 does not set forth these distinctions.” Appx. at 21 (*citing Woyczynski v. Wolf* (1983), 11 Ohio App.3d 226 (“The [R.C. 2317.02] privilege is not presumed waived merely because a third party filed a claim alleging malicious prosecution, nor does this court find the privilege waived from the fact that defendants denied the allegations in the complaint. The statute contains no provision for an automatic waiver based on the pleadings”)) (disapproved on other grounds in *Trussell v. General Motors Corp.*, 53 Ohio St. 3d 142 (1990)).

Moreover, any purported exception/waiver distinction is irrelevant to SSD’s proposition of law because “this Court . . . has consistently rejected the adoption of judicially created *waivers, exceptions, and limitations* for testimonial privilege statutes.” *Jackson*, 110 Ohio St. 3d at ¶ 13 (emphasis added); *Roe*, 2009-Ohio-2973 at ¶ 48. SSD argues that this Court’s use of the words “waivers, exceptions, and limitations” is meaningless, that *Jackson’s* reference to “waivers, exceptions, and limitations” should be read to mean “waivers” only, and that this Court’s rejection of all types of judicially-created deviations and departures from privilege statutes must be disregarded as inadvertent or mere dictum. *See* SSD’s Memo at 11-13.

If this interpretation of *Jackson* ever seemed even remotely plausible to SSD, the *Roe* decision should have dispelled that notion. By expressly citing to and relying on the identical “waivers, exceptions, and limitations” language set forth in *Jackson*, this Court in *Roe* plainly refuted SSD’s speculation that the language was simply a product of unintended or fuzzy decision-making. *Roe*, 2009-Ohio-2973 at ¶ 48.⁵ Indeed, in *Roe*, this Court recently confirmed

⁵ Moreover, SSD expressly conceded below that Givaudan’s reliance on *Jackson* “would *resonate* if . . . the order below had compelled the production of privileged communications ‘between and among Givaudan [and] its *new defense counsel*.’” Appellee’s Brief at 20 (filed by SSD with the Court of Appeals on December 15, 2008) (first emphasis added). However, the trial court’s order plainly covers all of SSD’s requests, many of which seek communications

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that any purported “*exception* to the [R.C. 2317.02 statutory] privilege is a matter for the General Assembly to address.” *Roe*, 2009-Ohio-2973 at ¶ 48 (citing *Jackson, supra*; emphasis added).

SSD’s other attempts to avoid *Jackson* – reliance on *Grace v. Mastruserio* and *H & D Steel Service, Inc. v. Weston, Hurd, Fallon, Paisley & Howley* (SSD’s Memo at 14) – do not fare any better. *Grace* expressly rests on the premise that the statutory privilege set forth in R.C. 2317.02(A) does not cover production in discovery. 2007-Ohio-3942, ¶¶ 17, 23, 2007 WL 2216080 (Ohio Ct. App. 1 Dist., Aug. 3, 2007). But this directly contradicts *Jackson*, which is controlling authority and clearly states that R.C. 2317.02(A) “applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process.” 110 Ohio St. 3d at ¶ 7 n.1. As for *H & D Steel Service*, the case provides no support to SSD because it was decided in 1998, long before *Jackson*.

Undeterred by the dearth of supporting authority and by this Court’s repeated and clear rejection of any and all judicially-created waivers of, exceptions to, and limitations upon testimonial privilege statutes, SSD insists that courts in Ohio have previously created and/or recognized a self-protection exception. Whether true or not, this contention is entirely irrelevant in light of this Court’s decisions rejecting judicially-created exceptions.

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between Givaudan and Morgan Lewis, Givaudan’s “new defense counsel.” Appendix to SSD’s Motion to Compel, Exs. A and B (Request Nos. 4-11, 22-28) [Court of Appeal’s Document reference number 62 (filed by SSD with the trial court on July 28, 2008)].

However, for the record, even if judicially-created exceptions were permitted by this Court (and they plainly are not), the 1902 Ohio decision trumpeted by SSD, *Keck v. Bode*, 13 Ohio C.D. 413, 1902 WL 868, at *1 (Ohio Cir. Ct. 1902) would not support the trial court's underlying order. *Keck* addressed permissive disclosure by the attorney in an attorney-client dispute, not an order compelling a client to disclose documents and testimony.⁶

SSD further relies on non-Ohio authority which is no more persuasive.⁷

⁶ SSD weakly attempts to resuscitate *Keck* by arguing that the Ohio legislature is "presumed" to have known about *Keck* and certain non-Ohio decisions when it enacted certain unspecified amendments to the statute. SSD's Memo at 9. SSD's reliance on *Clark v. Scarpelli*, 91 Ohio St. 3d 271, 744 N.E.2d 719 (2001) is misplaced. In *Clark*, the court noted that the "changes to R.C. 3937.18(A)(2) brought about by S.B. 20 have resulted in conflicting interpretations by various trial and appellate courts throughout Ohio," with the amended "'amounts available for payment' statutory language susceptible of at least two conflicting interpretations." 91 Ohio St. 3d at 274. Accordingly, the court interpreted "'amounts available for payment,' a phrase that is repeated throughout *Andrews* [this Court's decision predating the amendment]" the way that phrase was interpreted in *Andrews*. *Id.* at 278.

However, where "the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *Id.* at 274 (citations and quotation marks omitted). Here, SSD does not and cannot claim that R.C. 2317.03(A) is ambiguous or indefinite. Indeed, as observed by this Court, R.C. 2317.03(A) is clear. *Jackson*, 110 Ohio St. 3d at ¶ 12. The Court of Appeals below agreed that the statute "plainly states" that the attorney shall not testify in certain respects. Appx. at 21. Accordingly, SSD's attempt to inject a judicially-created exception into R.C. 2317.03(A) fails. *Jackson*, 110 Ohio St. 3d at ¶¶ 12-13; *Roe*, 209-Ohio-2973 at ¶ 42 ("We cannot insert words into a statute. Instead, we must give effect only to the words used.").

⁷ SSD's non-Ohio authority (SSD's Memo at 8-10) also addressed permissive disclosure by the attorney, not a motion to compel production of documents and testimony from the client. Nor are privilege decisions in other states particularly relevant. Each state has varying statutory and common law privileges, and the extent of their reach differs from one jurisdiction to the next. See *Swetland v. Miles*, 101 Ohio St. 501, 505, 130 N.E. 22, 23 (1920) (rejecting adoption of judicial exceptions to the statutory attorney-client privilege: "We are not especially concerned about the decisions in other courts, some of which are contrary to this holding. Each must be based upon the settled practice in that state, or the statute regulating such evidence in that particular state. We have only to do with our own statute, which is clear and comprehensive.").

In any event, each of SSD's non-Ohio cites is inapposite. In *Sokol v. Mortimer*, 225 N.E.2d 496, 501 (Ill. Ct. App. 1967), the court addressed testimony of "plaintiff, an attorney, . . . [regarding]

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Next, SSD asserts that Ohio Rule of Professional Conduct 1.6 (“Rule 1.6”) incorporates the self-protection exception. *See* SSD’s Memo at 13-14. The Court of Appeals held that it “cannot read Rule 1.6(b)(5) as the preeminent and controlling authority in this matter; the correct analysis must focus chiefly upon the statutory and common law related to the attorney-client privilege for each piece of evidence for which this privilege is claimed.” Appx. at 19. Indeed, SSD’s reliance on Rule 1.6 is misplaced for at least three separate reasons.

First, as noted by the Court of Appeals, Rule 1.6 is inapplicable here because it is limited in scope. It is only “designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.” Appx. at 18.

Second, Rule 1.6 has nothing to do with the ability of a law firm to compel production from its client or a third party. At most, and with certain limitations, it merely indicates when a law firm may disclose otherwise privileged information that is already in its possession.

Third, and most important, Rule 1.6 is a judicial creation, not a legislative enactment. Accordingly, SSD’s assertion that Rule 1.6 creates an exception to the testimonial privilege statute flies in the face of this Court’s repeated rejection of judicially-created waivers, exceptions, and limitations. No matter how many different ways SSD restates its core argument, judicial action – whether in the form of case decisions or rules of professional conduct – cannot supplant the legislature.

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certain privileged and confidential communications between himself and defendant, his former client.” *Carlson, Collins, Gordon and Bold v. Banducci*, 257 Cal. App. 2d 212, 225 (1967), likewise involved testimony by plaintiff-attorney. In *Daughtry v. Cobb*, 5 S.E.2d 352 (Ga. 1939), the client *testified* extensively about her communications with the attorney. *Id.* at 354-55. The court held that the “attorney should be allowed to testify as to matters which might otherwise be confidential.” *Id.* at 255. In *Weinshenk v. Sullivan*, 100 S.W.2d 66 (Mo. Ct. App. 1937), privileged letters were introduced by the attorney. *Id.* at 70. Finally, in *Stern v. Daniel*, 91 P. 552 (Wash. 1907), a client objected to the admissibility of client-attorney letters.

B. The Court Of Appeals Correctly Ruled That There Is No Automatic Waiver Of The Common Law Attorney-Client Privilege

The disclosure of information protected by the common law privilege (as opposed to the statutory privilege) is required *if*, among other things, “application of the privilege would . . . den[y] the opposing party access to information vital to his defense. . . . ‘Vital’ information necessarily implies that the information is unavailable from any other source.” *H & D Steel Service, Inc.*, 1998 WL 413772, at *3-4 (discussing the *Hearn* test).

In its motion to compel, SSD failed to identify any documents or information protected solely by the common law attorney-privilege. Nor did SSD make any showing that any such material is vital to its defense and unavailable from any other source. Instead, SSD suggests that the common-law privilege is defeated simply because there is a dispute between SSD and Givaudan. SSD’s Memo at 14. As recognized by the Court of Appeals, “*Hearn* . . . clearly indicated that its implied waiver analysis is applicable to situations ‘where the attorney and client are themselves adverse parties in a lawsuit arising out of the relationship.’” Appx. at 21 (*quoting Hearn*, 68 F.R.D. at 580). The Court of Appeals correctly declined to recognize a rule that an “automatic waiver” of the common law attorney-client privilege occurs “simply because the attorney and client who are the subject of such communications are now in an adverse relationship.” Appx. at 22.

C. The Court Of Appeals Correctly Ruled That There Is No Automatic Exception To The Work Product Doctrine Protection

As the Court of Appeals explained, “if requested discovery is arguably work product, the trial court should conduct an evidentiary hearing or *in camera* inspection to evaluate this claim.” *Id.* at 25. Here, it is undisputed that SSD’s motion to compel covered information protected by the work product doctrine and that the trial court failed to conduct an evidentiary hearing or an *in camera* inspection. The Court of Appeals correctly held that this is “reversible error.” *Id.* at 26.

Without any analysis, SSD now summarily (and incorrectly) asserts that the self-protection exception also defeats Givaudan's work product protection. SSD's Memo at 15. But the attorney-client privilege and the work-product doctrine constitute independent and distinct sources of immunity from discovery. *In re Election of Nov. 6 1990 for Office of Atty. Gen. of Ohio*, 57 Ohio St. 3d 614, 615, 567 N.E.2d 243, 244 (1991) ("a waiver of the attorney-client privilege does not necessarily constitute a waiver of [work-product] exemption under Civ. R. 26(B)(3)").⁸

Before it can obtain the requested work product, SSD must satisfy Civil Rule 26(B)(3), which it has not done. *See Jackson*, 110 Ohio St. 3d at ¶ 14; Appx. at 23-26. Ohio recognizes both ordinary fact and opinion work product. *Jerome v. A-Best Products Co.*, 2002-Ohio-1824, ¶¶ 20-21, 2002 WL 664027, at *3 (Ohio Ct. App. 8 Dist., Apr. 18, 2002). Here, SSD is not entitled to gain access to either type. First, SSD made no "showing that [such work product] materials, or the information they contain, are relevant" to this action. *Jackson*, 110 Ohio St. 3d at ¶ 16. Second, SSD made no "exceptional showing of need" for discovery of opinion work product, which can occur only "in rare and extraordinary circumstances." *Jerome*, 2002-Ohio-1824 at ¶ 20.

⁸ The sole Ohio authority for SSD's argument, *National Union Fire Ins. Co. v. Ohio State Univ. Bd. of Trustees*, No. 04AP-1340, 2005 WL 1840220, 2005-Ohio-3992 (Ohio Ct. App. 10 Dist., Aug. 4, 2005), is inapposite. That case addressed the discoverability of an insurer's "claims files" containing both attorney-client and work product information, and relied on *Garg v. State Auto. Mut. Ins. Co.*, 155 Ohio App. 3d 258, 2003-Ohio-5960, 800 N.E.2d 757 (2 Dist.) only for the proposition that both attorney-client and work product information contained in the insurer's "claims file" are "unworthy of protection . . . [and] are subject to disclosure during discovery on [insurance] bad-faith claims." *National Union Fire Ins. Co.*, 2005-Ohio-3992 at ¶¶ 9, 14; *Garg*, 155 Ohio App. 3d at ¶ 16. This is not the case here.

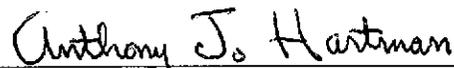
Accordingly, the Court of Appeals correctly held that the trial court's blanket order for the production of the requested work product, without any evidentiary hearing or *in camera* review, constituted reversible error.

CONCLUSION

Based on the foregoing reasons and authorities, this appeal does not involve issues of public or great general interest. Givaudan accordingly asks this Court to decline jurisdiction.

Dated: August 20, 2009

Respectfully submitted,

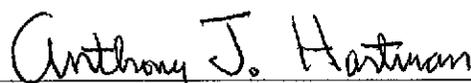


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CERTIFICATE OF SERVICE

On this 20th day of August, 2009 the original and ten copies of the foregoing Memorandum in Opposition were sent via Federal Express for filing to the Clerk of Court. On the same day a true copy was mailed by regular U.S. Mail, postage prepaid, to:

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