

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

MERIT BRIEF OF APPELLEE GIVAUDAN FLAVORS CORPORATION

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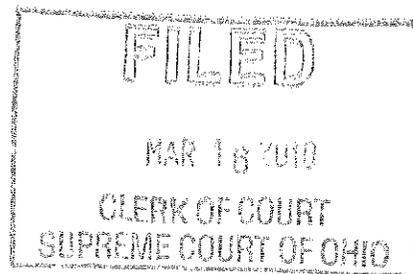


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INTRODUCTION

As much as Givaudan would prefer otherwise, it recognizes that this Court cannot assess the merits of the parties' factual allegations below. Nor will this appeal turn on public policy arguments for or against the adoption of a self-protection exception to the Ohio attorney-client privilege statute. Section I, Article II, of the Ohio Constitution vests in the General Assembly the exclusive power to address and weigh public policy issues and define the appropriate scope and limits of the statutory privilege. The proposition of law under review is whether this statute currently includes a self-protection exception.

The plain language of the privilege statute enacted and periodically amended by the General Assembly does not mention a self-protection exception. This Court has repeatedly cautioned that it "cannot insert words into a statute" and "must give effect only to the words used." *Roe v. Planned Parenthood Sw. Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶42. Nor can this Court "interpret" the unambiguous limitations in the statute to create a self-protection exception.

The privilege statute also does not incorporate a common law self-protection exception. The incorporation rule does not apply because the Circuit Court in *Keck v. Bode* (Ohio Cir. Ct. 1902), 13 Ohio C.D. 413, that purportedly created the exception in 1902 was not Ohio's court of last resort. Moreover, this Court reversed that Circuit Court decision in 1903. *Bode v. Keck* (1903), 69 Ohio St. 549, 70 N.E. 1115. Because this Court did not issue an opinion, it is not clear whether it agreed with the adoption of the exception. Also, even if the incorporation rule were to apply to *Keck*, it would apply equally to the long line of subsequent cases in which this Court has consistently rejected judicially created waivers, exceptions, and limitations during the past 90 years. Accordingly, under SSD's own incorporation theory, the General Assembly is deemed to now agree with these decisions (even if it previously was deemed to agree with *Keck*).

Because the privilege statute does not contain or incorporate a self-protection exception, this Court should affirm the Court of Appeals' Judgment. Of course, even if this Court elects to adopt a self-protection exception, it should apply the exception prospectively only (as the General Assembly would do), and still affirm the Judgment.

If, for whatever reason, this Court is inclined to retroactively apply a self-protection exception to this case, it should consider how the suspension of the privilege would impact Givaudan and SSD. Each party offers its own view of the problem and a proposed solution. Throughout this case, including in its opposition to SSD's motion to compel, Givaudan argued that the application of a self-protection exception would necessitate a stay of the action pending the resolution of the underlying product liability cases pending against Givaudan (the "Butter Flavor Litigation"). This Court has repeatedly recognized the ability of courts to stay legal malpractice actions until the underlying litigation is resolved. SSD does not dispute that the release of Givaudan's privileged information to plaintiffs' attorneys in the Butter Flavor Litigation would irreparably harm Givaudan's ability to defend itself. Since SSD's claims and Givaudan's counterclaims seek only monetary damages, a delay would not cause irreparable harm to whoever ultimately prevails.

SSD insists that a stay is unnecessary. It contends that a self-protection exception would fully satisfy Givaudan's compelling interest to protect its privileged material from the plaintiffs' attorneys in the Butter Flavor Litigation. However, the cases cited by SSD do not definitively establish that the many courts across the country in the Butter Flavor Litigation would universally follow SSD's interpretation of a self-protection exception. Given the uncertainty in this area of law and the multiple jurisdictions involved, SSD's planned use (disclosure to jurors,

experts, and third party deponents, among others) unfairly risks the release of Givaudan's privileged information.

Even if this Court were to adopt a self-protection exception, apply it retrospectively, and not stay the action, it still should affirm certain portions of the Court of Appeals' Judgment. The Trial Court erred as a matter of law in summarily granting SSD's motion to compel without conducting an *in camera* review of the privileged and work product documents. Even with a self-protection exception, SSD is not entitled to a blanket authorization to obtain and use each and every privileged document without any determination as to whether it is essential to its claims and defenses. The Trial Court also erred in ordering the disclosure of privileged documents between Givaudan and its new defense counsel. SSD now states that these documents were not covered in its motion to compel or in the Trial Court's Order, but the record clearly proves otherwise. The Trial Court also erred by authorizing SSD to use privileged and work product documents already in its possession. SSD did not seek this relief in its motion to compel and Givaudan did not have an opportunity to address this important issue before the Trial Court issued its ruling.

STATEMENT OF THE FACTS

A. The Litigation Between SSD And Givaudan

SSD represented Givaudan for more than four years in the multi-state product liability Butter Flavor Litigation filed by more than 350 plaintiffs. (Complaint ¶¶ 6, 12, Supp. 2, 4.¹) Givaudan terminated its relationship with SSD in May 2007. (Complaint ¶ 12, Supp. 4.)

¹ "Supp." refers to the Supplement filed with SSD's Merit Brief ("SSD's Brief"). "Givaudan's Supp." refers to the Supplement filed with Givaudan's Merit Brief. "Appx." refers to the Appendix to SSD's Brief.

Givaudan is now represented by new counsel in the Butter Flavor Litigation, which remains pending in numerous state and federal courts throughout the United States.²

On November 7, 2007, after billing Givaudan for and receiving payment of more than \$10 million in fees and costs, SSD sued Givaudan in the action below for approximately \$1.8 million in allegedly unpaid invoices. (Complaint ¶¶ 12, 19, Supp. 4, 5.) The compulsory counterclaim rules forced Givaudan to file (or forever waive) its claims against SSD for, among other things, excessive and unreasonable fees, legal malpractice, breach of contract, and breach of fiduciary duty. (Amended Counterclaims at 8-12, Supp. 34-38.) After the filing of its amended counterclaims, Givaudan inadvertently discovered that SSD had inflated hundreds of time entries and had charged Givaudan for a wide range of personal expenses. (Givaudan's Opposition to SSD's Motion to Compel at 1-5, Supp. 248-52.)

Both before SSD sued Givaudan, and even after Givaudan discovered SSD's misconduct, Givaudan attempted to resolve the dispute amicably and extrajudicially (by proposing, *inter alia*, binding arbitration and/or a tolling agreement).³ Givaudan took those steps in part because of the uncertainty of a possible waiver of the attorney-client privilege and work product protections if such information is disclosed in this litigation. (Givaudan's Opposition to SSD's Motion to Compel at 5-6, Supp. 252-53.) SSD was and is fully aware of the well-known (and obvious) dilemmas that confront Givaudan as it tries to litigate against SSD while simultaneously defending the hundreds of pending product liability claims in the Butter Flavor Litigation. (*Id.*)

² (Affidavit Of Jane E. Garfinkel ¶¶ 3-4 (incorporated into Givaudan's Opposition to SSD's Motion to Compel, Supp. 263 n.15), Givaudan's Supp. 1-2.)

³ (Givaudan's Opposition to SSD's Motion to Compel at 6, Supp. 253; Declaration of Anthony Hartman in Support of Givaudan's Motion for a Protective Order, or, in the Alternative, for a Stay ¶¶ 1-3, Givaudan's Supp. 3.)

B. SSD's Efforts To Obtain Privileged And Work Product Information

As part of SSD's litigation strategy, SSD propounded on Givaudan dozens of discovery requests targeted at privileged and work product documents. (*See generally* SSD's Requests for Documents at 4-24, Supp. 45-65.) Notably, much of the information SSD requested was already in SSD's possession by virtue of its prior representation in the Butter Flavor Litigation. (*Id.*; Complaint ¶¶ 6, 12-13, Supp. 2, 4.) SSD did not directly dispute that it has much of the information, but simply argued that it still is entitled to have a complete (even if duplicate) set produced from Givaudan. Givaudan served timely objections to SSD's document requests. (*See generally* Givaudan's Response to SSD's Requests for Documents, Supp. 68-105.)

SSD also took the deposition of Givaudan's former Vice President of Legal Affairs (Fred King) and Givaudan's current General Counsel (Jane Garfinkel). (Supp. 112-209.) During those depositions, SSD repeatedly sought attorney-client privileged and work product protected information. (*Id.*) Givaudan's counsel objected to those questions and the witnesses declined to reveal privileged or work product information. (*Id.*)

C. SSD's Motion To Compel

On July 28, 2008, SSD filed a motion to compel Givaudan to disclose privileged and work product information ("Motion to Compel"). (Supp. 229-31.) SSD mischaracterizes two critical aspects of its Motion to Compel. First, as discussed more fully in Section IV.C, *infra*, SSD's Motion to Compel did *not* seek permission to use privileged and work product information already in its possession, and, accordingly, Givaudan had no opportunity whatsoever to address that issue with the Trial Court.⁴ Second, as discussed more fully in Section IV.B,

⁴ (SSD's Motion to Compel, Supp. 229 (SSD "asks the Court to compel Givaudan . . . to produce the documents requested and to compel testimony") and 245 ("Conclusion" to SSD's Motion to Compel seeking same relief).)

infra, SSD's Motion to Compel *did* seek discovery of communications between Givaudan and its current attorneys (Morgan Lewis).⁵ SSD now admits that it is not entitled to those communications. (SSD's Brief at 29.) Each of these aspects of the Trial Court's order independently warranted reversal.

The Trial Court and SSD did not dispute that the subject documents and testimony were protected by the attorney-client privilege and/or the work product doctrine. (*See generally* SSD's Motion to Compel, Supp. 229-47; Trial Court Order, Appx. 33-36.) Nor could they. A brief review of SSD's document requests and deposition questions clearly demonstrates that they seek privileged and work product information relating to, among other things, case evaluation, defense strategy, potential liability and damages, experts, staffing, and settlement issues in the Butter Flavor Litigation. (*See generally* SSD's Requests for Documents, Supp. 45-65; Garfinkel Deposition, Supp. 112-80; King Deposition, Supp. 181-209.) Rather, SSD asserted that this information is nonetheless discoverable under a self-protection exception. (*See generally* SSD's Motion to Compel, Supp. 229-47; Trial Court Order, Appx. 33-36.)

On August 7, 2008, Givaudan filed an opposition to SSD's Motion to Compel ("Givaudan's Opposition"). Givaudan's Opposition demonstrated that the document requests and deposition questions improperly sought privileged and work product information. (Givaudan's Opposition at 1-16, Supp. 248-63.) Givaudan formally asked the Trial Court to conduct an *in camera* review of the requested information prior to ruling on SSD's Motion to Compel. (*Id.* at 11 n.9, Supp. 258.) Based on this Court's precedent, Givaudan's Opposition

⁵ (SSD's Motion to Compel, Supp. 229-31 (seeking all "documents requested" in SSD's Requests for Documents) and Givaudan's Response to SSD's Requests for Documents, Supp. 74-78 and 83-86 (for example, Request Nos. 4-11, 22-28 clearly seek communications between Givaudan and Morgan Lewis, Givaudan's new counsel in the Butter Flavor Litigation).)

also requested a stay of the action pending the resolution of the underlying Butter Flavor Litigation if the Trial Court was inclined to order the disclosure of any privileged or work product documents or testimony. (*Id.* at 16-24, Supp. 263-271.)

On August 18, 2008, SSD filed its reply to Givaudan's Opposition. SSD conceded that its document requests and deposition questions sought privileged and work product information. However, SSD asserted that it is entitled to obtain this information under a self-protection exception. (SSD's Reply in Support of Motion to Compel, Givaudan's Supp. 6-16.)

D. The Trial Court's Order And The Appeals

On October 28, 2008, the Trial Court erred by summarily granting SSD's Motion to Compel – without any determination of the scope of privilege, any determination of good cause for work product discovery, or any *in camera* review. (Appx. 33-36.) The Trial Court's order required Givaudan to produce privileged and work product documents (including documents that SSD concedes it is not entitled to receive) and required Givaudan's former chief legal officer and Givaudan's current General Counsel to provide deposition testimony about privileged and work product matters. (*Id.*) The Trial Court's order also appeared to permit SSD to use privileged and work product information in its possession (relief not requested in SSD's Motion to Compel or even addressed in the parties' briefs). (Appx. 35-36.) The privileged and work product information relates to SSD's defense of Givaudan for several years in the Butter Flavor Litigation, which remains pending throughout the United States. (*Id.*; *see generally* SSD's Motion to Compel, Supp. 233-35.)

Givaudan appealed. On June 8, 2009, the Eighth District Court of Appeals reversed the Trial Court's order in relevant part. (Appx. 4.) On November 4, 2009, this Court accepted SSD's petition for review.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

I. BASED ON THE PLAIN LANGUAGE OF R.C. 2317.02(A) AND THIS COURT'S PRECEDENT, THE COURT OF APPEALS CORRECTLY RULED THERE IS NO SELF-PROTECTION EXCEPTION TO THE OHIO STATUTORY PRIVILEGE

A. The Clear And Unambiguous Language Of The Ohio Statutory Privilege Does Not Include A Self-Protection Exception; No Interpretation Is Necessary Or Appropriate

R.C. 2317.02(A)(1) speaks for itself:

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 plain language provides that the two limitations established by the Ohio General Assembly are: "*except* that the attorney may testify by express consent of the client;" and a *waiver* exists "if the client voluntarily testifies."⁶ The statute does not mention a self-protection

⁶ Neither of these limitations applies in the present case. Givaudan has not and will not consent to the disclosure and/or use of its protected information and it will not voluntarily testify about such matters.

exception. This Court “cannot insert words into a statute. Instead, [it] must give effect only to the words used.” *Roe*, 122 Ohio St. 3d at ¶ 42.

SSD urges this Court to “interpret” the statute to add a self-protection exception. But SSD does not identify any ambiguous word, term, or phrase that this Court could interpret to create this exception. Indeed, this Court already determined that the limitations set forth in R.C. 2317.02(A) are clear. *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 12. The absence of any ambiguity in the privilege’s limitations means that the adoption of SSD’s proposed new exception would constitute legislation, not interpretation:

It has been so frequently stated as to become axiomatic that the meaning and intent of a legislative enactment are to be determined primarily from the language itself. The plain provisions of a statute must control. ***If there is no ambiguity therein there is no occasion to construe or interpret. To construe or interpret what is already plain is not interpretation but legislation, which is not the function of courts.***

Iddings v. Bd. of Educ. (1951), 155 Ohio St. 287, 290, 98 N.E.2d 827 (emphasis added); *Bd. of Comm'rs v. Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52 (“Following a primary rule of statutory construction, we must apply a statute as it is written when its meaning is unambiguous and definite. . . . An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words.”) (citations omitted).

Twenty years ago, this Court confirmed this critical point in a *unanimous* decision:

Where the words of a statute are free of ambiguity and express plainly and distinctly the sense of the lawmaking body, the courts should look no further in their efforts to interpret the intent of the General Assembly. Here it is clear that the legislature has stated that the privilege [provided in R.C. 2317.02(B)] is to be given effect absent specific statutory exceptions [i.e., express consent or voluntary testimony], none of which applies to this case.

State v. Smorgala (1990), 50 Ohio St. 3d 222, 223, 553 N.E.2d 672, *superseded by statute on other grounds* (emphasis added).

The “interpretation” cases cited by SSD involved ambiguous statutory language (in unrelated statutes). They do not authorize the addition of new words, much less an entirely new exception, to clear language. See *Klemas v. Flynn*, 66 Ohio St. 3d 249, 250, 1993-Ohio-45, 611 N.E.2d 810 (interpretation of the term “punitive damages”); *Richardson v. Doe* (1964), 176 Ohio St. 370, 371-73, 199 N.E.2d 878 (interpretation of the word “malpractice”); *Neder v. United States* (1999), 527 U.S. 1, 22 (interpretation of the term “defraud”).

SSD also cites to several cases that interpret the word “communication” in R.C. 2317.02(A). (SSD’s Brief at 21-22 and 24-25 (e.g., *Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258, 263, 452 N.E.2d 1304; *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 662 n.8, 1994-Ohio-324, 635 N.E.2d 331; *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 173 N.E.2d 892, Syllabus at 3).) However, SSD does not and cannot suggest that this Court should interpret the word “communication” to create a self-protection exception. As a matter of law, SSD’s inability to identify any ambiguity in the statute’s existing limitations precludes even the consideration of any interpretation to add a self-protection exception.

B. This Court Has Consistently Rejected Judicially Created Exceptions To The Statutory Privileges

SSD asserts that an Ohio Circuit Court created a self-protection exception to the privilege statute in 1902. (SSD’s Brief at 14-15, *citing Keck v. Bode* (Ohio Cir. Ct. 1902), 13 Ohio C.D. 413, 1902 WL 868). Even if this were true (and it is not entirely clear⁷), the exception would no longer exist. “[T]his Court . . . has consistently rejected the adoption of judicially created

⁷ See Section I.C.2, *infra*.

waivers, exceptions, and limitations for testimonial privilege statutes.” *Jackson*, 110 Ohio St. 3d at ¶ 13 (emphasis added); *Roe*, 122 Ohio St. 3d at ¶ 48.

SSD contends that *Jackson’s* prohibition against judicial creations is limited to waivers and that the specific reference to “waivers, exceptions, and limitations” is *dictum*. This argument completely ignores this Court’s recent decision in *Roe*, which expressly *cites, quotes, and relies* on this so-called “*dictum*.” *Roe*, 122 Ohio St. 3d at ¶ 48.⁸ Indeed, in *Roe*, this Court reiterated its consistent rejection of judicially created waivers, exceptions, and limitations of the testimonial privilege statute. *Id.* SSD has never argued that *Roe’s* rejection of “exceptions” is *dictum* or somehow inadvertent.⁹ To the contrary, the *Roe* decision plainly re-confirmed that any “*exception* to [the statutory] privilege is a matter for the General Assembly to address.” *Id.* (emphasis added).

Alternatively, SSD claims that *Jackson* is based on a misreading of precedent and a confusion between waivers, on the one hand, and exceptions or limitations, on the other hand. Specifically, SSD claims that this Court erroneously based its conclusion on cases that use all three terms, but actually addressed only waivers. Accordingly, SSD claims that the seven cases

⁸ Moreover, SSD expressly concedes that Givaudan’s reliance on *Jackson* “would be relevant if [SSD] had moved to compel production of material concerning Givaudan’s relationship *with its new counsel*” (SSD’s Brief at 29) (emphasis in original).) However, the Trial Court’s order plainly covers all of SSD’s requests, many of which seek communications between Givaudan and Morgan Lewis, Givaudan’s “new defense counsel.” (Appx. 33-36 (Trial Court Order granting SSD’s Motion to Compel); SSD’s Motion to Compel, Supp. 229-31 (seeking all “documents requested” in SSD’s Requests for Documents); Givaudan’s Response to SSD’s Requests for Documents, Supp. 74-78 and 83-86 (objecting to, for example, Request Nos. 4-11, 22-28 which clearly seek communication between Givaudan and Morgan Lewis, Givaudan’s new counsel in the Butter Flavor Litigation).)

⁹ SSD filed its jurisdictional brief after *Roe*, but it did not even mention that decision. SSD’s merit brief cites to *Roe* only once, and does not allege that the “waivers, exceptions, and limitations” language was *dictum*.

cited by *Jackson* support only the rejection of waivers, not the rejection of exceptions or limitations. (SSD's Brief at 30.)

However, a review of the seven cases demonstrates that this Court was not confused and, instead, relied on ample precedent for all three of the restricted categories of judicial rule-making. Indeed, only three of the cases (*Lambdin*, *Waldmann*, and *McDermott*) dealt exclusively with waiver. The other four cases (*Swetland*, *Smorgala*, *In re Miller*, and *In re Wieland*) were not limited to waivers, and clearly rejected judicially created exceptions and/or limitations.

In *Swetland*, this Court refused to judicially create an additional "exception." Even though this Court used both terms, it meant exception, not waiver. This Court interpreted the predecessor to R.C. 2317.02 and held that "[w]here there is no real room for doubt as to the meaning of a statute, there is no right to construe such statute . . . and the [privilege] statute provides the only two exceptions to the rule: (1) 'By express consent of the client.' (2) 'If the client * * * voluntarily testifies.'" *Swetland v. Miles* (1920), 101 Ohio St. 501, 130 N.E. 22, at Syllabus ¶¶ 1, 3. This Court declined to create another *exception*:

Now it is urged that this court should read into the statute another *exception*, to wit, 'that if the client be dead, her personal representative or heirs should waive the right for her.'

This squarely involves so-called judge-made amendments to legislative acts that are otherwise clear and unmistakable as to meaning. In reason there is much force in the logic of plaintiff in error as to the relevancy of this testimony; but the statute, which is clear and explicit, expressly says that the attorney *shall not* testify.

The argument addressed to this court might be addressed to the Legislature with persuasive power, and lead to what I believe would be a wholesome amendment; but it is not for this court to make such an amendment. This is solely in the power of the general assembly.

101 Ohio St. at 504-05 (first emphasis added).

Smorgala also is not a waiver-only case. This Court refused to judicially create “a public policy limitation” to the statutory physician-patient privilege in “drunk driving” cases. 50 Ohio St. 3d at Syllabus ¶¶ 1, 2. While the case arguably involved a possible exception (rather than a limitation), it certainly was not, as SSD argues, only a waiver case. *Id.* at Syllabus ¶ 2.

In re Miller also is not a waiver case. This Court rejected the State’s argument that the statutory psychiatrist-patient privilege should not apply. *In re Miller* (1992), 63 Ohio St. 3d 99, 107-08, 585 N.E.2d 396. This Court found that, because “Ohio’s physician-patient privilege statute makes no *exception* for civil commitment proceedings[, t]his means that the privilege applies in the appropriate commitment situation involving a patient and his or her psychotherapist.” *Id.* at 108 (emphasis added).

In re Wieland also is not a waiver only case. This Court addressed the admissibility of physician-patient communications in a child custody case. *In re Wieland*, 89 Ohio St. 3d 535, 535-36, 2000-Ohio-233, 733 N.E.2d 1127. This Court specifically stated that, “[i]n the absence of a specific statutory *waiver or exception*, the testimonial privileges established under R.C. 2317.02(B)(1) (concerning communications between a physician and patient) . . . are applicable to communications made by a parent in the course of treatment ordered as part of a reunification plan in an action for dependency and neglect.” *Id.* at Syllabus ¶ 1 (emphasis added). This Court ruled the subject testimony was inadmissible and “refused to engraft judicial *waivers, exceptions, or limitations* into the testimonial privilege statutes where the circumstances of the communication fall squarely within the reach of the statute.” 89 Ohio St. 3d at 538 (citations omitted; emphasis added). Since this Court specifically used all three terms, SSD cannot credibly argue that this Court was either confused or intended the term exception to mean waiver.

C. R.C. 2317.02 Does Not Incorporate A Self-Protection Exception

SSD next argues that the General Assembly's failure to amend the privilege statute following the Circuit Court's decision in *Keck v. Bode* (Ohio Cir. Ct. 1902), 13 Ohio C.D. 413, means that the statute is now deemed to incorporate that exception. (SSD's Brief at 22-24.) This argument fails for at least three separate reasons.

1. The Incorporation Rule Does Not Apply To Circuit Court Decisions

As a matter of law, the incorporation rule can apply *only* when a statute is "construed by a court of last resort having jurisdiction." *Spitzer v. Stillings* (1924), 109 Ohio St. 297, 142 N.E. 365, at Syllabus ¶ 4; *accord State v. Cichon* (1980), 61 Ohio St. 2d 181, 182, 399 N.E.2d 1259 (addressing a statute wherein "this court has construed the phrase 'without due regard' as used in R.C. 4511.20 and 4511.201"). Of course, the Circuit Court that decided *Keck* was not the "court of last resort" in Ohio in 1902. This Court – Ohio's true court of last resort – reversed the Circuit Court's decision without opinion or any explanation of its reasoning. Without evidence that this Court – in *Keck* or at any other time – construed the privilege statute to add a self-protection exception, the incorporation rule does not apply.

2. This Court Reversed The Circuit Court's Decision In *Keck*

This Court's reversal in 1903 also means that the Circuit Court's decision in 1902 is no longer good law. *Zabukovec v. Farmers Ins. Co.* (Ohio App. 11 Dist. Oct. 22, 1999), No. 98-L-114, 1999 WL 1073803, at *2 ("On appeal, both parties agree that our decision in *Hillyer* is no longer good law and that the trial court erred in relying on it [because s]ubsequent to the trial court's judgment in the instant case, the Supreme Court of Ohio reversed our decision in *Hillyer*[.]"). SSD contends that this Court "indicat[ed] its approval of the self-protection exception." (SSD's Brief at 15.) But this is pure speculation, at best. The trial court's judgment reinstated by this Court is not available. Moreover, the Circuit Court's decision does not

mention whether the trial court's judgment even mentioned a self-protection exception.

Accordingly, there is absolutely no evidence that this Court "indicated" its approval of a self-protection exception.

Of course, even if speculation counted (and it does not), this Court's reversal could easily "indicate" other grounds. As one example, this Court might have reversed the Circuit Court's decision merely because it disagreed that the admission of evidence was unduly prejudicial (and thus disagreed with the lower court's decision to reverse and remand). This Court could have made that determination without any need to consider, much less agree with or adopt, the self-protection doctrine or its application to the privilege statute. Either way, *Keck* hardly is a Supreme Court construction of a statute – sanctioning either a self-protection exception to the statute or the validity of the appellate court's discussion on the subject – that would deem the Ohio legislature to have "incorporated" the reversal of the appellate court in *Keck* into the statute. *Spitzer*, 109 Ohio St. at Syllabus ¶ 4.

3. If The Incorporation Rule Applied To *Keck*, It Would Apply Equally To The Long Line Of Post-*Keck* Decisions That Have Consistently Rejected Judicially Created Waivers, Exceptions, And Limitations To The Privilege Statute

If this Court were to apply the incorporation rule to *Keck*, it must similarly apply the rule to this Court's decisions that have "consistently rejected the adoption of judicially created waivers, exceptions, and limitations for testimonial privilege statutes." *Jackson*, 110 Ohio St. 3d at ¶ 13 (citing *In re Wieland*, 89 Ohio St. 3d 535; *State v. McDermott* (1995), 72 Ohio St. 3d 570, 1995-Ohio-80, 651 N.E.2d 985; *In re Miller*, 63 Ohio St. 3d 99; *Smorgala*, 50 Ohio St. 3d 222; *Waldmann v. Waldmann* (1976), 48 Ohio St. 2d 176, 358 N.E.2d 521; *State ex rel. Lambdin v. Brenton* (1970), 21 Ohio St. 2d 21, 254 N.E.2d 681; and *Swetland*, 101 Ohio St. 501).

In *Swetland* (1920), this Court interpreted the predecessor to R.C. 2317.02 and held that “the [privilege] statute provides the only two *exceptions* to the rule: (1) ‘By express consent of the client.’ (2) ‘If the client * * * voluntarily testifies.’” 101 Ohio St. at Syllabus ¶¶ 1, 3 (emphasis added). To paraphrase SSD’s argument about *Keck*: since the *Swetland* decision, the General Assembly has repeatedly amended and re-codified the privilege statute without indicating disapproval of this Court’s categorical rejection of other potential exceptions. While the General Assembly “subsequently modified the statute to include waiver by the ‘surviving spouse or the executor or administrator of the estate of the deceased client,’” it did not amend the statute to add or recognize the self-protection exception purportedly created in *Keck*.

In *Smorgala* (1990), this Court refused to judicially create “a public policy limitation” to the statutory physician-patient privilege in “drunk driving” cases. This Court held that, “[b]ecause the law of privilege is substantive in nature, the Supreme Court is not free to promulgate an amendment to the Rules of Evidence which would deny a statutory privilege in drunk driving cases.” 50 Ohio St. 3d at Syllabus ¶ 2. The General Assembly subsequently amended the privilege statute to allow law enforcement to obtain, and courts to admit, medical test results for alcohol and drugs. *State v. Mayl*, 106 Ohio St. 3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 54, *superseded by statute on other grounds*. However, the General Assembly did not indicate any disagreement with this Court’s rejection of judicially created exceptions which “would deny a statutory privilege.” *Smorgala*, 50 Ohio St. 3d at Syllabus ¶ 2. Accordingly, the General Assembly is deemed to agree with the rejection of such judicial exceptions.

In *In re Miller* (1992), this Court observed that “a number of states expressly render the [physician-patient] privilege *inapplicable* in civil commitment proceedings.” 63 Ohio St. 3d at

108 (emphasis added). However, this Court concluded that “Ohio’s physician-patient privilege statute makes no *exception* for civil commitment proceedings.” *Id.* (emphasis added). The General Assembly did not subsequently amend the statute in relation to *Miller* and is deemed to agree with the decision.

In *McDermott* (1995), this Court explained that “[t]he General Assembly has plainly and distinctly stated that the privileges of R.C. 2317.02 are to be given effect absent specific statutory *exceptions*.” 72 Ohio St. 3d at 573 (emphasis added). The General Assembly did not subsequently amend the statute in relation to *McDermott*. Under the incorporation rule, the General Assembly is deemed to agree that there are no judicially created exceptions to the privilege statute.

In *In re Wieland* (2000), this Court held that it has “repeatedly and consistently refused to engraft judicial waivers, exceptions, or limitations into the [physician-patient] testimonial privilege statutes where the circumstances of the communication fall squarely within the reach of the statute. . . . [¶] Whatever persuasive force these arguments [for creation of a judicial exception or limitation] may have, this is not the appropriate forum in which to raise them. This court will not engage in subterfuge by judicially creating a public policy limitation under the guise of statutory interpretation.” 89 Ohio St. 3d at 538. The General Assembly did not subsequently amend the statute in relation to *Wieland*. Under the incorporation rule, the General Assembly is deemed to agree that there are no judicially created “waivers, exceptions, or limitations” to this privilege statute.

4. The Privilege Statute Did Not Incorporate A Self-Protection Privilege Under Prior Common Law

SSD argues that the General Assembly’s initial version of the privilege statute incorporated a self-protection exception under *prior* common law. However, SSD fails to cite

any Ohio decision that created or recognized a self-protection exception to the attorney-client privilege prior to the initial adoption of the privilege statute. Moreover, even if there were any such decisions, the attorney-client privilege, including any exceptions, waivers, or limitations, is “clearly a matter of public policy, and within the power of legislators to change, or even abrogate entirely.” *Spitzer*, 109 Ohio St. at 300.

In *Spitzer*, this Court interpreted the “on the same subject” language of the privilege statute exception when the client takes the stand and testifies. 109 Ohio St. at 300. Plaintiff argued that the statute should be read by engrafting an additional qualification into the statute (appearing in bold in the following quote): “If the client voluntarily testifies to **such communication or advice**, the attorney may be compelled to testify on the same subject.” *Id.* at 301. This Court rejected that attempt to inject into the statute what is not expressly stated therein: “Such a construction would be nothing short of judicial legislation, and would be putting into the language of the statute something which the Legislature omitted.” *Id.* In doing so, *Spitzer rejected* SSD’s argument that R.C. 2317.02 “incorporates” the self-protection exception merely because it purportedly existed at common law:

If this case were to be decided according to the principles of the common law, a very different situation would be presented. . . . [However, attorney-client privilege] is in any event clearly a matter of policy, and within the power of legislators to change, or even abrogate entirely. This controversy involves the interpretation of a legislative act. No one questions the power of the Legislature, and we are only concerned with determining the legislative intent. It would perhaps be more accurate to say that it is rather a question of the application of language entirely free from ambiguity to a given state of facts.

Id. at 302-03.

D. Rule Of Professional Conduct 1.6(b)(5) Did Not Amend The Ohio Statutory Privilege

SSD claims that this Court somehow created a self-protection exception when it adopted Rule 1.6(b)(5). (SSD’s Brief at 26 and 35.) The Court of Appeals correctly recognized 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. 22.)

SSD’s reliance on Rule 1.6 is misplaced for at least three additional reasons. First, Rule 1.6 is a judicial creation, not a legislative enactment. SSD’s assertion that the adoption of this rule created an exception to the testimonial privilege statute flies in the face of this Court’s repeated rejection of judicially created waivers, exceptions, and limitations. Judicial action – whether in the form of case decisions or rules of professional conduct – does not supplant the legislature. *Smorgala*, 50 Ohio St. 3d at 225 (statutory enactments on matters of privilege control over “this court’s rulemaking authority under Section 5(B), Article IV of the Ohio Constitution”). For the same reason, SSD misplaces reliance on *Lannen v. Worland* (1928), 119 Ohio St. 49, 162 N.E. 271. There, this Court construed “related sections” of the General Code, not a statutory enactment and a rule under the authority of Section 5(B), Article IV, of the Ohio Constitution.

Second, as also noted by the Court of Appeals, Rule 1.6 is inapplicable here because it is limited in scope and is “designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.” (Appx. 21.)

Third, Rule 1.6 has absolutely nothing to do with the ability of a law firm to compel production from its client or a third party – the subject of SSD’s underlying Motion to Compel.

E. SSD's Public Policy Arguments Regarding The Ohio Statutory Privilege Are Properly Addressed To The Legislature

SSD argues that public policy supports a self-protection exception. (SSD's Brief at 18-19.) For the record, Givaudan firmly believes that a full assessment of all of the public policy considerations in this case would support the protection, not the disclosure and use, of its privileged documents. But the parties' policy disputes regarding the Ohio statutory privilege are not before this Court. Less than one year ago, this Court unequivocally confirmed in *Roe* that "public policy arguments [in connection with permissible disclosures under R.C. 2317.02] . . . should likewise be addressed by the General Assembly, not the judiciary." 122 Ohio St. 3d at ¶ 52.

This is not a novel point. This Court also confirmed in *Jackson* and in many other cases that the General Assembly has chosen to define the limits of the statutory attorney-client privilege and "it is not the role of this court to supplant the legislature by amending that choice." 110 Ohio St. 3d at ¶ 13; *see also Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 22 ("[J]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.") (citation omitted); *Al Minor & Assoc., Inc. v. Martin*, 117 Ohio St. 3d 58, 63-64, 2008-Ohio-292, 881 N.E.2d 850, ¶ 23 ("The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.") (citation omitted, and *citing Smorgala*, 50 Ohio St. 3d at 223 ("the General Assembly should be the final arbiter of public policy")). As explained in *Smorgala*, "[t]he Ohio Constitution vests the legislative power to resolve policy issues in the General Assembly. Section 1, Article II, Ohio Constitution." 50 Ohio St. 3d at 224 (citation and quotation marks omitted).

“The Supreme Court of Ohio has stated that although Ohio has no specific constitutional provision embodying the concept of separation of powers, the doctrine is implicit in the entire framework of the Constitution.” *Savoie v. Grange Mut. Ins. Co.*, 67 Ohio St. 3d 500, 514, 1993-Ohio-134, 620 N.E.2d 809 (Moyer, C. J., dissenting), *superseded by statute on other grounds*. “This court has long recognized the importance of the principle of separation of powers between the legislative and judicial branches of government. In 1919, this court stated, ‘probably our chief contribution to the science of government is the principle of the complete separation of the three departments of government, executive, legislative and judicial. No feature of the American system has excited greater admiration.’” *Id.* (citation omitted).

“[T]his court has not been unaware of the limitations upon its own power to create or alter certain rules, even those that directly affect the judicial system. Thus we held that the court lacked power to alter a statute concerning the physician-patient privilege. We reasoned that we must defer to the legislature when the rule involves a substantive, and not procedural, right.” *Id.* at 515 (citing *Smorgala*, 50 Ohio St. 3d at Syllabus ¶ 2). As Chief Justice Moyer explained:

The teaching of these cases is that for generations this court has recognized the distinction between the roles of the legislative and judicial branches. It has enforced this distinction both against itself and against Acts of the General Assembly. Having steadfastly protected the judicial branch from encroachment by the legislature, this court should now reciprocate and refrain from judicially limiting legislation whose result it simply [may] not like.

Savoie, 67 Ohio St. 3d at 516 (Moyer, C. J., dissenting).

Accordingly, this Court should disregard SSD’s policy arguments, which are properly addressed to the General Assembly.

F. Foreign Authorities And Commentators Do Not Trump The Ohio Statute Or The Ohio General Assembly

Finally, SSD argues that courts and commentators outside Ohio recognize a self-protection exception. This is entirely irrelevant. Foreign authority does not alter the plain language of Ohio’s testimonial privilege statute. Nor does it supplant the role or decisions of the Ohio General Assembly. *See Swetland*, 101 Ohio St. at 505 (rejecting adoption of judicial exceptions to the statutory attorney-client privilege). As this Court explained in *Swetland*:

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

*Id.*¹⁰

G. Due Process Also Precludes The Retroactive Adoption Of A Self-Protection Exception

As demonstrated above, the judicial adoption of a self-protection exception would violate both the separation of powers (by failing to defer to the legislature) and *stare decisis* (by failing to honor *Jackson*, *Roe*, and a long line of Supreme Court decisions that have consistently rejected judicially created waivers, exceptions, and limitations to the statutory privilege). However, even if this Court were willing to take each of those steps here (and it clearly should

¹⁰ The foreign “self-protection exception” cases cited by SSD address permissive disclosure by an attorney, not a motion to compel the production of privileged documents and testimony. *E.g.*, *see* SSD’s Brief at 14; *Hunt v. Blackburn* (1888), 128 U.S. 464, 470-71, 9 S. Ct. 125, 32 L. Ed. 488 (the court simply recognized the waiver now codified in R.C. 2317.02(A)); *Daughtry v. Cobb* (Ga. 1939), 5 S.E.2d 352, 354-55 (after the client testified extensively about her communications with the attorney, the court held that the “attorney should be allowed to testify as to matters which might otherwise be confidential”); *Pierce v. Norton* (Conn. 1909), 74 A. 686, 687-88 (addressing evidence by attorney “in response to the claims and statements of Mr. Norton [the client] on the witness stand”).

not take either), a third fundamental tenet – due process – would preclude the retroactive application of the exception to Givaudan’s previous relationship with SSD.

Givaudan had an attorney-client relationship with SSD between 2003 and 2007. Each and every attorney-client communication during that relationship took place at a time when the Ohio privilege statute clearly did not contain a self-protection exception. Before and during that same time period, this Court consistently rejected judicially created waivers, exceptions, and limitations. Like tens of thousands of other clients in Ohio, Givaudan freely communicated with its attorneys based on the clear and strong protections of the privilege statute and on this Court’s judicial restraint. A retroactive reduction in the statutory protection for those attorney-client communications would constitute a clear violation of due process. *Roe*, 122 Ohio St. 3d at ¶¶ 33, 37 (retroactive changes to substantive rights are unconstitutional and violate due process).

Moreover, in 2007, Givaudan carefully analyzed the privilege statute and applicable legal precedent (including this Court’s decision in *Jackson*) to determine whether it could oppose SSD’s lawsuit and pursue its counterclaims without risk to its defense of the underlying Butter Flavor Litigation. This research confirmed, as explained throughout this brief, that the mere existence of a lawsuit between a client and a former attorney does not constitute an automatic waiver, that the privilege statute does not contain a self-protection exception, and that this Court had, just one year earlier, reiterated its consistent rejection of judicially created waivers, exceptions, and limitations to privilege statute. Based on this state of the law, Givaudan made a decision to litigate with SSD and has now expended considerable legal fees during the past two years. A retroactive adoption of a self-protection exception would force Givaudan to abandon this litigation and would constitute a clear violation of due process. *Id.*

Thus, even if this Court were to “legislate” a reduction in the scope of the Ohio privilege statute, due process principles would require that it apply the change prospectively only.

II. IF THIS COURT IS UNWILLING TO AFFIRM THE COURT OF APPEALS’ REJECTION OF THE PROPOSED SELF-PROTECTION EXCEPTION, IT SHOULD STAY THE ACTION PENDING THE RESOLUTION OF THE UNDERLYING BUTTER FLAVOR LITIGATION

If, for whatever reason, this Court is unwilling to affirm the Court of Appeals’ decision, the only viable alternative that sufficiently protects each party’s interests is to fashion an equitable remedy that stays the present action pending the resolution of the underlying Butter Flavor Litigation.¹¹ Indeed, the equities clearly weigh in favor of protection of the client – who has the right to pursue malpractice and overbilling claims without sacrificing its defenses in hundreds of ongoing cases.

Indeed, more than 20 years ago, this Court recognized the ability of trial courts to stay legal malpractice actions until the underlying litigation is fully resolved. *Zimmie v. Calfee, Halter and Griswold* (1989), 43 Ohio St. 3d 54, 59, 538 N.E.2d 398 (“the trial court [can be] requested to stay this malpractice action until there [is] a final judgment” in the underlying litigation). Other courts have relied on *Zimmie*’s sound reasoning. *See Clark v. Brady* (Ohio Ct. App. 11 Dist. Apr. 16, 1999), No. 98-A-0045, 1999 WL 270059, at *2 (The trial court should

¹¹ (Givaudan’s Opposition to SSD’s Motion to Compel at 16-24, Supp. 263-71); *see, e.g., Treciak v. Ohio Dept. of Commerce* (Ohio Ct. App. 10 Dist. June 8, 1999), No. 98AP-1019, 1999 WL 378416, at *3 (a request for a stay made in an opposition to a motion is timely and sufficient); *DeRolph v. State*, 78 Ohio St. 3d 419, 1997-Ohio-87, 678 N.E.2d 886 (“Power to deal with the issues presented on appeal inherently includes authority to enforce the court’s decision or to regulate the course of further proceedings required to reach an effective decision.”) (Moyer, C. J., concurring in part and dissenting in part) (citation omitted); *Phillips v. Conrad* (Ohio App. 1 Dist. Dec. 20, 2002), No. C-020302, 2002 WL 31840923, at ¶ 26 (the reviewing court “revers[ed] the trial court’s judgment . . . and remand[ed] this case with instructions that the trial court stay further proceedings until the class action in Santos is resolved” “[b]ased on the potentially binding effect of the decision in Santos and in the interests of judicial economy and efficiency”).

stay the legal malpractice claim pending the outcome of the underlying action, particularly where the malpractice claimant is damaged regardless of the outcome of the underlying action: “Based on *Zimmie*, the trial court in the present case should have stayed [the former client’s] malpractice claim pending” resolution of the underlying action.); *Allen v. Murph* (6th Cir. 1999), 194 F.3d 722, 729 n.7 (Krupansky, J., concurring) (legal malpractice action should be stayed until the underlying litigation is resolved, because the former client does “not yet know the full *extent* of his damages” caused by legal malpractice) (*discussing Zimmie*, 43 Ohio St. 3d at 59; italics in original). *See also Francis v. Sonkin* (Ohio Ct. App. 8 Dist. Oct. 21, 1999), No. 74869, 1999 WL 961489, at *1-2 (granting a stay in legal malpractice actions pending the resolution of the underlying cases; the trial court lifted the stay more than two years later, after the underlying litigation was resolved); *Roseman v. Owen* (Ohio Ct. App. 10 Dist. Sept. 21, 2000), No. 99AP-871, 2000 WL 1357864, at *1 (issuing a stay of the malpractice action “until the underlying action . . . was resolved;” the trial court lifted the stay nearly three years later).¹²

¹² *Numerous* other courts are in accord, routinely staying both attorney-client fee dispute and legal malpractice actions. *See Superior Diving Co. v. Watts* (E.D. La. May 16, 2008), No. 05-197, 2008 WL 2097152, at *3 (staying former attorney’s claim for fees and client’s legal malpractice counterclaims: “the power to stay proceedings is ‘incidental to the power inherent in every court . . . [and is] left to the sound discretion of the district court, and it is the . . . court’s responsibility to weigh the competing interests of the parties relating to the appropriateness of a stay. . . . Moreover, a determination of whether prior counsel committed errors/omissions constituting actionable malpractice is inappropriate and premature while the underlying action is still being litigated.”); *Pudalov v. Brogan* (N.Y. Spec. Term 1980), 103 Misc. 2d 887, 895, 427 N.Y.S.2d 345, 350 (staying attorney’s action for unpaid fees pending the resolution of the underlying case); *Beal Bank, SSB v. Arter & Hadden, LLP* (Cal. 2007), 42 Cal. 4th 503, 513, 167 P.3d 666, 672-73 (California Supreme Court stated that, “[a]s we have previously emphasized, trial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation”) (quotation marks and citations omitted); *Jordache Enter., Inc. v. Brobeck, Phleger & Harrison* (Cal. 1998), 18 Cal. 4th 739, 758, 76 Cal. Rptr. 2d 749, 762 (“[E]xisting law provides the means for courts to deal with potential problems that may arise from the filing of a legal malpractice action when related litigation is pending. . . . The case management tools available to trial courts, including the inherent authority to stay an
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Although *Zimmie*, *Francis*, and *Roseman* do not set forth the criteria for a stay of a legal malpractice action, this Court's decision in *Boone v. Vanliner Insurance Company*, 91 Ohio St. 3d 209, 2001-Ohio-27, 744 N.E.2d 154, provides ample guidance. In *Boone*, the insured sued his insurance company for bad faith. *Id.* at 210. The insured sought to discover privileged and confidential information from the insurer, who, in turn, claimed that the release of such information would undermine its ability to defend against the underlying litigation. *Id.* at 210-11, 213. This Court found that, because of the nature of the bad faith claims, the insured was entitled to obtain the information. *Id.* at 213.¹³ However, this Court cautioned that, "if the trial

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action when appropriate and the ability to issue protective orders when necessary, can overcome problems of simultaneous litigation if they do occur.") (citations omitted); *Kopicko v. Young* (Nev. 1998), 114 Nev. 1333, 1337 n.3, 971 P.2d 789, 791 n.3 (Nevada Supreme Court concluded that the "commencement of the malpractice action will compel a stay of the malpractice action pending the resolution of the underlying action"); *Carvell v. Bottoms* (Tenn. 1995), 900 S.W.2d 23, 30 (Tennessee Supreme Court concluded that "clients can avoid the 'discomfort of maintaining inconsistent positions,' . . . by filing a malpractice action against the attorney and requesting that the trial court stay the action until the underlying proceedings are concluded") (citations omitted); *Grumwald v. Bronkesh* (N.J. 1993), 131 N.J. 483, 499, 621 A.2d 459, 466-67 (New Jersey Supreme Court reached the same conclusion as the Tennessee Supreme Court). *See also Julien v. Liebert* (N.Y. App. Div. 1998), 246 A.D. 2d 479, 479, 667 N.Y.S. 2d 750, 751 (Attorney sued the client for unpaid fees, the client counterclaimed for legal malpractice, and special referee awarded attorneys' fees, but "concluded that the issue of malpractice was not before her. The court "stay[ed] enforcement of [special referee's award of attorneys' fees] pending determination of [the client's] malpractice counterclaim" because "[h]ad the malpractice claim been sustained, damages thereon would have provided a substantial setoff against the award of outstanding legal fees."); *Saffer v. Willoughby* (N.J. 1996), 143 N.J. 256, 267-68, 670 A.2d 527, 532-33 (holding that award of attorneys' fees by a State-mandated Fee Arbitration Committee must be stayed if a client discovers a substantial claim for malpractice – "to resolve the dilemma" whereby "the client can be compelled to pay the lawyer's fee while contending in a legitimate malpractice case that the lawyer's malpractice bars collection of the entire fee awarded").

¹³ In *Boone*, this Court found that "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." 91 Ohio St. 3d at 213. That determination is inapplicable here because SSD has never argued that Givaudan's documents – which go directly to the defense of the underlying Butter Flavor Litigation – are unworthy of attorney-client protection.

court finds that the release of this information will inhibit the insurer's ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim." *Id.* at 214.

Here, SSD has never disputed that the release of Givaudan's privileged and work product information would materially inhibit Givaudan's ability to defend itself in the underlying Butter Flavor Litigation. Indeed, SSD's representation of Givaudan in more than 20 multiple plaintiff matters between 2003 and 2007 necessitated and generated a vast archive of attorney-client communications and attorney work product (as well as other confidential information) all of which is in SSD's possession. This Court has properly recognized the broad social importance of the attorney-client privilege, declaring: "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and administration of justice." *Boone*, 91 Ohio St. 3d at 210 n.2 (citation and quotation marks omitted). Similarly, this Court has recognized the importance of work product, explaining: "The purpose of the work product doctrine is 'to prevent an attorney from taking undue advantage of his adversary's industry or efforts.'" *Id.* (citation omitted).

Boone is based on the recognition of the broad social importance of the attorney-client privilege and the importance of work product, which warrant a stay of proceedings where the release of such information would inhibit the parties' ability to defend on the underlying claim. 91 Ohio St. 3d at 210, 214. The purpose of the stay, as stated by this Court, was to prevent jeopardizing a party's defense through disclosure of attorney-client communications. *Id.* at 214.

As explained more fully in Section III, *infra*, if Givaudan is ordered to produce privileged or work product information to SSD, such production might constitute a waiver. While SSD cited a 1907 case from Washington (*Stern v. Daniel* (Wash. 1907), 91 P. 552, 553) and a 1986

federal case (*United States v. Ballard* (5th Cir. 1986), 779 F.2d 287) for the proposition that this may not constitute a waiver (SSD's Brief at 16-17), neither Givaudan nor SSD is aware of *any* definitive authority on this point.

Accordingly, if the Trial Court's privilege rulings are affirmed and the action below is not stayed, Givaudan would be in serious jeopardy of losing these vitally important protections. Givaudan's "full and frank" attorney-client communications with SSD and the work product arising from Givaudan and SSD's "industry and efforts" might fall into the hands of the plaintiffs' attorneys in the underlying litigation. To call this irreparable harm would be a monumental understatement. *See, e.g., Garg v. State Auto. Ins. Co.*, 155 Ohio App. 3d 258, 2003-Ohio-5960, 800 N.E.2d 757, ¶ 29 (Where an insured sued her insurer asserting bad faith, breach of contract, and unfair practices claims, the trial court erred in ordering discovery of insurer's attorney-client and work product-protected information discoverable *only* for the purposes of the bad faith claim: "We agree with [the defendant-appellant] that the trial court's failure to bifurcate the bad-faith claim for trial and to stay discovery [of attorney-client communications and attorney work-product materials] on that claim would be grossly prejudicial to [the defendant] and, thus, an *abuse of discretion*. . . . To require [the defendant] to divulge its otherwise privileged information prior to a resolution of those other [breach of contract and unfair practices] claims would unquestionably impact [the defendant's] ability to defend against them.") (emphasis added); *United States v. Philip Morris Inc.* (D.C. Cir. 2003), 314 F.3d 612, 621-22 ("Although [the party] 'has not asserted any specific irreparable injury that would occur' if it produced the [privileged document], the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough. . . . [T]he public interest would be served by granting a stay [because] the

attorney-client privilege is an ‘institutionally significant status or relationship’ with deep roots in our nation’s adversary system. . . . As such, the privilege advances ‘broader public interests in the observance of law and administration of justice.’”); *cf. Howland v. Purdue Pharma L.P.*, 104 Ohio St. 3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶ 26 (“[W]here the trial court completely misconstrues the letter and spirit of the law, it is clear that the court has been unreasonable and has abused its discretion.”) (citation omitted); *Ranft v. Shaffer* (Ohio Ct. App. 5 Dist. Nov. 20, 2000), No. 2000CA00014, 2000 WL 1745149, at *2 (a trial court abuses its discretion when its order violates public policy).

These risks overwhelmingly demonstrate that the absence of a stay would significantly impair Givaudan’s ability to defend itself in the underlying Butter Flavor Litigation. Based on *Zimmie*, the standard set forth in *Boone*, other decisions cited above, and as a matter of common sense, this clearly constitutes irreparable harm to Givaudan.¹⁴

¹⁴ Other factors also support a stay. First, a stay would permit the parties and the Trial Court to determine the full extent of damages caused by SSD’s legal malpractice. Givaudan cannot know all of its damages until the Butter Flavor Litigation is resolved. As this Court held in *Zimmie, supra*, the client need not be aware of “the full extent” of damages before there is a cognizable event triggering the statute of limitations in a legal malpractice action, and thus the need to file a complaint. 43 Ohio St. 3d at 58-59. However, “the trial court [can be] requested to stay this malpractice action until there [is] a final judgment” in the underlying litigation. *Id.* This is because, until the underlying litigation is resolved, the former client does “not yet know the full extent of his damages” caused by legal malpractice. *Allen*, 194 F.3d at 729 n.7 (Krupansky, J., concurring) (italics in original) (*discussing Zimmie*, 43 Ohio St. 3d at 59). Other courts are in accord. See *Kopicko*, 114 Nev. at 1337 n.3 (“the presence of separate litigation regarding the transaction as of the commencement of the malpractice action will compel a stay of the malpractice action pending the resolution of the underlying action” because otherwise the extent of damages caused by malpractice is not known); *Sindell v. Gibson, Dunn & Crutcher* (Cal. Ct. App. 1997), 54 Cal. App. 4th 1457, 1473 n.11, 63 Cal. Rptr. 2d 594, 604 n.11 (“since it does appear that the full extent of plaintiffs’ damages cannot be determined until the resolution of the pending litigation, the trial court has the inherent authority to stay this [legal malpractice] action pending that event”); *Burgess v. Lippman* (Fla. Ct. App. 2006), 929 So. 2d 1097, 1098 (“Abatement is proper upon a showing by the movant that a related or underlying judicial

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On the other hand, SSD will not suffer any irreparable harm from a stay. Because Givaudan's damages exceed SSD's allegedly unpaid fees, the stay would simply push back the day on which SSD must write a check. *See, e.g.*, Restatement (Third) of The Law Governing Lawyers § 37 and cmts. a, b, d, e (2000) (a complete or partial disgorgement and/or forfeiture of attorneys' fees is appropriate in cases of serious and willful breaches of attorneys' fiduciary duty and malpractice).

Even if SSD were entitled to any additional payments from Givaudan (which it is not), a delay in receiving payment would not represent irreparable harm. *See Moretrench Am. Corp. v. S.J. Groves and Sons Co.* (7th Cir. 1988), 839 F.2d 1284, 1289. Indeed, "[i]rreparable harm is one for which there is no plain, adequate, and complete remedy at law, and for which money

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proceeding will determine whether damages were incurred which are causally related to the alleged negligence/malpractice.").

Here, a stay is necessary for precisely the same reason. When Givaudan terminated its relationship with SSD, it transferred the existing cases to another law firm. Givaudan does not and cannot know the full extent of the damage caused by SSD's legal malpractice until those underlying cases are fully resolved. If the action below is not stayed and Givaudan is forced to proceed with an incomplete assessment of damages caused by SSD, a decision on the merits in the action below may potentially prevent Givaudan from bringing another action based on the same facts.

Second, a stay would preserve Givaudan's ability in the Butter Flavor Litigation to mitigate, to the extent possible, the damage caused by SSD's legal malpractice. For argument purposes, assume that SSD neglected to raise the affirmative defense that a particular plaintiff had previously released his claims. To mitigate the damage from this malpractice, Givaudan would take proper and reasonable steps to convince the court in the underlying action that SSD did not waive the defense. However, to protect itself in a simultaneously litigated malpractice case, Givaudan would need to claim and prove that SSD erroneously waived the defense and damaged Givaudan. Obviously, this poses a significant dilemma. Fortunately, "[s]taying the malpractice action pending completion of the . . . underlying claim solves that apparent dilemma and, in the process, prevents duplicative litigation." *Grunwald*, 131 N.J. at 499, 621 A.2d at 466-67. Other courts agree that "an adequate solution to [this dilemma] is to request an abatement of the malpractice case pending resolution of the underlying case." *Eiland v. Turpin, Smith, Dyer, Saxe & McDonald* (Tex. Ct. App. 2001), 64 S.W.3d 155, 161-62 (citation omitted); *Carvell*, 900 S.W.2d at 30 (same).

damages would be impossible, difficult, or incomplete.” *Crestmont Cadillac Corp. v. General Motors Corp.* (Ohio Ct. App. 8 Dist.), 2004-Ohio-488, 2004 WL 229127, ¶ 36; *see also* R.C. 1343.03(A). SSD cannot show that any perceived harm to it can come close to outweighing the harm and prejudice to Givaudan as described herein. Finally, any claim by SSD that, once a stay is lifted, Givaudan might not have money left to pay SSD is sheer speculation. *Moretrench Am. Corp.*, 839 F.2d at 1289.

Based on the foregoing, Givaudan respectfully submits that, if this Court is unwilling to affirm the Court of Appeals’ decision, the only viable alternative that sufficiently protects each party’s interests is to equitably stay the present action pending the resolution of the underlying Butter Flavor Litigation. “[P]rotection of attorney-client confidences and . . . attorney work product involves a substantial right.” *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St. 3d 60, 63, 616 N.E.2d 181. The general injury caused by the breach of the attorney-client privilege and attorney work product protection and the harm resulting from the disclosure of such information is clear enough.

III. SSD’S PROPOSED SELF-PROTECTION EXCEPTION WOULD NOT ADEQUATELY PROTECT GIVAUDAN

SSD does not dispute Givaudan’s compelling need to protect its privileged material from third parties, including the various plaintiffs’ attorneys in the underlying Butter Flavor Litigation. Rather, SSD continues to belittle Givaudan’s concern that the proposed disclosure and/or use in this case might permit the highly-sensitive information to fall into the wrong hands. (SSD’s Brief at 16-19.) SSD insists that the statutory privilege “does not apply in litigation between an attorney and client relating to the attorney’s services, but [that the proposed self-protection exception] does prevent disclosure at the behest of third parties who were never part of that relationship.” (SSD’s Brief at 3.) Unfortunately, the law in this area is far from certain.

A. The Cases Cited By SSD Do Not Definitively Establish That The Courts In The Butter Flavor Litigation Would Universally Follow SSD's Proposed Interpretation Of A Self-Protection Exception

Throughout this litigation, Givaudan has invited SSD to identify authority that definitely establishes that the disclosure of privileged information to SSD (who no longer is in an attorney-client relationship with Givaudan) and/or SSD's subsequent use of such information would not constitute a waiver. None of the cases cited by SSD provides any conclusive authority in Ohio, much less in any of the other jurisdictions in which the Butter Flavor Litigation is pending.

In *Ballard*, plaintiff appealed his criminal conviction on various grounds, "including the admission in his criminal trial of his former lawyer's testimony concerning alleged privileged conversations between him and his erstwhile counsel." 779 F.2d at 290. Prior to the criminal indictment, Ballard sued his former attorney for malpractice. *Id.* The court of appeals ruled that the testimony was admissible as advice sought for the purpose of furthering criminal activity, but stated that "[t]he mere institution of suit against a lawyer, however, is not a waiver of the privilege for all subsequent proceedings, however related or unrelated." *Id.* at 292. The *Ballard* court recognized that those privileged communications may be admissible in separate but "related" proceedings, or if the malpractice lawsuit proceeds pasts its "mere institution" and progresses to the disclosure of privileged information. Accordingly, *Ballard* illustrates the risk that, if the litigation with SSD progresses to the disclosure of Givaudan's privileged documents, a court might rule that such documents are admissible in the Butter Flavor Litigation.

SSD cites to *Stern v. Daniel* (Wash. 1907), 91 P. 552, and *Netzley v. Nationwide Mut. Ins. Co.* (1971), 34 Ohio App. 2d 65, 296 N.E.2d 550, for the proposition that the disclosure of privileged information under a proposed self-protection will not waive the privilege. However, in both cases, the privileged documents were sought to be admitted at trial (and in one case were

admitted at trial). SSD does not explain how the admission of Givaudan's privileged information at trial will preserve the privilege.

Similarly, SSD cites *Qualcomm Inc. v. Broadcom Corp.* (S.D. Cal. Nov. 7, 2008), No. 05cv1958-B, 2008 WL 4858685, for the proposition that a court protective order purportedly will preserve the privilege. In *Qualcomm*, the parties disputed whether the client (Qualcomm) or its litigation attorneys were to blame for egregious discovery misconduct in that same action. After the misconduct came to light, the court ordered discovery of privileged documents on that issue under a protective order. However, SSD fails to mention two facts in *Qualcomm* that are fatal to its argument here. First, in opposition to Qualcomm's efforts to keep the documents privileged, Broadcom and attorneys for Qualcomm argued "that the relevant case law does not support Qualcomm's distinction between application of the self-defense exception to the attorney-client privilege and waiver of the attorney-client privilege." *Id.* at *3. They accordingly argued that, since Qualcomm filed declarations "point[ing] at Qualcomm's outside counsel as being to blame for the massive discovery failure," they "now should be allowed to publicly file privileged documents." *Id.* at *1, 3. Second, the district court apparently accepted that argument and ordered that certain privileged documents "may be filed in the public record pursuant to the self-defense exception and/or implied waiver." *Id.* at *7. Accordingly, *Qualcomm Inc.* illustrates the risk that the filing of Givaudan's privileged documents might constitute a waiver.¹⁵

¹⁵ SSD also erroneously relies on *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, 909 N.E.2d 1237. In that case, this Court ordered the release of privileged medical information based on a waiver under the statutory exception (medical consent-release) and simply noted the availability of protective orders which are "within the sound discretion of the trial court." *Id.* at ¶ 23. Similarly, the Restatement section SSD relies on simply notes that a "court might find it appropriate to issue a protective order." Restatement (Third) Of The Law
(...continued)

B. SSD's Planned Use Of The Privileged Information Will Jeopardize Givaudan's Legitimate Interests

SSD's intentions are clear. If permitted, SSD will share Givaudan's privileged information with witnesses and jurors during the trial in this action. SSD also has demanded the right to utilize this information before trial, including, among other things, the disclosure of privileged information to its experts, the use of privileged information at depositions (including non-party deponents), and the submission of privileged information to the Trial Court. SSD generically claims that its solution simultaneously permits these actions and protects Givaudan's interests, but this purported assurance does not withstand scrutiny.

First, SSD does not offer any trial plan that would absolutely preserve the privilege. Specifically, SSD fails to explain how the disclosure of privileged information to third party witnesses and jurors would not constitute a waiver. None of SSD's cases addresses this issue. Nor does SSD address the likely attendance by the media. *In re T.R.* (1990), 52 Ohio St. 3d 6, 12, 556 N.E.2d 439 (with certain exceptions, a civil action "proceeding is presumed open to the press and public"); Ohio Const., art. I, § 16 ("open courts" provision).

Second, SSD cannot guarantee that the disclosure of documents to experts or deposition witnesses would absolutely preserve the privilege. Below, SSD demanded the unfettered right to disclose privileged documents to multiple experts and third party deponents. However, even if SSD now offers to do so pursuant to a confidentiality agreement, this still might constitute a waiver. *See, e.g., In re Chrysler Motors Corp. Overnight Evaluation Program Litig.* (8th Cir.

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Governing Lawyers § 83, cmt. e. However, SSD fails to explain how a protective order will maintain the privilege for documents that are made available to the public.

1988), 860 F.2d 844, 846-47 (work product waived for material sought by a third party that was disclosed in previous separate action, despite the existence of a confidentiality agreement).

Third, SSD cannot guarantee that the submission of documents to the Trial Court would absolutely preserve the privilege. Even if the Trial Court permitted the parties to file documents under seal, the case cited by *Amicus Curiae* illustrates that the issue of whether this constitutes a waiver is hardly a simple one. *Ross v. Abercrombie & Fitch Co.* (S.D. Ohio Apr. 22, 2008), No. 2:05-cv-0819, 2008 WL 1844357. In *Ross*, private plaintiffs in a securities action sought to compel discovery of a report – admittedly covered by the attorney-client privilege and the work product doctrine – that was previously provided to plaintiffs in a separate *derivative* action in connection with a motion to dismiss filed under seal. *Id.* at *1. The report was created because, under Delaware law, a corporation

is entitled to request dismissal of [a derivative] action if, in the view of a disinterested director or committee of directors, pursuit of the action is not in the corporation's best interests. . . . Any motion for dismissal is typically accompanied by a report from the director or committee setting forth the basis for the conclusion that the corporate interests are not being advanced by the litigation in question. The court to which the motion is directed must, of course, have access to the report in order to discharge its duty to insure both that the request for dismissal is being made in good faith and by a truly independent director or committee, and that sound principles of business judgment support the request. . . . Additionally, the parties who filed the derivative action must be able to view the report . . . in order to be able adequately to respond to the motion to dismiss. Abercrombie disclosed the report to the derivative plaintiffs in that context, although the motion to dismiss was filed under seal.

Id. at *2. Even though Abercrombie filed the privileged report under seal, private plaintiffs in a separate securities action sought its discovery:

The primary way in which, according to plaintiffs, Abercrombie waived any privileges for the report and associated documents was the *production* of the report to the derivative plaintiffs when it filed its motion to dismiss. *Although the motion was filed under*

seal, it was necessary for Abercrombie to serve the derivative plaintiffs with a copy of the report so that they could adequately respond to the arguments presented in the motion. Plaintiffs contend that *any disclosure of a privileged document to someone other than the holder of the privilege must be characterized as an effort to “selectively waive” the privilege, and that such selective waivers have been rejected* by the Court of Appeals.

Id. (emphasis added); *See also, e.g., Joy v. North* (2d Cir. 1982), 692 F.2d 880, 894 (reversing protective order sealing privileged documents and stating that “the submission of materials to a court in order to obtain a summary judgment utterly precludes the assertion of the attorney-client privilege or work-product immunity”).

The *Ross* court denied discovery at that time, but invited the parties to submit further briefs because the issue of whether a waiver may have nonetheless occurred warranting discovery of the report was “far too complex to resolve on the basis of the three short memoranda.” 2008 WI 1844357 at *7.

As the foregoing cases illustrate, the law in this area is “in a state of ‘hopeless confusion’ . . . [;] some courts have even taken internally inconsistent opinions.” *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation* (6th Cir. 2002), 293 F.3d 289, 295 (citation omitted). To further compound the problem, the Butter Flavor Litigation is pending in multiple jurisdictions, which have varied privilege rules, waivers, exceptions, and/or limitations, and, of course, different judges. Neither SSD nor this Court can guarantee that the disclosure and use of Givaudan’s privileged documents in this case would not lead to the disclosure of such material in one or more of the underlying product liability cases. *See, e.g., Indus. Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Co.* (5th Cir. 1992), 953 F.2d 1004, 1007. In *Industrial Clearinghouse*, plaintiff sought to obtain defendant’s privileged documents on the grounds that the defendant had sued its former attorneys for legal malpractice in a separate action. The district court agreed and ordered the production of the privileged documents. *Id.* at 1006. The

Court of Appeals reversed because the mere institution of a malpractice lawsuit does not constitute a waiver and because the defendant had not yet produced the privileged documents in that lawsuit: “The revelation of confidential communications, not the institution of suit, determines whether a party waives the attorney-client privilege.” *Id.* at 1007.

Industrial Clearinghouse illustrates two risks. First, the district court’s order shows that the law is not as settled as SSD suggests. Second, even the Court of Appeals’ ruling suggests that, once the documents are produced in the malpractice action, they are discoverable by third parties in other actions.

Moreover, privileged documents filed under seal might nonetheless become public under Ohio’s Public Records Act. In Ohio, “any record used by a court to render a decision is a record subject to R.C. 149.43,” Ohio’s Public Records Act. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 27. The plaintiffs’ attorneys in the Butter Flavor Litigation might argue that, under R.C. 149.43, they are entitled to gain access to privileged documents disclosed to SSD and filed with the Trial Court under seal. *See id.* at ¶ 45 (ordering disclosure of sealed court records because “[t]hey are public records that are not subject to any exception” of R.C. 149.43 from disclosure).

The foregoing risks are too high for Givaudan. *See Swetland*, 101 Ohio St. at 505 (noting diverse treatment of privileges by different jurisdictions). If the Ohio court system ultimately determines that Givaudan is not entitled to a fair day in court in this case and in the Butter Flavor Litigation, Givaudan will have no choice but to dismiss all of its defenses to the Complaint and all of its Counterclaims and simply pay SSD’s \$1.8 million claim.

IV. EVEN IF THIS COURT WERE TO ADOPT THE PROPOSED SELF-PROTECTION EXCEPTION (AND DECLINE TO STAY THE ACTION), IT SHOULD NOT REVERSE THE OTHER PORTIONS OF THE COURT OF APPEALS' JUDGMENT

The Court of Appeals found numerous errors in the Trial Court's blanket order granting SSD's Motion to Compel. SSD's proposed self-protection exception, even if adopted by this Court, does not moot all of those errors.

A. The Trial Court Erred In Summarily Granting SSD's Disputed Motion To Compel Without Conducting An *In Camera* Review Of The Privileged And Work Product Documents

In its opposition to SSD's Motion to Compel below, Givaudan urged the Trial Court to conduct an *in camera* review if it was inclined to order the production of any privileged or work product documents. Specifically, Givaudan requested that the Trial Court "schedule an *in camera* hearing to make a document-by-document privilege and/or work product determination." (Givaudan's Opposition to SSD's Motion to Compel at 11 n.9, Supp. 258); *see, e.g., Gill v. Gill* (Ohio Ct. App. 8 Dist.), 2003-Ohio-180, ¶ 32, 2003 WL 132447, at *4 (assignment of error based on trial court's failure to conduct an *in camera* review is preserved unless appellant "did not file a brief in opposition to the motion to compel [and] . . . did not request an *in camera* inspection").

The Trial Court refused. Without any *in camera* review (or even a hearing, as also requested by Givaudan), the Trial Court granted SSD's Motion to Compel in its entirety. (Appx. 33-36.) The Court of Appeals correctly reversed the Trial Court (Appx. 22-23, 26, 29) because this error alone constitutes a clear abuse of discretion and required reversal. *Miller v. Bassett* (Ohio Ct. App. 8 Dist.), 2006-Ohio-3590, ¶ 16, 2006 WL 1934788, at *5 ("any blanket grant compelling discovery [of information asserted to be privileged or protected from discovery is] an abuse of discretion as the trial court must first conduct a hearing to determine the nature of the

privilege”); *Jerome v. A-Best Prods.* (Ohio Ct. App. 8 Dist.), No. 79139, 2002-Ohio-1824, 2002 WL 664027, ¶¶ 33-34 (remanding the case with instructions that an *in camera* inspection of the purported privileged information be conducted); *Peyko v. Frederick* (1986), 25 Ohio St. 3d 164, 495 N.E.2d 918, at Syllabus ¶ 2 (the defendant sought to protect a claims file on the ground that it contained attorney-client privileged information; the Supreme Court held that, “[i]f the defense asserts the attorney-client privilege with regard to the contents of the ‘claims file,’ the trial court shall determine by *in camera* inspection which portions of the file, if any, are so privileged.”) (emphasis added); *Stuffleben v. Cowden* (Ohio Ct. App. 8 Dist.), 2003-Ohio-6334, ¶ 24, 2003 WL 22805065, at *5 (reversing order compelling documents asserted to be privileged and work product information and “remand[ing the] case for an *in camera* inspection of the documents requested”).

SSD asserts that the proposed self-protection exception would obviate the need for any *in camera* inspection of any of the documents requested. (SSD’s Brief at 40-41.) But, even if an exception is adopted, SSD is not entitled to a blanket authorization to obtain and use each and every privileged document without any determination as to whether it is essential to SSD’s claims and defenses. The case cited by SSD, *Keck v. Bode*, actually illustrates why an *in camera* review is necessary here. In *Keck*, the Circuit Court reversed the trial court’s admission of privileged evidence that was “not essential to preserve the rights of the attorney.” 13 Ohio C.D. at *2. However, without an *in camera* review, the trial court cannot make a considered determination whether or not a particular document is “essential.”

Accordingly, even if this Court adopts a self-protection exception, it still should affirm the portion of the Court of Appeals’ Judgment that required the Trial Court to conduct an *in*

camera review of privileged and work product information to prevent the disclosure and use of information that is not vital and essential to the case.

B. The Trial Court Erred In Ordering The Disclosure Of Privileged Documents Between Givaudan And Its New Defense Counsel

SSD now admits that, even if a self-protection exception is adopted, it still is not entitled to obtain privileged documents relating to Givaudan’s relationship with its new defense counsel in the Butter Flavor Litigation. SSD insists in its opening merit brief that these communications were not covered by its Motion to Compel or the Trial Court’s order. (SSD’s Brief at 29.) But this simply is not true. SSD’s motion and the Trial Court’s order plainly cover all of SSD’s requests, many of which seek communications between Givaudan and Morgan Lewis, Givaudan’s “new defense counsel.” (*See* fn. 8, *supra*.) Givaudan urges this Court to review the referenced document requests (e.g., Nos. 4-11, 22-28) and not be swayed by SSD’s attempt to revise the factual record.

C. The Trial Court Erred By Authorizing SSD To Use Privileged And Work Product Documents In Its Possession

The Trial Court did not merely grant SSD’s Motion to Compel in its entirety. It also authorized SSD to *use the privileged and work product information in its files* relating to its four-year representation of Givaudan. (Appx. 35-36.) This ruling constitutes a clear abuse of discretion for at least two separate reasons.

First, the Trial Court granted this extraordinary relief without affording Givaudan any opportunity to address this issue. In its Motion to Compel, SSD sought nothing more than the production of and testimony about privileged and work product information. (SSD’s Motion to Compel, Supp. 229 (SSD “asks the Court to compel Givaudan . . . to produce the documents requested and to compel testimony”) and 245 (“Conclusion” to SSD’s Motion to Compel seeking same relief).) Because SSD’s Motion to Compel did not seek permission to *use* privileged and

work product information already in its possession, Givaudan did not have an opportunity to address this issue in its opposition brief. Even worse, because the Trial Court refused to conduct a hearing on SSD's Motion to Compel, Givaudan had absolutely no notice of this issue until the Trial Court ordered that SSD may use privileged information in its own files. This alone constitutes a clear abuse of discretion and requires the reversal of the Trial Court's Order. *See, e.g., State ex rel. Dann v. R&J P'ship, Ltd.* (Ohio Ct. App. 2 Dist.), 2007-Ohio-7165, 2007 WL 4615956, ¶ 30 n.4 (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"); Civ. R. 7(B)(1) (an application for an order, "whether written or oral, shall state with particularity the grounds therefore, and shall set forth the relief or order sought").

Second, the Trial Court failed to conduct an *in camera* review before ruling that SSD could use privileged and work product documents in its possession. The Trial Court stated that SSD's "use of documents already in its possession, and otherwise protected, that relate to the billing dispute between [SSD] and Givaudan are permitted to be used by [SSD] in order to mount a defense in this case in accordance with Rule of Professional Conduct 1.6(b)(5) and 2317.02(A)." (Appx. 35-36.) However, SSD made no showing whatsoever that any particular document in its possession is vital and essential to its defense and, because there was no *in camera* review of any such documents, the Trial Court necessarily did not make any such findings. This alone constitutes an abuse of discretion. *See* Section IV.A, *supra*.

V. THE COURT OF APPEALS ALSO CORRECTLY RULED THAT THERE IS NO AUTOMATIC WAIVER OF THE *COMMON LAW* ATTORNEY-CLIENT PRIVILEGE

SSD makes the conclusory assertion that a self-protection exception should also apply to the common-law attorney-client privilege. However, the disclosure of information protected by the common law privilege (as opposed to the statutory privilege) is required only *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. v. Weston, Hurd, Fallon, Paisley & Howley* (Ohio Ct. App. 8 Dist. July 23, 1998), No. 72758, 1998 WL 413772, at *3-4 (*discussing the Hearn test*) (emphasis added).

In its Motion to Compel, SSD failed to make any showing whatsoever that any individual document is purportedly vital to its defense or purportedly unavailable from any other source. Rather, SSD asks this Court to categorically toss aside the common law privilege for all of the privileged documents merely because of the dispute between SSD and Givaudan. (SSD’s Brief at 27.) But, as the Court of Appeals correctly held, there is no “automatic waiver” of the common law attorney-client privilege “simply because the attorney and client who are the subject of such communications are now in an adverse relationship.” (Appx. 25.) The Court of Appeals properly explained that “*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. 24 (*quoting Hearn v. Rhay* (E.D. Wash. 1975), 68 F.R.D. 574).)

VI. THE COURT OF APPEALS CORRECTLY RULED THAT THERE IS NO AUTOMATIC EXCEPTION TO THE WORK PRODUCT DOCTRINE PROTECTION

SSD finally argues that the self-protection exception also does away with the work product doctrine. (SSD's Brief at 36-38.) SSD is incorrect. 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 the Office of Atty. Gen. of Ohio* (1991), 57 Ohio St. 3d 614, 615, 567 N.E.2d 243 ("a waiver of the attorney-client privilege does not necessarily constitute a waiver of [work-product] exemption under Civ. R. 26(B)(3)").¹⁶

To 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. 26-29). Ohio recognizes both ordinary fact and opinion work product. *Jerome*, 2002-Ohio-1824 at ¶¶ 20-21. SSD is not entitled to either form. SSD made no "showing that [such work product] materials, or the information they contain, are relevant" to this action to overcome protection for either ordinary fact or opinion work product. *Jackson*, 110 Ohio St. 3d at ¶¶ 16-17. 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.

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

¹⁶ SSD's Ohio authority is inapposite. All three cases (*Moskovitz*, *National Union Fire Ins. Co.*, and *Garg*) cited by SSD (SSD's Brief at 36-37) addressed the discoverability of an insurer's "claims files" containing both attorney-client and work product information, and were premised on the proposition that such information in the insurer's "claims file" are "unworthy of protection . . . [and] are subject to disclosure during discovery on [insurance] bad-faith claims." *Nat'l Union Fire Ins. Co. v. Ohio State Univ. Bd. of Trustees* (Ohio Ct. App. 10 Dist.), 2005-Ohio-3992, ¶¶ 9, 14, 2005 WL 1840220; *Moskovitz*, 69 Ohio St. 3d at 661; *Garg*, 155 Ohio App. 3d at ¶ 16. This is not the case here.

claim.” (Appx. 28.) 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 the Trial Court blanket order for the production of the requested work product, without any evidentiary hearing or *in camera* review, constituted reversible error.

VII. THE ARGUMENTS BY THE OHIO STATE BAR ASSOCIATION DO NOT HAVE ANY MERIT

A. The OSBA’s Extensive Policy Arguments Are Properly Addressed To The General Assembly

Like SSD, the OSBA devotes significant attention to public policy arguments in support of a self-protection exception. (*Amicus* Brief at 1-2, 3-6.) However, as explained in Section I.E, *supra*, the parties’ policy disputes regarding the Ohio statutory privilege are not properly before this Court. *E.g., Roe*, 122 Ohio St. 3d 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”).

B. The OSBA Fails To Demonstrate That A Self-Protection Exception Would Fully Protect Givaudan’s Privileged Information

Like SSD, the OSBA summarily asserts that Givaudan’s privileged information “can remain shielded from all but the eyes of the tribunal resolving the dispute.” (*Amicus* Brief at 4.) OSBA does not provide any explanation, much less authority, for this contention. Moreover, as explained in discussed in Section III, *supra*, the proposed self-protection exception would unfairly risk the release of Givaudan’s privileged information.

C. Other Purported Exceptions To The Privilege Are Not Before This Court

Like SSD, the OSBA argues that the Court of Appeals’ decision (which followed this Court’s precedent) threatens other purported exceptions. (*Amicus* Brief at 6-8.) However, the

proposition of law on review (as framed by SSD) is limited to whether the statutory privilege includes a self-protection exception. Other purported exceptions are not before this Court. *State ex rel. White v. Kilbane Koch*, 96 Ohio St. 3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18 (reiterating the “well-settled precedent that [this Court] will not indulge in advisory opinions”).

D. The Ohio Privilege Statute Is Not Unconstitutional

For 90 years, this Court has consistently rejected judicially created waivers, exceptions, and limitations to the privilege statute and, for 90 years, the General Assembly is deemed to have agreed with that restraint. Starting with its Motion to Compel, SSD has now filed five separate briefs in three different courts, but it has never once suggested that the privilege statute is unconstitutional. Rather, SSD sought and this Court granted a discretionary review under S. Ct. Prac. R. II, § 1(A)(3), not as a claimed appeal of right involving “a substantial constitutional question” under S. Ct. Prac. R. II, § 1(A)(2).

Now, the OSBA suggests that the privilege statute, as interpreted by this Court in *Jackson, Roe*, and other decisions, is unconstitutional in two respects. However, “the arguments presented in the brief of the amicus curiae regarding the constitutionality of [the statute] are not properly before this court.” *State v. Webb* (Ohio App. 6 Dist. Nov. 8, 1977), C. A. NO. L-76-309, 1977 WL 198622, at *3 (emphasis added). “*An amicus curiae may not raise issues as to the constitutionality of a statutory provision where such issue is not raised by the parties to the action.*” *Id.* Indeed, less than two years ago, this Court confirmed that “[a]mici curiae are not parties to an action and may not, therefore, interject issues and claims not raised by the parties.” *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St. 3d 143, 2008-Ohio-554, 882 N.E.2d 420, ¶ 53.

Moreover, even if the OSBA's constitutional arguments were properly before this Court (and they are not), they are not persuasive.¹⁷

1. The Privilege Statute Does Not Impermissibly Detract From This Court's Regulation Of The Bar And The Practice Of Law

The OSBA claims that the privilege statute, as interpreted by this Court, infringes on this Court's authority under Section 5(B), Article IV of the Ohio Constitution, including the "procedural matters," such as the Rules of Evidence. (*Amicus* Brief at 8-10.) However, this Court, in a *unanimous* decision, already considered at length and *rejected* this *exact* argument:

[W]e have considered the Rules of Evidence and this court's rulemaking authority under Section 5(B), Article IV of the Ohio Constitution as possible means to obtain the result desired by appellant [of creating a judicial public policy limitation on the statutory privilege]. Under this rulemaking authority, the court prescribes "rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any *substantive* right." If the admission of evidence, i.e., the hospital-ordered blood test [privileged under R.C. 2317.02(B)], is a purely *procedural* matter, the court would arguably be free to pronounce an appropriate rule without usurping a legislative function. A review of Evid. R. 501 dispels any hope that such an approach will be helpful. Evid. R. 501 reads in its entirety:

"The privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in light of reason and experience."

The rule clearly states that the matter of privilege is controlled by statute or common law. This rule removes the matter of privileges from the operation of the Rules of Evidence. . . . Because the law of privilege has been determined to be *substantive* in nature, this court is not free to propose an amendment to the Rules of Evidence which would deny the privilege in drunk driving cases. Likewise,

¹⁷ *Amicus Curiae* also fails to explain how any constitutional challenge to the privilege statute could, consistent with due process, apply retroactively to Givaudan's attorney-client communications with SSD between 2003 and 2007.

since the legislature has enacted a specific statutory provision in R.C. 2317.02(B) to establish and control the physician-patient privilege, there is no vacuum within which we can proceed by common-law pronouncement.

Smorgala, 50 Ohio St. 3d at 225 (internal citations omitted; emphasis added); *cf. State v. Rahman* (1986), 23 Ohio St. 3d 146, 146, 148, 492 N.E.2d 401 (“R.C. 2945.42 confers a *substantive* right upon the accused to exclude privileged spousal testimony . . . unless a third person was present or one of the other specifically enumerated exceptions contained in the statute is applicable. . . . [T]he Rules of Evidence in Ohio are limited by Section 5(B), Article IV of the Ohio Constitution to *procedural* effect only. Evid. R. 601 [directed to competency] is inapplicable to the *substantive* spousal privilege”) (emphasis added).¹⁸

¹⁸ In *Smorgala*, this Court rejected appellant’s request to “judicially create a public policy limitation upon the statutorily created physician-patient privilege which would allow otherwise clearly inadmissible evidence to be received in ‘drunk driving’ cases. In keeping with the constitutional principle of separation of powers, we cannot adopt such a position.” 50 Ohio St. 3d at 223. *Smorgala* thus ended a line of appellate decisions in which courts had carved out a public-policy exception to the privilege statute for test results involving alcohol and drugs. *Id.* at 223-24. While SSD and/or the OSBA may attempt to distinguish *Smorgala* on the basis that the present case involves an attorney-client dispute, rather than a drunk driving case, the underlying constitutional principle is identical.

The cases cited by the OSBA (*Amicus* Brief at 8-9) are unpersuasive because they are either consistent with *Smorgala* or inapposite. In *State ex rel. Thompson v. Spon*, this Court stated, consistently with *Smorgala*, that the “Ohio Rules of Civil Procedure, promulgated pursuant to Section 5(B), Article IV of the Ohio Constitution, control over conflicting statutes on *procedural* matters while statutes supersede conflicting rules on *substantive* matters.” (1998), 83 Ohio St. 3d 551, 555, 700 N.E.2d 1281 (emphasis added).

Cleveland Bar Assn. v. Pearlman is inapposite. In that case, this Court considered whether a “layperson who presents a claim or defense and appears in small claims court” as a company officer for limited purposes engages in an authorized practice of law. 106 Ohio St. 3d 136, 2005-Ohio-4107, 832 N.E.2d 1193, at Syllabus.

Bailey v. Meister Brau, Inc. (N.D. Ill. 1972), 57 F.R.D. 11, is inapposite for the reasons stated in *Smorgala*. Moreover, *Bailey* is not an Ohio decision and its reasoning is based on a finding of a “waiver” of the attorney-client privilege “by plaintiff’s use of the documents to refresh his recollection” (*id.* at 13) which, as discussed above, Ohio has rejected.

(...continued)

The Ohio legislature recently echoed this Court's determination: "The General Assembly declares that the attorney-client privilege is a *substantial* right[.]" Notes to R.C. 2317.02 (2006 S 117, § 6) (emphasis added).

While this Court undoubtedly has exclusive jurisdiction over the "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law" (Section 2(B)(1)(g), Article IV, Ohio Constitution), the General Assembly has exclusive power over the statutory privilege. *Roe*, 122 Ohio St. 3d at ¶ 48 (an "exception to [the statutory] privilege is a matter for the General Assembly to address").

2. The Privilege Statute Does Not Impermissibly Interfere With SSD's Right To Remedy And Due Process

Based on a lone Ohio decision from 1911, the OSBA contends that the privilege statute, as interpreted by this Court, violates SSD's "right to remedy and due process."¹⁹ (*Amicus* Brief at 10-11.); *Byers v. Meridian Printing Co.* (1911), 84 Ohio St. 408, 95 N.E. 917, at Syllabus. However, *Byers* did not address the privilege statute, a self-protection exception, or an attorney's right to remedy and due process, much less establish that R.C. 2317.02(A) is unconstitutional. Rather, this Court merely determined that a statute "changing the presumption and burden of

(...continued)

Finally, *People v. Robnett* (Colo. 1993), 859 P.2d 872, is inapposite because it is not an Ohio decision and because it dealt with disciplinary proceedings, not a civil action. In any event, contrary to the OSBA's characterization of the case, *Robnett* simply noted that "the board found that the respondent's [i.e., disbarred attorney's] conduct throughout the proceedings, rather than his failure to respond to the request for investigation [by asserting attorney-client privilege], precluded a finding of cooperation. . . . We also reject the respondent's apparent suggestion that the board somehow penalized him for asserting his privilege against self-incrimination during the proceedings." *Id.* at 879.

¹⁹ The Ohio Constitution provides, in pertinent part, that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law." Art. I, § 16.

proof as to malice [in connection with an action based on an allegedly libelous statement] is unconstitutional and void.” *Id.*

If anything, *Byers* implies that the adoption of a self-protection exception would violate Givaudan’s right to remedy and due process. This Court explained that “we do deny . . . that [a party] can be arbitrarily subjected to an option to stand upon one right under penalty of losing another.” *Id.* at 422. Here, a suspension of the statutory attorney-client privilege would force Givaudan to choose between the right to contest SSD’s claims (and assert its counterclaims) and the right to defend itself in the Butter Flavor Litigation without plaintiffs’ attorneys having access to its privileged information. As explained above, if Givaudan ultimately is ordered to disclose privileged, it will have no choice but to dismiss all of its defenses to the Complaint and all of its counterclaims and simply pay SSD’s \$1.8 million demand.

SSD does not face the same dilemma. Givaudan repeatedly has suggested that the parties enter into a tolling agreement (or stipulate to a stay) pending the resolution of the Butter Flavor Litigation, and that offer remains open today. If SSD chooses to litigate against Givaudan without the use of privileged information, nothing in the statute (or the Court of Appeals’ Judgment for that matter) prevents it from doing so. On the other hand, if SSD wishes to use certain privileged documents, it can accept Givaudan’s offer and defer this litigation pending the resolution of the Butter Flavor Litigation. As this Court expressly noted in *Zimmie*, “the trial court [can be] requested to stay this malpractice action until there [is] a final judgment” in the underlying litigation. 43 Ohio St. 3d at 59. In short, the privilege statute will not impermissibly interfere with SSD’s right to remedy and due process.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' Judgment.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

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