

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellant,

v.

Givaudan Flavors Corp.,

Appellee.

Case No. 09-1321

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

Court of Appeals Case No. 92366

**RESPONSE OF APPELLANT SQUIRE, SANDERS & DEMPSEY L.L.P. TO APPELLEE
GIVAUDAN FLAVORS CORPORATION'S MOTION FOR RECONSIDERATION**

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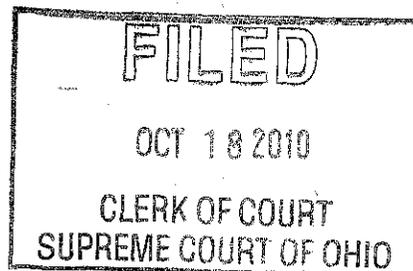


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As this Court explained in the very first sentence of its opinion, the subject of this appeal is a trial-court order “compell[ing] Givaudan Flavors Corporation to produce documents related to Squire Sanders’ representation of Givaudan” and “direct[ing] Givaudan’s former and current general counsel to testify regarding attorney-client communications” related to that relationship. 2010-Ohio-4469, at ¶ 1. The trial court held that, under the “self-protection exception,” the documents and testimony sought by Squire Sanders were not protected by attorney-client privilege or work-product doctrine. The court of appeals reversed. After extensive briefing and oral argument, this Court ruled 6-0 that Squire Sanders is entitled to the requested document production and testimony, thus validating the trial court’s order.

In what borders on a flat-out accusation of judicial incompetence, Givaudan first asserts that, in ruling to allow rather than (as Givaudan had wanted) forbid discovery, the Court “inadvertently” misstated its holding. What the Court meant to say, according to Givaudan, is that while the self-protection exception “would permit a[] S[quire Sanders] attorney to testify,” it does not permit Squire Sanders to take discovery of Givaudan documents and witnesses. (Givaudan Mem. in Support of Mot. for Reconsideration (“Givaudan Mem.”) at 1.) The Court, however, clearly held and intended to hold that the self-protection exception entitles Squire Sanders to secure the discovery it seeks, and not just to put Squire Sanders lawyers on the stand at trial. This is made crystalline by the Court’s syllabus and opinion, and (most importantly) is confirmed by the judgment itself, which reversed the court of appeals and reinstated the trial court’s order *compelling production of documents and testimony*. This treatment was hardly inadvertent. The validity of the discovery order was the central issue in the case, and deciding that issue differently (the polar opposite, as Givaudan would have it) would necessarily have yielded a very different writing and ruling from the Court.

Givaudan further asserts that, if the Court *did* intend to hold Squire Sanders entitled to the requested documents and testimony, the Court’s decision is “patent[ly]” and “radically” wrong. (Givaudan Mem. at 2.) That argument is procedurally improper, because it seeks to rehash an issue already fully briefed and argued by the parties. *See* Supreme Court Practice Rule 11.2(B) (prohibiting a party from using a motion for reconsideration to re-argue issues already raised in the appeal). At any rate, the Court’s holding was plainly correct. As the Court explained and the cases it cited establish, when an exception to privilege applies, the privilege does not attach and the normal rules of discovery apply. Because the privilege does not apply under the circumstances here, the Court correctly held that Squire Sanders was entitled to the requested discovery.

The Court should deny Givaudan’s motion for reconsideration.

I. THE JUDGMENT, OPINION, AND SYLLABUS RESOLVE IN CLEAR AND DEFINITIVE FASHION THE CENTRAL ISSUE IN THE CASE—WHETHER SQUIRE SANDERS IS ENTITLED TO THE DOCUMENTS AND WITNESS TESTIMONY IT SEEKS.

Givaudan’s argument—that the Court’s opinion is somehow unclear and “inadvertently misstate[d]” its holding as applying to discovery and not just to trial testimony by Squire Sanders lawyers—is manifestly wrong and even disingenuous. (Givaudan Mem. at 1.) The Court unmistakably held that the self-protection exception entitles Squire Sanders to have the discovery it seeks, and not just to call its lawyers to the witness stand.

First, and importantly, Givaudan’s motion for reconsideration, regardless what else it tries to do, does not ask the Court to alter its judgment. The ruling under review in this interlocutory appeal is the trial court’s order *compelling the production of documents and testimony by Givaudan and its current and former general counsel*. 2010-Ohio-4469, at ¶ 1. The court of appeals reversed that order. This Court reversed the court of appeals’ judgment and

remanded to the trial court for proceedings in line with that court's original discovery order. It could not be any clearer that, on remand under this Court's judgment, Givaudan will be required, among other things, to produce the documents and testimony covered by the trial court's order. Any different outcome would require not simply a change in some language in the opinion but an utter flip flop in the judgment, which, as noted, even Givaudan does not have the temerity to suggest.

Second, not just the Court's judgment, but its opinion makes clear the Court's well-founded intention to hold that the self-protection exception entitles Squire Sanders to the requested documents and testimony. The Court frames the issue from the outset as whether the trial court correctly "compelled Givaudan [] to produce documents" and "directed Givaudan's former and current general counsel to testify." 2010-Ohio-4469, at ¶ 1. The Court then recounts the procedural history of the case, describing the "discovery" Squire Sanders sought, the "deposition" questions Givaudan's current and former general counsel refused to answer on privilege grounds, and the trial court's order compelling production of documents and testimony. *Id.* at ¶ 8-10. The Court's legal analysis analogizes to other common-law exceptions to the attorney-client privilege statute (*e.g.*, the crime-fraud exception, the lack-of-good-faith exception, and the joint-representation exception), which allow discovery to be compelled (and not just permissive attorney testimony) on the ground that "the privilege does not attach" when an exception applies. *Id.* at ¶ 33 (citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 661); *see also id.* at ¶ 24-33. The Court then holds that under the self-protection exception, like other exceptions, "the privilege does not attach to the communications" and is, accordingly, "excluded from the operation of the statute." *Id.* at ¶ 47. The opinion concludes that, because the attorney-client privilege does not attach to the communications between Squire Sanders and

Givaudan, the self-protection exception permitted Squire Sanders to conduct discovery of the evidence needed to establish its defense to Givaudan's professional-liability claims. *Id.* at ¶ 64 (“the self-protection exception permits discovery”); ¶ 65 (“good cause exists for discovery”); ¶ 66 (“[T]he cause is remanded to the trial court, which has already made a finding of good cause requiring Givaudan to produce the requested documents, testimony, and other evidence. Therefore, the trial court is instructed to conduct further proceedings consistent with this opinion and its earlier journalized orders.”); *see also id.* at ¶ 68 (Lanzinger, J.) (concurring in judgment).¹

It is not reasonably possible to read the Court's opinion to hold, or intend to hold, that Squire Sanders is limited to having its attorneys testify at trial, and is not entitled to discovery concerning Givaudan's documents and witnesses. In aid of manufacturing some non-existent ambiguity that it can attempt to exploit on remand, Givaudan moves over to the syllabus, latching onto its first paragraph, and some similar language in the opinion, that refers to “permit[ting] an attorney to testify.” 2010-Ohio-4469, syllabus ¶ 1. But the Court used that language for an obvious reason: The statutory privilege, upon which Givaudan fundamentally rested its resistance to the discovery sought and ordered, itself is a testimonial privilege that governs when “the attorney may testify.” R.C. 2317.02(A). Obviously (to anyone but Givaudan) the syllabus is just describing one circumstance (a testimonial context) when the attorney-client privilege *does not apply*. When the privilege does not apply, normal rules of discovery do.

¹ The Court employed the same analysis to conclude that the self-protection exception also allowed Squire Sanders to discover evidence that would otherwise be protected by the work-product doctrine. 2010-Ohio-4469, at ¶ 59-63, 65-66.

In any event, the law established in a Supreme Court decision is the product of both the syllabus *and* the text of the opinion. S.Ct. Rep. R. 1(B)(1). Thus, even if the text were somehow seen as more “expansive” than paragraph 1 of the syllabus, the Court’s holding would still be clear. Under Ohio law, “[t]here is no disharmony between the syllabus and the text simply because the syllabus contains less than all of the holdings of the text.” *State ex rel. Glenn v. Industrial Comm’n of Ohio* (10th Dist.), 2007-Ohio-6535, at ¶ 33, *reversed and remanded on other grounds*, 2009-Ohio-3627, 122 Ohio St. 3d 483. Here, the entire opinion, including its text, footnotes, and syllabus, sets forth the Court’s holding and reasoning without the slightest fuzziness or inconsistency, *i.e.*, that the circumstances involved here raise an exception to privilege, and the trial court correctly compelled production of documents and testimony.

II. GIVAUDAN’S ALTERNATIVE ARGUMENT IS BOTH PROCEDURALLY IMPROPER AND WRONG.

Givaudan also asserts that, if the Court *did* intend to hold Squire Sanders entitled to the requested documents and testimony, the decision is “patent[ly]” and “radically” wrong. (Givaudan Mem. at 2.) That argument is procedurally improper, because it seeks to rehash an issue already briefed and argued by the parties. Supreme Court Practice Rule 11.2 prohibits a party from using a motion for reconsideration to re-argue issues already raised in the appeal. S.Ct. Prac. R. 11.2(B); *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379, 381, 2002-Ohio-4905, at ¶ 9 (holding that respondent’s attempt to re-argue position previously asserted in its merit brief was not authorized by the Supreme Court’s Rules of Practice). Givaudan seeks to contest all over again whether the self-protection exception entitles Squire Sanders to *compel* production of Givaudan documents and testimony of Givaudan witnesses. That issue (including Givaudan’s argument based on the language of Rule 1.6 of the Rules of Professional Conduct) was thoroughly briefed to the Court, by both parties, and is not properly

re-raised via a motion for reconsideration. (*See, e.g.*, Givaudan Merit Br. at 19 (arguing that “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”), 22 n.10 (arguing that “cases cited by SSD address permissive disclosure by an attorney, not a motion to compel production of privileged documents and testimony”), 43 n.16 (attempting to distinguish some, but not all, of the cases holding that discovery can be compelled under analogous exceptions to privilege and work-product doctrine), 45 (arguing that “[o]ther purported exceptions,” which have been relied on to compel discovery, “are not before this Court”)); *see also* Squire Sanders Reply Br. at 1, 12, 14, 19-20 (responding to these points).)

At any rate, the Court’s holding was plainly correct, for reasons given in the Court’s opinion and Squire Sanders’ merit briefs. When an exception to a privilege applies, “the privilege does not attach,” 2010-Ohio-4469, at ¶ 33, 47, 64, and the material is discoverable as any other non-privileged information, using the normal mechanisms for compelling production and testimony. *See id.* at ¶ 25-26, 27, 29-33 (discussing *Lemley v. Kaiser* (1983) 6 Ohio St. 3d 258, 266 (compelling attorneys to testify); *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638 (allowing discovery); *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St. 3d 209, 212-13 (same); *Netzley v. Nationwide Mut. Ins. Co.* (2d Dist. 1971), 34 Ohio App. 2d 65, 78-79 (same)). There is no basis in law or logic to treat the self-protection exception any differently in this respect from the other privilege exceptions to which the Court analogized. Just as the normal rules of discovery apply when the crime-fraud, good-faith, and joint-representation exceptions are established, so, too, as the authorities recognize, do the normal rules of discovery apply when the self-protection exception is involved. *See* 2010-Ohio-4469, at ¶ 25-26, 27, 29-33, 47, 64; *see also Daughtry v. Cobb* (Ga. 1939), 5 S.E.2d 352, 355 (the self-protection exception “applies with

equal force to the testimony of the other witnesses in behalf of the [lawyer]”); *Weinshenk v. Sullivan* (Mo. App. 1937), 100 S.W.2d 66, 70 (holding that, when self-protection exception applies, the attorney-client privilege has no application to letters between client and attorney); *Stern v. Daniel* (Wash. 1907), 91 P. 552, 553 (same); *Restatement (Third) of Law Governing Lawyers* § 83 (2000) (under the self-protection exception, the attorney-client privilege *does not apply* to communications between an attorney and her client).

Ironically, until just ten days or so ago, Givaudan vigorously asserted that the self-protection exception to attorney-client privilege did not even exist. Now it embraces this “150-year-old” doctrine, but accuses the Court of “radically alter[ing] [it].” (Givaudan Mem. at 2.) Hyperbole aside, Givaudan has failed to cite even a single case from any jurisdiction holding that even though the self-protection exception applies, discovery is *unavailable*. That is because the position Givaudan has taken is as difficult as doppelgangers to accept—that information to which the privilege does not apply nevertheless can be both non-privileged (for purposes of an accused attorney’s testimony) and privileged (for purposes of discovery) in the same litigation. This Court, like others, has sensibly held that when a privilege exception applies, the privilege is absent for all purposes in that litigation.

Nor, for reasons obvious from the Court’s opinion and also stated in our reply brief at the merit stage, does it make any difference that Rule 1.6 does not *compel* document production or address discovery at all. (Givaudan Mem. at 8; Squire Sanders Reply Br. at 12.) That Rule covers one manifestation of the exception in action, but does not purport to cover all manifestations, much less to deal specifically with discovery. The Court cites Rule 1.6 as support for the proposition that there is a self-protection exception, not as the underlying basis

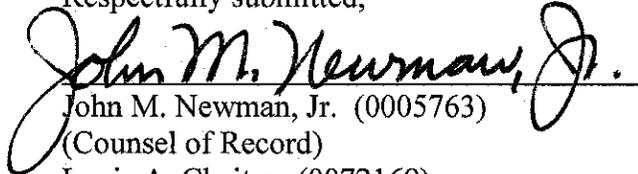
for the exception, 2010-Ohio-4469, at ¶¶ 49-52, or as defining its outer reach. Givaudan cannot rely on privilege to sidestep normal discovery rules.

CONCLUSION

For the foregoing reasons, the Court should deny Givaudan's motion for reconsideration.

Date: October 18, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2010, I served the foregoing Response of Appellant Squire, Sanders & Dempsey L.L.P. To Appellee Givaudan Flavors Corporation's Motion For Reconsideration by email and by U.S. mail upon the following counsel:

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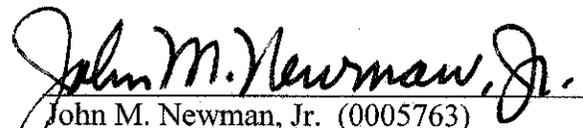
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