

ORIGINAL

In The
Supreme Court of Ohio

APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS
TENTH APPELLATE DISTRICT
CASE NO. 2012-1729

MA EQUIPMENT LEASING I LLC and MA 265 NORTH HAMILTON ROAD LLC,
Plaintiffs-Appellees,

v.

LYNN TILTON, PATRIARCH PARTNERS MANAGEMENT GROUP, LLC,
PATRIARCH PARTNERS XIV, LLC, LD INVESTMENTS, LLC, JOHN
HARRINGTON, ZOHAR II 2005-1, LIMITED, JOHN DOES DEFENDANTS 1-10,
Defendants-Appellants.

APPELLEES' MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM
IN SUPPORT OF JURISDICTION

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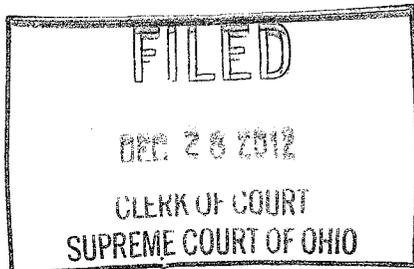


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EXPLANATION OF WHY THIS CASE DOES NOT PRESENT ANY ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

This narrow discovery dispute, tailored to its unusual facts regarding the existence of an attorney-client relationship, is simply not a case of public or great interest for the following three reasons:

First, Ohio courts have consistently held that a determination regarding the *existence* of an attorney-client relationship is a highly factual one, for which a more deferential review is appropriate. See *In Re Grand Jury Subpoenas Issued to Alice Lynd, Esq.*, 4th Dist. Nos. 04CA2966, 04CA2978, 2005-Ohio-4607, 2005 Ohio App. LEXIS 4170, ¶ 12; *Yost v. Wood*, 5th Dist. No. 7357, 1988 Ohio App. LEXIS 2791, *9 (July 11, 1988).

Second, Appellants' pronouncements of a "deep conflict" among Ohio courts of appeal are belied by a review of the authorities that they cite.

Third, the exceptional and highly unusual facts of this dispute render Appellants' invitation for this Court to "define . . . the scope of the attorney-client privilege in the context of corporate parents, subsidiaries and affiliates" unnecessary. It is important for this Court to note that the trial court and the Tenth District did **not** disturb the attorney/client communications between Appellants (collectively "Patriarch") and their own counsel. Rather, the narrow rulings, confined to the facts of this dispute, only addressed communications between Patriarch and the attorneys of their investment, Zohar Waterworks.

Simply put, the trial court's narrow decision here was based on a single finding of fact: that Patriarch did not meet its burden of showing the existence of an attorney-client relationship between Patriarch and the lawyers that represented a separate legal entity, Zohar Waterworks. The trial court did not interpret any privilege statute, make any determination about the scope of the attorney-client privilege, or even apply the privilege to any specific documents. The court

did not need to reach those legal questions, because without an attorney-client relationship, Patriarch could not invoke the privilege in the first place.

The Court of Appeals likewise did not make any legal interpretation of the scope or applicability of the attorney-client privilege. The portion of its decision relevant to this appeal is limited to the trial court's finding of fact, holding only that "the trial court did not abuse its discretion by finding no attorney-client relationship between appellants and Waterworks' counsel." *MA Equipment Leasing I, LLC v. Tilton*, 10th Dist. Nos. 12AP-564, 586, 2012-Ohio-4668, ¶ 42.¹ This fact-bound determination does not present any issue of great public importance.

This Case Does Not Warrant Review as to Application of the Attorney-Client Privilege to Affiliated Businesses.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the U.S. Supreme Court explained that recognition of an attorney-corporate client privilege should be determined on a case-by-case basis. "While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules [of Evidence]." *Id.* at 396-97.

Because no single rule can fit the myriad situations in which businesses may be related and may share communications with their attorneys, the courts have developed several rationales for different contexts. Some of these rationales are collected and explained in *In re Teleglobe Communications Corp. v. BCE Inc.*, 493 F.3d 345 (3d Cir. 2007), which is why both sides have

¹ For this reason, the memorandum of amicus curiae Ohio State Bar Association ("OSBA") reads as if it was written not for this case, but some other one. OSBA's brief repeatedly asserts a need for a clear rule "as to the proper application [and] scope" of the attorney-client privilege (Mem. at 1, 2, 3, 5, 8), but neither the trial court nor Court of Appeals here interpreted the scope of the privilege or applied it to any specific communications. This case does not present a proper vehicle for what OSBA wants.

cited that case repeatedly. For example, separate attorneys representing different clients with similar legal interests may share information with each other under a community-of-interest rationale. *Id.* at 364.

Simply because different rationales exist for extending the attorney-client privilege in different corporate contexts, however, does not mean that there is any conflict in the law or that courts in Ohio are confused. The Court of Appeals here did not recognize any conflict between its decision and that of any other federal or Ohio court, and no case cited by Patriarch even suggests any conflict in the Ohio courts. Patriarch, by contrast, proposes a single rule for all circumstances. *MA Equipment Leasing I LLC*, ¶ 36 (“Appellants flatly argue that communications between counsel and corporate affiliates under common ownership or control are privileged”). Imposition of that single rule would be inconsistent with *Upjohn* and set the Ohio courts into conflict with the federal policy of reviewing each case on its facts.

The Court of Appeals here recognized that the only rationale that could apply to this case is the co-client or joint-client rationale. The community-of-interest rationale does not apply because this is not a case of separate attorneys sharing information with each other. Instead, Patriarch seeks to piggy-back on Zohar Waterworks’ privileged relationship with its lawyers. The Court of Appeals also recognized that it was not appropriate to treat Patriarch and Zohar Waterworks as a single client. To do that not only disregards the corporate form, *MA Equipment Leasing I LLC*, ¶¶ 27-28, but this “single client” rationale, which has been applied to parent corporations and their wholly-owned subsidiaries, does not fit the facts here. *See id.* ¶¶ 3, 41.

The Court of Appeals’ choice of rationale therefore was fact-driven, and cannot be said to conflict with any other Ohio case. The Court of Appeals recognized correctly that all of the rationales “presuppose the existence of an otherwise valid privilege.” *Id.* ¶ 26. Whether the

Court of Appeals chose the correct rationale is academic here because Patriarch did not show the existence of an attorney-client relationship in the first place. *Id.* ¶ 41 (“Because the trial court appropriately found that Waterworks’ counsel did not also perform legal work for appellants, the second prong of the joint-client test set forth by the trial court – that appellants and Waterworks shared a common interest – is irrelevant.”).

There is No Split in the District Courts Over the Appropriate Standard of Review.

Neither the Court of Appeals here nor any case cited by Patriarch acknowledges any split, or even any mild disagreement, about the standard of review to apply to privilege determinations. Patriarch’s asserted “deep split” is illusory. Instead, the case precedent draws a distinction between questions of law (such as interpretation of a privilege statute or determinations of the scope of the privilege), which properly are reviewed *de novo*, and questions of fact (including existence of an attorney-client relationship), which are reviewed more deferentially. The Court of Appeals drew that distinction here, and it does not conflict with any other appellate decision or with *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, and *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, both of which involved the legal issue of statutory interpretation, and neither of which addressed existence of an attorney-client relationship.

Patriarch does not show that the attorney-client privilege has suffered in any way from the deferential review applied to fact issues, nor does it show that *de novo* review would better serve the privilege. The courts of appeals have not indicated any interest in a change in policy in this area, and no change is needed.

RESPONSE TO STATEMENT OF THE CASE AND STATEMENT OF FACTS

Patriarch’s statements obscure what the trial court decided, and what it did not decide. The trial court did not make any legal ruling about the attorney-client privilege, but addressed

only the antecedent fact question of whether Patriarch met its burden of showing an attorney-client relationship between itself and Zohar Waterworks' counsel:

Therefore, the Court finds that the totality of the facts, when combined with Defendants' past insistence that its separate corporate structure shielded them from liability as to Zohar Waterworks' debts and obligations, leads the Court to find that Defendants operated as a separate entity from Zohar Waterworks, and did not share common counsel or common interests with Zohar Waterworks.

The trial court's finding of no attorney-client relationship was compelled by facts that Patriarch never has disputed:

1. Patriarch at all relevant times retained its own counsel, separate from Zohar Waterworks' counsel. Patriarch never showed that Zohar Waterworks' counsel performed work directly for Patriarch. *MA Equipment Leasing I LLC*, ¶ 40 ("Appellants failed to point to any evidence that Waterworks' counsel performed work on appellants' behalf.").

2. The relationship between Patriarch and Zohar Waterworks was not simply that of affiliated companies, but was lender-borrower and then creditor-debtor. *See id.* ¶ 41:

Specifically, [Patriarch does] not contest that they held Waterworks in default of its obligations to appellants, cut off financing to Waterworks, and required Waterworks to waive its legal claims against appellants as a condition for additional financing. Moreover, in Waterworks' bankruptcy proceedings, Zohar II asserted its adverse interest as a secured creditor of Waterworks.

Nor does Patriarch dispute that when Plaintiffs alleged an alter ego claim against Patriarch, Patriarch argued "that only Zohar Waterworks could file such a claim against Defendants," which again shows opposing legal interests between Patriarch and Zohar Waterworks.

3. The relationship between Patriarch and Zohar Waterworks was not a typical parent-wholly-owned subsidiary one. Patriarch alleged that Defendant Zohar II owned Zohar Waterworks, but Zohar II was not the "parent" in any real sense because Zohar II was a shell entity, with no officers or employees. *MA Equipment Leasing I LLC*, ¶ 3. In addition, Zohar

Waterworks was not a subsidiary of any other defendant. *Id.* ¶¶ 3, 41. Nor was Zohar II wholly-owned by any other defendant.

4. The trial court’s reference to “Defendants’ past insistence that its separate corporate structure shielded them from liability as to Zohar Waterworks’ debts and obligations” indicated that Patriarch’s argument for an attorney-client relationship with Zohar Waterworks’ counsel was not credible because it contradicted Patriarch’s earlier legal positions in the case. Before the privilege dispute arose, Patriarch had asserted at every turn that it and Zohar Waterworks were “separate” companies and that as a result, Patriarch was entitled to the protections accompanying that separate corporate form.² Once the privilege dispute arose, however, and Patriarch’s interest changed to shielding its documents from discovery, Patriarch began to argue that it was closely affiliated with Zohar Waterworks. These inconsistent positions undermine the credibility of any claim of privilege.³

Response to Proposition of Law No. 1: Communications Among Counsel and Corporate Affiliates Are Not Privileged Automatically as a Matter of Law, but Only on a Showing of Identical Legal Interests.

² For example, in its Answer Patriarch asserts that it “cannot be held individually liable for the debts or obligations of Zohar Waterworks, LLC, a limited liability company,” and “Plaintiffs cannot pierce the corporate veils of any of the company/entity Defendants with limited liability to hold their parent entities, officers, managers, employees or members individually liable.” Answer ¶¶ 187, 188. In addition, as the trial court explained, “[i]n regards to Plaintiffs’ previous alter ego claim, Defendants argued that they were not liable for Zohar Waterworks due in part to their separate corporate form[.]” (June 28, 2012 Decision and Entry at 6.)

³ In *Hoffmann-LaRoche, Inc*, 2011 U.S. Dist. LEXIS 50404, *13, Roche, the party asserting the privilege, “has repeatedly and expressly taken the position that it and Chugai are different companies, and that Chugai’s documents are not in their control It is inconsistent for Roche . . . [now] to argue that *it* has standing to assert a privilege to prevent their disclosure.” (Emphasis in original). Similarly, in *Teleglobe* the Third Circuit explained that one party, BCE, “wants us to view the corporate group as a single client” for privilege purposes, but also wants “the controlling entity to own the privilege in perpetuity,” which means that the corporate parent is separate from its subsidiaries. 493 F.3d at 371-72. “Put simply, BCE wants to have it both ways[.]” *Id.* at 371.

Patriarch begins its argument by mis-characterizing the issue in this case. Neither the trial court nor the Court of Appeals decided that the attorney-client privilege was *waived* merely because the communications extend across corporate structures. (Patriarch Mem. 9). The issue here is not waiver, but whether Patriarch met its burden of showing that the privilege applies in the first place because Patriarch had an attorney-client relationship with Zohar Waterworks' attorneys. *MA Equipment Leasing I LLC*, ¶ 40; *Squire, Sanders & Dempsey LLP v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 47 (“Logically, the first issue to be addressed in any case where one party claims that any applicable privileges have been waived is whether the privileges attach to the requested documents in the first instance”) (citation omitted).

A. Patriarch’s Proposed Legal Rule is Overbroad.

Patriarch asks this Court to adopt a sweeping proposition of law: that communications between any kind of affiliated corporations under common control are privileged, automatically and as a matter of law, no matter what the circumstances and no matter what the affiliates’ interests may be. This proposition is based on the premise that affiliated corporations have, or should be deemed to have, the same legal interests.

The Court of Appeals properly rejected Patriarch’s proposition as overbroad and not representative of the current law. “[I]t is not the case that parents and subsidiaries are in a community of interest as a matter of law.” *Teleglobe*, 493 F.3d at 378; *see also id.* at 372, explaining that “it assumes too much to think that members of a corporate family necessarily have a substantially similar *legal* interest . . . in *all* of each other’s communications.” (Emphasis in original). Instead, “[t]he majority – and more sensible – view is that *even in the parent-subsidiary context* a joint representation only arises when common attorneys are affirmatively doing legal work for both entities *on a matter of common interest.*” *Id.* at 379 (emphasis added).

United States v. American Tel. & Tel. Co., 1979 U.S. Dist. LEXIS 12959, **58-59 (D. D.C. Apr. 18, 1979), thus explains that even when corporations are affiliated, the party invoking the privilege has the burden to show an identity of legal interests:

The cases in which the issue has arisen as to the identity of the client also involved facts in which the two related corporations had a substantial identity of legal interest in the matter in controversy. In such circumstances, notwithstanding that the corporations were distinct, the representation by the attorney was common or joint representation and hence the communications among them were still covered by the attorney-client privilege. *If the claimant of the privilege can show a substantial identity of legal interest in the specific matter*, it therefore makes no difference whether the two corporations were so affiliated as to be a single “client.”

(Emphasis added).

Patriarch misreads many of its own cited cases, which apply the same legal interest requirement to related corporations. In *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D. S.C. 1974), at the pages cited by Patriarch, the court found specifically that various affiliates of Chavanoz “were interested in the lawsuits involving Chavanoz” and that various affiliates of ARCT-France “were interested in the lawsuits involving ARCT-France.” *Id.* at 1184. The court plainly implied that had the affiliates *not* had that same legal interest in the litigation, the communications between them and Chavanoz or ARCT-France would not have been privileged. Thus, “if a corporation *with a legal interest in an attorney-client communication* relays it to another related corporation, the attorney-client privilege is not thereby waived.” *Id.* at 1185 (emphasis added).

Similarly, *Crabb v. KFC National Management Co.*, No. 91-5474, 1992 U.S. App. LEXIS 38268, *8 (6th Cir. Jan. 6, 1992), cites *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 687-88 (N.D. Ind. 1985), with the parenthetical description “identical nature of legal interest test applied to communications between two wholly-owned subsidiaries of common parent.” *Roberts* finds

specifically that two fellow corporate subsidiaries “do share an identical legal interest” based on the facts of that case. *MPT, Inc. v. Marathon Labels, Inc.*, No. 1:04 CV 2357, 2006 U.S. Dist. LEXIS 4998, *23 (N.D. Ohio Feb. 9, 2006), similarly finds *as a fact* that two corporations and an individual “have an identical legal interest in the enforcement and validity of the patents,” but notes that “adversarial aspects of the relationship [between licensees and patent owners] such as license negotiations are not protected.” *Id.* at *21.

And *Ins. Co. of N. Am. v. Superior Court*, 108 Cal. App.3d 758, 166 Cal.Rptr. 880 (1980), quotes *Duplan*’s language that communications between separate corporations are privileged “where they have an identical legal interest with respect to the subject matter of a communication” and then says that legal advice shared between affiliates will be privileged “[a]bsent some conflict of interest or some evidence of antagonism among entities.” *Id.* at 769. *State ex. rel. Syntex Agri-Bus., Inc. v. Adolf*, 700 S.W.2d 886, 888 (Mo. App. 1985), simply follows *Ins. Co. of N. Am.*, noting that “[t]he California opinion first analyzed the relationship of the third parties present at the conference and found that as officers of other members of the corporate family *they had specific need to know the information[.]*” (Emphasis added) ⁴

At most, Patriarch’s cases like *The Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 472-74 (W.D. Mich. 1997) (saying repeatedly “As long as Perrigo was a wholly owned subsidiary of Grow . . .”), *Medcom Holding Co. v. Baxter Travenol Lab.*, 689 F. Supp. 841, 843 (N.D. Ill. 1988) (“ownership of a wholly-owned subsidiary was transferred to a third party”), *Guy v.*

⁴ *Euclid Retirement Village, Ltd. v. Giffin*, 8th Dist. No. 79840, 2002-Ohio-2710, did not involve affiliated corporations at all, but held that neither a general partner of a limited partnership nor the partnership itself could assert the privilege against the other because each partner is a fiduciary to the others. Likewise irrelevant are Patriarch’s references to antitrust and tortious interference cases (Patriarch Mem. 10) that did not address the scope of the attorney-client privilege. In *Teleglobe*, the Third Circuit explained that those antitrust and tortious interference decisions “are tethered to the statutes (or common-law causes of action) they interpret, and do not give us license to disregard entity separateness in other contexts.” 493 F.3d at 371.

United Healthcare Corp., 154 F.R.D. 172, 177-78 (S.D. Ohio 1993), and *Ins. Co. of N. Am.* stand for the much narrower proposition that a sufficient identity of interest exists between a parent corporation and its *wholly-owned subsidiary*. But the simple parent-wholly-owned subsidiary context is not the relevant fact situation here. Patriarch argues that Zohar Waterworks was wholly owned by the investment fund Zohar II, but (1) Zohar Waterworks was not a wholly-owned subsidiary of any other Defendant, (2) Zohar II did not actually operate as a parent of Zohar Waterworks (it could not, because Zohar II had no officers or employees), and (3) Zohar II is not wholly-owned by any other Defendant.

B. Patriarch and Zohar Waterworks Had Differing and Conflicting Legal Interests.

Patriarch's argument is based solely on the corporate *form* of Patriarch and Zohar Waterworks as affiliated companies, without any examination of how these entities actually behaved or the nature of their legal interests. The trial court and Court of Appeals properly rejected this superficial approach and looked instead at the *substance* of the relationship.

The trial court and Court of Appeals first found it undisputed that Patriarch at all times had separate counsel from Zohar Waterworks. Separate representation alone indicates different legal interests. *Bowne of New York City, Inc. v. Ambase Corp.*, 150 F.R.D. 465, 491 (S.D. N.Y. 1993) (“This separate representation indicates an apparent recognition that the legal interests of the Home in this transaction were distinct from those of Ambase.”); *Net2Phone, Inc. v. Ebay, Inc.*, No. 06-2469, 2008 U.S. Dist. LEXIS 50451, *30 (D. N.J. June 26, 2008) (when separate legal entities claimed a common legal interest, “[t]heir separate interests on legal issues is demonstrated by the representations to the SEC that plaintiff retained counsel for services that IDT had formerly provided”).

The trial court and Court of Appeals further found it undisputed that Patriarch treated Zohar Waterworks initially as a borrower, then as a debtor. The record evidence shows that this lender/creditor – borrower/debtor relationship between Patriarch and Zohar Waterworks was embodied in specific credit agreements between them; that Zohar Waterworks’ CFO/COO Raul Tejada submitted a Declaration to the bankruptcy court further describing the debtor-creditor relationship that Zohar Waterworks had with Patriarch, and noting that Zohar Waterworks was in default of its credit agreements and that Patriarch had cut off funding to Zohar Waterworks before its bankruptcy filing; and that Patriarch forced Zohar Waterworks to agree to waive any potential claims that Zohar Waterworks might have against Patriarch, as a condition for further financing from Patriarch or its affiliates.

Patriarch never has disputed any of this conduct. *MA Equipment Leasing I LLC*, ¶ 41. For Patriarch now to say that it had a “community of interest” with Zohar Waterworks ignores reality and makes a mockery of the notion of community of interest. The trial court and Court of Appeals therefore properly found, on the specific facts of this case, “that [Patriarch] failed to demonstrate that the withheld communications pertained to a matter in which both [Zohar Waterworks] and [Patriarch] shared a common legal interest, and thus [Patriarch] lacked standing[.]” *In re Grand Jury Subpoena #06-1*, 274 Fed. Appx. 306, 311 (4th Cir. Apr. 21, 2008).

Response to Proposition of Law No. 2: The Asserted Conflict Over the Proper Standard of Review is Illusory.

Contrary to Patriarch’s assertion, there is no conflict between the courts of appeals on whether privilege decisions should be reviewed deferentially or de novo. Not a single one of Patriarch’s cited cases states that there is any conflict, or even indicates the slightest disagreement, with any other court of appeals. If there is a “deep conflict,” according to

Patriarch’s overblown description (Patriarch Mem. 4, 5), it has gone unrecognized by the courts of appeals and plainly is not treated as an issue of great importance requiring any action by this Court.

Schlotterer and *Ward* do not stand for the sweeping proposition that Patriarch asserts – that any trial court decision that touches on a privilege issue must be reviewed de novo. In *Schlotterer*, the only issue was whether certain medical records were protected by the physician-patient privilege; more specifically, this Court construed the consent exception to the privilege in R.C. 2317.02(B)(1). Similarly, in *Ward* the question presented was whether the specific information at issue was privileged. This Court actually construed the statute that embodied the privilege, and construction of a statute is a legal determination. *See Ward* at ¶ 28 (“Because we must strictly construe the statutory privilege . . .”). De novo review was appropriate in those cases of statutory construction, but neither case even tangentially addressed the existence of an attorney-client relationship.

Although some courts of appeals cite *Schlotterer* and *Ward* using loose language, when the courts actually *apply* de novo review, they apply that standard to legal determinations, not to findings of fact. ***Significantly, none of Patriarch’s cited cases involves the issue of whether an attorney-client relationship existed, and none of them applies de novo review to a specific finding of fact by the trial court.*** Instead, they apply de novo review to interpretation of a privilege statute or court order,⁵ to rulings on the scope of a privilege,⁶ or to application of a

⁵ *Stewart v. Vivian*, 12th Dist. No. CA2011-06-050, 2012-Ohio-228, ¶ 13 (“we will employ a de novo review because this appeal raises the issue of whether the peer review privilege found in R.C. 2305.252 applies to the Horizon Health report”); *Wessell Generations, Inc. v. Bonnifield*, 193 Ohio App.3d 1, 2011-Ohio-1294, 950 N.E.2d 989 (9th Dist.), ¶ 14 (construing the “scope of confidentiality afforded by R.C. 5101.27”); *Scott Elliott Smith Co. LPA v. Carasalina, LLC*, 192 Ohio App.3d 794, 2011-Ohio-1602, 950 N.E.2d 624 (10th Dist.), ¶¶ 19, 22-23 (construing the trial court’s discovery order).

privilege to specific documents or questions,⁷ all of which are legal determinations. At least one case does not actually apply any standard of review.⁸

Patriarch's attempt to analogize to the summary judgment context (Mem. 15) is also flawed. In summary judgment cases, an appellate court only determines whether there exists one or more disputed *issues* of material fact such that the case needs to go to trial for fact-finding. Thus, in Patriarch's cited case *Pinnix v. Marc Glassman, Inc.*, 8th Dist. Nos. 97998, 97999, 2012-Ohio-3263, ¶ 15, the court of appeals did not review any specific finding of fact by the trial court, but found that the trial court erred by granting a discovery request when there was a disputed issue of fact as to whether the privilege had been waived. Summary judgment procedure therefore does not support the notion that trial court findings of fact in the privilege context should be reviewed de novo.

By contrast to Patriarch's cases that involve legal determinations, precedent has held for decades that the existence of an attorney-client relationship is a question of fact. *Driftmer v. Carlton*, 6th Dist. No. L-06-1029, 2007-Ohio-2036, 2007 Ohio App. LEXIS 1902, ¶ 63 ("As with the existence of a fiduciary relationship, the scope and duration of an attorney-client relationship is generally a question of fact."); *Landis v. Hunt*, 80 Ohio App.3d 662, 672, 610 N.E.2d 554 (10th Dist. 1992) (existence of attorney-client relationship determined by "the

⁶ *Wallace v. Hipp*, 6th Dist. No. L-11-1052, 2012-Ohio-623, ¶ 38 ("Questions of law on the scope of privilege, however, are reviewed de novo.").

⁷ *Estate of Mikulski v. Cleveland Elec. Illum. Co.*, 8th Dist. No. 96748, 2012-Ohio-588, ¶¶ 21-22 (whether certain topics of deposition testimony were privileged); *Wagner v. Dennis*, 5th Dist. No. 11-COA-050, 2012-Ohio-2485, ¶ 19 ("The issue of whether the information sought is confidential and privileged from disclosure is a question of law that should be reviewed de novo.").

⁸ *Cobb v. Shipman*, 11th Dist. No. 2011-T-0049, 2012-Ohio-1676, ¶¶ 2, 4 (orders that involved privilege were not final and appealable).

facts”); *Yost v. Wood*, 5th Dist. No. 7357, 1988 Ohio App. LEXIS 2791, *9 (July 11, 1988) (“The existence of the relationship is a question of fact dependent upon the circumstances of each case[.]”).⁹

Because existence of the attorney-client relationship is a fact question, the courts appropriately apply more deferential review. *In Re Grand Jury Subpoenas Issued to Alice Lynd, Esq.*, 4th Dist. Nos. 04CA2966, 04CA2978, 2005-Ohio-4607, 2005 Ohio App. LEXIS 4170, ¶ 12 (“The determination of the existence of an attorney-client relationship will not be reversed when that determination is supported by substantial evidence.”) (citing both Ohio and non-Ohio precedents). Patriarch’s memorandum (at 15) acknowledges that “there are other circumstances in which factual determinations are reviewed for an abuse of discretion.”¹⁰ Neither *Schlotterer* nor *Ward* gives any indication to apply de novo review, and thereby essentially displace the trial courts’ review, on the existence of an attorney-client relationship.

The Court of Appeals here therefore recognized correctly that the standard of review depends on whether the trial court made a legal determination or a finding of fact. The Court of Appeals did not disagree with *Schlotterer* or *Ward*, and its decision here does not conflict with them. The Court of Appeals acknowledged that de novo review would apply to “the construction and application of the statutory privilege to particular information,” *MA Equipment Leasing I LLC*, ¶ 18, but it did not need to apply that standard here because the trial court only made a

⁹ *Accord, e.g., United States v. Rouse*, 410 F.3d 1005, 1010 (8th Cir. 2005) (“Whether an attorney/client relationship existed is a finding of fact we review for clear error.”); *Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990) (“We agree with the court that the existence of an attorney-client relationship normally is a question of fact . . .”).

¹⁰ *See also Paul v. Kaiser Foundation Health Plan of Ohio*, No. 11-4217, 2012 U.S. App. LEXIS 25247, *11 (6th Cir. Dec. 11, 2012) (insofar as trial court “inquired into the factual predicates for jurisdiction, any fact-findings integral to its ruling that complete preemption was triggered and federal jurisdiction established are reviewed for clear error”).

finding of fact that Patriarch had not proved the existence of an attorney-client relationship.¹¹

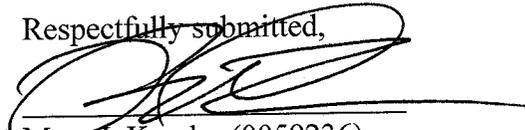
Patriarch does not show that the attorney-client privilege somehow has suffered because the courts distinguish between issues of law and fact. But in any event, this case should not be reviewed because Patriarch's proposed rule would be counter-productive. First, if the existence of an attorney-client relationship becomes subject to de novo review here, parties and lower courts will argue that de novo review likewise should apply where privilege is not at issue, which could have unforeseen consequences for breach of contract, legal malpractice, and other cases where existence of an attorney-client relationship is critical. Second, de novo review would undermine the longstanding judicial policy that trial courts are better suited than appellate courts to determining facts. Whether an attorney-client relationship was formed may require evaluation of the credibility of witnesses or documents. Trial courts are better situated, and have more relevant experience, to make those evaluations. The interest in protecting the attorney-client privilege does not require de novo review of all fact-finding that might touch on a privilege issue, including the antecedent question of whether an attorney-client relationship exists.

CONCLUSION

For the reasons set forth above, the Court should not accept jurisdiction in this case.

¹¹ Patriarch's assertion that the Court of Appeals did not examine the record here (Mem. 13) is wrong. An appellate court applying a deferential standard of review *does* examine the record, but instead of placing itself in the shoes of the trial court it compares the trial court's decision to the record to determine whether there is record evidence to support that decision. The Court of Appeals' examination of the record evidence is apparent at ¶¶ 2-6, 33-35, 41, and 43-44 of its decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Response has been served via electronic mail and regular U.S. mail this 26th day of December, 2012, upon the following;

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