[Cite as *MA Equip. Leasing I, L.L.C. v. Tilton*, 2012-Ohio-4668.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

MA Equipment Leasing I, LLC et al.,	:	
Plaintiffs-Appellees,	:	Nos. 12AP-564 and 12AP-586
v.	:	(C.P.C. No. 09CVH-08-12912)
Lynn Tilton et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on October 9, 2012

Hahn Loeser & Parks LLP, *Marc J. Kessler*, *John F. Marsh*, and *Phillip G. Eckenrode*, for appellees.

Brune & Richard LLP, *Hillary Richard*, and *David Elbaum*; *Jones Day*, *J. Kevin Cogan*, *Chad A. Readler*, and *Daniel N. Jabe*, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendants-appellants, Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners Management Group, LLC, Patriarch Partners XIV, LLC, LD Investments, LLC, John Harrington, and Zohar II 2005-1, Limited (collectively, "appellants"), appeal the judgment of the Franklin County Court of Common Pleas, which denied their motion for a protective order and granted a motion to compel filed by plaintiffs-appellees, MA Equipment Leasing I, LLC and MA 265 North Hamilton Road LLC (collectively, "appellees"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellee MA Equipment Leasing I, LLC is a private investment firm engaged in the business of leasing industrial equipment, and appellee MA 265 North Hamilton Road LLC is a private real estate investment firm that specializes in leasing industrial real estate. In February 2005, appellees entered into transactions with Oasis Corporation ("Oasis"), a financially distressed company, and through these transactions, appellees bought from Oasis and leased back certain real estate and equipment. In August 2005, appellees, Oasis, Wachovia (Oasis's secured lender), and appellant Zohar II 2005-1, Limited ("Zohar II"), entered into a series of transactions pursuant to Article 9 of the Uniform Commercial Code. As part of those transactions, Zohar II formed Zohar Waterworks, LLC ("Waterworks"), which acquired Oasis's assets and entered into equipment and real estate leases with appellees. The terms of those leases prohibited Waterworks from removing the leased equipment without appellees' written consent. Waterworks is not a party to this litigation.

{¶ 3} The corporate structures and relationships between appellants form a key basis for appellants' arguments on appeal. According to appellants, Zohar II is an investment fund, structured as a special purpose entity known as a collateralized loan obligation. Zohar II wholly owned Waterworks and was also a secured lender of Waterworks. Appellants state that Zohar II had no officers or employees and that it delegated full investment authority to its collateral manager, Patriarch Partners XIV, LLC ("Patriarch XIV"), an affiliate of Patriarch Partners, LLC ("Patriarch Partners"). Patriarch Partners Management Group, LLC ("Patriarch Management"), provides management and operational consulting services to portfolio companies held by Zohar II and other Patriarch-affiliated entities. LD Investments, LLC ("LD Investments"), is the sole parent of Patriarch Partners. At all relevant times, Lynn Tilton ("Tilton") was the CEO of Patriarch Partners, the sole member of LD Investments, and the manager of Patriarch XIV, Patriarch Management, and Waterworks. John Harrington ("Harrington") is the managing director of Patriarch Management and, at various times, served as interim CEO of Waterworks.

{¶ 4} In connection with the 2005 Article 9 transactions, Patriarch Partners retained the law firm now known as Richards, Kibbe & Orbe LLP ("RKO") to provide legal advice to Patriarch Partners and its affiliates, including Zohar II. Waterworks, however, retained Jenner & Block LLP ("Jenner") as its separate counsel in connection with the 2005 transactions, including its negotiation and execution of the leases with appellees.

{¶ 5} In 2007, appellees commenced litigation against Waterworks in the Franklin County Court of Common Pleas for breaches of the equipment and real estate leases between appellees and Waterworks. As part of that litigation, appellees sought a temporary restraining order to prohibit Waterworks from removing leased equipment to Mexico without appellees' consent. In connection with that action, Waterworks retained the law firms of McCarthy, Lebit, Crystal & Liffman, LPA, and Kemp, Schaeffer & Rowe, LPA. When appellees served a subpoena on Patriarch Partners, Patriarch Partners retained the law firm of Brune & Richard LLP to respond. Appellees contend that appellants aggressively delayed the 2007 litigation in order to perfect security interests in Waterworks before the trial court could issue a judgment. Appellees allege that appellants' interests perfected in March 2009, approximately two months before the trial court entered judgment in appellees' favor.

{¶ 6} In April 2009, prior to any judgment in the 2007 litigation, Waterworks filed for bankruptcy. In connection with the bankruptcy proceedings, Waterworks retained the law firm of Morris, Nichols, Arsht & Tunnell LLP. Waterworks' secured creditors, including Zohar II and possibly other appellants, were represented by the Jones Day law firm.

{¶ 7} Appellees filed this action against appellants on August 25, 2009, alleging claims of fraud, tortious interference with contract, and civil conspiracy.[1] Appellees also sought to set aside appellants' corporate forms and to proceed against appellants directly for breach of contract. Appellees subsequently amended their complaint to plead additional claims for negligent representation and abuse of process. On July 14, 2011, the trial court dismissed appellees' claims of fraud and negligent representation,

[1] Appellees' original complaint did not name Patriarch XIV as a defendant.

after which appellees filed a Fourth Amended Complaint containing an amended fraud claim.

{¶ 8} On August 19, 2011, appellants filed a motion for a protective order with respect to appellees' discovery requests, which appellants claim seek privileged communications with Jenner and RKO. In particular, appellants sought protection from appellees' requests for "[a]ny and all documents and communications with Jenner and RKO concerning the Oasis Leases and/or the Building Leases and the Equipment Lease" and for "[a]ny and all documents and communications (internal or external), including any communications with any Defendant, Jenner, RKO and/or * * * Waterworks, concerning the decision to move or transfer, and the implantation of any move/transfer/transportation of * * * Waterworks' operations and/or equipment (in whole or part) to Mexico or elsewhere." Appellants also sought a protective order with respect to appellees' request for unredacted copies of emails described in a privilege log that Patriarch Partners produced during the 2007 litigation. In addition to responding to appellants' motion, appellees filed a cross-motion to compel discovery. Appellees argued that appellants had no attorney-client relationship with any counsel retained by Waterworks and, alternately, that any privilege had been waived.

{¶ 9} On June 28, 2012, the trial court denied appellants' motion for a protective order and granted appellees' cross-motion to compel. The court found that Waterworks was a separate company from appellants and held that, to claim an attorney-client relationship with Waterworks' counsel, appellants "must show that [Waterworks'] counsel was performing work for both entities and that they shared a common interest." The court found, however, that Waterworks and appellants retained separate attorneys to represent their interests at all relevant times. The court also found compelling appellees' arguments that appellants' interests were not similar to Waterworks' interests, and may even have been adverse at times. Therefore, the court determined that appellants were not entitled to assert the attorney-client privilege to withhold communications with Waterworks' counsel. The court held that appellants "were not clients of * * * Waterworks' counsel, nor are [appellants] considered a common client with counsel for * * * Waterworks."

{¶ 10} Appellants appealed the June 28, 2012 judgment. On July 5, 2012, the trial court ordered a stay pending appeal and modified its June 28, 2012 judgment to provide that the compelled discovery was to be produced for "attorney eyes only" and to order that depositions at which the compelled discovery was used were to be filed under seal for in camera review. Appellants filed a second notice of appeal from the trial court's July 5, 2012 judgment; appellants' appeals have been consolidated.

II. ASSIGNMENTS OF ERROR

{¶ 11} Appellants presently assign the following as error:

> [I.] The trial court erred by imposing a "heightened" burden of proof on Appellants to establish their claim that documents are protected under the attorney-client privilege and/or the attorney work product doctrine.
>
> [II.] The trial court erred when it held that Appellant Lynn Tilton was not a member of the Board of Managers of Zohar Waterworks, LLC ("Waterworks").
>
> [III.] The trial court erred by overlooking the undisputed affiliation of Appellant John Harrington with Waterworks.
>
> [IV.] The trial court erred by finding that communications among counsel for Waterworks and representatives of its parent and affiliates were not protected by the attorney-client privilege and/or the attorney work product doctrine.

III. STANDARD OF REVIEW

{¶ 12} Before addressing the merits of this appeal, we must first determine the appropriate standard of review to employ. Appellants contend that we must apply a de novo standard, whereas appellees maintain we must review the trial court's judgment under the deferential, abuse of discretion standard.

{¶ 13} Trial courts possess broad discretion over the discovery process. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶ 18. Appellate courts, therefore, generally review a trial court's decision regarding a discovery matter only for an abuse of discretion. *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 592 (1996); *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 110 Ohio St.3d 343, 2006-Ohio-4574, ¶ 9. The abuse of

discretion standard, however, is inappropriate for reviewing a judgment based upon a question of law, including an erroneous interpretation of the law. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13. As relevant here, the Supreme Court of Ohio has held that whether information sought in discovery is confidential and privileged "is a question of law that is reviewed de novo." *Id.* *See also Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, ¶ 13 ("if the discovery issue involves an alleged privilege, * * * it is a question of law that must be reviewed de novo").

{¶ 14} *Schlotterer* involved a physician's assertion of the physician-patient privilege in opposition to a health insurer's request for patient medical records in its action against the physician for, inter alia, fraud and breach of contract. The parties did not dispute the existence of physician-patient relationships or that the physician-patient privilege would ordinarily shield the requested records from disclosure. Rather, the issue was whether contractual consent provisions executed by each of the patients satisfied the requirements for validly waiving the privilege. The Supreme Court concluded that the patients validly consented to the release of their medical information to their insurer, and that the statutory consent exception to the physician-patient privilege applied. As it based its determination on statutory and contractual interpretation, both of which are questions of law, the Supreme Court utilized de novo review.

{¶ 15} In *Ward*, a plaintiff contracted hepatitis B during his stay at Summa Health System ("Summa") for a heart-valve replacement and subsequently commenced a malpractice action against Summa and others. The trial court issued a protective order, based on physician-patient privilege, to shield the plaintiff's surgeon from testifying about the surgeon's own medical information, including whether he had hepatitis B. Applying a de novo standard, the Supreme Court examined the scope and purpose of the statutory physician-patient privilege and concluded that the statute "does not protect a person from having to disclose his or her own medical information when that information is relevant to the subject matter involved in a pending civil action." *Id.* at ¶ 27. Like *Schlotterer*, *Ward* did not involve a dispute over the existence of a

physician-patient relationship, but concerned only the application of statutory language to determine whether specific information was privileged.

{¶ 16} Despite the broad language in *Schlotterer* and *Ward*, Ohio courts do not review all issues surrounding privilege de novo. For example, the Supreme Court has characterized the determination of whether materials are protected by the attorney work-product privilege and the determination of the good-cause exception to that privilege, not as questions of law, but as "discretionary determinations to be made by the trial court." *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St.3d 270, 271 (1983). The Eighth District recently relied on *Guzzo* to hold that such discretionary decisions are reviewable only under an abuse of discretion standard. *See Sherwin-Williams Co. v. Motley Rice LLC*, 8th Dist. No. 96927, 2012-Ohio-809, ¶ 34. Neither *Schlotterer* nor *Ward* suggests an intention by the Supreme Court to overrule *Guzzo* and other Ohio case law applying a more deferential standard of review to questions of fact surrounding a claim of privilege.

{¶ 17} We acknowledge that this court has previously stated that we review discovery orders involving questions of privilege de novo. *See Mason v. Booker*, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶ 16 (10th Dist.), citing *Ward v. Johnson's Indus. Caterers, Inc.*, 10th Dist. No. 97APE11-1531 (June 25, 1998); *Scott Elliott Smith Co., L.P.A. v. Carasalina, L.L.C.*, 192 Ohio App.3d 794, 2011-Ohio-1602, ¶ 14 (10th Dist.) (emphasizing that whether specific information is confidential and privileged is a question of law). Like *Schlotterer*, the analysis in *Mason* and *Johnson's* involved interpretation and application of a statutory exception to the physician-patient privilege. At issue in those cases was the statutory exception that a physician may be compelled to testify or submit to discovery in a civil action filed by a patient against the physician with respect to communications between the physician and patient "that related causally or historically to physical or mental injuries that are relevant to issues" in the action. R.C. 2317.02(B)(3)(a) (formerly R.C. 2317.02(B)(2)). Thus, this court stated that *Johnson's* "turn[ed] on the proper interpretation of what are 'causally or historically' related medical records as such terms are used" in the statute. Statutory interpretation is a question of law, subject to de novo appellate review. *Aubry v. Univ. of Toledo Med.*

Ctr., 10th Dist. No. 11AP-509, 2012-Ohio-1313, ¶ 10, citing *State v. Banks*, 10th Dist. No. 11AP-69, 2011-Ohio-4252, ¶ 13.

{¶ 18} Upon review of the relevant case law, we conclude that not all issues surrounding an assertion of privilege are subject to de novo review. Rather, the appropriate standard ultimately depends upon whether an appellate court is reviewing a question of law or a question of fact. Consistent with the foregoing cases, we agree that interpretation and application of statutory language, to determine whether specific information is confidential and privileged, is a question of law that we must review de novo. *See also Flynn v. Univ. Hosp., Inc.*, 172 Ohio App.3d 775, 2007-Ohio-4468, ¶ 4 (1st Dist.) ("because the trial court's discovery order involved the *application or construction of statutory law* regarding privilege, we review the order de novo"). (Emphasis added.) An assertion of privilege, however, may also require review of factual questions. For example, in this case, the trial court based its determination of the privilege issue upon its finding that there was no attorney-client relationship between appellants and Waterworks' counsel, a factual matter. *See Frericks-Rich v. Zingarelli*, 94 Ohio App.3d 357, 360 (10th Dist.1994) (question of fact as to whether or not an attorney-client relationship existed precluded summary judgment). With respect to questions of fact, an appellate court must determine whether the trial court abused its discretion. *See, e.g., Harding v. Conrad*, 121 Ohio App.3d 598, 600 (10th Dist.1997). Accordingly, we review the trial court's determination of factual issues, including the existence of an attorney-client relationship between appellants and the counsel retained by Waterworks, for an abuse of discretion. To the extent it becomes necessary, however, to review the construction and application of the statutory privilege to particular information, we will utilize a de novo standard.

IV. DISCUSSION

A. Attorney-client privilege

{¶ 19} The attorney-client privilege in Ohio is governed by R.C. 2317.02(A) and, in cases not addressed there, by common law. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 18. R.C. 2317.02(A) provides that an attorney shall generally not testify "concerning a communication made to the attorney

by a client in that relation or the attorney's advice to a client." While the statute precludes an attorney from *testifying* about confidential communications, the common-law privilege " 'reaches far beyond a proscription against testimonial speech [and] protects against any dissemination of information obtained in the confidential relationship.' " *Leslie* at ¶ 26, quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991). The purpose of the attorney-client privilege " 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Leslie* at ¶ 20, quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

{¶ 20} There is no material difference between Ohio's attorney-client privilege and the federal attorney-client privilege. *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177 (S.D.Ohio 1993), fn.3; *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, S.D.Ohio No. 2:07-CV-116 (Aug. 28, 2012). Under the privilege, " '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.' " *Leslie* at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir.1998). Because a client's voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege, voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter. *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, ¶ 65 (1st Dist.), citing *Mid-Am. Natl. Bank & Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481 (6th Dist.1991), and *United States v. Skeddle*, 989 F.Supp. 905, 908 (N.D.Ohio 1997). *See also In re Teleglobe Communications Corp. v. BCE Inc.*, 493 F.3d 345, 361 (3d Cir.2007) ("Disclosing a communication to a third party unquestionably waives the privilege.").

B. First Assignment of Error

{¶ 21} Appellants' first assignment of error states that the trial court erroneously required appellants to meet a "heightened" burden of proof regarding their assertion of privilege. The trial court stated, "[t]he *heightened burden* 'to show that testimony or

documents are confidential or privileged is on the party seeking to exclude the material.' " (Emphasis added.) (Judgment Entry at 5, quoting *Grace v. Mastruserio*, 182 Ohio App.3d 243, 249, 2007-Ohio-3942 (1st Dist.).) The trial court was correct that the burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege. *See Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178 (1976), citing *Ex parte Martin*, 141 Ohio St. 87, 103 (1943); *Yosemite Invest., Inc. v. Floyd Bell, Inc.*, 943 F.Supp. 882, 884 (S.D.Ohio 1996), citing *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir.1983) (party asserting the attorney-client privilege must establish its right or standing to do so). "The party seeking to exclude testimony under this privilege bears the burden to show (1) that an attorney-client relationship existed and (2) that confidential communications took place within the context of that relationship." *Flynn* at ¶ 13. Appellants do not contest their burden; they contest only the characterization of that burden as "heightened." Appellees respond that, despite its use of the word "heightened," the trial court applied the proper standard of proof. We agree.

{¶ 22} After stating that appellants bore the burden to show that requested discovery was confidential and privileged, the trial court stated that appellants must present persuasive evidence that Tilton was an officer of Waterworks. The court also stated that, because Waterworks was a separate company from appellants' corporate structure, appellants were required to demonstrate that they were common clients of Waterworks' attorneys, by showing that Waterworks' counsel performed work for appellants and that appellants and Waterworks shared a common interest. The trial court ultimately determined that appellants were not clients, either individually or jointly, of Waterworks' counsel and were, therefore, not entitled to assert the attorney-client privilege. Despite its use of the word "heightened," the trial court's judgment contains no indication that the trial court required more of appellants than that they establish the applicability of the attorney-client privilege. Accordingly, we conclude that the trial court substantively applied the proper standard of proof and that any error as a result of the trial court's mention of a "heightened burden" is harmless. We, therefore, overrule appellants' first assignment of error.

C. Fourth Assignment of Error

{¶ 23} We now turn to appellants' fourth assignment of error, by which they argue that the trial court erred by finding that communications between Waterworks' attorneys and appellants' representatives are not privileged. Appellants broadly maintain that, where corporate parents, subsidiaries, and/or affiliates are under common ownership or control, the attorney-client privilege attaches to intra-group communications with counsel, based on the entities' unity of interest. Although courts frequently apply the attorney-client privilege in circumstances involving corporate parents, subsidiaries, and/or affiliates, the relevant case law suggests limitations not allowed by the broad rule appellants propose.

{¶ 24} Application of the attorney-client privilege in the corporate context must be determined on a case-by-case basis. *Upjohn* at 396. The attorney-client privilege applies to pertinent communications between attorneys and their corporate clients, just as between attorneys and their individual clients. *Leslie* at ¶ 22, citing *Upjohn* and *Am. Motors Corp.*; R.C. 2317.021(A). Because a corporation can only communicate through its employees or agents, however, complications often arise where the client is a corporation. *See Upjohn; Shaffer v. OhioHealth Corp.*, 10th Dist. No. 03AP-102, 2004-Ohio-63, ¶ 10. In *Upjohn*, the United States Supreme Court considered whose communications with corporate attorneys are entitled to protection and rejected a limitation of the privilege only to communications by employees in a position to control corporate action upon the advice of counsel. The court noted that middle-level and lower-level employees can embroil the corporation in legal difficulties and that those employees would naturally have relevant information needed by counsel to advise the corporation adequately. The court also stated that a corporate attorney's advice is often more significant to those employees who put the corporation's policies into effect.

{¶ 25} The complications recognized in *Upjohn* are compounded in scenarios that involve corporate parents, subsidiaries, and/or affiliates. One source of confusion is the effect that sharing otherwise confidential information amongst members of a corporate family has on attorney-client privilege. While a client's disclosure of confidential information to third parties normally precipitates a waiver of the attorney-client

privilege, courts often apply exceptions to the disclosure rule when communications are shared with a corporate parent, subsidiary or affiliate. In *Teleglobe*, upon which both appellants and appellees rely, the Third Circuit discussed various principles regarding attorney-client privilege in this context. Noting the "conceptual muddle" created by courts' varying rationales for avoiding the disclosure rule, the Third Circuit identified the following three rationales, most frequently stated for not construing the sharing of communications within a corporate family as a waiver of the attorney-client privilege: (1) the members of the corporate family comprise a single client; (2) the members of the corporate family are joint clients; and (3) the members of the corporate family are part of a shared community of interest. *Id*. at 369-70.

{¶ 26} The Third Circuit focused primarily on the "oft-confused" co-client (or joint-client) rationale, "which applies when multiple clients hire the same counsel to represent them on a matter of common interest," and the community-of-interest (or common-interest) rationale, which applies "when clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities." *Id*. at 359. The joint-client and community-of-interest rationales are not privileges in and of themselves; they are exceptions to the rule that disclosure of privileged communications to third parties constitutes a waiver of attorney-client privilege. *See FSP Stallion 1, LLC v. Luce*, D.Nev. No. 2:08-cv-01155-PMP-PAL (Sept. 30, 2010). Those rationales presuppose the existence of an otherwise valid privilege. *Id*. Of the three stated rationales, the Third Circuit found that only the joint-client rationale withstood scrutiny.

{¶ 27} The Third Circuit first rejected the rationale that affiliated, but separate, corporate entities comprise a single client for purposes of attorney-client privilege. Although courts have treated parent corporations and their wholly owned subsidiaries as a single entity in other contexts, the court held that those decisions are context-specific and tailored to the statutes or common law causes of action they interpret. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (treating the coordinated activity of a parent and its wholly owned subsidiary "as that of a single enterprise" for purposes of the Sherman Act because they "have a complete unity of

interest," common objectives, and a single corporate consciousness). In the privilege context, however, the Third Circuit held that "treating members of a corporate family as one client fails to respect the corporate form" and the "bedrock principle of corporate law * * * that courts must respect entity separateness unless doing so would work inordinate inequity." *Teleglobe* at 371.

{¶ 28} A company realizes benefits, including shielding itself from liability, by spreading corporate activities between separate, subsidiary corporations. *See id*. Indeed, appellants have consistently asserted that they cannot be held individually liable for Waterworks' debts or obligations and that appellees may not pierce appellants' corporate veils with respect to Waterworks' liabilities. With the benefits realized by creating separate corporate entities "comes the responsibility to treat the various corporations as separate entities." *Id*. The *Teleglobe* court held that, "absent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client." *Id*. at 372. *See also Hoffman-La Roche, Inc. v. Roxane Laboratories, Inc.*, D.N.J. No. 09-6335 (WJM) (May 11, 2011) (finding no reason to treat affiliate companies as one entity for privilege purposes where the company asserting the privilege had insisted that the entities were separate).

{¶ 29} The Third Circuit also declined to apply a community-of-interest rationale, which "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." *Id*. at 364. The court explained as follows:

> [T]he community-of-interest privilege only comes into play when parties are represented by separate counsel, which often is not the case for parents and subsidiaries. * * * Moreover, the community-of-interest privilege only applies when those separate attorneys disclose information to one another, not when parties communicate directly. * * * Finally, it assumes too much to think that members of a corporate family necessarily have a substantially similar *legal* interest (as they must for the community-of-interest privilege to apply * * *) in *all* of each other's communications. Thus, holding that parents and subsidiaries may freely share documents without implicating

> the disclosure rule because of a deemed community of interest stretches, we believe, the community-of-interest privilege too far.

(Citations omitted.) (Emphasis sic.) *Id*. at 372.

{¶ 30} The final rationale, which withstood the Third Circuit's scrutiny, is the joint-client (or co-client) rationale, which may exist when multiple clients engage common attorneys to represent them on a matter of interest to them all. When the joint-client rationale applies, the attorney-client privilege protects confidential communications between the joint clients and their common attorneys from compelled disclosure to persons outside the joint representation. *Id*. at 363. Privilege in the co-client context is limited "by 'the extent of the legal matter of common interest' " between the clients. (Citation omitted.) *Id*. "The joint client doctrine overcomes what would otherwise constitute a waiver of confidentiality when communications are shared between two clients." *FSP Stallion 1*, citing *In re Regents of the Univ. of California*, 101 F.3d 1386, 1389 (Fed.Cir.1996).

{¶ 31} In *Teleglobe*, at 369, the Third Circuit recognized that it was important to consider how the disclosure rule affects the sharing of information among members of a corporate group "[b]ecause parent companies often centralize the provision of legal services to [their] entire corporate group in one in-house legal department." The court acknowledged that, where in-house legal departments serve entire corporate groups, as in that case, a prohibition against intra-group sharing "would wreak havoc on corporate counsel offices." *Id*. Accordingly, the Third Circuit reasoned that treating members of a corporate family as joint clients "reflects both the separateness of each entity *and the reality that they are all represented by the same in-house counsel*." (Emphasis added.) *Id*. at 372.

{¶ 32} We now turn to the trial court's application of these principles to the facts of this case.

{¶ 33} Appellants argue that the trial court erroneously treated principles of corporate separateness as inconsistent with the allowance of privileged sharing within a corporate family. We agree that an assertion of corporate separateness may be

consistent with the allowance of privileged, intra-group sharing of communications in some instances. The trial court did not treat them as wholly inconsistent, however, and we discern no error by the trial court with respect to its treatment of corporate separateness. The trial court impliedly rejected any suggestion that appellants and Waterworks constitute a single client when it held that appellants could invoke the attorney-client privilege only by demonstrating that they were joint-clients with Waterworks. The court found that Waterworks operated as a separate company, apart from appellants' corporate structure, and quoted *Teleglobe*'s statement that courts should generally not treat separate corporate entities as a single client in the context of attorney-client privilege. The trial court did not, however, treat appellants' assertion of Waterworks' corporate separateness as determinative of the privilege question.

{¶ 34} Just as the Third Circuit did in *Teleglobe*, the trial court determined that the corporate separateness precluded treating appellants and Waterworks as a single client. The *Teleglobe* court, however, recognized that allowing privileged disclosure between joint clients reflects and respects the clients' corporate separateness. In concert with the Third Circuit's recognition, the trial court expressly acknowledged that appellants would be entitled to raise the attorney-client privilege upon a demonstration they were joint clients with Waterworks. Accordingly, we reject appellants' argument that the trial court's discussion of corporate separateness was inconsistent with *Teleglobe*. Moreover, while we agree with the trial court that appellants and Waterworks do not constitute a single client, we also agree that appellants are not precluded from establishing a joint-client relationship with Waterworks, so as to assert the attorney-client privilege.

{¶ 35} Nevertheless, the trial court went on to find that appellants failed to establish that they were joint clients of Waterworks' attorneys. Joint representation is distinguishable from situations where a lawyer represents one client, but another person with allied interests cooperates with the lawyer and client. *Id.* at 362. Further, joint representation does not necessarily exist when clients of the same lawyer share common interests. *Id*. A joint-client representation begins when the co-clients convey their desire for representation and the lawyer consents. *Id*. Unlike the vast majority of cases

that treat parent, subsidiary, and/or affiliate entities as joint clients as a matter of course, appellants and Waterworks were neither jointly represented by in-house counsel nor jointly represented by common outside counsel. It is undisputed that appellants did not request representation from or retain, as their own counsel, Jenner, RKO or other attorneys retained by Waterworks. The trial court expressly found that, at all relevant times, separate attorneys represented appellants and Waterworks. In fact, appellants admit that they and Waterworks had separate counsel in connection with the August 2005 transactions and the Waterworks bankruptcy, and that Patriarch Partners retained separate counsel in the 2007 litigation, at least for the purpose of responding to appellees' subpoena. The court further found that appellants and Waterworks did not share common interests and, to the contrary, sometimes had adverse interests.

{¶ 36} Appellants flatly argue that communications between counsel and corporate affiliates under common ownership or control are privileged and maintain that the trial court based its decision "on a flawed legal rule that incorrectly limited the ability of corporate parents to engage in privileged communications with outside counsel for a subsidiary." (Appellants' Brief at 17.) Appellants' arguments are circular and blur the distinction between the single-client, joint-client, and community-of-interest rationales for evading application of the disclosure rule. On one hand, appellants argue that they "have established *joint client* relationships" with Waterworks. (Emphasis added.) (Defendants' Reply Memorandum in Support of their Motion for a Protective Order at 5-6.) On the other hand, appellants' only basis for claiming a joint-client relationship is their argument that parent, subsidiary, and affiliate corporations under common ownership or control are essentially one client or, at least, part of a community of interest as a matter of law.[2]

{¶ 37} Appellants focus our attention on language in *Teleglobe* that "courts almost universally hold that intra-group information sharing does not implicate the disclosure rule." *Id.* at 369. *Teleglobe* explained, however, that parent and subsidiary

[2] Appellants have not asserted the community-of-interest rationale, as described in *Teleglobe*, which would apply only to communications between appellants' separate counsel and Waterworks' counsel. Appellants have not identified communications between counsel, but, rather, assert the attorney-client privilege with respect to their own communications with Waterworks' counsel.

companies are not in a community of interest as a matter of law. *Id*. at 378. "[I]t 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 sic.) *Id*. at 372. Similarly, courts should not assume, as a matter of law, that members of a corporate family have a sufficient common legal interest to constitute joint clients. *See id*. at 366 (stating that legal interests of co-clients must be more strictly aligned than clients' interest in a community of interest).

{¶ 38} In support of their position, appellants cite cases in which courts have stated that a corporate "client" encompasses both parent and affiliate companies. *See Crabb v. KFC Natl. Mgt. Co.*, 6th Cir. No. 91-5474 (Jan. 6, 1992), quoting *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 616 (D.D.C.1979) ("*AT&T*"). The *AT&T* court stated, at 616, that "[t]he cases clearly hold that a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations." Nevertheless, it went on to acknowledge as follows:

> 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.

(Emphasis added.) *Id*. Thus, despite its broad statement regarding the identity of a corporate client, the court recognized that the relevant cases involved joint representation of distinct corporations with a substantial identity of legal interests.

{¶ 39} In *Crabb*, KFC asserted the attorney-client privilege with respect to a memorandum drafted by its in-house legal department. There was no dispute that the communication reflected in the memorandum was between KFC and its in-house counsel or that the attorney-client privilege, at least initially, attached to the communication. The question was whether KFC waived its privilege by delivering the memorandum to a management employee of a corporate affiliate. The Sixth Circuit held that KFC did not waive the privilege and stated that "attorney-client privilege is not

waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations." Similarly, in *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D.Ind.1985), the issue was whether Carrier waived its attorney-client privilege with respect to communications between Carrier and its attorney and between Carrier's attorney and Carrier's insurer when Carrier disclosed those communications to a sister subsidiary company. As in *Crabb*, *Roberts* involved a corporate client's assertion of attorney-client privilege with respect to communications that, absent waiver, were undisputedly privileged. The *Roberts* court stated the issue as "whether two companies can avoid [the] general [disclosure] rule governing communications to a third party by virtue of their relationship as sister subsidiaries." *Id*. at 687.

{¶ 40} The issues in *Crabb* and *Roberts* are distinguishable from this case. The question here is not whether a client waived its right to assert attorney-client privilege by disclosing a communication to a third party, and the trial court did not address the issue of waiver. Waterworks did not raise the privilege, nor were the disputed communications between Waterworks and its attorneys; instead, appellants raised the privilege with respect to their own communications with Waterworks' counsel. The question here is whether appellants were clients of Waterworks' attorneys or whether their relationship to Waterworks nevertheless allows them to assert the attorney-client privilege. To demonstrate the availability of the attorney-client privilege as joint clients, the trial court stated that appellants were required to show that Waterworks' counsel performed work for both Waterworks and appellants and that appellants and Waterworks shared a common interest. *See Teleglobe* at 379 ("The 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."). Appellants failed to point to any evidence that Waterworks' counsel performed work on appellants' behalf.

{¶ 41} The trial court also held that appellants failed to establish that they and Waterworks had substantially similar legal interests. Appellants argue that they and Waterworks had substantially similar legal interests because of their common

ownership and control, based on Tilton's ownership and/or management of all of the Patriarch entities and Zohar II. 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. Nevertheless, we discern no error in the trial court's conclusion that appellants' interests were sometimes adverse to Waterworks' interests. Corporate affiliates are not joint clients as a matter of law. As stated above, corporate affiliation does not, as a matter of law, establish either a community of interest or that the affiliates have a substantially similar legal interest. *See id*. at 372. Even were we to agree with appellants that Waterworks, as a wholly owned subsidiary of Zohar II, had a complete community of interest with Zohar II, the community of interest would not extend to the other appellants. Nowhere have appellants attempted to distinguish between actions on behalf of Zohar II from actions on behalf of the other appellants. Appellants do not dispute the trial court's factual findings that weigh against a finding of similar legal interests. Specifically, they do 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. Based on those findings, the trial court could reasonably conclude that Waterworks' interests substantially differed from appellants' interests.

{¶ 42} Upon review, we conclude that the trial court did not abuse its discretion by finding no attorney-client relationship between appellants and Waterworks' counsel. Accordingly, we overrule appellants' fourth assignment of error.

D. Second and Third Assignments of Error

{¶ 43} In their second and third assignments of error, appellants argue that the trial court erred by holding that Tilton was not a member of Waterworks' board of managers and by overlooking Harrington's undisputed affiliation with Waterworks. They maintain that the trial court overlooked Tilton's unrebutted affidavit, the Waterworks LLC Agreement, and filings from the Waterworks bankruptcy that

identified Tilton as the sole member of Waterworks' board of managers. With respect to Harrington, appellants maintain that the trial court ignored appellees' own allegation, confirmed by Tilton, that Harrington served as an interim CEO of Waterworks. Appellants contend that both Tilton and Harrington were, therefore, part of the corporate "client."

{¶ 44} We agree with appellants that the record contains undisputed evidence of Tilton's membership on Waterworks' board of managers and of Harrington's service as Waterworks' interim CEO. As appellees note, however, those facts are irrelevant to appellants' argument—that appellants and Waterworks were joint clients—and to the trial court's ultimate holding—that they were not. To the extent appellants argue that Tilton and Harrington were entitled to act as Waterworks for the purpose of asserting Waterworks' attorney-client privilege, appellants' counsel conceded, at oral argument, that Waterworks itself has not asserted the privilege, a concession supported by the record. For these reasons, we conclude that any error in this regard had no effect on the trial court's judgment and was harmless. Accordingly, we overrule appellants' second and third assignments of error.

V. MOTION TO STRIKE

{¶ 45} Appellants moved this court to strike certain materials appended to appellees' brief. To the extent these materials were not part of the trial court record, we grant appellants' motion. Our ruling on appellants' motion has no bearing on the outcome of this matter.

VI. CONCLUSION

{¶ 46} We grant appellants' motion to strike, to the extent noted. Having overruled each of appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motion to strike granted;
judgment affirmed.

KLATT and DORRIAN, JJ., concur.