IN THE SUPREME COURT OF OHIO

Orlando P. Hudson,	:	
	:	
Relator-Appellant,	:	Case No. 2021-0478
	:	
v.	:	Appeal from the Eight Appellate
	:	District, Cuyahoga County
Greater Cleveland Regional	:	Court of Appeals No. CA-20-109405
Transit Authority,	:	
	:	
Respondent-Appellee	:	

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF RESPONDENT-APPELLEE GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY

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I. INTRODUCTION

This case involves a question pertaining to the level of protection afforded privileged attorney-client information shared with corporate employees in the scope of their employment: Is the attorney-client privilege maintained when privileged communications are disclosed to an employee within the scope of employment such that the employee has a reason to know the privileged information, despite the employee being personally adverse to the employer?"[1] The answer to the question must be in the affirmative in accordance with the seminal case of *Upjohn Co. v. United States*, 449 U.S. 383, 391, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) and its progeny, and this Court's recent decision in *State ex rel. Hicks v. Fraley*, Slip Opinion No. 2021-Ohio-2724.

GCRTA is a political subdivision of the State of Ohio, organized under the Ohio Revised Code Chapter 306 and is therefore subject to the Ohio Public Records Act, R.C. 149.43. This case originated as a mandamus action to compel GCRTA to disclose privileged communications prepared in the course of an internal investigation by outside legal counsel into allegations of discrimination by the same employee requesting the information, Appellant Lt. Hudson. The same protection applies to corporate clients in the private sector and governmental agencies in the public sector. See *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 22, 27. For purposes of this brief, use of the word corporate or organization is intended to encompass reference to both public and private sector employers.

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[1] GCRTA's Response to the Appellant's Proposition of Law No. 1 at page 20 of its merit brief:

> Attorney-client privileged documents disclosed to current employees within the scope of the corporate privilege under *Upjohn* remain privileged even if one or more of those employees is also, on a personal basis, a legal adversary outside of the employment relationship. (*Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981), followed and applied, *State ex rel. Hicks v. Fraley*, Slip Opinion No. 2021-Ohio-2724, applied and explained.)

Protecting privileged communications between attorney and client is essential when conducting an internal investigation for a corporate client. Where a member of management accuses his or her superior of engaging in inappropriate conduct that could constitute unlawful discrimination or harassment, as in this case, the attorney engaged to conduct the investigation must be able to have candid conversations with the client's employees and agents in order to advise the client. A free exchange of information between employees and the investigating attorney is essential to the attorney's ability to properly advise the client on the validity of the allegations, to draw legal conclusions regarding potential policy or legal violations, and to make recommendations to the client for taking corrective measures, such as discipline, termination or adopting new policies and procedures.

Internal allegations by an employee of wrongdoing can have serious economic consequences and cause reputational harm to the accuser, the accused and the company. Thus, it is crucial that the attorney investigator provide quality legal advice to the corporate client, which can only occur if the client's employees communicate with the attorney frankly and freely all known facts and information pertaining to the allegations. The objective of the attorney-client privilege, which is to encourage the free exchange of information between attorney and client, is served during the investigative process when the attorney's legal advice to the client can be discussed among corporate employees with a need to act or carry out the attorney's recommendations.

The argument of Lt. Hudson should therefore be rejected. Lt. Hudson advocates for allowing an employee to take advantage of privileged information shared with the employee in order for the employee to fulfill his duties to the employer by claiming the employee considered himself to be in an adversarial relationship at the time the disclosure was made. In other words,

the employee's personal characterization of his relationship should override the employer's need to share privileged communications with its employees. This would present difficult situations for corporate employers to navigate in real time and could stifle the internal discussion of legal advice with employees responsible for acting on that advice.

The proposition of law presented by Lt. Hudson should not be adopted and the decisions of the lower court should be affirmed. To find otherwise would threaten the purpose of the attorney-client privilege and discourage a corporate client from adopting and implementing recommendations of legal counsel. This would be to the detriment of the company, its workforce and would be against the public interest to have legally compliant workplaces, free from discrimination, harassment or retaliation.

II. STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is comprised of attorneys, corporate executives, and claims professionals devoted to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For more than fifty years, OACTA's mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio. OACTA supports laws and policies that promote predictability, stability, and consistency in Ohio's civil justice system. OACTA serves as the voice of the civil defense bar in the State of Ohio and it joins as amicus to urge the broad protection of privileged attorney-client communications between corporate clients and their attorneys under well-established Ohio law consistent with *Upjohn* and its progeny.

III. STATEMENT OF FACTS

OACTA adopts in its entirety the Statement of Facts submitted in the merit brief of Appellee the Greater Cleveland Regional Transit Authority ("GCRTA").

IV. LAW AND ARGUMENT

It is undisputed Appellant Lt. Hudson, while employed by GCRTA, made an internal complaint of racial discrimination against his superior, Chief Joyce. GCRTA hired an outside law firm, Tucker Ellis LLP, to conduct an independent investigation into the allegations of discrimination. At the conclusion of the investigation, the investigator issued a confidential written report, which included the investigator's legal findings, conclusions, and recommendations. The Report was shared with GCRTA's in-house legal counsel and management-level staff, including Lt. Hudson (the complaining employee) and Lt. Joyce (the target of the investigation), both of whom had some degree of responsibility to ensure the attorney's recommendations were implemented.

Thus, the question before this Court is whether the Tucker Ellis Report ("Report") and related documents maintained their privileged status when they were shared internally with management employees, Lt. Hudson and Chief Joyce who each had a responsibility to implement the recommendations of counsel, even though Lt. Hudson claims an adversarial relationship to GCRTA.[2] As explained below and in the merit brief of GCRTA, this Court should find that the privilege was maintained and no waiver occurred under these circumstances.

A. No Waiver Occurred Because Chief Joyce and Lt. Hudson were Provided the Report within the Scope of Their Employment.

The proposition that the attorney-client privilege only applies to high level employees or 'control group' has been rejected in Ohio, and instead "the attorney-client privilege in the corporate context applie[s] to all employees regardless of 'level[.]'" *See, eg. Bennett v. Roadway Express, Inc*., 9th Dist. Summit No. 20317, 2001 WL 866261, *14–15 (August 1, 2001), citing *Upjohn Co. v. United States*, 449 U.S. 383, 391, 66 L.Ed.2d 584. Here, GCRTA shared counsel's Report and

[2] Amici is not addressing the application of the Ohio Public Records Act.

recommendations with the target of the investigation and the complaining employee, both of whom held management-level positions and had varying degrees of responsibility for implementing the legal recommendations arising out of the investigation. GCRTA shared the Report, including the findings, conclusions, and recommendations, to provide the employees with accurate information which they could consider and use as they fulfilled their management duties to implement the recommendations at GCRTA. Communication to the employees in their employment capacity is within the scope of their employment such that they had a need to know and does not destroy the privileged nature of the information.

This Court recently held that a voluntary disclosure "to an adverse party outside of [the] attorney-client relationship" waives privilege. *State ex rel. Hicks v. Fraley,* Slip Opinion No. 2021-Ohio-2724, at ¶ 17. Contrary to the facts in *Fraley,* no disclosure (voluntary or otherwise) of privileged communication has been made by GCRTA to any party "outside of [the] attorney-client relationship."

Lt. Hudson does not dispute that the Tucker Ellis Report and underlying investigation materials are protected under attorney-client privilege. (Lt. Hudson's Merit Brief at p. 18.). Rather, he claims that attorney-client privilege was waived by GCRTA when a Sr. Manager, Ms. Brooks-Williams, allowed Chief Joyce and Lt. Hudson to view the Report. (*Id*. at p. 18). However, if a member of management conveys the attorney's advice to any other member of management, the privilege is not waived. *Barr Marine Prods. Co., Inc. v. Borg-Warner Corp.*, 84 F.R.D. 631, 28 Fed.R.Serv.2d 978 (E.D. Pa. 1979). Attorney advice may be shared with employees or agents of the employer, regardless of whether they are in management, on a need-to-know basis. *Upjohn* at 394-95. *Upjohn* protects the communication of facts from the employees of the organization, regardless of their level of managerial authority within the organization, to the organization's

attorneys outright. *Upjohn* further protects the communication of legal advice from the attorney to employees of the organization on a need-to-know basis. *Upjohn* at 390.

Neither the employee who files an internal complaint that results in an internal investigation nor the employee who is the target of an investigation, are relieved of their employment duties and responsibilities to their employer due to their role in the investigation. Rather, the employees must continue to perform their jobs. Regardless of their roles in the internal investigation, Lt. Hudson and Chief Joyce were management-level employees within the organizational attorney-client privilege at GCRTA and were required to keep confidential and not disclose privileged communications shared with them by their employer. Simply because they were involved in the investigation, they did not somehow transform into an "adverse party outside of the attorney-client relationship" and have the right to ignore the privileged nature of the Report or any related documents shared with them in their roles as employees of GCRTA. Rather, the information remained privileged and could not be used or disclosed by them. *Upjohn Co. v. United States*, 449 U.S. 383, 391, 66 L.Ed.2d 584.

A corporate client that shares privileged communications from its attorney with employees whose job duties relate to the implementation of that advice, has demonstrated the employees' need to know that information and no separate business rationale for making the disclosure need be shown. Communications with lower-level employees were privileged because the communications concerned matters within the scope of their corporate duties. *See Upjohn* at 394. To claim privilege "the communications between the attorney and the corporate employees must concern matters within the scope of the employees' corporate duties and the employees need to be aware that the communications were for the purpose of obtaining legal advice." *Jacobs v. Equity Trust Co.*, 9th Dist. Lorain No. 20CA011621, 2020-Ohio-6882, ¶ 12.

Managerial employees such as first line supervisors, mid-level managers or C-suite executives, by definition are responsible for ensuring compliance with internal policies and applicable legal standards. It is entirely understandable that a corporate employer like GCRTA would need to share with management employees the results of an attorney's internal investigation. Sharing the underlying rationale for the attorney's recommendations to adopt new policies and procedures would allow the employees responsible for implementing those policies and procedures to do so more effectively. Thus, when management-level employees like Lt. Hudson and Chief Joyce are provided privileged information generated during an internal investigation in the scope of their employment, no waiver of privilege can be found.

It is entirely appropriate to use a sliding scale approach when employees or agents are provided a different amount of information and in different formats based on their need to know. *See Spear v. Fenkell,* 2015 WL 3822138, at *7 (E.D. Pa. June 19, 2015). GCRTA was acting appropriately when it used a sliding scale approach with its disclosure of privileged information within the organization. For example, whereas Chief Joyce was given a written copy of the Report and permitted to keep a copy to make comments, Lt. Hudson who was lower ranking was allowed to read but not to keep a copy of the Report. (Brooks-Williams Depo. at pp. 37, 39.) Nor was Lt. Hudson authorized "to disclose the Report" to others. (*Id.* p. 43.) The different level of disclosure is consistent with their respective level of managerial authority and positions within GCRTA. In contrast, had GCRTA disclosed the same material to an hourly employee with no management responsibility for implementing the recommendations, and with no other business reason for knowing the privileged information, the result may have been different. Those facts, however, are not the facts before this Court. The undisputed facts in this case show that GCRTA's disclosures were made to management-level employees who had a need to know the information in the scope

of their employment and the disclosure was consistent with an intent to treat the documents as privileged and confidential. Lt. Hudson and Chief Joyce were given only the material that they needed to know in the manner they needed to know it based on their job duties at GCRTA.

The free flow of information between attorney and client should be encouraged and protected as broadly as possible. When a corporation or organizational client decides to act on its attorney's legal advice by adopting new policies and procedures, the client should be encouraged to communicate the attorney's legal advice within the corporation in a manner necessary to carry out those recommendations, and to do so without fear of waiver.

Accordingly, this Court should affirm the decisions of the courts below. The disclosures by GCRTA to its employees, including Lt. Hudson and Chief Joyce, in the scope of their employment were properly made within GCRTA's organizational attorney-client privilege and no waiver of the privilege should be found.

B. The Report and Related Documents are Further Protected Under the Attorney Work Product Doctrine.

Lt. Hudson has not challenged that the investigative Report, along with the drafts and other investigatory materials, are considered attorney work product. Even though the application of the attorney work-product doctrine was not presented on appeal, this Court may nonetheless consider its application. Amici adopts the argument of GCRTA in its merit brief at pp. 33-42, and urges the Court to find the work-product doctrine affords another level of protection to the investigative Report and related documents sought by Lt. Hudson in his mandamus action under the Ohio Public Records Act.

C. Unless the Appropriate Decision-Making Body of an Organization Authorizes Waiver of Privileged Information, Neither an Employee Nor Manager of the Organization Can Waive Privilege Belonging to the Organization.

Consistent with federal law, Ohio courts have held that "[w]hen the client is a corporation, the privilege can be waived only by a decision of management." *State v. Today's Bookstore, Inc.*, 86 Ohio App.3d 810, 818, 621 N.E.2d 1283 (2d Dist. 1993), cause dismissed, 66 Ohio St. 3d 1522, 614 N.E.2d 1051 (1993). Accordingly, courts have stated that "corporate executives and managers, *if endowed with appropriate authority by their employer*, may on behalf of the corporation either assert or waive the attorney-client privilege." *Shaffer v. OhioHealth Corp.*, 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63; emphasis added; *see also Aljaberi v. Neurocare Center, Inc.*, 2018-Ohio-1800, 113 N.E.3d 40, 44 (5th Dist.); ("While the issue has never been directly addressed in Ohio, it can safely be said that, in cases where a corporation, partnership, or other collective entity is the client, the attorney-client privilege belongs to the company and not to its employees outside of their employment capacity."); *Lynx Services Ltd. v. Horstman*, 2016 WL 4565895, *1 (N.D. Ohio 2016) (applying Ohio law).

There is no question that the privilege belongs to GCRTA, not its employees or agents, and the privilege cannot be waived by an employee or agent without permission. *Union Pac. R.R. v. Mower*, 219 F.3d 1069, 1072 (9th Cir. 2000); *Brown v. Oregon Dep't of Corrections*, 173 F.R.D. 265 (D. Or.1997). Thus, before waiver could be found in this case, a determination would have to be made that a knowing waiver was made by an employee with appropriate authority from GCRTA. Disclosure of privileged documents by a manager without appropriate authority from GCRTA, would not constitute a waiver and Lt. Hudson would be prohibited from using or disclosing any privileged information he learned from his review of the Report as an employee at GCRTA.

V. CONCLUSION

This Court should continue to apply well-established Ohio law in accord with *Upjohn* and its progeny to broadly protect to privileged communications between an attorney and its corporate client unless a clear and knowing waiver has occurred. In this situation, the law requires this Court to find that disclosure of privileged information to employees of a corporate client made in the scope of their employment does not destroy privilege, despite one or more employees having an adversarial relationship with the employer for purposes of the investigation. Further, as explained in the Appellee's merit brief, the investigative Report and related documents sought by Appellant Lt. Hudson are also protected from disclosure under the attorney work-product doctrine. Finally, unless the appropriate decision-making body of an organization authorizes waiver of privileged information, neither an employee nor manager of the organization can waive privilege belonging to the organization. Thus, were this Court inclined to consider Appellant's argument, which is not supported by the law, further consideration of the facts would be warranted to determine whether the appropriate decision-making body of GCRTA authorized waiver of privileged information.

Amici curiae the Ohio Association of Civil Trial Attorneys respectfully requests that this Court affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R.3.11(C), a copy of the foregoing **Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Respondent-Appellee Greater Cleveland Regional Transit Authority** was served upon the following by email on the 27th day of October, 2021:

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