

Chicago.

¶ 3 Plaintiff filed this defamation action against defendants for allegedly disparaging statements made during the report. During discovery, plaintiff moved to compel production of two groups of pre-report emails: (1) those between Dan Schwab and David Keneipp, Fox's California based in-house counsel and Senior Vice President of Legal Affairs; and (2) those pre-report emails between Keneipp and WFLD management.

¶ 4 On March 21, 2014, after an *in camera* review, the trial court found certain emails privileged attorney-client communications. These emails are not subject to this appeal. As part of the March 21 order, the trial court found email WLFD 000591 was not privileged because it was copied to several recipients, including Schwab, thus "destroying [sic] attorney/client privilege." The Fox defendants moved for reconsideration and argued that Schwab was part of the Fox "control group" protected by Illinois law. To support this assertion, the Fox defendants submitted an affidavit from Schwab along with portions of Schwab's deposition taken two year's prior.

¶ 5 The trial court denied the motion to reconsider finding Illinois law requires the application of the "control group" analysis and found that Schwab was not a member of the defendant "control group." Pursuant to this ruling, the Fox defendants did not contest the finding that Schwab was not within the corporate control group and produced email WLFD 000591.

¶ 6 Discovery continued and plaintiff learned that seven pages of pre-report emails between Schwab and Keneipp were not previously produced (WLFD 000001-WLFD 000007) and, because the court earlier ruled that Schwab was not part of the control group, plaintiff moved to compel production. The Fox defendants refused and further disclosed that there were an additional 115 pages of pre-publication emails between Schwab and Keneipp that they believed

were privileged because Schwab was within the Fox control group. Defendants supported this argument with an affidavit from Keneipp and the previously submitted Schwab affidavit.

Defendants also raised two alternative arguments: (1) even if Schwab was not within the control group, the emails between him and Keneipp were privileged because Schwab was seeking legal advice concerning content for which he may be potentially liable; and (2) the court should recognize a pre-publication privilege between reporters and in-house counsel.

¶ 7 The trial court again ordered production of the emails finding Schwab was not a member of the Fox control group. The court found that Schwab was not an employee that maintained an advisory role with top management such that a decision would not normally be made without his advice or opinion and whose opinion in fact forms the basis of any final decision by those with actual authority. Schwab furnished information to in-house counsel Keneipp, however, Keneipp did not rely on Schwab in making his decisions. The trial court further found the Schwab and Keneipp affidavits were conclusory and not supported by factual averments. The trial court also rejected the defendants' argument that the pre-report Schwab-Keneipp communications are protected under the attorney-client privilege because Schwab was seeking advice about the report which potentially exposed him to individual liability.

¶ 8 The Fox defendants refused to produce the WFLD 000001-WFLD 000115 emails. The circuit court held the Fox defendants in civil contempt of court and they were fined \$100. This appeal followed.

¶ 9 **BACKGROUND**

¶ 10 On November 15, 2010, WFLD television aired an investigative report during its evening news program that identified plaintiff and lawsuits he filed against several former patients who

had anonymously posted negative reviews about him in online forums. The report included references to negative statements made about plaintiff by those patients and included graphic images of bodily disfigurements purportedly caused by plaintiff's surgical procedures.¹ WFLD later published a companion article on the internet summarizing the report.

¶ 11 On September 9, 2011, plaintiff filed a 14-count complaint for defamation and false light against the Fox defendants, Schwab, Saxenmeyer and Carol Oshana, an attorney who represented a few of the former patients plaintiff sued and who appeared in the report. Plaintiff alleged defendants damaged his hard-earned reputation when they falsely portrayed him as a grossly incompetent and inept plastic surgeon who disfigured his patients and then used the legal system to harass patients who speak poorly of him. Plaintiff alleged 18 actionable defamatory statements from the report. Plaintiff alleged that, at all relevant times, Saxenmeyer and Schwab "acted in the course and scope of the[ir] employment" and Schwab "participated in the preparation of all aspects of the report" including interviewing the patients and their attorney, "obtaining and reviewing certain photographs and other images" used in the report, "writing and/or supervising the writing of the script that was used" in the report and "editing the report for final broadcast."

¶ 12 During discovery, plaintiff sought production of emails between various WFLD and Fox employees. Included were emails between Schwab and David Keneipp, WFLD's in-house counsel and senior vice president of legal affairs for Fox Television Stations, Inc. Defendants tendered plaintiff a privilege log identifying emails between Schwab and Keneipp that were sent prior to the broadcast as subject to the attorney-client privilege. Defendants asserted that Keneipp

¹ The parties have not provided us with a video of the broadcast. This summary of the broadcast was gleaned from the parties' representations in their briefs both here and at the trial court.

was responsible for pre-publication review of the report's broadcast by any television station owned or operated by Fox Television Stations, Inc., including WFLD. The privilege log identified the emails as "seeking advice about content of" and "providing advice regarding issues related to Report to be broadcast on 11-15-2010."

¶ 13 Plaintiff moved to compel the production of the pre-report emails arguing the Fox defendants had not met their burden to establish that Schwab was part of the corporate control group and therefore any email including Schwab was not an attorney-client privileged communication.

¶ 14 In response, defendants argued that in the emails Schwab requested Keneipp's legal review of the report and sought advice on minimizing legal risks associated with publishing the report. Various excerpts of the report's script were sent by Schwab to Keneipp for this purpose. According to defendants, Schwab and Keneipp were the only individuals corresponding in the emails and the substance of the emails demonstrates that Schwab had the authority to and did implement Keneipp's advice.

¶ 15 On March 21, 2014, following an *in camera* review of one particular email (bates number WFLD000591), the circuit court found that the email was not privileged because Schwab was not a member of a corporate control group. In addition, the court found that any email which included Schwab as a recipient resulted in "destroying attorney/client privilege." Lastly, the circuit court found that several other Fox employees were members of the control group, namely, Mike Renda, general manager; Carol Fowler, vice president, news director; and John Baich, vice president, engineering.

¶ 16 The Fox defendants moved for reconsideration and clarification, arguing that the pre-

publication communications between Schwab and Fox's legal counsel regarding potential legal issues relating to publishing the report should be protected by the attorney-client privilege. Schwab played an advisory role to top management at WFLD regarding the content of his special projects, and decisions with respect to those projects, were jointly made by Keneipp, Carol Fowler and Schwab, in his capacity as executive producer. The Fox defendants also argued that regardless of whether or not Schwab was in the control group, the emails are protected by attorney-client privilege because Schwab sought, and Keneipp provided legal advice in connection with the creation and publication of the report. Attached to their reply brief, the Fox defendants submitted an excerpt from Schwab's May 18, 2012 deposition where he testified that as executive producer of special projects, his duty was to "[o]versee projects and produce stories." Also submitted as part of its reply was an affidavit from Schwab where he attested that, in acting as the executive producer of special projects at WFLD, he oversaw and produced special projects and "played an advisory role to top management regarding the content of Special Projects considered for broadcast by WFLD, including this report." "Decisions with respect to Special Projects content were made jointly by in-house counsel for Fox Television Stations, Inc. *** Carol Fowler (vice president and news director at WFLD) and me in my capacity as Executive Producer." Notably, plaintiff objected to the defendants raising the argument of Schwab having a personal right to the attorney-client privilege for the first time in its reply brief and plaintiff raised a further objection that the Schwab affidavit was conclusory, contained no facts in support of the conclusions made, and plaintiff did not have the opportunity to test or depose Schwab about the contents of the affidavit. Lastly, plaintiff asked for an opportunity to depose Schwab.

¶ 17 On May 22, 2014, after a hearing, the circuit court denied the Fox defendants' motion to reconsider finding Illinois law requires application of the control group test and Schwab was not a part of the defendant control group. The circuit court again ordered the Fox defendants to produce the emails.

¶ 18 The Fox defendants did not produce the emails as ordered. Plaintiff again moved to compel the production of the Schwab-Keneipp email communications. In response, the Fox defendants argued that Schwab was acting as a control group member in the attorney-journalist pre-publication review which included the email exchanges with Keneipp and, therefore, the attorney-client privilege should be afforded to those communications. Attached to the response was an affidavit by Keneipp stating he communicated with Schwab prior to the report regarding legal risk and strategy associated with its content. He also stated Schwab's duties include project oversight, production and performing an advisory role to top management regarding special project content considered for broadcast by WFLD. Schwab, as executive producer, would consult with Keneipp from time to time "to determine the legal risk and strategy associated with the content of Special Projects." Decisions with respect to the special projects were jointly made by Carol Fowler, Keneipp as legal counsel and Schwab as executive producer. Lastly, certain decisions regarding special projects were withheld without Schwab's advice or opinion.

¶ 19 On June 25, 2014, after *in camera* review of several additional documents, the circuit court granted plaintiff's motion to compel and ordered the production of the Schwab-Keneipp emails. Before the court ruled, defendant again described Schwab as playing "a direct role in preparing a report, in helping to write the script for the report, and then ultimately submitting it to upper management, in this case, a senior lawyer of the company, for purpose of obtaining his

legal advice." In its ruling, the court noted, among other things, that plaintiff had attacked the Schwab and Keneipp affidavits as conclusory. The circuit court held the emails were part of a pre-publication legal review where Schwab sought the advice of Keneipp prior to the broadcast. The court noted that "only those employees who have an advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group." The court found that because Keneipp "did not rely on Mr. Schwab's advice in making decisions regarding pre-broadcast points, but, rather, it was Mr. Schwab who relied on the advice of in-house counsel" and Schwab's advice is not "routinely sought by top management before they make a decision." When asked if the circuit court had a ruling on "whether or not Schwab is available to avail himself of the direct attorney-client relationship because he was seeking advice about a report that he may be potentially liable on ***." The court replied: "No." The court then entered its ruling that the communications are not privileged solely on the basis that Schwab is not a member of the control group.

¶ 20 The Fox defendants refused to produce the communications and on July 29, 2014, the circuit court held the Fox defendants in civil contempt of court and fined them \$100 but deferred payment "pending final appellate resolution of this contempt order." This appeal followed.

¶ 21 On January 21, 2015, this court granted leave to the following groups to file *amici curiae* briefs in support of defendants: NBC Universal Media LLC, NBC Subsidiary (WMAQ-TV) LLC, Tribune Media Company and the Illinois Broadcasters Association, The Reporters

Committee for Freedom of the Press, The American Society of News Editors, Investigative Reports and Editors, Inc., The Online News Association, and The Society of Professional Journalists. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

¶ 22

ANALYSIS

¶ 23 We review discovery orders involving question of attorney-client privilege *de novo*. *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 29. Illinois Supreme Court Rule 201(b)(2) protects certain attorney-client communications and work product from discovery. 134 Ill. 2d R. 201(b)(2) (eff. Jan 1, 2013);² see also *Waste Management, Inc. v. International Surplus Lines, Ins. Co.*, 144 Ill. 2d 178, 190 (1991). "The purpose of the attorney-client privilege is to encourage clients to engage in full and frank discussion with their attorneys without the fear of compelled disclosure of information." *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 30. "In defining the attorney-client privilege this court has stated that where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by himself or the legal adviser, except the protection be waived." *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 584 (2000). In fact, "both the client's communications to the attorney and the attorney's advice to the client" are protected by the privilege. *People v. Radojcic*, 2013 IL 114197, ¶ 40. This privilege "constitutes a departure from the general duty to disclose and, accordingly, must be 'strictly confined within its narrowest possible limits.'" *Id.*

¶ 24 In a corporate setting, the attorney-client privilege is applicable to communications made

² Illinois Supreme Court Rule 201(b)(2) (eff. Jan. 1, 2013) provides that "[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney."

by members of the control group with the corporate attorney. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 112-13 (1982). If the communication is made within the control group by a control group member it is privileged. *Id.* If a control group member communicates with someone outside the control group there is no privilege. *Midwesco-Paschen Joint Venture for Viking Projects v. Imo Industries, Inc.*, 265 Ill. App. 3d 654, 664 (1994). If a non-control group employee communicates with someone in the control group that communication is not protected: the employee cannot shield his communication or communications to him and the control group member cannot claim the privilege because it was destroyed when it leaves the group, similar to an individual who has protected communication with counsel but loses the protection once he publishes the communication to another (see *id.*). This is so even if the communication is with the corporate attorney. *Id.* at 669 ("only members of a corporate control group may protect their communications with a corporate attorney through the attorney-client privilege.").

¶ 25 Control group members are either "decision makers or those who 'substantially influence' corporate decisions." *Archer Daniels Midland Co., v. Koppers Co., Inc.*, 138 Ill. App. 3d 276, 280 (1985). "No corporate decision maker *** makes decisions in a vacuum. They necessarily depend upon information from other persons." *Id.* Where an employee is merely a conduit of facts to the people who make the decisions, they are not a part of the corporate control group. *Archer Daniels Midland Co., v. Koppers Co., Inc.*, 138 Ill. App. 3d 276, 280 (1985).

¶ 26 The party asserting the attorney-client privilege has the burden of "establishing all elements of the privilege" and the "mere assertion" of privilege is insufficient to establish it. *Shere v. Marshall Field & Co.*, 26 Ill. App. 3d 728, 730 (1974). In fact, the party asserting

privilege must present "factual evidence" to establish the required elements. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 551 (2004). Simply asserting "the existence of an attorney-client privilege is insufficient to demonstrate that one is entitled to its protection." *Johnson v. Frontier Ford, Inc.*, 68 Ill. App. 3d 315, 319 (1979). Conclusory statements that documents are "confidential," "private," "secret," or "privileged" are "insufficient to invoke the privilege." *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 745 (1982). "Moreover, the claimant must show certain threshold requirements in order to avail itself of the privilege, including a showing that the communication originated in a confidence that it would not be disclosed, was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential." See 8 John Henry Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *Consolidation Coal Co.*, 89 Ill. 2d at 119.

¶ 27 In the circuit court and on appeal, the Fox defendants argue that the Schwab-Keneipp communications were protected by the attorney-client privilege on two independent bases. First, they argue that Schwab was a member of the corporate control group and acted as such when communicating with Keneipp, therefore, their pre-publication communications are protected by the privilege. Second, they argue the communications are protected by the attorney-client privilege because Schwab sought confidential legal advice from Keneipp regarding matters that could expose him to liability, namely the November 15, 2010 news report. Thus, the core issue is whether the emails are protected by the attorney-client privilege as established by factual evidence provided by the proponent of the claim. If the communications at issue are not privileged, whether they were made to an attorney by a member of a corporate control group or

by an individual in his own personal capacity, they are not protected and must be disclosed if otherwise discoverable.

¶ 28 With these principals in mind, we must first determine whether defendants have established with factual evidence all the required elements of attorney-client privilege or whether a "mere assertion" of the privilege has been made regarding the subject emails (WLFD 000001-WLFD 000115). *Sher v. Marshall Field & Co.*, 26 Ill. App. 3d 728, 730 (1974). Taking a liberal view of the record, the strongest evidence of the claimed privilege are the affidavits of Schwab, Schwab's deposition, Keneipp's affidavit and the privilege log description of the emails from Schwab to Keneipp as "seeking advice about content of report" and the emails from Keneipp to Schwab as "providing advice regarding issues related to report" to be broadcast 11-15-10.

¶ 29 While the privilege log's description of the emails is not determinative, it also does not constitute evidence of the privilege. There is nothing in the privilege log description that identifies the emails as having been initiated in confidence by Schwab for the purpose of seeking *legal* advice or Keneipp rendering *legal* advice related to the report: it only indicates that "*advice*" was sought and provided. We cannot conclude that because Keneipp is a lawyer, he only gives legal advice or that whatever advice he provides is confidential and intended by the recipient to remain confidential. Our *in camera* review of the subject emails confirms the accuracy of the characterization that the emails seek and provide "advice" and cannot fairly be described as seeking or providing legal advice. Keneipp's affidavit does not furnish factual evidence of a privileged communication.

¶ 30 Examining Schwab's affidavit, there is no averment that his email communications originated in a confidence that it would not be disclosed, was made to an attorney acting in his

legal capacity for the purpose of securing legal advice or services, and remained confidential.

¶ 31 The Schwab affidavit states that he was the Executive Producer for Special Projects and Executive Producer for the Report; as Executive Producer for Special Projects he played "an advisory role to top management regarding the content of Special Projects considered for broadcast by WFLD;" decisions on content were made "jointly by in-house counsel," Fowler and himself in his capacity as Executive Producer; he "consulted with in-house counsel from time to time to determine legal risk and strategy associated with the content of Special Projects;" his advice and opinions, as well as Fowler's, "formed part of the basis for some decisions" regarding content and "certain decisions regarding publication of Special Projects content would not normally be made without my advice or opinion."

¶ 32 There are no averments in the Schwab affidavit that state that he initiated the subject emails for the purpose of obtaining legal advice and that he did so in confidence with the intention that the confidence would remain. The averment that Schwab and Fowler "consulted with in-house counsel from time to time to determine legal risk and strategy associated with the content of Special Projects," does not constitute evidence that these emails were initiated for the purpose of seeking legal advice: the term "from time to time" is not specific to these emails and could relate to communications over a course of years. The term "Special Projects" is not specific to this report and reasonably can be considered to include other projects that Schwab was involved with. The remainder of Schwab's affidavit is directed to his purported status as a member of the control group which is not relevant to whether these specific emails are privileged.

¶ 33 The relevant averments in the Keneipp affidavit establish that he is indisputably in-house

counsel; his duties and responsibilities include supervision of all corporate legal activities, "including strategic reviews and prepublication review of content aired or published by stations owned or operated by [WFLD]" including project oversight and production; Schwab played "an advisory role to top management regarding the content of Special Projects considered for broadcast;" decisions with respect to Special Projects content were made jointly by Fowler and Schwab in his capacity as Executive Producer with input from me;" Schwab consulted with Keneipp "from time to time to determine the legal risk and strategy associated with the content of Special Projects, including the Report at issue in this case;" Keneipp's, Schwab's and Fowler's advice and opinions "formed part of the basis for some decisions regarding production and publication of Special Project content;" and, "certain decisions regarding publication and production of the content of Special Project would not normally be made without Dan Schwab's advice or opinion."

¶ 34 Similar to Schwab's affidavit, Keneipp's affidavit provides no factual evidence the emails at issue originated or were sent in confidence, that their purpose was for obtaining or providing legal advice regarding this report and that the emails would remain confidential. The averment that Schwab consulted with Keneipp "from time to time to determine the legal risk and strategy associated with the content of Special Projects, including the Report" is so broad that it cannot reasonably constitute factual evidence that these emails are confidential and that defendants' claims are entitled to attorney client privilege. Our *in camera* review of the subject emails confirm our conclusion that the emails in question were not initiated in confidence, did not seek legal advice and were not expected to remain in confidence.

¶ 35 In summary, the attorney-client privilege "constitutes a departure from the general duty to

disclose and, accordingly, must be 'strictly confined within its narrowest possible limits.'" *People v. Radojcic*, 2013 IL 114197, ¶ 40. Defendants have not established that the emails in question were initiated in confidence for the purpose of obtaining and transmitting legal advice with the intention that the communications remain confidential. Defendants have not provided factual evidence that the emails at issue fall within the protection from discovery afforded under Illinois Supreme Court Rule 201(b)(2). 134 Ill. 2d R. 201(b)(2) (eff. Jan 1, 2013).

¶ 36 There being no evidence to support the contention the subject emails were privileged attorney-client communications, it is unnecessary for us to consider whether Schwab was a member of defendants' corporate control group. Because our *de novo* review has determined that the subject emails are not privileged, they are discoverable. Under *de novo* review, we may affirm the circuit court for any reason supported by the record, regardless of the particular rationale relied upon by the circuit court. *In re Marriage of Benson*, 2015 IL App (4th) 140684, ¶ 22. The circuit court did not err in ordering defendants to produce emails identified as WLFD 000001-WLFD 000115.

¶ 37 It is clear that the civil contempt entered by the circuit court was entered in recognition of the good faith effort by the defendants' attorneys to serve their clients' best interests and to respectfully bring these issues to the court's attention. In order for the appellate court to have jurisdiction to review this important issue, the circuit court issued a "friendly contempt" order and assessed a nominal fine of \$100. As such, the circuit court's order serves as an aid to the reviewing court in formulating our decision. *People v. Siegel*, 94 Ill. 2d 167, 171 (1983). Whenever a noncompliance of a court order is based on "a good-faith effort to secure an interpretation of an issue without direct precedent," the contempt will be considered friendly and

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the finding should be vacated. *Doe v. Weinzeig*, 2015 IL App (1st) 133424, ¶ 40. We vacate the civil contempt order and fine entered in the circuit court.

¶ 38

CONCLUSION

¶ 39 For the foregoing reasons, the order of the circuit court is affirmed. The civil contempt order and fine are vacated. This matter is remanded to the circuit court for further proceedings in conformity with this decision.

¶ 40 Affirmed.