ARIZONA COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

FIRST DATA HEALTH SYSTEMS CORPORATION, a Delware corporation; ACB BUSINESS SERVICES, INC., a North Carolina corporation; JOHN and ANNETTE GAVEN, husband and wife; and TODD A. MORRISON, a single man; and JOHN DOES 1-10 and JANE DOES 1-10, Defendants/Petitioners vs. THE SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA, THE HONORABLE SHERRY HUTT, a Judge Thereof Defendants. and DANIEL JACOBSON, an individual Plaintiff/Real Party in Interest.	Special Action No. SA 96-0083 Maricopa County Superior Court No: CV 94-01203

BRIEF OF AMICUS CURIAE
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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is a corporation registered in the District of Columbia and the only national bar association exclusively serving the professional needs and interests of in-house counsel representing corporations and other private sector organizations. Since its founding in 1982, ACCA's membership has grown to nearly 10,500 in-house lawyers representing approximately 4,600 private sector organizations in the United States and abroad. ACCA members do not hold themselves out to the public for retention in the private practice of law. ACCA's membership includes over 60 attorneys who work as in-house counsel in Arizona.

ACCA and its members have consistently advanced the principle that the privileges and obligations of the legal profession apply equally to all attorneys, regardless of their practice setting. ACCA believes that the interests of in-house counsel, their clients, and the legal community as a whole are enhanced by encouraging the use of in-house lawyers because of their ability to deliver high-quality legal services in a cost-effective manner. In an era in which the importance of compliance and preventive law has been recognized, the role of in-house counsel is especially important.

This matter raises very serious policy considerations concerning the attorney-client privilege in an in-house corporate setting. Specifically, the trial court's decision to abrogate the attorney-client privilege and the work product

privilege in this case, if upheld, could have a far-reaching impact on the ability of in-house counsel to effectively represent the corporate client.

As we do not wish to unnecessarily impinge on the time of this Court, we do not address all of the issues raised and briefed in the trial court. In this regard, we would adopt and support the positions taken by the defendants on the attorney-client privilege issues in the trial court and in their Petition for Special Action. Also, as the briefs of counsel in this matter set forth the facts and issues in dispute, we will not repeat them here. We are limiting our response to three aspects of the order of the trial court that could have a dramatic and adverse impact on the practice of in-house counsel and, we believe, on the administration of justice.

Questions Presented

1) Did the trial court err in ordering the production of documents, which include legal advice memos of in-house counsel, based on the court's determination that the documents may be "relevant" and "central to plaintiff's claims"?

2) Did the trial court err in not performing an in camera review of the documents to determine if disclosure of the documents was warranted?

3) Did the trial court err in concluding that the documents in question "may be distinguished from work product" based on the fact that the plaintiff has "alleged" that the documents are "the evidence of the tort"?

Argument

I. The Attorney-Client Privilege is Critical to the Observance of Law and the Administration of Justice.

Over the years, courts have acknowledged that public policy is served by the consistent protection of the sanctity of communications between an attorney and his or her client, including protection of communications between an in-house attorney and a corporate client. See Upjohn v. United States, 449 U.S. 383 (1981).

In Upjohn, the Supreme Court confirmed the applicability of the attorney-client privilege to the corporate context and noted with the following the important role the privilege plays in the administration of justice:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev 1961). Its purpose 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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Id. at 389.

It has long been recognized that due to an attorney's professional independence and ethical obligations "[t]he counselor is the conscience of the corporation." R. Kagan & R. Rosen, On the Social Significance of Large Law

Firm Practice, 37 Stan. L. Rev. 399, 410 (1985). However, the attorney-client relationship will only be effective if the confidences of those seeking legal assistance and the legal advice of counsel are free from disclosure. Yes, certain prerequisites must be present to secure the privilege and, over time, certain limited exceptions to the attorney-client privilege have been created. However, any decision which would unduly limit the creation of the privilege or which would unduly expand the exceptions to the privilege should not be made lightly. Such decisions can have enormous ramifications on the ability of attorneys to adequately represent their clients.

The decision of the trial court in this matter creates an exception to the attorney-client privilege that can swallow the whole. A plaintiff need only add in-house counsel as a defendant, make allegations of "tortious conduct," and the attorney-client privilege evaporates. Further, under the order of the trial court, this abrogation of the privilege occurs without a requirement that plaintiff offer any evidence in support of the allegations of tortious conduct. Such casual treatment of a critical privilege should not be allowed.

ACCA, on behalf of its members, questions whether the fact that counsel in this matter was in-house counsel as opposed to outside counsel had any bearing on the decision of the trial court. The trial court did not articulate any distinction. However, it is difficult to believe that the trial court would have so casually abrogated the privilege if it concerned legal advice rendered by outside counsel.

There should not be any difference in the treatment of inside and outside counsel regarding the application of the attorney-client privilege.

The decision of the trial court, if upheld, would not only cause great damage to the privilege, it could create concern by the corporate client that the privilege is susceptible to attack when in-house counsel is providing the legal advice. The Supreme Court of New Jersey said it best when it noted that in-house counsel "are not second-class lawyers, these are first-class lawyers who are delivering legal services in an evolving format." In re Weiss, Healey and Rea, 109 N.J. 246, 254, 536 A.2d 266 (N.J.1988). Our clients have chosen to utilize in-house counsel, and they should enjoy that freedom of choice without concern that an otherwise applicable privilege may not apply. We would urge this court to not only consider the impact of the decision of the trial court on the privilege, itself, but also on the important relationship of in-house counsel and the corporate client.

II. The Attorney-Client Privilege Should not be Abrogated by Mere Allegations of Relevance.

In reaching its decision to compel the disclosure of attorney-client and work product documents, the trial court appears to employ a simple test of relevance. During oral argument at Defendant's Motion For Reconsideration, the trial court articulated this test as follows:

> Let me start off by saying, first of all, when I get something like this in an in camera situation it is

> difficult for me because certain things may or may not have interest to the plaintiffs in building their case.
>
> And if the disclosure is appropriate then nothing that has pertinence to this case should be withheld. My earlier ruling was correct. And the documents may be innocuous in which case disclosure -- in which case there's no harm in disclosure.
>
> So it's either relevant and to be disclosed pursuant to my prior order or not relevant and innocuous or at least of no harm to defendant from disclosure.
>
> So really what we're getting back to is not that I should go through these in camera and make a determination of what's relevant because that's what's difficult for me. I don't know plaintiff's case as plaintiff does so for me to make a relevancy determination is really as if I'm ruling on what plaintiff's case is.
>
> And the issues in this case are in some sense -- in some facets of plaintiff's case may be more subtle than others. I'm not that sure that I can really appreciate this as if I was looking at records from a medical chart or something.
>
> What we're down to is the heart of the initial ruling that I made; are we not?

Transcript at pp. 4 and 5.

Employing a relevance test to determine whether or not to abrogate the important fundamental principle of the attorney-client privilege is clearly erroneous. If documents constitute attorney-client privilege communications, the privilege from disclosure is, with limited exception, absolute. The trial court abrogates this absolute protection from disclosure by applying a standard that applies to documents with no claim of privilege and that by its very nature is an extremely easy test to meet. The Arizona Supreme Court in Brown v. Superior Ct., 137 Ariz. 327, 670 P.2d 725 (Ariz. 1983) noted that the test for relevancy is

indeed a test that presents only a minimal threshold to discovery:

> Rule 26(b)(1) permits discovery of information "relevant to the subject matter involved in the pending action." The requirement of relevancy at the discovery stage is more loosely construed than that required at trial. For discovery purposes, the information sought need only be "reasonably calculated to lead to the discovery of admissible evidence."

Id. at 332.

Applying a mere relevance test ignores the privilege altogether. The trial court reasons that if the attorney-client documents are not relevant the disclosure will be "of no harm to defendant." Such a conclusion is also clearly erroneous. Attorney-client communications often contain matters that are highly confidential, sensitive and personal to the attorney and the client. The trial court pre-judges the potential impact as "innocuous" or "of no harm" without having any knowledge of the information that may be contained in the privileged documents. The logical extension of the court's reasoning would be to always require the disclosure of "privileged information" as the disclosed information, if not relevant, would be, "of no harm to defendant." The disclosure of privileged information is harmful per se. Even if the disclosure does not cause harm in the instant case, it could cause great harm in other matters not even before the court. If the trial court's ruling is allowed to stand, it will circumvent centuries of public policy embodied in the privilege.

III. The Trial Court Erred in Refusing to Conduct an In Camera Review of the Documents.

As noted above, the trial court erred in employing a "relevance" test in ordering the disclosure of the privileged documents. However, assuming arguendo that such a test is appropriate, the court should have conducted an in camera review of the documents. A decision to abrogate the attorney-client privilege should not be made in such a cavalier manner. The trial court is ordering these attorney-client materials to be placed in the public domain without any review to determine if they are relevant, if information can or should be redacted, and without any knowledge of the sensitivity of the information in these documents. In Blazek v. Superior Ct., 177 Ariz. 535, 869 P.2d 509 (Ariz. Ct. App. 1994), this Court held that the trial court abused its discretion in not conducting an in camera review in a matter involving the marital communications privilege. This Court faulted the trial court's failure as follows:

> Before allowing Segrave complete access to petitioner's psychological records, the trial court should have conducted an in camera review of them to determine what information, if any, is reasonably calculated to lead to admissible evidence concerning petitioner's claims. See Brown v. Superior Ct., 137 Ariz. at 332, 670 P.2d at 730 (in camera inspection of insurance files purportedly containing irrelevant and privileged materials was best way to determine questions of relevancy and discoverability). Petitioner could be prejudiced by the disclosure of confidential information that is not relevant to this case.

Id. at 542.

The defendants in this matter specifically requested the trial court to conduct an in camera review, and the plaintiff indicated that he had no objection to the in camera review. It is unreasonable and a clear abuse of discretion for the trial court to abrogate the attorney-client privilege (a privilege with broader case law support than the marital communications privilege) and to require disclosure without conducting an in camera review - a review which was not contested by the parties.

IV. The Trial Erred in Concluding that the Documents can be "Distinguished" from Work Product Based on Plaintiff's Allegations that They are "the evidence of the tort."

The trial court is making new law for the State of Arizona in holding that the work product privilege is lost if a plaintiff "alleges" that the work product may contain evidence of a tort. First, the parties agree that the higher courts of the State of Arizona have not addressed the issue of an exception to the attorney-client privilege based on allegations that the materials may contain evidence of a tort. Moreover, although plaintiff's counsel cites two cases from Alaska for the proposition that "the privilege cannot be used to protect a client in the perpetration of a crime, civil fraud or other tortious conduct," neither of these cases involved "tortious-nonfraud conduct." The cases involved the crime-fraud exception to the attorney-client privilege. In one of the cases, United Services Automobile Association v. Werley, 526 P.2d 28 (Alaska 1974), the Supreme Court of Alaska specifically stated that it was not ruling on whether alleged

"tortious non-fraudulent" conduct is protected by the attorney-client privilege. Thus, the decision of the trial court would create new law for Arizona by expanding the crime-fraud exception to include alleged tortious conduct.

Secondly, the trial court does not offer any justification for creating a broad new exception to the attorney-client privilege for allegations of past tortious conduct. There is an obvious justification for the crime-fraud exception to the privilege in that the client is alleged to be seeking advice for the commission of fraud or a crime. Typically, the context of the discussions are alleged to involve the commission of ongoing or future crimes. Here, the trial court creates an exception for tortious conduct which is alleged to have occurred in the past. The policy justification that led to the creation of the crime-fraud exception is simply not present. In fact, to the contrary, such a ruling creates great opportunity for abuse by using mere allegations of tortious conduct to abrogate the sanctity of the privilege.

Thirdly, even if the crime-fraud exception cases cited by plaintiff should be expanded to cases involving mere allegations of tortious conduct, (an expansion we vigorously oppose) plaintiff must present some evidence that this exception is applicable. The United States Supreme Court established the criteria for an in camera review in order to determine if the crime-fraud exception should be employed. United States v. Zolin, 491 U.S. 554 (1989). In Zolin, the Supreme Court held that the party urging the crime-fraud exception must present a factual

basis adequate to support a good faith belief by a reasonable person that the in camera review may reveal evidence to establish the exception. Id. at 572. The Court noted that this standard for the in camera review entails a lesser evidentiary showing than is required ultimately to overcome the privilege. Id. The Arizona Supreme Court, also interpreting the crime-fraud exception, held that the higher standard to defeat the privilege is "prima facie evidence that has some foundation in fact." Buell v. Superior Ct., 96 Ariz. 62, 391 P.2d 919 (Ariz. 1964).

Plaintiff has not presented the prima facie evidence that tortious conduct may have occurred. Plaintiff merely makes allegations concerning what the privileged materials may contain. For example, plaintiff states that "it is possible these documents contain information crucial to plaintiff's case." Plaintiff's Motion to Compel, p.10 (emphasis added). Further evidence that plaintiff is on a fishing expedition is contained in plaintiff's own words when he states that the documents requested "may contain facts which are discoverable and can be excised." Plaintiff's Reply, p.6 (emphasis added). Both the U.S. Supreme Court, in Zolin, and the Arizona Supreme Court, in Buell, make it clear that plaintiff must present some factual basis before attorney-client privileged documents are reviewed, let alone disclosed. This important precedent should not be ignored.

V. Conclusion.

ACCA, on behalf of its members, urges this court to vacate the orders of the trial court compelling the disclosure of attorney-client privileged materials. The sanctity of the long recognized attorney-client privilege is severely threatened by the decision of the trial court. The ruling, if upheld, would create a disastrous precedent that would undermine the important attorney-client relationship and the ability of in-house counsel to adequately represent the corporate client.

Respectfully Submitted this 5th day of April, 1996.

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CERTIFICATE OF SERVICE

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