Curtis v. Superior Court (California Employment Lawyers Association)
(2021) 62 Cal.App.5th 453

Identity of attorney's non-testifying expert was not entitled to absolute work product protection because it would not reveal attorney's impressions, conclusions, opinions, or legal research or theories.

FACTS

Robert Curtis's law firm represented a local businessman, Antonio Romasanta, in a variety of legal matters for over 30 years. Romasanta owned a hotel and was sued by an employee for age discrimination. Romasanta hired Curtis to defend him. Curtis had a practice of retaining a plaintiff employment attorney, Doe 1, when asked to defend employment cases. Doe 1 was retained as a non-testifying expert. After a verdict was rendered for the plaintiff for $400,000, Curtis asked Doe 1 to assist in opposing attorney's fees. Doe 1 was included on a plaintiff attorney only Listserv for the California Employment Lawyer's Association (CELA). After the verdict, the plaintiff attorney in the Romasanta case filed a "colorful" account of the trial and the strategies and factors he believed contributed to his verdict. Doe 1, in an apparent violation of CELA's confidentiality agreement, forwarded the email to Curtis. It was attached to the attorney fee opposition. Plaintiff counsel moved to strike on the grounds of attorney work product and attorney client privilege. The court denied the motion as any privilege was waived upon posting it on Listserv. Plaintiff counsel was still awarded attorney's fees.

Thereafter, CELA filed a breach of contract suit against 5 Doe CELA members. At his deposition, Curtis refused to disclose the expert's identity asserting the attorney work product privilege. CELA field a motion to compel Curtis's testimony. The trial court granted the motion after finding the attorney work product protection was inapplicable to a fact witness. Curtis appealed.

SECOND APPELLATE DISTRICT'S RULING

The Appeal was converted to a Writ Petition and denied. The absolute work product privilege only protects documents which reveal the attorney's "impressions, conclusion, opinions, or legal research or theories." (CCP § 2018.030(a); *Coito v. Superior Court* (2012) 54 Cal.4th 480.) The identity of Curt's expert, Doe 1, would not reveal Curtis's impressions or theories. He had already disclosed the fact Doe 1 was a plaintiff employment lawyer. He did not provide any evidence that identification of this particular plaintiff attorney revealed anything about the representation of Romasanta or his strategy in defending the action. Therefore, there was no absolute work product protection.

However, Curtis' fear that public disclosure would chill Doe 1 and other plaintiff attorneys from consulting with him in the future may afford qualified work product privilege. Under *Coito,* where the qualified privilege applies the party seeking disclosure has the burden to establish the denial of disclosure will unfairly prejudice the party in preparing its claim or defense or it will result in an injustice. Here, CELA carried this burden. CELA put forward evidence they used IT consultants to conduct an internal investigation to identify Doe 1 but were unable to ascertain Doe 1's identify. As disclosure of the identity by Curtis was apparently the only way CELA would be able to proceed with its breach of contract claim it would be unfairly prejudiced and Curtis was ordered to testify as to Doe 1's identity.