COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2634 **Cir. Ct. No. 2013CV61**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WISCONSIN PROFESSIONAL POLICE ASSOCIATION,

PETITIONER-RESPONDENT,

V.

MARQUETTE COUNTY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County: PAUL S. CURRAN, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Marquette County appeals a circuit court order granting the petition for writ of mandamus filed by the Wisconsin Professional Police Association. The circuit court order compels the County to produce unredacted copies of its attorney billing records, except for a small number of

redactions requested by the County and accepted by the circuit court, pursuant to the Police Association's public records request.[1] The County argues that the circuit court erred in rejecting the remaining requested redactions, because the redacted portions contain privileged attorney-client communication and/or protected attorney work product, and are therefore exempt from the open records request.[2]

¶2 Upon independent review of the record, we conclude that the County fails to point to evidence sufficient to survive summary judgment on the question whether the material in its requested redactions is privileged attorney-client communication or protected attorney work product. Therefore, we affirm.

BACKGROUND

¶3 According to the County, after the enactment of 2011 Wis. Act 10, the County retained the law firm Phillips Borowski to "assist with Act 10 related issues including litigation with labor unions such as [the Police Association]."

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[1] WISCONSIN STAT. §§ 19.31 through 19.39 (2013-14) contain provisions of the Public Records Law, sometimes referred to as the "Open Records Law." *See* ***Juneau Cnty. Star-Times v. Juneau Cnty.***, 2013 WI 4, ¶1 n.1, 345 Wis. 2d 122, 824 N.W.2d 457. We use the statutory term "public records" in this opinion.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] With respect to the requested redactions identified as accepted by the circuit court, that portion of the judgment is not adverse to the County and, therefore, we need not address it on appeal. *See* WIS. STAT. § 809.10(4). The Police Association could have challenged this portion of the court's decision by cross-appeal but did not do so. *See* ***Park Falls State Bank v. Fordyce***, 206 Wis. 628, 639, 238 N.W. 516 (1931) (declining to review portion of judgment adverse to party where party neither appealed from judgment nor made a motion to review the ruling of the circuit court). Accordingly, we address only the requested redactions rejected by the circuit court, and when we refer to the "requested redactions" in this opinion, we mean only those redactions requested by the County and rejected by the circuit court.

The County also retained another law firm, Davis & Kuelthau, to handle certain litigation matters relating to Act 10.

¶4 In January 2013, the Police Association filed a public records request with the County, seeking billing invoices from the two law firms from June 24, 2011 through January 25, 2013. In response, the County provided the Police Association with ninety-six pages of billing invoices that contained over 300 redactions.[3] The County enclosed a letter and index indicating each dated billing entry that contained a redaction and the reasons for the redaction. The stated reasons consisted solely of two repeated blocks of boilerplate language, one asserting the disclosure of an attorney-client confidential communication and the other asserting the disclosure of attorney work product.

¶5 In May 2013, the Police Association filed a petition for writ of mandamus, asking the court to order the County to produce copies of the unredacted billing invoices. Both parties filed motions for summary judgment. The circuit court conducted an in camera review of the redacted and unredacted versions of the billing invoices along with the County's index of reasons for the redactions, and concluded that a small number of redactions were proper with respect to the billing statements from Phillips Borowski and that no redactions were proper with respect to the billing statements from Davis & Kuelthau. Accordingly, the circuit court granted the Police Association's petition for writ of mandamus, compelling the County to provide the Police Association with

[3] We count noncontiguous redactions within the same billing entry as separate redactions.

unredacted copies of the billing invoices with the exception of the accepted redactions identified in the circuit court order.

DISCUSSION

¶6 The County argues that the circuit court erred in not accepting the requested redactions where the redacted portions are: (1) "detailed narratives … that describe the nature of the work performed [and/or] reveal the subject matter of communications [between the County and its counsel]" and therefore "protected by the attorney-client privilege"; and/or (2) protected attorney work product. The Police Association, without knowing the contents of the redactions, assumes that the redactions rejected by the circuit court do not contain any material that is privileged attorney-client communication or protected attorney work product because the general "purpose of an invoice is to document who did what, when, and for what amount of time as the basis for the amount charged, rather than to communicate confidential information."

¶7 Thus, the only issue on appeal is whether any of the requested redactions should have been accepted on the basis that the redacted material is privileged attorney-client communication or protected attorney work product. We begin with the applicable standard of review, followed by a brief examination of the Wisconsin Public Records Law. We then review the law relating to each of the two exceptions to disclosure pertinent here—the attorney-client privilege and the work product doctrine—and, as to each of these categories individually, apply that law to the billing invoices redactions requested by the County. We conclude that the County fails to point to evidence sufficient to survive summary judgment on the question whether the material in its requested redactions is privileged attorney-client communication or protected attorney work product.

A. Standard of Review

¶8 "The proper interpretation of a statute and case law raises questions of law that we review de novo." ***State v. Starks***, 2013 WI 69, ¶28, 349 Wis. 2d 274, 833 N.W.2d 146. Whether the circuit court erred in applying the "[Public] Records Law to undisputed facts is a question of law that we review de novo, benefiting from the analyses of the circuit court." ***Hempel v. City of Baraboo***, 2005 WI 120, ¶21, 284 Wis. 2d 162, 699 N.W.2d 551.

¶9 "We review a grant of summary judgment independently, using the same methodology as the circuit court." ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶5, 352 Wis. 2d 436, 842 N.W.2d 508 (WI App 2013). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***; *see also* WIS. STAT. § 802.08(2).

B. Wisconsin Public Records Law

¶10 Under the Wisconsin Public Records Law, "any requester has a right to inspect any record" except otherwise provided by law, and "[e]ach authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." WIS. STAT. § 19.35(1), (4)(a).

¶11 "The Wisconsin [Public] Records Law reflects the common law principles favoring access to public records that have long been recognized in Wisconsin." ***Mayfair Chrysler-Plymouth, Inc. v. Baldarotta***, 162 Wis. 2d 142,

155, 469 N.W.2d 638 (1991). This strong policy in favor of public access is expressed in WIS. STAT. § 19.31, which reads:

> **Declaration of policy.** … [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.... To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

¶12 However, the "strong presumption of public access may give way to statutory or specified common law exceptions, or, if there is an overriding public interest in keeping the record confidential." ***Portage Daily Register v. Columbia Cnty. Sheriff's Dept.***, 2008 WI App 30, ¶11, 308 Wis. 2d 357, 746 N.W.2d 525.

¶13 "When addressing [a public] records request, a records custodian must make the initial decisions on whether a requested item is a 'record' and whether any statutory or common law exceptions to disclosure apply."[4] ***John K. MacIver Inst. for Public Policy, Inc. v. Erpenbach***, 2014 WI App 49, ¶13, 354 Wis. 2d 61, 848 N.W.2d 862. If the authority denies a request in whole or in part,

[4] Alternatively, "[i]f no statutory or common-law exceptions apply, a records custodian is permitted to engage in a balancing test to decide whether the strong presumption favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." ***Seifert v. School Dist. of Sheboygan Falls***, 2007 WI App 207, ¶30, 305 Wis. 2d 582, 740 N.W.2d 177. "If the custodian determines that the records request should be denied, then he must state the specific policy reasons that he relied on to make that determination." ***Mayfair Chrysler-Plymouth, Inc. v. Baldarotta***, 162 Wis. 2d 142, 157, 469 N.W.2d 638 (1991). The County did not engage in the alternative balancing test of public interests because its reasons for redacting the billing invoices were based only upon statutory or common law exceptions.

"the requester shall receive from the authority a written statement of the reasons for denying the written request." WIS. STAT. § 19.35(4).

¶14 "If the custodian's decision is challenged … a court must make its own independent decisions regarding these matters ...." ***Erpenbach***, 354 Wis. 2d 61, ¶14. "'The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient.'" ***Id.*** (quoted source omitted).

¶15 Here, the parties do not dispute that the billing invoices are "records" subject to the Wisconsin Public Records Law. The parties also do not dispute that the attorney-client privilege and the attorney work product doctrine are recognized exceptions to the general rule of disclosure under the law. *See* ***Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls***, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996) (attorney-client privilege); ***Seifert v. School Dist. of Sheboygan Falls***, 2007 WI App 207, ¶¶27-28, 305 Wis. 2d 582, 740 N.W.2d 177 (attorney work product).

¶16 As an authority seeking to redact information from records that are otherwise accessible under the public records law, the County has the burden to show that the redactions are justified. *See* ***Franzen v. Children's Hosp. of Wisconsin, Inc.***, 169 Wis. 2d 366, 386-88, 485 N.W.2d 603 (Ct. App. 1992) ("the party asserting the privilege bears the burden to establish that the privilege exists"). The question, then, is whether the County has met its burden to show that the material in the requested redactions in this case is, as the County asserts, privileged attorney-client communication or protected attorney work product. We address this question next.

C. Exceptions to Disclosure: Privileged Attorney-Client Confidential Communication

¶17 The County asserted the attorney-client confidential communication privilege for over 200 requested redactions, and repeated as its reason for each of those redactions the same following statement:

> The billing record contains detailed descriptions of the nature of the legal services rendered to the County and providing access would directly or indirectly reveal the substance of privileged lawyer-client communications. *Journal/Sentinel v. Sch. Dist. of Shorewood,* 186 Wis.2d 443, 460, 521 N.W.2d 165 (Ct.App.1994); *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 40, 251 Wis. 2d 68, 105, 640 N.W.2d 788, 805; *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460, 464 (Ct.App. 1992).

To determine whether this reason provided by the County for its assertion of attorney-client privilege is sufficient to survive summary judgment, we examine the law on attorney-client privilege and apply that law here.

¶18 The attorney-client privilege, codified in WIS. STAT. § 905.03, "protects confidential communications between clients and their attorneys." ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶21, 251 Wis. 2d 68, 640 N.W.2d 788.

¶19 The attorney-client privilege is narrowly construed, because the privilege is "'an obstacle to the investigation of truth.'" ***Lane***, 251 Wis. 2d 68, ¶21 (quoted source omitted). "Wisconsin, like most jurisdictions, has recognized only a narrow ambit to the communications included within the attorney-client privilege." ***State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.***, 34 Wis. 2d 559, 579, 150 N.W.2d 387 (1967).

¶20 Specifically, the attorney-client privilege "only encompasses confidential communications from the client to the lawyer, and those

communications from the lawyer to the client if their disclosure would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." ***State v. Boyd***, 2011 WI App 25, ¶20, 331 Wis. 2d 697, 797 N.W.2d 546 (citations and internal quotation marks omitted). A "mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged." ***Jax v. Jax***, 73 Wis. 2d 572, 581, 243 N.W.2d 831 (1976). The communication must be confidential, and a communication is "confidential" only if it is "not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." WIS. STAT. § 905.03(1)(d).

¶21 The privilege also only "protects *communications* and not necessarily facts or evidence." ***Jax***, 73 Wis. 2d at 579 (alteration in original). For example, "[t]he act of signing a promissory note is not privileged simply because it is done in the presence of an attorney." ***Id.*** The rationale for this is that the "privilege contemplates a confidential disclosure by a client to his attorney which the client reasonably believes to be related to obtaining professional legal services [and the] signing of a document which represents an agreement between two parties is not usually intended as an act of disclosure to the attorney, or, if it is, as a confidential one." ***Id.*** at 579-80. "It would go beyond the purpose of the privilege to preclude the attorney from testifying to that act, especially where … the signature is required to give the document legal efficacy." ***Id.*** at 580.

¶22 Whether attorney billing invoices are subject to the attorney-client privilege was at issue in our supreme court's ***Lane*** decision, which held that "[b]illing records are communications from the attorney to the client, and producing these communications violates the lawyer-client privilege *if production*

of the documents reveals the substance of lawyer-client communications." 251 Wis. 2d 68, ¶40 (emphasis added). The ***Lane*** court declined to establish a per se rule that all attorney billing records are protected by the attorney-client privilege. *See* ***id.***, ¶41. Rather, the court held that producing attorney billing records that "contain *detailed* descriptions of the nature of the legal services rendered" to the client would reveal the substance of confidential client communications. ***Id.*** (emphasis added). We glean from ***Lane*** that the descriptions must be detailed in a way that would directly or indirectly reveal the substance of a confidential client communication.[5]

¶23 In ***Juneau Cnty. Star-Times v. Juneau Cnty.***, 2011 WI App 150, 337 Wis. 2d 710, 807 N.W.2d 655 (*aff'd on other grounds* 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457), we observed that the approach in ***Lane*** "is consistent with the approach of many jurisdictions that have rejected the argument that 'descriptive billing entries are *per se* privileged from disclosure under the attorney-client privilege.'" ***Id.***, ¶38 (quoted source omitted and alteration in original). We also noted that "[t]hese jurisdictions reject blanket assertions of the privilege in this context, and more specifically, 'generally agree that billing statements that provide only *general* descriptions of the nature of services performed and do not reveal the subject of confidential communications with any specificity are *not* privileged.'" ***Id.*** (quoted source omitted; emphasis added and

[5] The County defines privileged attorney-client communication more broadly, citing to ***Dyson v. Hempe***, 140 Wis. 2d 792, 413 N.W.2d 379 (Ct. App. 1987), to support its contention that "the attorney-client privilege extends to prevent *any* disclosures of the *subject matter* of attorney-client communications." (Emphasis added and alteration in original.) The County misinterprets ***Dyson***. We did not hold, as the County suggests, that disclosure of the general subject matter of discussion is always prevented by the attorney-client privilege.

alteration in original). Adopting this same legal standard, we rejected the authority's position that "each piece of redacted information, without differentiation or explanation, is sufficiently 'detailed' within the meaning of ***Lane*** so as to reveal the substance of confidential communications by the County to the attorneys." ***Id.***, ¶42. We then held that none of the requested redactions in that case revealed, on their face, the substance of privileged communications, and that the authority "failed to point to evidence sufficient to survive summary judgment on the issue of its justifications for redacting each specific piece of information redacted from these public records." ***Id.***, ¶¶43, 47.

¶24 With these principles in mind, we turn now to the facts in this case.

¶25 As far as we can discern from the record, the County's presentation to the circuit court consisted of an unredacted set of billing invoices, a redacted set of billing invoices, an index of reasons for the redactions, and an affidavit by the attorney for the County who reviewed and redacted the billing invoices. The affidavit provides an overview of the litigation pertaining to 2011 Wis. Act 10, which, as far as we can surmise, is the subject of some of the billing entries. However, the affidavit adds nothing to the repeated boilerplate assertion of privilege that we quote at the beginning of this section: "The billing record contains detailed descriptions of the nature of the legal services rendered to the County and providing access would directly or indirectly reveal the substance of privileged lawyer-client communications." This boilerplate language merely asserts attorney-client privilege. It does nothing to explain why the many corresponding billed items would actually disclose a confidential attorney-client communication if not redacted.

¶26 Thus, we are left to guess how the material in each redaction could potentially relate to any confidential communication between the attorney and client. It is possible, we suppose, that the information the County proposes to redact, when combined with other information, could disclose confidential client communication, such as the County's motive for seeking representation, or the County's view of some specific proposed litigation strategy, or the research of particular areas of law pertaining to the County's legal theories.[6] But the County's presentation does nothing more than hint at such a possibility. The general assertion does not satisfy the County's burden to demonstrate that each redaction is necessary to prevent disclosure of a privileged communication.

¶27 Moreover, our review of the unredacted versions of the invoices reveals no reason to suppose that the redacted portions, on their face, reveal the substance of privileged communications. Indeed, many of the redacted portions do not appear to even arguably reflect the content of communications, but rather, appear simply to refer to the fact that there was a contact between parties or a contact between the County with its attorneys. The County fails to explain here, as it failed to do in the circuit court, how any of the proposed redactions contain information that directly or indirectly reveals the substance of confidential communication.

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[6] *See* ***Clarke v. American Commerce Nat'l Bank***, 974 F.2d 127, 129 (9th Cir. 1992) (holding that documents that "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the [attorney-client] privilege"). Other jurisdictions have adopted a similar standard. *See, e.g.*, ***Chaudhry v. Gallerizzo***, 174 F.3d 394, 402 (4th Cir. 1999); ***City Pages v. State***, 655 N.W.2d 839, 844 (Minn. Ct. App. 2003); ***Hewes v. Langston***, 853 So. 2d 1237, 1248 (Miss. 2003); ***Tacke v. Energy West, Inc.***, 227 P.3d 601, 609 (Mont. 2010).

¶28 We agree with the circuit court's observation, on reconsideration, that all the circuit court "had in front of [it] was little more than the bald assertion that these were attorney/client" documents. Therefore, like the circuit court, we conclude that "[a]bsent more information, the strong presumption of public access was not overcome" on summary judgment with respect to the redactions made on the basis of the attorney-client privilege.

D. Exception to Disclosure: Protected Attorney Work Product

¶29 The County repeats the following statement as the reason for each of the approximately 240 redactions made on the basis of protected attorney work product:

> The billing record also contains privileged attorney work product, including information, mental impressions and strategies an attorney compiled in preparation for litigation. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 28, 305 Wis. 2d 582, 602, 740 N.W.2d 177, 187.

The parties do not cite to, and we have not found, any legal authority applying the attorney work product doctrine to the contents of billing invoices. Assuming that attorney billing invoices could contain attorney work product, we nevertheless conclude that the County's proffered reason is inadequate here.[7]

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[7] Because we conclude that the County fails to show that any of the rejected redactions are protected attorney work product, we need not address its other argument relating to the Police Association's failure to show a substantial need for the attorney work product. *See* ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Issues that are not dispositive need not be addressed."). However, the County's argument lacks merit. The County fails to point to any legal authority supporting its argument, derived from case law concerning discovery, that a requester of public records is required to show a need for those records under Wisconsin's Public Record Law. Rather, as we have stated above, there is a strong presumption that public records shall be open to the public, and the burden is upon the custodian to explain why the record should not be disclosed. *See* ***Mayfair Chrysler-Plymouth***, 162 Wis. 2d at 155, 157.

¶30 "The common law long has recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles *in preparation for litigation*." ***Seifert***, 305 Wis. 2d 582, ¶28 (emphasis added). "[A] lawyer's work product consists of the information [the lawyer] has assembled and the mental impressions, the legal theories and strategies that [the lawyer] has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means." ***Dudek***, 34 Wis. 2d at 589.

¶31 The County's failure here is the same one we describe in our discussion regarding the attorney-client privilege. The County points to a generalized boilerplate assertion, but fails to explain why we should conclude that any of the redactions here contain protected attorney work product. The County repeats the broad assertion quoted above as the reason for each redaction and, on appeal, suggests that "this Court can see from the face of the billing narratives that many plainly contain attorney work product." We disagree.

¶32 Our review of the unredacted versions of the invoices reveals that none of the billing entries, on their face, indicate directly or indirectly the content of protected attorney work product. At most, many of the redacted portions state that counsel will begin or continue to work on something that could potentially qualify as attorney work product, such as a memorandum or a drafted brief. However, the County provides no reason to think that entries suggesting the creation of attorney work product have the effect of actually disclosing work product. Thus, we reject the County's argument that the material in the requested redactions constitutes protected attorney work product such that it is excepted from disclosure.

¶33 In sum, the County fails to point to evidence sufficient to survive summary judgment on the issue of its justification for redacting each specific piece of information redacted from the billing invoices, thereby entitling the Police Association to summary judgment on this issue.

CONCLUSION

¶34 For the reasons set forth above, we conclude that the County fails to meet its burden of establishing that the redactions are necessary to prevent the disclosure of privileged attorney-client confidential communication and/or protected attorney work product. Therefore, we affirm the circuit court order granting the Police Association's petition for writ of mandamus and compelling the County to provide the Police Association with unredacted copies of the billing invoices except for those accepted redactions identified in the circuit court order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.