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Court of Appeals Outlines Standards for Implied Waiver of Attorney-Client Privilege in Settlement Reasonableness Hearings

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Division II of the Court of Appeals recently outlined the standards for implied waiver of the attorney-client privilege in the context of settlement “reasonableness” hearings under RCW 4.22.060. In *Steel v. Philadelphia Indemnity Insurance Co.*, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 4001431 (July 26, 2016), the parents of children who had been abused at a day care center sued the center and its owners. The day care center had limited insurance coverage and eventually agreed to settle the case for the policy limits and the assignment of their bad faith claim against their insurance carrier. The settlement was to be effected through a \$25 million “covenant judgment” under which the day care center stipulated that the abuse occurred, that the day care center was negligent and the plaintiffs had been harmed. RCW 4.22.060 provides a procedure for a trial court to determine whether a settlement is reasonable because the settlement may affect the rights of other parties. In this instance, the day care center’s insurance carrier intervened to challenge the reasonableness of the settlement involved.

The carrier sought discovery of privileged or otherwise confidential information from the *plaintiffs’* attorneys relating to the settlement—evidently in

the hope of showing that they had proposed an inflated number for the judgment. The carrier argued that the plaintiffs' attorneys had impliedly waived the attorney-client privilege by proposing the specific amount in the judgment and their files were needed to determine how they had arrived at the \$25 million total. The trial court ordered production of some of the documents the carrier sought and related depositions of the plaintiffs' attorneys by the carrier. The plaintiffs then sought discretionary review of the trial court's discovery order. The Court of Appeals allowed review and reversed.

In doing so, the Court of Appeals first noted that implied waiver of the attorney-client privilege can apply outside its most frequent setting—a legal malpractice claim by a former client against an attorney. The Court of Appeals relied heavily on a Washington federal court decision, *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), as applied in *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990)—referring to the former as “*Hearn* factors” in determining whether privilege had been waived impliedly:

“[A]ssertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.” 2016 WL 4001431 at *9, quoting *Pappas*, 114 Wn.2d at 207.

The Court of Appeals emphasized that the party contending that privilege has been waived holds the burden of proving each of the *Hearn* factors.

Although the Court of Appeals concluded that privilege may be waived in some instances in the “reasonableness” hearing context, the Court stressed that privilege is not automatically waived. Rather, it found that a party contending waiver in that setting would need to undertake a specific showing of how the *Hearn* factors were met in the particular case involved. In the case before it, the Court of Appeals held that the carrier had not met that standard.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.