Supreme Court Case No. S227539

Public Entity
~ No Fee Required ~
Gov. Code, § 6103

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CITY OF PETALUMA,

Defendant and Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SONOMA,

Respondent.

ANDREA WATERS,

Plaintiff and Real Party in Interest.

Court of Appeal, First Appellate District, Division 3
Case No. A145437

Sonoma County Superior Court/Empire College Annex
Case No. SCV 256309

Hon. Elliot Lee Daum, Judge
Courtroom: 16
Telephone: (707) 521-6547

REPLY TO ANSWER TO PETITION FOR REVIEW

THE CITY ATTORNEY'S OFFICE
CITY OF PETALUMA
Eric W. Danly, City Attorney
11 English Street
Petaluma, California 94952
Email: edanly@ci.petaluma.ca.us
Telephone: (707) 778-4497

BURKE, WILLIAMS & SORENSEN, LLP
Samantha W. Zutler, State Bar No. 238514
101 Howard Street, Suite 400
San Francisco, California 94105-6125
Email: szutler@bwslaw.com
Telephone: (415) 655.8100 ~ Facsimile: (415) 655.8099

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates, State Bar No. 110364
*Alison M. Turner, State Bar No. 116210
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Email: aturner@gmsr.com
Telephone: (310) 859-7811 ~ Facsimile: (310) 276-5261

Attorneys for Defendant and Petitioner CITY OF PETALUMA

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5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Email: aturner@gmsr.com
Telephone: (310) 859-7811 ~ Facsimile: (310) 276-5261

Attorneys for Defendant and Petitioner CITY OF PETALUMA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Plaintiff and real-party-in-interest Andrea Waters's answer to the petition for review fails to dispel the grounds for review asserted by the City, namely:

- The need to determine whether the attorney-client privilege protects an investigation undertaken by an attorney when the scope of services for which she was retained includes the exercise of professional expertise in marshaling and evaluating relevant evidence, but does not include giving legal advice as to the action ultimately to be undertaken as a result of the investigation; and
- The need to provide guidance where none exists as to whether mere assertion of the avoidable consequences defense puts a post-employment investigation conducted by an attorney into issue and constitutes a waiver of the attorney-client or work product privileges as to any such investigation.

With respect to the first issue, the thrust of plaintiff's argument against review is that the trial court made a factual determination, reviewable for substantial evidence, that no attorney-client relationship existed with respect to the investigation, and hence no privilege, and thus

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725 ("*Costco*") has no bearing on this case.

Plaintiff is simply wrong on what transpired below. The *facts* regarding the relationship between the City and its outside counsel were undisputed. The court's ruling was based on an *incorrect legal analysis* of those facts, which led it to conclude that if an attorney is retained for anything *other than* to render advice as to the ultimate action to take as a result of an investigation, the attorney is not providing legal services, and consequently communications with the attorney are not protected. The purely legal issue of what it means to provide legal services, which is fundamental to the question of attorney-client privilege, plainly requires resolution by this Court, or at least some explanation by the Court of Appeal as to why retaining an attorney to exercise professional expertise in gathering and evaluating evidence in anticipation of a lawsuit does not create an attorney-client relationship. Significantly, it must be noted that plaintiff admits by not disputing that *Costco* would apply — to protect even the transmission of factual material — if an attorney-client relationship exists.

With respect to the second issue, plaintiff actually concedes the City's ground for review — that there is no law as to whether the mere assertion of the avoidable consequences defense waives the privilege with

respect to a post-employment investigation. Clearly, guidance is needed and review is warranted to address the interplay between the assertion of the avoidable consequences defense and the attorney-client privilege in the context of a post-employment investigation.

ARGUMENT

PLAINTIFF'S ANSWER UNDERSCORES THE NEED FOR REVIEW.

A. Plaintiff's Answer Underscores Her Own, And The Trial Court's, Confusion About What It Takes To Establish An Attorney-Client Relationship As A Basis For Invoking The Attorney-Client Privilege.

Plaintiff contends that the predicate "fact" of whether an attorney-client relationship existed was disputed, and that the trial court implicitly found it did not exist when it found no attorney-client privilege attached to the investigation. (Answer, pp. 9, 12.) Thus, she contends that because substantial evidence purportedly supports the trial court's conclusion, the ruling should be upheld, and review is unwarranted. (Answer, pp. 9-12.) *Costco*, in plaintiff's view, has no application to this case because in *Costco*, "the recitation of factual information was intertwined with legal analysis. . . . Here, by contrast, Oppenheimer [the outside counsel retained to investigate] did not provide any legal advice but only provided factual information." (Answer, pp. 10, 12.) Like the trial court, plaintiff focuses

on the purported content of the investigation and not on the purpose of the relationship between the City and its outside counsel, as *Costco* requires.[1/]

In fact, there were *no disputed facts* as to the relationship between the City and its outside counsel: it is undisputed that their express intention was to establish a confidential attorney-client relationship. (Petition, pp. 8-9, 14-16.) It is undisputed that Oppenheimer was retained for "her legal expertise and experience" and to provide "professional evaluation of the evidence." (Petition, pp. 15-16.) The trial court drew the purely legal conclusion that there was no attorney-client relationship, and no attorney-client or work product protection attached, because Oppenheimer had stated in the retainer agreement she would not render legal advice as to what action should be taken as a result of her findings. (Petition, p. 11.) The trial court also made the statement that neither documents nor testimony was protected "just because the mechanics of the investigation . . . reflect an attorney's evaluation or interpretation of the law or the facts." (*Ibid*.)[2/]

[1/] As this Court made clear in *Costco,* the content of a communication is not relevant to whether the privilege exists — trial courts in fact cannot compel disclosure of the contents of documents for in-camera review to determine whether they are privileged. (*Costco*, *supra*, 47 Cal.4th at p. 739.) The key is whether the communication was made within the course of the attorney-client relationship.

[2/] Astonishingly, plaintiff asserts that another fact purportedly weighing against the finding of an attorney-client relationship is that outside counsel was to be "impartial" rather than an advocate. (Answer, pp. 6-8.)

(continued...)

Under *Costco*, the focus of the inquiry as to whether a communication is privileged is "the dominant purpose *of the relationship*. (*Costco*, *supra*, 47 Cal.4th at p. 739, original emphasis.) The trial court's focus on the content of the investigation, surmised from a statement in the retainer agreement, in itself conflicts with *Costco*, signaling a need for review and clarification. Moreover, its conclusion that retaining an attorney to exercise professional, legal expertise in determining what evidence is relevant, and evaluating such evidence somehow does not create an attorney-client relationship unless the attorney is also retained to provide an opinion as to the ultimate action to be taken in a matter, cannot be squared with the provisions of Evidence Code section 952, or common sense for that matter.

Public and private employers routinely conduct post-termination investigations in anticipation of litigation, and not surprisingly, employ attorneys to utilize their professional expertise in marshaling and evaluating evidence. It is essential that California employers, courts, and litigants, be

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[2/] (...continued)
But the duty of attorney to client is to be impartial, to objectively evaluate evidence, and not just tell the client what it wants to hear. The obvious point in retaining outside counsel is to ensure that happens. Not surprisingly, plaintiff cites no authority in support of her extraordinary proposition.

provided with clear guidelines concerning the scope of the attorney-client privilege with respect to such investigations. Review is clearly warranted.

B. Review Is Necessary To Address The Interplay Between The Assertion Of The Avoidable Consequences Defense And The Attorney-Client Privilege In The Context Of A Post-Employment Investigation.

Plaintiff contends the City "offers no case authority for the novel proposition that pleading the avoidable consequences defense results in a waiver of the attorney-client privilege as it relates to a workplace investigation only if that investigation was conduct '*during* a plaintiff-employee's term of employment.' (Citation.) And, indeed, there isn't any." (Answer, p. 14.)

Plaintiff makes the case for review. What happens when, as here, the investigation is post-employment? As even plaintiff recognizes, the avoidable consequences defense pertains to whether *a plaintiff-employee* could have prevented some or all of the harm that befell her by taking advantage of measures, policies, and procedures available or put in place during her employment to remediate her situation. (Answer, p. 16.) The post-employment investigation in this case, and any action taken to deter misconduct in the future, can have no effect on this plaintiff's damages and her obligation to mitigate. To say that an employer must take steps to deter

unlawful conduct in the future and ensure a harassment-free environment for all employees, while true, is beside the point of the issue raised by the defense *asserted here* — whether this specific employee could have avoided the specific consequences of the alleged harassment if she had complained. That there are numerous post-employment actions an employer could take to fulfill its corrective duties under FEHA to create a harassment-free workplace, such as stern warnings (see Answer, p. 15), does not put in issue for purposes of *this* lawsuit and the mitigation of *this* plaintiff's damages, the contents of *this* post-employment investigation report. (See Petition, p. 23, fn. 6.)

No court has addressed the avoidable consequences defense in the context of a post-employment investigation.[3/] Review is necessary because employers need clear guidelines concerning whether mere assertion of the defense will come at the steep price of forever forfeiting the protections of

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[3/] Plaintiff contends *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110 supports the trial court's finding of waiver because "[n]othing in *Wellpoint* turns on whether the employee is still working at the time of the investigation." (Answer, p.17.) According to plaintiff, *Wellpoint* stands for the proposition that if the employer injects the adequacy of the investigation into the lawsuit, there is waiver. (*Ibid*.) But an investigation *during* employment was the factual context upon which the *Wellpoint* ruling was based. Plaintiff begs the question. Whether the City is injecting the adequacy of its post-employment investigation into the lawsuit by asserting the avoidable consequences defense is the question presented here — to which *Wellpoint* provides no answer.

the attorney-client privilege with respect to a post-employment investigation. For this reason too, review is warranted.

CONCLUSION

In its petition, the City demonstrated that review of the important issues presented is warranted. Plaintiff has not demonstrated otherwise. It is essential that this Court grant review to resolve these issues, or to transfer the matter back to the Court of Appeal with directions to resolve the issues on the merits.

DATED: July 23, 2015

Respectfully submitted,

THE CITY ATTORNEY'S OFFICE
CITY OF PETALUMA
Eric W. Danly

BURKE, WILLIAMS, & SORENSEN, LLP
Samantha W. Zutler

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates
Alison M. Turner

By: _____
Alison M. Turner
Attorneys for Defendant and Petitioner CITY OF PETALUMA

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the **REPLY TO ANSWER TO PETITION FOR REVIEW** contains **1,584** words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

DATED: July 23, 2015

Alison M. Turner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On July 23, 2015, I served the foregoing document described as: **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by serving:

Deborah Kochan, Esq.
Mathew Stephenson, Esq.
KOCHAN & STEPHENSON
1680 Shattuck Avenue
Berkeley, California 94709
Telephone: (510) 649-1130 ~ Facsimile: (510) 649-1131
Attorneys for Plaintiff and Real Party-In-Interest *ANDREA WATERS*

Clerk to the Honorable Elliot Lee Daum
Sonoma County Superior Court
Courtroom 16
3035 Cleveland Avenue, Suite 200
Santa Rosa, California 95403
Telephone: (707) 521-6547
[Respondent / Case No. SCV-256309]

California Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, California 94102
Telephone: (415) 865-7300
[Case No. A145437]

(✓✓) By U.S. Mail: The envelope was deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

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Executed on July 23, 2015 at Los Angeles, California.

(✓✓) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta L. Herndon