No. 219A21 **TWENTY-SIXTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA
****

BUCKLEY LLP,

Plaintiffs,

v.

SERIES 1 OF OXFORD INSURANCE COMPANY, NC LLC,

Defendant.

From: Mecklenburg County
No.: 19 CVS 21128

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DEFENDANT-APPELLEE'S REPLY TO AMICI CURIAE BRIEF

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In this appeal, Buckley LLP ("Buckley" or "the Firm") objects to the production of communications and other documents which, after an *in camera* inspection, the Business Court found did not contain or seek legal advice and were not made for primarily legal purposes. Instead, Buckley seeks, and Amici, the Chamber of Commerce and the Association of Corporate Counsel, apparently support, a rule in which any investigation performed by outside counsel is considered to be privileged (or at least presumed so).

But in supporting this position, Amici contradict Buckley while also making several of the same errors. Thus, Amici wholly ignore the standard of review to be applied in this case, let alone acknowledge that the Business Court's Order should not be overturned unless it "is manifestly unsupported by reason." *Friday Investment,*

LLC v. Bally Total Fitness of the Mid-Atlantic, 370 N.C. 235, 241 (2017). Then, Amici not only contradict Buckley's argument that "[i]n general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance," Buckley Brief at p 6, (Quoting Restatement (Third) of the Law Governing Lawyers §72, Reporter's Note to Comt c)), but also say just the opposite: "North Carolina courts . . . . have, like courts from nearly every other jurisdiction, applied the primary-purpose test. *See Window World*." Amici Brief p 6. They then argue that notwithstanding 129 separate findings of fact that the communications ordered to be produced were not "for a primarily legal purpose," the Business Court did not use the "primary purpose" test at all, but instead adopted a "but for" test. However, in so doing Amici are in the curious position of arguing that documents which they have not seen, and which have not been provided to this Court for review, are somehow mischaracterized by the Business Court, which did review the documents and made those findings. Finally, Amici's concern over the "ripple effects" of this matter beyond its "immediate context" is belied by the fact that the Business Court did not alter the law of privilege in North Carolina, it simply followed it. Thus, if according to Amici businesses have been "chilled" from conducting investigations, then they have been so "chilled" for more than 20 years. The Business Court's ruling departed from no precedent in its approach to privilege. It required only that a party claiming privilege show that a communication (or investigation) sought or provided legal advice or was for the primary purpose of providing legal services.

ARGUMENT

I. THERE IS NO BASIS TO ARGUE THAT THE BUSINESS COURT APPLIED AN INCORRECT LEGAL STANDARD.

In its Brief, Buckley argues that the "primary purpose" test used by the Business Court is the wrong standard, and asks that this Court change North Carolina law to adopt the "significant purpose" test of *In re Kellogg Brown & Root,* 756 F.3d 754 (D.C. Cir. 2014). In so doing, Buckley argues such a standard was imposed by *Upjohn Co. v. United States,* 449 U.S. 383 (1981), and claims "[i]n general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance," Brief at p 6 (Quoting Restatement (Third) of the Law Governing Lawyers §72, Reporter's Note to Comt c)). But Amici disagree, writing that "North Carolina courts . . . . have, like courts from nearly every other jurisdiction, applied the primary-purpose test." In support, they cite *Window World of Baton Rouge, LLC v. Window World, Inc.*, No. 15-CVS-1-2, 2019 WL 3959941, at *25, 2019 N.C.B.C. 53 (Aug. 16, 2019), *aff'd* 377 N.C. 551, 857 S.E.2d 850 (2021) (*per curiam*), a decision authored by Chief Judge Bledsoe, the Business Court Judge here. Amici Brief p 6. Indeed, according to Amici, "[i]t is no accident that courts across the country follow the primary purpose test" precisely to distinguish between the legal and non-legal roles that attorneys serve. Amici Brief p 7.

Having rejected Buckley's argument that the primary purpose standard should be changed, Amici then argue that while Judge Bledsoe "claimed to apply the 'primary purpose test,'" Amici Brief p 6, in fact he applied a different standard, one

that "seemed to assume that attorney-client communications arising from an internal investigation . . . are not privileged if they reflect both legal advice *and* business concerns or policies." Amici Brief pp 7-8. But Amici cite to nothing in the Business Court's actual Order that says this, or anything close to it. And this is a curious thing for Amici to argue for Judge Bledsoe, unlike Amici, or Appellee, or this Court, actually had access to the communications at issue. After reviewing them, Judge Bledsoe made 129 separate findings in Appendix B that the communications withheld by Buckley were "not made in the course of giving or seeking legal advice or for a primarily legal purpose." (SR pp 1979-2018, Tabs 1-46, 50-68, 72-73, 75-87, 89, 91-115, 116, 127-154). On the face of his Order, Judge Bledsoe identified the correct legal standard and wrote that he applied it. And because Buckley has not submitted these materials for review to this Court, there is no evidence that this legal standard was not correctly applied to these documents. *See, e.g., Friday Investments,* 370 N.C. 235, 241 (2017) ("the record merely contains a privilege log that briefly describes each of the allegedly privileged documents. Nothing in this privilege log or the trial court's order suggests that the trial court erroneously concluded that the tripartite attorney-client relationship had not formed or that the court misapplied the five factor *Murvin* test.").

Amici also claim that the Business Court "seems to have created a false dichotomy between 'legal services' and 'investigative' efforts," arguing that investigative efforts can be legal services. Amici Brief p 8 n. 2. But the Business Court did no such thing. The Business Court found that the main purpose of the

investigation opened by Buckley into its Chairman was business motivated; it nonetheless recognized that such a business investigation could include legal advice or services, and simply required Buckley to show that a particular communication was actually privileged before it could be withheld. In short, the Business Court did precisely what Amici claim it did not do - - it applied the privilege in the context of a business-motivated investigation.

Amici wholly ignore not only the Business Court's findings of fact that contradict its argument, but the legal reality that the standard of review for this matter is whether the Order was an abuse of discretion standard. This standard "require[s] the reviewing court to determine whether the decision of the trial court is manifestly unsupported by reason or is so arbitrary that it cannot be the result of a reasoned decision." *State v. Locklear,* 331 N.C. 239, 248 (1992). *Accord Friday Investment, LLC v. Bally Total Fitness of the Mid-Atlantic,* 370 N.C. at 241 (2017) ("A trial court's discovery ruling is reviewed for abuse of discretion [ ] and will be overturned 'only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.'") (attorney-client privilege) (citations omitted). Instead, Amici raise a series of questions as to whether business policies must be in writing, whether these policies can be changed, whether they can be inferred, or whether they can be eliminated. Amici Brief p 9. But these questions do not exist in this case - - Buckley has not only admitted but affirmatively pleaded in its Complaints that its policies required an investigation into this alleged

conduct. Thus, there was nothing inferred, or changed, or eliminated in this matter; the policy is both explicit and conceded.

Far from "jettisoning" the attorney-client privilege, Amici Brief p 9, the Business Court's Order specifically recognized its applicability even when the primary purpose of an investigation is a business purpose. What the Business Court did not do, and what North Carolina law has never allowed, was to hold that merely hiring an outside law firm to conduct an investigation is sufficient to imbue all materials in that matter with privilege, regardless of their content.

II. THE BUSINESS COURT'S ORDER DOES NOT DISINCENTIZE COMPANIES FROM INVESTIGATIONS BECAUSE IT DID NOT CHANGE THE LAW.

Amici argue that the Business Court's Order will result in fewer investigations because privilege may not apply. This argument is misplaced for several reasons.

First, and critically, the Business Court's Order did not alter or change North Carolina law. Rather, it applied in a straightforward fashion principles of attorney-client privilege that have been in effect in North Carolina for nearly 20 years. At least since *Evans v. United States Services Auto, Ass'n,* 142 N.C. App. 18, 32 (2001), it has been a fundamental principle of North Carolina law that a party "may not avail themselves of the protection afforded by the attorney-client privilege if the attorney was not acting as legal advisor when the communication was made." Nor are the North Carolina courts alone in this position. *See Navigant Consulting, Inc. v. Wilkinson,* 220 F.R.D. 467, 474-75 (N.D. Tex. 2004) ("Where an attorney is functioning in some other capacity - - such as an accountant, investigator, or business advisor - - there is no privilege."). Yet, for the past 20 years North Carolina businesses and their

management, including Boards of Directors, have performed the investigations and tasks necessary for their business - - and have done so without regard to whether the investigation might ultimately be privileged.

Second, "the [attorney client] privilege does not permit an attorney to conduct his client's business affairs in secret." *In re Grand Jury Subpoenas*, 803 F2d 493 (9th Cir 1986). Amici advocate for nothing less than a legal standard which permits any business or organization to conduct business affairs in a secret fashion so long as it retains an outside attorney to do so. Indeed, the fact that no legal advice is actually sought or given - - as is the case with the documents ordered to be produced here - - is beside the point. Secrecy is the point.

Far from encouraging investigations, this type of legal rule will only encourage businesses to retain law firms so that they can make decisions and take actions under the cloak of privilege that they do not want the world to see. This case illustrates this point well. Buckley, in order to avoid an exclusion in the Policy that bars recovery for circumstances that could lead to a loss known to the it before the effective date of the Policy, as well as an exclusion for losses caused by Buckley's own actions, alleged in its Complaints that it had no knowledge of such circumstances and that Sandler's termination was "voluntary" and not caused by the Firm in any way. It then refused to provide the best evidence of whether its allegations were true by claiming that the contemporaneous communications with the law firm retained to conduct the investigation were privileged. Thus, to adopt Amici's position would mean that the only evidence that may be offered on these issues is Buckley's evidence, unchallenged

by any contrary and contemporaneous material. Such a rule will not encourage truth-seeking by business organizations, but will create a cottage industry for outside attorneys in truth-concealing through the use of privilege.

Amici argue that the Business Court's decision will undermine the principles of *Upjohn* by, somehow, making employees more reluctant to cooperate in investigations if they are not assured of privilege. But this argument fundamentally misunderstands *Upjohn*. *Upjohn* involved the question of whether the corporate attorney-client privilege would extend beyond the "control group" of a company's management and to its employees. The Court applied the corporate privilege to a company's employees, rejecting as too narrow the "control group" test. *Upjohn* gave rise to a practice in which counsel for the company, in interviewing employees, cautions those employees that there is no privilege between counsel and the employee - - rather, any privilege is between counsel and the company and it is the company that determines whether the privilege will be exercised. In context, *Upjohn* warnings serve to advise employees that they do not have a privileged relationship with counsel for the company and that the privilege, if any, will be exercised (or waived) by the company. Thus, in providing *Upjohn* warnings, counsel for a company simply makes clear that the company, not the individual employee, is the client. As such, a corporate employee is on notice that she has no individual privilege with counsel for a company.

Nothing about *Upjohn* makes otherwise non-privileged matters privileged. And from the perspective of an employee, *Upjohn* warnings make clear that they have

no individual privilege whatsoever with counsel for the company. The Business Court's Order simply makes it clear that in order for communications to be privileged, they must seek or provide legal advice or have as their primary purpose providing legal services. In this context, it is not clear how an employee, who is told that there is no privileged relationship between she and counsel for the company, and further that the company will determine whether a conversation is privileged (and if so, whether the privilege can be waived), is deterred by a rule that says if a communication does not occur in the context of primarily providing legal services, it is not privileged at all. And Amici do not explain how this is so.[1]

CONCLUSION

The Business Court's Order broke no new ground on the law of privilege. Rather, it simply applied long-standing rules to hold that when a business conducts an investigation for business reasons, it cannot then throw a veil of secrecy over all matters in the investigation by engaging outside counsel to perform it. Amici present no valid argument as to why this should not be the law, let alone why the Business Court abused its discretion in this matter.

This 27th day of October 2021.

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[1] Finally, Amici's *Upjohn* argument is particularly misplaced in this matter, where there is no evidence that outside counsel gave any of Buckley's employees *Upjohn* warnings.

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CERTIFICATE OF SERVICE

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