

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/01/11

DEPT. 69

HONORABLE RAMONA G. SEE

JUDGE

T. FREEMAN

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

G. MACK, C.A.

Deputy Sheriff

NONE

Reporter

8:00 am

BC403889

Plaintiff

Counsel

MARK DYNE

N/A

VS

Defendant

PRICEWATERHOUSECOOPERS LLP

Counsel

NATURE OF PROCEEDINGS:

DYNE MOTIONS IN LIMINE TAKEN UNDER SUBMISSION ON NOVEMBER 8, 2011, ARE RULED ON AS FOLLOWS:

1. Plaintiff's Motion in Limine No. 1: Excluding Any Evidence or Argument Relating to the October 8, 2007 Memorandum of Jeanne Irving is DENIED.

Under the work product privilege, "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." California Code of Civil of Procedure §2018.030. The attorney is the exclusive holder of the work product protection. State Compensation Ins. Fund v. Sup. Ct. (2001) 91 Cal.App.4th 1080, 1091. Waiver of the work product privilege only occurs through a "disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation." Raytheon Co. v. Sup. Ct., (1989) 208 Cal.App.3d 683, 688. "[D]isclosure operates as a waiver only when otherwise protected information is divulged to a third party who has no interest in maintaining the confidentiality of a significant part of the work product." Laguna Beach County Water Dist. v. Sup. Ct. (2004) 124 Cal.App.4th 1453, 1459.

The discovery referee, Judge Victor Person (ret.), found that the attorney-work product privilege had

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been waived because (1) Mr. Karlin wrote notes on the document and these notes were included in his report and the subject of his opinions, (2) although Plaintiff's counsel objected to the introduction of the Memo at the depositions, counsel did not advise Mr. Karlin not to answer questions about it, and (3) Counsel produced this document a second time at the deposition and thus had not shown that it was inadvertently disclosed. Although Ms. Irving's disclosure of the memo to Mr. Karlin does not constitute a waiver of the work product privilege because the disclosure was for the purpose of trial preparation and not inconsistent with the purpose of the privilege, the Court finds that Plaintiff's counsel's production of the memorandum to Defendant and other behavior inconsistent with the privilege did constitute a waiver. See Raytheon Co. v. Sup. Ct., (1989) 208 Cal.App.3d 683, 688.

2. Plaintiff's Motion in Limine No. 2: Excluding Any Evidence or Argument Regarding E-Mail Communications Dated March 22, 2006 is DENIED.

An agent's hearsay statement may be admissible against the party principal. See Los Angeles County Flood Control Dist. v. Mindlin, (1980) 106 Cal.App.3d 698, 713; Greenspan v. LADT, LLC, (2010) 191 Cal.App.4th 486, 523. "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control,

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and consent by the other so to act." Edwards v. Freeman, (1949) 34 Cal.2d 589, 591. The existence of an agency relationship is mainly a question of fact. Brokaw v. Black-Foxe Military Institute (1951) 37 C.2d 274, 278.

Plaintiff argues that Ronnie Dyne was not Plaintiff's agent, but was merely involved in helping Plaintiff prepare his 2004 tax return. Defendant argues that Ronnie Dyne was Plaintiff's agent who was intimately involved in the preparation of Plaintiff's tax returns. Defendant presented deposition testimony of David Schnaid, Plaintiff's accountant, who testified that he considered Ronnie Dyne to be Plaintiff's "representative" and the "ultimate decision maker" as to Plaintiff's tax return. The deposition testimony of Plaintiff and Mr. Schnaid indicates that Plaintiff consented to Ronnie Dyne acting on his behalf in regards to the filing of his 2004 tax returns. Therefore, there is sufficient evidence supporting a finding that Ronnie Dyne was Plaintiff's agent. As Plaintiff's agent, Ronnie Dyne's e-mail communication falls within the party admission hearsay exception. See Los Angeles County Flood Control Dist. v. Mindlin, (1980) 106 Cal.App.3d 698, 713; Greenspan v. LADT, LLC, (2010) 191 Cal.App.4th 486, 523.

Writings must be authenticated prior to being received into evidence. Evid. Code §1401. The party offering the writing has the burden of offering

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sufficient evidence of its authenticity to sustain a finding of fact to that effect. Evid. Code §403(a). A writing may be authenticated by evidence that the party against whom it is being offered has "acted upon" the writing as authentic. Evid. Code §1414(a). Authentication may also occur through circumstantial evidence. See People v. Smith, (2009) 179 Cal.App.4th 986, 1001-1002. Defendant will have to provide proper authentication at the time of introduction of the subject documents and the Court will determine at that time whether or not proper authentication has been accomplished to allow admission.

3. Plaintiff's Motion in Limine No. 3: Excluding Any Evidence or Argument That Plaintiff or Other Persons Were Engaging in Improper or Illegal Activities: Parties stipulated.

4. Plaintiff's Motion in Limine No. 4: Excluding Any Evidence or Argument Regarding Plaintiff's Financial Status and Affairs is GRANTED IN PART.

All relevant evidence is admissible unless otherwise prohibited by statute. Evid. Code §350. Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action, including the credibility of a witness or hearsay declarant. Evidence Code § 210. Under Section 352, the court has the discretion to exclude evidence "if its

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probative value is substantially outweighed by the probability that its admission will result in an undue consumption of time, be unduly prejudicial, or mislead the jury. Evidence Code §210.

Plaintiff's financial status and business acumen in 1992 is directly relevant to the action. However, Plaintiff's current wealth, financial status and affairs, including Plaintiff's sale of Skype stock held personally by Plaintiff outside of the transaction at issue, Plaintiff's net worth, family's net worth, and family trusts, are irrelevant to the current action. Plaintiff's financial status and affairs outside of the transaction at issue are irrelevant to the substantive issue in the case - Defendant's alleged negligence in 1992. The introduction of Plaintiff's financial status and affairs outside of the transaction at issue would result in an undue consumption of time, unduly prejudice the Plaintiff, and mislead the jury. See Evidence Code § 210. This ruling, however, does not prevent Defendants from introducing other potential evidence which might demonstrate Plaintiff's alleged sophistication in business generally and Plaintiff's knowledge or sophistication with the type of transactions at issue in this action.

5. Plaintiff's Motion in Limine No. 5: Excluding Any Evidence or Argument Concerning Plaintiff's Citizenship is GRANTED-unopposed.

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6. Plaintiff's Motion in Limine No. 6: Excluding Any Evidence or Argument Regarding the Capital Gains Tax Rate Differential in Any Year Other Than 2005: Denied.

Foreseeability is a primary consideration in establishing the element of duty. Weirum v. RKO General (1975) 15 Cal.3d 40, 47. In considering foreseeability, "[l]iability is imposed only if the risk of harm resulting from the act is deemed unreasonable - i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved." Id.

Plaintiff contends that the differential between the capital gains rate and the ordinary income rate in 1992 is irrelevant in a professional negligence action because the unforeseeability of the extent or nature of the specific harm suffered by a plaintiff does not mean that a defendant's conduct was not the proximate cause of the injuries. Defendant argues that the differential rate in 1992 is relevant to determining whether there was a breach of a duty based on the foreseeability of risks at the time of the transaction. The difference between the capital gains rate and the ordinary income rate in 1992 was 3%. Today, the differential is 20%. The differential tax rate in 1992 is relevant to the transaction in 1992 in terms of determining whether the amount of care provided by Defendant was in

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NATURE OF PROCEEDINGS:

proportion to the danger to be avoided. See Beck v. Sirota (1941) 42 Cal.App.2d 551, 557.

7. Plaintiff's Motion in Limine No. 7: Excluding Any Evidence or Argument that Plaintiff Did Not File a QEF Election for Lockeridge Limited is DENIED.

All relevant evidence is admissible unless otherwise prohibited by statute. Evid. Code §350. Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action, including the credibility of a witness or hearsay declarant. Evidence Code § 210. Under Section 352, the court has the discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will result in an undue consumption of time, be unduly prejudicial, or mislead the jury. Evidence Code § 210. Evidence relating to whether or not Plaintiff filed a QEF election is relevant to key issues in the action and is admissible under section 352.

8. Defendants' Motion in Limine No. 7: Excluding Expert Testimony of Michael J. Karlin is GRANTED.

The basis for Plaintiff's claim are that Defendant's accountant services fell below the standard of care "as other members of the accounting profession commonly possess and exercise providing this type of advice." See Complaint, at 24-25. Thus, the key

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issue is whether Defendants' actions fell below the standard of care for accountants in th subject area. In professional malpractice cases only persons who are qualified and knowledgeable in that profession can testify as to the applicable standard of care for that profession. See Wright v. Williams (1975) 47 Cal.App.3d 802, 810. It is for the trial court to determine, in its discretion, the competency and qualification of an expert, and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown. See Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal.3d 689, 701.

Karlin is not trained as an accountant, has not been licensed as an accountant, and has never worked as an accountant. See Karlin Depo. at pp. 8-12. His experience working with accountants does not qualify him to opine as an expert on what the standard of care is for accountants rendering tax advise. Although Plaintiff argues that Defendant only advised Plaintiff on tax matters, not accounting matters, Plaintiff has sued Defendant for Defendant's accountant's failure to meet the standard of care in the accounting community. The Court finds that Karlin is not qualified to testify as to the accounting standard of care. As a result, an accountant is required to opine regarding the standard of care and whether Defendant's actions fell below it. An attorney could only testify in a professional negligence action involving whether the

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actions of an attorney practicing in a particular field fell below the standard of care. To rule otherwise, would allow attorneys to opine as to the standard of care regarding a non-attorney professional's actions in every trial and the law does not support such a result.

Defendants' remaining motions in limine were not yet argued.

The clerk gives notice.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12-01-2011 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 12-02-2011

John A. Clarke, Executive Officer/Clerk

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Reporter

8:00 am

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Plaintiff

Counsel

MARK DYNE

N/A

VS

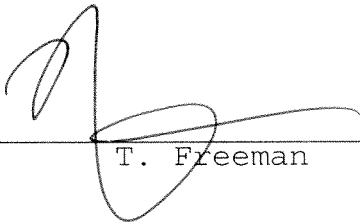
Defendant

PRICewaterHOUSECOOPERS LLP

Counsel

NATURE OF PROCEEDINGS:

By:



T. Freeman

GERSH DERBY

Attn: Jeffrey Gersh, Esq.

15821 Ventura Blvd., Ste. 515

Encino, CA 91436

ORRICK, HARRINGTON

Attn: William Molinski, Esq.

777 S. Figueroa St., # 3200

Los Angeles, CA 90017

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