No. 07-99546--S

IN THE SUPREME COURT OF THE STATE OF KANSAS

PHILIP MORRIS USA INC., PHILIP MORRIS INTERNATIONAL, INC. R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, LORILLARD TOBACCO COMPANY, and BRITISH AMERICAN TOBACCO (INVESTMENTS), LTD.,
Petitioners,

v.

THE HONORABLE TOM R. SMITH, JUDGE OF THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, SEWARD COUNTY, KANSAS and DARIC SMITH,
Respondents.

AMICUS CURIAE BRIEF OF THE KANSAS ASSOCIATION OF DEFENSE COUNSEL

Appeal From the District Court of Seward County, Kansas
The Honorable Tom R. Smith, Judge of the District Court
District Court Case No. 00-CV-26

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INTRODUCTION

On October 29, 2007, the Seward County District Court ("District Court") adopted the conclusions of Special Master Judge Paul Buchanan on issues related to the attorney-client privilege and work product doctrine. The District Court concluded that Judge Paul Buchanan correctly applied Kansas law when he refused to acknowledge the existence of the joint client doctrine and the common interest doctrine, and ruled that work product protection was waived when shared with jointly aligned co-parties or when the underlying litigation in which it was created was resolved. The District Court's ruling is contrary to Kansas law and contrary to the law of every other jurisdiction which has considered the issues.

This Court should reverse the decision of the District Court because K.S.A. 60-426 and Kansas case law support the recognition and application of the joint client doctrine and the common interest doctrine. Further, the doctrines are necessary to protect the interests of justice and the integrity of the Kansas judicial system. The doctrines are imperative to the practice of law in Kansas, and elsewhere, and are required to protect litigants, promote fairness, promote judicial efficiency and eliminate unnecessary costs.

This Court should also reverse the District Court's decision regarding the waiver of the work product doctrine. Contrary to respondents' position, and the District Court's ruling, work product protection is not waived when it is shared with jointly aligned co-parties, nor is the protection lost when the underlying lawsuit in which the documents were created is over.

Should this Court disregard the long line of authority from other jurisdictions, and refuse to apply the universal rules relating to the attorney-client privilege and work

product doctrine, the consequences will be severe. Kansas cannot afford to adopt contrary rules on these fundamental issues. Otherwise, it will severely hamstring the Kansas judicial system, Kansas parties, Kansas lawyers and lawyers practicing elsewhere.

The Kansas Association of Defense Counsel ("KADC") respectfully requests this Court to right the wrong of the District Court, uphold the intent of the Kansas legislature and reaffirm the existence of the joint client doctrine and the common interest doctrine. In addition, the KADC respectfully requests that this Court conclude that work product protection is not lost when protected documents are shared with co-parties with common legal interests or when the underlying suit in which the documents were originally created is over.

ARGUMENT AND AUTHORITIES

A. The Joint Client Doctrine And The Common Interest Doctrine Are Necessary To Protect The Interests Of The State Of Kansas, The Kansas Judicial System And The Kansas Bar

1. Recognition of the Joint Client Doctrine and the Common Interest Doctrine Protects Litigants and Promotes Fairness

The joint client doctrine and the common interest doctrine are not one-sided, but instead, benefit both plaintiffs and defendants. *In re Grand Jury Subpoenas,* 902 F.2d 244 (4th Cir. 1990); *Owen v. Turner, et al.,* Case No. 85,025 (March 9, 2001) [1]; Joan K. Archer, *Joint Defense/Common Interest Privilege in Kansas,* 75 J. Kan. B.A. 20 (Feb. 2006); Gerald Heller, *Raising the Joint Defense Privilege,* 44 Jan. Fed. Law. 46 (January, 1997). The doctrines are invaluable and necessary for the protection of all clients at all stages of the attorney-client relationship. *Continental Oil Co. v. United States,* 330 F.2d

[1] *Owen v. Turner, et al.,* Case No. 85,025 (March 9, 2001), is an unpublished opinion of the Kansas Court of Appeals and is attached hereto pursuant to Supreme Court Rule 7.04.

347 (9th Cir. 1964). Not only do the doctrines benefit individual parties, they are of vital importance to the practice of law as a whole.

Because the importance of the doctrines is so transparent and universally recognized by courts and legal scholars across the nation, Kansas attorneys have long operated under the assumption that such basic protection exists in Kansas, as it does elsewhere. Should this Court fail to recognize the joint client doctrine and the common interest doctrine, the global and statewide consequences will be severe.

Every litigant is entitled to a fair trial and the right to such a trial is inviolate. Kansas Constitution, Bill of Rights, § 5; *In re Rushing,* 9 Kan. App. 2d 541, 547, 684 P.2d 445 (1984). The doctrines protect and enhance our system of justice and non-recognition of the doctrines will interfere with this fundamental right. See e.g., *In re Rushing,* 9 Kan. App. 2d at 547 (no fair trial when ineffective assistance of counsel provided).

In order to protect and preserve the right to a fair trial, and ensure that parties are receiving effective legal representation, counsel must be able to engage in the free flow of confidential information. The doctrines fulfill this goal by promoting the uninhibited exchange of confidential information among co-parties and their joint or separate counsel. Susan K. Rushing, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege,* 68 TEX. L. REV. 1273 (May, 1990). The free exchange of confidential information fosters effective legal representation, which is one of the primary justifications for recognition of the doctrines. Heller, 44 Jan. Fed. Law. at 47; Rushing, 68 TEX. L. REV. at 1274.

Effective communication is necessary to ensure that counsel articulate their best case and provide their clients with the highest possible level of representation. Mark A.

Miller, *A Privileged Character? The President & Joint Defense,* 85 Geo. L. J. 1979 (June 1997); *In re LTV Sec. Litig.,* 89 F.R.D. 595, 604 (N.D. Tex. 1981) (protecting collaborative efforts of co-parties encourages better case preparation). Uninhibited communications, and uninhibited strategizing, amongst co-parties with common legal interests are necessary for a fair trial. See e.g., *United States v. McPartlin,* 595 F.2d 1321, 1335-37 (7th Cir. 1979). Otherwise, the ability of co-parties to present the best case in the most efficient and effective manner will be lost.

Without the protection afforded by the doctrines, counsel will have a disincentive, and even a fear, to collaborate and confer with co-counsel. Parties will avoid communication for fear that the communication will be discoverable or used against them in subsequent litigation. This fear will jeopardize the ability to present the best, most consistent and comprehensive case. See e.g., Michael G. Jones, *Finding a Way to Get Along: Joint Defense Agreements and Other Ideas for Forging a United Defense Front Against Plaintiffs*, Kansas Defense Journal (Fall 2007). In other words, without the doctrines, and the guarantee that confidential information will remain confidential, plaintiffs and defendants will no longer communicate about matters of common interest.

The inability of co-parties and co-counsel to freely exchange confidential information will also lead to other adverse effects. Co-parties will no longer be able to present unified theories of their cases, nor will they be able to collaborate on strategic decisions. Inconsistent and contradictory theories will create "destructive anarchy" in multi-party litigation, penalizing plaintiffs and defendants alike. See e.g., Robert L. Haig, *Corporate Counsel's Guide,* 68 (1996). This divisiveness will lead to inefficient trials and result in a tactical advantage to single parties.

It is also important to note that recognition of the joint client doctrine and the common interest doctrine will not deprive the judicial system of evidence which would otherwise be discoverable. Any contrary argument is unsupported because collaborative communications are unlikely to be exchanged in the absence of protection under the doctrines.

Since recognition of the doctrines benefits both litigants and the system as a whole, this Court should reaffirm their existence and place in Kansas law. The legislature has expressly adopted the doctrines in K.S.A. 60-426 and the intent of the legislature should govern. Kansas case law further supports recognition of the doctrines. There is no contrary authority anywhere and no persuasive policy rationale to support rejection of the doctrines.

2. Recognition of the Joint Client Doctrine and the Common Interest Doctrine Promotes Judicial Efficiency and Eliminates Unnecessary Costs

Recognition of the joint client doctrine and the common interest doctrine fosters judicial efficiency at every stage of the litigation process. In fact, it is not uncommon, and is in fact beneficial, for co-parties to begin planning and strategizing immediately upon the filing of a lawsuit, if not before. This early planning and sharing of confidential communication eliminates, among other things, duplicative pleadings, discovery, motions and trial material. More specifically, non-recognition of the doctrines will lead to additional cross claims, indemnity claims, third party actions, as well as duplicative discovery, expert disclosures, depositions, motions, briefs, exhibits and trials. This consequence alone justifies recognition of the joint client doctrine and the common interest doctrine.

Without the protection afforded by the joint client doctrine and the common interest doctrine, everything would be duplicated because counsel would no longer share confidential communications out of fear that the communications would be discoverable. For instance, without protection, multiple parties would automatically lead to multiple experts. Multiple experts, in turn, would lead to increased fees, increased time, increased expenses, increased scheduling conflicts and increased delays. The consequences would have a detrimental effect on plaintiffs, defendants and the court system.

The ability to share confidential communication, pool resources and divide labor are imperative to the efficiency of our judicial system. But for the sharing of information, and the pooling of resources, the chaos of litigation would be increased exponentially, wreaking havoc on the judicial system in Kansas and elsewhere.

Not only is judicial efficiency increased by the recognition of the doctrines, but the sharing of privileged information among co-parties eliminates unnecessary costs for litigants. Duplicative, ineffective and inefficient pleadings, discovery and trials will create more work and more significant costs to clients. Recognition of the doctrines "save[s] money, time and effort," which will lead to more cost efficient litigation. Rushing, 68 TEX. L. REV. at 1280. Conversely, non-recognition of the doctrines will increase litigation expenses and make access to the judicial system even more cost-prohibitive for a number of individuals and corporations which lack unlimited financial resources.

Consequently, this Court should follow the language and intent of K.S.A. 60-426, and should follow the rulings and rationale of all other jurisdictions, and hold that the

joint client doctrine and the common interest doctrine will continue to protect the interests of the state of Kansas, the Kansas judicial system and the Kansas bar.

B. The Protection Afforded By The Work Product Doctrine Must Be Construed In Such A Way As To Support Its Purpose And Goal

The purpose of the work product doctrine is to protect information and materials "prepared in anticipation of litigation or for trial" from discovery against *opposing* parties. K.S.A. 60-226; *United States v. AT&T Co.,* 642 F.2d 1285, 1299 (D.C. Cir. 1980) (Emphasis added). It is not intended to protect information and material from parties with a common interest. And, contrary to the ruling of the District Court, the protection afforded by the work product doctrine extends to all subsequent litigation. See e.g., *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.,* 136 F.3d 695, 703 (10th Cir. 1998). In other words, the protection is not waived or lost when the underlying litigation in which the documents were created is over. This, of course, would undermine the purpose and intent of the doctrine.

Although the attorney-client privilege and the work product doctrine have slightly different purposes, the rationale for holding that neither privilege is waived when shared with jointly aligned co-parties, or when the underlying litigation is over, is the same. Indeed, the protection of work product under these circumstances protects litigants, promotes fairness, promotes judicial efficiency and eliminates unnecessary costs.

As discussed above in greater detail, the ability of jointly aligned co-parties and co-counsel to share information in the furtherance of their mutual objectives ensures that parties receive the best, most effective, legal representation. The work product doctrine is intended to protect mental impressions, opinions and legal theories of counsel. In order for co-counsel to present consistent theories of a case and collaborate on strategic

decisions, they must be able to share work product, including but not limited to, drafts of pleadings, correspondence, settlement agreements, joint motions and joint briefs.

Not only is the sharing of work product important to provide effective representation, it is necessary for judicial and economical efficiency. Without the ability to share work product, joint filings, joint experts and the like will be non-existent. This will create more work for the judicial system and attorneys, and lead to inefficient litigation and unnecessary costs. Our judicial system cannot absorb such drastic consequences.

C. This Court's Failure To Follow The Attorney-Client Privilege And Work Product Rules Of Every Other State Would Severely, And Detrimentally, Impact Kansas Lawyers And Lawyers Practicing Elsewhere

Should Kansas stand alone on the extent of protection afforded to parties under the attorney-client privilege and work product doctrine, it will create a chaotic conflict of law with every other jurisdiction in the nation. Although such a conflict would impact plaintiffs and defendants alike, defendants who are unsuspectingly hailed into Kansas courts because of *de minimis* contacts with the state will undoubtedly suffer more.

Because defendants often cannot choose, let alone predict, where they might be sued, a conflict involving the protection of confidential communications will create extreme chaos. If Kansas courts automatically apply the law of the forum on privilege issues in all cases, as the District Court suggests the rule should be, plaintiffs will file cases in Kansas in order to obtain otherwise confidential communications made in other states. But for the act of filing in Kansas state court,[2] plaintiffs would not be able to

[2] This problem would only arise if the case was filed in Kansas state court, as opposed to federal court, because Kansas federal courts wisely and universally recognize that confidential documents and communications shared among co-parties with common legal interests are protected.

obtain co-defendants' confidential documents or communications. This lack of uniformity would give plaintiffs an unfair advantage and encourage forum shopping.

If this Court were to adopt the District Court's erroneous ruling, Kansas defendants, and out of state defendants sued in Kansas state courts, would be unfairly penalized. For instance, if a multi-defendant suit was filed in Kansas, all defendants would cease to communicate with one another for fear that their communications would be discoverable. The inability of co-defendants to communicate among themselves would create divisiveness and exacerbate the problems emphasized above.

Additionally, if a Kansas defendant were sued in a multi-defendant action in another state, the Kansas defendant would be excluded from participating in joint defense strategies and communications among other non-Kansas defendants because of the risk that Kansas law may apply to some or all of the communications with the Kansas defendant. If the District Court's view of Kansas law governed the communications with the Kansas defendant, all confidential information shared with the Kansas defendant would be discoverable and, if the holding of the District Court is upheld *in toto*, would include work product created in other previous lawsuits. Co-defendants will be unwilling to accept such a significant risk. As a result, the Kansas defendant would be specifically excluded from participating in all joint defense efforts and left to battle the plaintiff and other co-defendants on its own.

The conflict would also create uncertainty and is unmanageable from a practical standpoint. Numerous individuals and corporations have their principal place of business in Kansas, yet conduct business and have facilities in multiple states. This large group of prospective defendants will never be able to join ranks with co-defendants in any

litigation regardless of where suit is filed. In other words, because of the significant risk that Kansas law would govern the discoverability of some, or all, of the Kansas defendants' communications, no other co-defendant will share confidential documents or communications with the Kansas defendant. No other defendant will take that risk when so much is at stake, leaving the Kansas defendant alone and at a distinct disadvantage. This could potentially cause companies to avoid operating in Kansas altogether. Moreover, attorneys will not be able to provide meaningful advice to their Kansas clients on the discoverability of confidential information. This uncertainty will create an undue hardship for Kansas attorneys, as well as outside counsel.

Magnifying the uncertainty is the fact that Kansas federal courts recognize that confidential documents and communications shared among co-parties with common legal interests are protected. This is directly contrary to the ruling of the District Court. This internal conflict within the state of Kansas would be unworkable and unmanageable. Because of the threat of remand, and because of the possibility that the federal court will not exercise supplemental jurisdiction, there would be absolutely no communication and no joint alignments by plaintiffs or defendants. The result would be devastating.

As such, this Court should conclude that Kansas law provides that work product and attorney-client privilege communication is not waived by sharing such information with jointly aligned co-parties. Kansas statutes and case law support a reversal of the District Court, as does the rationale and public policy considerations discussed above.

D. K.S.A. 60-426 Protects Both Confidential Communications Among Jointly Aligned Co-parties Represented By The Same Counsel And Confidential Communications Among Jointly Aligned Co-parties Represented by Separate Counsel

The District Court concluded that the joint client doctrine and the joint defense doctrine, or common interest doctrine, are not recognized in Kansas. Judge Smith reasoned that the District Court's legal basis for rejecting the "joint defense privilege" was two-fold. (Judge Tom R. Smith's Response, at p. 3-4). First, that the decision in *State v. Maxwell,* 10 Kan. App. 2d 62, 691 P.2d 1316 (1984), only confirmed the existence of the joint client doctrine and not the joint defense doctrine. Second, that the District Court followed controlling principles set forth in *Associated Wholesale Grocers, Inc. v. Americold Corp.,* 266 Kan. 1047, 975 P.2d 231 (1999), when it struck down petitioners' joint defense argument. However, with all due respect, neither argument advances respondents' position.

Judge Smith acknowledged in his response to petitioners' petition for mandamus that *Maxwell* recognized the existence of the joint client doctrine, as opposed to the joint defense doctrine, yet the District Court refused to apply the holding of *Maxwell.* Instead, the District Court concluded exactly the opposite.

Judge Smith further relied on *Americold*[3] to support his conclusion that no joint defense doctrine exists in Kansas. Interestingly, the joint defense issue was not even addressed in that case. In fact, the Kansas Supreme Court specifically stated that the joint defense issue "is reserved for another day when the issue and policy considerations have been fully briefed and placed squarely before us." *Americold,* 266 Kan. at 1059. Thus, the District Court's reliance on *Americold* is also misplaced. The position of the District Court that Kansas does not recognize the joint client doctrine and the common interest

[3] Judge Smith cited *Americold I* in his response brief. *Americold I* did not address the issue of the attorney-client privilege or the joint defense doctrine. These issues were discussed in *Americold II.*

doctrine is erroneous and one need not look any further than the language of Kansas' attorney-client privilege statute for confirmation. See K.S.A. 60-426.

1. K.S.A. 60-426 Recognizes the Joint Client Doctrine

K.S.A. 60-426 codifies the attorney-client privilege in Kansas. Contrary to respondents' position, and the ruling of the District Court, K.S.A. 60-426 expressly recognizes the joint client doctrine and the common interest doctrine. See K.S.A. 60-426. K.S.A. 60-426(a) provides in relevant part that "*communications* . . . between lawyer and his or her *client* in the course of that relationship and in professional confidence, are privileged . . . ." (Emphasis added). "Communication" includes "disclosures of the client to a representative, *associate* or employee of the lawyer incidental to the professional relationship." K.S.A. 60-426(c) (Emphasis added). A "client" includes a person, corporation or other association. K.S.A. 60-426.

Since "client" includes a person, corporation or other association, and communications between a lawyer and his client are privileged, it stands to reason that K.S.A. 60-426 protects communications between a lawyer and his clients. It is commonplace for a lawyer to represent multiple parties in a multi-party litigation. And, both parties are "clients" of the lawyer as defined by K.S.A. 60-426. Just as communications between a lawyer and his client are privileged, so are communications between a lawyer and his clients. See e.g., K.S.A. 60-426; *Owen v. Turner, et al.,* Case No. 85,025 (March 9, 2001); *Maxwell,* 10 Kan. App. 2d at 65.

The plain language of subsection (b) of K.S.A. 60-426 adds further support for the proposition that the Kansas legislature intended to protect confidential communications among jointly aligned co-parties and their common counsel. Indeed, K.S.A. 60-426(b)

specifically excludes from protection certain communications, including "communication[s] relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common *when offered in an action between any of such clients*." K.S.A. 60-426(b)(5) (Emphasis added). The only reason the legislature would have included the italicized language in the statute was if the legislature intended to protect communications among co-parties and their common counsel outside the context of an action between clients. Any other interpretation would render the statutory language in subsection (b)(5) meaningless. *State v. Brown,* 272 Kan. 843, 847, 35 P.3d 910 (2001) (the legislature does not intend to enact useless legislation).

In other words, the plain language of the statute provides that confidential communications among clients and their jointly retained counsel are privileged. This is unequivocally the law in Kansas and should be reaffirmed by this Court. K.S.A. 60-426; *Maxwell,* 10 Kan. App. 2d at 62 (where two or more persons jointly consult an attorney, their confidential communications with the attorney will be privileged).

2. K.S.A. 60-426 Recognizes the Common Interest Doctrine

Not only does K.S.A. 60-426 protect confidential communications among co-parties with their jointly retained counsel, it also protects confidential communications among co-parties with their separately retained counsel. K.S.A. 60-426; *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355 (10th Cir. (Kan.) 1997) (acknowledging the breadth of the Kansas attorney-client privilege statute and broad protection afforded by Kansas courts).

As referenced above, "communication" includes disclosures made to a "representative, *associate* or employee" of the lawyer. K.S.A. 60-426(c) (Emphasis

added). Not only did the legislature use the words associate, employee and lawyer in the same statute, these three words appear in the very same sentence. As a rule, each word is presumed to have a separate and distinct meaning. See e.g., *Boatwright v. Kansas Racing Comm.,* 251 Kan. 240, 245, 834 P.2d 368 (1992) (different words are presumed to have different meanings).

"Associate" cannot be construed to mean an employee of the lawyer because the word employee is also used. In addition, "associate" cannot be construed to mean associate lawyer because an associate lawyer is a "lawyer" and the use of both words would be superfluous. Thus, the legislature must have intended "associate" to have a meaning separate and apart from the term employee and lawyer. *Brown,* 272 Kan. at 847.

The ordinary meaning of the term "associate" encompasses co-parties who are jointly aligned with a common interest and a common goal. In fact, the word "associate" "Signifies confederacy or union for a particular purpose, good or ill." Black's Law Dictionary, at p. 121 (6th ed. 1990). Based on the language of the statute, and the broad definition of "associate," K.S.A. 60-426 undoubtedly contemplates the protection of confidential communications among co-parties and co-counsel. Consequently, confidential communications among co-parties and co-counsel in the furtherance of their mutual objectives should be protected in accordance with the plain meaning and purpose of K.S.A. 60-426.

3. Statutory Authority is Not Required for This Court to Recognize the Joint Client Doctrine and the Common Interest Doctrine

Although K.S.A. 60-426 incorporates the joint client doctrine and the common interest doctrine, it is important to note that codification is not required for this Court to

reaffirm their existence in Kansas. *Sawyer v. Southwest Airlines,* 2002 U.S. Dist. Lexis 111 (D. Kan. 2002); *Burton v. R.J. Reynolds Tobacco Co.,* 167 F.R.D. 134 (D. Kan. 1996). This is because the doctrines are not separate privileges, but instead, are exceptions to waiver of the attorney-client privilege. Thus, even if this Court concludes that K.S.A. 60-426 does not incorporate these doctrines, which is disputed, the conclusion is not fatal.

CONCLUSION

For the reasons stated above, the KADC respectfully requests that this Court reverse the District Court and grant the relief requested by the petitioners.

Respectfully submitted,

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The undersigned does hereby certify that on the 12th day of March, 2008, the original and 16 copies of the above and foregoing AMICUS CURIAE BRIEF OF THE

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