NO. 230PA10 TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

Langdon B. Raymond, Plaintiff-Appellee, v. North Carolina Police Benevolent Association, Inc., A North Carolina Corporation; Southern States Police Benevolent Association, Inc., A Florida Corporation; and John Midgette, Defendants-Appellants.	)	From Buncombe County No. 08 CVS 04456 From NC Court of Appeals No. COA09-797

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BRIEF OF AMICI CURIAE
NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS,
NORTH CAROLINA ADVOCATES FOR JUSTICE,
ACLU OF NORTH CAROLINA LEGAL FOUNDATION, AND
NORTH CAROLINA ASSOCIATION OF EDUCATORS

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IDENTITY AND INTERESTS OF AMICI CURIAE

1. North Carolina Association of Defense Attorneys

The North Carolina Association of Defense Attorneys (the "NCADA") was established in 1977 with 136 charter members. Today there are almost 1,000 attorneys who make up the membership of the NCADA. The NCADA is the only organization in North Carolina devoted exclusively to meeting the needs of the civil defense trial attorneys in the State. As such, the NCADA seeks to address issues germane to defense attorneys and the civil court system within North Carolina.

The NCADA services the needs of the State's defense bar by providing a voice for defense counsel through its publications, dealings with the judiciary, public positions on matters of interest, and participation in a variety of events connected with the bench, the bar and the business community.[1]

The Mission Statement of the NCADA provides that, "[t]he North Carolina Association of Defense Attorneys brings together civil trial attorneys to promote the administration of justice, the exchange of information, ideas, and litigation techniques, and to strengthen the practice, improve the skills, and enhance the knowledge of lawyers defending individuals and businesses in North Carolina."[2]

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[1] See the North Carolina Association of Defense Attorneys webpage, http://www.ncada.org/.

[2] See the Mission Statement of the North Carolina Association of Defense Attorneys at http://www.ncada.org/about.html.

The case at bar presents an issue of great importance to organizations such as the NCADA, whose members are frequently involved in cases where a tripartite attorney-client relationship presents itself and where the parties have a legitimate expectation that their confidential communications will be protected by the attorney-client privilege. Therefore, the NCADA and its membership have an interest in ensuring that the attorney-client privilege remains intact in the tripartite attorney-client relationship, ensuring that an individual's right to receive needed legal services and organizations' abilities to provide those services are not impaired.

2. **North Carolina Advocates for Justice**

The North Carolina Advocates for Justice ("NCAJ") is a professional association of more than 3,500 North Carolina lawyers. In furtherance of its mission, the NCAJ regularly participates in the legislative process, prepares resource materials, conducts seminars, and appears as amicus curiae before state and federal courts. NCAJ has a strong interest in protecting confidential communications between attorney and client, and in enabling individuals to obtain legal assistance from non-profit organizations.

3. American Civil Liberties Union of North Carolina Legal Foundation

The American Civil Liberties Union of North Carolina ("ACLU-NC") is a statewide, non-profit, nonpartisan organization with approximately 6,000 members. Since its inception, the purpose of the ACLU-NC and its Legal Foundation has been to defend the constitutional rights of all people through educational programs, public statements, opinion letters to public officials, and litigation.

4. North Carolina Association of Educators

The North Carolina Association of Educators ("NCAE") is a professional association of over 60,000 school employees, including administrators, teachers and support personnel, employed in every school system in North Carolina. As part of their dues, NCAE members receive legal services at no cost to them in certain circumstances.

NCAE contracts with a number of private attorneys from across the state to represent its members in a variety of employment disputes. NCAE selects these attorneys for their expertise in education and employment matters and pays their fees and expenses when representing its members on pre-approved matters. Many of these matters arise out of the state statutes governing the relationship between school employees and local school board (hereafter "education statutes"), such as N.C.G.S §115C-325 (System for employment of public school teachers) and

§115C-287.1 (Method of employment of principals, assistant principals, supervisors and directors).

NCAE has a strong interest in the uniform application of these education statutes to its members and works to amend these statutes when needed. These NCAE-selected attorneys make regular reports to NCAE about their cases and receive information from NCAE and its senior counsel about prior applications of these education statutes and suggestions about the handling of their cases. These communications create a tripartite attorney-client relationship arising out of a common interest. The Court of Appeals opinion in this case, that apparently requires the disclosure of such reports and other communications, would greatly impair this tripartite relationship by severely limiting the timely exchange of information between NCAE and its retained attorneys and, in general, create a chilling effect when applied to commonplace tripartite attorney-client relationships in which there is a legitimate arrangement for legal fees to be paid on behalf of a party.

STATEMENT OF FACTS

These amici curiae adopt the Statement of Facts in Defendants-Appellants' New Brief.

SUMMARY OF ARGUMENT

The Court of Appeals failed to recognize that a tripartite relationship existed between Attorney Lovins, Foxx and the SSBA. Such relationships engender a legitimate expectation that the flow of information between the parties will be confidential and protected by the attorney-client privilege. Unless the Court of Appeals' opinion is reversed, it will have a chilling effect on the ability of organizations to provide legal assistance, and will seriously impair individuals' access to legal services.

Because a tripartite relationship existed between the SSPBA, Foxx and Attorney Lovins, the court should have afforded the parties the protections of an attorney-client relationship. Lovins represented both the SSPBA and Foxx. The communications regarding attorney's fees, expert witness fees and costs are laced with Lovins' mental impressions and are therefore protected as confidential communications between Lovins and her clients.

ARGUMENT

I. AN ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN ATTORNEY LOVINS AND DEFENDANTS THAT PROTECTED DEFENDANTS' COMMUNICATIONS WITH LOVINS.

A. Tripartite Relationship

The SSPBA provides a "Grievance, Disciplinary and Other Services" benefit to its members, under which the SSPBA will pay for attorney's fees for its members when SSPBA Panel Approved Attorneys are utilized. Policy No. 03-24, Section One, provides in part:

> A. The services will be provided to Southern States P.B.A. members only in those cases arising out of that member's performance of or in pursuit of his/her official duties.
>
> B. The service shall consist of the payment by Southern States P.B.A. of staff services, attorney's fees, and directly related Court costs . . .

Section Two of Policy No. 03-24 provides that:

> C. The Legal Department shall endeavor to obtain periodic updates on cases in an effort to endure that proper representation is being provided to the member and that the fees, costs and expenditures are being incurred within the coverage limitations set forth by this policy.

Finally, Section 3, Legal Defense Benefit Panel of Attorneys and Authorized Fees, of Policy No. 03-24, states in Part D(3) that:

> The attorney shall file with the Director of Legal Services a detailed periodic status report of the case he/she is handling, together with an itemized statement of fees and costs. Costs will be paid pursuant to a

> schedule established by the Association President and/or the Director of Legal Services.

Policy No. 03-24 of the SSPBA creates a tripartite relationship among the SSPBA, the police officer seeking assistance and the selected attorney.[3]

The relationship in this case among Attorney Lovins, the SSPBA and Foxx is analogous to the tripartite relationship in insurance litigation among an attorney, an insurer and an insured. In *Nationwide Mutual Fire Insurance Company v. Bourlon*, 172 N.C. App. 595, 603, 617 S.E.2d 40, 46 (2005), (Timmons-Goodson, J.), aff'd per curiam, 360 N.C. 356, 625 S.E.2d 779 (2006), the Court of Appeals properly recognized that the attorney hired by an insurance company to defend a liability claim has two clients: the insurer and the insured. In a per curiam decision, this Court affirmed. 360 N.C. at 356, 625 S.E.2d at 779.

In situations such as this case, where associations or organizations provide their members with the benefit of legal assistance, under the holding in *Bourlon,* both the organization and its member should be treated as a client of the attorney and communications between the parties should be protected as confidential under the attorney-client privilege. Accordingly, the Court of Appeals erred in holding that no attorney-client privilege existed between Lovins and the SSPBA.

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[3] Policy 03-24, Legal Defense Benefit, Southern States Police Benevolent Association, Inc. The Policies of the Southern States Police Benevolent Association, Inc., have been adopted by the organization pursuant to its Constitution and By-Laws, amended in July 2004 and June 2000, respectively.

The North Carolina State Bar in numerous opinions has firmly established that a lawyer defending an insured at the request of an insurer represents both clients. 2003 Formal Ethics Opinion 12 provides that in a tripartite insurance litigation context both the insured and the insurance company are entitled to an attorney's full candid evaluation of all aspects of the claim, including but not limited to (1) the probability of an adverse liability verdict, (2) the range of potential verdicts, and (3) probable settlement amounts.

The legal services benefit provided by the SSPBA is a form of insurance, paid for by membership dues.[4] In this case, the SSPBA is analogous to the insurer, and Foxx is analogous to the insured. Pursuant to 2003 Formal Ethics Opinion 12, Attorney Lovins is required to provide the SSPBA a full and candid evaluation of Foxx's case. The State Bar could not reasonably opine that an attorney must provide assessments of cases including (1) the probability of an adverse liability verdict, (2) the range of potential verdicts, and (3) probable settlement amounts, unless this information was intended to be protected by attorney-client privilege.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*

Co. v. United States, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 591, 101 S. Ct. 677 (1981); *Bourlon*, at 603, 617 S.E.2d at 46. The SSPBA is a client of attorney Lovins, and application of the attorney-client privilege to their communications is necessary to promote open communication in the interest of justice. The Court of Appeals erred in failing to recognize that the communications between the SSPBA and Attorney Lovins were confidential.

Should the Court of Appeals' decision stand, it could be interpreted in the insurance litigation context to allow a plaintiff to request, through the discovery process, all documents or communications provided to an insurer during the course of preparation for litigation or litigation with an insured. This could include litigation reports, communications to the insurer, attorney's mental impressions regarding the strengths and weakness of the case, the potential defenses the insured may have, the attorney's impressions regarding the range of possible verdicts, the likelihood of settlement and the probability of a plaintiff's verdict. Opening this type of information to discovery would thwart communications between attorneys and clients, frustrating "the broader public interests in observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. at 389, 101 S. Ct. at 682. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or

[4] SSPBA members pay a $10.00 initiation fee and a $23.50 monthly fee.

advocacy depends upon the lawyer's being fully informed by the client. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id*.

Under the Court's current ruling, the SSPBA would be required to turn over all periodic updates and information provided pursuant to Section 3 of Policy No. 03-24 of the SSPBA.[5] Both Foxx and the SSPBA retained Attorney Lovins so that she could provide them with the very information sought to be obtained by Plaintiff in his Request for Production Number 4.[6] Neither party could have reasonably suspected when they retained Attorney Lovins that the court would require that they produce the documents, impressions and opinions that Attorney Lovins was hired to provide them in confidence. The Court of Appeals' holding was erroneous, as both Foxx and the SSPBA's expectations of confidentiality should have been protected by the attorney-client privilege.

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[5] Section 3 provides that, "The attorney shall file with the Director of Legal Services a detailed periodic status report of the case he/she is handling, together with an itemized statement of fees and costs. Costs will be paid pursuant to a schedule established by the Association President and/or the Director of Legal Services."

[6] Plaintiff's Request for Product Number 4, reads as follows: "4. Copies of all correspondence between Defendants and Shannon Lovins concerning Langdon Raymond and/or Timothy Foxx in the federal lawsuit referenced above including but not limited to any discussion of fees and costs of Timothy Foxx in the federal lawsuit against Langdon Raymond and others."

Under *Bourlon*, a tripartite attorney-client relationship exists when the attorney provides joint or dual representation. *Bourlon*, 172 N.C. App. at 603, 617 S.E.2d at 46. Even in the absence of a tripartite relationship, a valid attorney-client relationship can arise through the common interest or joint client doctrine. *Id*.

B. Common Interest/Joint Client Doctrine

Our North Carolina courts, as well as courts across the country, have held that the "common interest" or "joint client" doctrine applies to the tripartite relationship. However, the common interest or the joint client doctrine may be applicable even in the absence of such a relationship. Foxx and the SSPBA possessed a common interest arising out of the SSPBA's purpose of assisting its members with legal matters.[7] Foxx and the SSPBA employed Attorney Lovins in pursuit of a common interest. Foxx's interest is in seeking redress for his termination by the Town of Fletcher police department. The SSPBA shares the same interest, as the policies of the SSPBA promote the providing of its members with competent counsel in situations such as Foxx's and assisting with the payment for hired counsel. Both clients have an interest in receiving periodic updates on the status of the case and in receiving information which will

[7] Policy No. 03-24 of Southern States Police Benevolent Association, Inc., Grievance, Disciplinary and Other Services, was enacted "in order to provide Grievance and disciplinary services to members of the Southern States P.B.A."

undoubtedly contain the mental impressions of the attorney who is providing possible valuations of the plaintiff's case, probable outcomes, potential obstacles and other information generated in the analysis and pursuit of a claim and lawsuit.

The concept of a joint defense first arose in the context of criminal co-defendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense. The courts recognized an exception to the rule that disclosure to a third party of privileged information waives the attorney-client privilege. *In re: Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990). The Fourth Circuit defined the rule as follows:

> Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

Id. at 249.

Our courts have long held that "whenever the relation of counsel or attorney and client exists, all communications made to the counsel or attorney, on the faith of such relation, and in consequence of it are privileged." *Carey v. Carey*, 108 N.C. 267, 270, 12 S.E. 1038, 1038 (1891). However, where two or more persons employ the same attorney to act for them in some business transaction, their

communications to him are not ordinarily privileged *inter sese*. *Dobias v. White*, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954). In the instant case, it is clear that an attorney-client relationship exists between both the SSPBA and Attorney Lovins and between Foxx and Attorney Lovins. Despite the disclosure of information among the three parties involved in the tripartite relationship, there was no disclosure to any person or party not involved in the common endeavor pursued by Foxx and the SSPBA. Accordingly, contrary to the decision below, both parties retained the attorney-client privilege.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE PAYMENT OF ATTORNEY'S FEES AND EXPENSES IS NEVER CONFIDENTIAL INFORMATION PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE

"The public's interest in protecting the attorney-client privilege is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law." *In re: Investigation of the Death of Miller*, 357 N.C. 316, 328, 584 S.E.2d 772,782 (2003). This Court has set forth a five-part test to determine whether a communication is within the purview of the attorney-client privilege:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper

> purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Id. at 335, 584 S.E.2d at 786.

In this case, each of the five prongs has been met: (1) at the time any communications were made regarding the payment of attorney's fees, expert witness fees or court costs, both Foxx and SSPBA were clients of Attorney Lovins; (2) the communications were made in confidence and were intended to be confidential; (3) the payment of attorney's fees, expert witness fees and court costs are directly related to the legal pursuit for which the SSPBA and Foxx retained Attorney Lovins; (4) the communications were made in preparation for or during the course of litigation; and (5) none of the parties in the tripartite relationship has waived the privilege.

Citing cases from other jurisdictions, the Court of Appeals mistakenly concluded that attorney fee agreements and expenses are never confidential communications:

> More specifically, several circuit court[s] have held that the attorney-client privilege does not ***normally*** extend to the payment of attorney's fees and expenses. *In re Grand Jury Subpoena* (Under Seal), 774 F.2d 624, 628 (4th Cir. 1985) (the attorney-client privilege ***normally*** does not extend to the payment of attorney's fees and expenses . . . ") (citing *In re Grand Jury Proceedings (United States v. Jones)*, 517 F.2d 666, 670-71 (5th Cir. 1975) ("[T]he identity of a client is a matter not ***normally*** within the privilege . . . nor are matters involving the receipt of fees from a client ***usually*** privileged.") (citations omitted));

> *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) ("We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not ***generally*** privileged."); *United States v. Haddad*, 527 F.2d 537, 538 (6th Cir. 1975), cert. denied, 425 U.S. 974, 96 S. Ct. 2173, 48 L. Ed. 2d 797 (1976) ("In the absence of ***special circumstances*** the amount of money paid or owed to an attorney by his client is ***generally*** not within the attorney-client privilege." (citations omitted.)

Raymond v. North Carolina Police Benevolent Association, Inc., ___ S.E.2d at, ___2010 N.C. App. LEXIS 580 (2010) (emphasis added).

When deciding whether the payment of attorney's fees and expenses is privileged, the Court of Appeals should not have found that the payment of attorney's fees and expenses is never confidential information protected by the attorney-client privilege. The authority upon which the Court of Appeals relied is laden with qualifiers making it clear that the courts of other jurisdictions are not of the position that payment of attorneys fees and expenses is never confidential.

Furthermore, the authorities cited simply address the discovery of the fact that attorney's fees were paid. In this case, the Court of Appeals required the disclosure of much more detailed information about attorney's fees and costs, including specific and particular fee arrangements, documents reflecting fee arrangements, and copies of all correspondence between the SSPBA and Attorney Lovins.

Providing the requested information could disclose the mental impressions of Attorney Lovins. The production of a fee agreement to opposing counsel could

also divulge confidential strategic information. The fee agreement could set forth payment schedules based upon specific actions taken. Providing information regarding payment to expert witnesses could also disclose confidential information.

Section 3 of Policy 03-24 of the SSPBA provides as follows; "The attorney shall file with the Director of Legal Services a detailed periodic status report of the case he/she is handling, together with an itemized statement of fees and costs. Costs will be paid pursuant to a schedule established by the Association President and/or the Director of Legal Services." The ruling of the Court of Appeals arguably requires disclosure of this periodic status report. Undoubtedly this status report contains information that would not have been communicated if the attorney drafting the document thought the document would not be confidential.

Additionally, in North Carolina 98 Formal Ethics Opinion 10, the North Carolina State Bar opined that "[b]ills for legal services are confidential and can, therefore, only be revealed with the consent of the client or clients affected, but only after consultation with them." North Carolina State Bar, 98 Formal Ethics Opinion 10 (1998). Therefore, clearly, the North Carolina State Bar is of the opinion that information contained in the fee statements and case updates to be provided by Attorney Lovins to the SSPBA are confidential, and can only be disclosed with the consent of the client, which was not given in the instant case.

Under the five-part test set forth by this Court, fee agreements and statements of fees and costs are protected by attorney-client privilege. The Court of Appeals relied on case law from other jurisdictions addressing only whether the fact of payment or non-payment of attorneys' fees was privileged and therefore discoverable, not cases addressing the broader disclosures sought by Plaintiff here. Accordingly, the Court of Appeals erred in holding that the payment of attorney's fees and expenses is never confidential information protected by the attorney-client privilege.

III. THE COURT OF APPEALS DECISION DETERS NON-PROFIT ORGANIZATIONS FROM PROVIDING LEGAL SERVICES AND ENGAGING IN CONSTITUTIONALLY-PROTECTED ADVOCACY, AND IMPAIRS INDIVIDUALS' ACCESS TO JUSTICE.

Finally, the Court of Appeals decision should be reversed because it deters non-profit organizations, such as the ACLU-NC and NCAE, from providing legal services and engaging in constitutionally-protected advocacy, thereby impairing individual North Carolinians' access to justice. The decision below adversely impacts ACLU-NC, NCAE, and the Police Benefit Association defendants by ignoring United States Supreme Court decisions that provide constitutional protections to non-profit advocacy organizations whose efforts constitute "collective activity undertaken to obtain meaningful access to the courts." *United Transportation Union v. Michigan,* 401 U.S. 576, 585 (1971). Such activity is a

fundamental right" within "the protection of the First Amendment." *Id.*; *Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar,* 377 U.S. 1 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). That right specifically includes the right of the association to employ counsel to represent its members or to provide representation to those whose rights may be violated. Indeed, one of the leading cases, *In re Primus,* 436 U.S. 412, 425-27 (1978), bars on constitutional grounds the kind of champerty and maintenance claims that plaintiff Raymond seeks to assert in this case, and rejects the notion that the potential recovery of fees and costs removes the constitutional protection. *Id.*

The tripartite relationship between the advocacy organization, the attorney employed by the advocacy organization and the individual plaintiff is critical to carrying out the constitutionally protected "collective activity" of these organizations. The Court of Appeals decision -- requiring disclosure of the fee arrangement as well as the litigation strategy of the attorney -- chills and interferes with constitutionally-protected activity.

As applied to the ACLU-NC, its cooperating attorneys often serve in a tripartite relationship with the organization and its members who serve as plaintiffs in civil rights lawsuits. The Court of Appeals decision, if affirmed, would potentially open to discovery any communications among a cooperating attorney, ACLU-NCLF Legal Director Katherine Lewis Parker, and any member-plaintiffs.

NCAE's retained attorneys face the same risks, given that they participate in a tripartite relationship with the individual NCAE member and NCAE's Legal Services Director or senior counsel and communicate regularly about case strategies, legal theories and settlement options. The Court of Appeals decision would chill these tripartite communications, which have been essential to providing NCAE members with sound legal advice and representation.

It appears that the Court of Appeals did not recognize the constitutional mandates regarding advocacy organizations or consider the widespread chilling effect its opinion will likely have if opposing counsel may seek to discover protected communications between retained attorneys and non-profit member organizations such as the ACLU-NC, NCAE and the Police Benevolent Association defendants. Consequently, the Court of Appeals decision should be reversed on this basis as well.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants-Appellants' New Brief, the Court of Appeals opinion should be reversed.

Respectfully submitted, this the 11th day of October, 2010.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this **AMICI CURIAE BRIEF** in the above entitled action upon all parties to this cause by depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

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