



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**BRADFORD D. LUND, et al., v. HON. ROBERT D.
MYERS /MICHELLE A. LUND, et al.
CV-12-0349-PR**

PARTIES:

Petitioners: Michelle A. Lund, Diane Disney Miller, Kristen Lund Olson, and Karen Lund Page (collectively, “Miller”).

Respondents: Bradford D. Lund, William S. Lund and Sherry L. Lund (hereafter the group will be referred to as “Lund” except where necessary to refer to Bradford Lund (“Bradford”) individually.)

Intervenor: Jennings Strouss & Salmon, P.L.C.

FACTS:

The issue here involves a discovery dispute in long-running litigation between Miller and Lund about whether a guardian and conservator should be appointed to manage the substantial financial assets Bradford Lund owns. Miller asserts that Bradford does not have sufficient mental capacity to understand and oversee his own assets. Lund argues that he is sufficiently competent.

This case is currently being litigated in the trial court. The parties are still exchanging discovery. A dispute arose after Jennings, Strouss and Salmon (JS&S), a law firm that used to represent Bradford in other litigation, provided its case file for that earlier litigation to Miller’s lawyers in response to a subpoena duces tecum. Due to an error and misunderstanding by the JS&S attorney who provided the file, JS&S mistakenly included documents that are or may be confidential because of attorney-client privilege or work product privilege. When Lund’s current lawyer, Shumway, learned that the file had been sent to Miller’s counsel, Burch and Cracchiolo (“B&C”), Shumway immediately contacted B&C to explain that JS&S had produced privileged documents inadvertently, and to ask that the documents be returned.

Three weeks later, B&C filed a Rule 26.1 discovery statement and attached copies of all of the documents in the JS&S file, in that way sharing the documents with all parties to the litigation. Shumway considered this disclosure of the documents to be a violation of Rule 26.1(f)(2) of the Arizona Rules of Civil Procedure. Shumway promptly filed a Motion to Disqualify B&C from continued involvement in this litigation. Further motions followed, aimed at having the documents returned to JS&S.

B&C asked that the documents be filed under seal, and that the trial judge, Judge Myers,

review the documents *in camera* to determine whether any privilege applied. Judge Myers directed that the documents be filed with the court under seal (to be opened only by the court). Judge Myers will be the trier-of-fact in this litigation. When it appeared that Judge Myers might decide to review the documents *in camera*, Lund filed a petition for special action relief with the Court of Appeals to keep the documents confidential.

The Court of Appeals accepted jurisdiction of the special action, and issued a formal opinion granting relief. In the opinion, the Court of Appeals interpreted Rule 26.1 of the Arizona Rules of Civil Procedure and determined that the documents should not be subject to *in camera* review unless Miller could make some minimal showing that the documents were not privileged.

After the Court of Appeals issued its Opinion, Miller filed a Petition for Review, asking this Court to determine whether the Court of Appeals had construed the applicable rules of procedure correctly.

ISSUE:

Whether the Court of Appeals['] holding that the trial court must somehow determine, without viewing or examining the documents, whether allegedly privileged/protected documents are or are not entitled to protection from disclosure before an *in camera* review of those documents can occur to determine whether the documents are privileged/protected (*i.e.*, not protected from disclosure) is the standard that should be applied in Arizona.

DEFINITIONS:

“**Discovery**” is a process by which parties to a court case exchange information about facts, documents, or proposed testimony about the issues in the lawsuit. The Arizona Rules of Civil Procedure set out the rules for conducting discovery.

Rule 26.1(f)(2) of the Arizona Rules of Civil Procedure is entitled “Claims of Privilege or Protection of Trial Preparation Materials.” That rule provides:

If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. *After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved.* A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(Emphasis added by Court of Appeals when the court quoted the Rule in its Opinion at ¶ 17.)

“Attorney-client privilege” protects some documents as confidential, so that a party cannot be required to disclose those documents unless the court determines that the documents are not privileged. Generally, the privilege applies to confidential communications between an attorney and his client.

“In camera review” occurs when a judge reviews documents privately, in the judge’s office, without counsel for the parties being there.

“Trier-of-fact” means the judge or jury who will decide which facts are true. In this case, Judge Myers will be the trier-of-fact and will decide whether a guardian and conservator should be appointed.

“Subpoena duces tecum” is a formal written request that copies of specific documents be given to the party that sends the subpoena.

“Special action” is a type of court proceeding in which a party asks a higher court to step in before the trial court has reached a final judgment, to correct an error by the trial court that might seriously harm the party’s interests, particularly if the error cannot be adequately corrected on appeal later. In any special action, the higher court can decide whether to “accept jurisdiction” of the petition for special action relief, and to rule on the issue presented. If the appellate court accepts jurisdiction, the court will decide the issues and then tell the trial court what to do.

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