

SUPREME COURT OF SOUTH DAKOTA

Molly R. Nylen and Brendon W. Nylen v. Mary Ellen Nylen

2015 S.D. 98 · No. #27390 · Decided December 16, 2015

SUMMARY

The South Dakota Supreme Court reviewed whether communications between Mary Ellen Nylen and her attorney friend were protected by the attorney-client privilege. The court held that Mary Ellen could no longer reasonably believe she was the attorney's client after January 1, 2014, and that she waived privilege as to privileged documents shared with the attorney friend. The court affirmed the circuit court's discovery rulings.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Zinter, Justice; Gilbertson, Chief Justice; Severson, Justice; Wilbur, Justice; Kern, Justice
JURISDICTION	South Dakota
DECIDED	December 16, 2015
DOCKET	#27390
DISPOSITION	affirmed
PROCEDURAL POSTURE	Mary Ellen Nylen appealed an order permitting discovery of communications and documents that she claimed were protected by the attorney-client privilege.
STANDARD OF REVIEW	The Supreme Court reviewed the circuit court's factual findings for clear error, disturbing them only if they were against a clear preponderance of the evidence or unsupported by credible evidence.
PRECEDENTIAL VALUE	published
PARTIES	Mary Ellen Nylen v. Molly R. Nylen, Brendon W. Nylen

TOPICS

attorney client privilege privilege evidence family law procedure appellate procedure

PRACTICE AREAS

evidence attorney-client privilege family law appellate procedure

QUESTIONS PRESENTED

1. Whether Mary Ellen remained Schrunk's client, and therefore could assert attorney-client privilege, after January 1, 2014.
2. Whether Mary Ellen waived attorney-client privilege over documents shared with Schrunk.

HOLDINGS

1. Mary Ellen failed to prove that she was Schrunk's client after January 1, 2014, because she understood that Schrunk could not represent her and could no longer reasonably believe that she was consulting Schrunk with a view to obtaining professional legal services.
2. Mary Ellen waived attorney-client privilege over otherwise privileged documents when she voluntarily shared them with Schrunk, who was not her attorney or client representative.

KEY QUOTATIONS

“A “client” is a person . . . who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from [her].” (¶ 10)

“The attorney-client privilege is waived if the holder of the privilege “voluntarily discloses . . . any significant part of the privileged matter.”” (¶ 19)

“The burden of showing entitlement to [] the privilege rests with its claimant.” (¶ 14)

FACTUAL BACKGROUND

Mary Ellen Nylen had previously been represented by attorney Irene Schrunk and later maintained a friendship with her. In late 2013 and early 2014, amid an anticipated divorce and related family disputes, Mary Ellen communicated with Schrunk and exchanged documents with her. Mary Ellen gave conflicting accounts of whether she contacted Schrunk as a friend or to obtain legal advice, and she acknowledged that Schrunk told her on January 1, 2014, that Schrunk could not represent her. Some documents Mary Ellen shared with Schrunk were communications with other attorneys.

PROCEDURAL HISTORY

Molly and Brendon Nylen filed a declaratory action against Mary Ellen concerning personal property allegedly gifted to them. During discovery, they subpoenaed Mary Ellen's friend, attorney Irene Schrunk, for communications and documents exchanged with Mary Ellen. After an evidentiary hearing and in camera review, the circuit court found that Mary Ellen could no longer reasonably believe she was Schrunk's client after January 1, 2014, and that she waived privilege over otherwise privileged documents by sharing them with Schrunk. The South Dakota Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Voorhees Cattle Co., LLP v. Dakota Feeding Co., LLC, 2015 S.D. 68, ¶ 10, 868 N.W.2d 399, 405
- State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984)
- State v. Rickabaugh, 361 N.W.2d 623 (S.D. 1985)
- Parnes v. Parnes, 80 A.D.3d 948 (N.Y. App. Div. 2011)

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