

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA

Kayla Hominski, et al. v. Gusar, LLC, et al.

Hominski · No. 24-CV-21590-ELFENBEIN · Decided May 7, 2026

SUMMARY

The United States District Court for the Southern District of Florida addresses Wayfair LLC’s second motion to compel production of attorney-client communications in a products-liability action arising from injuries allegedly caused by a fire pit. The Court finds that Plaintiffs waived privilege as to attorney-client communications included in their September 23, 2025 ESI production because they failed to take reasonable preventive and remedial steps under Federal Rule of Evidence 502(b), but declines to impose a wholesale subject-matter waiver. The motion is granted in part and denied in part.

CASE DETAILS

COURT	United States District Court for the Southern District of Florida
WRITING FOR THE COURT	Marty Fulgueira Elfenbein
JURISDICTION	United States District Court for the Southern District of Florida
DECIDED	May 7, 2026
DOCKET	24-CV-21590-ELFENBEIN
DISPOSITION	other
PROCEDURAL POSTURE	Defendant Wayfair LLC moved to compel production of attorney-client communications, arguing that Plaintiffs waived privilege through inadvertent production under Federal Rule of Evidence 502(b) and that the crime-fraud exception applied. The court granted the motion in part as to communications included in Plaintiffs' September 23, 2025 ESI production and denied it in part as to otherwise withheld communications.
STANDARD OF REVIEW	The court applied the fact-specific totality-of-the-circumstances analysis under Federal Rule of Evidence 502(b) and required a prima facie showing, including a sufficient nexus between the alleged crime or fraud and the communications, to invoke the crime-fraud exception.
PRECEDENTIAL VALUE	unpublished district court order; nonprecedential
PARTIES	Kayla Hominski, Nicholas Hominski v. Wayfair LLC, Gusar, LLC

TOPICS

discovery dispute

attorney client privilege

privilege

civil procedure

products liability

PRACTICE AREAS

civil procedure

evidence

products liability

QUESTIONS PRESENTED

1. Whether Plaintiffs waived attorney-client privilege under Federal Rule of Evidence 502(b) by producing privileged communications, failing to promptly rectify the initial disclosure, reproducing the same communications after asserting a claw-back, and failing to investigate for additional privileged materials.
2. Whether the crime-fraud exception to the attorney-client privilege applied based on alleged witness tampering, subornation of perjury, or fraud by Plaintiffs' former counsel.
3. Whether the waiver extended to undisclosed communications on the same subject matter.

HOLDINGS

1. Plaintiffs waived attorney-client privilege as to the communications included in their September 23, 2025 ESI production because they failed to establish that they took reasonable steps to prevent disclosure and reasonable, prompt steps to rectify the disclosure.
2. The waiver was limited to communications actually included in Plaintiffs' September 23, 2025 ESI production and did not extend to all undisclosed communications concerning the same subject matter.
3. The crime-fraud exception did not apply to the attorney-client communications Plaintiffs otherwise withheld because Defendant failed to make the required prima facie showing that Plaintiffs were engaged in or planning criminal or fraudulent conduct and that the communications were in furtherance of that conduct.

KEY QUOTATIONS

“Rule 502(b) requires reasonableness, not perfection.” (Section III(A))

“But the crime-fraud exception requires more than concern, suspicion, or adversarial conjecture.” (Section III(B))

“Accordingly, Defendant’s Motion, ECF Nos. [189] and [231], is GRANTED IN PART and DENIED IN PART.” (Conclusion)

FACTUAL BACKGROUND

This products liability action arises from severe burns allegedly suffered by Kayla Hominski when a rectangular tabletop fire pit purchased through Wayfair's website malfunctioned. During discovery, Plaintiffs produced attorney-client communications between Hominski and former counsel, including communications located in folders specifically requesting communications with those attorneys. Defendant also identified a text message

and voice notes that it claimed suggested witness coaching or attempted subornation of perjury. The court found that Plaintiffs failed to take reasonable steps to prevent or rectify the production of the identified communications, but that Defendant lacked sufficient evidence to establish the crime-fraud exception as to communications otherwise withheld.

PROCEDURAL HISTORY

Plaintiffs produced ESI during discovery, including communications with former counsel. After Defendant identified attorney-client communications in the production, Plaintiffs later issued a claw-back demand, but then reproduced the same materials on a USB drive and did not independently search for additional privileged communications. Defendant moved to compel and later submitted supplemental briefing after identifying additional communications. Following briefing and a discovery hearing, the court ruled on waiver and the crime-fraud exception.

DISPOSITION

other

CASES CITED

- *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
- *United States v. Noriega*, 917 F.2d 1543, 1551 (11th Cir. 1990)
- *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1416–1417 (11th Cir. 1994), opinion modified on reh'g, 30 F.3d 1347 (11th Cir. 1994)
- *Thermoset Corp. v. Bldg. Materials Corp. of Am.*, No. 14-CV-60268, 2015 WL 1565310, at *7 (S.D. Fla. Apr. 8, 2015)
- *Penrod Bros., Inc. v. City of Miami Beach, Fla.*, No. 23-CV-23362, 2025 WL 1555991, at *2–3
- *Latele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, No. 12-CV-22539, 2014 WL 4449451, at *4 (S.D. Fla. Sept. 10, 2014)
- *Koch Foods of Alabama, LLC v. Gen. Elec. Capital Corp.*, 303 F. App'x 841, 846 (11th Cir. 2008)
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260–263 (D. Md. 2008)
- *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 698–700 (S.D. Fla. 2009)
- *In re Grand Jury Subpoena*, 2 F.4th 1339, 1345–1351 (11th Cir. 2021)
- *Gutter v. E.I. Dupont De Nemours*, 124 F. Supp. 2d 1291, 1305–1307 (S.D. Fla. 2000)
- *Drummond Co. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1335, 1337 (11th Cir. 2018)
- *United States v. Stein*, No. 21-CR-20321, 2023 WL 2585033, at *2–3 (S.D. Fla. Mar. 21, 2023)
- *White Cap, L.P. v. Heyden Enters., LLC*, No. 23-CV-14248, 2024 WL 5473666, at *7 (S.D. Fla. Oct. 25, 2024)
- *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984)
- *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 n.11 (5th Cir. 1982)
- *Carroll v. United States*, 267 U.S. 132, 161 (1925)

- In re Grand Jury Investigation, 842 F.2d 1223, 1226–1227 (11th Cir. 1987)
- United States v. Zolin, 491 U.S. 554, 572, 574–575 (1989)
- Tindall v. H & S Homes, LLC, 757 F. Supp. 2d 1339, 1358 (M.D. Ga. 2011)
- Diamond Resorts U.S. Collection Dev., LLC v. US Consumer Att'ys, P.A., 519 F. Supp. 3d 1184, 1222 (S.D. Fla. 2021)
- In re Grand Jury Proc., 417 F.3d 18, 23 (1st Cir. 2005)
- Chevron Corp. v. Salazar, 275 F.R.D. 437, 452–454 (S.D.N.Y. 2011)
- United States v. Rivera, 837 F. Supp. 565, 568–569 (S.D.N.Y. 1993)
- Duttie v. Bandler & Kass, 127 F.R.D. 46, 53–56 (S.D.N.Y. 1989)
- In re Sealed Case, 107 F.3d 46, 49–52 & n.2 (D.C. Cir. 1997)
- In re Impounded Case (Law Firm), 879 F.2d 1211, 1213–1215 (3d Cir. 1989)
- In re Grand Jury Proc. #5 Empanelled Jan. 28, 2004, 401 F.3d 247, 251 (4th Cir. 2005)
- Rubinstein v. Keshet Inter Vivos, No. 17-61019-CIV, 2019 U.S. Dist. LEXIS 240740, at 10 (S.D. Fla. Jan. 29, 2019)

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