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Sword and Shield: The Georgia Supreme Court Adopts Third-Party Waiver of Attorney-Client Privilege

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Sword and Shield: The Georgia Supreme Court Adopts Third-Party Waiver of Attorney-Client Privilege*

I. INTRODUCTION

The attorney-client privilege is generally held out as a sacred instrument (a shield) reserved for clients and used by attorneys for the benefit of those clients. Persons untrained in the law tend to have a basic understanding of what the attorney-client privilege is and can often explain in a rudimentary sense what it protects. What few non-lawyers realize, however, is that the privilege is not absolute, and is waivable under certain, limited, circumstances. Now, it seems that shield is losing its integrity in the realm of legal malpractice.

In January 2020, the Georgia Supreme Court ruled in *Hill, Kertscher & Wharton v. Moody*[1] that where a client sues a former firm for legal malpractice, the waiver of attorney-client privilege, also known as the "offensive use" doctrine, applies to third parties, unnamed firms, and other lawyers that represented the malpractice plaintiff in the underlying litigation or transaction, and not just the firm being sued.[2] At first glance *Hill* seems to be a sweeping ruling, applying to any and all lawyers or firms involved in a legal malpractice suit. In reality, *Hill* is a narrow decision that seriously implicates the Georgia Supreme Court's reaffirmation that attorney-client privilege may be waived by former clients that put prior representation at issue. The decision strengthens a powerful defensive mechanism in the defendant-attorney's arsenal when they become the target of malpractice litigation. At first glance readers may fall into a trap, assuming that *Hill* dramatically expands the third-party waiver of attorney-client privilege. However, a close reading

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[1] 308 Ga. 74, 839 S.E.2d 535 (2020).

[2] *Id.*

of *Hill* shows that the Georgia Supreme Court actually reaffirms and bolsters the third-party waiver as factually dependent, while upholding the purpose of the attorney-client privilege and protecting Georgia attorneys. The decision in *Hill* has flown under the radar, but should be viewed under a microscope, and reviewed by evidence and legal ethics scholars, not only in the state of Georgia, but across the United States.

II. FACTUAL BACKGROUND

While the facts of *Hill* are somewhat complex and contain several parties, it is important to focus on the plaintiff's relationship with the firms or individual lawyers that represented him in the matters that gave rise to the malpractice action. Plaintiff, Daryl Moody (Moody) and two businesses, Mast Nine, Inc. (Mast Nine), and UAS Investments, LLC (UAS) invested in a company named Leucadia Group, LLC (Leucadia Group), a California-based company owned by Robert Miller (Miller) and Sean Frisbee. Moody, Mast Nine, and UAS sought legal advice from the law firm of Hill, Kertscher & Wharton, LLP (HKW) about terminating Miller, the sitting president of Leucadia Group.[3]

HKW advised the parties to appoint Moody to Leucadia Group's Board of Directors; form a new company named Leucadia Group Investment Holdings, Inc.; issue shares to the new company; and, finally, terminate Miller. Moody followed the advice. HKW further recommended filing suit against Miller and Leucadia Group in Fulton County Superior Court. Miller responded by filing his own lawsuit in California against Moody.[4]

Despite specific requests from Moody, HKW failed to assert certain defenses, including a defense that the California court lacked personal jurisdiction over Moody. Further, HKW was disqualified from the Fulton County lawsuit after it failed to disclose or obtain written waivers of potential or actual conflicts of interest from the prior or ongoing representation of Leucadia Group and Miller. HKW withdrew from the California lawsuit. The California court ruled that the appointment of Moody to the Board, the issuance of shares to Leucadia Investment Holdings, Inc., and Miller's termination were all void.[5]

Moody, Mast Nine, and UAS then filed suit in Cobb County, Georgia State Court against HKW for legal malpractice and breach of fiduciary duty based on legal advice and services in the matter involving Leucadia Group, and the Fulton County and California lawsuits. HKW filed its Answer, counterclaimed for unpaid legal fees, and admitted many of the

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[3] *Id.* at 74, 839 S.E.2d at 536.

[4] *Id.* at 74–75, 839 S.E.2d at 536–37.

[5] *Id.* at 75, 839 S.E.2d at 537.

factual allegations in the Complaint. HKW asserted several defenses including that non-parties caused some or all of the damages, and that plaintiffs had separate counsel–Holland & Knight, LLP–who provided "confirmatory advice." HKW further alleged that Moody directed the firm to "follow the instructions" of Holland & Knight, LLP (Holland & Knight) over the course of the representation of Moody.[6]

During discovery, HKW served a request for production of documents on non-party Holland & Knight. The request included: (1) Files for any corporate work performed for plaintiffs regarding Leucadia Group, Miller, etc.; (2) Holland & Knight's litigation file for the Fulton County lawsuit; (3) Holland & Knight's litigation file for the California lawsuit; and (4) All correspondence related to that corporate work and the Fulton County and California lawsuits, including communications between plaintiffs and Holland & Knight.[7]

Holland & Knight produced many redacted documents, but withheld others based on specific objections including the attorney-client privilege and work-product protection. Moody as well as the other plaintiffs filed a motion for protective order on the same grounds. HKW argued in its response that filing of a complaint for legal malpractice based on HKW's legal advice was an implied waiver of the attorney-client privilege and work-product doctrine as to all attorneys and law firms involved in the underlying suit, including Holland & Knight.[8]

The trial court found that Holland & Knight as well as HKW represented Moody in connection with the legal malpractice complaint, and found that the plaintiffs waived attorney-client privilege and work-product protection as to Holland & Knight. The trial court granted Plaintiffs' request for a certificate of immediate review. The Georgia Court of Appeals granted an application for interlocutory appeal, and reversed the trial court's order denying Plaintiffs' motion for protective order. The court expressed doubt that the waiver extends as far as other attorneys who represented the client in the same underlying matter, and concluded there was no basis for finding implied waiver of attorney-client privilege between Holland & Night, and Moody.[9]

The Georgia Supreme Court decided the case as a matter of first impression, holding that even though a client chooses not to sue certain lawyers or firms that represented the client in an underlying matter, implied waiver of attorney-client privilege extends to those lawyers and firms as well as those that the former client chose to sue. The court held,

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[6] *Id.*.

[7] *Id.* at 75–76, 839 S.E.2d at 537.

[8] *Id.* at 76, 839 S.E.2d at 537–38.

[9] *Id.* at 77-78, 839 S.E.2d at 538.

"[W]hen a client sues his former attorney for legal malpractice, the implied waiver of attorney-client privilege extends to the client's communications with other attorneys who represented the client with respect to the same underlying transaction or litigation." [10] [11]

III. LEGAL BACKGROUND

A. Attorney-client privilege

The attorney-client privilege is codified in Georgia under O.C.G.A. § 24-5-501[12] which states: "(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including . . . (2) [c]ommunications between attorney and client . . . ."[13] The privilege is narrowly construed in Georgia due to the fact that it operates to exclude evidence and impede the truth-seeking process.[14] The purpose of the privilege is to:

> [E]ncourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[15]

The attorney-client privilege originated in evidence law. However, it is often confused as a product of legal ethics because of its relationship with confidentiality in the Georgia Supreme Court's Rules of Professional Conduct.[16] The rules state only that, "The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client."[17] Client confidentiality is broader, and encompasses the attorney-client privilege according to the Rules.[18]

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[10] The court vacated the court of appeals' judgment with regard to the work-product doctrine on other grounds, therefore, a discussion of the work-product doctrine is outside of the scope of this casenote.

[11] *Id.* at 74, 839 S.E.2d at 536.

[12] O.C.G.A. § 24-5-501 (2014).

[13] *Id.*

[14] St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 422, 746 S.E.2d 98, 103 (2013).

[15] 308 Ga. at 78–79, 839 S.E.2d at 539 (quoting *St. Simons Waterfront, LLC*, 293 Ga. at 422, 746 S.E.2d at 103.

[16] Ga. R. & Regs. St. Bar 1.6 cmt. 5 (2015).

[17] *Id.*

[18] *Id.*

Finally, the attorney-client privilege often arises in the context of gathering evidence, or "discovery."[19] During discovery, "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . ."[20]

B. Waiver

The attorney-client privilege is not absolute, and may be waived if there is a "voluntary relinquishment of a known right and may be established by express statements or implied by conduct."[21] Implied waiver is shown by "decisive, unequivocal conduct reasonably inferring the intent to waive."[22] In other words, under Georgia law, disclosure of privileged communication may waive the attorney-client privilege.[23] It is generally accepted that the attorney-client privilege belongs to the client, and not the attorney.[24] If a client does not wish to disclose certain privileged information from a previous suit, they must be careful not to impliedly waive privilege through third-party waiver often called offensive use doctrine, which recognizes that when a litigant places information protected by privilege at issue through an affirmative act for their own benefit, they waive the privilege.[25] Courts have recognized that allowing the litigant to claim privilege in such a situation would be manifestly unfair to the opposing party.[26]

Implied waiver is often seen in professional malpractice suits, specifically when a former client sues their attorney for breach of contract or legal malpractice.[27] In *Daughtry v. Cobb*,[28] an attorney sued a client for breach of contract. The client counterclaimed inducement by fraudulent representations of the attorney. The trial court allowed the attorney to take the stand and testify even though the testimony was about privileged communications between the attorney and the client.[29] The Georgia Supreme Court ruled that the attorney-client privilege was

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[19] O.C.G.A. § 9-11-26 (2020).

[20] *Id.* (emphasis added).

[21] Kennestone Hosp. v. Hopson, 273 Ga. 145, 148, 538 S.E.2d 742, 745 (2000).

[22] *Id.*

[23] Osborn v. State, 233 Ga. App. 257, 260, 5o4 S.E.2d 74, 77 (1998).

[24] *Id.*

[25] Christenbury v. Locke Lord Bissell & Liddell, LLP, 285 F.R.D. 675, 681 (N.D. Ga. 2012).

[26] *Id.* (quoting *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994)).

[27] *Christenbury*, 285 F.R.D. at 682.

[28] 189 Ga. 113, 5 S.E.2d 352 (1939).

[29] *Id.* at 114, 5 S.E.2d at 353.

waived "where the client, in an action against the attorney, charges negligence or malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule . . . ."[30]

C. The Trial Court And Its Reliance On Christenbury

In *Hill*, the trial court found that Moody and the other plaintiffs waived their attorney-client privilege concerning Holland & Knight by asserting the legal malpractice claim against HKW, because it was "undisputed that Holland & Knight together with HKW represented Moody in connection with the matters that are the subject of the legal malpractice complaint . . . ." [31] The trial court relied heavily on *Christenbury v. Locke Lord Bissell & Liddell, LLP*.[32]

In *Christenbury*, the plaintiff spoke with an attorney, Terry Lustig (Lustig), about obtaining a tax-favorable insurance and financial product, which would be bought with the recent proceeds from the sale of certain business assets. On Christenbury's behalf, Lustig obtained a tax opinion letter from the law firm, Locke Lord Bissell & Liddell, LLP (Locke Lord Bissell), stating that the transaction Lustig proposed qualified for federal income tax deduction and was not a tax shelter. Subsequent to the opinion letter, Christenbury purchased the recommended financial instrument from Fidelity. Thereafter, Christenbury received a letter from Locke Lord Bissell stating that they had learned some of the material facts regarding the "[p]olicy and the related reinsurance and guarantee structure do not appear as they were represented to us as stated in the Opinion." The letter further stated that Locke Lord Bissell may be required to withdraw the Opinion and that it should not be relied on.[33]

Upon receipt of the letter, Christenbury tried to terminate the Trust instrument he purchased from Fidelity and recover $2.5 million he had spent to purchase the Trust.[34] He brought suit against Locke Lord Bissell alleging: (1) breach of contract; (2) professional negligence; (3) breach of fiduciary duty; and (4) negligent misrepresentation.[35] During discovery, Locke Lord Bissell sought documents provided to Christenbury by Lustig

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[30] *Id.* at 118, 5 S.E.2d at 355.

[31] 308 Ga. at 76, 839 S.E.2d at 538.

[32] 285 F.R.D. 675 (N.D. Ga. 2012).

[33] *Id.* at 678.

[34] *Id.* at 678–79 (At the time the trial court decided Christenbury, Plaintiff had a pending lawsuit against Fidelity who he sued to recover the $2.5 million he had spent on the Trust. Plaintiff later sued Lustig in Texas as well).

[35] *Id.* at 679.

as well as another firm, Crozier & Associates, whom Christenbury retained subsequent to receiving the letter that rescinded the Opinion. Locke Lord Bissell specifically sought communications with Lustig relating to the decision to participate in the Trust transaction as well as post-transaction communications with Lustig and Crozier. Christenbury objected and Locke Lord Bissell moved to compel production of the documents.[36]

Holding that Christenbury waived attorney-client privilege based on the offensive use doctrine,[37] the court found that "Georgia courts have consistently affirmed that the attorney-client privilege may be impliedly waived, 'when a client charges negligence, malpractice or other professional misconduct in an action against the attorney.'"[38] In addressing whether or not offensive use doctrine applies to third-party attorneys, the court recognized that the question was of first impression, but accepted the Supreme Court of Washington's expansion of the implied waiver in malpractice suits to communications with third-party attorney's.[39] Citing three federal cases from other jurisdictions, the court found that "Plaintiffs placed their communications with Lustig at issue and waived privilege to at least a limited extent," and also found that "Plaintiffs can accuse more than one attorney of malpractice[,] [b]ut in doing so here they put at issue whether and to what extent each attorney's advice actually caused their loss and/or are responsible for a share of damages."[40] In *Hill*, the Georgia Court of Appeals did not rely on *Christenbury* and held otherwise.

D. The Georgia Court of Appeals

On interlocutory appeal, the Georgia Court of Appeals reversed the trial court's order denying Moody's motion for protective order.[41] Citing *Waldrip*, the court recognized that Plaintiffs waived attorney-client privilege between themselves and Defendants, but expressed doubt as to whether they did so with regard to other attorneys or law firms.[42] Further, the court pointed out, "the Supreme Court of Georgia has indicated implied waivers of the attorney/client privilege should be

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[36] *Id.* at 679–80.

[37] *Id.* at 684.

[38] *Id.* (citing *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000)).

[39] *Id.* at 682.

[40] *Id.* at 683–84.

[41] 308 Ga. at 77, 839 S.E.2d at 538.

[42] Moody v. Hill, Kertscher & Wharton, LLP, 346 Ga. App. 129, 130, 813 S.E.2d 790, 791 (2018).

narrowly drawn, limited to the specific claims of attorney malfeasance."[43] The court of appeals also distinguished *Christenbury* by pointing out that Christenbury also sued the third-party attorney in a different court.[44] The court's emphasis, however, was the fact that the trial court in *Christenbury* found that the plaintiff waived privilege with regard to the third-party for any "communications and materials generated by the non-party third-party attorney during the subject transaction."[45] Based on this analysis the court held that the implied waiver did not apply to post-transactions and materials, and considering Moody engaged Holland & Knight after the alleged malpractice, the implied waiver did not apply.[46]

E. Treatment In Other Jurisdictions

As a case of first impression in Georgia, the Georgia Supreme Court searched outside of the State to inform its ruling in *Hill*,[47] and understanding how other jurisdictions view the implied waiver of attorney-client privilege is helpful when determining why the court ruled a particular way. In *Pappas v. Holloway*,[48] the Washington Supreme Court held that former clients' malpractice suit against their former attorney was an implied waiver of attorney-client privilege as to all attorneys who represented the client in the underlying litigation.[49] The defendants Harold and Rosemarie Holloway (the Holloways) sold diseased cattle to a number of purchasers who subsequently sued. The Holloways hired several attorneys to defend them in the different suits including John Pappas (Pappas). Pappas eventually took over representation of the entire matter. Another attorney, James Thompson (Thompson), began a joint representation with Pappas. One month before trial, Pappas withdrew as the Holloways' attorney with court permission. The Holloways hired Douglas Shepherd (Shepherd) to assist Thompson at trial. The trial resulted in a judgment against the Holloways of approximately $2.9 million.[50] Afterward, Pappas sued the Holloways for his attorneys fees and the Holloways counterclaimed alleging Pappas had committed legal malpractice. Pappas brought third-party complaints against all of the attorneys who represented the Holloways in the underlying litigation. He subsequently filed a motion to compel the third-

[43] *Id.*

[44] *Id.* at 130, 813 S.E.2d at 791.

[45] *Id.*

[46] *Id.* at 130–31, 813 S.E.2d at 791–92.

[47] 308 Ga. at 79–80, 839 S.E.2d at 540.

[48] 114 Wash.2d 198, 787 P.2d 30 (1990).

[49] *Id.* at 212–13, 787 P.2d at 39.

[50] *Id.* at 199, 787 P.2d at 32.

parties to produce documents relating to the Holloways' insurance coverage among other things. The third-party defendants objected to the motion to compel, arguing that the requested documents were protected by attorney-client privilege.[51]

The Washington Supreme Court recognized the importance of the attorney-client privilege in encouraging free and open communication between an attorney and their client.[52] Further, noting that *Pappas* was a case of first impression in Washington, the court extended the waiver of attorney-client privilege to the third-parties, stating, "to allow the Holloways to block Pappas' request . . . would effectively deny him an adequate defense," and further recognized that the Holloway's counterclaim was what made malpractice an issue in the first place. [53]

Relying on *Pappas*, a federal district court, in *Rutgard v. Haynes*,[54] held that a plaintiff waived attorney-client privilege as to the files of an attorney who defended the plaintiff in a malicious prosecution action.[55] Richard Haynes (Haynes) sought to obtain the files of Gene E. Royce (Royce) relating to Royce's representation of Jeffrey Rutgard (Rutgard) in a malicious prosecution action. Rutgard argued that only some of the documents should be produced.[56]

The court held that just by filing suit for malpractice against one attorney and placing protected communication at issue, the privilege is waived as to *all* attorneys involved in the underlying litigation.[57] However, the court placed a limit on the waiver, holding that "a party does not place otherwise privileged information 'at issue' merely by seeking an award of attorney fees as damages."[58] The court mentioned that if Rutgard would have limited his claims to attorney's fees the waiver may not apply, but considering he sought other relief, the court held that the privilege was waived.[59]

Not all courts freely extend the offensive use doctrine to unnamed third parties. In *Coates v. Akerman, Senterfitt & Eidson, P.A.*, [60] Bobby and Deborah Coates (the Coates) along with three other entities sued Akerman, Senterfitt & Eidson, P.A. (Akerman) as well as Joseph Rugg

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[51] *Id.* at 198–202, 787 P.2d at 30–33.

[52] *Id.* at 203, 787 P.2d at 34.

[53] *Id.* at 208–09, 787 P.2d at 36–37.

[54] 185 F.R.D. 596 (S.D. CA. 1999).

[55] *Id.* at 602.

[56] *Id.* at 597.

[57] *Id.* at 597–98 (emphasis added).

[58] *Id.* at 599.

[59] *Id.*

[60] Coates v. Akerman, Senterfitt, & Eidson, P.A., 940 So.2d 504 (Fla. Dist. Ct. App. 2d. 2006).

(the attorneys) in connection with their representation regarding a tax savings plan and the establishment of a joint venture. The Coates retained Akerman in 1999 to provide legal services on an ongoing basis in various personal and business matters. [61] In 2001 the Coates were introduced to Temple Drummond (Drummond), another lawyer with Akerman to discuss business tax, tax, and estate planning issues. Drummond allegedly had expertise in those areas of law. Drummond introduced the Coates to Lex Byers (Byers) who proposed a tax savings plan that would "eliminate" the Coates' tax liability. Drummond and Byers also proposed a joint venture that involved offering the plan to medical doctors. The Coates invested in the plan based on the expertise of Drummond and Byers.[62] It is unclear exactly what led to the legal malpractice lawsuit but the Coates asserted various claims respect to legal advice concerning the tax savings plan and the joint venture.[63]

Other professionals represented the Coates in various capacities while they were considering the plan and the joint venture. During discovery, the lawyers being sued for malpractice sought production of documents relating to any legal advice that the Coates received from individuals or entities other than the lawyers concerning the plan or joint venture. The Coates produced some documents but asserted attorney-client privilege as to others. The lawyers filed a motion to compel production of the disputed documents. The lawyers argued that the Coates "put at issue the advice . . .received from any other professionals with respect to the [p]lan or the . . . [j]oint venture."[64]

The District Court of Appeal for the Second District of Florida held that waiver of the attorney-client privilege is not favored in Florida.[65] Florida refers to a substantially similar version of the offensive use doctrine it calls "at issue" doctrine.[66] In Florida, attorney-client privilege is not waived simply by bringing or defending a lawsuit, but when a party raises a claim that "will necessarily require proof by way of a privileged communication," in other words, if proof of the claim would require evidence of the privileged information, the privilege is waived.[67] The court ruled that for the waiver to apply, the Coates would have to present evidence of the privileged communications at trial to prove their claim.[68]

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[61] *Id.* at 506.

[62] *Id.*

[63] *Id.* at 504–07.

[64] *Id.* at 507.

[65] *Id.* at 508.

[66] *Id.*

[67] *Id.*

[68] *Id.*

Recognizing that the Coates had not placed the privileged communications at issue, their communications with other professionals about the plan and joint venture, the privilege was not waived.[69]

While *Coates* stands for the proposition that other jurisdictions may not have an expansive view of waiver of attorney-client privilege as to third-parties, Georgia law makes it clear that rather than disfavoring waiver of attorney-client privilege, the courts confine the privilege to its "narrowest possible limits."[70]

IV. COURT'S RATIONALE

In *Hill*, the Georgia Supreme Court mentioned that it was deciding an issue of first impression in Georgia; more specifically, whether or not the implied waiver that applies to legal malpractice described above applies to other attorneys who represented the client-plaintiff in the underlying matter that the client chose not to sue.[71] The Court took into consideration the rationale of both the trial court and the Georgia Court of Appeals to inform its decision. [72]

In short, the court began its analysis by citing the relevant section of the Georgia Code and recognizing that it:

> [A]uthorizes parties to civil lawsuits to 'obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.'[73]

The court followed by determining whether the scope of the discovery requested by the parties was appropriate and recognizing that Holland & Knight did not dispute that the discovery requested by HKW was relevant; nor did Holland & Knight express they had no such documents.[74] The court describes the attorney-client privilege as "the oldest of the common law privileges for confidential communications."[75] It recognized that the privilege exists to encourage "full and frank" communications and to promote public interest in law and the administration of justice, while also recognizing that sound legal advice

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[69] *Id.*

[70] 285 F.R.D. at 683.

[71] 308 Ga. at 74, 839 S.E.2d at 536.

[72] *Id.* at 76–77, 839 S.E.2d at 538.

[73] *Id.* at 78, 839 S.E.2d at 538.

[74] *Id.* at 78, 839 S.E.2d at 538–39.

[75] *Id.* at 78, 839 S.E.2d at 539 (citing *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013)).

or advocacy serves the public and that advice or advocacy depends "on the lawyer's being fully informed by the client."[76]

The court further held that the application of the attorney-client privilege is "narrowly construed" in Georgia based on its nature as a rule of evidence that "impede[s] the search for the truth."[77] Citing *Daughtry*, the court expressed that "a similar rationale *requires* recognition that the implied waiver of the attorney-client privilege extends to other attorneys who represented the plaintiff-client in the same underlying matter."[78] Therefore, by suing HKW, Moody put causation, reliance, and damages into question, which all "may have been affected by other attorneys who represented Plaintiffs in the same matters . . . ."[79] Citing *Pappas*, the Court reasoned that clients should not be allowed to file a claim against a former attorney "and at the same time conceal from him communications which have a direct bearing on this issue simply because the attorney-client privilege protects them. To do so would in effect enable them to use as a sword the protection which the Legislature awarded them as a shield."[80] Noting that the findings made by the trial court were entitled to substantial deference by the court of appeals, the Georgia Supreme Court held the court of appeals erred in rejecting them.[81] Ultimately the court concluded that the "Court of Appeals should have affirmed the trial court's ruling that Plaintiffs were not entitled to a protective order based on attorney-client privilege," and reversed and remanded with regard to the implied waiver of attorney-client privilege.[82]

V. IMPLICATIONS

Some jurisdictions recognize an expansive third-party waiver. The sword and shield analogy seemed to be the rationale that the Georgia Supreme Court most heavily relied on when making its final determination, essentially expressing to future malpractice plaintiffs that they may not have their cake and eat it too. More than likely, the decision from *Hill* will have a greater effect on malpractice claims involving complex litigation and large commercial transactions as these run a greater risk of involving more than one lawyer or firm. However, *Hill* does have implications in future malpractice litigation in general. It is easy to fall into a trap and read *Hill* as a broad, sweeping decision that

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[76] *Id.* at 78–79, 839 S.E.2d at 539.

[77] *Id.*

[78] *Id.* at 79, 839 S.E.2d at 539 (emphasis added).

[79] *Id.* at 79, 839 S.E.2d at 539–40.

[80] *Id.* at 79, 839 S.E.2d at 540.

[81] *Id.*

[82] *Id.*

weakens attorney-client privilege, taking the "shield" out of the plaintiff's hands if it were. In actuality *Hill* is a rather narrow ruling that clarifies long-recognized law in Georgia. A party may not sue their former attorney and keep that attorney from discovering relevant, once-privileged information. When read closely *Hill* creates a factually dependent application of third-party waiver.

The decision may also lead to paradoxical implications in future Georgia legal malpractice litigation. Meaning the decision could open the floodgates of litigation while also chilling litigation. It could encourage more litigation in the sense that parties will decide to join all lawyers and firms that play even a minor role in their underlying transaction or litigation when they realize that any and all privileged information between themselves and an attorney that represented them in the underlying litigation is fair game for the defendant-attorney if the client sues for malpractice. Therefore, the malpractice plaintiff might as well see how many defendants they can join in a malpractice lawsuit. Alternatively, *Hill* could chill legal malpractice litigation. Sophisticated, commercial clients, realizing that potentially sensitive information might be discoverable under *Hill*, may think twice before initiating a malpractice suit.

Hill is really an example of the Georgia Supreme Court protecting its attorneys by removing an unfair obstacle from the path of lawyers attempting to defend themselves. Malpractice claims can ruin an attorney's career. Losing a malpractice suit may subject an attorney to a financially ruinous judgment, could lead to punishment for violating rules of professional conduct, and destroy an attorney's most important asset, their reputation. The court in *Hill* is protecting lawyers in Georgia not by weakening the attorney-client privilege, but rather expanding and strengthening attorneys' ability to defend themselves. The third-party waiver turns on the facts of an underlying case. The waiver only applies to privileged information between a client and any attorney that *represented* them in the same underlying matter. Stepping back and taking a wide-angle view of underlying litigation helps make sense of the ruling. For example, in *Hill*, Holland & Knight, while not at the helm of the underlying litigation did in fact represent Moody during the litigation, and served in an advisory role throughout. It only seems fair that since Moody sued HKW for malpractice, HKW be afforded an opportunity to discover information that might show that Holland & Knight was at least somewhat liable for Moody's alleged damages.

Hill should serve as a cautionary tale to readers, all attorneys in general, and malpractice plaintiffs in the future. The attorney-client privilege is and will likely always be reserved for the client. It is construed narrowly in Georgia, but can be a powerful shield so long as

the privilege is not abused. However, when a client makes the decision to sue a former attorney or law firm for malpractice, they waive the privilege, and may not also use the privilege as a sword to prevent the defendant-attorney from obtaining discoverable information. After *Hill*, the client not only waives privilege as to the firm they sue, but to any firm or attorney that represented them in the underlying litigation.

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