

STATE OF MICHIGAN
COURT OF APPEALS

SHARON V. FRALEY and RONALD LEE
FRALEY,

UNPUBLISHED
September 14, 2001

Plaintiffs-Appellants,

v

HARRY LAVELLE, JACQUELINE LAVELLE
and ANTHONY GREGG LAVELLE,

No. 222575
Genesee Circuit Court
LC No. 95-034306-NI

Defendants-Appellees.

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order granting defendants' motion for summary disposition. Plaintiffs specifically challenge the trial court order denying their motion to compel testimony regarding the substance of a conversation between defense counsel and defendant Jacqueline Lavelle. We affirm.

Plaintiffs sought to recover damages following a 1992 automobile accident between plaintiff Sharon Fraley and defendant Anthony Lavelle. The trial court granted defendants' motion for summary disposition, concluding that the summons expired before defendants were properly served. However, we remanded for the trial court to determine "whether defendants had notice of plaintiffs' claims prior to [the] expiration of plaintiffs' original summons." *Fraley v Lavelle*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 1998 (Docket No. 195415). We specifically opined as follows:

If the trial court finds that defendants, by May 8, 1995 had notice of plaintiffs' complaint as a result of plaintiffs' improper substitute[d] service on American States, then the court should permit plaintiffs to proceed with their case. However, in the event the evidence shows that defendants lacked such notice, then the court may properly dismiss plaintiffs' complaint. [*Id.* at 5.]

On remand, defendants Jacqueline Lavelle and Anthony Lavelle testified that they were unable to recall when they first received actual notice that the complaint was filed. This led to a disclosure of defense counsel's billing records. The billing records suggested that defense counsel telephoned defendant Jacqueline Lavelle on May 1, 1995; in fact, her actual notice of the lawsuit on that date was conceded. However, because there was no indication that defense

counsel communicated with defendant Anthony Lavelle, plaintiffs moved to compel defendant Jacqueline Lavelle, and perhaps even defense counsel, to testify regarding the substance of their May 1, 1995, conversation. Specifically, plaintiffs wanted to know whether defense counsel instructed defendant Jacqueline Lavelle to notify defendant Anthony Lavelle about the filing of the complaint. Defendants opposed the discovery request, contending that the substance of the conversations was privileged, and that, regardless of the substance of the conversation, defendant Jacqueline Lavelle already testified that she did not contact defendant Anthony Lavelle before May 8, 1995.

The trial court noted that the pertinent question was not whether defense counsel instructed defendant Jacqueline Lavelle to notify defendant Anthony Lavelle, but whether such a notification did, in fact, occur. Thus, the trial court denied plaintiffs' motion to compel disclosure of the substance of the conversation. Nevertheless, the trial court allowed plaintiffs to send additional interrogatories to determine whether defendant Jacqueline Lavelle "did anything to notify" defendant Anthony Lavelle about the filing of the complaint. However, the record contains no evidence that plaintiffs sent additional interrogatories, and the case was ultimately dismissed.

On appeal, plaintiffs contend that the trial court erred by denying their motion to compel, contending that the substance of the May 1, 1995, conversation was not privileged as a matter of law. Generally, a trial court's decision on whether the attorney-client privilege may be properly asserted is a question of law reviewed de novo. *Koster v June's Trucking*, 242 Mich App 162, 166; 625 NW2d 82 (2000). However, in the instant matter, the trial court ruling was not based on privilege; rather, the trial court essentially opined that the substance of the May 1, 1995, conversation was irrelevant. A trial court's decision to either grant or deny discovery is reviewed for an abuse of discretion. *Id.*

The record indicates that the pertinent question was whether defendant Anthony Lavelle had actual notice of the filing of the complaint before May 8, 1995. Indeed, we remanded for such a determination. There is no evidence suggesting that defendant Jacqueline Lavelle said or did anything that would have provided defendant Anthony Lavelle with actual notice of the filing of the complaint before May 8, 1995. Thus, even if defense counsel instructed Jacqueline Lavelle to notify defendant Anthony Lavelle, there is no evidence to suggest that she complied with the purported instruction. Therefore, without even reaching the question of privilege, we are not persuaded that the trial court abused its discretion by denying further discovery regarding the substance of the May 1, 1995, conversation.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot