NO. 5-09-0460

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LESLIE BATES, Administrator of the Estate of Brett McDaniel, Plaintiff-Appellee, v. MERCY REGIONAL EMERGENCY MEDICAL SYSTEM, L.L.C., a Kentucky Limited Liability Company, Defendant-Appellant, and JAMES RATTA, Defendant.	)	Appeal from the Circuit Court of Pope County. No. 08-L-3 Honorable Joseph M. Leberman, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

RULE 23 ORDER

Held: Where the defendant employer failed to produce, during discovery, employees' statements regarding an accident with the plaintiff's decedent, the circuit court's ruling that the statements are not protected by the attorney-client privilege and the subsequent contempt order against the defendant for failing to produce the statements are affirmed.

The defendant, Mercy Regional Emergency Medical System, L.L.C. (Mercy), appeals the decision of the circuit court of Pope County ruling that written statements made by Mercy employees James Ratta (Ratta) and Kimberly Hughes (Hughes) are not protected from discovery by the attorney-client privilege. The defendant also appeals the contempt order entered upon the defendant's refusal to produce Hughes' and Ratta's statements. On appeal,

the defendant contends that the statements should be protected from discovery by the attorney-client privilege and that, accordingly, the contempt order is invalid. For the reasons that follow, we affirm.

On October 8, 2007, Brett McDaniel, the plaintiff's minor decedent, was on his bicycle, and there was a collision with an ambulance owned by defendant Mercy Regional Emergency Medical System. The ambulance was driven by James Ratta and was also occupied by Kimberly Hughes, both of whom were Mercy employees. After the collision, Ratta and Hughes provided medical attention to McDaniel and transported him to the hospital. McDaniel died as a result of his injuries from the collision.

After transporting the decedent to the hospital, Ratta and Hughes gave written statements to the Illinois State Police. Hughes and Ratta also notified their superiors at Mercy of the accident. Dr. Irvin Smith, the medical director of Mercy Regional Emergency Medical System, spoke with Mercy's corporate counsel, Ted Hutchins, about the accident. Hutchins advised Smith that the employees should provide Mercy with written statements that evening. Dr. Smith communicated this advice to Jamey Locke, the executive director of Mercy Regional Emergency Medical System. Locke also spoke with corporate counsel Hutchins, who offered the same advice.

Upon their return to Mercy's headquarters, Hughes and Ratta prepared written statements about the accident. These statements were given to their supervisor, Jeremy Jeffrey, and were placed in an "Illinois incident file" in his office. The only people who had access to this file were Locke, Jeffrey, and Doyott White, the assistant director of Mercy. The statements were never requested by, or provided to, attorney Hutchins. This file remained in Jeffrey's office until November 27, 2007.

On November 27, 2007, Mercy representatives met with insurance defense counsel Van F. Sims and turned over Ratta's and Hughes' statements to him. Pursuant to company

procedure, electronic copies of the documents were stored in Mercy's computer system when the documents were transmitted to Sims. The hard copies of Hughes' and Ratta's statements were mistakenly refiled in Hughes' personnel file instead of the "Illinois incident file" in Jeffrey's office. Hughes' personnel file was kept in Mercy's front office, and according to the defendant, only Locke and White had access to it. The filing mistake was discovered in the summer of 2009 when the defendant was responding to the plaintiff's discovery requests, at which time the statements were returned to the "Illinois incident file" in Jeffrey's office.

The procedural history of this case is as follows. On October 7, 2008, the decedent's estate filed suit against Mercy and Ratta. The plaintiff served interrogatories and requests for production on the defendant asking for, among other things, statements made by any person at any time regarding the decedent's injuries or the manner in which the accident had occurred. The defendant responded that Ratta and Hughes had prepared typed statements on the night of the accident that were given to their supervisor. The defendant further asserted that the statements had been prepared at the direction of Mercy's corporate counsel in anticipation of litigation and were therefore privileged. The defendant did produce, however, Ratta's and Hughes' statements to the Illinois State Police, as well as previous incident reports completed by Ratta.

The plaintiff then filed a motion to compel the defendant to produce, among other things, Ratta's and Hughes' statements. The defendant responded that the statements had been prepared at the direction of counsel and had been created in anticipation of litigation and that they were protected by the attorney-client privilege. In an affidavit attached to the defendant's response to the motion to compel, Ratta stated, "I understood the report would be used for my defense and that of Mercy Regional if we were sued as a result of the accident." The circuit court heard argument on the motion to compel on July 9, 2009.

The court granted the motion to compel on July 9, 2009, and ordered the defendant

to produce the statements within 30 days. The court found that the statements were not given to an attorney or an attorney's agent, that they were not given in a confidential manner with the expectation of privacy, that they were taken as "incident reports" in the normal course of business, and that there is no indication that Mercy's corporate counsel reviewed the statements or that the statements were anything other than "incident reports." Mercy informed the court that it would respectfully not comply with the order compelling it to produce the statements. On August 10, 2009, the circuit court found Mercy in contempt of court and ordered it to pay a penalty of $200 and the plaintiff's reasonable attorney fees. On August 26, 2009, Mercy filed its notice of appeal from the contempt order.

The defendant's argument on appeal is straightforward: whether the attorney-client privilege protects Ratta's and Hughes' statements and, once that is determined, whether the contempt order was properly entered.

We begin our analysis by determining the appropriate standard of review. "Our review of the contempt finding necessarily encompasses a review of the propriety of the underlying order upon which the contempt finding is based." *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 785 (2009). Generally, the standard of review for contempt orders is abuse of discretion. *Illinois Emcasco Insurance Co.*, 393 Ill. App. 3d at 785. This court applies a *de novo* standard in deciding the applicability of the attorney-client privilege. *Illinois Emcasco Insurance Co.*, 393 Ill. App. 3d at 785; *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 463 (2010). We will first examine whether the attorney-client privilege applies, and then we will turn to the propriety of the contempt order.

Supreme Court Rule 201(b)(2) provides, in part, "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery

procedure." Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002). The attorney-client privilege exists for the purpose of encouraging and promoting full and frank communication between a client and his attorney. *In re Estate of Wright*, 377 Ill. App. 3d 800, 806 (2007). The burden of showing the applicability of the attorney-client privilege rests on the party who claims its exception. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118-19 (1982). The claimant must meet threshold requirements in order to avail itself of the privilege: (1) the statement originated in confidence that it would not be disclosed, (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and (3) it remained confidential. *Consolidation Coal Co.*, 89 Ill. 2d at 119. Because Illinois has a strong policy of encouraging disclosure, the attorney-client privilege is construed within its narrowest possible limits. *Illinois Emcasco Insurance Co.*, 393 Ill. App. 3d at 786.

In order for the attorney-client privilege to protect a communication, it must have originated in confidence. *Consolidation Coal Co.*, 89 Ill. 2d at 119. We find that Ratta's and Hughes' statements did not originate in the confidence that they would not be disclosed. Ratta and Hughes were told by Locke and Jeffrey to prepare a report. They also knew that Hutchins had directed them to prepare statements. Thus, at a minimum, Ratta and Hughes knew that individuals at Mercy in addition to counsel would read their statements. Neither Ratta nor Hughes stated that they knew the report was confidential, but Ratta did state that he believed that the report would be used for his and Mercy's defense if they were sued as a result of the accident. Ratta and Hughes never completed "incident reports" pursuant to Mercy's standard business practice. Thus, the statements at issue were needed as documentation for both Mercy and counsel. Because numerous individuals told Ratta and Hughes to prepare statements, because Ratta and Hughes had reason to know that their statements would be used by both Mercy and counsel, and because Mercy did not maintain distinct records of the accident, we cannot find that the statements originated in the

confidence that they would not be disclosed.

The statements were also not maintained in confidence. Upon creation, Ratta's and Hughes' statements were given to their shift supervisor, Jeremy Jeffrey. The statements were stored in a file in Jeffrey's office labeled "Illinois incident file." Three people–Jeffrey, White, and Locke–had access to the statements. Additionally, an electronic copy of each statement was stored on Mercy's computer system. It is not clear from the record how many people had access to the electronic files. Further, after an electronic copy of the statements had been created, the hard copies of Hughes' and Ratta's statements were filed in Hughes' personnel file instead of Jeffrey's office. Hughes' personnel file was stored in Mercy's front office. At any given time, therefore, numerous individuals had access to Ratta's and Hughes' statements. In light of these factors, we cannot find that the statements were maintained in confidence.

The defendant asserts that Jeffrey, if not other employees of Mercy, was acting as an agent of the attorney in accepting and maintaining Ratta's and Hughes' statements. This assertion is incorrect because employees of Mercy are clearly not agents or independent contractors of an attorney. *Cf. People v. Ryan*, 30 Ill. 2d 456 (1964) (statements made to an insurer's agent are protected); *Lower v. Rucker*, 217 Ill. App. 3d 1 (1991) (statements to an insurer's independent contractor are protected). Further, communications between employees of the same company are not protected by the attorney-client privilege. *Sakosko v. Memorial Hospital*, 167 Ill. App. 3d 842 (1988). Any attempts to recategorize the statements as attorney-client communications once they were transmitted to attorney Sims are also futile. The Second District noted that turning otherwise unprivileged notes over to an attorney months after they were created does not "change the nature of the notes." *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 229 (2006).

In the instant case, an attorney was consulted prior to the creation of the statements,

but the statements were never communicated to him. While we do not know the content of Ratta's and Hughes' statements, we do know that the statements were made immediately after an accident and were provided directly to their employer and not an attorney or an agent of the attorney. While the documents were later provided to an attorney, this does not change the status of otherwise nonprivileged statements. *Cangelosi*, 366 Ill. App. 3d at 229. Further, public policy strongly favors disclosure, and we note that the privilege is a narrow exception to the general duty to disclose. *Illinois Emcasco Insurance Co.*, 393 Ill. App. 3d at 786. "If this court would allow documents merely labeled as 'special reports' to fall under the umbrella of documents prepared in anticipation of litigation, it would potentially 'insulate so much material from the truth-seeking process' that justice would no longer be served." *Rounds v. Jackson Park Hospital & Medical Center*, 319 Ill. App. 3d 280, 288 (2001) (quoting *Consolidation Coal Co.*, 89 Ill. 2d at 118).

In light of the foregoing, we find that Ratta's and Hughes' statements did not originate in the confidence that they would not be disclosed, nor did they remain confidential once they were created. Thus, the requirements of the attorney-client privilege were not met. Because the circuit court did not err in ordering Mercy to produce the nonprivileged statements, we find that the court's contempt order was not an abuse of discretion. Accordingly, the order of the circuit court of Pope County is hereby affirmed.

Affirmed.