2019 IL App (5th) 180215-U

NO. 5-18-0215

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EUGENE HUEBNER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 15-L-68
	)	
FAMILY VIDEO MOVIE CLUB, INC.,	)	Honorable
	)	Christopher T. Kolker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order requiring the defendant, Family Video, to produce certain documents in discovery is affirmed in part where Family Video has failed to establish that its human resources representative was a member of its control group. Thus, the emails distributed to the human resources representative were not protected by any privilege. In addition, the court's order is reversed in part where certain email communications were protected by the work product doctrine as they contained core work product.

¶ 2 The plaintiff, Eugene Huebner, brought an action in the circuit court of St. Clair County against the defendant, Family Video Movie Club, Inc. (Family Video), alleging negligence and premises liability arising out of a slip and fall incident in the parking lot of the Family Video store in Waterloo, Illinois. At the request of Family Video, the

circuit court held Family Video in civil contempt for failing to comply with a discovery order, which required it to produce email communications between Family Video's attorney, Family Video's employees, and private investigators that were retained to assist in Family Video's defense. The court also assessed a civil penalty of $1 so that Family Video could appeal the trial court's decision regarding the production of the relevant discovery. Family Video appeals the contempt order and the underlying discovery order, contending that the circuit court erred in requiring it to produce discovery that was protected by attorney-client privilege and the attorney work product doctrine. For the reasons that follow, we vacate the contempt order and monetary sanction, and we affirm in part and reverse in part the underlying discovery order.

¶ 3 Initially, we have ordered taken with the case Family Video's motion to strike documents contained in Huebner's appendix to his brief because they were not filed with the trial court, and, as such, are not part of the record on appeal. The documents at issue include the following: (1) Huebner's April 10, 2015, interrogatories to Family Video; (2) Family Video's September 2, 2015, answers to the interrogatories; (3) a letter dated October 16, 2015, from Huebner's counsel, Matthew Marlen, to Family Video's counsel, Brandy Johnson at Feirich/Mager/Green/Ryan (FMGR), pursuant to Illinois Supreme Court Rule 201(k) (eff. July 30, 2014),[1] which addressed the objections that Family Video had made to certain interrogatories; (4) a letter dated November 23, 2015, from Marlen to FMGR, enclosing Huebner's request for production of documents; (5) Family

[1]Supreme Court Rule 201(k) instructs the parties to make reasonable attempts to resolve discovery differences before making a motion with respect to discovery in the trial court. Ill. S. Ct. R. 201(k) (eff. July 30, 2014).

Video's January 28, 2016, responses to the request for production of documents; and (6) a letter dated February 4, 2016, from Marlen to FMGR pursuant to Rule 201(k), which addressed objections made by FMGR to certain requests to produce.

¶ 4 In response, Huebner admits that the documents are not part of the record on appeal but contends that this court has broad discretion to permit the record to be amended with matters that should have been included or that will help the court understand the issues before it. Huebner also notes that the two Rule 201(k) letters were referenced as exhibits in his motion to strike objections and compel complete answers to interrogatories and request for production of documents filed on February 19, 2016, which was part of the record on appeal, but they were inadvertently not attached to the motion. Thus, Huebner requests that we supplement the record with the identified documents.

¶ 5 Illinois Supreme Court Rule 366(a)(3) (eff. Feb. 1, 1994) allows a reviewing court to amend the record on appeal by correcting errors or by adding matters that should have been included. As the failure to attach the Rule 201(k) letters to Huebner's motion to strike objections and compel complete answers was an admitted oversight on counsel's part, we conclude that they should have been included in the record on appeal and grant Huebner's motion to supplement the record on appeal with the October 16, 2015, and February 4, 2016, letters. However, as for the remaining documents, we find that amending the record on appeal to include those documents would be a questionable use of our Rule 366(a)(3) authority. Thus, we grant Family Video's motion to strike with regard to the April 10, 2015, interrogatories; Family Video's answers to interrogatories;

the November 23, 2015, letter regarding the request for production of documents; and Family Video's responses to the requests to produce.

¶ 6 We will now turn to the facts dealing with the issues raised on appeal. On February 10, 2015, the plaintiff filed a complaint against Family Video for injuries that he sustained on January 9, 2014, when he slipped and fell on an unnatural accumulation of snow in the Waterloo, Illinois, Family Video store parking lot. Count I of the complaint sought recovery for negligence, and count II asserted a violation of the Premises Liability Act (740 ILCS 130/1 *et seq*. (West 2014)). Gallagher Bassett Services, Inc., the third party administrator handling the claim for Family Video, was represented by FMGR in this matter.

¶ 7 On April 10, 2015, Huebner served written interrogatories on Family Video. On September 2, 2015, Family Video responded to the interrogatories. On October 16, 2015, Marlen sent a Rule 201(k) letter to FMGR, which noted that Family Video had objected to a number of the interrogatories on the basis of the attorney-client and insured-insurer privileges, and sought to resolve the discovery differences.

¶ 8 Thereafter, Huebner served a request for the production of documents on Family Video. On January 28, 2016, Family Video responded to the request for the production of documents. On February 4, 2016, Marlen sent another letter to FMGR pursuant to Rule 201(k), which noted that Family Video had made a number of objections on the basis that the request sought information protected by attorney-client privilege, insurer-insured privilege, and attorney work product, and again sought to resolve the discovery dispute. In this letter, counsel noted that no privilege log was provided identifying the

various documents claimed to be privileged or the specific privilege applicable to each document as required by Illinois Supreme Court Rule 201(n) (eff. July 30, 2014).

¶ 9 On February 19, 2016, Huebner filed a motion to strike objections and to compel complete answers to interrogatories and the request for production of documents with full and complete responses to his discovery requests. On March 7, 2016, Family Video provided its privilege log, which identified the following documents as privileged: (1) various communications, both oral and written, between Family Video employees and Family Video attorneys, insurance adjusters, or investigators, including notes and written communications of Family Video's attorneys and staff regarding interviews with Family Video's employees and an inspection of the premises as well as diagrams prepared by counsel, which were protected from disclosure by the attorney-client and insurer-insured privileges and the work product doctrine; (2) Gallagher's claim investigation materials, which were protected by the attorney-client and insured-insurer privileges; (3) photographs taken by Family Video's employees in anticipation of litigation, which were protected by the insurer-insured privilege; and (4) documents relating to any claims made against Family Video's stores located throughout the United States and Canada other than the store involved in this accident, which were protected as work product and by the attorney-client privilege.

¶ 10 On March 14, 2016, Huebner filed a motion to compel production of the documents identified in Family Video's privilege log. The motion argued, in pertinent part, that written communications between FMGR and Family Video's employees were not privileged unless the employees were part of Family Video's control group. The

motion requested the trial court conduct an *in camera* review of the various documents and determine whether any privilege protected them from disclosure.

¶ 11 On March 29, 2016, the trial court ordered Family Video to respond to certain interrogatories and requests to produce where the information was not protected by any applicable privilege. In addition, the court's order stated as follows:

> "If [Huebner's] counsel believes certain documents are not properly claimed as privileged in [Family Video's] privilege log, then at [Huebner's] request, [Family Video] shall tender the privilege log along with the privileged [documents] to the Court for an *in camera* inspection to rule on [Family Video's] claim of privilege."

¶ 12 Subject to the trial court's order, on May 9, 2016, Family Video filed amended interrogatory answers to Huebner's interrogatories and amended responses to the request for production of documents. In its response, Family Video again claimed that some of the requests sought information protected by attorney-client privilege and work product.

¶ 13 On or about March 15, 2017, FMGR and Gallagher retained the services of a private investigator, Georgantas Claims Services (Georgantas), to assist in the investigation; specifically, Georgantas was hired to help locate and contact a former Family Video employee, Jeremy Klien, who was believed to reside in Colorado. On or about June 14, 2017, FMGR and Gallagher retained the services of a local private investigator, Ron Buretta (Buretta) at Ron R. Buretta & Associates, to help with their investigation and defense.

¶ 14 On August 4, 2017, Marlen emailed FMGR, requesting that the following documents be submitted to the trial court for an *in camera* review to determine whether they were protected from disclosure by any privilege: (1) any document where FMGR

has asserted a claim of attorney-client privilege when the document was not sent directly to or from the firm; (2) any document that FMGR claimed was attorney work product that FMGR or FMGR's staff did not personally prepare; (3) all documents that FMGR claimed were protected by the insurer-insured privilege; (4) Gallagher's complete file; (5) photographs that FMGR claimed were privileged; and (6) documents that related to any claims arising from the Waterloo store incident that were claimed as privileged.

¶ 15 After FMGR contended that the Gallagher claims file was voluminous and objected to the request for the entire file as overbroad, FMGR sent a September 22, 2017, letter to Marlen identifying the following categories of documents in the claims file: (1) communications with Family Video; (2) pleadings; (3) medical records and bills; (4) communications with counsel; (5) court orders; (6) discovery (interrogatories, depositions, etc.); (7) communications with Marlen; (8) Huebner's tax documents; (9) claims notes; (10) documentation related to Huebner's divorces (petitions, judgments/orders, custody agreement, etc.); (11) photographs of the Family Video parking lot; (12) communications with, and documents from, investigators; (13) materials related to expert witnesses; and (14) the police report/accident report. In the letter, counsel reiterated that she did not believe that there was any discoverable material in the claims file that had not already been produced and requested Marlen to withdraw his request for an *in camera* review of the entire file.

¶ 16 On October 5, 2017, Marlen sent a letter to FMGR, in which he clarified the following categories of documents that he wanted submitted to the trial court for an *in camera* review: (1) intracompany and extracompany communications involving the

slip and fall accident, excluding any communications between the "control group" at Family Video; (2) any statements that FMGR claimed were privileged; (3) any communications with, and documents from, investigators; (4) Gallagher's claim notes; and (5) documents related to any testifying expert witnesses.

¶ 17 On December 1, 2017, FMGR filed a response to Huebner's request for an *in camera* review of the documents and a supplemental privilege log, which was more detailed than the previous privilege log. In the supplemental privilege log, FMGR identified the following categories of documents that it deemed privileged: (1) emails dated June 14, 2017, and subsequent email chain between FMGR, Buretta, Billy Allen (a claims adjuster at Gallagher), and Veronica Duda (a human resources representative at Family Video), which included a background report acquired by FMGR (identified as FV1-40); (2) emails dated June 14, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV41-43); (3) emails dated June 18, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV44-50); (4) emails dated June 20, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda, which attached a Gallagher ISO claims report (identified as FV51-61); (5) email dated June 20, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV62-67); (6) email dated June 23, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV68-74); (7) email dated June 24, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda, which attached a record of Huebner's worker's compensation report, Facebook printouts, and a draft report (the worker's compensation report and Facebook

printouts were already produced to Huebner) (identified as FV75-99); (8) email dated June 26, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV100-08); (9) email dated June 30, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV109-18); (10) email dated July 19, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV119-30); (11) email dated August 14, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda, which included a draft letter prepared by Buretta (identified as FV131-44); (12) email dated August 17, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV145-58); (13) email dated August 23, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV159-74); (14) email dated August 23, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda, which attached the Gallagher ISO claims report (identified as FV175-96); (15) email dated August 31, 2017, from FMGR to Buretta, which attached a background report acquired by FMGR (identified as FV197-236); (16) email dated September 1, 2017, and subsequent email chain between FMGR, Buretta, and Mike Rapp of Ron R. Buretta & Associates, Inc. (identified as FV237-39); (17) email dated September 1, 2017, and subsequent email chain between FMGR, Buretta, and Rapp (identified as FV240-41); (18) email dated September 1, 2017, and subsequent email chain between FMGR, Buretta, and Rapp (identified as FV242-45); (19) email dated September 1, 2017, and subsequent email chain between FMGR, Buretta, and Rapp, which attached the accident report that was already provided to Huebner (identified as FV246-53); (20) email dated September 1,

2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV254-55); (21) email dated September 1, 2017, and subsequent email chain between FMGR, Buretta, Allen, and Duda (identified as FV256-58); (22) email dated October 6, 2017, and subsequent email chain between FMGR, Buretta, Rapp, Allen, and Duda, which included the Illinois traffic crash report that was already disclosed to Huebner (identified as FV259-66); (23) email dated March 15, 2017, and subsequent email chain between FMGR and Maureen Aguiniga of Georgantas (identified as FV267-70); (24) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV271-75); (25) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV276-81); (26) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV282-87); (27) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV288-94); (28) email dated March 15, 2017, from FMGR to Aguiniga (identified as FV295); (29) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV296-98); (30) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV299-300); (31) email dated March 15, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV301-03); (32) email dated March 24, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV304-07); (33) email dated April 7, 2017, from FMGR to Aguiniga, which included an outline of questions prepared by FMGR for the interview of a potential witness (identified as FV308-11); (34) email dated April 27, 2017, and subsequent email chain

between FMGR and Aguiniga (identified as FV312-13); (35) email dated April 27, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV314-15); (36) email dated May 2, 2017, from FMGR to Aguiniga (identified as FV316); (37) email dated May 2, 2017, and subsequent email chain between FMGR and Aguiniga (identified as FV317-18); (38) email dated May 5, 2017, and subsequent email chain between FMGR, Aguiniga, and Lynn Lorch of Georgantas (identified as FV319-21); (39) email dated July 11, 2017, from Tracy Woods at Georgantas to FMGR, which attached an invoice for investigative services (identified as FV322-23); (40) email dated April 20, 2017, from Aguiniga to FMGR regarding a status report, which was disclosed to Huebner (identified as FV324-25); and (41) a time and expense report from Buretta dated October 6, 2017 (identified as FV326-27).

¶ 18 FMGR contended that the identified documents between FMGR and the private investigators were protected under the attorney-client privilege as the investigators were hired to assist in the defense of the case; that the email chains disclosed to Gallagher fell within the insured-insurer privilege exception; and that the email chains involving Buretta and Rapp were protected as work product because they were prepared in anticipation of litigation and contained the mental impressions, litigation plans, and defense strategy of FMGR.

¶ 19 On January 30, 2018, the trial court entered an order after conducting an *in camera* inspection of the various documents submitted by FMGR, finding no privilege applied, especially when the information and documents involved communications with third

parties or were disclosed to third parties. Thus, the court ordered FMGR to tender all of the identified documents to Huebner.

¶ 20 On February 27, 2018, Family Video filed a motion for finding of contempt, which requested the trial court to enter a "friendly" contempt order against it for the sole purpose of facilitating appellate review of the January 30, 2018, discovery order. On March 20, 2018, the court entered an order holding Family Video in civil contempt for its refusal to comply with the discovery order of January 30, 2018. The court assessed a penalty of $1 and stayed discovery pending an appeal of the order. Thereafter, Family Video appealed the discovery order and the contempt order.

¶ 21 This is an interlocutory appeal under Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016) in which Family Video seeks to challenge a discovery order. As discovery orders are not final orders, they are not ordinarily appealable. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). "However, it is well settled that the correctness of a discovery order may be tested through contempt proceedings." *Id.* When a finding of contempt is appealed, our review of the contempt finding encompasses a review of the underlying discovery order upon which the contempt finding is based. *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 785 (2009).

¶ 22 We review discovery orders involving questions of privilege *de novo*. *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 IL App (5th) 150384, ¶ 19. Illinois Supreme Court Rule 201(b)(2) (eff. July 30, 2014) governs the protection of attorney-client communications and attorney work product from discovery. Rule 201(b)(2) instructs as follows:

> "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. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2) (eff. July 30, 2014).

¶ 23 Because the privilege is an exception to the general duty to disclose, the party claiming the privilege has the burden of proving it. *Shere v. Marshall Field & Co.*, 26 Ill. App. 3d 728, 730 (1974). A mere assertion that the matter is privileged is not sufficient. *Id.*

¶ 24 " 'Where legal advice of any kind is sought from a lawyer in his or her capacity as a lawyer, the communications relating to the purpose, made in confidence by the client, are protected from disclosure by the client or lawyer, unless the protection is waived.' " *Daily*, 2018 IL App (5th) 150384, ¶ 22 (quoting *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 30). To be entitled to attorney-client privilege, a claimant must show that the statement: (1) originated in a confidence that it would not be disclosed; (2) was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) remained confidential. *Claxton v. Thackston*, 201 Ill. App. 3d 232, 235 (1990). In addition, in a corporate setting, the corporate claimant must show that the statement was made by someone in the corporate "control group." *Id.* "Under the control-group test, there are two tiers of corporate employees whose communications with the corporation's attorney are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the

decision-makers rely." *Mlynarski v. Rush Presbyterian-St. Luke's Medical Center*, 213 Ill. App. 3d 427, 431 (1991). "Distribution of otherwise privileged material to individuals outside of the control group destroys the privilege." *Midwesco-Paschen Joint Venture for the Viking Projects v. Imo Industries, Inc.*, 265 Ill. App. 3d 654, 664 (1994). However, there are some instances where the attorney-client privilege attaches to communications between a client and a nonlawyer; one such instance is where the communication is made between an insured and an insurer, who is under an obligation to defend the insured. *Exline v. Exline*, 277 Ill. App. 3d 10, 13 (1995).

¶ 25 The email communications identified as FV1-196 and FV254-266 were disclosed to both Allen and Duda. The inclusion of Allen, a claims adjuster at Gallagher, on the email chain does not destroy any attorney-client privilege, because Gallagher was under an obligation to defend Family Video. However, the inclusion of Duda would destroy any attorney-client privilege. Family Video has failed to offer any proof, other than her title of human resources representative, that Duda was part of its corporate control group. There was no evidence presented that Duda was a decision-maker or top management, that she was normally consulted for her opinions, or even what her duties entailed. The only thing that was offered by the party claiming the privilege was her job title, human resources representative. Family Video does not dispute this on appeal but instead contends that Huebner has forfeited this issue because it failed to raise the control group argument in the trial court. However, we find this argument unpersuasive as it was Family Video's burden, as the claimer of the privilege, to show the facts that give rise to the privilege. The party asserting the privilege must present factual evidence to establish

the required elements, as a mere assertion of the privilege will not suffice. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 551 (2004).

¶ 26 Where documents are given to persons outside of the attorney-client relationship, any privilege that might have existed is waived. *Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App. 3d 396, 409 (1998). Thus, as Family Video has not presented any evidence that Duda was part of its control group, the distribution of the email communications to her destroys any attorney-client privilege. Moreover, the attorney work product doctrine may be waived in much the same way. *Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶ 34. Because Family Video has failed to establish that Duda was part of its control group, the email communications identified as FV1-196 and FV254-266 are not protected from disclosure by the attorney-client privilege and the attorney work product doctrine. Moreover, the email chain identified as FV197-236, which contained the background check on Huebner that was previously disclosed to Duda, and the email chain identified as FV 251-253, which was sent by Duda to the payroll department and was already provided to Huebner, are also not protected from disclosure by any privilege.

¶ 27 We will next turn to the email communication chains between FMGR and its investigators that were not disclosed to Duda. As we previously noted, the work product doctrine in Illinois is based on Illinois Supreme Court Rule 201(b)(2) (eff. July 30, 2014), which states that material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. Illinois has taken a narrow approach to the discovery of work product by distinguishing between "core" work product and "ordinary"

work product. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 196 (1991). Ordinary work product, which is defined as any relevant material generated in preparation for trial which does not disclose "conceptual data," is freely discoverable. *Id.* In contrast, opinion or "core" work product, which consists of materials generated in preparation for litigation which reveal the mental impressions, opinions, or trial strategy of an attorney, is subject to discovery only upon a showing of impossibility of securing similar information from other sources. *Id.* This doctrine not only applies to documents prepared by the attorney but also to documents prepared by the attorney's agent or investigator. *Mlynarski*, 213 Ill. App. 3d at 432.

¶ 28 Here, the email chain between FMGR and its investigators, which includes a list of questions prepared by FMGR that was given to Georgantas for interviewing a potential witness, contains core work product as it discloses the theories, mental impressions, or litigation plans of FMGR, Family Video's counsel. The Georgantas emails document communications made as part of FMGR's efforts to contact a potential witness to assess the validity of Huebner's allegations and acquire additional evidence. This information was used to provide advice to Gallagher/Family Video and devise a litigation strategy. The emails between Buretta and FMGR document the investigation being conducted by Buretta to aid in the development of the defense's strategy. Thus, the email chains, which contained communications that were not disclosed to employees outside of Family Video's control group and were identified as FV237-50, and FV267-327 in the record on appeal, between FMGR and its agent, the investigators, are protected by the attorney work product doctrine.

¶ 29 In addition, Huebner requests that we order Family Video to disclose the entire Gallagher claims file, contending that any assertion of privilege had been forfeited by Family Video's failure to tender the entire file to the trial court for an *in camera* review. In response, Family Video contends that Huebner did not request that the entire claims file be submitted for review in its revised list of documents that it requested be submitted to the trial court.

¶ 30 As the entire claims file was not submitted for an *in camera* review, we cannot determine whether it contains any documents that are subject to discovery. Thus, Family Video must, based upon the analysis set forth here, determine which remaining documents, if any, it must produce to Huebner from this claims file and which documents, if any, it maintains as privileged. With regard to the documents claimed as privileged, Family Video must produce a new privilege log that conforms to the requirements of Illinois Supreme Court Rule 201(n) (eff. July 30, 2014). The log should contain only those documents for which Family Video can make a good faith argument, based on the law set forth in this decision, that the attorney-client privilege or the attorney work product doctrine applies. See *Daily*, 2018 IL App (5th) 150384, ¶ 46.

¶ 31 Finally, Family Video asks us to vacate the civil contempt finding. Where a party's refusal to comply with a trial court's order constitutes a good faith effort to secure an interpretation of the privileges at issue, then it is appropriate for the reviewing court to vacate a contempt finding on appeal. *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 230 (2006). Family Video's refusal to comply with the trial court's discovery order was made

in good faith, as it merely sought review of its assertions of privilege. Thus, the contempt order is vacated. See *Chicago Trust Co.*, 298 Ill. App. 3d at 410.

¶ 32 In summary, we affirm the trial court's discovery order as it relates to those email communications that were disclosed to Duda, as Family Video failed to establish that she was a member of its control group. We reverse the trial court's discovery order as it relates to the email chains between FMGR and its investigators that were not disclosed to Duda, as those communications are protected from disclosure by the attorney work product doctrine. Accordingly, the trial court's discovery order is affirmed in part and reversed in part, and the contempt finding is vacated.

¶ 33 Affirmed in part and reversed in part; contempt order vacated.