

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT KANSAS CITY**

<b>LEONARD RAY FRANKLIN, et al.,</b>	)	
<b>Plaintiffs,</b>	)	
	)	
	)	<b>Case No. 1416-CV04078</b>
<b>v.</b>	)	<b>Division 8</b>
	)	
<b>MISSION LAKE CONVALESCENT</b>	)	
<b>CENTER, INC., et al.,</b>	)	
<b>Defendants.</b>	)	

**ORDER GRANTING MOTION FOR ENFORCEMENT OF DISCOVERY**

Before the Court is Plaintiffs’ Motion for Enforcement of Discovery, filed September 26, 2014. The Court, being duly advised in the premises, and having reviewed said motion, Defendant Mission Lake Convalescent Center, Inc.’s (hereinafter “Defendant Mission Lake”) response in opposition thereto, and Plaintiffs’ reply in support thereof, finds that justice would be served by GRANTING said motion.

Rule 56.01(b)(1) provides that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. “If . . . a party claims that a privilege precludes disclosure, the party asserting the privilege usually has the burden of proof to show that the privilege applies.” *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364 (Mo. banc 2004). Claims of privilege are impediments to discovery of truth and are carefully scrutinized. *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 843 (Mo. banc 1998).

The Court finds that Defendant Mission Lake has failed to show that the attorney-client privilege protects the written statements at issue. “The attorney-client privilege prohibits ‘the discovery of confidential communications, oral or written, between an attorney and his client with reference to . . . litigation pending or contemplated.’” *Ratcliff v. Sprint Missouri, Inc.*, 261

S.W.3d 534, 546 (Mo. App. W.D. 2008) (internal citations omitted). This privilege also “encompasses documents prepared by an employee at the direction of the employer for the purpose of obtaining the advice of an attorney or for use in prospective or pending litigation.” *Id.* at 547. “[A] report made by an employee to his employer concerning the details of an incident, which is transmitted to the employer’s attorney . . . is within the confidential communication privilege and is not subject to discovery, absent a waiver.” *May Dep’t Stores Co. v. Ryan*, 699 S.W.2d 134, 136-37 (Mo. App. E.D. 1985).

Here, the Court determines that any possible privilege was waived when the written statements were produced to the Department of Health & Senior Services (hereinafter “the Department”)<sup>1</sup> for its investigation. Regarding attorney-client privilege, “[a] voluntary disclosure of information which is inconsistent with the confidential nature of the attorney-client relationship waives the privilege.” *Gray v. Bicknell*, 86 F.3d 1472, 1482 (8th Cir. 1996) (applying Missouri law). Regarding work product, the party seeking discovery may show waiver by establishing “that the materials’ work product status has been lost by prior disclosure without an accompanying protective order . . . .” *Westbrooke*, 151 S.W.3d at 368.

Defendant Mission Lake contends that the written statements at issue did not lose their privileged status because the Department’s investigation was carried out confidentially. In support of this contention, Defendant Mission Lake cites section 192.2435, RSMo,<sup>2</sup> which provides that investigative reports such as the one at issue here are “confidential and shall not be deemed a public record . . . .” The statute further provides criminal penalties for the unauthorized dissemination of information contained in an investigative report.

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<sup>1</sup> The Department is not a party to this lawsuit, but conducted a separate investigation of the death of Plaintiff Leonard Ray Franklin.

<sup>2</sup> In the briefing on this motion, this statute is cited as section 660.263, RSMo. However, effective August 28, 2014, this statute was recodified as set forth above in the main text.

The Court disagrees with Defendant's contention. "A statute creates a discovery or evidentiary privilege where it specifically uses the word 'privilege' in that context, prohibits the state from obtaining disclosure of the confidential information . . . or prohibits the use of confidential information in evidence." *State ex rel. Missouri Ethics Com'n v. Nichols*, 978 S.W.2d 770, 773 (Mo. App. W.D. 1998) (internal citation omitted). The *Nichols* court further explained:

Generally, where a statute prohibits disclosure of the records of an administrative body or other entity or makes its processes confidential, courts have held that no discovery or evidentiary privilege is created with respect to those records in the absence of further specific statutory language creating a privilege. Such statutes mandate confidentiality but do not create a privilege. *Id.* at 773.

Here, reading the statute in light of the standard set forth above, the Court finds that section 192.2435 does not protect the written statements from discovery. Moreover, Plaintiffs have effectively shown that the documents were voluntarily disclosed in a manner which is inconsistent with the confidential nature of the attorney-client relationship, and that no protective order applied to these documents when the disclosure occurred.

THEREFORE IT IS HEREBY ORDERED that Plaintiffs' Motion should be, and the same is hereby, GRANTED. IT IS FURTHER ORDERED that Defendant Mission Lake shall provide full and complete responses to Request for Production No. 4 and Request for Production No. 36 no later than **December 1, 2014**.

IT IS SO ORDERED.

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Date

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**HONORABLE BRYAN E. ROUND**

**CERTIFICATE OF SERVICE**

A copy of the foregoing was delivered to:

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Law Clerk or JAA, Division 8