

Window World of Baton Rouge, LLC v. Window World, Inc.; Window World of St. Louis, Inc. v. Window World, Inc., 2022 NCBC Order 16.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WILKES COUNTY

15 CVS 1

WINDOW WORLD OF BATON
ROUGE, LLC; WINDOW WORLD OF
DALLAS, LLC; WINDOW WORLD
OF TRI STATE AREA, LLC; and
JAMES W. ROLAND,

Plaintiffs,

v.

WINDOW WORLD, INC.; WINDOW
WORLD INTERNATIONAL, LLC;
and TAMMY WHITWORTH,

Defendants.

**ORDER FOR *IN CAMERA* REVIEW
AND FOR FURTHER REVIEW AND
BRIEFING**

WILKES COUNTY

15 CVS 2

WINDOW WORLD OF ST. LOUIS,
INC.; WINDOW WORLD OF
KANSAS CITY, INC.; WINDOW
WORLD OF SPRINGFIELD/PEORIA,
INC.; JAMES T. LOMAX III;
JONATHAN GILLETTE; B&E
INVESTORS, INC.; WINDOW
WORLD OF NORTH ATLANTA,
INC.; WINDOW WORLD OF
CENTRAL ALABAMA, INC.;
MICHAEL EDWARDS; MELISSA
EDWARDS; WINDOW WORLD OF
CENTRAL PA, LLC; ANGELL P.
WESNERFORD; KENNETH R.
FORD, JR.; WORLD OF WINDOWS
OF DENVER, LLC; RICK D. ROSE;
CHRISTINA M. ROSE; WINDOW
WORLD OF LEXINGTON, INC.;
TOMMY R. JONES; JEREMY T.
SHUMATE; WINDOW WORLD OF
PHOENIX LLC; JAMES BALLARD;
and TONI BALLARD,

Plaintiffs,

and

WINDOW WORLD OF ROCKFORD,
INC.; WINDOW WORLD OF JOLIET,
INC.; SCOTT A. WILLIAMSON;
JENNIFER L. WILLIAMSON; and
BRIAN C. HOPKINS,

Plaintiffs and
Counterclaim
Defendants,

v.

WINDOW WORLD, INC.; WINDOW
WORLD INTERNATIONAL, LLC;
and TAMMY WHITWORTH,
individually and as trustee of the
Tammy E. Whitworth Revocable
Trust,

Defendants and
Counterclaim
Plaintiffs,

v.

WINDOW WORLD OF
BLOOMINGTON, INC.,

Counterclaim
Defendant.

1. **THIS MATTER** is before the Court on Plaintiffs' Motion to Compel (the "Motion"), (ECF No. 812)¹ in the above-captioned cases.

2. At issue in this Motion are various documents, communications, and billing records that Plaintiffs allege Defendants Window World, Inc. and Window World

¹ For ease of reference, all ECF citations in this Order are to the Court's e-docket in 15-CVS-1.

International, LLC (together, “WW”) have wrongfully withheld or redacted on the basis of attorney-client privilege or the work-product doctrine.

3. The current dispute has its antecedents in the Court’s rulings on 16 August 2019 resolving (i) Plaintiffs’ Motion for Finding of Waiver of Attorney-Client Privilege and Work-Product Doctrine as to Certain Topics, (ECF No. 446), and (ii) Plaintiffs’ Motion to Compel and Motion for Sanctions for Defendants’ Wrongful Assertions of Privilege, (ECF No. 448). *See Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC LEXIS 54 (N.C. Super. Ct. Aug. 16, 2019), ECF No. 724. In those rulings, the Court ordered WW to (i) produce certain documents WW had voluntarily produced and then clawed-back in 2018 because WW had waived the protections of the attorney-client privilege and work-product immunity doctrine as to those documents; (ii) produce certain documents included within a sample set of documents identified as privileged on WW’s privilege logs that the Court determined were not protected by privilege or work product immunity; (iii) re-review all documents WW had withheld as privileged or as work product and produce all documents not properly withheld under the standards set forth by the Court; and (iv) revise all privilege logs to contain adequate and accurate document descriptions consistent with the Court’s guidelines. *Id.* at *103–105.

4. WW appealed the Court’s rulings, and, on 11 June 2021, the Supreme Court of North Carolina affirmed the Court’s rulings, *per curiam*. *Window World of Baton Rouge, LLC v. Window World, Inc.*, 377 N.C. 551, 2021-NCSC-70 (2021), ECF No.

793. The mandate issued on 1 July 2021, and the cases were subsequently returned to this Court for further proceedings.

5. On 21 July 2021, the Court, with input from the parties, entered a Fifth Amended Case Management Order (“Fifth CMO”), (ECF No. 797), to implement the Court’s 16 August 2019 rulings and to set a timetable for all remaining pretrial case activity. The Fifth CMO included a process through which the parties could apprise the Court of any disputes arising from the implementation of the Court’s 16 August 2019 rulings.

6. Consistent with the Fifth CMO, on 7 January 2022, the parties filed a Joint Report outlining numerous unresolved issues arising from the implementation of the Court’s 16 August 2019 rulings. (ECF No. 801.) The Court thereafter set a motion, briefing, and hearing schedule to consider these unresolved matters. (ECF No. 804.)

7. Plaintiffs timely filed the current Motion on 31 January 2022. (ECF No. 812.) After full briefing, the Court held a hearing on the Motion on 21 April 2022 (the “Hearing”), at which all parties, non-party Anna Elizabeth “Beth” Vannoy (“Ms. Vannoy”), and non-party Vannoy Colvard were represented by counsel.

8. Plaintiffs seek through the Motion to compel the production of 53 documents that fall into four separate categories: (i) twenty-six documents related to WW’s franchise-related actions and its first Franchise Disclosure Document (“FDD”); (ii) seven documents produced by WW’s counsel, Manning, Fulton & Skinner, P.A. (“Manning Fulton”), that WW has withheld or redacted on the basis of work-product immunity; (iii) fifteen documents produced by WW or third-parties that WW has

withheld or redacted on the basis of privilege; and (iv) billing detail redacted from five billing records produced by WW's counsel, Vannoy, Colvard, Triplett & Vannoy, PLLC ("Vannoy Colvard"), that WW and Vannoy Colvard argue are properly withheld under Plaintiffs' agreement with Vannoy Colvard. (Br. Supp. Mot. to Compel 10, 17, 21, 22, 25, ECF No. 813 (sealed), ECF No. 821 (redacted)).

9. Plaintiffs urge the Court to conduct an *in camera* review of these documents to determine whether WW's claims of privilege and work-product protection are valid. WW disagrees, contending that an *in camera* review of any documents is unwarranted because WW faithfully followed the Court's privilege and work-product standards set forth in its 16 August 2019 rulings. WW also contends that the twenty-six franchise-related documents at issue have either been deemed privileged by the Court or the Special Discovery Master² or are substantially similar to those documents deemed privileged, further supporting its position that an *in camera* review is unnecessary.

10. Thus, before reaching the merits of Plaintiffs' Motion, the Court must first determine whether an *in camera* review of some or all of the challenged documents is appropriate.

11. A trial court may, in its discretion, order an *in camera* review of documents to assess the propriety of claims of privilege. *Global Textile All., Inc. v. TDI*

² With the consent of the parties and by order dated 12 October 2018, the Court appointed the Honorable W. David Lee as a referee or "Special Discovery Master" to conduct an *in camera* review of various documents WW had withheld from production on privilege and work product grounds. (ECF No. 594.) Based on that review, Judge Lee submitted his Master's Report on 3 January 2019. (ECF No. 681.)

Worldwide, LLC, 375 N.C. 72, 29 (2020) (“A trial court acting in its discretion may require an *in camera* [sic] review of documents to assist in ascertaining whether certain materials are entitled to privileged status.”). Indeed, our Supreme Court has noted,

[A] trial court is not required to rely solely on an attorney’s assertion that a particular communication falls within the scope of the attorney-client privilege. In cases where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply, the trial court may conduct an *in camera* inquiry of the substance of the communication. See *State v. Buckner*, 351 N.C. 401, 411–12, 527 S.E.2d 307, 314 (2000) (trial court must conduct *in camera* review when there is a dispute as to the scope of a defendant’s waiver of the attorney-client privilege, such as would be the case when a defendant has asserted an ineffective assistance of counsel claim); . . . see also *Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976) (trial court may require *in camera* inspection of documents to determine if they are work-product).

In re Investigation of the Death of Miller, 357 N.C. 316, 336–37 (2003). The Supreme Court has also advised that “[i]n cases of doubt whether the privilege has been established, the presiding officer may examine the contested communication *in camera*.” *Id.* at 337.

12. Having considered the Motion, the related briefing and caselaw, the relevant materials associated with the Motion, and the arguments of counsel at the Hearing on the Motion, the Court, in the exercise of its discretion and for good cause shown, concludes that an *in camera* review of the forty-eight documents comprising the first three categories of challenged documents is necessary to resolve the Motion. Plaintiffs have provided sufficient evidence to support a nonfrivolous assertion that WW has improperly invoked the attorney-client privilege and work-product doctrine to withhold production of, or make redactions to, these documents. Accordingly, the

Court concludes, in the exercise of its discretion and for good cause shown, that it should undertake an *in camera* review of these documents.

13. The Court is not yet prepared, however, to order an *in camera* review of the fourth category of challenged documents—the redacted portions of the five Vannoy Colvard billing records. Despite apparently holding these documents for some time and reviewing them sufficiently to state in their brief that the billing descriptions were privileged under *State v. Cherry*, 141 N.C. App. 642, 647 (2000), (Defs.’ Br. Opp’n to Pls.’ Mot. to Compel 23, ECF No. 827 (sealed), ECF No. 828 (redacted)), WW nevertheless contends that it has not yet adequately reviewed these challenged documents for privilege. At the same time, Vannoy Colvard complains that it has not yet had the opportunity to offer briefing on the Motion, despite not seeking to be heard on the Motion after its counsel learned that its records were at issue on Plaintiffs’ Motion nearly three months ago on 31 January 2022. While the Court is not impressed with WW’s and Vannoy Colvard’s diligence in asserting their perceived rights in connection with these records, the Court recognizes that the attorney-client privilege “is one of the oldest and most revered in law,” *id.* at 328, and will therefore exercise its discretion to permit WW to conduct a privilege review and Vannoy Colvard to offer briefing before further considering whether to order an *in camera* review of these records.

14. **WHEREFORE**, the Court, for the reasons stated herein and in the exercise of its discretion, hereby **ORDERS** as follows:

- a. No later than 29 April 2022,³ WW shall submit to the Court via hand delivery or overnight mail for the Court's *in camera* review a zip drive containing, as well as two hard copies of, the documents identified in Exhibit A to Plaintiffs' Motion as relating to (i) "Privilege Claims related to Pre-October 2011 Franchise Documents (26 documents)"; (ii) "Work Product Claims (7 documents)"; and (iii) "Additional Privilege Claims (15 documents)."
- b. WW shall conduct a privilege review of the "Vannoy Colvard Billing Records (5 documents)" identified in Exhibit A to Plaintiffs' Motion and produce the billing records to Plaintiffs and Vannoy Colvard, identifying in writing all assertions of privilege or work-product immunity with adequate and accurate descriptions, no later than 2 May 2022.
- c. Plaintiffs and Vannoy Colvard shall each have through and including 9 May 2022 to file a response to WW's assertion of privilege or work-product immunity to the Vannoy Colvard billing records.
- d. WW shall have five (5) days after WW or Vannoy Colvard files a response to file a reply to such response.
- e. The Court **DEFERS** further ruling on the Motion pending the results of its *in camera* review and the briefing associated with the Vannoy Colvard billing records ordered hereunder.

³ The Court indicated at the conclusion of the Hearing on 21 April 2022 that it would order an *in camera* review of the challenged documents other than the Vannoy Colvard billing records with an expected date for WW's submission of those documents to the Court of 28 April 2022.

SO ORDERED, this the 26th day of April, 2022.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge