IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MELISSA MCGLOTHLIN, *Petitioner*,

v.

THE HONORABLE BRADLEY ASTROWSKY, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge,*

JAKE V.; ANGELICA RIZIK; DAVID RIZIK; TRACY RIZIK; ALEXANDRIA RIZIK; JULIA RIZIK; MIKAELA RIZIK, *Real Parties in Interest*

No. 1 CA-SA 23-0059
FILED 6-29-2023

Petition for Special Action from the Superior Court in Maricopa County
No. CV2022-010612
The Honorable Bradley H. Astrowsky, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

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OPINION

Judge Michael S. Catlett delivered the opinion of the Court, in which Presiding Judge Paul J. McMurdie and Judge Michael J. Brown joined.

C A T L E T T, Judge:

¶1 We consider when a superior court should conduct an *in camera* (meaning "in chambers" in English) review of attorney-client privileged documents to resolve a claim of implied waiver of the privilege. We hold the superior court erred by conducting an *in camera* review to determine the existence of the privilege but correctly concluded that the legal malpractice claim at issue did not impliedly waive the privilege.

FACTS AND PROCEDURAL BACKGROUND

¶2 Respondent Jake V. ("Father") and real party in interest Angela Rizik ("Mother") had a child together. Mother petitioned to sever Father's parental rights, and the juvenile court appointed Petitioner Melissa McGlothlin ("Former Counsel") as Father's counsel.

¶3 According to Father, he was never served with the petition, never received notice of the juvenile court proceedings, and Former Counsel never communicated with him about her representation. Instead, Father alleges Former Counsel relied on a forged letter stating Father would not participate in the juvenile court proceedings and he was aware his parental rights would be severed. At a subsequent hearing, Former Counsel admitted to the court that she had not spoken with Father, including about the legal implications of severance. Former Counsel did not object or otherwise oppose severance, and the juvenile court severed Father's parental rights.

¶4 Father first learned of the severance proceedings six months later when Mother began preventing Father from seeing their child. Father hired a new attorney ("Replacement Counsel") to represent him in the juvenile court proceedings. Following discovery and motion practice, the court set aside the severance order for lack of notice. *See Angela R. v. Popko,* 253 Ariz. 84 (App. 2022) (allowing father to bring fraud on the court claim more than 6 months after judgment); *In re Z.R.,* 1 CA-JV 22-0223, 2023 WL

2809239 (Ariz. App. Apr. 6, 2023) (mem. dec.) (affirming juvenile court's order setting aside severance).

¶5 While the severance litigation was ongoing, Father sued Former Counsel. This special action stems from that suit. In the complaint, Father asserts Former Counsel committed malpractice by not communicating with him, not advising him of his rights, and not challenging the request to sever his parental rights. Father maintains that "[h]ad [Former] [C]ounsel adhered to the standard of care, [Father] would have contested the proceeding, and the juvenile court would have reached a different result and [Father] would not have had his parental rights terminated." And Father claims he "has suffered significant damages as a result of [Former Counsel's] ineffective assistance, including the attorney's fees and costs he has expended in an effort to" set aside the severance order.

¶6 After discovery began, Former Counsel served Replacement Counsel with a subpoena *duces tecum* (in English, seeking documents) under Arizona Rule of Civil Procedure 45. The subpoena sought the production of Replacement Counsel's legal file for Father's severance matter. Replacement Counsel objected to the subpoena based on attorney-client privilege and confidentiality. Father, however, later produced filings made in the severance matter, a description of the contents of the requested file, and redacted copies of billing statements.

¶7 But Former Counsel continued to demand an unredacted copy of the entire file, so Father and Former Counsel raised the dispute with the court. Former Counsel argued she was entitled to the file because Father, by suing her for malpractice, "put into issue" various questions about the underlying severance litigation, including "both the reasonableness of [Replacement Counsel's] fees and the reasonableness of [Replacement Counsel's] conduct," thereby waiving the attorney-client privilege between Father and Replacement Counsel.

¶8 During oral argument, the superior court suggested an *in camera* review of Replacement Counsel's file. Although neither party requested an *in camera* review, neither party objected to the court doing so. After conducting that review, the court explained that "an *in camera* inspection was proper in lieu of merely turning over the entire file to [Former Counsel] without regard to the privilege." The court found "that no portion of the file contains additional discoverable information concerning the billing issue, nor does the file contain communications that would be discoverable[.]" Former Counsel timely petitioned for special

action relief, asking that we order Father to disclose Replacement Counsel's entire file.

JURISDICTION

¶9 "The decision to accept or reject special action jurisdiction is highly discretionary." *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 511 ¶ 9 (App. 2009). "Arizona Rule for Special Action Procedure 3 sets forth those questions, and *only* those questions, that can be raised in a special action." *Kelly v. Blanchard*, __ Ariz. __, 2023 WL 3107250, *1 ¶ 7 (App. Apr. 27, 2023). Moreover, "the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal[.]" Ariz. R.P. Spec. Act. 1(a). Special action jurisdiction is appropriate "in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again." *Prosise v. Kottke*, 249 Ariz. 75, 77 ¶ 10 (App. 2020).

¶10 Former Counsel claims the superior court erred in refusing to compel Father to produce an unredacted copy of Replacement Counsel's file. Former Counsel also argues the court exceeded its authority by ordering an *in camera* review of that file. Those questions are both proper for special action review. *See* Ariz. R.P. Spec. Act. 3.

¶11 Father opposes special action jurisdiction, maintaining that Former Counsel has a plain, speedy, and adequate remedy by way of appeal. This Court has explained that "[a]lthough appellate courts do not 'routinely entertain petitions for extraordinary relief on discovery matters,' special action jurisdiction may be appropriate because a discovery order is not immediately appealable." *Am. Family Mut. Ins. Co.*, 222 Ariz. at 511 ¶ 10. It has also broadly stated that special action jurisdiction was appropriate "because the issues involve a question of whether information is privileged." *Slade v. Schneider*, 212 Ariz. 176, 179 ¶ 17 (App. 2006).

¶12 Father is correct that this Court has most often exercised special action jurisdiction when the superior court orders documents produced after overruling a privilege objection. *See, e.g.*, *Sun Health Corp. v. Myers*, 205 Ariz. 315, 317 ¶ 2 (App. 2003) ("Because an appeal offers no adequate remedy for the prior disclosure of privileged information, special action jurisdiction is proper to determine a question of privilege."). In at least a handful of cases, however, this Court has accepted special action jurisdiction where documents were successfully withheld due to a privilege claim. For example, in *Slade*, the Court said that "although Petitioners arguably have a remedy by appeal, the trial court's erroneous interpretation

of the Confidentiality Statute will substantially hamper their ability to discover relevant and non-privileged information throughout this litigation." 212 Ariz. at 179 ¶ 17. Similarly, the Court accepted special action jurisdiction of an order applying a privilege "[s]ince an issue of state-wide significance is presented, and in order to clarify and declare the law in Arizona," despite acknowledging that petitioners ordinarily "would have an adequate post-trial remedy on direct appeal." *Duquette v. Super. Ct.*, 161 Ariz. 269, 271 (App. 1989); *see also Phx. Child.'s Hosp., Inc. v. Grant*, 228 Ariz. 235, 237 ¶ 6 (App. 2011) (accepting special action jurisdiction of an order barring certain discovery on privilege grounds); *Para v. Anderson ex rel. Cnty. of Maricopa*, 231 Ariz. 91, 93 ¶ 6 (App. 2012) (accepting special action jurisdiction of an order barring discovery when the petition raised questions concerning the "nature of privilege").

¶13 We similarly conclude that the issues presented here satisfy the requirement that there be no adequate remedy by way of appeal. Like in *Slade*, if erroneous, the trial court's order would "substantially hamper [Former Counsel's] ability to discover relevant and non-privileged information throughout this litigation." 212 Ariz. at 179 ¶ 17. Moreover, in addition to challenging the superior court's treatment of the privilege, the petition also questions the propriety of the superior court's *in camera* review. The court's decision to conduct that review is an order requiring the production of privileged documents, albeit only to the court, and gives rise to due process and prejudice concerns, both of which could be difficult to raise by way of appeal. *See infra* ¶¶ 26-29.

¶14 The issues presented satisfy the other factors justifying special action jurisdiction. The issues raised are purely legal, likely to recur, and of statewide importance. *See Clements v. Bernini*, 249 Ariz. 434, 439 ¶ 6 (2020) ("[W]e accepted [special action] jurisdiction to clarify the process and burden of establishing attorney-client privilege and litigating challenges to the privilege, both legal issues of statewide importance."). We, therefore, exercise discretion to accept special action jurisdiction.

DISCUSSION

¶15 Turning to the merits of Former Counsel's arguments, we review *de novo* whether the attorney-client privilege exists and whether a party has waived that privilege. *State ex rel. Adel v. Adleman*, 252 Ariz. 356, 360 ¶ 10 (2022).

I.

¶16 Former Counsel argues the superior court implicitly found waiver before ordering *in camera* review because waiver was a precondition to that review. Father disputes that the court first found waiver, positing that the purpose of the *in camera* review was to decide the waiver question. As discussed further herein, we agree with Former Counsel that a *prima facie* showing of waiver is a necessary precondition to an *in camera* review. *See infra* ¶ 23. Still, we disagree that the superior court followed that path. Instead, the court's explanation for conducting the review makes clear that it had not first found waiver; rather, the primary purpose for the review was to decide the waiver issue. The court explained that "[g]iven the privilege involved, an *in camera* inspection was proper in lieu of merely turning over the entire file to Defendants without regard to the privilege." This is the lens through which we review the superior court's decision.

A.

¶17 At common law, "[t]he first evidentiary privilege to be recognized was that protecting the attorney-client relationship; cases upholding the attorney-client privilege appear as early as 1577[.]" *Developments in the Law--Privileged Communications*, 98 Harv. L. Rev. 1450, 1456 (1985) (hereinafter, "Developments"). One of the first treatises devoted to evidence explained that, "A Man retained as Attorney, Counsel, or Sollicitor can't give Evidence of any thing imparted after the Retainer, for after the Retainer they are considered as the same Person with their Clients, and are trusted with their Secrets[.]" Geoffrey Gilbert, *The Law of Evidence*, at 98 (1754). In the United States, "[a]s the nineteenth century progressed, many states enacted privilege statutes to replace the judicially created common law of privileges." *Developments*, at 1458.

¶18 In Arizona, the first legislature codified the attorney-client privilege in the 1913 Civil Code: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment[.]" 1913 Ariz. Civil Code § 1677(4). The statute has since remained largely unchanged. The statute creating an attorney-client privilege in civil actions now provides: "In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." A.R.S. § 12-2234(A).

¶19 The attorney-client privilege "is rigorously guarded to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *State v. Sucharew*, 205 Ariz. 16, 21 ¶ 10 (App. 2003). More specifically, "[t]he privilege serves a critical function by encouraging a client to speak truthfully with his or her lawyer." *Clements*, 249 Ariz. at 439 ¶ 7. "Unless the lawyer knows the truth, he or she cannot be of much assistance to the client." *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501 (1993).

B.

¶20 We consider whether the superior court erred in conducting an *in camera* review. Ordinarily, the party who challenges such a review is the party forced to disclose documents to the court. This, however, is the unique case where the party asserting the privilege is the one now defending *in camera* review—Father defends the review, Former Counsel challenges it. Former Counsel argues the review was improper because "[t]he superior court . . . failed to hold [Father] to his burden of making the initial prima facie showing" and "deprived [Former Counsel] of any meaningful opportunity to challenge individual assertions" of the privilege. We conclude these arguments are sufficient in this case—particularly the point about having a meaningful opportunity to challenge individual privilege assertions (*see infra* ¶¶ 27-28)—to allow Former Counsel to challenge the review.

¶21 In a series of recent opinions, our supreme court has provided guidance on the process for deciding a privilege dispute using an *in camera* review. *See Adleman*, 252 Ariz. at 360–63 ¶¶ 13–22; *Clements*, 249 Ariz. at 439–41 ¶¶ 8–18; *Lund v. Myers*, 232 Ariz. 309, 312–13 ¶¶ 15–19 (2013). Those opinions clarify that such a review should be a last resort and, even when appropriate, should be limited. The superior court should follow a three-step process: (1) determine whether the party asserting the privilege has made a *prima facie* showing of privilege; (2) if so, determine whether the party challenging the privilege has made a *prima facie* showing of an exception to the privilege; and (3) if so, determine whether an *in camera* review of particular documents is necessary and appropriate to resolve the dispute. If so, then an *in camera* review is permitted. Applying this framework, we conclude the superior court too hastily conducted an *in camera* review of Replacement Counsel's entire file.

1.

¶22 The first step in resolving a privilege dispute is to determine whether the proponent of the privilege has satisfied "the burden of making a prima facie showing that the privilege applies to a specific communication." *Clements*, 249 Ariz. at 439–40 ¶ 8. The proponent must show four things as to each communication: "1) there is an attorney-client relationship, 2) the communication was made to secure or provide legal advice, 3) the communication was made in confidence, and 4) the communication was treated as confidential." *Id.* at 440 ¶ 8. "[G]enerally an attorney's representation to the court that a communication was made to secure or provide legal advice is entitled to substantial weight." *Id.* at 440 ¶ 10. The superior court is not required to "scrutinize each communication, line-by-line[.]" *Adleman*, 252 Ariz. at 361 ¶ 14. Instead, "the privilege may be established for a class of communications based on appropriate circumstances." *Id.* For example, "privilege may be established by grouping communications if circumstances demonstrate they share a common nature and purpose." *Id.* If the proponent makes a *prima facie* showing that a communication or group of communications is privileged, the superior court should move to step two.

¶23 At step two, the party contesting the privilege must "make[] a factual showing to support a reasonable, good faith belief that the document is not privileged." *Lund*, 232 Ariz. at 312 ¶ 15; *see also Adelman*, 252 Ariz. at 362 ¶ 21 ("Upon [the party claiming privilege] carrying his burden, the [other party] could have contested privilege by proving or demonstrating a good faith basis for an exception."). As Justice Cardozo explained, "To drive the privilege away, there must be something to give colour to the charge; there must be prima facie evidence that [the exception] has some foundation in fact." *Clark v. United States*, 289 U.S. 1, 15 (1933); *see also Buell v. Super. Ct. of Maricopa Cnty.*, 96 Ariz. 62, 68 (1964) ("An examination of the reporter's transcript shows that a prima facie case had been made, and that under the circumstances the attorney-client privilege did not apply."). The inquiry ends if the party contesting the privilege fails to make the required factual showing. If the party contesting the privilege instead makes the required showing, the inquiry moves to step three.

¶24 At step three, the superior court must "determine[], as to each document, that in camera review is necessary to resolve the privilege claim." *Lund*, 323 Ariz. at 312 ¶ 15; *United States v. Zolin*, 491 U.S. 554, 571 (1989) ("There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting

(and perhaps unwilling) agents.").[1] Once that necessity determination is made, the superior court must make one last decision—whether *in camera* review is appropriate. That decision rests in the court's discretion. *See Zolin*, 491 U.S. at 572. In exercising that discretion, the superior court should consider, "among other things, the volume of materials the [superior] court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish an exception to the attorney-client privilege." *Id.*

2.

¶25 The superior court should not bypass the first two steps and conduct an *in camera* review to decide a privilege dispute. In other words, the superior court should not "review all of the documents to determine whether they are privileged." *Lund*, 232 Ariz. at 312 ¶ 18; *Clements*, 249 Ariz. at 438 ¶ 1 ("[T]he court may not invade the privilege to determine its existence, even in camera using a special master."); *see United States v. Reynolds*, 345 U.S. 1, 10 (1953) (declining to "go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case").

¶26 There is good reason why *in camera* review is limited, not automatic. While producing otherwise privileged documents for *in camera* review is less intrusive than full production to a litigation adversary, "examination of the evidence, even by the judge alone, in chambers" might in some cases "jeopardize the security which the privilege is meant to protect[.]" *Reynolds*, 345 U.S. at 10. As a result, even if review is limited to a judicial officer certain to maintain confidentiality, "[a] blanket rule allowing *in camera* review as a tool . . . would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Zolin*, 491 U.S. at 571.

¶27 Overuse of *in camera* review could also become inconsistent with principles of due process and reliance on the adversarial system. "[O]ur adversar[ial] system presupposes" that "accurate and just results are most likely to be obtained through the equal contest of opposed interests[.]"

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[1] Our supreme court has repeatedly relied on *Zolin* regarding the standard for *in camera* review. *See Adleman*, 252 Ariz. at 361 ¶ 15 (citing *Zolin*); *Clements*, 249 Ariz. at 441 ¶ 18 (same); *Lund*, 232 Ariz. at 312 ¶ 15 (same).

Lassiter v. Dep't of Social Servs. of Durham Cnty., 452 U.S. 18, 28 (1981). Similarly, due process ordinarily requires that parties "be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other." *United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004). Because *in camera* review can frustrate these important principles, it should be the exception rather than the rule. *Cf. Lund*, 232 Ariz. at 312 ¶ 19.

¶28 Relatedly, *in camera* review can render appellate review more difficult, particularly when that review upholds the privilege. When the privilege is sustained, the court might be hard-pressed to meaningfully explain why the specific content of documents is privileged without simultaneously undercutting the privilege. Take this case for example. The trial court conducted an *in camera* review and determined that the entirety of Replacement Counsel's file is privileged. But we (and Former Counsel) are left to guess why—the court could not publicly explain on a document-by-document basis why the privilege applied without simultaneously risking harm to the privilege. The only way for us to confirm the accuracy of the court's *in camera* review would be to conduct our own *in camera* review without the benefit of knowing why the trial court determined each document was privileged.

¶29 Last, reviewing all documents *in camera* to determine whether they are privileged could contradict the Arizona Rules of Evidence. Rule 104(a) provides that when the court decides a "preliminary question about whether . . . a privilege exists," the court "is not bound by evidence rules, *except those on privilege*." Ariz. R. Evid. 104(a) (emphasis added). Those evidence rules include "an applicable statute," Ariz. R. Evid. 501, here A.R.S. § 12-2234(A). Similarly, Rule 1101(c) provides that "[t]he rules on privilege apply to *all stages of a case or proceeding*." Ariz. R. Evid. 1101(c) (emphasis added). Conducting a blanket *in camera* review of all documents without first determining the existence of a good faith basis for an exception to the privilege conflicts with Rules 104(a) and 1101(c). *See Zolin*, 491 U.S. at 573 (explaining that Federal Rule of Evidence 104(a) "establishes that materials that have been determined to be privileged may not be considered in making the preliminary determination of the existence of a privilege").

3.

¶30 Applying these principles here, after Replacement Counsel's objection to Former Counsel's subpoena, Father and Former Counsel filed a joint notice of discovery dispute with the court. During oral argument, the court suggested that Father submit a full copy of the requested legal file

for an *in camera* review. Both parties agreed to proceed in that fashion. Father provided the court with a full copy of Replacement Counsel's file. After review, the court refused to order Father to produce any additional items out of Replacement Counsel's file.

¶31 Father first argues that, by agreeing with the court's suggestion of an *in camera* review, Former Counsel invited any error and cannot now complain. Our supreme court has emphasized caution against applying the invited error doctrine "unless it is clear from the facts that the party asserting the error on appeal is responsible for introducing the error into the record." *State v. Robertson*, 249 Ariz. 256, 260 ¶ 15 (2020). It clarified that "the invited error doctrine only applies when the facts show the party urging the error initiated, or at least actively defended, the error rather than passively acquiescing in it." *Id.* at 260 ¶ 16. Here, the superior court, not Former Counsel, initiated the *in camera* review process. Father points to no facts supporting that Former Counsel either initiated or defended that process. At most, Former Counsel (as well as Father) failed to correct the superior court's purported error.

¶32 Turning, therefore, to the propriety of the process followed, we agree with Former Counsel that the superior court did not follow the required procedure for resolving the privilege issue. The court did not start at step one and determine whether Father made a *prima facie* showing that each document or group of documents in Replacement Counsel's file is privileged. The court also did not advance to step two and determine whether Former Counsel made a factual showing to support a reasonable belief that documents in Replacement Counsel's file fall within an exception—like implied waiver—to the attorney-client privilege. And the court did not end at step three by determining "as to each document, that in camera review is necessary to resolve the privilege claim." *Lund*, 232 Ariz. at 312 ¶ 15. Instead, the court skipped steps one, two, and most of three and concluded that an *in camera* review of the entire file was appropriate to determine whether any of Replacement Counsel's file is privileged. The court erred by "invad[ing] the privilege to determine its existence[.]" *See Clements*, 249 Ariz. at 438 ¶ 1; *Lund*, 232 Ariz. at 312 ¶ 18 ("The trial court . . . erred by ruling that it would review all the documents to determine whether they are privileged.").

II.

¶33 Because Former Counsel requests an order requiring production of Replacement Counsel's entire file, we address the merits of the privilege dispute. Former Counsel argues that once we conclude that

an *in camera* review was inappropriate, as we have done, we must order production of Replacement Counsel's file because the trial court implicitly found waiver and Father has not cross-petitioned for special action relief. As we have already explained, we read the superior court's reasoning differently—we do not think the court ever, implicitly or explicitly, found waiver. *See supra* ¶ 16. Even assuming a cross-petition for special action is allowed under the Rules, that is not the route Father had to take. Father is permitted, without cross-petitioning, to oppose the special action relief Former Counsel seeks, including by arguing that there has been no implied waiver. We, therefore, address, in full, Former Counsel's arguments that she is entitled to obtain an unredacted copy of Replacement Counsel's file.

A.

¶34 Former Counsel first argues we should require the production of Replacement Counsel's file because Father did not establish a *prima facie* case of privilege.

¶35 The record indicates that Father provided Former Counsel with a description of the contents of Replacement Counsel's legal file. Although Former Counsel argues the description was insufficient to meet Father's initial burden to show privilege, Former Counsel has not provided us with a copy of the description. "A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. When a party fails to include necessary items, we assume they would support the court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) (citations omitted). We, therefore, assume that the record supported the superior court's conclusion that Father had established that the documents Former Counsel requested from Replacement Counsel are privileged.

¶36 Moreover, in the superior court, Former Counsel never disputed that the information in Replacement Counsel's file is *prima facie* privileged. In the joint statement of discovery dispute submitted to the superior court, Father and Former Counsel agreed that "the primary issue in this dispute is whether [Father] has waived the attorney/client privilege." Former Counsel's separate description of the issues discussed only waiver. At the hearing on the discovery dispute, Former Counsel focused only on waiver and did not address whether the documents in Replacement Counsel's file are *prima facie* privileged. Because Former Counsel did not raise the issue with the superior court, she cannot do so on appeal. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349 ¶ 17 (App. 2007) (explaining that an "argument [is] waived on appeal when not briefed"

with the superior court, meaning that "court had no opportunity to consider it"); *see also Hennessey v. Super. Ct.*, 190 Ariz. 298, 301 (App. 1997) (applying waiver principles "for purposes of special action review").

B.

¶37 We are left only with the question of whether Father's allegations impliedly waived the attorney-client privilege. Former Counsel asserts Father waived the attorney-client privilege with Replacement Counsel by "alleging his parental rights were terminated because [Former Counsel] fell below the standard of care, which cost him almost $375,000 in attorneys' fees (so far) to remedy" because doing so "was an affirmative act that put the contents of [Replacement Counsel's] file at issue[.]" Father responds that implied waiver does not apply because Father "has never claimed that the viability of his claims somehow depends upon the advice he received from" Replacement Counsel. On the record before us, we agree with Father that he has not impliedly waived the privilege.

1.

¶38 In *State Farm v. Lee*, our supreme court adopted the following three requirements, known as the *Hearn*[2] test, for implied waiver of the attorney-client privilege:

> (1) [The] assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

199 Ariz. 52, 56 ¶ 10 (2000). *Lee* also adopted an approach to implied waiver that "focuses on whether the client asserting the privilege has interjected the issue into the litigation and whether the claim of privilege, if upheld, would deny the inquiring party access to proof needed fairly to resist the client's own evidence on that very issue." *Id.* at 62 ¶¶ 26–28 (adopting the third approach to implied waiver discussed in Restatement (Third) of Law Governing Lawyers § 80 cmt. b). Thus, implied waiver does not occur unless the proponent of the privilege "has asserted some claim or defense . . . which necessarily includes the information received from counsel." *Id.* at 62 ¶ 28.

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2 *See Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

¶39 Building on *Lee*, the supreme court later clarified that "merely filing an action or denying an allegation does not waive the privilege." *Empire W. Title Agency, L.L.C. v. Talamante ex rel. Cnty. of Maricopa*, 234 Ariz. 497, 499 ¶ 10 (2014). Instead, "the party claiming the privilege must affirmatively interject the issue of advice of counsel into the litigation." *Id.* (cleaned up). Thus, "neither the relevance nor pragmatic importance alone of the information sought will support a finding that the attorney-client privilege has been waived." *Id.* (cleaned up). The court rejected implied waiver because "the breach of contract claim in this case does not depend on [the plaintiff's] mental state or subjective knowledge." *See id.* at 500 ¶ 14. This was true "[a]lthough [the plaintiff's] knowledge of the alleged title defect might be material to [a] defense" in the case. *See id.*

¶40 Following *Empire West Title Agency*, this Court explained that waiver also does not occur where a party is allegedly responsible for filing a complaint that serves as "the catalyst" for a defense implicating the privilege. *Robert W. Baird & Co. Inc. v. Whitten*, 244 Ariz. 121, 126 ¶ 12 (App. 2017). Adopting a "catalyst approach" to waiver "would, of course, mean that every plaintiff is responsible for every defendant's actions in every case, because claims are always catalysts for defenses." *Id.* Similarly, this Court, quoting the Illinois Supreme Court, rejected the notion that raising a dispute about damages automatically results in waiver of the privilege as to subsequently retained counsel: "That [the plaintiff]'s damages are subject to dispute by the parties does not mean that [the plaintiff] has waived its attorney-client privilege regarding communications between it and [its litigation counsel] that might touch on that question." *Id.* at 127 ¶ 14 (*quoting Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 727 N.E.2d 240, 241–42 (Ill. 2000)).

2.

¶41 Father's claims are not such that they waived the privilege with Replacement Counsel. Father has not interjected advice of counsel into this litigation. Former Counsel has provided us with two documents from Father relevant to the implied waiver issue: Father's complaint and a Rule 26.1 supplemental disclosure statement wherein Father sets forth the legal and factual basis for his claims. Nothing in either of those documents establishes that Father has asserted a claim which necessarily includes or hinges on information received from counsel. Father has not "ma[de] an affirmative claim that [his] conduct was based on [his] understanding of the advice of counsel[.]" *Everest Indem. Ins. Co. v. Rea*, 236 Ariz. 503, 505 ¶ 9 (App. 2015).

¶42 Former Counsel argues that filing this litigation was an affirmative act that put Replacement Counsel's entire file at issue because the file might "contain[] information related to the grounds for severance, [and] the circumstances underlying the claim that a notary forged his signature on fraudulent documents[.]" Nothing in Father's complaint or supplemental disclosure statement relating to the grounds for severance or the alleged forgery of his signature relies on, or injects, the advice of counsel. Rather, the complaint states only "[t]he [c]ourt granted the termination petition terminating [Father's] parental rights," and that, had Former Counsel complied with the standard of care, Father would have contested the severance request and prevailed. Neither of those contentions, or any others, "affirmatively interject the issue of advice of counsel into the litigation." *Empire W. Title Agency*, 234 Ariz. at 499 ¶ 10 (cleaned up).

¶43 Former Counsel also asserts that Father's malpractice claim implicates "[Former Counsel's] knowledge or ability to discover the alleged fraud, and the likelihood of a different result from the termination hearing had [Father] received notice." The argument that Former Counsel could not have known about the alleged forgery and that, even with notice, the juvenile court would have severed Father's rights, are issues that Former Counsel injected into the litigation to avoid or reduce liability. Former Counsel cannot use her defenses—even if Father's claim is a "catalyst" for those defenses—as a reason to set Father's attorney-client privilege aside. *See Robert W. Baird & Co.*, 244 Ariz. at 126 ¶ 11 (rejecting waiver where "Bond Counsel, not Underwriters, placed fault- and damage-apportionment at issue by asserting contributory negligence as an affirmative defense and filing notices of non-parties at fault").

¶44 Former Counsel next argues Father impliedly waived the attorney-client privilege as to Replacement Counsel's file by seeking damages in the form of attorneys' fees Replacement Counsel billed. Contrary to that argument, seeking damages for attorneys' fees is not equivalent to interjecting advice of counsel into the litigation. Litigants, particularly in legal malpractice cases, routinely seek damages in the form of attorneys' fees. Like in *Robert W. Baird & Co.*, we agree with the Illinois Supreme Court that "[i]f raising the issue of damages in a legal malpractice action automatically resulted in the waiver . . . with respect to subsequently retained counsel, then the privilege would be unjustifiably curtailed." 244 Ariz. at 126 ¶ 14 (*quoting Fischel & Kahn, Ltd.*, 727 N.E.2d at 241–42). Also, Father bears the burden of proving damages. His decision to use the attorney-client privilege as a shield, while legally proper, may impair his claim "to the extent that the disclosed billing records are insufficient to

permit an informed assessment of how much [Replacement Counsel's] work related to [Former Counsel's] alleged negligence[.]"[3] *Id.* at 128 ¶ 18.

3.

¶45 Former Counsel relies heavily—indeed, almost exclusively—on *Elia v. Pifer*, 194 Ariz. 74 (App. 1998). In *Elia*, which predates our supreme court's opinion in *Lee*, this Court first adopted and applied the *Hearn* test to find implied waiver of the attorney-client privilege. 194 Ariz. at 82 ¶ 40. *Lee* suggests, however, that *Elia* followed an approach different than that adopted in *Lee*. *See* 199 Ariz. at 62 ¶ 26. *Lee* quotes an excerpt from the Restatement (Third) of Law Governing Lawyers explaining that courts have followed three approaches to waiver and placing *Elia* in the second of those three approaches. *See id.* The Restatement describes the second approach—that used in *Elia*—as "an indeterminate, ad hoc balancing approach." *See id. Lee* then describes the *Elia* approach (and the first approach) as "'dubious' absent 'acceptance of the Benthamite principle that the privilege ought to be overthrown to facilitate the search for truth.'" *See id.* (quoting John W. Strong, McCormick on Evidence § 93, at 373 (5th ed. 1999)). *Lee* concludes that "[w]e do not accept that principle, though some of the language in our cases would seem to do so, and instead adopt a more narrow view." *Id.* It is hard to read *Lee* without concluding that, when the court disapproved of "some of the language in our cases," it was referring in part to *Elia* (or at least to opinions *Elia* relied on). *See id.*

¶46 Properly understood, however, *Elia* is consistent with *Lee* and subsequent opinions addressing the implied waiver of the attorney-client privilege. In *Elia*, the plaintiff sued his former lawyer for malpractice, claiming she had agreed to a decree of dissolution of marriage without his authority. *See* 194 Ariz. at 78 ¶ 10. The former lawyer responded that the plaintiff and the attorneys who succeeded her in representing the plaintiff were responsible for his damages for failure to appeal the decree. *See id.* ¶ 12. In response to that defense, the plaintiff claimed that "he had not been advised of his appeal rights." *See id.* at 81 ¶ 35. Thus, this Court agreed

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[3] Former Counsel argues that the redacted content of Replacement Counsel's billing records is not privileged because it does not reflect legal advice. It is unclear whether the superior court reviewed the billing records with this argument in mind. In any event, the special action record is insufficient to resolve the issue. Thus, nothing herein is intended to prohibit Former Counsel from later asserting that, even if Father's claim for damages does not result in implied waiver, that Father cannot establish that the redacted contents of the billing records are privileged.

with the superior court that the plaintiff "had impliedly waived the attorney-client privilege as to communications with his later retained attorneys relating to the issue of attacks on or appeal from the decree." *See id.* The plaintiff could not use the content of subsequent counsel's advice as a sword against a defense to the malpractice claim while using the privilege as a shield to block access to evidence reflecting that advice. *See id.* at 82 ¶ 40 (commenting that a party is not allowed "to use privilege as a shield to block inquiry into an issue that he had raised"); *see also Robert W. Baird & Co.*, 244 Ariz. at 126 ¶ 12 ("[T]he [*Elia*] court found waiver of the attorney-client privilege based on the *plaintiff* s specific theory of the case.").

¶47 Father has not responded to any of Former Counsel's defenses by asserting a legal theory or argument relying on legal advice (or lack thereof) from Replacement Counsel. For example, Father has not responded to any of Former Counsel's defenses by asserting he took or refrained from taking some action in the severance proceeding because Replacement Counsel advised him to do so. Unless and until Father does so, or otherwise interjects advice of counsel, he is only "attempting to use the privilege purely as a shield, consistent with its intended purpose." *Empire W. Title Agency*, 234 Ariz. at 500 ¶ 17.

CONCLUSION

¶48 We accept special action jurisdiction but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA