

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPT.
C.A. NO. 2483CV00692

PAUL O'KEEFE, INDIVIDUALLY & AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF JOHN
JOSEPH O'KEEFE, III; MARGARET O'KEEFE,
INDIVIDUALLY AND AS GRANDPARENT / GUARDIAN
OF KAYLEY FURBUSH; and JOHN O'KEEFE, II,
Plaintiffs,

v.

C&C HOSPITALITY, LLC, *d/b/a* C.F. MCCARTHY'S;
G&S HOSPITALITY, LLC *d/b/a* C.F. MCCARTHY'S;
WATERFALL BAR & GRILL, LTD *d/b/a* WATERFALL
BAR & GRILL; and KAREN READ,
Defendants.

**PLAINTIFFS' OPPOSITION TO DEFENDANT KAREN READ'S MOTION
FOR ORDER REQUIRING PLAINTIFFS' COUNSEL TO DESTROY
INADVERTENTLY PRODUCED COMMUNICATION**

Plaintiffs respectfully submit this memorandum of law in opposition to Defendant Karen Read's motion for order requiring Plaintiffs' counsel to destroy inadvertently produced communication and strenuously dispute the allegations set forth therein.

Defendant Read has presented no valid basis to claim impropriety on the part of Plaintiffs' counsel with respect to the contested email communication. Ms. Read possesses the burden of proving that the email communication in question is protected by the attorney-client privilege, and that such privilege was properly preserved. Plaintiffs contend that any applicable privilege was relinquished when Ms. Read responded to opposing counsel, because Read and her team failed to adequately mitigate the clear and avoidable risk of inadvertently disclosing confidential communications. In addition, even if privilege is deemed to apply, Plaintiffs are entitled to retain.

and to utilize the email communication for impeachment purposes should Ms. Read provide testimony inconsistent with her prior statements.

I. RELEVANT BACKGROUND

During a status conference on November 21, 2025, the Parties convened pursuant to Rule 9C at the direction of this Court regarding Plaintiffs' contention that Defendant Read failed to provide a proper response to Plaintiffs' interrogatory (No. 1) seeking the factual basis supporting Read's third-party culprit defense as required under the rules of discovery.

On December 15, 2025, Plaintiffs filed a motion to compel further answers to interrogatories from Defendant Read together with Read's opposition and Plaintiffs' Reply brief. [See, Docket Nos. 58 – 58.6] The same day, Plaintiffs' counsel served Read's team of attorneys via email with the motion to compel Rule 9A filings including Plaintiffs' Reply brief.

The following day on December 16, 2025, Read's counsel responded to Plaintiffs' email denying the allegations in Plaintiffs' Reply brief and seeking immediate clarification regarding the statement that "Read and her team not only have leaked evidence that now appears inconsistent with the under oath answer signed by Ms. Read, but also have stated publicly that she has evidence to suggest John O'Keefe was killed inside the house." [See, EX. 1] Unbeknownst to Plaintiffs, Read's counsel apparently blind copied ("bcc") Ms. Read to the subject email chain before sending the response.

Approximately 46 minutes later, Ms. Read replied to all email participants with factual allegations that are relevant to the aforementioned motion to compel filings and the subject matter of the email chain. Plaintiffs' counsel read the email response before recognizing that it may have been sent inadvertently and prior to receiving any notice from defense counsel regarding same.

The content of Ms. Read's email response was inconsistent with her previous under oath positions in the interrogatory that is the subject of Plaintiffs' motion to compel.¹

The next day, on December 17, 2025, this Court issued an Order addressing the Parties' discovery motions with a request that the Parties attempt to narrow areas of disagreement. [See, Docket No. 59] With respect to Plaintiffs' motion to compel, the Court noted that "Ms. Read's counsel is requested to suggest to the court how to reconcile the position '[t]here is nothing further for the Court to compel.' (Paper 58.2, page 5) with the information in the fourth, fifth, and sixth paragraphs on Paper 58.1, page 2."

On or about December 24, 2025, at the request of defense counsel, Plaintiffs agreed to hold their motion to compel in abeyance and to serve Read with a supplemental interrogatory² rephrased to specifically articulate all facts forming the basis for Affirmative Defense No. 2, to which Ms. Read would respond as required by Superior Court Rule 30A.

Plaintiffs agreed to withdraw their motion to compel *if* Ms. Read provides an acceptable response to the supplemental interrogatory.

II. ARGUMENT

Defendant Read's implication that Plaintiffs' counsel has failed to fulfil their obligations under the applicable Rules of Professional Conduct and case law with respect to Read's email response has no merit. Plaintiffs' counsel has not disseminated, leaked, or otherwise acted unethically in any way with respect to the subject email. Despite Ms. Read's contention, Plaintiffs'

¹ Plaintiffs will provide the Court with a copy of the subject email response for *in camera* review at the Court's request.

² Plaintiff's Interrogatory No. 2: "State all facts forming the basis for your claim that Plaintiffs' damages arising from the death of John O'Keefe, III were 'caused by acts or omissions of third parties for whom Ms. Read is not responsible,' as set forth in Affirmative Defense No. 2 in your Answers to the Plaintiffs' Complaint."

counsel is under no obligation to destroy the communication at the direction of defense counsel or to affirmatively seek Court intervention whereas Ms. Read has the burden of proving that the contents of her email response were privileged and that she neither intentionally nor unintentionally waived any such privilege at the time of her reply. Furthermore, even if this Court finds that Ms. Read did not waive any privilege, Plaintiffs are permitted to retain and to use the subject communication to impeach Ms. Read in the event she provides under oath statements inconsistent with her statements in the email.

A. Defendant Read Waived Any Privilege With Respect To The Subject Matter Of Her Email Response.

In order to show that a communication is protected by the attorney-client privilege, the party attempting to assert that privilege must demonstrate: "(1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; **and (3) the privilege as to these communications has not been waived.**" *In the Matter of the Reorganization of Electric Mutual Liability Ins. Co., Ltd.*, 425 Mass.419, 421 (1997) (emphasis added) (hereafter "*EMLICO*") and cases cited. "Because the attorney-client privilege often deprives the court of relevant evidence, it is strictly construed, and it is the client's burden to establish its application to a particular communication." *Carpenter v. Mass. Inst. of Tech.*, 19 Mass. L. Rep. 339 (2005) citing *EMLICO*, supra, 425 Mass. at 421. The existence of the privilege and the applicability of any exception to the privilege is a question of fact for the judge. *Purcell v. District Attorney for the Suffolk Dist.*, 424 Mass. 109, 113, (1997).

Here, unlike the typical scenario involving an attorney's accidental production of confidential materials, Ms. Read herself chose to share her opinions on the legal issue that was the subject of the email chain when she responded to the group. Regardless of whether Ms. Read's

email response was inadvertent, this Court should find that Ms. Read waived privilege due to her failure to take reasonable precautions to prevent the disclosure of privileged communications. The SJC held that “[t]he modern trend...has moved toward a principle that the privileged status of a communication or document is not lost when an attorney and client take reasonable precautions to ensure confidentiality but, for example, a privileged communication is nonetheless overheard.” *See EMLICO*, supra, 425 Mass. at 422. *See also* Mass. R. Civ. P. 26(b)(5)(B) (governing mistaken production of privileged materials in discovery); Mass. G. Evid. § 523(c)(2) (under *EMLICO*, similar standard applies outside context of discovery).

In support of her motion, Defendant relies exclusively on the trial court decision in *Charm v. Kohn*, 08-2789-BLS2, 2010 Mass. Super. LEXIS 276 (Mass. Super. Ct. Sep. 30, 2010), in which Judge Fabricant held that a client’s accidental transmission of a “reply all” email communication to opposing counsel did not lose its privilege. While Plaintiffs concede that the general circumstances in *Charm* are analogous to the present dispute, Defendant Read and her legal team conveniently disregard the clear message from J. Fabricant warning future litigants of the preventable risk taken by Read and her counsel here. In finding “[t]he question is close”, J. Fabricant cautioned:

Kohn's counsel's practice of sending him a bcc of e-mails to opposing counsel, with a cc to co-counsel, gave rise to a foreseeable risk that Kohn would respond exactly as he did. In sending his response, Kohn would have to have known what he was responding to, but nevertheless failed to take careful note of the list of addressees to which he directed his reply..

...

On the other hand, **a client who seeks to preserve the privilege has a responsibility to be careful, particularly when using a means of communication that poses known and obvious risks. Lawyers should advise clients to be careful, and should avoid practices that exacerbate risks.** Here, it appears that both Kohn and his counsel were less vigilant than they might have been.

They, and others, should take note: Reply all is risky. So is bcc. Further carelessness may compel a finding of waiver.

Charm, 2010 Mass. Super. LEXIS 276 at *5-6 (emphasis added)

Here, the precautions taken by Read and her team to ensure confidentiality of communications were careless, not reasonable. In all likelihood, by her own direction and/or by recommendation of counsel, Ms. Read has been blind copied on all e-mail communications with opposing counsel since the outset of this lawsuit. As cautioned by J. Fabricant, this practice exacerbated the known and obvious risk of broadcasting privileged communications to opposing counsel. Plaintiffs do not suggest that Ms. Read should be kept in the dark concerning developments in the case, however, the foreseeable risk which occurred here could have been easily avoided. For example, defense counsel could have simply forwarded the email communications with opposing counsel to Ms. Read's attention. *See MCLE, Inc. Managing Client Relationships*, Sect. 10.3.2 The Attorney-Client Privilege and Confidentiality, Massachusetts BBO lawyer, Joseph S. Berman, Esq. (when a lawyer includes the client on emails with opposing counsel, the client replies to all, and the other counsel sees the message, "an argument could be made that the privilege is now waived for all purposes.")

Under the circumstances here including, but not limited to, J. Fabricant's warning to future litigants, this Court should find that Ms. Read waived any privilege with respect to the subject matter of her December 16, 2025, email communication. *See Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995) (waiver of attorney client privilege "premised on inadvertent disclosure will be deemed to encompass 'all other such communications on the same subject.'")

B. Even If Ms. Read Did Not Waive Privilege, Plaintiffs Are Entitled To Use The Subject Email For Impeachment Purposes.

Even if this Court determines that Ms. Read's email communication was inadvertent and that she took such precautions sufficient to preserve privilege, the Plaintiffs are entitled to retain and to use the subject communication to impeach Ms. Read in the event she testifies or answers under oath inconsistent with her statements in the email.

In *Vigor Works, LLC v. Skanska*, SUCV2016-02146-BLS1, 2019 Mass. Super. LEXIS 15, at *10 (February 12, 2019), the Court held that while a party's inadvertent disclosure of a privileged communication did not amount to a waiver under the circumstances, such finding did not preclude use of the communication by opposing counsel in the future to assess credibility. Judge Kaplan reasoned that the "issue is a little like the bell that cannot be un-rung. No witness ought to testify in a manner that it is inconsistent with the information communicated in the email. As with statements suppressed because they were obtained in violation of a defendant's constitutional rights, they may still be used to assess the defendant's credibility if he testifies at trial in contradiction of those suppressed statements." *Id. citing Commonwealth v. Mahnke*, 368 Mass. 662, 695-95 (1975).

Similarly, in *Mira, Inc. v. O'Brien*, 02-5545-H, 2003 Mass. Super. LEXIS 275, at *6-7 (October 3, 2003), the Court held that an inadvertently disclosed privileged letter could still be used for impeachment purposes under certain conditions. Judge Gants noted that "[w]hile this Court has found that the inadvertent disclosure by Mira's attorney did not waive Mira's attorney-client privilege, it does not intend, by this ruling, to require O'Brien's attorney to sit quietly if Curtin (or another authorized representative of Mira) were to testify falsely [at trial]." *Id. citing Harris v. New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971). J. Gants further stated "[t]o permit the trial judge to resolve this controversy promptly and accurately, this Court shall

permit O'Brien's attorney to retain the privileged letter that was inadvertently disclosed as long as access is limited only to those attorneys who have already read it. This Court shall also permit Curtin to be deposed concerning the purpose and meaning of this privileged letter, provided that this portion of the deposition shall be closed to all but necessary attorneys and this portion of the transcript shall be sealed.” *Id.* at *7.

Here, Ms. Read’s choice to respond to the entire email chain and to make factual assertions directly relevant to disputed issues in this case, whether inadvertent or not, is a bell that cannot be un-rung. Consistent with the above rulings, the Plaintiffs should be permitted to retain Read’s subject email communications for use at trial and further to depose Ms. Read concerning the purpose and meaning of the subject email communications with any such conditions as the Court deems necessary.

III. REQUESTED RELIEF

WHEREFORE, for the foregoing reasons, the Plaintiffs respectfully request that Defendant Read’s motion be DENIED.

Plaintiffs further request that this Honorable Court 1) find that Defendant Read waived privilege with respect to the December 16, 2025, email response and its subject matter; and 2) permit Plaintiffs to retain a copy of the subject email for use at trial and to depose Ms. Read concerning the purpose and meaning of the subject email communications with any such conditions as the Court deems necessary.

THE PLAINTIFFS RESPECTFULLY REQUEST A HEARING ON THIS MATTER.

Date: 1.22.26

Respectfully submitted, Plaintiffs,
By Their Attorney,

/s/ Marc Diller

Marc Diller, Esq. BBO # 644997
DILLER LAW, LLP
50 Congress St. Suite 420
Boston, MA 02100
(617) 523-7771
marc@dillerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the within document was served upon counsel of record via E-MAIL to:

Aaron Rosenberg
Damon Seligson
Charles Waters
arosenberg@sheehan.com
dseilgson@sheehan.com
cwaters@sheehan.com
SHEEHAN PHINNEY
Counsel for Karen Read

Alan Jackson
Elizabeth Little
Caleb Mason
ajackson@werksmanjackson.com
elittle@werksmanjackson.com
cmason@werksmanjackson.com
WERKSMAN, JACKSON & QUINN LLP
Pro Hac Counsel for Karen Read

Tamara Smith Holtslag
Lincoln A. Rose
Kevin M. Bergin
tsmith@peabodyarnold.com
lrose@peabodyarnold.com
kbergin@peabodyarnold.com
PEABODY and ARNOLD LLP
Counsel for C.F. McCarthy's

Arthur Maravelis
Thomas Tang
Michael Bell
Sarah Shipley
amaravelis@tangmaravelis.com
ttang@tangmaravelis.com
mbell@tangmaravelis.com
sshipley@tangmaravelis.com
TANG & MARAVELIS, P.C.
Counsel for Karen Read

John M. Dealy
John Donovan, III
David Hassett
Casey L. McCaffrey
jdealy@hassettdonnelly.com
jdonoan@hassettdonnelly.com
dhassett@hassettdonnelly.com
cmccaffrey@hassettdonnelly.com
HASSETT and DONNELLY, P.C.
Counsel for Waterfall Bar & Grill

DATED: 1.22.26

/s/ Marc Diller
Marc A. Diller, Esq.

EXHIBIT 1

From: Damon M. Seligson <dseligson@sheehan.com>
Sent: Tuesday, December 16, 2025 2:17 PM
To: Marc Diller <MDiller@dillerlaw.com>
Cc: Charles M. Waters <cwaters@sheehan.com>; Aaron D. Rosenberg <arosenberg@sheehan.com>; Elizabeth S. Little (Elittle@werksmanjackson.com) <elittle@werksmanjackson.com>; Alan Jackson <ajackson@werksmanjackson.com>; Caleb Mason <cmason@werksmanjackson.com>; Bibi Fell <bibi@fellfirm.com>; Daniel Buck <DBuck@dillerlaw.com>; Jason Varsch <JVarsch@dillerlaw.com>; Art Maravelis <amaravelis@tangmaravelis.com>; Thomas M. Tang, Esq. <ttang@tangmaravelis.com>; Michael Bell <mbell@tangmaravelis.com>; Sarah Shipley <sshipley@tangmaravelis.com>
Subject: Reply Brief

Marc, in your Reply brief filed with this Court you state "[i]n so doing, Read and her team not only have leaked evidence that now appears inconsistent with the under oath answer signed by Ms. Read, but also have stated publicly that she has evidence to suggest John O'Keefe was killed inside the house."

We deny having "leaked evidence." Please identify your Rule 11 bases for making this claim, as we think this needs to be cleared up immediately.

Thanks,
Damon

Damon M. Seligson, Esq.
Shareholder

SHEEHAN PHINNEY

28 State Street, Floor 22, Boston, MA 02109
T 617.897.5640 (direct) / 617.897.5600 (main)
www.sheehan.com

