

2011 WL 1480425 (Md.App.) (Appellate Brief)  
Maryland Court of Special Appeals.

Roger Mandel GREENBERG, Appellant,  
v.  
STATE OF MARYLAND, Appellee.

No. 928.  
September Term, 2010.  
March 2, 2011.

Appeal from the Circuit Court for Montgomery County (The Honorable Judge Eric M. Johnson Presiding)

**Appellant's Brief and Appendix**

Sarah M. Miller, Assigned Public Defender, 1440 New York Avenue, NW, Washington, D.C. 20005, 202/371-7000, sarah.miller@skadden.com, Paul B. Dewolfe, Public Defender, Counsel for appellant.

**\*i TABLE OF CONTENTS**

Statement of the Case .....	1
Question Presented .....	3
Statement of Facts .....	3
I. Introduction .....	3
II. Annulment Proceedings .....	5
III. Trial .....	8
A. Defense Counsel's Repeated Objections to Hessel's Testimony .....	9
B. Hessel's Testimony at Trial .....	11
C. The Prosecution's Reliance on Hessel's Testimony for Key Elements of Its Case Against Greenberg .....	13
Argument .....	16
I. The Circuit Court's Refusal to Exclude Attorney Hessel's Testimony under the Attorney-Client Privilege Was Prejudicial Error .....	16
A. The Circuit Court's Waiver Analysis Was Procedurally Defective .....	17
B. The Circuit Court's Failure to Follow the Required Procedure to Assess Attorney-Client Privilege Resulted in Prejudicial Error .....	19
1. The Attorney-Client Privilege Extended to Virtually All of Hessel's Testimony at Trial .....	20
2. The Circuit Court Erred in Concluding that Greenberg's Testimony in the Annulment Proceedings Categorically Waived Attorney-Client Privilege .....	22
3. The Circuit Court Erred in Concluding that Greenberg's Failure to Object to Hessel's Testimony in the Annulment Proceedings Waived Attorney-Client Privilege .....	25
*ii 4. The Admission of Hessel's Testimony Was Prejudicial Error .....	26
Conclusion .....	27

**\*iii TABLE OF AUTHORITIES**  
**CASES**

<i>Agnew v. State</i> , 51 Md. App. 614 (1982) .....	23
<i>Blanks v. State</i> , 406 Md. 526 (2008) .....	20
<i>Bequette v. State of Maryland</i> , 31 Md. App. 85 (1976) .....	25
<i>Casey v. State</i> , 124 Md. App. 331 (1999) .....	17, 19, 24
<i>E.I. du Pont de Nemours &amp; Co. v. Forma-Pack, Inc.</i> , 351 Md. 396 (1998) .....	20
<i>Forbes v. Maryland</i> , 175 Md. App. 630 (2007) .....	17, 19, 24
<i>Haley v. State</i> , 389 Md. 106 (2006) .....	16, 23
<i>Harrison v. State</i> , 276 Md. 122 (1975) .....	17, 18, 19, 22, 23, 24

<i>Klaenberg v. State</i> , 355 Md. 528 (1999) .....	17
<i>Lanasa v. State</i> , 109 Md. 602 (1909) .....	20
<i>Maxima Corp. v. 6933 Arlington Development Ltd.</i>	17
<i>Partnership</i> , 100 Md. App. 441 (1994) .....	
<i>Newman v. State</i> , 384 Md. 285 (2004) .....	16, 18, 26
<i>Parler &amp; Wobber v. Miles &amp; Stockbridge, P.C.</i> , 359 Md. 671 (2000) .....	17, 25
*iv <i>Smith v. State</i> , 196 Md. App. 494 (2010) .....	17
<i>Smith v. State</i> , 394 Md. 184 (2006) .....	20, 23
<i>In re Zucker</i> , No. 75528FL (Md. Cir. Ct. Dec. 1, 2009) .....	6

### \*1 STATEMENT OF THE CASE

Appellant Roger Greenberg is a seventy-year-old man who served for nearly two years as a constant caretaker and companion to Evelyn Zucker, an eighty-five-year-old woman from Silver Spring, Maryland with limited mobility who had suffered from diabetes and heart problems for many years. The two married in November 2008, and both before and during their marriage the couple cared for each other. Greenberg provided physical and emotional support to Zucker, and Zucker, in turn, provided financial support to Greenberg. However, police became suspicious of a series of substantial withdrawals from Zucker's account and began investigating Greenberg's relationship with Zucker. Greenberg and Zucker maintained that the withdrawals were either gifts from Zucker or done at her direction, but Greenberg was eventually arrested and tried for offenses related to alleged theft from and neglect of Zucker.

On March 1, 2010, after a week-long trial in the Circuit Court for Montgomery County, a jury acquitted Greenberg of first-degree neglect of Zucker, a vulnerable adult, but found him guilty of financial exploitation of a vulnerable adult, misappropriation by a fiduciary, a theft scheme of over \$500, and second-degree neglect of a vulnerable adult. Greenberg also pled guilty to an unrelated firearms charge. On June 8, 2010, Judge Eric M. Johnson sentenced Greenberg to thirty-five years' imprisonment. The judge suspended ten years of that term, and ordered restitution in the amount of \$90,000 and five years' probation upon release. *Id.* at 63-66.

The central evidentiary issue at trial was whether the prosecution could call Greenberg and Zucker's former attorney, Mark Hessel, as a witness and have him testify about Greenberg's communications during the representation, the advice Hessel gave, and Hessel's resulting impressions of Greenberg and Zucker. Over vigorous objections by defense counsel, the Circuit Court ruled that Greenberg had previously waived the attorney-client privilege and therefore allowed Hessel to testify fully regarding the entire representation. The Circuit Court ruled that \*2 privilege had been waived by implication in a prior proceeding brought by Zucker's estate to annul the marriage between Greenberg and Zucker. Waiver, the Circuit Court found, occurred in two ways during the annulment proceeding: first, when Greenberg volunteered privileged communications in his testimony, and second, when Hessel testified about the representation and Greenberg, who represented himself *pro se*, failed to object.

The Circuit Court's ruling, however, failed to follow the procedures for analyzing attorney-client privilege required by the Court of Appeals since 1975. The Circuit Court failed to determine at the outset which portions of Hessel's trial testimony would implicate attorney-client privilege. The Circuit Court's analysis of whether Greenberg waived privilege at the annulment proceedings, portions of which had been introduced into the trial record, was likewise inadequate. The Circuit Court failed to ascertain what privileged communications, if any, were waived in those proceedings, and thus failed to consider the scope of any waiver that might have occurred.

The Circuit Court also failed to appreciate that Greenberg, an interested party in the annulment proceedings who represented himself *pro se* to oppose the motion to annul, had not opened the door to any privileged communication during his testimony on his own behalf. Any information disclosed in response to questions from opposing counsel and during attorney Hessel's subsequent testimony at the annulment proceeding did not waive the attorney-client privilege. Hessel's testimony in the annulment proceedings was not even part of the motions hearing record, and the Circuit Court's legal conclusion that an attorney

can waive attorney-client privilege by testifying about privileged communications was erroneous. As a result of these procedural defects, the Circuit Court erroneously held that Greenberg waived attorney-client privilege in the annulment proceedings.

The resulting admission of Hessel's testimony at trial constituted prejudicial error because the privileged communications Hessel revealed were the primary \*3 basis for elements of the state's case on both the embezzlement and neglect-charges against Greenberg. Appellant therefore respectfully requests a new trial.

### ***QUESTION PRESENTED***

Did the Circuit Court commit prejudicial error in admitting the testimony of appellant's former civil attorney in violation of the attorney-client privilege when it erroneously held that appellant categorically waived attorney-client privilege at trial by testifying in an earlier annulment proceeding about communications with his attorney and by failing to object to the attorney's testimony at the same proceeding?

### ***STATEMENT OF FACTS***

#### ***I. Introduction***

Roger Greenberg is a seventy-year-old man who became a fixture in Zucker's life in 2007, after Zucker's son died and when Zucker had no close friends or relatives left to provide her the intensive assistance her condition required. T. 3/01/2010 at 8, 50-51.<sup>1</sup> According to Zucker, Greenberg and Zucker's late son were friends and collected antiques together; after Zucker's son died, Zucker and Greenberg formed a close bond. T. 2/23/2010 at 72-73.

For nearly two years, as Zucker recounted, Greenberg lived with Zucker in her house in Silver Spring, Maryland. Zucker was unable to drive and suffered from numerous health problems before she ever met Greenberg, including **diabetes**, and heart problems requiring a pacemaker. *Id.* at 66. Greenberg cared for Zucker her by bringing her meals, ensuring that she took her medicines, taking her to doctor's appointments, caring for Zucker's dog, Samantha, and paying bills on Zucker's behalf by drawing funds from her accounts at her direction. *Id.* 42-45, 67-70. Greenberg was, however, unable to perform basic housekeeping functions \*4 because he was a hoarder, and it is uncontested that Zucker's house fell into severe disrepair while Greenberg lived there. *Id.*

In return for the sustained care and companionship Greenberg provided, Zucker testified that she helped Greenberg **financially** because she felt sorry for him and wanted to improve his life, telling him "to take whatever he needed to help him." *Id.* at 76-77, 81. Zucker also bought Greenberg a car so that he could drive her to appointments and meals, *Id.* at 67-68. In October 2008, in the midst of the **financial** crisis, Zucker, who had lived through the Depression, worried that the banks would fail and, she later stated, she instructed Greenberg to withdraw large sums of money to protect her fortune. *Id.* at 45-46. Zucker was so devoted to Greenberg that she also arranged for them to be buried next to each other. *Id.* at 77.

Later that month, on October 28, 2008, Greenberg was arrested in Washington D.C. on unrelated weapons charges.<sup>2</sup> A search incident to that arrest revealed that he was in possession of five checks for \$9,000 each with Zucker's signature on them. *Id.* at 50, 118-19. Zucker later testified that at least some of these checks were to pay bills, but was not certain whether she had signed them. *Id.* at 50-53, 129-30. Police began investigating Greenberg's relationship with Zucker, *id.* at 50-53, and in early November, banks where Zucker held accounts also began to investigate what they deemed unusual patterns of withdrawals, *id.* at 96-97.

On November 26, 2008, Zucker and Greenberg were married by a justice of the peace. Also on November 26, Greenberg and Zucker began staying at the Sleep Inn in Rockville, Maryland. According to Zucker, the reason for their stay was that Samantha, Zucker's dog, was gravely ill and required surgery at a nearby veterinary clinic. *Id.* at 78.

\*5 Around December 1, Greenberg hired attorney Mark Hessel to help handle Zucker's **financial** affairs and to represent the couple on other legal matters. T. 2/25/2010 at 89. With Hessel's legal assistance, Zucker signed a new deed leaving her house to Greenberg upon her death; the prosecution later contested whether the signature was Zucker's. T. 2/23/2010 at 63-64. During the first week of December, while Zucker and Greenberg continued their stay at the Sleep Inn, Greenberg and Zucker consulted Hessel frequently on a variety of matters. According to Hessel, the trio also made visits to various banks where Zucker had accounts as a result of an inheritance from Zucker's sister, with Hessel acting as legal representative. T. 65-82, 2/25/ 2010.

On December 9, Adult Protective Services and police officers came to the Sleep Inn and, over Zucker's objections, entered the hotel room, where they found Zucker in a disheveled state. T. 2/25/2010 30-31, 125-31. Greenberg was not in the hotel room at the time. *Id.* at 34. Adult Protective Services sent Zucker to the hospital, where doctors concluded that Zucker had suffered a heart attack and successfully treated her condition. *Id.* at 10, 19. Soon thereafter, the police arrested Greenberg on charges of, *inter alia*, theft and embezzlement from Zucker.

By late January 2009, Hessel had resigned as Greenberg's attorney but continued to represent Zucker. *Id.* at 88. After executing search warrants of Zucker's residence in February 2009, police discovered a will on file with the register of wills in Montgomery County which left most of Zucker's estate to Greenberg upon her death. T. 2/26/2010 at 28-29; T. 3/01/2010 at 36.

## II. Annulment Proceedings

In May 2009, attorney Tom McCarthy was appointed guardian of Zucker's estate, and Hessel's representation of Zucker ceased. T. 2/23/2010 at 76; T. 2/25/2010 at 96. McCarthy then brought proceedings to annul the marriage between Zucker and Greenberg, to void the deed giving Zucker's house to Greenberg, to invalidate Zucker's latest will, and to appoint a new healthcare agent for Zucker. T. 2/22/2010, State's Exhibit 1 at 66 (testimony of Roger Greenberg in \*6 the Dec. 1, 2009 annulment proceeding); *see also In the Matter of Evelyn Zucker*, Docket No. 64, No. 75528FL (Md. Cir. Ct. Dec. 1, 2009).<sup>3</sup> Hessel, in turn, petitioned Zucker's estate for attorney's fees for work he performed for Zucker months after he terminated his representation of Greenberg, T. 2/23/2010 at 14-15, and Hessel's motion was consolidated with the annulment proceedings. T. 2/22/2010, State's Exhibit 2 at 23-24 (testimony of Evelyn Zucker in the Dec. 1, 2009 annulment proceeding)(referring to Hessel's separate petition for fees from the estate). Unlike McCarthy's motions, Hessel's claim against Zucker's estate had nothing to do with Greenberg.

Greenberg did not freely choose to appear at the annulment proceedings. Rather, on attorney McCarthy's motion, a writ of habeas corpus ad testificandum was issued to compel Greenberg's appearance at the annulment hearing on December 1, 2009, because Greenberg was incarcerated at that point. *See In the Matter of Evelyn Zucker*, Docket Nos. 43-46, 50, 54, 61, No. 75528FL (Cir. Ct. filed Jan. 27, 2009). At that hearing, Greenberg appeared as an interested party and opposed McCarthy's motions on behalf of Zucker's estate. Indeed, as the judge emphasized to Greenberg during the hearing, McCarthy's motions to annul the marriage, to void Zucker's deed and will, and to appoint a new healthcare agent \*7 for Zucker are "really directed at you; they're not directed at Mrs. Zucker...What this is about is, removing you." T. 2/22/2010, State's Exhibit 1 at 69. In that capacity, Greenberg represented himself *pro se* and cross-examined several witnesses, including Zucker. In addition, Greenberg was called as a witness to answer questions from McCarthy and attorney Ria Rochvarg, who represented Zucker in her personal capacity and supported McCarthy's motions. Greenberg also offered direct testimony on his own behalf for the purpose of opposing McCarthy's motions.

During the hearing, Greenberg was first questioned by McCarthy, as the moving party seeking the annulment and the granting of other motions, and then cross-examined by Rochvarg. Greenberg did not volunteer information about Hessel's representation; McCarthy instead broached the subject by asking whether Greenberg knew Hessel, and introduced a series of questions about the representation. *Id.* at 31. McCarthy asked “[D]id you contact Mr. Hessel first? Or did Ms. Zucker contact Mr. Hessel first,” and Greenberg replied that “I believe it was me that contacted him... We wanted to put the house in both our names.” *Id.* at 31. McCarthy asked why Greenberg hired Mr. Hessel, and Greenberg replied, “I don't know how to handle these **financial** things...He needed to find out everything that was going on and straighten the mess out.” When asked “what services had [Hessel] provided to you up to that date,” Greenberg stated that Hessel prepared the deed for Greenberg and Zucker and that he was “invaluable...to help my wife.” *Id.* at 57.

McCarthy further questioned Greenberg about Greenberg's communications with Hessel regarding the deed transfer, including whether Greenberg “asked Mr. Hessel what the tax charges are going to be for putting that property in your name,” whether Greenberg “realized the taxes would be about \$11,000” to transfer the deed because “you were not married to Ms. Zucker,” and whether “Mr. Hessel told you if you were married, there would be...no transfer tax.” *Id.* at 32-33. Greenberg replied to each question that he did not recall whether he had asked \*8 Hessel about the tax charges and that he was not certain about what Hessel had advised him. *Id.* at 32-33. Rochvarg's cross-examination repeated similar questions about why Hessel was hired, and Greenberg again explained that his ineptitude in handling **finances** made Hessel a necessary intermediary to represent Zucker's **financial** interests. *Id.* at 59-60. The only other questions Rochvarg asked about Hessel's representation were about when Hessel withdrew from representing Greenberg. *Id.* at 65-66.

After being questioned by opposing counsel, Greenberg testified on his own behalf to voice his opposition to McCarthy's motions before the court. *Id.* at 66. In more than fifteen pages worth of testimony, Greenberg did not once refer to Hessel, nor did he discuss any of the matters about which he consulted Hessel. Instead, Greenberg repeatedly praised Zucker, recounted her life story, and emphasized her desire to help him **financially** throughout their relationship. *Id.* at 68-82.

Hessel also testified at the annulment proceedings in connection with his motion for attorney's fees from Zucker's estate. This testimony was not introduced into evidence at Greenberg's trial.

### III. Trial

At trial, the prosecution's theory was that Greenberg deliberately **exploited**, neglected, and embezzled from Zucker over a period of months as part of a long-term plan to obtain all her money for himself. T. 2/23/2010 at 19-27; T. 3/01/2010 at 7-49. The defense's theory was that Greenberg had not deliberately left Zucker in squalor, but instead he was a hoarder who was unable to keep a house in order, and that Zucker had freely given Greenberg the money he allegedly stole as a token of gratitude for his companionship and care. T. 2/23/2010 at 27-31; T. 3/01/2010 at 50-64.

#### \*9 A. Defense Counsel's Repeated Objections to Hessel's Testimony

The most significant evidentiary issue at trial was whether Hessel, as Greenberg's former attorney, could testify notwithstanding Greenberg's assertion of the attorney-client privilege. From the moment the prosecution conveyed its intent to call Hessel to the stand during the pre-trial motions hearing, the defense raised a series of objections on attorney-client privilege grounds, all of which were overruled. In an oral motion *in limine*, defense counsel objected that Hessel's testimony would reveal privileged communications, and “I'm not certain that the State can in fact call Mr. Hessel as a witness or what they believe he is going to testify to that would be admissible evidence if there's evidence outside of the privilege that they're trying to admit.” T. 2/23/2010 at 5-6. Defense counsel further argued that Hessel was testifying in the annulment proceedings “because he was seeking attorney's fees” from Zucker's estate, not on matters related to his earlier representation of Greenberg. *Id.* at 14-15.

The Circuit Court nonetheless concluded that by testifying about communications with Hessel in the annulment proceeding, Greenberg had categorically waived attorney-client privilege. The Circuit Court did not identify what privileged

communications Greenberg had testified about in the annulment proceeding. *Id.* at 15-16. Nor did the Circuit Court require the prosecution to proffer the scope of Hessel's testimony at trial. *Id.* Indeed, the prosecution informed the court that it only intended to introduce Hessel's testimony concerning the deed he drafted and the advice Hessel gave Greenberg regarding the tax implications of the deed. *Id.* at 7. Nevertheless, the Circuit Court ruled that "the decision that Mr. Greenberg made to represent himself and to testify regarding these matters that he now seeks to suppress" in the annulment proceedings meant that "he waived the privilege when he testified at a judicial hearing regarding the very matters that he now seeks to stand behind the attorney-client privilege." *Id.* at 15. The Circuit Court also rejected defense counsel's further objection that Greenberg's waiver in those proceedings was neither knowing nor voluntary \*10 because Greenberg, who represented himself *pro se*, was unaware of the risk of waiving attorney-client privilege. *Id.* at 16.

Just before Hessel was called to testify, defense counsel reiterated objections to Hessel's testimony, stressing that Hessel "was Mr. Greenberg's lawyer," that an attorney-client relationship existed, and that "things they discussed, talked about...should be covered by the attorney-client privilege." T. 2/25/2010 at 52. The Circuit Court judge, recognizing that "I was not satisfied that I had made a good record as to...why the testimony would be allowed or not allowed," described his understanding of what happened in the annulment proceedings: Greenberg "gives testimony that is now sought to be suppressed, and examined the lawyer." *Id.* at 60. The prosecution replied, "Right. Well...Mr. Greenberg gave testimony about defending--" and the judge interjected, "What he had said to the lawyer?" The prosecution replied, "Right. And then the lawyer testified about what the interactions that he had with Mr. Greenberg...and Mr. Greenberg was present and failed to raise any objection." *Id.* Neither the Circuit Court nor the prosecution pointed to any of Greenberg's specific testimony during the annulment proceedings that justified finding waiver. Moreover, the prosecution did not introduce Hessel's testimony from the annulment proceedings into the record at the motions hearing. Therefore, the court's assumption that Greenberg had "examined the lawyer" at the annulment proceeding, and the prosecution's characterization of what occurred in the annulment hearing, were unsubstantiated by the record. *Id.*

Immediately after that exchange, the Circuit Court reiterated its earlier ruling, holding that Greenberg "waived the attorney-client privilege at a prior judicial hearing" two ways: "A, by testifying about the discussions between he and his lawyer himself, it's privilege. He chose to do that. And then the second waiver comes about when the lawyer testifies at a prior hearing about the advice and conversations between he and his then client, his former client, Mr. Greenberg. I think the privilege is waived." *Id.* 60-61. The Circuit Court informed defense \*11 counsel that "you've made your objection on the record" and granted defense counsel a continuing objection to the witness, *Id.* at 61-62. The prosecution then called Hessel to the stand. *Id.* at 62.

#### B. Hessel's Testimony at Trial

On direct, Hessel testified that Greenberg had contacted him about legal representation in early December 2008, seeking advice in preparing a deed for a house. Greenberg, Hessel said, came to his office and "told me...that someone wanted to give him her house...and could I prepare the deed to do that." T. 2/25/2010 at 65. Hessel further testified that before the deed was conducted, Greenberg and Hessel discussed the tax ramifications of the deed and that Hessel advised, based on Greenberg's estimate of the value of the house, "that there would be \$11,000 in taxes" for the transfer. *Id.* at 66. Finally, Hessel testified that after he drafted the deed, "Roger came back to my office. I gave him the deed with instructions of how it had to [be] executed in front of a notary. And a few days later...he came back with the deed with a notarized signature on it...Then I recorded the deed." *Id.* at 69-70. When the prosecutor asked, "Is it normal not to meet with the person who is deeding their home in the name of another," Hessel replied that "it's not normal, but it's not abnormal," and explained, "That's why I spoke to [Zucker] on the phone and I was not the one who notarized her signature." *Id.* at 71.

Hessel also testified extensively about Greenberg's communications regarding the circumstances of Greenberg and Zucker's marriage. Early in the representation, Hessel said, he had assumed Greenberg and Zucker were not married, but that Greenberg "later told me that they were and showed me the marriage certificate." *Id.* at 67. Over another defense counsel objection, the state also asked whether Hessel was "aware of the circumstances of their marriage," at which point Hessel stated that "they both told me that they were married...right around Thanksgiving...in a car--that a minister came to the car to conduct the marriage."



Again over defense counsel's objection, the state asked whether "that \*12 seem[ed] unusual to you at all." *Id.* at 68. Hessel agreed that "it's definitely unusual." *Id.* at 68.

The state then asked Hessel about other matters that arose in the representation after Hessel prepared the deed, including whether Hessel "w[as] contacted by Roger to set up an appointment to check on some bank accounts." Hessel testified that Greenberg told him "my wife has this other issue that maybe you can help us with": that Zucker's "sister had died, that the attorney handling the estate they didn't trust," and that "[t]hey weren't able to get access to her bank accounts and they were afraid that the attorney was stealing from her." In response to the State's questions, Hessel emphasized that Greenberg had initiated the efforts to access these accounts. *Id.* at 72. Hessel further recounted the advice he provided Greenberg and Zucker ("I said, 'If your attorney goes with you, they'll give it to you' ") and described how he, Greenberg, and Zucker proceeded to different banks so that Hessel could represent the couple in their attempts to access the accounts Zucker inherited from her sister. *Id.* at 71-81.

The prosecutor also questioned Hessel about his view of the relationship between Greenberg and Zucker based on his communications with them in the course of the representation. Though Hessel himself questioned whether "all attorney-client privileges are waived," the Circuit Court reiterated that "as a result of previous testimony and at a previous hearing...the attorney-client privilege with respect to these issues has been waived." *Id.* at 73. The state then questioned Hessel about his observations and Greenberg's communications regarding Zucker's health in the days before Zucker's heart attack on December 9, 2008. *Id.* at 72-75. These communications and observations, Hessel confirmed, were things he had learned while representing Greenberg and Zucker in their efforts to access Zucker's sister's bank accounts. *Id.* at 72-74. Hessel testified that he went to the Sleep Inn for consultations with Greenberg and Zucker during the first week of December 2008, *id.* at 74, and that he was there on December 8, 2008 to continue acting as the couple's legal representative as they continued their trips to banks, *id.* \*13 at 80. Hessel also testified that Greenberg made statements to him about Zucker's health, including that "she wasn't up to going out that day [Tuesday]" to banks due to "soreness in her chest." *Id.* at 81. When asked by the prosecution "what did you advise him to do based upon that information," Hessel said he advised Greenberg to "take her to a doctor," but did not know whether Greenberg took his advice. *Id.* at 81-82.

Finally, the prosecutor questioned Hessel about the discussions that led to Greenberg's appointment as Zucker's health care agent. According to Hessel, during the second week of December, he had advised Greenberg and Zucker that "Generally, married couples will have power of attorney and appointment of healthcare agent for each other," *id.* at 80, and he "suggested that we should execute [the power of attorney and the healthcare agent documents]...at the hotel [the Sleep Inn]," *id.* at 82.

### C. The Prosecution's Reliance on Hessel's Testimony for Key Elements of Its Case Against Greenberg

Though the State introduced numerous witnesses at trial, the prosecution depended upon Hessel's testimony for key elements of the prosecution's case. Much of the prosecution's case relied on circumstantial evidence. Though the prosecution called Evelyn Zucker to testify at trial, she was an adverse witness, and most of her testimony supported the defense's theory that Zucker generously supported Greenberg in exchange for his care and companionship. T. 2/23/2010 at 34-35, 47-48.

On direct examination, Zucker testified that she met Greenberg through her deceased son, who was Greenberg's friend; that Greenberg cared for her devotedly by performing a variety of tasks for her; that on numerous occasions, she gave him thousands of dollars to pay bills for her; that she directed Greenberg to "draw out a lot of my money" from banks three or four different times due to her fears of bank collapse during the financial crisis in October 2008; and that she could not remember how many checks she wrote for Greenberg. *Id.* at 40, 42-46, 49. In \*14 response to questions as to whether she told police officers that Greenberg must have been stealing from her, Zucker insisted that the checks "were to pay bills," *id.* at 51, 53, and she also stated later in her testimony that Greenberg did not even know where she kept her money in her house. *Id.* at 83. Zucker's testimony that Greenberg "wasn't a good housekeeper," *id.* at 43, also supported the defense's theory that Greenberg was a hoarder who was prone to extreme messiness, not someone who was deliberately neglecting Zucker, as the prosecution claimed.

On cross-examination, defense counsel further established that Zucker told Adult Protective Services to leave her alone and to stop interfering with how she chose to spend her money. *Id.* at 75. Zucker also confirmed that when Greenberg made withdrawals at her direction, she counted the money to ensure the right amount was there. *Id.* at 82. Zucker's testimony closed, after redirect by the prosecution, with her exclamations that "This isn't right," that Greenberg "should be a free man, not locked up," and that "[h]e hasn't done anything." *Id.* at 83-84.

The rest of the prosecution's case focused on three themes. First, the prosecution called witnesses to show that Zucker's testimony at trial was confused and contradicted earlier statements she had made to acquaintances, Adult Protective Services, and police officers when she was in poor health in late 2008. But several of those witnesses also testified that Zucker had been confused when she made initial statements in late 2008 about the checks drawn from her account, T. 2/23/2010 at 129-30, and that Zucker's mental condition when she testified was considerably sharper than her condition in late 2008. T. 2/25/2010 at 179. Second, the prosecution introduced circumstantial evidence purporting to show that the withdrawals and checks drawn from Zucker's account were the result of embezzlement and fraud. But the patterns of withdrawals that bank officers and police deemed suspicious were also consistent with the defense's theory that Zucker panicked about bank failures, repeatedly directed Greenberg to make large withdrawals, and began storing large sums of money in her home. Third, to make its case on the neglect charges, the prosecution called witnesses to show that \*15 Zucker's house was in squalor and that Zucker's physical appearance was filthy and unkempt. But those facts were also consistent with defense counsel's theory that Greenberg was incapable of cleanliness and was not deliberately neglecting Zucker. Testimony from medically trained Adult Protective Services personnel and the cardiologist who treated Zucker in December 2008 also suggested that Greenberg failed to get Zucker urgent medical care when Zucker had suffered a heart attack and was only able to be examined by a cardiologist six to twelve hours afterward. But Adult Protective Services personnel conceded on cross-examination that Zucker was not showing visible signs of heart trouble when they arrived and that they waited two hours to call an ambulance. *Id.* at 143-45.

Hessel was the only witness who could describe Green berg's intended actions and motivations, as revealed in Greenberg's consultations with Hessel, during the crucial weeks between Greenberg and Zucker's marriage in late November and Zucker's heart attack in early December 2008. Hessel was also the only witness who could describe the circumstances under which the deed giving Zucker's house to Greenberg on Zucker's death was altered, as well as the couple's attempts to access Zucker's bank accounts in person, two important elements of the prosecution's case for **financial exploitation**. The prosecution placed heavy emphasis on Hessel's testimony as evidence of Greenberg's intent to **exploit** and neglect Zucker.

In addition to the evidentiary weight of Hessel's testimony, the prosecution's opening argument also relied heavily on Hessel's testimony in describing the events surrounding Greenberg and Zucker's marriage, the circumstances surrounding the new deed conveying Zucker's house to Greenberg on her death, visits to banks to access Zucker's accounts, and Zucker's appointment of power of attorney to Greenberg. The prosecution portrayed Greenberg's communications with Hessel as proof that Greenberg was scheming to **exploit** Zucker and seize her money for himself. T. 2/23/2010 at 24-25.

\*16 Likewise, during closing arguments, the prosecution told the jury that "We know that [Zucker] didn't approve the deed on record, that she didn't sign the deed" -- a key element of the embezzlement charge -- "because of the circumstances surrounding the deed." The prosecution continued: "We know" -- thanks to Hessel's testimony--"that Roger goes to Mr. Hessel, who is his attorney, and asks Mr. Hessel to write up a deed now that he's married to this woman so that he can inherit this property when she dies," and that "Roger takes the deed from the law office back to the hotel, comes back with a signed deed," and "[n]obody knows if Evelyn signed that deed." T. 3/01/2010 at 16-17.

The prosecution stressed Hessel's testimony even more when summarizing the first and second-degree neglect charges, stressing that Hessel's testimony about Zucker's physical condition in the course of his representation of the couple "speaks directly to the deterioration not only between when Roger got involved in her life and when the police started getting involved, but the deterioration that occurred between the wedding and the heart attack." *Id.* at 21. Later, when summing up these charges, the prosecution again invoked Hessel's testimony, telling the jury that the State proved Greenberg knew Zucker was suffering from



a heart attack but failed to get medical attention for her because “[h]e tells his attorney that [Zucker's] experiencing the pains the next morning so clearly [Greenberg] knew about it [her heart condition].” *Id.* at 25:

## ARGUMENT

### ***I. The Circuit Court's Refusal to Exclude Attorney Hessel's Testimony under the Attorney-Client Privilege Was Prejudicial Error***

For more than a century, Maryland case law has held that “[n]o rule is better established than ‘that communication which a client makes to his legal advise for the purpose of professional advice or aid shall not be disclosed, unless by the consent of the client for whose protection the rule was established.’ ” *Newman v. State*, 384 Md. 285, 301 (2004) (internal quotation marks and citation omitted). The attorney-client privilege is “so essential to a relationship of trust \*17 and confidence that it is interrelated with the specific constitutional guarantees of the individual's right to counsel.” *Haley v. State*, 389 Md. 106, 127 (2006). For that reason, “strict limitations on its application could undermine this basic guarantee.” *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 691 (2000). The Circuit Court's ruling on the scope and applicability of attorney-client privilege “is a mixed question of fact and law” which this court reviews *de novo*. *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 457 (1994).

At trial, it was uncontested that attorney Mark Hessel, whom the prosecution sought to call as a key witness, had served as Greenberg's attorney for several months, during which Greenberg frequently communicated with him to solicit confidential legal advice on a variety of matters. Defense counsel made timely and repeated objections to the admission of Hessel's testimony on the specific ground that it violated attorney-client privilege, and did so both during the disposition of pretrial motions and just before Hessel was called to the stand, thereby preserving the issue for review. *See Klauenberg v. State*, 355 Md. 528 (1999); *cf. Smith v. State*, 196 Md. App. 494, 10 A.3d 798, 823 (2010). Notwithstanding those objections, the Circuit Court concluded that Greenberg waived all attorney-client privilege with respect to Hessel's representation in two ways: by testifying about privileged communications in the prior annulment proceeding, and by failing to object when Hessel testified about those matters in the same prior proceeding. That ruling reflected numerous legal errors that warrant a new trial.

#### ***A. The Circuit Court's Waiver Analysis Was Procedurally Defective***

Maryland law is clear: once attorney-client privilege is invoked, the Circuit Court must “conduct[] a preliminary inquiry out of the presence of the jury and hearing testimony of all the surrounding facts and circumstances to determine initially whether a confidential relationship existed...and if so, whether or not there had been a waiver of the privilege.” *Harrison v. State*, 276 Md. 122, 151 (1975); *see also Casey v. State*, 124 Md. App. 331, 346-47 (1999). As part of that \*18 inquiry, the Circuit Court must “expressly identif[y] the permissible and prohibited areas of inquiry,” *Forbes v. Maryland*, 175 Md. App. 630, 639 (2007) (internal quotation marks and citation omitted), and “decide as a matter of law whether the elements of the privilege are present and if so, whether the communication, absent an exception, is privileged.” *Newman*, 384 Md. at 313 n.7.

The Circuit Court failed to conduct this inquiry properly, notwithstanding defense counsel's timely objection regarding “what [the prosecution] believe [s] [Hessel] is going to testify to that would be admissible evidence if there's evidence outside of the privilege that they're trying to admit.” T. 2/23/2010 at 5-6. Like the Circuit Court's reversible error in *Harrison*, the Circuit Court here “required a disclosure of the communication without first determining the existence of the privilege.” 276 Md. at 151.

Instead of hearing testimony or evaluating all of the relevant information in a proffer regarding the surrounding facts and circumstances of Hessel's representation of Greenberg, the complete circumstances related to the possible waiver of privilege during the annulment proceeding, and the scope of the prosecution's proposed use of the evidence at trial, the Circuit Court assumed after a cursory review that the distinction between any privileged and unprivileged communications was immaterial and that all privilege was waived. The Circuit Court thereby failed to rule as a matter of law on whether attorney-client privilege existed and if so, what kinds of communications were privileged. *See Newman*, 384 Md. at 384 n.7.

Instead of analyzing whether Greenberg waived privilege by pointing to Greenberg's actual statements in the annulment proceedings--testimony that the prosecution had already introduced into evidence--the Circuit Court asserted that Greenberg's direct testimony in those proceedings categorically waived all possible bases of privilege. At no point did the Circuit Court cite any specific passages from Greenberg's prior testimony, nor did the Circuit Court inquire into the circumstances under which Greenberg testified about Hessel's representation.

**\*19** Though the Circuit Court identified Hessel's testimony about privileged communications in the annulment proceedings as the second basis for its waiver ruling, Hessel's testimony was not even part of the record. Despite defense counsel's statement that Hessel's testimony in the annulment proceedings was for the purpose of obtaining attorney's fees from Zucker's estate, the Circuit Court also failed to consider how Greenberg, who was not implicated in Hessel's fees claim, could even challenge Hessel's testimony in the annulment proceeding. Instead, the Circuit Court accepted the prosecution's characterization of Hessel's prior testimony without requiring any substantiation and without identifying the matters about which Hessel testified.

Finally, the Circuit Court failed to address the scope of any waiver from the annulment proceedings. Instead of asking the prosecution to specify the kind of communications it sought from Hessel regarding his representation of Greenberg, the Circuit Court assumed that the prosecution would question Hessel about exactly the same communications that were raised in the annulment proceedings.

It is well established that failure to follow the required procedure for assessing waiver is error, *see Harrison, 276 Md. at 151; Forbes, 175 Md. App. at 637-38; Casey, 124 Md. App. at 346-47*. That is so because this procedure is an essential safeguard of the right to protect the confidentiality of attorney-client communications. The failure to undertake the proper inquiry here not only deprived Greenberg of that substantial right, but also undermined the effectiveness of Greenberg's defense, as discussed below.

### ***B. The Circuit Court's Failure to Follow the Required Procedure to Assess Attorney-Client Privilege Resulted in Prejudicial Error***

Three central errors resulted from the Circuit Court's flawed procedural analysis. First, the Circuit Court's failure to discern which elements of Hessel's testimony were potentially subject to privilege skewed the resulting waiver analysis and allowed the prosecution to introduce a wide range of privileged communications that were beyond the scope of the annulment proceedings.

**\*20** Second, the Circuit Court's failure to analyze Greenberg's testimony in the annulment proceedings led to the erroneous conclusion that Greenberg waived attorney-client privilege in his testimony. Greenberg was compelled to appear at the annulment proceedings, he never mentioned Hessel in his own testimony, and his limited revelations about the representation when questioned by opposing counsel do not constitute waiver. Third, the Circuit Court could not have analyzed Hessel's testimony in the annulment proceedings, which was not even introduced into the motions hearing record, and erred in holding that the attorney, rather than the client, can waive privilege through testimony. The Circuit Court's resulting admission of Hessel's broad testimony regarding Greenberg's communications on a variety of matters impaired Greenberg's defense at trial and rose to the level of prejudicial error. A new trial is therefore warranted.

#### ***1. The Attorney-Client Privilege Extended to Virtually All of Hessel's Testimony at Trial***

The Court of Appeals has held that the attorney-client privilege protects against “the disclosure of the attorney's opinions, impressions, or perceptions relating to the attorney-client relationship,” not merely “the disclosure of confidential communications made by the client to the attorney.” *Smith v. State, 394 Md. 184, 203 (2006)*; *see also Blanks v. State, 406 Md. 526, 538-39 (2008)*. “Because an attorney's advice is necessarily tailored to the information communicated by his or her client,” observations an attorney develops in connection with advising a client, like the client's communications, are subject to attorney-client privilege. *Smith, 394 Md. at 204*. The key requirement is that the communications “relate to professional advice

and to the subject-matter about which such advice is sought.” *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 416 (1998)(quoting *Lanasa v. State*, 109 Md. 602, 71 A. 1058, 1064 (1909)(emphasis omitted).

Had the Circuit Court followed the proper procedure to determine the applicability of attorney-client privilege here, it likely would have found that \*21 virtually everything Hessel testified about at trial was subject to attorney-client privilege that had not been waived. Hessel testified extensively about Greenberg's discrete requests for legal advice regarding the deed, power of healthcare agent and power of attorney, and Hessel's representation of Greenberg and Zucker as they attempted to ascertain the status of various accounts Zucker held at different banks. Both Greenberg's communications regarding the legal advice sought, and the advice Hessel gave, are well within the scope of the privilege.

Likewise, Greenberg's communications to Hessel regarding the circumstances of his marriage to Zucker, and Hessel's impressions of the marriage, fall squarely within the scope of attorney-client privilege. Greenberg relayed those details in the course of seeking Hessel's advice regarding the tax implications of marriage for the deed, and Hessel's impressions of the marriage were colored by the details Greenberg presented.

Finally, Greenberg's communications regarding his impressions of Zucker's health were privileged. According to Hessel, Greenberg conveyed impressions of Zucker's health in the context of rescheduling Hessel's appointment to represent the couple in their dealings with various banks, and at a time when Hessel was preparing documents to transfer power of healthcare agent to Greenberg. Greenberg also conveyed all of these communications in professional confidence, seeking out Hessel in the privacy of his office or in other private settings to solicit legal advice. And there is no indication that Greenberg intended any of these communications for public consumption or ever expressly or impliedly waived privilege with respect to these matters.

In sum, Hessel's testimony at trial revealed numerous privileged communications, opinions, and impressions regarding a variety of matters in the course of Hessel's representation. Contrary to the prosecution's representations to the court, Hessel's testimony was not limited to discussing the deed Hessel drafted for Greenberg and its tax implications. T. 2/23/2010 at 7. The breadth of Hessel's testimony at trial, the privileged nature of the communications Hessel revealed, \*22 and the number of discrete matters he discussed underscored the need for the Circuit Court to assess the scope of attorney-client privilege in the first instance. The Circuit Court's failure to conduct this preliminary inquiry distorted its subsequent waiver analysis. Had the Circuit Court conducted the proper inquiry, substantial portions of Hessel's testimony would likely have been excluded.

## ***2. The Circuit Court Erred in Concluding that Greenberg's Testimony in the Annulment Proceedings Categorically Waived Attorney-Client Privilege***

The primary basis for the Circuit Court's ruling was that Greenberg waived all applicable attorney-client privileges by voluntarily testifying about Hessel's representation during the prior annulment proceedings. That ruling rests on two flawed conclusions. First, Greenberg did not waive attorney-client privilege in the annulment proceedings because he did not knowingly or voluntarily put privileged communications at issue. Because the Circuit Court failed to review the circumstances of Greenberg's testimony in the annulment proceeding, the Circuit Court erroneously concluded that Greenberg raised privileged communications of his own volition. In fact, Greenberg did not appear at the annulment proceedings voluntarily; he was compelled to appear after McCarthy, his de facto adversary in the proceedings, filed a motion for a writ of habeas corpus ad testificandum habeas. Greenberg only discussed the representation in response to questions from McCarthy and Rochvarg, whose interests, as the judge in the annulment proceedings took pains to emphasize, were adverse to Greenberg's. That questioning was the equivalent of cross-examination, and substantial Maryland caselaw suggests such testimony on cross-examination is not waiver. Second, the Circuit Court erred in concluding that Greenberg's prior testimony categorically allowed Hessel to testify about all matters in the representation. Even if Greenberg's prior testimony in the annulment proceedings waived privilege as to certain communications, that testimony was far more limited than Hessel's \*23 testimony at trial, and Greenberg's prior testimony did not open the door to further disclosure of privileged communications.

It is elementary that a client can waive attorney-client privilege by implication as well as by an explicit statement of waiver. *Harrison*, 276 Md. at 136-37; *Agnew v. State*, 51 Md. App. 614, 649-50 (1982). But the bar for waiver by implication is high. The waiver must be knowing and voluntary, as evidenced by the client's words or deeds, and the implied waiver must comport with principles of fairness and consistency. *Harrison*, 276 Md. at 840; see also *Smith*, 394 Md. at 201 (“[i]ntrinsic to the definition of ‘waiver’ is the recognition that the client must be informed of both the scope and nature of the right being relinquished as well as the consequences of so doing.”). For that reason, Maryland law has long distinguished between a client who volunteers information about privileged communications in direct testimony, elicited by the client's own lawyer for the client's benefit, and testimony elicited by opposing counsel on cross-examination. “Generally, the client's offer *by his own testimony* as to a specific communication with his attorney constitutes a waiver as to all other communications to the attorney on the same subject matter.” *Harrison*, 276 Md. at 136 (emphasis added). “But we are not willing to hold that the failure to insist on [attorney-client privilege] makes the testimony which [the client] may give on cross-examination voluntary, in such sense as to constitute a waiver of his privilege with reference to the communication to his attorney.” *Id.* at 148 (quoting *Burgess v. Sims Drug Co.*, 86 N.W. 307, 309 (Iowa 1901); see also *Haley*, 389 Md. at 127-29).

Greenberg's testimony in the annulment proceedings did not constitute an implied waiver of attorney-client privilege. The Circuit Court mistakenly assumed that in the annulment proceedings, Greenberg “gives testimony that is now sought to be suppressed, and examined the lawyer,” and added, “don't you waive the privilege when you openly talk about it” T. 2/23/2010 at 7. That assessment ignored the fact that Greenberg's testimony on his own behalf made no reference \*24 to Hessel's representation, let alone to privileged communications. T. 2/22/2010, State's Exhibit 1 at 68-82. Greenberg addressed his communications with Hessel only in response to specific questions about the representation from attorneys McCarthy and Rochvarg, who were Greenberg's adversaries in the proceeding. McCarthy and Rochvarg, not Greenberg, broached the subject of Hessel's representation and asked Greenberg a series of pointed questions about his communications with Hessel during the representation. Greenberg's responses to these questions--that he could not remember or did not know the answer--were limited and vague. Cf. *Harrison*, 276 Md. at 138-39 (“In those cases where courts have found a waiver of the privilege based upon the disclosure of communications with counsel upon cross-examination, the disclosures have generally been substantive and detailed.”). Greenberg's statements fall far short of the standard required to impute waiver. The Circuit Court's conclusion to the contrary further underscores the inadequacy of the initial waiver inquiry, particularly here, when Greenberg was compelled to appear as a result of McCarthy's motion and when Greenberg was acting *pro se*.

In any event, even if Greenberg waived any privilege, and he did not, any waiver resulting from Greenberg's responses to questions from opposing counsel would have been limited to the matters discussed: Greenberg's approach to Hessel in connection with the deed, and the tax charges Hessel advised would be associated with a deed transfer to a non-spouse. T. 2/22/2010, State's Exhibit 1 at 31-33, 65-66. Waiver is limited to the subject matter of the particular communications disclosed; waiver as to certain communications does not categorically waive the privilege as to other matters. See *Forbes*, 175 Md. App. at 637; *Casey*, 124 Md. App. at 346-47. Though Greenberg answered questions about the deed, neither opposing counsel nor Greenberg discussed Greenberg's consultations with Hessel in connection with Zucker's bank accounts, the consultations during the stay at the Sleep Inn, or the consultations leading to Greenberg's appointment as Zucker's healthcare agent. All of those matters should \*25 have remained subject to attorney-client privilege, and Hessel's testimony at trial violated that privilege.

### ***3. The Circuit Court Erred in Concluding that Greenberg's Failure to Object to Hessel's Testimony in the Annulment Proceedings Waived Attorney-Client Privilege***

The second basis for the Circuit Court's ruling that Greenberg waived all privilege--that Greenberg failed to object to Hessel's testimony in the annulment proceedings--is equally erroneous. The attorney-client privilege belonged to Greenberg, as the client, not to his attorney, Hessel, and “[o]nly the client has power to waive the attorney-client privilege.” *Parler & Wobber*, 359 Md. at 691.

Greenberg's failure to object to Hessel's testimony in the annulment proceedings while Greenberg represented himself *pro se* was in no way a clear and unequivocal waiver of the privilege. Cf. *Bequette v. State of Maryland*, 31 Md. App. 85, 90 (1976)

(finding attorney-client privilege was not waived when appellant's former attorney made a public accusation about appellant and appellant was or should have been "fully aware" of the letter). As an initial matter, since the transcript of Hessel's annulment proceeding testimony was neither introduced at the motions hearing nor was a proffer made of the substance of his testimony, the record fails to demonstrate that Hessel actually testified to any privileged communications at the annulment hearing. Absent that crucial evidence, the conclusion that Hessel's mere testimony at the annulment hearing resulted in a waiver of the attorney client privilege is clearly erroneous.

Moreover, given the posture of the annulment proceedings--where Hessel and Greenberg were not adverse parties, and Hessel's claims for attorney's fees were directed against Zucker's estate only--it is not even clear that Greenberg could have objected to Hessel's testimony. Nor did any of Greenberg's subsequent actions waive privilege with respect to Hessel's testimony if Hessel did in fact testify about privileged matters. The state, not Greenberg, subsequently called Hessel at trial, and defense counsel repeatedly objected to Hessel's testimony; thus \*26 Greenberg did not open the door to the introduction of Hessel's prior, privileged testimony. *Cf. id.* The Circuit Court's conclusion that Greenberg waived attorney-client privilege by failing to object to Hessel's testimony in the annulment proceeding was plainly erroneous.

#### **4. The Admission of Hessel's Testimony Was Prejudicial Error**

As the above arguments make clear, the Circuit Court's cursory analysis of whether Hessel's testimony at trial was barred by attorney-client privilege introduced numerous legal errors into Greenberg's trial.

When a Circuit Court erroneously admits privileged testimony at trial, the "convictions cannot stand unless, 'upon [this court's] own independent review of the record, [the court] is able to conclude, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Newman*, 384 Md. at 312 (quoting *Dupree v. State*, 352 Md. 314, 333 (1998)).

This court cannot reach that conclusion here. The admission of Hessel's testimony made privileged communications an essential aspect of the state's case on several of the counts against Greenberg. *See id.* (finding prejudicial error where the State's case was largely circumstantial and only the attorney's testimony substantiated a major element of the prosecution's case). The prosecution construed Hessel's testimony as key evidence of Greenberg's deliberate intent to **exploit** and neglect Zucker, as opposed to the defense's theory that Greenberg was disorganized and prone to living in squalor due to uncontrollable psychological conditions. Hessel was the only witness to testify about Greenberg and Zucker's visits to various banks, an important aspect of the State's embezzlement and theft claims, and to convey Greenberg's ostensible motivations for going there. Hessel was also the only person, aside from Greenberg, who saw Zucker in the week before her heart attack and was in a position to observe and communicate with Greenberg about Zucker's condition. Those communications, which occurred in the context of Hessel's representation during the visits to banks, were so central to the prosecution's case against Greenberg on the first and second-degree neglect \*27 charges that the prosecution twice stressed Hessel's testimony in its closing arguments.

Hessel's singular ability to shed light on Greenberg's communications during a crucial time period--communications that the prosecution then seized as proof of Greenberg's culpable intent--was also essential given weaknesses in the rest of the prosecution's case. Zucker's testimony at trial, in which she stated that she told Greenberg to take whatever he needed, supported the defense's theory, and the prosecution's efforts to impeach that testimony only established that Zucker was confused in late 2008 as her pre-existing heart condition worsened. The pattern of large withdrawals from Zucker's account were circumstantial evidence which Zucker herself said she had authorized Greenberg to do to pay bills and to assuage her fears that the banks would collapse. Defense counsel established the possibility that Zucker's house was in squalor because Greenberg was a hoarder unable to maintain a basic level of cleanliness, not because Greenberg was deliberately neglecting Zucker. Given the equivocal nature of the rest of this evidence, this court cannot conclude that the admission of Hessel's testimony was harmless beyond a reasonable doubt.



### *CONCLUSION*

Had the Circuit Court undertaken the proper inquiry, some, if not all, of Hessel's testimony would likely have been prohibited. The Circuit Court erred again by assuming that Greenberg's testimony in the prior annulment proceedings categorically waived all privilege when Greenberg never brought up Hessel on direct and limited the scope of his responses when cross-examined about Hessel's representation. And the Circuit Court further erred by holding that Hessel's testimony in the annulment proceedings waived attorney-client privilege because Greenberg did not object to that testimony. The admission of Hessel's testimony was the product of numerous errors that materially prejudiced Greenberg's defense. In light of these errors, appellant respectfully requests that this court grant him a new trial.

#### **Appendix not available.**

#### Footnotes

- 1 References to the record transcripts, including the motions hearing transcript, the trial transcript, the sentencing transcript, and associated exhibits, are designated "T.," followed by the date of the hearing and page number of the transcript.
- 2 The details of this arrest were excluded from Greenberg's trial to avoid possible prejudice.
- 3 The annulment proceedings had an unusual posture because they arose from the State's initial petition to appoint a guardian for Zucker as a disabled adult. Zucker opposed that petition, but the State prevailed, and McCarthy was therefore appointed guardian of Zucker's estate. Shortly thereafter, McCarthy filed various motions, including the motion to annul Zucker and Hessel's marriage, with the court. Greenberg, as an interested, adverse party, then filed responses to McCarthy's motion to void the deed and to annul the marriage. *See In the Matter of Evelyn Zucker*, Docket Nos. 1-35, No. 75528FL, Cir. Ct. filed Jan. 27, 2009. Portions of the annulment proceeding--specifically, Greenberg's and Zucker's testimony in those proceedings--were introduced into the record at trial. T. 2/22/2010 at 10 (introducing Greenberg's and Zucker's testimony as State's Exhibits Nos. 1 and 2).