[Cite as *Autumn Health Care of Zanesville, L.L.C., v. DeWine*, 2015-Ohio-2655.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Autumn Health Care of Zanesville, LLC,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-593 (C.P.C. No. 13CVH-11869)
Mike DeWine for Ohio Committee,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
[Health Care Fraud Section of the Ohio Attorney General's Office et al.,	:	
Appellants].	:	

D E C I S I O N

Rendered on June 30, 2015

Brunner Quinn, *Rick L. Brunner* and *Peter A. Contreras*, for appellee Autumn Health Care of Zanesville, LLC.

Michael DeWine, Attorney General, and *Bridget C. Coontz*, for non-party appellants Christina J. Opperman, Beth Bumgardner, Christine Haenszel, and Charles Angersbach.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Non-party appellants, Christina J. Opperman, Beth Bumgardner, Christine Haenszel, and Charles Angersbach (collectively "appellants"), appeal from an order of the Franklin County Court of Common Pleas denying their motion to quash subpoenas duces tecum served by plaintiff-appellee, Autumn Health Care of Zanesville, LLC ("Autumn"), and ordering them to attend discovery depositions. Because we conclude that the trial court erred by failing to conduct an in camera review of documents to be produced under the subpoenas, we reverse in part.

{¶ 2} Autumn owns and operates a long-term nursing and rehabilitation center in Zanesville, Ohio. In October 2013, Autumn filed a complaint against the Mike DeWine for Ohio Committee ("Committee"), alleging that the Committee organized a press conference at which its candidate, Mike DeWine, made false statements regarding the alleged treatment of a patient at Autumn's facility. Autumn further alleged that the Committee issued a fundraising message republishing these allegedly false statements. Autumn sought damages for slander and/or libel.

{¶ 3} On July 3, 2014, Autumn filed notices of subpoenas duces tecum to multiple employees of the Ohio Attorney General's Office who were not parties to the litigation, including appellants. On July 14, 2014, appellants and the other non-party employees of the Ohio Attorney General's Office moved to quash the subpoenas, asserting that the documents requested were protected under the law enforcement investigatory privilege. The trial court denied the motion to quash as to appellants, finding that it was speculative to conclude that appellants were involved in a criminal investigation of Autumn during the relevant time period under the subpoenas. The trial court ordered appellants to appear for discovery depositions pursuant to the subpoenas.

{¶ 4} Appellants appeal from the trial court's order, assigning a single error for this court's review:

> The trial court erred in denying non-party Appellants' Motions to Quash Plaintiff-Appellee Autumn Health Care of Zanesville's ("Autumn's") subpoenas seeking evidence and testimony from Appellants in this civil defamation case, where Appellants are part of a law enforcement unit that is investigating and prosecuting Autumn for Medicaid fraud and other criminal violations and where the information sought is protected by the law-enforcement investigatory privilege and the work product privilege under Ohio Crim. R. 16(J) and is not relevant to this defamation case.

{¶ 5} Although neither appellants nor Autumn have directly raised the issue, we begin by considering whether this court has jurisdiction over the present appeal. Under the Ohio Constitution, courts of appeals have jurisdiction to review final orders of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). An order is final and appealable if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Eng. Excellence,*

Inc. v. Northland Assoc., L.L.C., 10th Dist. No. 10AP-402, 2010-Ohio-6535, ¶ 10. Appellate courts use a two-step analysis to determine whether an order is final and appealable. First, the court determines if the order is final within the requirements of R.C. 2505.02. Second, the court determines whether Civ.R. 54(B) applies and, if so, whether the order contains a certification that there is no just reason for delay. *Id*.

{¶ 6} Generally, discovery orders are not final and appealable. *Concheck v. Concheck*, 10th Dist. No. 07AP-896, 2008-Ohio-2569, ¶ 8. However, discovery orders requiring a party to produce privileged or confidential information are final and appealable orders. *Mason v. Booker*, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶ 11 (10th Dist.). In this case, the order denying appellants' motion to quash had two effects: (1) the court directly ordered appellants to present themselves for deposition, and (2) because the depositions were sought pursuant to subpoenas duces tecum served on appellants, the court implicitly required appellants to produce the documents sought under the subpoenas. We will consider each effect in determining whether the order was final and appealable. *See, e.g., Hope Academy Broadway Campus v. White Hat Mgt.*, 10th Dist. No. 12AP-116, 2013-Ohio-911, ¶ 11.

Compelling Attendance at Deposition

{¶ 7} As defined by statute, a final order includes "[a]n order that grants or denies a provisional remedy" when (1) "[t]he order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy," and (2) "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4). Provisional remedy is defined to include a proceeding ancillary to an action, including "discovery of a privileged matter." R.C. 2505.02(A)(3). An order that requires disclosure of privileged material may satisfy these criteria and constitute a final, appealable order. In the present case, however, to the extent the trial court's order compels appellants to attend depositions, the record is insufficiently developed to establish whether the testimony to be elicited at the depositions would involve the disclosure of privileged information.

{¶ 8} The Fifth District Court of Appeals considered a similar scenario in *Riggs v. Richard*, 5th Dist. No. 2006CA00234, 2007-Ohio-490. Riggs claimed that an attorney for

the school board maliciously made false statements and provided false documents to the school board in order to purposefully injure Riggs's reputation and employment opportunities. *Id*. at ¶ 7. As part of pretrial discovery, Riggs filed a notice of deposition for the attorney, who moved for a protective order seeking to limit the deposition to communications not protected by attorney-client privilege. *Id.* at ¶ 8. The trial court denied the motion for protective order. On appeal, the Fifth District Court of Appeals found that the order denying the motion for protective order was not a final, appealable order because the record was insufficiently developed to establish that the deposition would result in the disclosure of privileged materials. *Id.* at ¶ 21. As the court explained:

> To properly address whether the communications or material sought is subject to the attorney-client privilege, it is, at a minimum, necessary to ask the questions first and for the privilege rule to be invoked. After such has occurred, the trial court then can, at a hearing, determine if, in fact, privileged matters may be disclosed.

Id. *See also Buffmyer v. Cavalier, M.D.*, 5th Dist. No. 03COA067, 2004-Ohio-3303, ¶ 18 (holding that answers given in a deposition may not disclose privileged matters and that, in order to properly address those issues, "it is at a minimum necessary to ask the questions and for the privilege rule to be invoked"). *Compare Lightbody v. Rust*, 137 Ohio App.3d 658, 663-65 (8th Dist.2000) (holding that trial court erred by ordering attorney to answer deposition questions concerning communications made by the attorney's client during the attorney-client relationship when there was no evidence in the record that the client waived the testimonial privilege).

{¶ 9} The reasoning applied in the *Riggs* decision applies to this case as well. Appellants assert that they were involved in the criminal investigation of Autumn and that the information they compiled is subject to the law enforcement investigatory privilege. Assuming, without deciding, that appellants are correct, compelling appellants to answer questions at depositions *might* require the disclosure of privileged information. However, whether privileged information is implicated will turn on the questions that are asked in the depositions. Autumn may be able to discover the information it seeks without encroaching into the realm of privilege. We cannot resolve the matter with any certainty without knowing the specific questions asked and the grounds upon which any privilege

was asserted. At this point, the record is insufficiently developed to establish that compelling appellants to attend depositions will necessarily lead to the disclosure of privileged information. Therefore, to the extent the trial court's order requires appellants to attend depositions, it does not constitute a final and appealable order. To the extent appellants seek to appeal this portion of the order, we dismiss the appeal for lack of a final, appealable order.

Compelling Production of Documents

{¶ 10} Autumn sought to depose appellants pursuant to subpoenas duces tecum requesting that appellants bring certain specified documents with them to the depositions. By denying the motion to quash and ordering appellants to attend the depositions, the trial court also implicitly ordered appellants to produce the requested documents. *See Future Communications, Inc. v. Hightower*, 10th Dist. No. 01AP-1175, 2002-Ohio-2245, ¶ 12 (by denying motion to quash, trial court ordered appellant to comply with subpoena duces tecum). Appellants assert that at least some of the requested documents are subject to the law enforcement investigatory privilege. Accordingly, to the extent the trial court's order requires production of privileged documents, it constitutes a final and appealable order. *Mason* at ¶ 11; *Hightower* at ¶ 12-13.

Standard of Review

{¶ 11} Trial courts possess broad discretion over the discovery process, and we generally review discovery decisions for abuse of discretion. *MA Equip. Leasing I, LLC v. Tilton*, 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 13. However, the appropriate standard of review for a privilege claim depends on whether it involves a question of law or a question of fact. *Id.* at ¶ 18. When it is necessary to interpret and apply statutory language to determine whether information is confidential and privileged, the de novo standard applies. By contrast, when a claim of privilege requires a review of factual questions, the trial court's decision is reviewed for abuse of discretion. *Id.*

{¶ 12} Appellants argue that the documents Autumn sought under the subpoenas were compiled in the course of a criminal investigation. Therefore, appellants assert, the documents are subject to a qualified law-enforcement investigatory privilege, as recognized by the Supreme Court of Ohio in *Henneman v. Toledo*, 35 Ohio St.3d 241 (1988). Because the motion to quash required the trial court to interpret and apply this

privilege as defined in *Henneman* and subsequent court decisions, it involved a question of law, and we review the trial court's decision under the de novo standard of review. "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9 (internal citations omitted).

Analysis of Privilege Issue

{¶ 13} Appellants moved to quash the subpoenas pursuant to Civ.R. 45(C), which provides in relevant part that, "[o]n timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena * * * [r]equires disclosure of privileged or otherwise protected matter and no exception or waiver applies." Civ.R. 45(C)(3)(b). Appellants argued that the subpoenas should be quashed because the documents sought under the subpoenas are subject to the law enforcement investigatory privilege.

{¶ 14} The law enforcement investigatory privilege is not absolute but is a qualified privilege that may be overcome based on a showing of a compelling need for the privileged information. *J & C Marketing, L.L.C. v. McGinty*, Sup. Ct. No. 2013-1963, 2015-Ohio-1310, ¶ 17-18. Courts apply a balancing test to determine whether the privilege applies, weighing the legitimate public interest in the confidentiality of the information versus the needs of a litigant to obtain evidence in support of a non-frivolous cause of action. *Id*. at ¶ 19. The Supreme Court of Ohio has held that the most appropriate method of conducting the balancing test is through an in camera review of the documents allegedly subject to the privilege. *Henneman* at 242 ("We hold that [investigatory materials] must be disclosed upon a proper discovery request if, pursuant to an *in camera* inspection, the trial judge determines that the public interest in the confidentiality of such information is outweighed by the litigant's specific need for the evidence."). *See also McGinty* at ¶ 10 (noting that trial court conducted in camera inspection of documents before ordering production of investigative reports).

{¶ 15} Courts have similarly held that an in camera review is the proper method to deal with other types of privilege claims. *See, e.g., State ex rel. Dann v. Taft*, 110 Ohio St.3d 1, 2006-Ohio-2947, ¶ 20 (materials alleged to be privileged under gubernatorial-communications privilege); *In re Subpoena Duces Tecum Served on Atty. Potts*, 100 Ohio

St.3d 97, 2003-Ohio-5234, ¶ 23 (materials alleged to be privileged under attorney-client and work-product privileges); *Legg v. Hallett, M.D.*, 10th Dist. No. 07AP-170, 2007-Ohio-6595, ¶ 27 (health care provider risk management documents alleged to be privileged under R.C. 2305.253); *Gates v. Brewer*, 2 Ohio App.3d 347 (10th Dist.1981), at paragraph four of the syllabus (health care peer review committee records).

{¶ 16} In this case, the trial court did not conduct an in camera review of the relevant documents to determine whether they were subject to the law enforcement investigatory privilege. Appellants assert that they are employees of the Medicaid Fraud Control Unit of the Health Care Fraud Section of the Ohio Attorney General's Office and that they were involved in investigating an ongoing criminal case against Autumn and its owner. The Ohio Attorney General's Office is presently pursuing criminal prosecution of both Autumn and its owner. *See State v. Autumn Health Care of Zanesville, LLC*, Franklin C.P. No. 14CR-3399; *State v. Hitchens*, Franklin C.P. No. 14CR-3400. Under these circumstances, we conclude that the trial court erred by failing to conduct an in camera review of the relevant documents before determining whether they were subject to the law enforcement investigatory privilege and whether Autumn demonstrated a compelling need sufficient to overcome that privilege.

{¶ 17} We note that, on remand, it may be necessary for the parties to further clarify what documents have not been produced. The subpoenas duces tecum requests, inter alia, documentation of communication between appellants or anyone at the Ohio Attorney General's Office and anyone at the Ohio Department of Health related to or concerning Autumn or its owner during a specified timeframe. In their brief on appeal, appellants assert that communications between the Ohio Attorney General's Office and the Ohio Department of Health were disclosed following a public records request. At oral argument, appellants' counsel similarly suggested that at least some of the documents Autumn sought have been produced. To facilitate an effective in camera review, Autumn may wish to identify any documents or classes of documents it believes have not been produced; appellants should identify any documents it believes are subject to privilege so that the trial court may evaluate the privilege claim.

{¶ 18} For the foregoing reasons, we dismiss in part and sustain in part appellant's sole assignment of error. The judgment of the Franklin County Court of Common Pleas is

reversed with respect to the production of documents pursuant to the subpoenas duces tecum, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed in part;
cause remanded with instructions.

LUPER SCHUSTER and HORTON, JJ., concur.

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