

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

DANIEL N. LAVIN, EXECUTOR OF THE  
ESTATE OF MARTHA K. LOTTMAN.  
DECEASED

Plaintiff - Appellee

-VS-

PAUL HERVEY, ESQ., et al.

Defendants - Appellants

: JUDGES:  
: Hon. William B. Hoffman, P.J.  
: Hon. Patricia A. Delaney, J.  
: Hon. Craig R. Baldwin, J.

: Case No. 2015CA00021

: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court  
of Common Pleas, Probate Division,  
Case No. 221652

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

August 24, 2015

APPEARANCES:

For Plaintiff-Appellee

SCOTT M. ZURAKOWSKI  
JAMES M. WILLIAMS  
Krugliak, Wilkins, Griffiths  
& Dougherty Co., L.P.A.  
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For Defendants-Appellants

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*Baldwin, J.*

{¶1} Appellants Paul B. Hervey and the law firm of Fitzpatrick, Zimmerman & Rose Co., L.P.A. appeal a judgment of the Stark County Common Pleas Court, Probate Division, ordering the disclosure of documents to appellee Daniel N. Lavin, Executor of the Estate of Martha K. Lottman, Deceased.

#### STATEMENT OF FACTS AND CASE

{¶2} The decedent was represented during her life by family friend Paul B. Hervey, Esq., one of the appellants herein. Attorney Hervey is an attorney with the firm of Fitzpatrick, Zimmerman & Rose Co., L.P.A.

{¶3} Hervey represented the decedent in estate planning and business matters. In addition, he assisted her with various computer issues, including backing up her computer, removing and adding files and documents, reinstalling deleted information, and taking the computer for repair and recovery of files. The decedent kept her business records primarily on her computer.

{¶4} During the months leading up to her death, the decedent and her children were involved in litigation in Texas regarding the sale of one of the family's businesses. As a result of the settlement of that litigation, three of the four children agreed to the appointment of appellee as fiduciary of their mother's estate. The decedent passed away on February 17, 2014, and appellee was named fiduciary on August 11, 2014.

{¶5} Appellee filed the instant concealment action on September 15, 2014, alleging that appellants refused to turn over files containing documents and materials

necessary to the full and effective administration of the estate, as well as assets which are the property of the estate.

{¶6} On October 8, 2014, appellants filed a motion to dismiss the action, arguing that the items sought by appellee were protected by attorney-client privilege. Appellee asked the court to conduct an in camera inspection of the documents in appellants' possession to determine which may be protected by privilege. Following an in camera inspection, the court found certain documents to not be protected by attorney-client privilege nor by the work product doctrine, and ordered that such documents be turned over to appellee. The underlying concealment action was referred to mediation.

{¶7} Appellants assign two errors to the court's order requiring them to turn over documents to appellee:

{¶8} "I. THE COURT BELOW ERRED AS A MATTER OF LAW IN A CONCEALMENT ACTION UNDER O.R.C. §2109.50 IN ISSUING THE SUBJECT JUDGMENT ENTRY BUT NOT FIRST CONDUCTING AN EVIDENTIARY HEARING AS TO THE REVELATION OF INFORMATION CLAIMED TO BE PROTECTED BY THE ATTORNEY-CLIENT RELATIONSHIP OR OTHERWISE CONFIDENTIAL.

{¶9} "II. THE COURT BELOW ERRED AS A MATTER OF LAW IN ISSUING THE SUBJECT JUDGMENT ENTRY WHEN IT FAILED TO ADDRESS THE ISSUE OF APPELLANTS' DUTY OF CONFIDENTIALITY UNDER PROFESSION [SIC] CONDUCT RULE 1.6."

{¶10} At the outset, we address the issue of whether the instant appeal is a final, appealable order. Recently the Ohio Supreme Court clarified that when an appeal is

taken from an order compelling discovery pursuant to R.C. 2505.02(B)(4), the party appealing must demonstrate both that the order determines the action with respect to the provisional remedy and prevents judgment in favor of the appealing party with respect to the provisional remedy, *and* that the 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. *Smith v. Chen*, 142 Ohio St. 3d 411, 31 N.E.3d 633, 2015-Ohio-1480, ¶5. In that case, the Supreme Court noted that the appellants failed to address the requirement in R.C. 2505.02(B)(4)(b) even after the court had ordered them to show cause as to why the appeal should not be dismissed. *Id.* at ¶6. The court dismissed the appeal because the appellants failed to establish why an immediate appeal was necessary. *Id.* at ¶8. In so doing, the court clarified that some interlocutory discovery orders would remain appealable:

{¶11} "This ruling does not adopt a new rule, nor does it make an appeal from an order compelling disclosure of privileged material more difficult to maintain. An order compelling disclosure of privileged material that would *truly* render a postjudgment appeal meaningless or ineffective may still be considered on an immediate appeal." *Id.* at ¶9.

{¶12} In the instant case, appellants addressed both prongs of R.C. 2505.02(B)(4) in their brief. Appellants argued as to R.C. 2505.02(B)(4)(b) that the entry which ordered disclosure of confidential and privileged information falls within the category of provisional remedies for which no meaningful or effective remedy could be granted following final resolution of the underlying action, since there would no longer be an opportunity for the attorney to preserve the subject information. Accordingly, we

find that appellants have demonstrated that the instant order is a final, appealable order and we address the merits of the appeal.

I.

{¶13} In their first assignment of error, appellants argue that the court erred in failing to hold an evidentiary hearing. Appellants argue that a hearing is required by R.C. 2109.50, which provides in pertinent part:

Upon complaint made to the probate court of the county having jurisdiction of the administration of an estate, a testamentary trust, or a guardianship or of the county where a person resides against whom the complaint is made, by a person interested in the estate, testamentary trust, or guardianship or by the creditor of a person interested in the estate, testamentary trust, or guardianship against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, personal property, or choses in action of the estate, testamentary trust, or guardianship, the court shall by citation or other judicial order compel the person or persons suspected to appear before it to be examined, on oath, touching the matter of the complaint. . . .

The probate court shall promptly proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the probate court.

If required by either party, the probate court shall swear the witnesses who are offered by either party touching the matter of the complaint and cause the examination of every witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

{¶14} R.C. 2109.52 further instructs the court as to the procedure for determining a concealment action:

When passing on a complaint made under section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, personal property, or choses in action of the estate, testamentary trust, or guardianship. If the person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind. The probate court may issue a citation or other judicial order into any county in this state

that shall be served and returned as provided in section 2109.50 of the Revised Code. The citation or other judicial order shall require any person who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession to appear before the court. At the hearing, the court may hear and determine questions of title relating to those assets. In all cases, except when the person found guilty is the fiduciary, the probate court shall render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the personal property or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of the proceedings or complaint; except that the judgment shall be reduced to the extent of the value of anything specifically restored or returned in kind as provided in this section.

If the person found guilty is the fiduciary, the probate court shall render judgment in favor of the state against the fiduciary for the amount of the moneys or the value of the personal property or choses in action concealed, embezzled,

conveyed away, or held in possession, together with penalty and costs as provided in this section.

{¶15} The purpose of R.C. 2109.50 is to provide a speedy and effective method of discovering assets belonging to the estate and securing their recovery. *In re the Estate of Gordon*, 5th Dist. Richland No. 13-CA-77, 2014-Ohio-2087, ¶ 21. It is a quasi-criminal statute requiring a finding of guilty or not guilty. *Id.* R.C. 2109.52 empowers the probate court to conduct a hearing in the concealment proceeding at which the court may determine questions of title concerning the allegedly concealed, embezzled, or conveyed estate assets, to determine whether the person accused is guilty and, if so, to enter judgment against the person found guilty for the amount of the money or value of assets with a ten percent penalty. *Id.*

{¶16} In the instant case, the court has not yet determined appellants' guilt or innocence in the underlying concealment action. The order appealed from is an interlocutory discovery order. While the statute requires an evidentiary hearing on the concealment action itself, appellants' assignment of error is premature, as the court has not yet made a determination of whether appellants are guilty of concealment.

{¶17} An in camera inspection is a proper method for determining whether matters claimed to be privileged must be disclosed in discovery. A trial court abuses its discretion when it fails to hold an evidentiary hearing or in camera review to analyze the requested material alleged to be work-product or attorney-client privileged. *Caiazza v. Mercy Medical Center*, 5th Dist. Stark App. No 2012-CA-83, 2012-Ohio-3940, ¶20. In the instant case, the court conducted an in camera review of the requested documents which appellants claimed were protected by work-product or attorney-client privilege.



The court did not err in failing to hold an evidentiary hearing in addition to the in camera review at this stage of the proceedings.

{¶18} The first assignment of error is overruled.

## II.

{¶19} In their second assignment of error, appellants argue that the court erred in ordering the release of documents without discussing Professional Rule of Conduct 1.6. Appellant Hervey argues that he contacted ethical counsel concerning Rule of Conduct 1.6 concerning this matter, and was informed that he should not deliver the decedent's client file to anyone until an executor was appointed for the estate and a proper court order issued.

{¶20} Rule 1.6 sets forth an attorney's responsibilities regarding confidentiality. The rule does not define what documents are protected by privilege. The trial court's opinion sets forth a detailed legal and factual analysis of what documents submitted to the court in camera were or were not protected by attorney-client privilege or work-product privilege. The trial court did not err in failing to discuss Rule 1.6.

{¶21} As discussed in the first assignment of error, the court has yet to make a determination as to whether appellants are guilty of concealment. Appellants have not challenged the merits of the trial court's decision regarding attorney-client privilege and work-product privilege as to any of the specific documents the court ordered to be released to appellee. Appellant Hervey's ethical duties to his client pursuant to Rule 1.6 and the advice he received regarding his ethical duties may become relevant when the merits of the concealment action are considered by the court, but at this point the court

has merely made a preliminary determination of what documents are not privileged and are to be turned over to the estate in discovery and for preparation of a tax return.

{¶22} The second assignment of error is overruled.

{¶23} The judgment of the Stark County Common Pleas Court, Probate Division, is affirmed. Costs are assessed to appellants.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.