

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rosemary S. Joyce, Individually
and as Administratrix of the
Estate of Edward M. Joyce

Court of Appeals No. L-09-1089

Trial Court No. CI0200706640

Appellee

v.

William Rough, et al.

Defendant

[Toledo Area Regional Transit Authority
Appellant]

DECISION AND JUDGMENT

Decided: October 30, 2009

* * * * *

Joseph R. Gioffre and Michael S. Schroeder, for appellee.

Glenn E. Wasielewski, for appellant.

* * * * *

BOYLE, J.

{¶ 1} This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted a motion to compel filed by appellee, Estate of Edward M. Joyce, III, denied a motion for protective order filed by appellant,

Toledo Area Regional Transit Authority (TARTA), and ordered TARTA to produce certain documents.

{¶ 2} This case arises out of an October 26, 2005 accident involving Edward M. Joyce, a pedestrian who was fatally injured when he was hit by a TARTA bus. During the course of discovery, appellee sought the disclosure of "copies of any and all incident reports regarding the incident set forth in the Plaintiff's complaint," "copies of any and all incident reports or other documents prepared by TARTA following the incident," and "any and all documents which refer and/or relate to the incident." TARTA responded by asserting that the requested documents were subject to attorney-client and work product privileges and therefore were not discoverable. Appellee subsequently filed a motion to compel discovery, asserting that defense counsel had improperly objected to the discovery request. In response, TARTA filed a motion for protective order and memorandum in opposition to the motion to compel, again asserting that the requested documents were privileged.

{¶ 3} The documents at issue in this dispute, all of which were submitted to the trial court for in camera review (and, likewise, have been reviewed by this court in connection with this appeal), are as follows: (1) TARTA's accident report prepared by the bus driver; (2) TARTA's accident report prepared by the investigating supervisor; and (3) TARTA's accident report prepared by the dispatcher who received the initial call about the accident.

{¶ 4} Also contained in the record is an affidavit by attorney Glenn Wasielewski, counsel for TARTA, attesting to the following undisputed facts: (1) that Wasielewski and his partner, attorney Cormac Delaney, had been retained by TARTA "to provide legal advice" and to "investigate and defend liability claims and other matters"; (2) that on the date of the accident, Wasielewski and Delaney, at the request of a TARTA representative, went to the site of the accident "to assist in the investigation" of the accident, and that, a day later, they returned with TARTA representatives "to continue the on scene investigation of the fatal accident which, it was anticipated, would result in litigation"; and (3) that "during the course of the investigation" Wasielewski was provided with investigative reports that were generated by TARTA personnel, and that these reports were the same reports that, ultimately, were submitted to the trial court for in camera review.

{¶ 5} In an order file-stamped March 2, 2009, the trial court granted appellee's motion to compel, denied TARTA's motion for protective order, and ordered TARTA to produce the requested documents. TARTA timely appealed the trial court's decision, raising the following assignment of error:

{¶ 6} I. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING THE PLAINTIFF-APPELLEE'S MOTION TO COMPEL DISCOVERY AND DENYING THE DEFENDANT-APPELLANT'S MOTION FOR PROTECTIVE ORDER BY ORDERING TARTA TO PRODUCE DOCUMENTS THAT ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE."

{¶ 7} In general, trial courts have broad discretion regarding the management of discovery; absent an abuse of that discretion, a trial court's decision on discovery matters will not be reversed. *Baker v. Meijer Stores Ltd. Partnership*, 12th Dist. No. CA2008-11-136, 2009-Ohio-4681, ¶ 11.

{¶ 8} "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *." Civ.R. 26(B)(1). Potentially applicable privileges include the attorney-client privilege, which "prevents the disclosure of certain communications made from a client to that client's legal counsel," *Hunter v. Wal-Mart Stores, Inc.*, 12th Dist. No. CA2001-10-035, 2002-Ohio-2604, ¶ 36, and the work product doctrine, which protects from discovery "documents and tangible things prepared in anticipation of litigation." *Id.*, at ¶ 35; Civ.R. 26(B)(3).¹

{¶ 9} In the instant case, we find that the disputed reports are protected from discovery by the attorney-client privilege. Ohio courts have repeatedly held that the attorney-client privilege protects from discovery witness statements or reports that are given to one's legal counsel for the purpose of preparing a defense to a lawsuit. See *Baker*, 2009-Ohio-4681, at ¶ 16 (accident report found privileged because it was turned over to defendant's attorneys in order to mount a defense to plaintiff's lawsuit); *In re Klemann* (1936), 132 Ohio St. 187, 193 (accident report was privileged when it was transmitted to an attorney in preparation for a lawsuit); *In re Tichy* (1954), 161 Ohio St. 104, 105-106 (information obtained after an accident was privileged when turned over to

¹We note that even where discovery is protected by the work product doctrine, Civ.R. 26(B)(3) allows discovery of those documents prepared in anticipation of litigation upon a showing of good cause therefor. *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo* (1983), 6 Ohio St.3d 270, 271.

the legal department); *Woodruff v. Concord City Discount Clothing Store* (Feb. 19, 1987), 2d Dist. No. 10072 (notes taken by store managers after a slip and fall injury, per *Klemann*, were protected by the attorney-client privilege); *Leslie v. The Kroger Co.* (June 18, 1992), 2d Dist. Nos. 2824, 2899 (incident report, per *Klemann* and *Woodruff*, was protected by attorney-client privilege); *Witt v. Fairfield Pub. School Dist.* (Apr. 22, 1996), 12th Dist. No. CA95-10-169 (witness statements were protected by the attorney-client privilege, per *Klemann*); *Hunter*, 2002-Ohio-2604, ¶ 39 (witness statements were protected by the attorney-client privilege when turned over to attorneys to prepare defense, per *Klemann* and *Witt*).

{¶ 10} Here, there is no question that the accident reports were given by TARTA to its legal counsel for the purpose of preparing a defense to the instant lawsuit. As a result, they are privileged. See, *Baker*, supra; *Klemann*, supra; *Tichy*, supra; *Woodruff*, supra; *Leslie*, supra; *Witt*, supra; and *Hunter*, supra. Accordingly, we find that the trial court abused its discretion in granting appellee's motion to compel. TARTA's sole assignment of error is found well-taken.

{¶ 11} In light of the foregoing determination, we find that a separate determination on the issue of whether the accident reports were prepared "in anticipation of litigation" is essentially moot. Nevertheless, in the interest of conducting a thorough review, we find that (despite attorney Wasielewski's credible and uncontroverted statement to the contrary), in fact, the reports were not prepared "in anticipation of litigation" within the meaning of the applicable law. The reports were prepared shortly after the October 26, 2005 accident, well before the case was filed, nearly two years later,

on October 5, 2007. Therefore, the work product doctrine does not protect the subject documents from discovery. See *Witt*, 12th Dist. No. CA95-10-169 (where statements were made within a few months of accident, but litigation not commenced until nearly two years after accident, the statements were not protected by work product doctrine); *Hunter*, 2002-Ohio-2604, at ¶ 38 (where defendant prepared witness statements shortly after accident occurred and well before plaintiff's filing of lawsuit, such statements and the related incident report were not protected by work product doctrine).

{¶ 12} Because the accident reports are protected by the attorney-client privilege, the judgment of the Lucas County Court of Common Pleas is reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, J.

JUDGE

Mary J. Boyle, J.
CONCUR.

JUDGE

Judge Mary J. Boyle, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.