[Cite as *Price v. Karatjas*, 2011-Ohio-1048.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CARMEN PRICE, et al. Appellees v. BECKY KARATJAS, et al. Appellants	C.A. No. 25361 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2009-04-2633

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

MOORE, Judge.

{¶1} Appellant, Ohio Board of Nursing, appeals the order to disclose granted by the Common Pleas Court of Summit County. This Court reverses.

I.

{¶2} Carmen Price was a nurse at Ridgewood Healthcare Center, LLC ("Ridgewood"). Becky Karatjas was her immediate supervisor. As alleged in the trial court complaint, Karatjas began ordering nurses not to chart bruising or other evidence of injury found on patients who were residents at Ridgewood. She allegedly discouraged documentation associated with state regulatory and licensing authority requirements for reporting such bruising or injury. On October 19, 2008, Carmen Price sent a letter to Ridgewood and its affiliate, Boulevard Healthcare, LLC ("Boulevard"), voicing her concerns and objections to the instructions from Karatjas. On October 24, 2008, Carmen Price was suspended from work.

{¶3} On or about April 3, 2009, Plaintiff-Appellees Carmen and Richard Price ("the Prices") filed a complaint with the Summit County Court of Common Pleas for wrongful termination and other employment-based torts against Defendant-Appellees Karatjas, Ridgewood and Boulevard. As alleged in the trial court complaint, Carmen Price was suspended in retaliation of her "whistleblowing" activities. She acknowledged that on or about November 18, 2008, she filed a formal complaint with the Ohio Board of Nursing ("the Board") concerning certain events involving Karatjas.

{¶4} On July 17, 2009, Karatjas, Ridgewood and Boulevard sent a discovery subpoena pursuant to Civ.R. 45 to the Board. The subpoena commanded the Board to produce:

> "1. Any and all documents which evidence or relate in any way to Carmen A. Price, SSN * * * DOB June 9, 1955, including, but not limited to, her complaint—filed on or around November 12, 2008—regarding alleged unprofessional nursing practices on the part of Ridgewood Healthcare Center, LLC, which is located at 3558 Ridgewood Road, Akron, Ohio 44313."

{¶5} On August 4, 2009, the Board filed a motion to quash the subpoena contending that it requested confidential information protected from discovery in a civil action pursuant to R.C. 4723.28(I)(1). On March 25, 2010, the Common Pleas Court ruled on the Board's motion:

> "The Motion to Quash Subpoena is DENIED. The Ohio Board of Nursing shall comply with subpoenas. However, the Court hereby amends the subpoenas limiting the disclosure to any Complaints filed by Carmen Price. No other information shall be disclosed."

{¶6} The Ohio Board of Nursing timely filed a notice of appeal and the trial court granted a stay of the order on April 28, 2010. On May 18, 2010, this Court issued a journal entry which found the trial court's March 25, 2010 order to be a provisional remedy, and thus a final and appealable order pursuant to R.C. 2505.02(B)(4).

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN ORDERING THE OHIO BOARD OF NURSING (OBN) TO DISCLOSE CONFIDENTIAL INVESTIGATORY COMPLAINTS IN CONTRAVENTION OF THE OBN'S STATUTORY, CONFIDENTIAL PRIVILEGE COVERING ALL INVESTIGATORY DOCUMENTS."

{¶7} In its sole assignment of error, the Ohio Board of Nursing contends that the trial court erred when it ordered the Board to disclose the complaints filed by Carmen Price which it purports to be protected by R.C. 4723.28(I)(1). We agree.

{¶8} "This court generally reviews discovery orders for an abuse of discretion." *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, at ¶12. However, the Supreme Court of Ohio has concluded that the issue of whether the information sought is confidential and privileged from disclosure is a question of law that should be reviewed de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13; see also *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, at ¶29. As the Board's assignment of error raises the issue of whether the information sought is confidential and privileged from disclosure, we will conduct a de novo review. Id.

{¶9} Initially, we note that privileges are to be strictly construed and that "[t]he party claiming the privilege has the burden of proving that the privilege applies to the requested information." *Giusti* at ¶17. R.C. 4723.28(H) provides:

"The board shall investigate evidence that appears to show that any person has violated any provision of this chapter or any rule of the board. Any person may report to the board any information the person may have that appears to show a violation of any provision of this chapter or rule of the board. In the absence of bad faith, **any person who reports such information** or who testifies before the board in any adjudication conducted under Chapter 119. of the Revised Code **shall not be liable for civil damages as a result of the report or testimony**." (Emphasis added.)

R.C. 4723.28(I)(1) further provides that "[i]nformation received by the board pursuant to an investigation is confidential and not subject to discovery in any civil action * * *."

{¶10} This statutory language was analyzed by the Fifth District Court of Appeals in *Fountain v. Twin City Hosp. Corp*. (Nov. 2, 1995), 5th Dist. No. 95AP010002, at *2. The court reviewed the Ohio Supreme Court case *State Med. Bd. Of Ohio v. Murray* (1993), 66 Ohio St.3d 527, and found "the [Ohio Supreme] Court's interpretation of the language contained in R.C. 4731.22(C)(1) controlling since the language contained in R.C. 4723.28(E) is identical concerning the confidentiality of information received as a result of an investigation." *Fountain* at *2.

{¶11} In *Murray*, the appellant requested investigatory records in preparation for his disciplinary hearing for improperly prescribing anabolic steroids. The Medical Board asserted that the requested records were privileged under R.C. 4731.22(C)(1).[1] "The [Ohio Supreme] Court stated that pursuant to the language of the statute, '* * * such information is to be kept confidential at all times and is not, under any circumstances, including the issuance of a protective order, discoverable in a civil action.'" Id. quoting *Murray* at 536.

{¶12} This Court cited *Murray* in *Kremer v. Cox* (1996), 114 Ohio App.3d 41. Kremer subpoenaed the State Medical Board of Ohio for investigatory complaints filed against him. This Court found the complaints to be privileged, confidential, and not subject to discovery:

> "The Supreme Court of Ohio has held that such records are to be considered privileged and that their confidentiality may not be breached in the course of a civil action such as the instant case. Therefore, it does not appear that the trial court erred in quashing the subpoena." Id. at 54.

{¶13} In the instant case, both *Murray* and *Kremer* require this Court to conclude that the documents requested by the defendant-appellees fall within the privilege of R.C. 4723.28.

The defendant-appellees aver, however, that the plain language of the statute "does not prohibit the disclosure of the underlying reports or complaints that lead to an investigation, but only 'information received by the board pursuant to an investigation.'" Thus, they contend that the complaints are not protected by statute because they initiate or precede the investigation.

{¶14} The defendant-appellees cite no authority for this contention. Instead, they simply state that "[t]he General Assembly, in enacting Revised Code section 4723.28(I)(1), could have easily included reports, complaints, the identity of those making reports or complaints, or any other such information in the list of items protected from production. It did not do so." They further contend that *Kremer* is not controlling because R.C. 4731.22 "goes on to expressly protect any and all information regarding those individuals who make complaints to the medical board. Specifically, the statute applicable to the medical board provides that:

> 'The [medical] board shall conduct all investigations and proceedings in a manner that protects the confidentiality of patients and persons who file complaints with the [medical] board. The [medical] board shall not make public the names or any other identifying information about patients or complainants unless proper consent is given or, in the case of a patient, a waiver of the patient privilege exists under division (B) of section 2317.02 of the Revised Code.'" Brief of Defendant-Appellees citing R.C. 4731.22(F)(5).

{¶15} This argument, however, is misplaced. Courts have interpreted the express language of R.C. 4723.28(I)(1) protecting "[i]nformation received by the board pursuant to an investigation * * *" to encompass all materials relating to an investigation, including the complaints. The court in *State ex rel. Mahajan v. Med. Bd. of Ohio*, 2010-Ohio-5995, held that "[t]he plain language of R.C. 4731.22(F)(5) protects '[i]nformation received by the board pursuant to an investigation' – it is not restricted to information relating to patients and complainants." Id. at ¶35. The court interpreted this sentence to expressly include complainants

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[1] R.C. 4731.22(C) has since been renumbered and now appears at R.C. 4731.22(F)(5).

as deserving protection under the language that is identical to the statute at issue in the instant case. The court acknowledged that

> "[a]lthough the remainder of R.C. 4731.22(F)(5) emphasizes the importance of protecting the confidentiality of patients and complainants, we have expressly recognized that under the statute, '[s]everal groups have a privilege of confidentiality in the Medical Board's investigative files,' * * * [and that t]his conclusion is supported by the breadth of the preliminary sentence in R.C. 4731.22(F)(5)." (Internal citations omitted.) Id.

{¶16} In addition, the court in *Schweisberger v. Weiner* (Dec. 12, 1995), 5th Dist. Nos. 1994 CA 00291, 1995 CA 00367, upheld the trial court's finding that the complaints filed were "'privileged' under the clear language of R.C. 4731.22(C)(1) and, therefore, inadmissible." Id. at *5. These cases never addressed the additional language of R.C. 4731.22 to allow the inclusion of the complaints under this language. Instead, the cases include the original complaint and the identity of the complainants as part of information afforded protection under the statute. Here, the complaints filed by Carmen Price with the Ohio Board of Nursing are protected by R.C. 4723.28(I)(1) and are not subject to discovery by the defendant-appellees. Thus, the trial court erred in denying the motion to quash the subpoena. The Ohio Nursing Board's assignment of error is sustained.

III.

{¶17} The Ohio Board of Nursing's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for proceedings consistent with this opinion.

Judgment Reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

MIKE DEWINE, Ohio Attorney General, and MELISSA L. WILBURN, Assistant Attorney General, for Appellant.

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