[Cite as *Brown v. ManorCare Health Servs.*, 2015-Ohio-857.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
RENEE BROWN, as Appointed Guardian of Etta Harris Appellee v. MANORCARE HEALTH SERVICES, et al. Appellants	C.A. No. 27412 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2013-05-2618

DECISION AND JOURNAL ENTRY

Dated: March 11, 2015

CARR, Presiding Judge.

{¶1} Appellants ManorCare Health Services, et al. ("ManorCare") appeal the order of the Summit County Court of Common Pleas that granted in part, and denied in part, appellee Renee Brown's (Guardian for Etta Harris) motion to compel discovery. This Court dismisses the appeal for lack of a final, appealable order.

I.

{¶2} Ms. Brown[1] filed a personal injury complaint on behalf of her mother Ms. Harris against ManorCare, alleging multiple claims of negligence premised on various theories, as well as claims for violations of R.C. 3721.13 (regarding rights of residents in nursing homes). The factual allegations underlying the claims were based on Ms. Harris' roommate at ManorCare

[1] Ms. Harris filed the original complaint. Ms. Brown was subsequently substituted as the plaintiff after she was appointed as her mother's guardian.

having allegedly barricaded the door to their shared room and attempted to kill Ms. Harris by strangling her with a clothes hanger on May 27, 2012. Ms. Brown further alleged that ManorCare acted with actual malice, as well as in a reckless, wilful, and wanton manner. In addition to compensatory damages, Ms. Brown sought costs, pre- and post-judgment interest, punitive damages, and attorney fees. ManorCare filed an answer.

{¶3} The parties engaged in discovery. Of significance to this appeal, Ms. Brown requested the names of all of Ms. Harris' roommates during her residency at the facility, including the name of the roommate who allegedly assaulted her on May 27, 2012; copies of all documentation arising out of the May 27, 2012 incident, including, but not limited to, witness statements, incident reports, investigation and abuse files, and reports made to the Ohio Department of Health regarding Ms. Harris' roommate; copies of all documentation regarding similar incidents of assault, threats, or other abuse involving Ms. Harris' subject roommate; and copies of all facility records of Ms. Harris' subject roommate.

{¶4} ManorCare moved for a 30-day leave to respond to Ms. Brown's first and second sets of interrogatories, second and third requests for production of documents, and first request for admissions. Eventually, after not receiving the requested information, Ms. Brown filed a motion to compel discovery, including, but not limited to, information regarding other abusive or threatening incidents in which Ms. Harris' roommate was involved at ManorCare. Appended to the motion were copies of correspondence between counsel for Ms. Brown and ManorCare, in which Ms. Brown attempted to resolve the matter without court intervention. Counsel for ManorCare did not respond to every communication by Ms. Brown's counsel, but when he did, he assured the plaintiff that the facility's responses to discovery requests would be forthcoming. Counsel for ManorCare did not assert that any information sought was privileged and, therefore,

not subject to disclosure. Moreover, in its brief in opposition to the motion to compel, ManorCare argued only that Ms. Brown's discovery requests were overbroad and unduly burdensome, and that "a nonparty patient's [Ms. Harris' roommate] medical records are protected by the physician-patient privilege and not discoverable." With regard to its physician-patient privilege argument, ManorCare cited only R.C. 2317.02(B)(1) and case law relevant to that provision, and only discussed the medical records of the nonparty patient, not other types of records relative to her. Ms. Brown filed a reply and ManorCare filed a sur-reply; however, no additional issues were raised therein.

{¶5} The trial court considered all briefs and thereafter granted the motion to compel in part, and denied it in part. Specifically, the trial court ordered that all requested discovery, with the exception of the non-party roommate's medical records, be produced for the periods indicated in the order. As to Ms. Harris' roommate's medical records, the trial court ordered that they not be produced, as they are shielded from discovery by the physician-patient privilege enunciated in R.C. 2317.02(B)(1). ManorCare appealed and raised one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY ORDERING THE PRODUCTION OF PRIVILEGED MEDICAL RECORDS PERTAINING TO MEDICAL CARE AND TREATMENT OF THIRD PARTIES.

{¶6} ManorCare argues that the trial court erred by ordering the production of the medical records of Ms. Harris' roommate at the time of the incident. Because the order appealed is not a final, appealable order, this Court does not have jurisdiction to address the merits of ManorCare's argument.

{¶7} As a preliminary matter, this Court is obligated to raise sua sponte questions related to our jurisdiction. *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.*, 29 Ohio St.2d 184, 186 (1972). This Court has jurisdiction to hear appeals only from final judgments. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2501.02. In the absence of a final, appealable order, this Court must dismiss the appeal for lack of subject matter jurisdiction. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.*, 9th Dist. No. 2930-M, 2000 WL 109108 (Jan. 26, 2000). "An order is a final appealable order if it affects a substantial right and in effect determines the action and prevents a judgment." *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 229 (1999); *see also* R.C. 2505.02(B)(1).

{¶8} "Generally, trial court orders addressing discovery issues are merely interlocutory and not immediately appealable." *Bowers v. Craven*, 9th Dist. Summit No. 25717, 2012-Ohio-332, ¶ 14, citing *Novak v. Studebaker*, 9th Dist. Summit No. 24615, 2009-Ohio-5337, ¶ 14, citing *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 120-121 (1997). Nevertheless, the legislature has carved out certain limited exceptions to the general rule. This Court recognizes one such exception with regard to orders for the disclosure of privileged matters pursuant to R.C. 2505.02(B), which states:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The 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.
>
> (b) 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.

See, e.g., Grove v. Northeast Ohio Nephrology Assoc., Inc., 164 Ohio App.3d 829, 2005-Ohio-6914, ¶ 7-9 (9th Dist.).

{¶9} A "provisional remedy" is "a proceeding ancillary to an action, including, but not limited to, * * * discovery of privileged matter * * *." R.C. 2505.02(A)(3).

{¶10} The law recognizes that a person's medical records are confidential. *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, ¶ 9; R.C. 2317.02(B) (privileged communications between physician and patient).

{¶11} In this case, the trial court recognized the physician-patient privilege enunciated in R.C. 2317.02(B)(1), and as argued by ManorCare below. The court expressly denied Ms. Brown's motion to compel in part on those grounds. Specifically, the trial court wrote: "[Ms. Brown] has not provided a valid exception to the roommate's privilege. The non-party roommate's medical records are privileged and shall not be produced." Therefore, the trial court has already granted the relief sought by ManorCare, and the discovery of privileged material is not at issue. Accordingly, there is no provisional remedy from which ManorCare is entitled to seek relief via an interlocutory appeal. The trial court's order prohibiting the production of medical records does not vest this Court with jurisdiction.

{¶12} ManorCare further argues that any and all records it kept regarding its residents, including incident reports, witness statements, or investigation and abuse files, constitute medical records which are shielded by the physician-patient privilege. The facility did not raise this argument below. "It is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal." *Stefano & Assocs., Inc. v. Global Lending Grp., Inc.*, 9th Dist. Summit No. 23799, 2008-Ohio-177, ¶ 18. This Court, therefore, limits our review accordingly. Moreover, ManorCare offers no support for its assertion, and this Court has found

no authority to conclude that information such as a report documenting an assault by a patient would constitute "a communication made to the physician * * * by a patient * * * or the physician's * * * advice to a patient," as contemplated by R.C. 2317.02(B)(1). Accordingly, even were we to consider ManorCare's argument as properly before us, the facility has not demonstrated that the trial court has ordered the production of privileged material pursuant to R.C. 2317.02(B)(1).

{¶13} ManorCare next argues that, even if the requested discovery would not constitute medical records pursuant to R.C. 2317.02(B)(1), it would still constitute the roommate's "personal" records which must remain confidential pursuant to R.C. 3721.13(A)(10). ManorCare, however, did not argue below that any requested discovery was privileged or protected pursuant to R.C. 3721.13. As noted above, "an appellate court will not consider as error any issue a party was aware of but failed to bring to the trial court's attention[]" at a time when the trial court might have corrected the error. *State v. Dent*, 9th Dist. Summit No. 20907, 2002-Ohio-4522, ¶ 6. By failing to raise the issue below that Ms. Harris' roommate's personal records were privileged, ManorCare has forfeited the issue on appeal. Accordingly, this Court lacks jurisdiction to consider the issue of the discovery of matters which may be privileged pursuant to R.C. 3721.13.

{¶14} Finally, to the extent that ManorCare challenges the trial court's order granting Ms. Brown's motion to compel ManorCare to produce materials that are not privileged, this Court has no jurisdiction to consider those arguments. *Lytle v. Mathew*, 9th Dist. Summit No. 26932, 2014-Ohio-1606, ¶ 10 ("To the extent Attorney Grubb's motion was based upon a relevancy argument, and to the extent the trial court concluded that the discovery was relevant, the trial court's ruling is not appealable.").

{¶15} As the trial court did not order the disclosure of privileged material pursuant to R.C. 2317.02(B)(1), as ManorCare did not raise below any other arguments regarding privilege, and as all other discovery orders did not implicate provisional remedies, this Court lacks jurisdiction to address the merits of the appeal.

Appeal dismissed.

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(C). 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 Appellants.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

MARTIN T. GALVIN, THOMAS A. PRISLIPSKY and DANNY M. NEWMAN, JR., Attorneys at Law, for Appellants.

BLAKE A. DICKSON and MARK D. TOLLES, II, Attorneys at Law, for Appellee.