[Cite as *Randall v. Cantwell Mach. Co.*, 2013-Ohio-2744.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael A. Randall,	:	
Plaintiff-Appellant,	:	
		No. 12AP-786
v.	:	(C.P.C. No. 11CVD-9996)
Cantwell Machinery Co. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 27, 2013

Mark A. Adams, LLC, and *Mark A. Adams*, for appellant.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for appellee Administrator, Bureau of Workers' Compensation.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Michael A. Randall ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas denying his motion to quash and/or for a protective order and granting a motion filed by defendant-appellee Ohio Bureau of Workers' Compensation ("appellee") to compel appellant to sign an unaltered medical release. Because we conclude that the trial court erred by not granting appellant's proposed protective order or implementing other measures to protect records potentially subject to the physician-patient privilege, we affirm in part and reverse in part.

{¶ 2} Appellant suffered an industrial accident and sustained injuries to his neck and shoulder while employed by defendant-appellee Cantwell Machinery Co. ("Cantwell") in 2009. Appellant filed a workers' compensation claim, which was allowed for the condition of left shoulder sprain. The claim was subsequently allowed for additional

conditions of left infraspinatus tear, left rotator cuff tear, left supraspinatus tear, left biceps tendinitis, and neck sprain. In 2011, appellant requested that additional allowances be granted for degenerative disc disease at C5-6 and C6-7, disc herniation at C5-6 and C6-7, foraminal stenosis at C5-6 and C6-7, spinal canal stenosis at C5-6, and spinal stenosis at C6-7. A district hearing officer for the Industrial Commission of Ohio ("commission") initially disallowed these additional allowances, but a staff hearing officer reversed that decision and granted all additional allowances except foraminal stenosis at C5-6 and C6-7. The commission refused appellant's appeal from the staff hearing officer's decision. Appellant then appealed to the Franklin County Court of Common Pleas, naming Cantwell and appellee as defendants.[1]

{¶ 3} After filing an answer to appellant's complaint, appellee served subpoenas on ten medical providers, requesting complete certified medical records for appellant. Appellant filed a motion to quash the subpoenas and for a protective order. Appellant also sought sanctions against appellee, arguing that appellee misrepresented the scope of the authorization for release of medical records that appellant agreed to by submitting a first report of injury form to file his claim. Appellee subsequently withdrew the subpoenas. Appellee later filed a motion to compel appellant to sign an unaltered copy of a medical release authorizing the release of any and all medical reports, records, files, and information pertaining to appellant. After conducting a status conference with the parties, the trial court issued orders addressing various pending discovery motions. The trial court denied appellant's motion to quash and/or for a protective order and request for sanctions. The trial court granted appellee's motion to compel appellant to provide an unaltered medical release.

{¶ 4} Appellant appeals from the trial court's decision, assigning three errors for this court's review:

> **ASSIGNMENT OF ERROR NO. 1**
>
> In this workers' compensation case, the trial court erred by ordering plaintiff-appellant to produce an unlimited, unrestricted global release of all medical records relating to plaintiff-appellant, including statutorily privileged irrelevant

[1] As appellee notes in its brief, Cantwell is nominally an appellee in this matter but did not participate in this appeal.

> medical records, even though the only body part at issue in the case involves plaintiff-appellant's neck.
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> **ASSIGNMENT OF ERROR NO. 2**
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> In this workers' compensation case, the trial court erred by denying plaintiff-appellant's motion for a protective order that would allow defendant-appellee to obtain all medical records but which placed reasonable restrictions on the use and disclosure of those records on defendant-appellee.
>
> **ASSIGNMENT OF ERROR NO. 3**
>
> In this workers' compensation case, the trial court erred in denying plaintiff-appellant's motion for sanctions where defendant-appellee's counsel subpoenaed all of plaintiff-appellant's medical records and misrepresented the scope of the an [sic] initial authorization signed by plaintiff-appellant as defendant appellee's conduct was in direct contradiction of plaintiff-appellant's consent.

{¶ 5} In appellant's first assignment of error, he asserts that the trial court erred by granting appellee's motion to compel him to grant an unaltered medical release authorizing the release of all medical reports, records, files, and information related to him. In his second assignment of error, appellant argues that the trial court erred by denying his motion for a protective order. We conclude that these two assignments of error are interrelated because they address appellant's claims of privilege and the measures taken to identify and protect any privileged documents; we will address these assignments of error together.

{¶ 6} Generally, discovery orders are not final and appealable. *Concheck v. Concheck*, 10th Dist. No. 07AP-896, 2008-Ohio-2569, ¶ 8. Therefore, we begin by considering whether the trial court's decision constitutes a final, appealable order. A trial court 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. *Id*. at ¶ 11. 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 being appealed contains a certification that there is no just reason for delay. *Id.*

{¶ 7} R.C. 2505.02(B)(4) provides that an order is a final order when it grants or denies a "provisional remedy" and 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 when the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all claims in the action. A "provisional remedy" is defined as a proceeding ancillary to an action, including "discovery of privileged matter." R.C. 2505.02(A)(3). An order requiring the release of privileged or confidential information in discovery determines the action with respect to a provisional remedy and prevents the appealing party from obtaining an effective remedy following final judgment because the privileged information has already been released. In this situation, the proverbial bell cannot be unrung. Therefore, such orders are appealable. *Hope Academy Broadway Campus v. White Hat Mgt., L.L.C.*, 10th Dist No. 12AP-116, 2013-Ohio-911, ¶ 18; *Mason v. Booker*, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶ 11. Likewise, an order denying a protective order is final and appealable when it relates to the discovery of privileged matters. *Covington v. The MetroHealth Sys.*, 150 Ohio App.3d 558, 2002-Ohio-6629, ¶ 20 (10th Dist.). Accordingly, we conclude that the portions of the trial court's order granting appellee's motion to compel appellant to sign a medical release and denying appellant's motion for a protective order constitute final orders.

{¶ 8} After determining that these portions of the trial court's decision constitute final orders under R.C. 2505.02, we next consider whether Civ.R. 54(B) applies. It does not. "A provisional remedy is a remedy other than a claim for relief. Therefore, an order granting or denying a provisional remedy is not subject to the requirements of Civ.R. 54(B)." *State ex rel. Butler Cty. Children Servs. Bd. v. Sage*, 95 Ohio St.3d 23, 25 (2002). Therefore, we conclude that, to the extent that the decision orders appellant to grant an unaltered medical release that could lead to the production of privileged information and denies a protective order related to that information, it is a final, appealable order.

{¶ 9} Trial courts possess broad discretion in regulating discovery, and appellate courts generally review a trial court's decision regarding discovery issues for abuse of discretion. *MA Equip. Leasing I, L.L.C. v. Tilton*, 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 13. However, with respect to a privilege claim, the appropriate standard of review depends on whether the privilege claim presents 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 certain information is confidential and privileged, a de novo standard applies. *Id.* When a claim of privilege requires review of factual questions, such as whether an attorney-client relationship existed, an abuse-of-discretion standard applies. *Id.* In this case, the issue presented is whether the records appellee sought in discovery were within the statutory physician-patient privilege created by R.C. 2317.02(B). Therefore, we apply a de novo standard of review to appellant's privilege claim.

{¶ 10} The physician-patient privilege is governed by R.C. 2317.02(B). *Mason* at ¶ 14. Generally, that statute provides that a physician may not testify concerning a communication made by a patient to the physician or the physician's advice to the patient. R.C. 2317.02(B)(1). However, the statute also provides exceptions where the general privilege does not apply. If an individual files a workers' compensation claim under Chapter 4123 of the Revised Code, a physician may be compelled to testify or submit to discovery regarding communications that "related causally or historically to physical or mental injuries that are relevant to issues" in that claim. R.C. 2317.02(B)(3)(a). Thus, under the statute, filing a workers' compensation claim waives the physician-patient privilege as to any communication, including a medical record, that relates causally or historically to the injuries at issue in that claim. *Mason* at ¶ 14.

{¶ 11} Ohio law generally provides for a broad scope of discovery, allowing parties to obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of an action. *Hope Academy* at ¶ 24. However, under Civ.R. 26(C), a trial court may limit discovery through the issuance of protective orders. The rule provides that a protective order may be granted "for good cause shown." Civ.R. 26(C). We review a trial court's denial of a protective order under an abuse-of-discretion standard. *See Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 23 ("Whether a protective order is necessary remains a determination within the

sound discretion of the trial court."). An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 12} In this case, appellee issued subpoenas to several medical providers requesting copies of appellant's complete medical records. Appellee indicated that these subpoenas were issued to medical providers identified by appellant in response to appellee's interrogatories as having treated or examined him for injuries related to his claim or to medical providers identified in appellant's workers' compensation claim file. Presumably, the records possessed by medical providers who treated appellant only for the injuries that gave rise to his workers' compensation claim would be causally and historically related to issues in the claim. However, appellee also subpoenaed records from Dr. Maurice Mast, whom appellant identified in response to appellee's interrogatories as his family care physician since 1993. In its brief, appellee conceded that Dr. Mast may have treated appellant for unrelated conditions, but argues that it is entitled to Dr. Mast's entire file on appellant because he previously treated appellant for shoulder problems that may be causally and historically related to the workers' compensation claim. Although appellee subsequently withdrew its initial subpoenas, some of the medical providers had already responded. Under the trial court's order compelling appellant to grant an unaltered medical release, appellee will be able to obtain the same records sought under its initial subpoenas.

{¶ 13} Appellant concedes that, by filing a workers' compensation claim, he has waived the physician-patient privilege with respect to records that are causally or historically related to the injuries giving rise to that claim. However, appellant argues that, under the unaltered medical release the trial court ordered, appellee will be able to obtain additional records that are not causally or historically related to the injuries giving rise to the workers' compensation claim. In addition to seeking to quash the subpoenas, appellant proposed a protective order under which he would agree to sign the medical authorization. Under the proposed protective order, the parties would seek to reach agreement on which documents were subject to physician-patient privilege or otherwise not subject to discovery. If the parties were unable to agree on a particular document, appellant would submit his objections to the court for an in camera

inspection and determination of whether the privilege applied. The trial court denied appellant's request for a protective order.

{¶ 14} In determining this appeal, we are guided by our prior decision in *Mason*. That case involved a discovery dispute about medical records in a personal injury lawsuit. *Mason* at ¶ 2-3. The defendant sought certain medical records that the plaintiff claimed were privileged and irrelevant to the complaint. *Id.* at ¶ 3. The defendant filed a motion to compel the plaintiff to grant releases authorizing the release of her medical records and the trial court granted the motion to compel. *Id.* at ¶ 3-4. On appeal, the plaintiff argued that the trial court erred by granting the motion to compel production of all medical records and by failing to conduct an in camera inspection of the records to determine which records were causally or historically related to the claimed injuries. *Id.* at ¶ 8. The defendant claimed that the plaintiff never requested an in camera inspection, but this court concluded that the plaintiff informally requested that the trial court inspect at least some of the records and the trial court refused. *Id.* at ¶ 19. Although acknowledging that there are many methods for obtaining medical records and determining their relevance, and that trial courts have broad authority to determine the most appropriate method to protect privileged medical records, the court concluded that "[a] trial court may not, however, simply ignore the requirements of R.C. 2317.02(B)." *Id.* at ¶ 22. This court reversed the trial court's order and remanded the case back to the trial court to address the plaintiff's privilege claims. *Id.* at ¶ 23.

{¶ 15} In this case, as in *Mason*, appellant asserts that some of the records appellee seeks in discovery may be protected by the physician-patient privilege. As noted above, appellee concedes that the records sought from Dr. Mast may include communications regarding unrelated conditions. Under these circumstances, the trial court should take measures to ensure that privileged medical records are protected from disclosure. We conclude that the trial court did not err by granting appellee's motion to compel the unaltered medical release, but that it was also necessary to protect any privileged medical records that might be produced under that release. Accordingly, we conclude that the trial court erred by not granting appellant's protective order or implementing some other measure, such as an in camera review, to determine whether certain records were privileged. As in *Mason*, we recognize that the trial court is in the best position to

determine the most appropriate method to protect privileged records in a particular case, but the court may not ignore the need to preserve the statutory physician-patient privilege. Because we do not have the medical records before us, we express no opinion as to whether any of the records appellee may obtain pursuant to the release are or are not historically or causally related to appellant's claimed injuries, nor whether appellant's privilege claims are reasonable. On remand, the trial court should implement appropriate measures to determine whether any of the records are covered by the physician-patient privilege and how to protect any records that are subject to that privilege.

{¶ 16} Accordingly, we overrule appellant's first assignment of error and sustain appellant's second assignment of error.

{¶ 17} In appellant's third assignment of error, he asserts that the trial court erred by denying his motion for sanctions. Once again, we begin by considering whether this portion of the trial court's decision constitutes a final, appealable order.

{¶ 18} In relevant part, R.C. 2505.02(B)(2) provides that "[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment" is a final order. A "special proceeding" is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). Because workers' compensation did not exist at common law or in equity prior to 1853 and was established by special legislation, it falls within the definition of a special proceeding. *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶ 15. A " '[s]ubstantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). An order that affects a substantial right is an order that, if not immediately appealable, would foreclose appropriate relief in the future. *Hillman v. Kosnik*, 10th Dist. No. 05AP-122, 2005-Ohio-4679, ¶ 20, citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63 (1993). Because this case involves a special proceeding, the portion of the trial court's order denying appellant's motion for sanctions could constitute a final order under R.C. 2505.02(B)(2) if it affected a substantial right.

{¶ 19} As explained above, the trial court's decision could also constitute a final order under R.C. 2505.02(B)(4) if it granted or denied a provisional remedy and

prevented a judgment in favor of appellant with respect to the provisional remedy, and if appellant would not be afforded a meaningful or effective remedy through an appeal following final judgment. The issue of whether sanctions should be imposed on appellee for alleged misconduct in the discovery process is one that can be determined as part of an appeal following a final judgment. If the trial court erred and sanctions were warranted, an appellate court could remedy the error and order the trial court to impose sanctions. Therefore, the portion of the trial court's order denying appellant's motion for sanctions was not a final order under R.C. 2505.02(B) because the lack of an immediate appeal does not foreclose appropriate relief in the future and because appellant may still obtain a meaningful remedy through an appeal following final judgment. *See, e.g., Longo v. Bender*, 11th Dist. No. 2006-G-2699, 2006-Ohio-2239, ¶ 4 ("The granting of sanctions accompanying a discovery order is not final and appealable."); *Chuparkoff v. Farmers Ins. of Columbus, Inc.*, 9th Dist. No. Civ.A. 22083, 2004-Ohio-7185, ¶ 15 ("[A] denial of sanctions accompanying a discovery order is not final and appealable.").

{¶ 20} Accordingly, appellant's third assignment of error is not ripe for review because the portion of the trial court's order denying his motion for sanctions is not a final, appealable order.

{¶ 21} For the foregoing reasons, we overrule appellant's first assignment of error, sustain appellant's second assignment of error, and dismiss appellant's third assignment of error as not ripe for review. We affirm in part and reverse in part the decision of the Franklin County Court of Common Pleas, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment affirmed in part,
reversed in part, and cause remanded.

TYACK and BROWN, JJ., concur