[Cite as *B.R.M. v. OhioHealth Corp.*, 2023-Ohio-2399.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

B.R.M., A MINOR, BY AND THROUGH HIS PARENTS AND NATURAL GUARDIANS, RAVEN DILLON AND THOMAS MAURER, ET AL.,

Plaintiffs-Appellees

-vs-

OHIOHEALTH CORPORATION, ET AL.

Defendants-Appellants

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Andrew J. King, J.

Case No. 2022 CA 0078

O P I N I O N

CHARACTER OF PROCEEDINGS: Appeal from the Richland County Court of Common Pleas, Case No. 21-CV-472

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 13, 2023

APPEARANCES:

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Hoffman, J.

{¶1} Defendants-appellants OhioHealth Corporation and OhioHealth Mansfield Hospital ("OhioHealth," collectively) appeal the October 31, 2022 Order on Pending Motions entered by the Richland County Court of Common Pleas, which granted plaintiffs-appellees B.R.M., a minor, by and through his parents and natural guardians, R.D. and T.M., et al.'s motion to compel and denied OhioHealth's motion for protective order.

STATEMENT OF THE CASE[1]

{¶2} On September 28, 2021, Appellees[2] filed a complaint for medical malpractice against OhioHealth, and Ashley M. Green, R.N., Alyssa Coley, R.N., Andrea J. Tingley, R.N., Abigail L. Pauley, R.N. ("the Nurses," collectively), and Allison Pruett, M.D. ("Dr. Pruett"), and Mansfield Obstetrics and Gynecology Associates, Inc. ("Mansfield Obstetrics")[3] alleging OhioHealth, the Nurses, Dr. Pruett, and Mansfield Obstetrics provided negligent care and treatment to Appellees during Mother's labor and delivery which resulted in the Child sustaining serious brain damage. At the time of the filing of the complaint, Appellees served OhioHealth with requests for production of documents, seeking, inter alia, documents and materials related to hospital labor and delivery nursing policies, procedures, guidelines, protocols, and algorithms.

{¶3} On January 21, 2022, OhioHealth responded to Appellees' Requests for Production, objecting to Requests Nos. 1-12, and 25-30, as follows:

[1] A Statement of the Facts is unnecessary to our disposition of this Appeal.
[2] We shall refer to Appellees individually as "the Child," "Mother," and "Father."
[3] This Appeal does not involve the Nurses, Dr. Pruett, and Mansfield Obstetrics.

> The documents requested are neither relevant nor reasonably likely to lead to the discovery of relevant evidence and they are likely to confuse the jury on the relevant issues. Further, the documents requested are confidential and proprietary to OhioHealth. Without waiving the above objection, [OhioHealth responds] as follows: a copy of the requested documents, if any, will be produced once the attached Stipulated Protection Order is executed and filed.

{¶4} After repeated attempts to resolve the issue, Counsel for Appellees filed a motion to compel on April 27, 2022. OhioHealth filed a memorandum in opposition or, in the alternative, a motion for protective order on May 18 2022. Appellees filed a reply on May 26, 2022. The magistrate conducted an evidentiary hearing on all of the pending motions on May 26, 2022. Following the evidentiary hearing, OhioHealth filed a motion to compel Appellees' medical records on August 25, 2022.

{¶5} The magistrate issued a decision on October 3, 2022, granting Appellees' motion to compel and OhioHealth's motion to compel. The magistrate found, "hospital rules and regulations are, at the discretion of the trial court, admissible to provide evidence of the standard of care in a medical negligence action." Oct. 3, 2022 Magistrate's Order Resolving All Pending Motions at p. 6. The magistrate further found the policies requested by Appellees were relevant and discoverable under Ohio Evid. R. 401. The magistrate denied OhioHealth's request for a protective order, finding OhioHealth failed to satisfy its burden of establishing the protective order was necessary.

{¶6} On October 12, 2022, Appellees filed a motion to amend, moving the trial court vacate the portion of the magistrate's decision granting OhioHealth's motion to compel as Appellees complied with the request for discovery. OhioHealth filed a motion to set aside the magistrate's order pursuant to Civ. R. 53(D) on October 13, 2022, and a motion to stay the effectiveness of the magistrate's order pursuant to Civ. R. 53(D) on October 20, 2022. Via Order on Pending Motions filed October 31, 2022, the trial court granted Appellees' motion to amend, and denied OhioHealth's motion to set aside and motion to stay. The trial court agreed with the magistrate, finding the policies and procedures of a hospital relative to the medical care provided were admissible as evidence of the standard of care. The trial court also found OhioHealth failed to establish the necessity of the protective order.

{¶7} It is from this judgment entry OhioHealth appeals, raising the following assignments of error:

I. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO COMPEL BECAUSE OHIOHEALTH'S POLICIES AND PROCEDURES ARE NOT RELEVANT TO THE STANDARD OF CARE IN THIS CASE.

II. THE TRIAL COURT ERRED IN DENYING OHIOHEALTH'S MOTION FOR PROTECTIVE ORDER BECAUSE OHIOHEALTH ESTABLISHED GOOD CAUSE FOR A PROTECTIVE ORDER.

I

{¶8} In its first assignment of error, OhioHealth contends the trial court erred in granting Appellees' motion to compel as OhioHealth's policies and procedures are not relevant to the standard of care in the instant matter.

{¶9} The trial court granted Appellees' motion to compel, finding "the policies and procedures requested to be relevant and discoverable in this matter and, therefore, subject to discovery." Oct. 31, 2022 Order on Pending Motions at p. 4. "[T]o the extent an order pertains to matters other than those concerning discovery of privileged matters, the order is deemed interlocutory and therefore not final and appealable." *Hope Academy Broadway Campus v. White Hat Mgt., LLC.,* 10th Dist. Franklin No. 12AP–116, 2013–Ohio–911, ¶ 43 (Internal quotations and citation omitted.). "Consistent with this reasoning, appellate courts have declined to consider arguments that materials to be produced under a discovery order were not relevant." *Id.*

{¶10} Because that portion of the order granting Appellees' motion to compel, as it pertains to whether such evidence is relevant, is not a final appealable order, but merely interlocutory, this Court lacks jurisdiction to review OhioHealth's first assignment of error.

II

{¶11} In its second assignment of error, OhioHealth asserts the trial court erred in denying its motion for protective order as OhioHealth established good cause for the issuance of the same. Specifically, OhioHealth maintains the trial court's denial of OhioHealth's request for a protective order was based upon three erroneous findings: (1) the written policies and procedures were not confidential and proprietary; (2) not-for-profit entities do not fall within the protections of Civ. R. 26(C)(7); and OhioHealth failed to

demonstrate serious injury would result from the disclosure of the information; therefore, a protective order was not necessary.

{¶12} We review a trial court's denial of a protective order under an abuse-of-discretion standard. See, *Randall v. Cantwell Mach. Co.*, 10th Dist. Franklin No. 12AP-786, 2013-Ohio-2744, 2013 WL 3341201, ¶ 11. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶13} Civ.R. 26(C) governs protective orders in Ohio and provides, in relevant part:

> Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way * * *.
>
> Civ.R. 26(C).

{¶14} "Where the party resisting discovery alleges the requested information is confidential or proprietary: Courts apply a balancing test in determining whether to grant protective orders, weighing the competing interests to be served by allowing discovery to

proceed against the harm that may result." *Coon v. OhioHealth Corp.*, 3rd Dist. Marion No. 9-22-41, 2023-Ohio-492, ¶26 (Citations and internal quotations omitted). See also, *Lima Mem. Hosp. v. Almudallal*, 3d Dist. Allen, 2016-Ohio-5177, 69 N.E.3d 204, ¶ 56 ("In determining whether to grant a protective order, a trial court must balance the competing interests to be served by allowing the discovery to proceed against any harm which may result.").

{¶15} "The burden of establishing good cause for a protective order rests with the movant." *Lima Mem. Hosp. v. Almudallal*, supra at ¶ 57 (Citation and internal quotations omitted). "To demonstrate good cause, the movant must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements." *Id.* (Citation and internal quotations omitted).

{¶16} In its October 31, 2022 Order on Pending Motions, the trial court found OhioHealth failed to meet its burden of proving the documents in dispute are confidential. Specifically, the trial court noted: OhioHealth had "disclosed similar policies in prior cases without stipulations;" "the policies and procedures in question borrow heavily from public sources such as the recommendations and guidelines of national health care associations and other medical literature;" and OhioHealth had "not demonstrated why . . . [its] specific configuration of this publicly obtained information should be considered to be confidential." Oct. 31, 2022 Order on Pending Motions at p. 6.

{¶17} OhioHealth asserts it "has demonstrated that the polices are unique to OhioHealth and not taken directly from a publicly available source, and that OhioHealth now works to protect its policies and procedures." Brief of Appellants at 15. In support of its assertion, OhioHealth points to the testimony of Dr. Marian K. Schuda, the medical

director for patient services and system medical director for risk management at Riverside Methodist Hospital, given at the May 26, 2022 magistrate's hearing:

> Dr. Schuda explained the process to create a new policy, which involves the creation of a group of individuals who evaluate the current science and determine how to incorporate it into OhioHealth's values and practices. * * * She then testified that one policy can take as long as six months to produce. * * * Dr. Schuda further explained that the end result is unique to OhioHealth despite being based on publicly available science because they incorporate OhioHealth's unique faith-based values and thus produce an end product that is proprietary to OhioHealth. * * * "[W]e're a faith-based, not-for-profit system, and so we would like the care to be high quality. . . [and] personal in a way that's. . . loving [and] consistent with [our] principles." Brief of Appellants at 15 (Internal transcript references omitted).

{¶18} We find the trial court did not abuse its discretion in finding OhioHealth failed to establish the documents in dispute are confidential. The record reveal OhioHealth disclosed similar documents in prior cases without stipulations. Further, the policies and procedures were created using information gathered from public sources including recommendations and guidelines of national health care associations as well as medical literature. OhioHealth's "unique" compilation of such information does not transform otherwise public information into confidential information.

{¶19} We, however, disagree with the trial court's determination because OhioHealth is a not-for-profit company, it is not a "commercial" business; therefore, is not entitled to a protective order under Civ. R. 26(C)(7). Oct. 31, 2022 Order at p. 7. "The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction." *United States v. Brown Univ.*, 5 F.3d 658, 666 (3rd Cir. 1993). "All sorts of non-profits—hospitals, colleges, and even the National Football League—engage in commerce as that term is ordinarily understood." *N.H. Right to Life v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 43, 50 (1st Cir. 2015).

{¶20} Nevertheless, the trial court's finding OhioHealth, as a not-for-profit company, was not entitled to a protective order was not the sole basis for the trial court's denial of the protective order. The trial court found OhioHealth failed to establish a protection order was necessary. Oct. 31, 2022 Order at p. 8. We find the trial court did not abuse its discretion in finding OhioHealth failed to "articulate specific facts showing clearly defined and serious injury resulting from the discovery sought." *Lima Mem. Hosp. v. Almudallal*, supra at ¶ 57.

{¶21} At the May 26, 2022 evidentiary hearing, Dr. Schuda testified on direct examination:

> Q. [Attorney for OhioHealth] Are you aware of any firsthand knowledge that you can point us to of actual harm that OhioHealth has incurred because a policy was used outside of a particular piece of litigation?
>
> A. [Dr. Schuda] No, I – I can't – I personally don't know.

Q. Is there a very real risk that if these – if this property that belongs to OhioHealth is made public in some fashion, that harm would become OhioHealth?

Well, I'd say yes. You know, I'm a doctor, so harm is a different thing in my head, really. But I'd say this: You know, I consider it important for us to be good stewards. You know, we are not-for-profit, we provide community benefit, we try to help people. But at the end of the day, really, we have to take care of our – the – our things, our time, our effort. * * *

Q. And Dr. Schuda, on behalf of OhioHealth, is there anything I didn't ask you that you think is important that you want this Court to know about the proprietary nature of policies?

* * * We have put a lot of effort into them. If we could just take them out of the book, we – you know, that would save us all a lot of trouble, but we don't do that. No one has, or at least not – nobody I'm aware of has. And they do have a lot of value to us. * * * they certainly have value to us who created them, log them, maintain them, try to train people on them when training is necessary. So I think that's reasonable stewardship to say when you're done with them, destroy them.

Transcript May 26, 2022 Evidentiary Hearing at pp. 43-45.

{¶22} On cross-examination, Dr. Schuda stated she did not know which specific policies were the subject of the hearing. *Id*. at p. 50. Dr. Schuda conceded she had "not read any of the policies that you [counsel for Appellees] have requested for this case."

Id. at p. 51. When asked if she could give an example of economic harm to OhioHealth for providing its labor and delivery policies and procedures, or any other nursing policies and procedures, Dr. Schuda responded, "I'm not aware of anything very – a significant – what I would consider a significant risk that the public might lose some trust in us." *Id*. at p. 59. Dr. Schuda repeated, "I'm not aware of any specific harm, but I can tell you it's not good." *Id*. at p. 62.

{¶23} To quote the magistrate in her October 3, 2022 Order Resolving All Pending Motions:

> While Dr. Schuda testified that OhioHealth has gone to considerable effort and expense to develop and protect their policies, and that they are not available to the public, she also testified several times that she had no specific examples of any incidents where OhioHealth Corporation's internal policies were revealed outside the organization, resulting in any specific harm to OhioHealth. Both her testimony and affidavit couched the risk of harm to OhioHealth Corporation in producing the requested discovery in terms of what "could" happen, or what "might" happen. *Id*. at pp. 9-10.

{¶24} The trial court determined OhioHealth's conclusory statement it will be harmed is insufficient to show clearly defined and serious injury resulting from the discovery sought. Dr. Schuda's testimony is purely speculative. OhioHealth failed to identify anything unique or distinctive about its policies and procedures, which are different from the policies and procedures followed by other hospitals. "A conclusory

statement that disclosure of the documents would provide competitors with an advantage" [is] insufficient to demonstrate 'good cause,' as such a generalized showing would undermine 'the general principle of open access that underlies the judicial system.'" *Williams v. Baptist Healthcare Sys.*, No. 3:16-CV-00236-CRS, 2018 WL 989546, *3 (W.D. Ky. Feb. 20, 2018) (Citation omitted).

{¶25} Based upon the foregoing, we find the trial court did not abuse its discretion in denying OhioHealth's motion for a protective order. Upon review of the record, we further find there is some competent, credible evidence the documents in dispute are neither confidential nor proprietary.

{¶26} OhioHealth's second assignment of error is overruled.

{¶27} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.
Gwin, P.J. and
King, J. concur