[Cite as *Desmond v. Gains*, 2022-Ohio-200.]

IN THE COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

Martin Desmond, et al.

Appellants

v.

Paul Gains, et al.

Appellees

Court of Appeals No. 2021 MA 00025

Trial Court No. 2018-CV-0771

DECISION AND JUDGMENT

Decided: January 27, 2022

* * * * *

Subodh Chandra and Patrick Haney, for appellants.

Frank H. Scialdone, Patricia A. Rubright, and Cara M. Wright, for appellees.

* * * * *

MAYLE, J.

{¶ 1} Plaintiff-appellant, Martin Desmond, appeals the March 1 and March 12, 2021 judgments of the Mahoning County Court of Common Pleas, resolving various discovery disputes in favor of defendants-appellees, Paul Gains, Linette Stratford, and Mahoning County. As explained further below, we reverse the trial court judgments for multiple reasons.

{¶ 2} First, appellees sought to compel Desmond to submit to a second deposition based on their assertion that Desmond refused to answer questions at his first deposition regarding conversations he or his counsel had with FBI agents. We find that Desmond fully answered questions about his conversations with the FBI and was not asked questions about his counsel's communications with the FBI. Additionally, we find that counsel's communications with Desmond about any such conversations are protected by the attorney-client privilege. The trial court erred in compelling Desmond to submit to a second deposition.

{¶ 3} Second, appellees sought to compel Desmond to produce a case list that he "furnished to" the FBI. Appellees were required under the rules of civil procedure to describe with reasonable particularity the documents they sought from Desmond. Desmond made clear at his deposition that he did not furnish a case list to the FBI, therefore, no responsive document exists. Moreover, the case list sought by appellees is an attorney-client privileged communication. It was created by Desmond and his attorneys and was not shared because they considered it (and treated it as) a privileged communication. The trial court erred in compelling Desmond to produce that document.

{¶ 4} Finally, appellees sought to depose and obtain documents from Desmond's attorneys. Appellees failed to establish that no other means exist to obtain the information they seek from opposing counsel, the information they seek is relevant, and the information is crucial to their preparation of the case—the test enunciated in *Shelton*

v. Am. Motors Corp., 805 F.2d 1323 (8th Cir.1986). The trial court erred in denying Desmond's attorneys' motion to quash the subpoenas duces tecum issued to them.

I. Background

{¶ 5} Martin Desmond was an assistant prosecuting attorney for Mahoning County until April 5, 2017, when his employment was terminated. Desmond claims that his termination was in retaliation for reporting the misconduct of a fellow assistant prosecutor, the specifics of which we detailed in *Desmond v. Mahoning Cty. Prosecutor's Office*, 2019-Ohio-4282, 134 N.E.3d 280 (7th Dist.). Simply summarized, Desmond believes that his co-worker, Dawn Cantalamessa, pursued an indictment against a witness in a murder case—Kalilo Robinson—based solely on his invocation of his Fifth Amendment right to remain silent. He believes that after voluntarily dismissing the indictment, Cantalamessa then argued for Robinson's continued detention as a material witness by misleading the court into believing that Robinson, in recorded jailhouse phone calls, expressed an intention to flee to another state to avoid testifying. The Seventh District Court of Appeals ultimately granted Robinson a writ of habeas corpus. Robinson later filed a grievance against Cantalamessa and an action under 42 U.S.C. 1983 ("section 1983 action"). His section 1983 action was eventually dismissed by the federal court on grounds of prosecutorial immunity.

{¶ 6} Around the time the habeas petition was filed, Desmond reported his concerns about Cantalamessa to Ralph Rivera, the chief of the Mahoning County prosecutor's appellate division. Rivera allegedly relayed Desmond's concerns to Linette

Stratford, the chief assistant prosecutor. Shortly after the section 1983 action was filed, Desmond reported his concerns directly to Stratford and to Paul Gains, the elected county prosecutor. At their request he drafted a memo detailing his allegations. Stratford investigated the allegations, but instead of finding that Cantalamessa had engaged in wrongdoing, she determined that Desmond had acted inappropriately. She authored a memo summarizing her findings, which she provided to Gains. Stratford concluded that Desmond: (1) engaged in communications with adverse parties; (2) knowingly made himself a witness to a lawsuit against the county, his superior, and a fellow assistant prosecutor; (3) uttered false claims of ethical violations against a fellow assistant prosecutor, causing a grievance to be filed against her; (4) wrongfully made false and misleading allegations against a fellow assistant prosecutor to adverse parties; (5) failed to communicate to the appropriate supervisor his belief that a fellow assistant prosecutor engaged in misconduct; and (6) used county equipment and assets to conduct research to assist parties adverse to his client, his superior, and a fellow assistant prosecutor.

{¶ 7} Gains placed Desmond on administrative leave. After a pre-disciplinary hearing, Gains terminated Desmond's employment effective April 6, 2017, for the reasons cited in Straford's memo. Gains announced his decision publicly, taking the unusual step of holding a press conference to make the announcement.

{¶ 8} On March 21, 2018, Desmond filed a 23-count complaint against the county, Gains, and Stratford, alleging various counts of defamation, intimidation, false-light invasion of privacy, retaliation, wrongful discharge in violation of public policy,

interference with civil rights, perjury, and falsification. Additionally, around the time of his termination, Desmond approached FBI special agents and encouraged them to undertake an investigation of Gains, Stratford, Cantalamessa, and Shawn Burns (another assistant prosecutor involved in indicting Robinson) concerning their conduct in *Robinson*. He later spoke with the FBI about constitutional violations he believed the Mahoning County prosecutor's office had committed in other cases.

{¶ 9} Since the filing of Desmond's complaint, the parties have conducted extensive discovery. As part of that discovery, Desmond was deposed over the course of two days on December 15 and 16, 2020. At Desmond's deposition, counsel for appellees questioned Desmond concerning information that he provided to the FBI. They learned of a list that Desmond prepared—with the help of counsel—identifying criminal cases in which Desmond believed the prosecutor's office had committed constitutional violations, and this became of particular interest to appellees. Specific questions about the content of the list elicited objections from Desmond's attorney on the basis of work-product and attorney-client privilege.

{¶ 10} Following Desmond's deposition, appellees served him with discovery requests, seeking "[a]ny and all Lists of criminal cases prepared by Martin Desmond identifying Mahoning County Criminal cases demonstrating alleged/potential prosecutorial misconduct furnished to the Federal Bureau of Investigation." Desmond responded by objecting to the request as vague, ambiguous, overbroad, and unduly burdensome. He also claimed that the request sought to invade attorney-work product

and is not reasonably calculated to lead to the discovery of admissible evidence because it involves communications with law enforcement that occurred after his termination.

{¶ 11} Appellees moved to compel Desmond to answer questions posed to him during his deposition and to produce the list of cases. Desmond amended his response to appellees' request to assert that no responsive documents exist. The same day, he filed a brief in opposition to appellees' motion. He argued (1) appellees' motion to compel deposition testimony seeks to compel Desmond to divulge communications with counsel that are protected by the attorney client-privilege; (2) appellees' motion seeks to compel production of a document that does not exist—i.e., a list of criminal cases *furnished to the Federal Bureau of Investigation*—and any list that otherwise exists is protected by attorney-client and work-product privileges; and (3) appellees' motion seeks irrelevant information that is beyond the scope of Civ.R. 26(B).

{¶ 12} Appellees also issued subpoenas duces tecum to two of Desmond's attorneys, Subodh Chandra and Sandhya Gupta (who no longer represents Desmond), commanding that they appear for deposition and bring lists of criminal cases, documents furnished to, and communications with the FBI or U.S. Attorney's office, alleging misconduct by the Mahoning County prosecutor's office. Chandra and Gupta moved to quash the subpoenas. They argued that (1) the subpoenas were untimely because they sought to conduct depositions after the discovery deadline; (2) the subpoenas were not properly served under Civ.R. 45(B); (3) the subpoenas seek information beyond the scope

of discovery; and (4) appellees cannot depose counsel because they have failed to satisfy the test devised in *Shelton v. Am. Motors Corp*., 805 F.2d 1323 (8th Cir.1986).

{¶ 13} In a judgment entered March 1, 2021, the trial court granted appellees' motion to compel, ordered Desmond to "produce the documents requested," and ordered that appellees may further depose Desmond. It specified that "production and examination be limited to cases and events prior to plaintiff's termination."

{¶ 14} In a judgment entered March 12, 2021, the court found Desmond's attorneys' motion to quash not well-taken, however it ordered that the depositions of Desmond's attorneys and their production of documents "be limited to events occurring prior to [Desmond's] termination," except that "it does not matter when the communications between [the attorneys] and the FBI * * * occurred."

{¶ 15} Desmond appealed. He assigns the following errors for our review:

> Assignment of Error #1: The lower court erred in ordering Plaintiff Martin Desmond to disclose communications with his attorneys regarding a federal criminal investigation into the Mahoning County Prosecutor's Office because those communications were attorney-client privileged.
>
> Assignment of Error #2: The lower court erred in ordering Plaintiff Martin Desmond to produce a case list that his counsel prepared with him during the course of this case because that list was attorney work product and a privileged and confidential communication.

Assignment of Error #3: The lower court erred in enforcing untimely, unserved subpoenas to plaintiff's attorneys that seek to depose his attorneys and compel them to produce documents.

II. Law and Analysis

{¶ 16} In his first assignment of error, Desmond challenges the trial court's March 1, 2021 judgment, ordering Desmond to appear again for deposition and to disclose communications with his attorneys concerning the federal investigation of the Mahoning County prosecutor's office. In his second assignment of error, Desmond challenges the trial court's March 1, 2021 judgment, ordering him to produce the list of cases that he and his attorney prepared together. And in his third assignment of error, he challenges the trial court's March 12, 2021 judgment, permitting appellees to depose his attorneys and compelling them to produce documents described in the subpoena duces tecum.

{¶ 17} We address Desmond's assignments of error out of order. Before doing so, we discuss a preliminary matter raised by appellees concerning our jurisdiction to consider Desmond's appeal.

A. Jurisdiction over the Appeal

{¶ 18} Discovery orders generally are interlocutory and not immediately appealable. *State v. Hendon*, 2017-Ohio-352, 83 N.E.3d 282, ¶ 10 (9th Dist.). Certain discovery orders may be final and appealable, however, if they meet the requirements of R.C. 2505.02(B). *Id.* R.C. 2505.02(B) provides, in pertinent part:

> 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.
>
> * * *

{¶ 19} For example, "[a]n order compelling the production of materials alleged to be protected by the attorney-client privilege is a final, appealable order under R.C. 2505.02(B)(4)." *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 30. This is because "[w]hen a party is compelled to produce material protected by the attorney-client privilege, harm extends beyond the actual case being litigated and causes the loss of a right that cannot be rectified by a later appeal * * *." *In re Grand Jury Proceeding of John Doe*, 150 Ohio St.3d 398, 2016-Ohio-8001, 82 N.E.3d 1115, ¶ 22, citing *Burnham* at ¶ 2.

{¶ 20} In *Burnham*, the Ohio Supreme Court held that where a litigant "plausibly allege[s] that the attorney-client privilege would be breached by disclosure of the requested materials, the order compelling the disclosure is a final, appealable order." We need not ultimately characterize the requested materials as being covered by the attorney-client privilege in order to review the trial court's decision requiring disclosure of the materials. *Id.*

{¶ 21} Here, we find that Desmond has plausibly alleged that the attorney-client privilege would be breached by disclosure of the requested materials, thus we may properly consider this appeal.

B. Case List Created with Counsel

{¶ 22} Appellees moved to compel Desmond to produce "[a]ny and all Lists of criminal cases prepared by Martin Desmond identifying Mahoning County Criminal cases demonstrating alleged/potential prosecutorial misconduct *furnished to the Federal Bureau of Investigation.*" (Emphasis added.) The trial court granted appellees' motion, specifically adopting their analysis of the applicable law and facts. In his second assignment of error, Desmond argues that the trial court erred.

{¶ 23} At his deposition, Desmond was questioned at length about cases where he believed the prosecutor's office committed constitutional violations, and cases that he discussed with FBI agents concerning his belief that constitutional violations had been committed. Desmond divulged during his deposition that with help from his attorney, he

created a list of approximately 24 cases where he believed the prosecutor's office committed constitutional violations. He testified that he did not provide this list to the FBI.

{¶ 24} Desmond's attorney permitted him to answer questions about the cases that caused him concern and cases he recalled mentioning to the FBI. But counsel did not want Desmond to respond to questions about what was on the list that they had created together. To that end, he voiced objections seeking to distinguish between "the category of things that might be on the list"—which he felt was a permissible topic—versus "specific questions about what may be on the list"—which he felt invaded privilege.

{¶ 25} After Desmond's deposition, appellees served a request for production of documents, seeking the list of cases "furnished to the [FBI]." Desmond first objected to the request as vague, ambiguous, overbroad, unduly burdensome, protected by attorney-work product privilege, and not reasonably calculated to lead to the discovery of admissible evidence. Then, in supplemental objections and responses, Desmond clarified that no responsive documents exist because he did not "furnish" any list "to the [FBI.]". Nevertheless, in its March 1, 2021 judgment granting appellees' motion to compel, the trial court ordered Desmond to produce the documents requested by appellees.

{¶ 26} Generally speaking, we review a trial court's resolution of discovery disputes under an abuse of discretion standard. *See Dennis v. State Farm Ins. Co.*, 143 Ohio App.3d 196, 205, 757 N.E.2d 849 (7th Dist.2001). Where, however, the discovery issue involves the assertion of privilege, it presents a question of law that must be

reviewed de novo, unless it involves a question of fact—such as whether an attorney-client relationship existed. *Randall v. Cantwell Mach. Co.*, 10th Dist. Franklin No. 12AP-786, 2013-Ohio-2744, ¶ 9. Questions of fact are reviewed for an abuse of discretion. *Id*.

{¶ 27} In briefing the motion to compel in the trial court, the parties selected excerpts of the transcript of Desmond's deposition and attached them to their briefs—no party filed the transcript in its entirety. Notably, appellees did not attach to their motion excerpts of Desmond's deposition where he made clear that he did not furnish the case list to the FBI. Desmond testified at his deposition that he prepared the list with assistance from his attorney, he "did not create the list for the FBI," he "did not turn over the list to the FBI," and he specifically did not do so "because it was a privileged document."

{¶ 28} Civ.R. 34(B) provides the procedure for requesting the production of documents. It requires the requesting party to describe "with reasonable particularity" the items or categories of items it wishes to inspect. Here, appellees described the documents they sought with reasonable particularity. The wording of the request for production of documents was entirely within their control. Nevertheless, despite Desmond's clear testimony, appellees asked for "any and all" lists that "were *furnished* to the [FBI]." No list was furnished to the FBI. The documents appellees requested, therefore, do not exist. This fact alone warrants reversal of the trial court's judgment requiring Desmond to produce documents responsive to appellees' request. *See Wallace*

v. Nally, 7th Dist. Columbiana No. 14 CO 32, 2015-Ohio-4146, ¶ 52 ("[A] party cannot produce what it does not possess."); *Flower v. Brunswick City School Dist. Bd. of Edn.*, 2015-Ohio-2620, 34 N.E.3d 973, ¶ 46 (9th Dist.) (finding that defendant was not required to produce "general, blank form not related to any particular teacher" when request for discovery sought documents relating to observation or evaluation of plaintiff-teacher). But even if the request was worded in such a manner as to encompass the list Desmond referenced at his deposition, we would find that this list was not discoverable because it is protected by the attorney-client privilege.

{¶ 29} "'The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 21, quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). It is "intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." (Internal quotations and citations omitted.) *Id.* "'In modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential.'" *Id*., quoting *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 660, 635 N.E.2d 331 (1994).

{¶ 30} "In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824

N.E.2d 990, ¶ 18. R.C. 2317.02(A) "is a mere testimonial privilege precluding an attorney from testifying about confidential communications," whereas "[t]he common-law attorney-client privilege * * * 'reaches far beyond a proscription against testimonial speech,'" "'protect[ing] against any dissemination of information obtained in the confidential relationship.'" *Id.* at ¶ 26, quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (1991). "Under the attorney-client privilege, "'(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.'" *State ex rel. Leslie* at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355-356 (6th Cir.1998). To be protected by the attorney-client privilege, the communications need not be purely legal analysis or advice, so long as the communication facilitates the rendition of legal services or advice. *State ex rel. Toledo Blade Co.* at ¶ 27.

{¶ 31} Here, Desmond testified that he and his attorneys worked together to prepare a list of cases, which they created "through [their] communications." He described that the information they compiled was "researched" and "discovered" after he was terminated, and was prepared from a review of the public docket. He explained that "the process that [his] attorneys and [he] used was the subject of [their] attorney-client privilege and their work product as to how [they] determined what cases needed to be looked into further." Desmond emphasized that the list was not turned over to the FBI

because it was a privileged document. He and his attorneys both maintain copies of the list—his is stored electronically; he is not sure if his attorneys' copy is stored electronically or in printed form.

{¶ 32} In our view, Desmond's testimony establishes that the list itself is privileged. The entire document is a confidential communication between Desmond and his attorneys that facilitated the rendition of legal services or advice—i.e., they used the list to "determine[] what cases needed to be looked into further."

{¶ 33} This is not to say that appellees could not have used other tactics to discover the non-privileged information they appear to be after—i.e., the identity of cases where Desmond believes the Mahoning County Prosecutor's office committed constitutional violations. One way to obtain this information was simply to ask Desmond at his deposition. Appellees asked Desmond some questions about cases where he believes constitutional violations occurred, and Desmond answered to the best of his recollection. Another way would have been to serve an interrogatory asking the same question. As far as we are aware, appellees did not do this, and instead (in a carelessly-worded request), sought production of an attorney-client communication—i.e., the written list itself. So, while appellees could have used other means to discover a list of cases from Desmond, they are not entitled to the written list at issue because it is protected by the attorney-client privilege. While this may be a distinction without much difference, it is a distinction nonetheless.

{¶ 34} In sum, we find that the list at issue is protected by the attorney-client privilege and is not subject to discovery. We also find that the trial court abused its discretion when it ordered Desmond to produce a document that was not responsive to appellees' request for production. Accordingly, we find Desmond's second assignment of error well-taken.

C. Desmond's Communications with Counsel

{¶ 35} In their motion to compel, appellees complained that Desmond's attorney instructed him not to answer questions at his deposition "if his answer would reveal conversations Desmond had with counsel about *counsel's* conversations with the FBI." They requested the court to order Desmond to reappear for deposition and "to respond to all questions pertaining to the information provided to the FBI and any alleged criminal activity within the Mahoning County Prosecutor's office." In its March 1, 2021 judgment, the court granted appellees' motion. In doing so, the court specifically adopted appellees' analysis of the applicable law and facts. Desmond argues that the trial court erred.

{¶ 36} In their motion to compel, appellees claimed that Desmond was instructed "not to answer certain questions regarding conversations and/or communications Desmond *or his counsel* had with agents of the [FBI] regarding [appellees] and/or [Cantalamessa] and or [Burns]." Desmond countered that "[e]xcept for a few limited exceptions," he answered appellees' questions about communications with the FBI.

{¶ 37} As we observed above, neither party filed the transcript of Desmond's transcript in its entirety. But from the excerpts attached to the parties' briefing that we are able to review, we see no instances where Desmond refused to answer questions about his communications with the FBI, and we see no questions posed to him concerning his attorney's communications with the FBI. This discrepancy itself calls into question the entire basis of appellees' request to reopen Desmond's deposition. And to the extent appellees highlight examples where Desmond's attorney objected or provided admonitions to Desmond to avoid discussing the content of attorney-client and work-product privileged communications, appellees cite only one example where Desmond actually refused to answer a question. Even then, if one continues to read the deposition, it becomes apparent that Desmond ultimately answered the question.

{¶ 38} The examples appellees provide are as follows:

- Appellees' counsel asked Desmond if the FBI requested documents from him. Desmond told him that he provided the FBI a copy of his filed petition for grand jury transcripts (which was the subject of *Desmond v. State*, 2020-Ohio-181, 141 N.E.3d 1052, (7th Dist.)) and the FBI requested additional documents from his attorney. He described that the FBI wanted "any documents that supported the criminal activity that was occurring or was believed to be occurring," including Cantalamessa and Burns's depositions, appellees' discovery responses, and any affidavits of appellees. Appellees' counsel asked Desmond if the FBI went through

him to get documents from his attorney or whether they went directly to his attorney. Counsel objected, *but Desmond answered*. He responded that he told FBI agents to go directly to his attorney, and Desmond testified that the FBI confirmed that his attorney indeed provided the documents they requested.

- Appellees' counsel asked Desmond if there was an ongoing FBI investigation relating to Cantalamessa, Burns, Gains, or Stratford. Counsel objected, *but Desmond answered*. Desmond said that he "[does] not know if there is or not," but his belief based on the circumstances is that there is at least an inquiry.

- Appellees' counsel asked Desmond what cases he discussed with the FBI. At this point, Desmond divulged that he and his attorney had created a list, but he also stated that they did not create it for the FBI, and he did not remember what cases on the list he discussed with the FBI. Counsel objected, *but Desmond continued to answer questions*. He clarified that the list was not provided to the FBI, the list was created by he and his attorneys through their communications, and he considers the list to be privileged. Nevertheless, he listed the names of cases that he remembered being on the list (*Robinson, Chaney, Byrd, Williams, and Jackson*). He responded to questions about what he remembered sharing

with the FBI about those cases. He could not remember off the top of his head all of the cases on his list.

- Appellees' counsel showed Desmond a list of cases they created, compiled from Desmond's requests for case files. It was marked as an exhibit. Counsel asked Desmond which of the cases he discussed with the FBI. Counsel objected, *but Desmond answered*. Desmond identified all the cases on the exhibit—at least 12 cases—that he recalled discussing with the FBI (*Jackson, Brown, Chaney, Woods, Dawson, Correa, Lucky, Hill, Ravnell, Roberson, Johnson, Washington, and maybe Williams, Wilson, Downs, Glenn*). He clarified that he could not recall off the top of his head all of the cases from the exhibit that he discussed with the FBI.
- Appellees' counsel asked Desmond if he knew the identity of any assistant U.S. attorney assigned to investigate his allegations. Counsel objected and instructed him not to answer "to the extent [Desmond has] gained information about any investigation through discussions with counsel." Desmond first responded that he could not answer. But *Desmond ultimately answered* that Bridget Brennan had been mentioned as the assistant U.S. attorney assigned to the inquiry.
- Appellees' counsel asked Desmond which FBI agents he spoke with after they spoke to his attorney and how many times he spoke with

them. Counsel objected, *but Desmond answered*. He identified the FBI agents he spoke with and estimated the number of times he spoke with them.

{¶ 39} Our review of the excerpts of Desmond's deposition reveals that at no time did appellees' counsel ask Desmond about the substance of his attorney's conversations with the FBI. And although Desmond's counsel interjected objections premised on work-product or attorney-client privilege, Desmond answered appellees' counsel's questions about what he discussed with the FBI. Appellees' motion was premised on their claim that Desmond refused to answer questions, and this is simply not the case.

{¶ 40} Setting aside this issue of the legitimacy of the premise of appellees' motion, and turning to the information that appellees seek to discover in reopening Desmond's deposition—i.e., Desmond's communications with counsel regarding counsel's communications with the FBI—we find that they seek attorney-client privileged information. While it is true that Desmond's attorneys' conversations with the FBI are not themselves attorney-client privileged, this is not what would be revealed by compelling Desmond to respond to questions about his attorneys' conversation with law enforcement. Rather, what would be revealed is *what counsel told Desmond*. What counsel chose to tell Desmond about those conversations is intertwined with the legal advice being provided to Desmond and is privileged.

{¶ 41} Moreover, we disagree with appellees that Desmond waived privilege. First, they claim that Desmond "expressly instructed his attorney to divulge the contents of the communications to the FBI." They cite to pages of Desmond's deposition transcript, which we have reviewed. In those passages, Desmond stated only that the FBI asked him for "documents that supported the criminal activity that was occurring or was believed to be occurring," including Cantalamessa and Burns's depositions, appellees' discovery responses, and any affidavits of appellees, which Desmond told them to get from his attorney.

{¶ 42} They also claim that Desmond made partial, voluntary disclosures of his communications with counsel. Again, we have reviewed the pages of the deposition transcript where appellees claim this occurred, and we see no instances where Desmond disclosed communications with counsel.

{¶ 43} Finally, appellees claim that they "simply seek to discover those facts surrounding [Desmond's] claims and allegations that [appellees] had engaged in criminal conduct," and "those facts were communicated by [Desmond] to his attorneys, who in turn communicated those facts to a third party, the FBI." Again, nothing in the portions of the transcript that we received supports this contention. And if that is what appellees wanted to know, they could have simply asked Desmond himself to explain—at his December 2020 deposition—in what manner he believed appellees engaged in criminal conduct. Their failure to obtain this information was not the result of Desmond's refusal to answer their questions.

{¶ 44} We, therefore, find that the trial court abused its discretion when it ordered Desmond to submit to another deposition. We further find that the court's judgment compels the disclosure of attorney-client privileged information. Accordingly, we find Desmond's first assignment of error well-taken.

D. Subpoenas Issued to Desmond's Attorneys

{¶ 45} Appellees issued subpoenas duces tecum to Desmond's attorney, Chandra, and his former attorney, Gupta, commanding them to appear for deposition and to produce: (1) any lists of Mahoning County criminal cases they furnished to the FBI or U.S. Attorney's office or to Special Agent Wally Sines regarding Desmond's reports of misconduct in the Mahoning County prosecutor's office, including "any transmittal of a list or lists of criminal cases on which [they] were copied"; (2) all documents furnished to the FBI or U.S. Attorney's office or to Special Agent Wally Sines regarding Desmond's reports of misconduct in the Mahoning County prosecutor's office, including "any transmittal of a list or lists of criminal cases on which [they] were copied"; and (3) any communications that they or anyone at the Chandra Law Firm sent (or were copied on) to any person at the FBI or U.S. Attorney's office in response to requests for documents or information regarding Desmond's reports of misconduct in the Mahoning County prosecutor's office, whether specifically requested by or voluntarily provided to those entities. Chandra and Gupta moved to quash the subpoenas. In its March 12, 2021 judgment, the trial court denied their motion. Desmond argues that the trial court erred.

{¶ 46} Desmond maintains that the trial court should have granted Chandra and Gupta's motions to quash because appellees failed to serve the subpoenas as required by Civ.R. 45(B); the subpoenas were not timely issued; and the subpoenas fail to satisfy the test set forth in *Shelton*, 805 F.2d 1323, which limits the circumstances under which opposing counsel may be deposed.

{¶ 47} Appellees counter that the *Shelton* test has not been adopted in Ohio, and even if *Shelton* does apply, the subpoenas were appropriately issued. They insist that the court properly rejected the timeliness arguments here because it has the inherent authority to control its own docket and appellees did not learn of the existence of the case list and Chandra and Gupta's involvement in disseminating information to the FBI until Desmond's December 2020 deposition. And they argue that the court properly rejected the arguments concerning service of the subpoenas because, with respect to Chandra, they made several attempts to serve the subpoena and Chandra ignored a request to voluntarily accept service, and with respect to Gupta, residence service was perfected.

{¶ 48} We review an order denying a motion to quash under an abuse-of-discretion standard. *Tassone v. Tassone*, 10th Dist. Franklin No. 19AP-382, 2020-Ohio-3151, ¶ 24. However, an assertion of privilege is generally subject to de novo review, except where a question of fact is presented, such as whether an attorney-client relationship exists. *Hinerman v. Grill on Twenty First, LLC*, 2018-Ohio-1927, 112 N.E.3d 1273, ¶ 14 (5th Dist.).

{¶ 49} In *Shelton*, the court considered the issue of whether the deposition of opposing counsel may be taken. In considering the issue, the court expressed concern with the practice of deposing opposing counsel as "an increasingly popular vehicle of discovery." *Shelton* at 1327. It acknowledged that "the Federal Rules of Civil Procedure do not specifically prohibit the taking of opposing counsel's deposition," but it lamented that "the increasing practice of taking opposing counsel's deposition" has become "a negative development in the area of litigation, and one that should be employed only in limited circumstances." *Id*. at 1326-1327. It described some of its concerns about the practice, including that it disrupts the adversarial system, lowers the standards of the profession, adds to the already burdensome time and costs of litigation, causes pretrial delays to resolve assertions of work-product and attorney-client privilege and other collateral issues, detracts from the quality of client representation, interferes with counsel's ability to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent, and impacts the flow of truthful communications from the client to the attorney.

{¶ 50} The *Shelton* court concluded, therefore, that opposing counsel should not be permitted to be deposed unless the party seeking to take the deposition has shown that "(1) no other means exist to obtain the information than to depose opposing counsel * * *; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327. *But see Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir.2002) (clarifying that the *Shelton* test should

be applied where a party seeks to depose opposing counsel who is representing the client in the pending litigation—not in a closed case).

{¶ 51} Appellees acknowledge that two Ohio districts—the Sixth District in *Al-Fayez v. Baycliffs Homeowners Assn., Inc.*, 2018-Ohio-4542, 123 N.E.3d 351 (6th Dist.), and the Eighth District in *Estate of Mikulski v. Cleveland Elec. Illum Co.*, 8th Dist. Cuyahoga No. 96748, 2012-Ohio-588—have followed *Shelton* and adopted its test for determining whether to allow opposing counsel to be deposed. But they insist that *Shelton* "has never been followed by the Seventh District Court of Appeals." While this is true, no Ohio court (including the Seventh District) has rejected *Shelton*. And it is our view that the *Shelton* test properly balances a litigant's need to depose opposing counsel against the dangers associated with that practice. The parties in their briefs address the *Shelton* factors, therefore, we apply that test here.

{¶ 52} Appellees insist that all three *Shelton* requirements are satisfied. As to the first requirement—that no other means exist to obtain the information—they contend that (1) they attempted to obtain the information from the FBI but their request was denied, and (2) they "attempted to obtain the information from [Desmond] himself," but Desmond refused to provide the information because he "was instructed by Chandra not to answer or because he was not present when his counsel spoke with law enforcement officers."

{¶ 53} While it may be true that the FBI refused to provide the information requested by appellees, we have already determined that it is not true that appellees attempted to obtain the information from Desmond but were refused. Unless appellees simply failed to attach relevant excerpts of Desmond's deposition to their motion to compel, our review of his deposition convinces us that there were simply no questions that Desmond refused to answer concerning communications with the FBI or the basis for his belief that Mahoning County prosecutors committed constitutional violations. And, as we observed above, Desmond answered the only question he was asked about what information his attorneys provided to FBI—he said the FBI requested "documents that supported the criminal activity that was occurring or was believed to be occurring," including Cantalamessa and Burns's depositions, appellees' discovery responses, and any affidavits of appellees, and the FBI confirmed that they received that information.

{¶ 54} Appellees' failure to establish the first *Shelton* requirement precludes them from deposing Chandra and Gupta. But we also fail to see how the information they seek is relevant or crucial to their preparation of the case—the second and third *Shelton* requirements.

{¶ 55} The list (discussed in further detail above) identifies approximately 24 Mahoning County criminal cases where Desmond believes constitutional violations occurred. Appellees' counsel asked Desmond at his deposition "if the cases on [the list he created with his attorneys] form the basis for some of the claims that [he made] in the pending lawsuit." Desmond responded that the information may provide some

background, but no—they do not "fulfill an element" of his claims for defamation, false light, intimidation, retaliation, perjury, or falsification. A review of Desmond's complaint demonstrates that his claims for civil liability for criminal acts are premised on the alleged wrongdoing that he reported in his December 22, 2016 text and January 27, 2017 memo, which he claims led to his wrongful termination. His claims are not premised on all the various cases where he believes constitutional violations were committed. Additionally, Chandra and Gupta have stated that they did not know Desmond before his employment was terminated and they have no personal knowledge of any of the events that led to his termination. Given these circumstances, we agree with Desmond that information concerning his attorney's post-termination communications with the FBI are not crucial—and arguably not even relevant—to appellees' preparation of the case.

{¶ 56} Accordingly, because the *Shelton* requirements have not been satisfied, we find that the trial court erred in denying the motion to quash Chandra and Gupta's subpoenas duces tecum.[1] We find Desmond's third assignment of error well-taken.

[1] Desmond also argues—and appellees do not dispute—that service of the subpoena was never perfected as to Chandra; attempts at service were made but were unsuccessful. Desmond also argues that service of the subpoena on Gupta was not perfected because Gupta was primarily residing in India when residence service was made. We need not address this argument given our resolution of Desmond's assignment of error on other grounds.

III. Conclusion

{¶ 57} The trial court abused its discretion when it granted appellees' motion to compel Desmond to submit to a second deposition. Their motion was premised on their assertion that Desmond was instructed "not to answer certain questions regarding conversations and/or communications Desmond *or his counsel* had with agents of the [FBI] regarding [appellees] and/or [Cantalamessa] and or [Burns]," when, in fact, Desmond fully answered questions about his communications with the FBI and was not asked questions about his counsel's communications with the FBI. Moreover, counsel's communications with Desmond about those conversations are protected by the attorney-client privilege. We find Desmond's first assignment of error well-taken.

{¶ 58} The trial court abused its discretion when it ordered Desmond to produce a case list "furnished to" the FBI when Desmond made clear that the case list he created with his attorney was not created for the FBI, was not intended to be shared with the FBI, and indeed was not shared with the FBI because he considered it to be a privileged communication. Accordingly, the document appellees requested does not exist. Additionally, the document is protected from disclosure by the attorney-client privilege. We find Desmond's second assignment of error well-taken.

{¶ 59} The trial court erred when it denied the motion to quash the subpoenas duces tecum issued to Desmond's attorneys. Appellees failed to establish that no other means exist to obtain the information than to depose opposing counsel, the information sought is relevant, and the information is crucial to their preparation of the case—the test

enunciated in *Shelton*, 805 F.2d 1323 and adopted here. We find Desmond's third assignment of error well-taken.

{¶ 60} We reverse the March 1 and March 12, 2021 judgments of the Mahoning County Court of Common Pleas. Appellees are ordered to pay the costs of this appeal under 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.

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, J. _____
CONCUR.
JUDGE

Judges, Thomas J. Osowik, Christine E. Mayle, and Gene A. Zmuda, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.