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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 8/13/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN L. BIBB, M.D.,) 1 CA-SA 13-0135
)
Petitioner,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE HONORABLE J. RICHARD GAMA,) Rule 28, Arizona Rules of
Judge of the SUPERIOR COURT OF) Civil Appellate Procedure)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
SOUTHWEST HEMATOLOGY ONCOLOGY,)
P.C., an Arizona professional)
corporation, and JEFFREY D.)
ISAACS, M.D.,)
)
Real Parties in Interest.)
)

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. CV 2011-012995

The Honorable J. Richard Gama, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED

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C A T T A N I, Judge

¶1 Dr. John L. Bibb seeks special action review of the superior court's pre-trial discovery order granting Southwest Hematology Oncology, P.C.'s, and Dr. Jeffrey D. Isaacs's (collectively, "SHO") motion to quash Dr. Bibb's subpoenas duces tecum served upon the law firm of Mitchell & Yearin, P.L.C., ("Mitchell & Yearin") and CBIZ Accounting, Tax & Advisory of Phoenix ("CBIZ"). For reasons that follow, we accept special action jurisdiction and grant relief.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 Dr. Bibb left his medical practice with SHO in November 2012; he is now working at a new oncology practice. Dr. Bibb retained a 16 percent ownership interest in SHO, and he sought to have his shares redeemed pursuant to the terms of his shareholder's agreement with SHO. Dr. Bibb and his former partners have been unable to reach an agreement on the value of

¹ When reviewing a discovery ruling, we defer to the court's factual findings and affirm them if supported by reasonable evidence. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003).

his shares, and he filed the pending lawsuit seeking to establish a redemption value.

¶13 This special action arises from a discovery dispute that culminated in the superior court granting SHO's motion to quash subpoenas seeking documentation from Mitchell & Yearin and CBIZ relating to a previous valuation of SHO for a different purpose. In 2010, SHO consulted with Mitchell & Yearin and CBIZ to value SHO's medical practice for a potential sale. CBIZ prepared a draft valuation that valued SHO at \$6.6 million, but did not create a final or formal valuation because negotiations ended without a sales agreement. As of the date of Dr. Bibb's departure in 2012, SHO valued itself at just under \$1 million.

¶14 In granting SHO's motion to quash, the superior court ruled that SHO had not waived its attorney-client privilege as to information from Mitchell & Yearin and that the accountant-client privilege protects information held by CBIZ to the exclusion of Dr. Bibb's shareholder's right to access SHO's accounting records.

DISCUSSION

¶15 Special action jurisdiction is appropriate when no equally plain, speedy, and adequate remedy is available by appeal. Ariz. R.P. Spec. Act. 1(a); *Arpaio v. Figueroa*, 229 Ariz. 444, 446, ¶ 5, 276 P.3d 513, 515 (App. 2012). "Although appellate courts do not routinely entertain petitions for

extraordinary relief on discovery matters, special action jurisdiction may be appropriate because a discovery order is not immediately appealable." *Figueroa*, 229 Ariz. at 446, ¶ 5, 276 P.3d at 515 (quoting *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 511, ¶ 10, 217 P.3d 1212, 1216 (App. 2009)). Additionally, when the denial of a motion to compel raises important issues of law, exercise of special action jurisdiction is appropriate. See *Brown v. Superior Court*, 137 Ariz. 327, 330, 670 P.2d 725, 728 (1983). Because the issues presented in this case satisfy these criteria, we accept special action jurisdiction.

¶6 We review pre-trial discovery rulings for an abuse of discretion; erroneous legal rulings constitute an abuse of discretion. See *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253-54, ¶ 10, 63 P.3d 282, 284-85 (2003).

¶7 Dr. Bibb argues that as a former member of SHO's partnership group, he was then and remains now entitled to the requested information from Mitchell & Yearin and from CBIZ. Because the requested information was never confidential as to Dr. Bibb, we agree.

¶8 The attorney-client privilege, Ariz. Rev. Stat. ("A.R.S.") § 12-2234, and the accountant-client privilege,

A.R.S. § 32-749,² only apply if the communication at issue is confidential. See, e.g., *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993), *superseded by statute on other grounds*, 1994 Ariz. Sess. Laws, ch. 334, § 1 (2d Reg. Sess.). Here, SHO specifically structured the scope of the attorney-client privilege to protect the information as against third parties, while fully sharing the information within the partnership group. The retainer agreement reads in pertinent part, "All correspondence and communications to and from the firm may be shared between all counsel and/or paraprofessionals for the Firm. All such communication will, however, be considered privileged *vis-a-vis* third parties outside of the partnership group." All three partners of the practice, including Dr. Bibb, signed the Mitchell & Yearin engagement letter on behalf of SHO.

¶19 Dr. Bibb is not just a former member of SHO's partner group, he is also an owner who paid a pro-rata share of Mitchell & Yearin's and CBIZ's fees and was responsible for meeting with SHO's legal counsel and accountants as part of his regular duties. Dr. Bibb was entitled to the information from the 2010 valuation when it was prepared, and there is no reasoned basis for precluding him from now reviewing documentation he was

² Absent material revisions after the relevant date, statutes cited refer to the current version unless otherwise indicated.

entitled to review and consider as a partner and shareholder in SHO. Therefore, we conclude that the superior court erred by granting SHO's motion to quash Dr. Bibb's subpoenas seeking Mitchell & Yearin's and CBIZ's documents relating to the 2010 valuation.

¶10 SHO seeks leave to file an application for attorney's fees and a statement of costs. As SHO is not the prevailing party in this special action, we deny its request for attorney's fees and costs.

CONCLUSION

¶11 We accept jurisdiction, grant relief, and direct the superior court to issue appropriate discovery orders consistent with this decision.

/S/
KENT E. CATTANI, Judge

CONCURRING:

/S/
JON W. THOMPSON, Presiding Judge

/S/
JOHN C. GEMMILL, Judge