[Cite as *Nash v. Cleveland Clinic Found.*, 2010-Ohio-10.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92564

AMY NASH, ADMINISTRATOR OF THE ESTATE OF SHANE COLLINS, ET AL.

PLAINTIFFS-APPELLEES

vs.

THE CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED WITH INSTRUCTIONS

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-588421, CV-602833, and CV-603845

BEFORE: Rocco, P.J., Dyke, J., and Boyle, J.

RELEASED: January 7, 2010

JOURNALIZED:

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendants-appellants, The Cleveland Clinic Foundation ("CCF"), Johanna Goldfarb, M.D., and Rita Steffen, M.D., appeal from a common pleas court order denying their motions to quash deposition subpoenas for Rita Steffen, M.D., Conrad Foley, M.D., Elumalai Appachi, M.D., Kadakkal Radhakrishnan, M.D., Hilary K. Rossen, L.I.S.W., and Sally D. Siggins, L.I.S.W. They urge that it was error for the court to refuse to quash subpoenas served on persons with mandatory obligations under R.C. 2151.421 to report known or suspected child abuse.

{¶ 2} We find the court erred by denying the motions to quash in toto. The confidentiality afforded to reports of child abuse does not preclude discovery of either the appellees' medical records or the communications among the deponents and the Cuyahoga County Department of Children and Family Services ("CCDCFS") that do not relate to a report of child abuse. Only reports of child abuse, the identity of persons making such reports, and the information contained in such reports, are confidential under R.C. 2151.421(H)(1). The scope of the depositions should be limited to avoid inquiry on these subjects. Therefore, we reverse the common pleas court's decision to deny the motions to quash and remand with instructions to permit the depositions to go forward following the entry of an appropriate protective order limiting the scope of inquiry to avoid these subjects.

Procedural History

{¶ 3} The underlying consolidated cases were originally filed as three separate actions. The first action was filed by plaintiff-appellee Amy Nash, administrator of the estate of Shane Collins, and Mary Jo Bajc, individually and as next friend of Austin Collins. The defendants were appellants, CCF and Drs. Goldfarb and Steffen, as well as MetroHealth Medical Center and Irene Dietz, M.D. This action alleged that Shane and Austin Collins were medically fragile twin infants who were placed in foster care with Ms. Bajc shortly after their birth in September 2002. The children were removed from her home on July 22, 2004 and placed in other foster homes after CCF suggested that Ms. Bajc suffered from Munchausen-by-proxy syndrome. Shane died on October 11, 2004.

{¶ 4} The complaint alleges that the CCF and Drs. Goldfarb and Steffen were negligent in failing to diagnose and treat the infants' true medical conditions, to diagnose or rule out Munchausen-by-proxy syndrome, and to notify proper authorities of suspected child abuse and neglect. The complaint further alleged that MetroHealth and Dr. Dietz failed to provide the infants with appropriate diagnosis, testing, and treatment. Plaintiff claimed that the negligence of any or all of the defendants caused Shane's wrongful death and caused severe emotional distress.

{¶ 5} Nash later filed an action for wrongful death against CCDCFS, several CCDCFS employees, and the foster parents who were caring for the children at the time of Shane's death. Ms. Bajc and her husband, Daniel Bajc, also filed a separate action in which they claimed that the CCDCFS and its

employees created a false suspicion that Bajc and her family fit the profile for Munchausen-by-proxy syndrome and thus defamed Bajc, cast her in a false light, and interfered with her guardianship interest in the children. All three actions were consolidated.

{¶ 6} CCF filed a motion for summary judgment under seal in which it contended that plaintiffs' claims against it were barred by R.C. 2151.421(H)(1). The court granted this motion. Thereafter, plaintiffs sought to depose several CCF employees, specifically, Drs. Rita Steffen, Conrad Foley, Elumalai Appachi and Kadakkal Radhakrishnan, and social workers Hilary K. Rossen and Sally D. Siggins. The subpoenas addressed to the medical doctors asked them to produce their office charts concerning the children and "all records or notes concerning any communications made with the Cuyahoga County Department of Family Services [sic] or its employees after July 21, 2004." In addition, Dr. Foley was asked to produce "copies of all letters sent on behalf of Mary Jo Bajc concerning the allegation of Munchausen syndrome by proxy." The social workers were asked to produce "1) Any documents provided to you by any employee of the [CCDCFS], including Maria Velez. 2) Any documents provided by you to any employee of the [CCDCFS], including Maria Velez and Theresa Almusaad."

{¶ 7} CCF filed motions to quash these subpoenas, under seal. These motions asserted that Ohio law prohibits discovery pertaining to a child abuse report made pursuant to R.C. 2151.421 and any information contained therein,

and "the attendant circumstances concerning the report." Both plaintiffs and CCF submitted evidentiary material to the court under seal in connection with these motions.

{¶ 8} In its journal entry filed December 8, 2008, the court concluded that "summary judgment should not have been granted [to CCF, Steffen, and Goldfarb] as the evidentiary materials show issues of fact as to which individual and/or individuals were involved in reporting suspected child abuse." However, "[b]y vacating the prior ruling, this Court is by no means expressing any opinion as to whether the CCF Defendants are entitled to immunity or not under R.C. 2151.421. It will be necessary to develop a more complete record on this issue before the Court revisits the issue in the future, and the Court must necessarily overrule and deny the motions to quash the deposition subpoenas directed at the CCF Defendants." Therefore, the court vacated the prior decision to grant summary judgment to appellants and denied appellants' motions to quash the deposition subpoenas.

Law and Analysis

Final Appealable Order

{¶ 9} We do not have jurisdiction to review the common pleas court's decision to vacate its prior order granting appellants' motion for summary judgment. The court's order, in effect, denied summary judgment to appellants. The denial of summary judgment on immunity grounds does not meet any of the definitions of a final order under R.C. 2505.02(B), and therefore is not appealable.

See *Stevens v. Ackley* (2001), 91 Ohio St.3d 182, 190, 2001-Ohio-249; *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90 (denial of summary judgment on grounds of immunity not a final appealable order); cf. R.C. 2744.02(C) ("An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order").

{¶ 10} Appellants' brief asserts that this interlocutory appeal was brought pursuant to R.C. 2505.02(B)(4). R.C. 2505.02(B)(4) makes final and appealable "an order that grants or denies a provisional remedy" if (1) the order "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 (2) the appealing party would not have a meaningful remedy in an appeal after final judgment on all claims. We have previously determined that the denial of immunity is not a final order under R.C. 2505.02(B)(4) because an appealing party could be afforded a meaningful and effective remedy by appeal following final judgment on all claims in the action. Therefore, the denial of immunity cannot be appealed under this provision. *Drum v. Washlock* (August 24, 2000), Cuyahoga App. Nos. 74816 and 74817, affirmed without opinion, 91 Ohio St.3d 207, 2001-Ohio-263.

{¶ 11} However, the court's denial of appellants' motions to quash is appealable pursuant to R.C. 2505.02(B)(4). Provisional remedies include, e.g., proceedings for the discovery of privileged matter. Although neither the

physician-patient privilege nor the social worker-client privilege under R.C. 2317.02 is at issue here, this court has held that "[t]o the extent that R.C. 2151.421(H)(1) protects information provided in a report of known or suspected child abuse, it does in fact create a testimonial privilege." *Walters v. The Enrichment Ctr. of Wishing Well, Inc.* (1999), 133 Ohio App.3d 66, 73.[1] By allowing discovery of allegedly privileged information, the court's ruling here "determines the action with respect to the provisional remedy and prevents a judgment in the action favoring the appealing party with respect to the provisional remedy." Furthermore, once the allegedly privileged information is disclosed, appellants cannot effectively appeal the decision. Therefore, we find we have jurisdiction to review the denial of CCF's motions to quash.

Discovery Regarding Confidential Reports of Abuse

{¶ 12} In reviewing the trial court's decision, we decline appellants' invitation to address the validity of the court's stated reason for denying the motions to quash, that "[i]t will be necessary to develop a more complete record on this issue [of immunity] before the court revisits the issue in the future." The issue before us is whether the testimony and documents appellees sought were privileged from discovery. We review this matter de novo. *Roe v. Planned*

[1]In an earlier appeal in the *Walters* case, the supreme court found that an order denying a motion for a protective order concerning allegations of abuse was not appealable. *Walters v. The Enrichment Ctr. of Wishing Well, Inc.* (1997), 78 Ohio St.3d 118. This determination was based on a prior version of R.C. 2505.02 that did not allow an appeal from an order that granted or denied a provisional remedy.

Parenthood S.W. Ohio Region, 122 Ohio St.3d 399, 2009-Ohio-2973, ¶29; see, also, *Cepeda v. Lutheran Hosp.*, Cuyahoga App. No. 90031, 2008-Ohio-2348, ¶9.

{¶ 13} R.C. 2151.421(A)(1) requires, e.g., physicians and social workers who know or suspect that a child has been injured by abuse or neglect to immediately report their knowledge or suspicion to a public children's services agency or a peace officer. Under R.C. 2151.421(H)(1), with exceptions not relevant here, "a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report." Further, "[n]o person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section." R.C. 2151.421(H)(2).

{¶ 14} The subpoenas in this case asked the deponent doctors to provide their office charts, as well as any records or notes concerning communications with CCDCFS after July 21, 2004. They asked the deponent social workers to provide any documents they provided to CCDCFS and any documents CCDCFS provided to them. Communications between CCDCFS and the doctors, and the exchange of documents between CCDCFS and the social workers, were not necessarily reports of abuse. To the extent that they were reports of abuse, or discussed information contained in a report of abuse, or identified the person who made the report, R.C. 2151.421(H)(1) precludes discovery.

{¶ 15} On the other hand, R.C. 2151.421(H) does not preclude discovery of all discussions about injuries or conditions that may have resulted from abuse. For example, in the circumstances of this case, where the estate of the child and the alleged abuser are the parties seeking discovery,[2] there is no limitation on discovery about the record of medical care provided to the child.

{¶ 16} Accordingly, we reverse the common pleas court's decision to deny appellants' motions to quash. We remand with instructions for the trial court to enter a protective order allowing the depositions to go forward subject to restrictions on the scope of inquiry consistent with this opinion.

Reversed and remanded with instructions.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

[2] While the physician-patient privilege may prevent discovery of the child's medical records in other cases, see, e.g., *Roe v. Planned Parenthood*, supra, the privilege is waived in the case of a wrongful death claim such as that asserted here, and may be waived by the estate of the patient/child. R.C. 2317.02(B)(1)(a)(ii) and (iii).

ANN DYKE, J., and
MARY J. BOYLE, J., CONCUR