[Cite as *DeCuzzi v. Westlake*, 2010-Ohio-5365.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94661

KIM DECUZZI, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF WESTLAKE, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-687617

BEFORE: Gallagher, A.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: November 4, 2010

ATTORNEYS FOR APPELLANTS

Daniel A. Richards
John S. Kluznik
Weston Hurd LLP
The Tower at Erieview
1301 East Ninth Street, Suite 1900
Cleveland, OH 44114-1862

ATTORNEY FOR APPELLEES

Michael Terrence Conway
Michael Terrence Conway Co.
4536 Sandlewood
Brunswick, OH 44212

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellants, city of Westlake and Mayor Dennis Clough (collectively referred to as the "City"), bring this appeal challenging the trial court's granting of the motion of appellees, Kim DeCuzzi, Kari Davila, and Janine Downs (collectively referred to as "appellees"), to compel responses to certain discovery requests. For the reasons set forth herein, we reverse.

{¶ 2} On March 16, 2009, appellees, who are current and former employees of the City, filed their complaint alleging wrongful termination, pay discrimination, hostile work environment, unsafe work environment, and

witness intimidation.[1] The City filed its answer denying appellees' claims and asserting 27 affirmative defenses. In the course of discovery, appellees propounded interrogatories and requests for production of documents; only Interrogatories Nos. 3, 6, and 12 are at issue on appeal.

{¶ 3} Interrogatory 3 reads as follows: "Please state the exact factual defense which will be affirmatively proved in the Defendants' case in chief at trial by specific reference to facts, exhibits, dates, witnesses, and transactions between the parties. Please state the factual basis for any affirmative defense."

{¶ 4} Interrogatories 6 and 12 are identical to one another and read as follows: "If the Defendant is going to use an immunity defense of any kind to the Complaint in this case, please identify the immunity defense by its type (i.e., absolute, qualified, etc.) and identify what facts establish the defense."

{¶ 5} In response, the City objected on the basis that the requests were vague and overbroad, and furthermore that Civ.R. 26 "does not allow for the discovery of the factual basis for a party's affirmative defenses," citing this court's holding in *Sawyer v. Devore* (Nov. 3, 1994), Cuyahoga App. No. 65306.

{¶ 6} After much heated debate, name-calling, and threats between counsel, in which appellees demanded supplemental discovery and which the

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[1] Appellees subsequently filed first and second amended complaints, but their original complaint was filed on the date noted.

City refused to provide, appellees filed a motion to compel and for sanctions. The City opposed the motion on the basis that appellees sought information that was privileged under the work-product doctrine. Nonetheless, the trial court granted appellees' motion to compel, and the City brought this appeal.[2]

{¶ 7} In its sole assignment of error, the City argues the "trial court erred by granting appellees' motion to compel discovery of material which is privileged under the work-product doctrine and which is beyond the scope of Ohio Civ.R. 26."

{¶ 8} Civ.R. 26(B)(1) states in relevant part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *." When a party claims the information sought is protected as work product, analysis is undertaken pursuant to Civ.R. 26(B), and pursuant to the Supreme Court's decision in *Hickman v. Taylor* (1947), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, and its progeny. See *Jerome v. A-Best Prods. Co.,* Cuyahoga App. Nos. 79139-79142, 2002-Ohio-1824. Civ.R. 26(B)(3) sets forth what is commonly referred to as the work-product doctrine.

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[2] "We note that generally discovery orders are not appealable. However, if the judgment orders a party to disclose allegedly privileged material, it is appealable pursuant to R.C. 2505.02(B)(4)." (Internal citations omitted.) *Chiasson v. Doppco Dev., LLC*, Cuyahoga App. No. 93112, 2009-Ohio-5013.

It states the following: "[A] party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only upon a showing of good cause therefor." Civ.R. 26(B)(3); see *Huntington Natl. Bank v. Dixon*, Cuyahoga App. No. 63604, 2010-Ohio-4668.

{¶ 9} In *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, the Ohio Supreme Court discussed the meaning of "good cause," stating "a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials _ i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable. The purpose of the work-product rule is '(1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.' Civ.R. 26(A). To that end, Civ.R. 26(B)(3) places a burden on the party seeking discovery to demonstrate good cause for the sought-after materials." See *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, ____Ohio St.3d ____, 2010-Ohio-4469.

{¶ 10} "The existence of a Civ.R. 26(B)(1) privilege as well as Civ.R.

26(B)(3) good cause are discretionary determinations to be made by the trial court. Absent an abuse of discretion, an appellate court may not overturn the trial court's ruling on discovery matters." (Internal citations omitted.) *Huntington Natl. Bank*, supra at ¶ 17. "The term 'abuse of discretion' connotes more than an error in judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} The City's argument is straightforward and simple: that *Sawyer* provides a blanket prohibition on a plaintiff from asking for the facts a defendant relies on to support its affirmative defenses. We read *Sawyer* more narrowly. In *Sawyer*, the court found that the plaintiff sought such a vast amount of general information that it could not be viewed as anything more than a "fishing expedition." *Sawyer*, supra. This court, in affirming the trial court, stated: "Sawyer's discovery request * * * essentially demanded that appellees examine their own body of evidence, determine the elements of that body of evidence relevant to appellees' affirmative defenses and compile the relevant evidence into a neat little package to be used against appellees by Sawyer. Clearly the trial court, had it granted Sawyer's discovery request * * *, would, thus, have permitted Sawyer to take undue advantage of the industry and efforts put forth by appellees' counsel." Id.

{¶ 12} While we do not overturn the *Sawyer* decision, we do not agree

that its holding has general applicability. See *Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.* (1999), 134 Ohio App.3d 673, 731 N.E.2d 1209 (this court allowed discovery of facts supporting affirmative defenses). Just as the City is entitled to discovery of the facts supporting appellees' complaint, appellees are entitled to discovery of the facts supporting the City's defense; Civ.R. 26 so provides. However, we agree that as worded, appellees' Interrogatory No. 3 is vague and overbroad, and may be construed as seeking work-product information.

{¶ 13} Although we decline to rewrite appellees' interrogatories for them, we suggest that a proper discovery request asks for letters, memoranda, and other documents that contain facts that support the City's affirmative defenses. Defense counsel knows full well what type of information is sought and should not feign such sensitivity to opposing counsel's broad discovery request. Furthermore, we believe the parties should make a good faith effort to complete discovery, rather than engage in the kind of name-calling undertaken to date. The trial court should be called upon to conduct an in camera review of any materials the City continues to assert are protected by the work-product doctrine, once it has produced the information it most surely knows is not.

{¶ 14} Nonetheless, we agree with the City that appellees' request in Interrogatories 6 and 12 that it "identify the immunity defense by its type

(i.e., absolute, qualified, etc.) and identify what facts establish the defense" is beyond the scope of Civ.R. 26. We find that by these interrogatories, the apparent assumption is appellees are seeking "opinion work-product," which reflects the attorney's mental impressions, opinions, conclusions, judgments, or legal theories. See, *Hickman*, 329 U.S. 495. "Because opinion work product concerns the mental processes of the attorney, not discoverable fact, opinion work product receives near absolute protection." *State v. Hoop* (1999), 134 Ohio App.3d 627, 731 N.E.2d 1177.

{¶ 15} Discovery of this nature is asking the City to divulge *how* it intends to defend its case, and this information can legitimately be considered privileged under the work-product doctrine. Appellees are not entitled to supplemental discovery of the defense counsel's immunity theory, beyond notification that it intends to use an immunity defense.

{¶ 16} Having found the trial court abused its discretion by granting appellees' motion to compel without having conducted an in camera review, the City's assignment of error is sustained, and the trial court's decision is reversed.

Judgment reversed.

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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY