[Cite as *DePaul v. St. Elizabeth Health Center*, 2004-Ohio-4992.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DOROTHY S. DePAUL,	)	
	)	CASE NO. 03 MA 137
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
ST. ELIZABETH HEALTH CENTER, et al.,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 01CV3234.

JUDGMENT: Reversed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendants-Appellants:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 17, 2004

VUKOVICH, J.

{¶1} Defendants-appellants St. Elizabeth Health Center and Humility of Mary Health Partners (collectively referred to as the Health Center) appeal the decision of the Mahoning County Common Pleas Court that ordered the disclosure of a hospital incident report to plaintiff-appellee Dorothy DePaul. The issue presented to this court is whether a hospital incident report is privileged from discovery. Finding that it is, the trial court's judgment is reversed.

STATEMENT OF FACTS

{¶2} DePaul was admitted to the Health Center for rehabilitation after surgery. During her stay at the Health Center, DePaul sustained a bi-malleolar fracture[1] to her left ankle. This injury occurred when DePaul was being moved from her bed to a wheelchair. The Health Center's staff prepared a hospital incident report regarding this incident.

{¶3} As a result of the injury, DePaul filed a complaint sounding in negligence. During the course of discovery, DePaul requested the production of the incident report. The Health Center objected to the request and argued that the incident report was privileged. DePaul pursued production of the report and requested the opportunity to depose the nursing supervisor. In response to these actions, the Health Center, pursuant to Civ.R. 26, filed a motion for a protective order. Oral arguments on this issue were held during a pretrial conference. The Health Center provided copies of the medical record and incident report to the trial court, which conducted an in-camera inspection of the documents.

{¶4} After reviewing the documents, the trial court ordered the Health Center to disclose the incident report to DePaul. 06/26/03 J.E. The trial court, relying on *Johnson v. University Hosp. of Cleveland*, 150 Ohio App.3d 256, 2002-Ohio-6338, found that "the medical record did not include any event giving rise to the preparation of the incident report. The medical record fails to mention any fall by the Plaintiff, controlled or otherwise." 06/26/03 J.E. Thus, according to the trial court, the incident report was discoverable. The Health Center timely appealed from this decision, which is a final appealable order pursuant to R.C. 2505.02(B)(4).

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[1]The malleolar is the rounded bony prominence on the side of the ankle joint. Stedman's Medical Dictionary (26th Ed. 1995) 1057.

ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED THE DISCLOSURE OF A HOSPITAL INCIDENT REPORT, AND BY FINDING THAT THE REPORT WAS NOT ABSOLUTELY PRIVILEGED AND CONFIDENTIAL PURSUANT TO THE APPLICABLE STATUTORY PROVISIONS."

{¶6} When considering pretrial discovery, the results of an in-camera review by a judge, and the judge's determinations of what is discoverable are evaluated by an appellate court under an abuse of discretion standard. *Radovanic v. Cossler* (2000), 140 Ohio App.3d 208, 213. "[W]hen applying an abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court but must be guided by a presumption that the findings of the trial court are correct." *Focke v. Focke* (1992), 83 Ohio App.3d 552, 555. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Tracy v. Merrill-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152.

{¶7} The Health Center contends that the incident report is privileged under R.C. 2305.23, confidentiality of quality assurance committee statute, 2305.251 (now R.C. 2305.252), confidentiality of peer review committee statute, 2305.253, confidentiality of an incident report statute, and 2317.02(A), attorney-client privilege statute. DePaul argues that privilege is not absolute and contends that the trial court's application of the above statutes and the *Johnson* holding was correct.

{¶8} Shortly *prior* to the trial court's ruling in this case, R.C. 2305.253 became effective. This statute solely addresses the confidentiality of incident and risk management reports and renders these reports privileged. It states, in pertinent part:

{¶9} "(A) Notwithstanding any contrary provision of section 149.43, 1751.21, 2305.24, 2305.251, 2305.252, or 2305.28 of the Revised Code, an incident report or risk management report and the contents of an incident report or risk management report are not subject to discovery in, and are not admissible in evidence in the trial of, a tort action."

{¶10} This language indicates that even if any of the other cited statutes contain an exception to the privilege, that exception does not apply to incident or risk management reports. Furthermore, the Legislative Service Commission's final analysis states that the act "specifies that an incident report or risk management report

and the content of an incident report or risk management report are not subject to discovery in, and are not admissible in evidence of the trial of, a tort action, notwithstanding any contrary provision of pre-existing law or the act." http://lsc.state.oh.us. Thus, both the wording of the statute and the final analysis indicate that R.C. 2305.253 confers an absolute privilege over incident and risk management reports. Accordingly, the trial court abused its discretion in holding that the incident report was discoverable.

{¶11} This determination does not create a conflict with the Eighth District's holding in *Johnson.* R.C. 2305.253 renders the *Johnson* analysis inapplicable as *Johnson* was decided prior to the Legislature's enactment of R.C. 2305.253. Hence, it has been superceded

{¶12} In *Johnson*, the Eighth District was asked to determine whether an incident report was privileged under R.C. 2305.24 and 2305.252. These statutes address the confidentiality of peer review committees and utilization committees, and do not specifically address incident reports. The Eighth District found that the incident report was privileged. *Johnson*, 150 Ohio App.3d 256. In finding the privilege qualified rather than absolute, the court reasoned that R.C. 2305.252 created a major exception to confidentiality privilege of peer review committees. Id. It found that the incident report fell within this exception and thus was discoverable. Id.

{¶13} But, the enactment of R.C. 2305.253 renders R.C. 2305.252 and any exception it contains inapplicable to the determination of whether an incident report is privileged. As shown above, R.C. 2305.253 specifically states that regardless of any exceptions to the privilege enumerated in R.C. 2305.252, the incident report is privileged. R.C. 2305.253 is a specific provision applicable to incident reports and, as such, it controls over a general provision, i.e. the exception enumerated in R.C. 2305.252. See R.C. 1.51. Thus, the exception does not apply to incident reports.

{¶14} Furthermore, the *Johnson* case is distinguishable. In *Johnson*, the hospital had a policy manual that stated the events of the incident were to be documented in the incident report and in the *patient's medical record*. *Johnson v. University Hospitals of Cleveland*, 8th Dist. No. 80117, 2002-Ohio-1396 (*Johnson* I). The appellate court found that the incident was not properly documented in the patient's medical record. Id. The court focused on the fact that the hospital's medical record violated its own policy manual and, thus, it could not hide behind the privilege of

the incident report. In the matter at hand, however, the record contains no indication that the Health Center has a policy manual that required the events of the incident to be documented in the patient's medical record. Thus, the cases are distinguishable. The trial court's reliance on *Johnson* as a basis for the discoverability of the incident is misplaced and in error.

{¶15} As aforementioned, in addition to R.C. 2305.253, the Health Center contends that R.C. 2317.02(A), attorney-client privilege, also protects the incident report from discovery. This argument is based upon the Second District's determination that an incident report is an attorney-client communication. *Ware v. Miami Valley Hospital* (1992), 78 Ohio App.3d 314, 319. The *Ware* decision was based on the hospital's in-house counsel's affidavit. That affidavit stated that the incident report is prepared for review by the hospital's legal counsel and for risk management purposes to determine any potential legal liability on the part of the hospital.

{¶16} In the instant case, there is an affidavit from the Health Center's Risk Compliance officer, who is also an attorney. The Health Center contends that this affidavit is almost identical to the affidavit filed in the *Ware* case, and thus urges this court to find that it is also protected by the attorney-client privilege. However, due to our prior analysis we need not address this argument. This assignment of error is meritorious.

{¶17} For the foregoing reasons, the judgment of the trial court is hereby reversed.

Donofrio, J., concurs.
DeGenaro, J., concurs.