[Cite as *Howell v. Park E. Care & Rehab.*, 2019-Ohio-3283.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DAVID HOWELL, JR.,	:	
Plaintiff-Appellee,	:	No. 107864
v.	:	
PARK EAST CARE AND REHABILITATION, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 15, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-876418

Appearances:

The Dickson Firm, L.L.C., Blake A. Dickson, and Danielle M. Chaffin, *for appellee*.

Reminger Co., L.P.A., Brian D. Sullivan, Erin Siebenhar Hess, and Michael J. Pelagalli, *for appellants*.

ANITA LASTER MAYS, J.:

I. Background and Facts

{¶ 1} This appeal arises from a wrongful death and medical negligence action filed by plaintiff-appellee David Howell, Jr. ("Howell"), as the personal

representative of his mother's estate, the Estate of Pauline Wilbourn ("Estate"), against Harborside of Cleveland Limited Partnership d.b.a. Park East Care and Rehabilitation Center, Genesis HealthCare, L.L.C., Arnold Whitman, 1995 Donna Reis Family Trust, GEN Management L.L.C., Sun Healthcare Group, Inc., FC-GEN Operations Investment, L.L.C., Gazelle GEN, L.L.C., and GEN Management, L.L.C. (collectively "Park East"). *Howell v. Park E. Care & Rehab.*, Cuyahoga C.P. No. CV-14-820136 (Jan. 14, 2014).

{¶ 2} Howell alleged that, on January 14, 2013, Pauline Wilbourn ("Wilbourn") was assaulted by Lewis Warren ("Warren") while both were residents at Park East. Howell states that Wilbourn was "brutally attacked" and that the nursing staff "stood by" while Warren choked Wilbourn and pounded her head on the floor several times. Wilbourn suffered physical and emotional injuries and died on August 2, 2013. Appellee brief, p. 2.

{¶ 3} During the course of discovery, Park East moved for a protective order denying Howell's request that Park East produce Warren's medical records and personal records including any reports that Warren had previously acted in an abusive manner. Warren was deceased and a probate estate was never opened from which Howell could seek consent.

{¶ 4} The trial court denied the motion and Park East appealed. *Howell v. Park E. Care & Rehab.*, 8th Dist. Cuyahoga No. 102111, 2015-Ohio-2403 ("*Howell I*"). This court dismissed the appeal for lack of a final appealable order because Park East did not demonstrate entitlement to a provisional remedy. "Park

East does not make any attempt to establish the necessity of an immediate appeal or demonstrate actual prejudice to satisfy the requirements of R.C. 2505.02(B)(4)(b)." *Id*. at ¶ 13. The discretionary appeal was not allowed by the Ohio Supreme Court. *Howell v. Park E. Care & Rehab*., 144 Ohio St. 3d 1459, 2016-Ohio-172, 44 N.E.3d 288. Reconsideration was also denied. *Howell v. Park E. Care & Rehab*., 145 Ohio St. 3d 1426, 2016-Ohio-1173, 47 N.E.3d 169.

{¶ 5} The case was dismissed without prejudice on August 25, 2016, and the instant case was filed on February 24, 2017, asserting the same allegations of abuse and neglect against Park East. Howell again pursued discovery regarding Warren. Park East claimed that the information was privileged under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); R.C. 3721.13 (Ohio's Nursing Home Residents' Bill of Rights); R.C. 3721.02 (Ohio Department of Health Reports); R.C. 2317.02 (physician-patient privilege); R.C. 2305.253 (incident-report privilege); and R.C. 2305.25 (peer-review privilege).

{¶ 6} On July 18, 2017, the trial court ruled on the following disputed requests:

> Request for Production of Documents 2: Documents relative to [Warren], including nursing home chart, medical records, physician notes, nurse statements and notes, progress notes, documentation of activities of daily living, assessment reports, incident/accident reports, physical therapy, administration of narcotics, dietary records, communications about [Warren], etc.
>
> Request for Production of Documents 5: Documents relative to [Warren] including medical records, documentation of any incidents, police reports, and witness statements.

> Request for Production of Documents 6: [Warren's] original nursing home chart during his entire residency.
>
> Request for Production of Documents 7: Documentation of any incidents in which [Warren] verbally and/or physically threatened, abused, assaulted, and/or otherwise attacked anyone at the nursing home.
>
> Request for Production of Documents 9: Documentation in any incident, investigation, or abuse file which contains reference to [Warren] or any incident involving or otherwise pertaining to [Warren].
>
> Request for Production of Documents 11: documentation reported to the Ohio Department of Health relative to [Warren], including any reports of injuries of unknown origin or suspected abuse to that individual.
>
> Request for Production of Documents 14: Billing that was sent out relative to [Warren].
>
> Request for Production of Documents 15: Documentation of amounts paid relative to [Warren].
>
> Request for Production of Documents 20: Incident reports and/or witness statements relative, in any way, to [Warren].
>
> Interrogatory 5: Identify and describe any and all instances in which [Warren], at any time, verbally and/or physically threatened, abused, assaulted, battered, and/or otherwise attacked anyone in the building or on the premises of the nursing home, or exhibited any type of aggressive behavior. The interrogatory also seeks more specific information for each incident.

Journal entry No. 99704847 (July 8, 2019), p. 2-3, and opinion.

{¶ 7} The trial court granted Howell's motion to compel. Park East was ordered to respond to Howell's first request for production of documents and first set of interrogatories, including production request numbers 2, 5, 6, 7, 9, 11, 14, 15, and 20 and Interrogatory 5. *Id*. at p. 7.

{¶ 8} Park East appealed. *Howell v. Park E. Care & Rehab.*, 8th Dist. Cuyahoga No. 106041, 2018-Ohio-2054 ("*Howell II*"). In the opinion, this court discussed each of the asserted privilege claims.

{¶ 9} For privilege under R.C. 2317.02(B), we determined that the statute "does not protect a nonparty from having to disclose his or her own medical information when that information is relevant to the subject matter involved in a pending civil action." *Howell II* at ¶ 16, citing *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514.

{¶ 10} We also considered privilege under the nursing home rights confidentiality provision in R.C. 3721.13(A).

> "(A) The rights of residents of a home shall include * * *:
>
> (10) The right to confidential treatment of personal and medical records, and the right to approve or refuse the release of these records to any individual outside the home, except in cases of transfer to another home, hospital, or health care system, as required by law or rule, records."

Id. at ¶ 18, quoting R.C. 3721.13(A).

{¶ 11} We concluded that no privilege existed:

> In *Rothstein v. Montefiore Home*, 116 Ohio App.3d 775, 689 N.E.2d 108 (8th Dist.1996), this court held that the right granted under this provision is "enforceable through a civil action by 'any resident,'" and could not be asserted by the estate of a former resident. Additionally, we note that in *Large* [*v. Heartland-Lansing of Bridgeport Ohio, L.L.C.*], 2013-Ohio-2877, 995 N.E.2d 872, the court analyzed the reports provision of R.C. 3721.02 and held that it did not create a privilege or forbid discovery. *Id.* at ¶ 21. * * *

Howell at ¶ 19.

{¶ 12} HIPAA was also excluded as a privilege source. "[T]he HIPAA privacy regulation, 45 C.F.R. 164.512, allows disclosure of protected health information in the course of any judicial or administrative proceeding in response to a court order." *Id.* at ¶ 22, citing *Grove v. Northeast Ohio Nephrology Assoc. Inc.*, 164 Ohio App.3d 829, 2005-Ohio-6914, 844 N.E.2d 400, ¶ 22 (9th Dist.).

{¶ 13} The peer-review privilege under R.C. 2305.252 was also addressed. The statute provides:

> Proceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider[.] * * * No individual * * * shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the peer review committee.

{¶ 14} On this issue, we determined:

> However, "Ohio courts have been adamant that merely labeling a committee * * * 'peer review' is insufficient to meet the burden of proving that the privilege applies." *Smith v. Cleveland Clinic*, 197 Ohio App.3d 524, 2011-Ohio-6648, 968 N.E.2d 41, ¶ 23 (8th Dist.). A party claiming the peer-review privilege, at "a bare minimum" must show that a peer-review committee existed and that it actually investigated the incident. *Id.* at ¶ 13. The party must also establish that the documents being sought were prepared by or for the use of a peer review committee. *Bailey v. Manor Care of Mayfield Heights*, 2013-Ohio-4927, 4 N.E.3d 1071, ¶ 26. Moreover, the documents or records are not completely outside the scope of discovery, and are available from the original source of the information. *Fravel v. Columbus Rehab. & Subacute Inst.*, 2016-Ohio-5807, 70 N.E.3d 1161, ¶ 15 (10th Dist.), citing *Doe v. Mt. Carmel Health Sys.*, 10th Dist. Franklin No. 05AP-435, 2005-Ohio-6966, ¶ 16.

Howell II, 8th Dist. Cuyahoga No. 106041, 2018-Ohio-2054, at ¶ 25- 26.

{¶ 15} We also responded to the incident-report privilege asserted under R.C. 2305.253(A), which except risk management and incident reports from discovery or trial admission in tort actions and prohibits testimony regarding the contents by the preparer. *Id*. at ¶ 29. An incident report under R.C. 2305.25(D) is "'a report of an incident involving injury or potential injury to a patient as a result of patient care * * *, that is prepared by or for the use of a peer review committee * * * within the scope of the functions of that committee.'" *Id*. at ¶ 28.

{¶ 16} Thus,

> [o]nly a document prepared by, or for the use of a peer review committee is deemed an "incident report" and is considered privileged and nondiscoverable. *Manley v. Heather Hill, Inc*., 175 Ohio App.3d 155, 2007-Ohio-6944, 885 N.E.2d 971, ¶ 27 (11th Dist.). In order to invoke this privilege, the party claiming the privilege must show that it had a peer review committee, the peer review committee investigated the matter, and the documents sought were incident reports prepared for use by a peer review committee. *Id*. at ¶ 22. *Accord Rinaldi v. City View Nursing & Rehab. Ctr., Inc*., 8th Dist. Cuyahoga No. 85867, 2005-Ohio-6360, ¶ 20-22.

Howell II at ¶ 30.

{¶ 17} Finally, we considered whether privilege was granted under R.C. 3721.02 and 3721.17 to the reports issued to the Ohio Department of Health.

> "'[T]he results of an inspection or investigation of a home that is conducted under this section, including any statement of deficiencies and all findings and deficiencies cited in the statement on the basis of the inspection or investigation, shall be used solely to determine the home's compliance with this chapter, [and such statement and findings] shall not be used in * * *
>
> Any court or in any action or proceeding that is pending in any court and are not admissible in evidence in any action or proceeding unless that action or proceeding is an appeal of an action by the department of health under this chapter[.]'"

Howell, 8th Dist. Cuyahoga No. 106041, 2018-Ohio-2054, at ¶ 32, quoting R.C. 3721.02(F).

{¶ 18} We concluded that the court in *Large v. Heartland-Lansing of Bridgeport Ohio, LLC*, 2013-Ohio-2877, 995 N.E.2d 872 (7th Dist.), conducted a thorough analysis of the privilege. That court concluded that the statute "does not create a statutory privilege protecting the reports from discovery, but is instead an evidence exclusion provision." *Id*. at ¶ 32.[1]

{¶ 19} We observed at the conclusion of our analysis that the trial court did not engage in the best practice of conducting an in camera review of the documents. Thus, we could not affirm the judgment based on the "'blanket release" of the records. *Id*. at ¶ 34, quoting *Dubson v. The Montefiore Home*, 8th Dist. Cuyahoga No. 97104, 2012-Ohio-2384, citing *Sessions v. Sloane*, 789 S.E.2d 844, 856 (N.C. Ct. App. 2016).

{¶ 20} We remanded the matter to the trial court with the directive to conduct an in camera review and to analyze the records "for each of the privilege claims, as well as for relevancy." *Id*. at ¶ 36. Park East submitted Warren's medical records and other responsive information for inspection and filed an amended motion expanding on the argument regarding incident reports and the Ohio Department of Health reports.

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[1] Licensing reports are discoverable, however, to the extent allowed by the Civil Rules; that is, where they are "relevant to the subject matter involved in the pending action" and appear "reasonably calculated to lead to the discovery of admissible evidence" despite the fact that they are not, themselves, admissible. Civ.R. 26(B)(1). *Large* at ¶ 24.

{¶ 21} After completing the in camera review, the motion was granted in part and denied in part by the trial court, based on this court's determination and analysis of the substantive law governing the privileges rendered in *Howell II*:

> The court notes that this court as well as the Eighth District Court of Appeals have already determined that the following privileges are not applicable to prevent discovery of the documents at issue: R.C. 3721.13 (Ohio's Nursing Home Bill Of Rights); 45 CFR 160 (HIPAA Privacy Rule); R.C. 3721.02 (Licensing Report Privilege).
>
> Lewis Warren's complete chart (Warren 000001-000336) is discoverable and not subject to absolute protection by the physician-patient privilege to the extent that the records may contain instances of physician-patient communication, the court finds that the physician-patient privilege does not provide an absolute protection against disclosure of medical information. R.C. 2317.02(B) does not protect a nonparty from having to disclose his or her own medical information when that information is relevant to the subject matter involved in a pending civil action. *See Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 30.
>
> The self-reported incident form and supporting documentation provided to the Ohio Department of Health (Warren 000337-000386) are discoverable and not protected by any privilege. Defendants failed to meet their burden of proving that the documents are protected by an absolute privilege.
>
> The Genesis Health Care Risk Management documentation regarding three separate incidents on 1/14/2013, 12/1/2012, and 11/15/2012 (Warren 000387-000411) are not discoverable and are protected by the peer review and incident report privileges pursuant to R.C. 2305.252 and 2305.253. These documents are protected by peer review privilege and incident report privilege because defendants established that the documents were prepared exclusively by and for use by a peer review committee in its investigations of incidents at the facility. *See Bailey v. Manor Care of Mayfield Heights*, 2013-Ohio-4927, 4 N.E.3d 1071 (8th Dist.).
>
> Defendants shall produce the following documents to the plaintiff on or before 11/1/2018: Lewis Warren's complete medical chart (Warren 000001-000336) and the self-reported incident form and supporting documentations provided to the Ohio Department of

> Health (Warren 000337-000386). Due to the sensitive nature of these documents, the court orders defendants to redact social security numbers prior to production. Further, these documents shall be labeled as "confidential-attorneys eyes only."

Journal entry No. 106024659 (Oct. 24, 2018).

{¶ 22} The instant appeal ensued.

II. Assignments of Error

{¶ 23} Appellants pose two assignments of error challenging the trial court's determinations regarding privilege under (1) R.C. 2317.02 and (2) R.C. 3721.02:

> I. The trial court erred by ordering a nursing home to produce a resident's privileged medical records when the resident is not a party to the litigation and has refused to consent to such disclosure.
>
> II. The trial court erred by ordering production of reports to the Ohio Department of Health, which are statutorily shielded from discovery.

III. Discussion

{¶ 24} Upon a thorough review of the record, we find that the law-of-the-case doctrine applies in this case.

> The law of the case is a longstanding doctrine in Ohio jurisprudence. "The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d at 3, 462 N.E.2d 410.

Hopkins v. Dyer, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15.

{¶ 25} The doctrine serves an important purpose.

> The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32,

391 N.E.2d 343 (1979). It is considered a rule of practice, not a binding rule of substantive law. *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404, 1996-Ohio-174, 659 N.E.2d 781 (1996).

Id.

{¶ 26} In *Howell I*, Park East appealed the trial court's denial of a protective order under R.C. 3721.13 and 2317.02(B)(1). We determined that we lacked jurisdiction in the absence of a final, appealable order. *Id*. at ¶ 13.

{¶ 27} In *Howell II*, this court ruled on each of the privilege arguments that are again before us and directed to the trial court to conduct an in camera review pursuant to our opinion.

> In applying the foregoing [analysis] to this matter, we note that the trial court did not require Park East to produce the documents for an in camera review. As this court noted in *Dubson v. The Montefiore Home*, 8th Dist. Cuyahoga No. 97104, 2012-Ohio-2384, the "blanket release of all medical and financial records" was unreasonable. *Id*. at ¶ 18. Moreover, an in camera document review for relevancy and privilege is considered the "best practice." *See Sessions v. Sloane*, 789 S.E.2d 844, 856 (N.C. Ct. App. 2016). *Accord Doe v. Mt. Carmel Health Sys*., 10th Dist. Franklin No. 03AP-413, 2004-Ohio-1407. The *Doe* court held that the in camera review has been deemed the most appropriate way to determine if a privilege applies. *Id*. at ¶ 12. The trial judge may make the necessary determination without compromising the confidentiality of any information found to be privileged. *Id*. at ¶ 13. This practice also creates a complete record that would allow this court to conduct a meaningful review of whether a privilege is applicable to the documents at issue. *Id*.
>
> * * *
>
> In accordance with all of the foregoing, we conclude that the trial court's blanket order to provide discovery of all of the disputed records, without an in camera review, was erroneous. *We conclude that the disputed documents must be analyzed in the first instance by the trial court for each of the privilege claims, as well as for relevancy*. Additionally, we caution that even if the trial court again concludes, following an in camera review, that the documents must be produced,

> information concerning other patients as well as social security numbers and other sensitive information must still be redacted from the records. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

(Emphasis added.) *Howell II*, 8th Dist. Cuyahoga No. 106041, 2018-Ohio-2054, at ¶ 34, 36.

{¶ 28} As directed by this court, the trial court conducted an in camera review of the documents for the privilege claims and relevancy. The trial court's judgment entry details the findings of the evidentiary review as guided by this court's findings on the applicable law in *Howell II*. In the instant appeal, we are faced with "substantially the same facts and issues as were involved in the appeal." *Johnston v. Case W. Res. Univ.*, 8th Dist. Cuyahoga No. 80231, 2002-Ohio-3642, ¶ 19, citing *Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410.

{¶ 29} In *Howell II*, we "address[ed] each argument in turn." *Id.* at ¶ 8. We conclusively determined the law applicable to each of the privilege claims and directed the trial court to review the documents according to those findings. Thus, the "legal questions resolved by" this court in a prior appeal remain the law of that case for any subsequent proceedings at both the trial and appellate levels. *Nolan*, 11 Ohio St.3d, 1, 3, 462 N.E.2d 410. As Howell states in his responsive brief, "[t]here are no new facts or issues which would allow [a]ppellants to re-litigate the issue." Appellee brief, p. 5-6.

{¶ 30} Finally, we note that this privilege dispute has been pending for several years. The first privilege log was finally submitted in October 2018 after this court's opinion in *Howell II*. Our decision in the instant case supports Ohio's

> strong public policy [underlying the law-of-the-case doctrine] to "'ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts.'"

Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 144 Ohio St.3d 128, 2015-Ohio-4304, 41 N.E.3d 396, ¶ 36, quoting *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404, 659 N.E.2d 781 (1996).

IV. Conclusion

{¶ 31} The trial court's judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

ANITA LASTER MAYS, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, SR., J., CONCUR