

IN THE SUPREME COURT OF OHIO

Scott Elliot Smith, LPA, et al.,

Appellants,

vs.

Carasalina, LLC, et al.,

Appellees.

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals

Case No.: 10-AP-001101

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS SCOTT ELIOT SMITH, LPA, ET AL.

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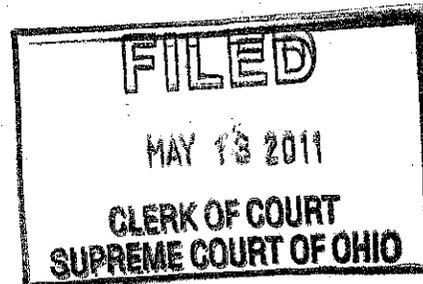


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Proposition Of Law

Where the proprietary computer system of a third party expert witness contains information necessary to access communications, correspondence and other materials protected by the attorney-client privilege, attorney work product doctrine and other privileges, a party may not connect to the computer system for the purpose of electronic discovery unless the court order defines specific and strict limitations on the scope of electronic discovery, protecting the integrity of the confidential and privileged documents.

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I. EXPLANATION OF WHY THIS COURT SHOULD EXERCISE JURISDICTION OVER THIS APPEAL.

“The attorney/client privilege is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). As stated by the Ohio Supreme Court:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves the public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.

* * *

[B]y protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts.

Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St. 3d 161, 937 N.E.2d 533, at ¶ 16, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 824 N.E.2d 990, ¶ 20.

The matter before this court is a public or great general interest because the Tenth District Court of Appeals’ unprecedented decision will allow the exposure of confidential and privileged information by unfettered electronic discovery. The Tenth District Court of Appeals affirmed a discovery order which allows access to the proprietary computer systems of third party expert witnesses. The computer system contains communications, correspondence and other materials protected by the attorney-client privilege, attorney work product doctrine and other privileges. The discovery order did not limit or otherwise exclude such privileged information from the scope of discovery.

The precedent set by the Tenth District Court of Appeals is a severe deviation from the traditional course of pre-trial discovery and it violates the attorney-client privilege. Before computer databases existed, party A would serve a subpoena on party B. Party B would produce the requested documents. If party B believed any documents were subject to the attorney-client privilege, party B would withhold the privileged documents and present a privilege log to party A. If party A disputed the privilege, a judge would inspect the document and rule on the matter. However, under this recent decision by the Tenth District Court of Appeals, the court effectively granted party A access to party B's entire electronic database, including privileged information. As a result, party B may claim that a document is protected by the attorney client privilege only after it is already exposed.

The scope of electronic discovery is an issue that affects exposure of confidential and privileged information of every citizen in Ohio. Hospitals electronically store patients' medical records. Law offices electronically store client files, legal documents, and work product. Accountants electronically store client tax records. Electronic storage is the most efficient method to keep records. However, it is because of this "efficiency" that specific limits must be set on the scope of discovery before a party may be permitted access to an opposing party's electronically stored data. A basic subpoena requesting discoverable documents should not allow access to a law firm's entire electronic database, exposing volumes of privileged material.

As technology advances, electronic discovery issues will become more and more prevalent. Guidance by the Supreme Court Ohio regarding the scope and limitations of electronic discovery is certainly a public or great general interest. There is little precedence on this issue and the Tenth District Court of Appeals itself does not follow a consistent set of limitations.

In the present case, the Tenth District Court of Appeals affirmed a discovery order allowing defendant to “copy all related documents, files, and all other items listed on the subpoena” from the computer of plaintiff’s IT service provider. Plaintiff is an attorney and, thus, the defendants will have access to records protected by the attorney client privilege. Significantly, the order did not limit the discovery of the records protected by the attorney client privilege. Rather, plaintiff was merely afforded the opportunity to redact current IP addresses, current server passwords, and current SSID’s.

However, just two years ago, the Tenth District Court of Appeals expressed more than extreme caution while discussing electronic discovery. In *Bennett v. Martin*, 186 Ohio App. 3d 412, 928 N.E.2d 763 (Ohio App. 10 Dist., 2009), the court said,

Generally, courts are reluctant to compel forensic imaging, largely due to the risk that the imaging will improperly expose privileged and confidential material contained on the hard drive. Because allowing direct access to a responding party’s electronic information system raises issues of privacy and confidentiality, courts must guard against undue intrusiveness.

Thus, before compelling forensic imaging, a court must weigh “the significant privacy and confidentiality concerns” inherent in imaging against the utility or necessity of the imaging.” In determining whether the particular circumstances justify forensic imaging, a court must consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests. When a requesting party demonstrates either discrepancies in a response to a discovery request or the responding party’s failure to produce requested information, the scales tip in favor of compelling forensic imaging.

* * *

Even when a defendant’s misconduct in discovery makes forensic imaging appropriate, a court must protect the defendant’s confidential information, as well as preserve any private and privileged information. The failure to produce discovery as requested or ordered will rarely warrant unfettered access to a party’s computer system. Instead, courts adopt a protocol whereby an independent computer expert, subject to a confidentiality order, creates a forensic image of the computer system. The expert then retrieves any responsive files (including deleted files) from the forensic image, normally using search terms submitted by the plaintiff. The

defendant's counsel reviews the responsive files for privilege, creates a privilege log, and turns over the nonprivileged files and privilege log to the plaintiff.

Id. at 425-28. (Internal citations omitted.)

In *Bennett*, the trial court included some safeguards for defendants' privileged and confidential personal matter. *Id.* at 428. The trial court permitted defendants to redact privileged information from the forensic copies and provided that defendants could designate certain confidential personal information for "attorneys' eyes only." *Id.* Nevertheless, the appellate court believed that more-comprehensive protection was necessary, particularly given the sensitivity of the information at issue. *Id.* The court found that the defendants should not be made to sacrifice highly sensitive, confidential information that had no bearing on plaintiff's claims and remanded the order for further proceedings. *Id.*

In a matter of two years, the Tenth District Court of Appeals stance on electronic discovery went from extreme caution in *Bennett* to showing lack of any concern in the present case. It is clear that the Tenth District Court of Appeals needs guidance from this Court on the issue of protection of privileged information in the course of electronic discovery.

The Sixth District Court of Appeals recently addressed the issue of electronic discovery. In *Cornwall v. N. Ohio Surgical Ctr.*, 185 Ohio App. 3d 337, 923 N.E.2d 1233 (Ohio App. 6 Dist. 2009), a husband brought a wrongful death action against a surgeon, medical group, nurse anesthetist, and anesthesia group after the patient died following arthroscopic knee surgery. *Id.* at 339. Based upon information gleaned from discovery, appellee filed an amended complaint alleging a claim of spoliation of evidence and a claim for fraud. *Id.* at 340. These claims were premised on an allegation that the defendants altered, destroyed, or concealed evidence on an office computer to

disrupt plaintiff's case. *Id.* Plaintiff's moved for an expedited motion for discovery, asking the court to allow a forensic computer expert to create a "mirror image" of the hard drive. Defendants argued that the hard drive contained privileged health information on hundreds of other patients. The trial court granted the motion. *Id.*

The Sixth District Court of Appeals affirmed the order. *Id.* at 345. It was significant factor in the court's opinion that the computer had a virus and was inoperable. *Id.* Further, there was a direct relationship between the computer and the claims of spoliation and fraud. The court also noted that the plaintiffs were not granted unfettered access to the electronic data. *Id.* Rather, pursuant to the discovery order, the search was required to follow a specific protocol using definite search terms in order to protect privileged information. *Id.*

The cases above leave the question, "what protections must be put into place to prevent the disclosure of privileged and confidential records during electronic discovery?" The decisions of the Tenth District are not consistent, and the decision in the Sixth District is riddled with distinguishing factors. Most significantly, upon consideration of the question above, the courts in *Bennett* and *Cornwall* sought guidance from jurisdictions outside of Ohio state law. It is clear that the lower courts need direction from the Ohio Supreme Court.

This issue is a great general interest because most, if not all, Ohioans have confidential and privileged records stored on an electronic database. This issue will become more prevalent as technology advances and, without guidance from this Court, a great number of number of privileged documents will be subject to exposure.

II. STATEMENT OF CASE

The Appellants in this matter are Scott Elliot Smith Company, LPA, its predecessor, Smith, Phillips & Associates and Third Party Defendant Scott Elliot Smith (hereinafter collectively referred to as "Appellants" or "SES"). Appellees in this matter are Carasalina, LLC and Brandt Cook.

This case arises out of a Complaint that was filed by SES on January 20, 2010. The basis of the initial lawsuit will be described in more detail below. On or about November 8, 2010, counsel for Appellees served on SES's expert witnesses, Netwave and Leon Lively, subpoenas which will be more fully described below. SES filed a Motion to Quash these subpoenas. The hearing on the Motion to Quash came before the court on November 17, 2010. The court denied the Motion to Quash by Order dated November 28, 2010.

SES filed their Notice of Appeal on November 29, 2010, pursuant to O.R.C. §2505.02(B)(4). SES's second assignment of error contended that the trial court erred in denying the Motion to Quash because it allowed Appellees to access SES's computer system through the expert witnesses' computer systems, thereby allowing Appellees to obtain privileged communications and confidential documents. By Order on March 31, 2011, the Tenth District Court of Appeals overruled SES's Motion to Quash.

SES now petitions the Supreme Court of Ohio for jurisdiction.

III. STATEMENT OF FACTS

In October of 2008, SES entered into a lease agreement to lease space for the operation of its law office from Appellee Carasalina. The sole member of the limited liability company, Carasalina, is Laura Cook, the mother of Appellee Brandt Cook. At the time that SES entered into the lease for the law office, SES also entered into an agreement with Appellee Big Thumb, LLC,

owned by Appellee Brandt Cook, for the purpose of Big Thumb providing Internet access and IT services to the SES law firm.

The relationship between all parties progressed just fine for approximately one (1) year. SES enjoyed the use of its leased space with no issues and there were no problems with Big Thumb providing SES Internet access and IT services. However, in late 2009, SES had a falling out with Brandt Cook over another contract. At that time, Big Thumb canceled its IT contract with SES and stated it would no longer be providing SES Internet services or IT support, despite the fact that the only Internet access for the building was controlled by Big Thumb. In addition, for the first time, landlord Carasalina began to claim that it was not receiving SES's rent checks, even though those rent checks had been sent to the same address for the past year.

Carasalina, through Laura Cook, threatened to evict SES, claiming that it had not received rent checks, even though SES had documentation that the checks were, in fact, sent. In addition, SES began to experience significant disruption of its Internet access, email, and law firm website. As a result, SES was forced to file a lawsuit to enjoin the Appellees from continuing to disrupt both its quiet enjoyment of the leased premises, as well as its Internet access and IT service. A TRO was granted in favor of SES, prohibiting Appellees from continuing to disrupt the quiet enjoyment¹ of the leased premises and continuing to disrupt the firm's Internet access and IT capabilities.

¹ Also during this time, the temperature in SES's leased space "mysteriously" began to fluctuate wildly. On several days, SES had to send its employees home early as temperatures reached nearly 100°. On other days, the temperatures barely exceeded 50°. In the prior year, before the litigation between the parties, SES never had any problems with the HVAC system in the building.

After Appellees had each fired several of their lawyers,² the case was transferred to the Commercial Docket. SES sought the court's intervention to prevent Appellees from continuing to disrupt its Internet access, email and IT services for the law office. Appellees were ordered to allow SES to continue to access the Time Warner Cable line servicing the building and to transfer SES's IT system to a new server, to be controlled by SES, and not Appellees. In order to switch over its IT system, email and Internet, SES obtained the services of IT experts Leon Lively and Netwave, in early 2010, after the litigation was already pending. Both Mr. Lively and Netwave assisted SES in transitioning its computer system, diagnosing problems regarding Internet connectivity and email that were being caused by Appellees, and providing opinions as to the source of the disruption. SES transitioned its computer system in March 2010 and moved out of the building in May 2010 by order of the Trial Court. In providing IT services, expert consulting and expert opinions to SES, experts Leon Lively and Netwave utilized their own computer systems and those computer systems contain information that would allow a third party to gain access to the computer network of SES.

On or about November 8, 2010, Appellees served subpoenas on experts Leon Lively and Netwave. The subpoenas served upon these expert witnesses seek not only documents, but also seek to discover electronic data, including all "data, screen shots, data downloads, date uploads, configuration files, license agreements...computer logs, event logs...of all individuals and associates who accessed any system owned or controlled [SES] from January 1, 2007 to the present," on behalf of Leon Lively and/or Netwave. SES filed a Motion to Quash the subpoenas. The Motion to Quash

² Interestingly, during the short time that this appeal has been pending, Appellees have filed lawsuits against 3 of their 5 former attorneys. This is in addition to two (2) separate lawsuits filed during the same period against Appellant and Appellant's counsel, Crabbe, Brown & James.

came on for a hearing before the court on November 17, 2010 and the court found in favor of the Appellees.

Following the hearing, Appellees submitted to the court an Entry which provides for two (2) things. First, the Entry provides for the expert witnesses to produce documents, including communications between these expert witnesses and SES³. The Order specifically deals with the production of documents as follows:

1. All attorneys will meet at an agreed upon time at the place of the deponent within seven (7) days of this Order.
2. The deponent shall have all records set aside in accordance with the subpoena.
3. Each document will be examined first by Plaintiffs' counsel and that [sic] Plaintiffs' counsel may redact the following items:
 - a. Current IP addresses.
 - b. Current passwords to Server User ID's on Scott Smith's systems (Scott Smith meaning all of his related entities and personal systems).
 - c. Current SSID's of any wireless routers.

(Emphasis supplied).

The Order makes provision for the discovery of electronic data. The Order prepared by Appellees and submitted to the court goes on to provide for the following:

4. Representatives of [Appellee] Big Thumb⁴ will appear with equipment to copy all related documents, files, and all other items listed in the subpoena.

This portion of the Order specifically authorizes representatives of Appellees to appear at the personal residence of Leon Lively and the business of Netwave with their own computer equipment,

³ Many documents which would be subject to production per the Order also contain communications between the experts and Appellant's counsel.

⁴ Appellee Big Thumb is a sophisticated computer and Internet technology company.

to log on to the computer systems of these expert witnesses and download electronic data from 2007 forward, as referred to in the subpoenas. There is no provision in the Order for review by counsel for SES of any of the electronic information or for any control whatsoever regarding Appellees' accessing of the electronic information on the expert witnesses' computer networks.

The only explanation ever given by Appellees as to why they wish to log on to the computer networks of the third party experts, is to gain electronic information that would then allow Appellees to access the computer network of the SES law firm. When challenged at the hearing as to why it was necessary for Appellees to log on to the computer systems of the third party experts, counsel for Appellees gave the following answer:

Mr. Lucas: The computer system is part of the litigation. If we can't have access to his entire computer system, we are hindered in defending our claims and hindered in prosecuting others. The entire case centers around Mr. Smith's computer system. To deny us access to it, it is ludicrous... (Emphasis supplied).

In addition, following the hearing on the Motion to Quash, counsel for Appellees sent a letter to counsel for SES making it clear that Appellees intend to utilize the information gleaned from the computer systems of Netwave and Lively to gain access to the computer system/network of SES. The correspondence states that the Appellees intend to access "mountains of data on Scott's systems...[and gain] access to Mr. Smith's data...."⁵

As noted at the hearing on the Motion to Quash, the computer system of SES is made up almost entirely of documents protected by the attorney-client privilege. As the Court might imagine,

⁵ The Court will note that although the letter from Attorney Lucas is mistakenly dated November 15, 2010, it was sent and received on November 17, 2010, following the hearing on the Motion to Quash Subpoenas. In addition, the Court will note that this letter has been filed with the trial court, has been made a part of the record, and was transmitted as part of the record to the Court of Appeals.

the computer system of a law firm contains communications between the lawyer and all of his or her clients including correspondence and emails. The computer system also contains electronic records including clients' medical records and other proprietary information such as client Social Security numbers. In addition, the computer system of SES contains all communications between SES and its counsel on this case, Christina Corl, including research memoranda that will be protected by the attorney work product doctrine, correspondence, emails, affidavits and other documentation that would never be subject to disclosure to an opponent in the course of litigation.

For the reasons set forth below, Appellees must be prohibited from obtaining documents which contain information protected by the work product doctrine and must be prohibited from obtaining electronic information that would allow Appellees to access the computer network of the SES law firm.

IV. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition Of Law

Where the proprietary computer system of a third party expert witness contains information necessary to access communications, correspondence and other materials protected by the attorney-client privilege, attorney work product doctrine and other privileges, a party may not connect to the computer system for the purpose of electronic discovery unless the court order defines specific and strict limitations on the scope of electronic discovery, protecting the integrity of the confidential and privileged documents.

As stated above, in addition to the documents being produced by the expert witnesses, the subpoenas seek other electronic information to be downloaded from the computer systems of the expert witnesses. This electronic information is in addition to the documents that are to be produced per the court Order on the Motion to Quash. The subpoenas seek electronic information including all "data, screen shots, data downloads, data uploads, configuration files, license agreements...

computer logs, event logs...of all individuals and associates who access any system owned or controlled by [SES] from January 1, 2007 to the present...”

In order to allow Appellees to obtain this electronic data from the computer systems of the third party experts, the Order on the Motion to Quash Subpoenas entered by the trial court states:

4. Representatives of Big Thumb will appear with equipment to copy all related documents, files, and all other items listed in the subpoena.

In other words, Appellees, a party, intend to bring computer equipment to the personal residence of Leon Lively and the business of Netwave, log on to those expert witnesses' computer systems and download electronic data specifically related to the computer system of the SES law firm. Once again, Appellees have made it clear that they intend to obtain information from the computer systems of the expert witnesses which will in turn allow Appellees to access the computer system of the SES law firm. As stated by Attorney Lucas, “The entire case centers around Mr. Smith’s computer system. To deny us access to it, it is ludicrous.”

The court must beg the question as to why, if SES is willing to produce the documents sought in the subpoena, would Appellees need to then log on to the computer systems of the expert witnesses. What is it on the computer systems of the expert witnesses that Appellees are seeking to view or obtain? What is it on the computer systems of the expert witnesses that is relevant to this case? What information are Appellees seeking to obtain from the computer systems of the expert witnesses that is not contained in the documents that are already being produced?

The answer to the above questions is very simple. Appellees seek to find information on the computer systems of the expert witnesses that will allow Appellees to gain access to the SES law firm’s computer system. There is simply no other explanation. Since the expert witnesses provided

IT support services to SES, the computer systems of the expert witnesses contain electronic information which would allow Appellees to then access the computer system of SES. As stated by Appellees' counsel following the hearing on the Motion to Quash, Appellees intend to access "mountains of data on Scott's systems...[and gain] access to Mr. Smith's data...."

The computer system of SES is made up almost entirely of privileged information. The computer system consists of documents prepared for clients, electronic and word processing communications and correspondence to and from clients, confidential client medical files, legal research and strategy memorandum protected by both the attorney/client privilege and the work product doctrine. These privileged materials pertain not only to protected communications between SES and its counsel on this very case, but also to protected communications between SES and its other clients.

The Order on the Motion to Quash does not make any provision for SES to review the information being downloaded by Appellees from the computer systems or restrict that download in any fashion. In addition, Appellees' suggestion that a "Special Master" be appointed to examine the SES computer system does not cure the problem. SES would be required to obtain waivers from every single past and current client to allow a third party to review every communication and other document on its computer system. Once these communications are viewed, the bell cannot be rung.

In *Bennett v. Martin*, 186 Ohio App. 3d 412, 928 N.E.2d 763 (Ohio App. 10 Dist., 2009), the court said,

Generally, courts are reluctant to compel forensic imaging, largely due to the risk that the imaging will improperly expose privileged and confidential material contained on the hard drive. Because allowing direct access to a responding party's electronic

information system raises issues of privacy and confidentiality, courts must guard against undue intrusiveness.

Thus, before compelling forensic imaging, a court must weigh “the significant privacy and confidentiality concerns” inherent in imaging against the utility or necessity of the imaging.” In determining whether the particular circumstances justify forensic imaging, a court must consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests.

Id. at 425.

In direct contradiction to *Bennett*, the Tenth District did not show any reluctance in its order to compel forensic imaging of the computer systems of Leon Lively and Netwave. SES has not withheld any requested information. SES is willing to search for and produce the requested information. Further, there are significant inherent concerns that would result from allowing Appellees access to a computer system that has access to SES’ privileged and confidential materials.

The Order on the Motion to Quash does not contain a single provision for any monitoring of the forensic imaging to be conducted by the employees of Big Thumb. The Order simply states that employees of Big Thumb will appear with equipment to download the electronic data referred to in the subpoena. There is no provision made for redacting any of the electronic information, for SES to review any of the electronic information or to limit the access of Appellees to the computer systems of the expert witnesses. It is quite clear that Appellees’ forensic imaging will result in the exposure of confidential and privileged information.

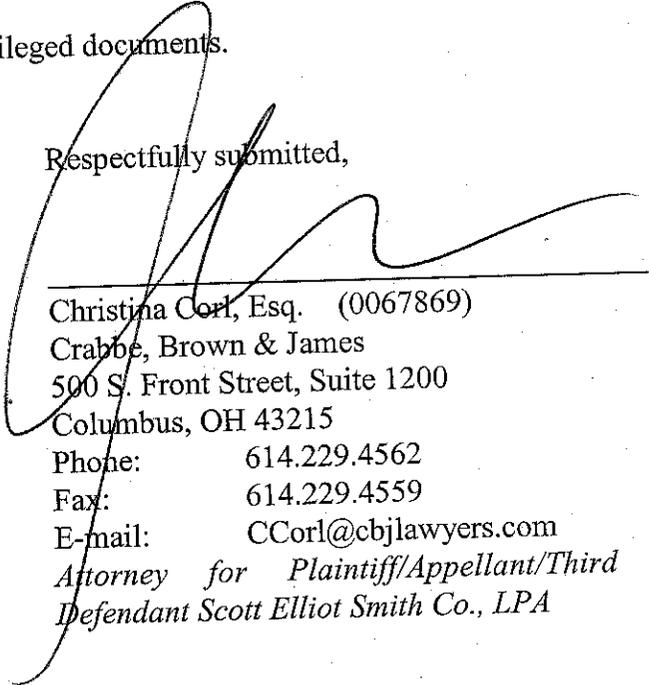
IV. CONCLUSION

By Appellees own statements, Appellees sole reason to conduct forensic imaging on the experts computer systems is to gain access the computer network of SES. As a result, the Order

denying the Motion to Quash will result in the exposure of volumes of material protected by the attorney-client privilege, the physician-patient privilege and the work product doctrine.

Such an extreme measure is not necessary. SES agrees that Appellees are entitled to receive redacted documents from expert witnesses Leon Lively and Netwave. However, those documents should be provided, in redacted form, by SES' counsel. Specifically, those documents would be redacted to remove any information that would allow Appellees to gain access to SES' computer system, including any identifying information for the SES system, and any information protected by the work product doctrine. In addition, SES requests that Appellees be prohibited from accessing the computer networks of the expert witnesses without a strict scope of discovery in place, eliminating the potential exposure of privileged documents.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served, via regular U.S. Mail, this 13 day of May, 2011, to the following:

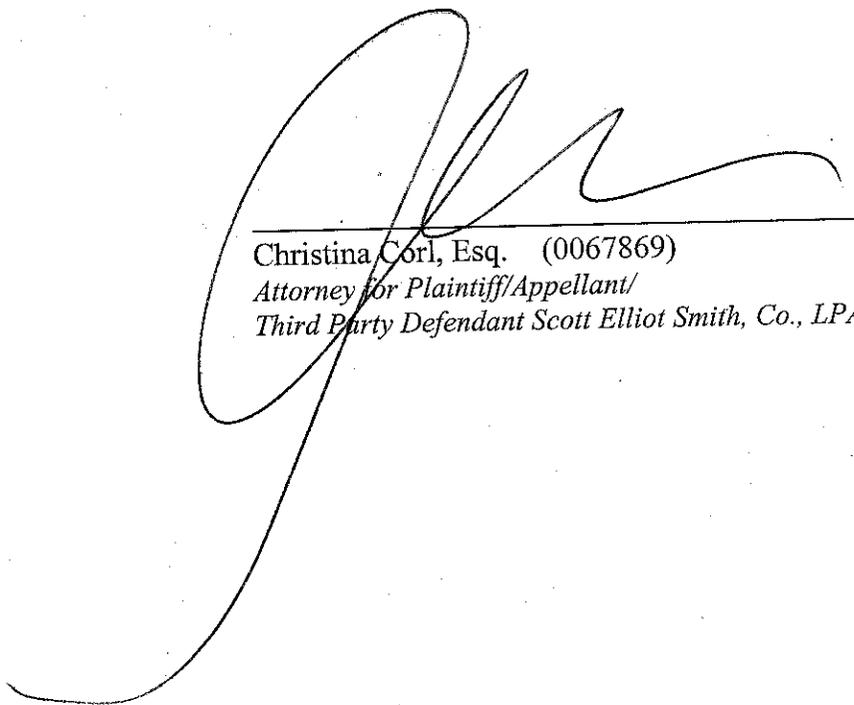
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IN THE COMMON PLEAS COURT OF
FRANKLIN COUNTY, OHIO

Scott Elliott Smith LPA
f/k/a Smith Phillips & Associates
Company, LPA

Plaintiff,

v.

Carasalina, LLC, et al.

Defendants

Case No.: 10 CVC 01 866

Judge Bessey

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
2010 NOV 19 PM 4:05
CLERK OF COURTS

ORDER ON PLAINTIFFS MOTION TO QUASH SUBPONEAS

This cause came to be heard this 17th day of November, 2010 on Plaintiffs' Motion for Temporary order and Motion to Quash Subpoenas issued to Netwave, AT & T, Verizon and Leon Lively by Defendants Big Thumb, LLC, Digital Sparks Studio, LLC and Highmark Advisors, LLC. The Court finds Defendants' proposal for the handling certain confidential information to be acceptable and hereby orders the following with respect to Leon Lively and Netwave:

1. All attorneys will meet at an agreed upon time at the place of the deponent within 7 days of this order.
2. The deponent shall have all records set aside in accordance with the subpoena.
3. Each document will be examined first by Plaintiffs' counsel and that Plaintiffs' counsel may redact the following items:
 - a. Current IP addresses



- b. Current passwords to Server User ID's on Scott Smith's systems (Scott Smith meaning all of his related entities and personal systems).
- c. Current SSID's of any wireless routers.
4. Representatives of Big Thumb will appear with equipment to copy all related documents, files, and all other items listed on the subpoena.
5. Big Thumb shall create a file that is Bate Stamped with all of the documents subject to the subpoena and provide said file to all parties and their attorneys. If the file is exceedingly larger (i.e. larger than the storage space of a two DVD's), each counsel shall than provide a storage media for the transfer of the data.
6. All documents obtained pursuant to the subpoena shall be subject to the protective order currently in place and any amendments or changes thereto.

With respect to AT & T and Verizon, Plaintiffs Motion is overruled.

IT IS SO ORDERED.



Judge Bessey

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
MAR 31 PM 12:47
CLEIN CO. COURTS

Scott Elliott Smith Company, LPA,

Plaintiff-Appellant,

v.

Carasalina, LLC et al.,

Defendants/Third-
Party Plaintiffs-Appellees,

v.

Smith Phillips & Associates Co. L P A.,
et al.,

Third-Party
Defendants-Appellants

No. 10AP-1101
(C P C No 10CVH-01-866)

(ACCELERATED CALENDAR)

DECISION

Rendered on March 31, 2011

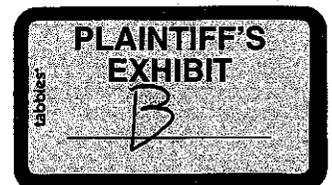
Crabbe, Brown & James, and Christina L. Corl, for appellants.

Chuparkoff Law Offices and Mark A. Chuparkoff, for appellee Carasalina, LLC.

Jeffrey K. Lucas, for appellees Big Thumb, LLC, Highmark Advisors, LLC, and Digital Spark Studio, LLC.

Brandt Cook, pro se.

APPEAL from the Franklin County Court of Common Pleas.



DORRIAN, J

{¶1} Plaintiffs, Scott Elliott Smith Company, LPA, its predecessor, third-party defendant Smith Phillips & Associates Co., L.P.A., and third-party defendant Scott Elliot Smith ("appellants"), appeal from an order of the Franklin County Court of Common Pleas denying a motion to quash subpoenas served upon appellants' expert witnesses by defendants, Big Thumb, LLC, Highmark Advisors, LLC, and Digital Spark Studio, LLC ("appellees"). Although not the issuers of the subpoenas in question, defendants Carasalina, LLC, and Brandt Cook also filed appellee's briefs in this matter. For the following reasons, we affirm.

{¶2} On January 20, 2010, appellants-plaintiffs filed a complaint regarding an alleged breach of commercial lease agreement with respect to appellants' law firm. Appellants-plaintiffs subsequently filed a first amended complaint on January 27, 2010, and a second amended complaint on June 15, 2010. In their second amended complaint, appellants-plaintiffs asserted eight counts against Carasalina, LLC, Brandt Cook and appellees, including: (1) breach of lease agreement; (2) tortious interference with contract, (3) misrepresentation; (4) conversion; (5) invasion of privacy, (6) trespass, (7) interference with business relationships, and (8) bad-faith breach of express or implied contract. Appellants-plaintiffs specifically claimed that appellees gained access to private attorney-client protected property by trespassing into its computer system. In addition, appellants-plaintiffs accused appellees of disrupting the daily operations of its law office by denying access to the internet, computer server, computer equipment and software. Appellees, as well as defendants Carasalina, LLC, and Brandt Cook, filed answers, counterclaims and third-party complaints in response to the complaint.

{¶3} A grossly protracted discovery dispute ensued between the parties, resulting in several motions to compel, motions for contempt, motions to quash and motions for protective orders. On August 10, 2010, the parties entered into a confidentiality stipulation and protective order regarding all discovery matters.

{¶4} On November 8, 2010, appellees served subpoenas on two of appellants' expert IT witnesses, Leon Lively and Netwave, in order to properly defend the claims raised in appellants' complaint. On November 9, 2010, appellants filed a motion to quash the subpoenas, and on November 17, 2010, the motion was heard by the trial court.

{¶5} At the hearing, the trial court allowed both parties to state their arguments on the record, denied the motion to quash, and adopted appellees' proposed order regarding the same.

{¶6} On November 19, 2010, appellants filed a timely notice of appeal.

Appellants raise two assignments of error for our consideration:

FIRST ASSIGNMENT OF ERROR

The trial court erred as a matter of law in denying appellants' motion to quash subpoenas to two (2) expert witnesses, to the extent that the court order fails to allow for redaction of attorney work product information from documents produced.

SECOND ASSIGNMENT OF ERROR

The trial court erred as a matter of law in denying appellants' motion to quash subpoenas to two (2) expert witnesses to the extent that the order denying the motion to quash allows appellees to log on to the computer systems of the third party expert witnesses and obtain electronic data which will enable the appellees to access the computer system of appellant, revealing attorney/client privileged communications and other confidential information.

{¶7} Prior to addressing appellants' assignments of error, we will discuss appellants' motion to strike appellees Big Thumb, LLC, Highmark Advisors, LLC, Digital

Sparks Studio, LLC and Brandt Cook's exhibits "A," "B," "C," "E," "F," and "I," pursuant to App.R. 9, and exhibits "E," "G," and "H," pursuant to App.R.16(D). Appellees and Brandt Cook filed a memorandum contra to appellants' motion, and appellants filed a reply. Appellants have moved to strike appellees' exhibits because (1) they are not properly in the record, and (2) they are cited incorrectly in appellees' brief.

{¶8} Appellants also argue that appellees failed to refer to an appendix in its table of contents, citing in error "Local R. 7(F)," which is not a local rule of this court. We believe that appellants are referring to Loc.R. 7(E) of the Tenth District Court of Appeals.

{¶9} Appellants also move to strike Carasalina's exhibits "1" and "2," pursuant to Loc.R. 7(E), because they are not essential to the assignments of error presented on appeal.

{¶10} Pursuant to App.R. 9, we agree that exhibits "A," "B," "C," "F," and "I" shall be stricken because they are not properly in the record before this court. Appellees claim that exhibits "A" and "F" are in the record attached to appellees' memorandum contra appellants' motion to quash. Upon review of the record, this court was unable to locate any exhibits attached to appellees' memorandum contra appellants' motion to quash. However, we decline to strike exhibit "E" because both parties referenced its contents in their briefs.

{¶11} Pursuant to App.R. 16(D), we decline to strike appellees' exhibits "E" and "G" for incorrectly citing to the record.

{¶12} Pursuant to Loc.R. 7(E), we decline to strike appellees' exhibits for failure to refer to an appendix in the table of contents.

{¶13} Pursuant to Loc.R. 7(E), we agree that defendant Carasalina's exhibit "1" shall be stricken because it is not essential to the assignments of error presented on

appeal. It should also be noted that, although Carasalina referenced two exhibits in its appendix, it only filed one exhibit for this court's review. Therefore, appellants' motion to strike is granted in part and denied in part.

{¶14} An appellate court generally reviews discovery orders under an abuse-of-discretion standard. *Tracy v. Merrell Dow Pharmaceuticals, Inc* (1991), 58 Ohio St 3d 147, 151-52. However, when the discovery order involves questions of privilege, we review de novo. *Mason v. Booker*, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶16. In *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St 3d 181, 2009-Ohio-2496, ¶13, the Supreme Court of Ohio stated that, in discovery matters, "whether the information sought is confidential and privileged from disclosure is a question of law." Therefore, "[w]hen a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Id.*

{¶15} Appellants' first assignment of error contends that the trial court erred in denying the motion to quash "to the extent that the court order fails to allow for redaction of attorney work product information from documents produced " We disagree.

{¶16} The Ohio Rules of Civil Procedure clearly provide a means for withholding privileged documents from an adversary party in litigation. Civ.R. 26(A), the general rule governing discovery states, in relevant part, that.

It is the policy of these rules (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 an adversary's industry or efforts.

Further, Civ.R. 26(B)(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."

{¶17} Pursuant to Civ.R 45(D)(4).

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

In addition, Civ.R 45(F) clearly provides that "[n]othing in this rule shall be construed to authorize a party to obtain information protected by any privilege recognized by law, or to authorize any person to disclose such information."

{¶18} Here, appellants claim that "[t]he communications subject to production pursuant to the subpoena[s] contain communications with counsel for SES pertaining to trial strategy and tactics, legal opinions and other matters clearly covered by the work product doctrine " (Appellants' brief at 9) The record clearly indicates that appellants never made an express claim to the trial court, as required by Civ.R 45(D)(4), regarding any specific documents alleged to be privileged communications. Appellants certainly have not, at this stage in the litigation, described the nature of the documents and/or communications sufficient to enable the demanding party to specifically contest the claim. See Civ.R. 45(D)(4). At the hearing, appellants merely alleged that privileged documents exist, but failed to provide the trial court with any evidence in support of their claim. Appellants' attorney stated "[w]e *will* produce a log of what's not being produced. If there is some objection as to what is not being produced, the standard procedure is there *will* be an in camera inspection. The court *will* determine if there is work product and what confidential information should be kept." (Tr. 5) (Emphasis added.)

{¶19} Appellants also argue that the trial court's order limits their rights to withhold privileged communications because the order is silent on that issue The civil rules are

implicit in any order of the court, including the trial court's order denying appellants' motion to quash. Civ.R. 1(A) states "[t]hese rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity." Further, the exceptions to this general rule of applicability, outlined in Civ.R. 1(C), state that the rules shall not apply when "they would by their nature be clearly inapplicable." Upon careful review of the order, we believe that appellants' rights were not restricted regarding the assertion of privilege as prescribed by Civ.R. 45(D)(4) or (D)(5). Nowhere does the order state that the civil rules do not apply or that they are superceded by the order. Therefore, if privileged communications indeed exist, appellants must adhere to the process set forth in Civ.R. 45(D) in order for the trial court to make an informed determination regarding the same.

{¶20} Appellant's first assignment of error is overruled.

{¶21} Appellants' second assignment of error contends that the trial court erred in denying the motion to quash because appellees can access appellants' computer system through the expert witnesses' systems and, as such, can obtain privileged communications and other confidential information. We disagree.

{¶22} First, we believe that the word "document" in the trial court's order refers to both printed documents and electronic data. In the Lively subpoena, "any and all letters, agreements, email, social networking communications, documents, text communication, logs, computer logs, computer files, data, invoices, reports, communications and any form of written or electronic document," are "hereinafter called 'document.'" (See Lively subpoena, exhibit A, at ¶1.) In the Netwave subpoena, "any and all letters, agreements, email, documents, logs, computer files, data, invoices, reports, communication and any other form of written or electronic document," are also "hereinafter called 'document'."

(See Netwave subpoena, exhibit A, at ¶1.) Appellees, as the drafters of the subpoenas, clearly understand the term "document" to include electronic data and, accordingly, we believe the trial court intended the same.

¶23 The trial court's order directs that "[e]ach document will be examined first by Plaintiffs' counsel and that Plaintiffs' counsel may redact the following items: (a) [c]urrent IP addresses[,] (b) [c]urrent passwords to Server User ID's on Scott Smith's systems (Scott Smith meaning all of his related entities and personal systems)[,] and (c) [c]urrent SSID's of any wireless routers." (See Order on Plaintiffs' Motion to Quash Subpoenas at ¶3.) Further, the order states that "[a]ll documents obtained pursuant to the subpoena shall be subject to the protective order currently in place and any amendments or changes thereto." (Order at ¶6.) Therefore, the same safeguards extended to hard copy documents appear to be extended to electronic data as well.

¶24 Second, based upon the evidence before this court, we are not convinced that appellees can gain access to appellants' computer system, through the systems of Netwave and/or Leon Lively, in order to access privileged and/or confidential information. Appellants have not provided any evidence in the record to substantiate this claim and, therefore, it is merely conjecture and speculation. Because we do not find that there is a possible breach of attorney/client privilege in this matter, we decline to further address the sanctity and importance of attorney/client privilege in the discovery process.

¶25 Appellants' second assignment of error is overruled.

¶26 Finally, we address appellees' motion for sanctions pursuant to App.R 23, whereby appellees argue that appellants should pay reasonable expenses, such as attorney fees and costs, due to filing a frivolous appeal. App.R 23 states that "[i]f a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay

reasonable expenses of the appellee including attorney fees and costs." Appellees contend that the appeal is frivolous because appellants filed it (1) for the purpose of delay, (2) to avoid depositions, and (3) to increase the cost of litigation to appellees.

{¶27} Pursuant to App.R. 23, this court stated that a frivolous appeal "is essentially one which presents no reasonable question for review" *Talbott v Fountas* (1984), 16 Ohio App.3d 226, syllabus. Further, "[t]he purpose of sanctions is to compensate the nonappealing party for the expense of having to defend against a frivolous appeal and to help preserve the appellate calendar for cases that are worthy of consideration" *Coburn v. Auto-Owners Ins. Co.*, 10th Dist. No. 09AP-923, 2010-Ohio-3327, ¶56.

{¶28} Here, we determined that the trial court did not err in denying appellants' motion to quash. Notwithstanding our conclusion, this appeal is not frivolous if it raised any valid questions for review. We find that, while their arguments were tenuous and unpersuasive, appellants did raise valid questions for review and, as such, we deny appellees' motion for sanctions.

{¶29} Having overruled both of appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Motion to strike granted in part and denied in part,
motion for sanctions denied; judgment affirmed.*

KLATT and TYACK, JJ., concur

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
2011 MAR 31 PM 3:45

CLERK OF COURTS

Scott Elliott Smith Company, LPA,

Plaintiff-Appellant,

v.

Carasalina, LLC et al.,

Defendants/Third-
Party Plaintiffs-Appellees,

v.

Smith Phillips & Associates Co. L.P.A.,
et al.,

Third-Party
Defendants-Appellants.

No. 10AP-1101
(C.P.C. No. 10CVH-01-866)

(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 31, 2011, appellants' motion to strike is granted in part and denied in part, appellees' motion for sanctions is denied, and both of appellants' assignments of error are overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

DORRIAN, KLATT & TYACK, JJ.

By


Judge Julia L. Dorrian

PLAINTIFF'S
EXHIBIT

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