

IN THE SUPREME COURT OF OHIO

NeuroTherm, Inc.,

Appellant,

v.

Clinical Technology, Inc.

Appellee.

:
: Case No. **13-1595**
:

: On Appeal from the Cuyahoga County Court
: of Appeals, Eighth Appellate District
:

: Court of Appeals Case No. 99745
:
:
:

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
NEUROTHERM, INC.**

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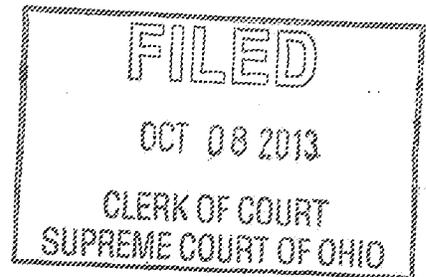
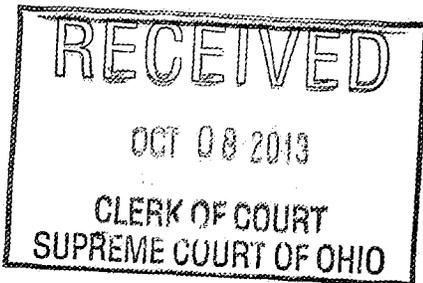


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a critically important question for Ohio litigants: What legal standard determines whether materials were created “in anticipation of litigation” and are thus privileged from disclosure under Civ.R. 26(B)(3)? Presently, Ohio’s appellate courts are divided over the meaning of “in anticipation of litigation.” See *Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013, ¶ 46 (7th Dist.) (“The phrase ‘in anticipation of litigation’ has caused interpretation problems.”). The court below applied its own unduly narrow standard to order the production of the document at issue here, even though it was prepared solely “in anticipation of litigation.” As the result here shows, this division among Ohio’s appellate courts has plunged Civ.R. 26(B)(3)’s “work product privilege” into a state of unacceptable inconsistency.

If this division were allowed to persist, Ohio litigants will have no assurance that materials they create “in anticipation of litigation” will be protected from disclosure, unless they are created only after litigation has been initiated or, at minimum, explicitly threatened. This result is unsanctioned by Civ.R. 26(B)(3)’s plain language and the realities of modern-day litigation. Indeed, the standard applied by the court below to determine what constitutes “in anticipation of litigation” erodes the intended scope and function of the work product privilege. Under the appellate court’s approach, materials are privileged under Civ.R. 26(B)(3) only if the possibility of litigation is (a) “real and substantial”; or (b) in the case of materials prepared by or at the direction of non-attorneys, “exclusively and in specific response to imminent litigation.” See *Perfection Corp. v. Travelers Cas. & Surety*, 153 Ohio App. 3d 28, 2003-Ohio-2750, ¶¶ 27-28 (8th Dist.).

The Seventh District Court of Appeals, however, uses the better, more logical approach. Adopting the “prevalent” position among federal courts and rejecting the *Perfection Corp.*

standard applied below, the Seventh District holds that materials are prepared “in anticipation of litigation” if they are produced “because of the prospect of litigation,” so long as the party invoking the privilege reasonably and actually believed that litigation was possible when the materials were created. This practical and simple rule—rather than the unduly narrow, bifurcated rule employed by the court below—comports with Civ.R. 26(B)(3)’s plain language and intended scope. *Estate of Hohler* at ¶ 50 (“Civ.R. 26(B)(3) does not use words such as substantial or imminent possibility of litigation but merely states ‘in anticipation of litigation.’”). This Court thus should review this case and adopt the Seventh District’s approach.

These competing and irreconcilable rules trigger compelling reasons to hear this case. The rule-based privilege embodied in Civ.R. 26(B)(3) should be applied consistently across Ohio. Leaving the work product privilege in flux and subject to these irreconcilable rules leaves Ohio’s litigants and their attorneys uncertain about whether they may invoke Civ.R. 26(B)(3)’s protections during discovery. It also unduly impinges on a party’s ability to conduct its own investigations when there is a reasonable belief that litigation is possible. Moreover, allowing lower Ohio courts to continue applying their own varying constructions of a privilege clearly embodied in the Civil Rules thwarts the Civil Rules’ stated goals of achieving efficiency and consistent results in civil litigation. Finally, the applicability of Civ.R. 26(B)(3)’s privilege should not turn on which district in which the lawsuit is pending. Uniformity is needed.

At bottom, this case involves a question of public or great general interest because there is a great general interest in ensuring that Ohio’s legal privileges—and particularly those codified in statutes or court rules—are applied uniformly. To promote the consistency of privileges and the fair and uniform application of the Civil Rules and to give Ohio litigants clearly defined guidance on what constitutes work product under Civ.R. 26(B)(3), this Court

must grant jurisdiction to hear this case and adopt the Seventh District's "because of the prospect of litigation" test, which the Seventh District adopted from the Sixth Circuit and numerous other federal courts.

STATEMENT OF THE CASE AND FACTS

Appellant NeuroTherm, Inc. ("NeuroTherm") manufactures interventional pain products designed for the treatment of spinal and back pain. This case arises from the February 2011 transition of certain of Appellee Clinical Technology, Inc.'s ("CTI") employees to NeuroTherm. From 2001 to February 2011, CTI served as a distributor and sales representative for NeuroTherm's interventional pain products in NeuroTherm's Great Lakes sales region. CTI employed sales representatives in its Pain and Anesthesia Products Division who sold NeuroTherm products to customers. NeuroTherm paid CTI commissions for each NeuroTherm product sold. Between at least July 2010 and February 2011, CTI and NeuroTherm had been discussing a broad transition in which certain CTI sales representatives and Dominic Verrilli (who was then a CTI vice-president responsible for overseeing CTI's Pain & Anesthesia Products Division) would become employed by NeuroTherm. In February and March 2011, the transition took place, and Verrilli and six of CTI's former sales representatives joined NeuroTherm (the "Transition").

After the Transition, CTI's principals, Dennis Forchione and Jason Forchione, immediately expressed their anger over the Transition to NeuroTherm's then-CEO, Larry Hicks, and other NeuroTherm personnel. CTI accused NeuroTherm of (among other things) "damaging its business." At the same time, Verrilli informed Hicks that Dennis Forchione had angrily told Verrilli by telephone "that [Verrilli] had lost everything" and to "stuff a sock in it." Anticipating imminent litigation because of the Forchiones' anger and allegations, Hicks asked Verrilli to

prepare a chronological summary of his perspective of the events leading to the Transition. Verrilli created a chronological written summary, which became the “Verrilli Timeline” document at issue in this case, and he sent it to Hicks. Fearing CTI would sue NeuroTherm, Hicks kept the Verrilli Timeline to share with counsel if litigation were to arise.

Hicks’s fears materialized when CTI sued Verrilli in October 2011 for (among other things) breach of fiduciary duty and misappropriation of trade secrets (the “Verrilli Litigation”). In the Verrilli Litigation, CTI subpoenaed NeuroTherm to produce documents relating to the Transition in March 2012, and it attempted to join NeuroTherm in the lawsuit in August 2012. When CTI’s motion to join NeuroTherm in the Verrilli Litigation was denied, CTI dismissed the Verrilli Litigation, sued NeuroTherm in August 2012, and amended its complaint in November 2012. CTI’s amended complaint, which is based on allegations substantially similar to those CTI alleged against Verrilli, alleges that NeuroTherm, in concert with Verrilli, misappropriated CTI’s trade secrets, interfered with CTI’s contracts with its employees, and aided and abetted Verrilli’s breach of fiduciary duty to CTI. In discovery, CTI requested the Verrilli Timeline at issue.¹ NeuroTherm duly objected on work product grounds. The parties’ extrajudicial efforts to resolve their disagreement over whether the Verrilli Timeline constitutes privileged work product were unsuccessful, so they sought the trial court’s assistance in resolving the dispute.

The trial court determined on the parties’ briefs that the Verrilli Timeline was not work product, even though the only record evidence concerning its creation was Hicks’s affidavit supporting NeuroTherm’s brief. In that affidavit, Hicks explained that he asked Verrilli to create

¹ NeuroTherm presumes that CTI became aware of the existence of the Verrilli Timeline because, in response to a subpoena that CTI served on NeuroTherm in the Verrilli Litigation, and in response to CTI’s discovery requests in the case below, NeuroTherm produced other, non-privileged email messages that made reference to the Verrilli Timeline.

the Verrilli Timeline solely because Hicks anticipated imminent litigation with CTI, and not for any ordinary business purpose. Indeed, Hicks's affidavit explains that he believed litigation with CTI was imminent because he learned that CTI was angry about the Transition. Hicks explained that CTI's anger was apparent, based on communications he and other NeuroTherm employees exchanged, internally and with CTI, in the last few weeks of January and the first few weeks of February 2012. Hicks submitted those communications in support of his affidavit. Hicks thus concluded that litigation with CTI was imminent, and he asked Verrilli to document the events surrounding the Transition to share with counsel if litigation were to arise. Notably, no other record evidence was submitted regarding the Verrilli Timeline's creation.

On appeal, the Eighth District affirmed the trial court's decision.² The appellate court held that Hicks's perception that CTI was "angry," coupled with the fact that litigation against NeuroTherm did not begin until a year and a half after the transition, did not indicate that there was a "real and substantial" or "imminent" threat of litigation sufficient to meet its narrow definition of "in anticipation of litigation." See Journal Entry & Opinion of August 29, 2013, attached hereto, ¶ 9 (the "Opinion"). The courts below so held, even though the only record evidence before them showed that Hicks reasonably believed litigation with CTI was imminent, he asked Verrilli to prepare the Verrilli Timeline for only that reason, and litigation against NeuroTherm did subsequently ensue. This important issue thus is fully developed for this Court's review.

² The trial court's order was immediately appealable under R.C. 2502.02. See *Abbuhl v. Orange Village*, 8th Dist. No. 82203, 2003-Ohio-4662, ¶ 31. This Court has discretionary jurisdiction to review the appellate court's judgment. See Ohio Const. Art. IV, § 2(A)(2)(e).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Documents are prepared “in anticipation of litigation,” and are thus privileged from disclosure under Civ.R. 26(B)(3), if: (1) they were produced “because of the prospect of litigation”; (2) the party claiming the privilege had a subjective belief that litigation was a real possibility; and (3) that belief was objectively reasonable.

Civ.R. 26(B)(3)’s plain text makes clear that a document is privileged from disclosure if it was prepared “in anticipation of litigation.”³ Thus, this Court should adopt the test used by the Seventh District Court of Appeals: A document is prepared “in anticipation of litigation” if: (1) the nature of the document and the factual circumstances show it was prepared “because of the prospect” of litigation; (2) the party claiming the privilege had a subjective belief that litigation was a “real possibility”; and (3) that belief was objectively reasonable. *See Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶¶ 47, 49 (adopting this standard from the U.S. Court of Appeals for the Sixth Circuit and noting that it is the “prevalent” rule among the federal courts). Several considerations mandate this standard.

First, the plain language of Civ.R. 26(B)(3) requires the application of this standard. Civ.R. 26(B)(3) plainly protects documents from disclosure if they were prepared “in anticipation of litigation.” It does not limit the work product privilege only to documents prepared “in anticipation of ‘imminent’ or a ‘substantial threat’ of litigation.” *See Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶ 50 (concluding that Civ.R. 26(B)(3)’s plain language does not require the threat of litigation to be “imminent” or “substantial” and, thus, the “because of the prospect of litigation” test is “more in accord with” Civ.R. 26(B)(3)’s plain

³ Of course, the privilege created by Civ.R. 26(B)(3) can be overcome if the party seeking discovery can show “good cause” to override the privilege. *See* Civ.R. 26(B)(3). This Court has defined “good cause” in prior cases, and NeuroTherm does not challenge that interpretation here. *See Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, ¶ 16.

language). Similarly, Civ.R. 26(B)(3)'s plain language does not justify the Eighth District's bifurcated standard, which requires an additional showing of imminence if the material is prepared by or at the direction of a non-attorney. To the contrary, Civ.R. 26(B)(3) protects all material prepared "in anticipation of litigation or for trial *by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, or agent).*" See Civ.R. 26(B)(3) (emphasis added). Thus, however this Court would construe "in anticipation of litigation," there is no basis in Civ.R. 26(B)(3)'s plain language for imposing different standards on materials prepared by attorneys and materials prepared by non-attorneys.

Also, as discussed above, the "because of the prospect of litigation" standard is "the prevalent position in the United States circuit courts" construing the federal work product privilege. See *Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶ 49 (collecting federal cases); see also *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006). Although the decisions of the federal courts on federal procedure are not binding on Ohio courts, Ohio courts often look to federal case law to interpret Ohio's own Civil Rules, including Civ.R. 26(B)(3). See, e.g., *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 2010-Ohio-4469, ¶¶ 54-59 (construing Civ.R. 26(B)(3) using case law from the United States Supreme Court and several federal circuit courts of appeal); *Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶ 49 (construing Civ.R. 26(B)(3) using case law from numerous federal circuit courts of appeal); *Holloway v. Holloway Sportswear, Inc.*, 971 N.E.2d 1001, 2012-Ohio-2135, ¶ 29 (3d Dist.) (applying federal case law on Fed.R.Civ.P. 11 to an issue concerning Civ.R. 11 because, although not binding, such federal case law is "instructive"). This Court thus should look to federal case law—as it has before in construing Civ.R. 26(B)(3)—and

adopt the “prevalent” standard favored by many federal courts of appeal in defining “in anticipation of litigation.”

Moreover, the “imminence” and “real and substantial possibility” standards used by the Eighth District are not only unsupported by Civ.R. 26(B)(3)’s plain language, but they also ignore the realities of modern civil litigation. These standards improperly ask *when* or *by whom* the material was prepared, rather than asking *why* it was prepared. As the Seventh District correctly observed, “Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced.” *Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶¶ 47-48 (citing 8 Wright & Miller, *Federal Practice and Procedure* 198, Section 2024 (1970)). In the modern, complex, document-driven litigation environment, plaintiffs’ counsel often needs to conduct substantial and lengthy investigations before filing a lawsuit or even merely approaching a potential adversary to attempt an extrajudicial resolution of the dispute. It thus is unsurprising that prudent defendants with an objectively reasonable belief that litigation is likely often have the opportunity to conduct their own investigations—and develop materials “in anticipation of litigation” with or without an attorney’s assistance—for months and years before litigation is initiated or explicitly threatened. Such objectively reasonable foresight should be protected by Civ.R. 26(B)(3) just as much as it would be after suit is filed or explicitly threatened. But under the court of appeals’s unduly narrow and idiosyncratic approach, such materials are not protected.

Likewise, the appellate court’s rule holding that materials prepared by or at the direction of non-attorneys will be protected only if prepared in specific response to “imminent” litigation ignores similar realities. In today’s litigious society, prudent, non-lawyer businesspersons and individuals are well aware of the risks and stakes of civil litigation. It thus is unsurprising that

prudent non-lawyer business executives or managers objectively believing litigation to be likely might ask employees to create materials or notes about a dispute or an incident that reasonably could lead to litigation. For instance, they may prepare or instruct their subordinates to prepare these types of materials in preparation for a meeting with counsel to discuss and prepare for litigation that they are reasonably anticipating. Materials prepared in these situations clearly would fall within Civ.R. 26(B)(3)'s plain text because they are prepared "in anticipation of litigation" and "by or for. . . a party's agent." And yet, under the Eighth District's standard, the focus incorrectly shifts from *why* the document was created to *when* or *by or for whom*. This shift is unjustified by Civ.R. 26(B)(3)'s plain language and the realities of modern litigation. The analysis should be much simpler: Were the materials at issue prepared "because of the prospect of litigation," and not in the ordinary course of business? If so, they are protected from disclosure under Civ.R. 26(B)(3). *See Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶ 48. In sum, parties should be entitled to conduct factual investigations with the protections of Civ.R. 26(B)(3) when they reasonably believe litigation is possible. Their having the initiative to do so before litigation is specifically threatened or "imminent" should not strip them of their work product privilege.

That misguided focus on *when* or *by or for whom* the materials were created leads to an anomalous consequence: The plaintiff can control the scope of the defendant's work product privilege merely by waiting for time to pass before suing the defendant seeking to invoke the privilege. The plaintiff's decision about when to sue, to threaten suit, or to make a demand should not control the viability of a defendant's work product claim. The focus should be solely on *why* the document was produced. For example, in this case, the Eighth District's "imminence" requirement for materials prepared by or for non-attorneys elevated the fact that

CTI did not sue NeuroTherm until one-and-a-half-years after the document was created, over unrefuted evidence that the document was created solely “because of the prospect of litigation.”⁴ See Opinion, ¶ 8. Focusing on temporal aspects makes little sense in this context because plaintiffs choose when to sue, and they need not send defendants demands, courtesy draft complaints, or otherwise warn defendants that they might file suit. Because prudent parties (including non-attorneys) anticipate litigation when it is objectively reasonable to do so, the proper focus is on *why* the document was created. And as the Seventh District held in *Estate of Hohler*, the party’s reasons for creating the materials can be determined from the nature of the documents and the circumstances surrounding their creation. *Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶¶ 47, 50.

Also, aside from those anomalous consequences, the standard applied below is unworkable in its application. Absent an explicit threat of litigation or the filing of a complaint, at what point does the possibility of otherwise foreseeable litigation become “real and substantial” or “imminent”? Will a document be privileged if it is created six months before suit is filed? Eight months? Ten months? Does the analysis change depending on the complexity of the claims? The Eighth District’s standard leaves these questions unanswered, and in this case, the appellate court determined (without explaining why) that a document created one-and-a-half years before CTI sued NeuroTherm (but only eight months before CTI sued Verrilli and just over a year before CTI subpoenaed NeuroTherm in the Verrilli Litigation) was not “imminent”

⁴ NeuroTherm’s merits brief will address these issues in detail. But as briefly explained in the Statement of the Case and Facts above, the only evidence before the lower courts concerning the Verrilli Timeline’s creation was Hicks’s affidavit, which attested (among other things) that (a) the Verrilli Timeline at issue was not prepared in the ordinary course of business; and (b) it was prepared solely because Hicks anticipated imminent litigation.

enough. *See* Opinion, ¶ 8. Thus, in practice, these temporal standards pose troublesome problems in application and interpretation.

Furthermore, allowing inconsistent substantive standards to govern the application of the work product privilege undermines the purposes of enacting rules of civil procedure. To start with, the Civil Rules “prescribe the procedure to be followed *in all courts of this state in the exercise of civil jurisdiction.*” *See* Civ.R. 1(A) (emphasis added). Moreover, the Rules are to be “construed and applied to effect *just results* by eliminating delay, unnecessary expense, and all other impediments to the expeditious administration of justice.” *See* Civ.R. 1(B) (emphasis added). The existence of contradictory standards governing what materials are protected from disclosure under Civ.R. 26(B)(3) means that “all courts” are not following the procedures prescribed by Civ.R. 26(B)(3). More important, these contradictory standards are not effecting “just results,” because currently, materials may well be privileged under Civ.R. 26(B)(3) in one district and unprotected in another. Indeed, this appeal is just one example where that would be the case, because the undisputed record evidence shows that the document at issue was prepared with an objectively reasonable belief that litigation was imminent. Such a showing easily suffices under the Seventh District’s test. This anomaly leaves Ohio civil litigants uncertain about whether materials they create in objectively reasonable anticipation of litigation will be unfairly exposed to their adversary’s prying eyes if they have the misfortune of being *too* diligent in their own investigations. The uniform application of the Civil Rules and the work product privilege codified therein is of great general interest to Ohio residents and potential litigants.

Finally, the drafters of Civ.R. 26(B)(3) indicated no intent to apply different standards to materials prepared by attorneys and materials prepared by non-attorneys, as the appellate court’s definition of “in anticipation of litigation” does. As discussed above, Civ.R. 26(B)(3)’s plain

language is clear: Materials are privileged if they are prepared “in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent),” and they are discoverable “only upon a showing of good cause.” *See* Civ.R. 26(B)(3). The only limitation Civ.R. 26(B)(3) places on the work product privilege is when the party seeking discovery can show “good cause” to override the privilege. This Court has defined “good cause” to mean “a demonstration of need for materials— i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable.” *See Jackson*, 110 Ohio St. 3d 488, 2006-Ohio-4968 at ¶ 16. This flexible standard safeguards against concerns that a work product privilege based on reasonable anticipation of litigation, regardless of temporal aspects, could sweep too broadly. Thus, Civ.R. 26(B)(3) already strikes the appropriate balance between duly preserving the work product privilege and allowing materials to be discovered in certain circumstances. By unduly narrowing the meaning of “in anticipation of litigation,” the court below grafted additional inappropriate limitations into Civ.R. 26(B)(3), contrary to the Rule’s plain language and intended scope. *See Estate of Hohler*, 185 Ohio App. 3d 420, 2009-Ohio-7013 at ¶ 50. This it cannot do.

CONCLUSION

The Seventh District and the court below cannot both be right. There must be one definition of “in anticipation of litigation” for purposes of determining whether Civ.R. 26(B)(3)’s work product privilege applies. As explained above, the Seventh District’s standard—and not the standard applied by the court below—is the most sensible and logical way to apply the work product privilege. Privileges are a vitally important aspect of our system of civil litigation. The Court thus should accept jurisdiction over this case and reverse the decision below.

Respectfully submitted,



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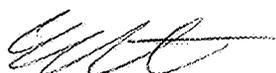
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CERTIFICATE OF SERVICE

I certify that a copy of this *Memorandum in Support of Jurisdiction of Appellant NeuroTherm, Inc.* has been served pursuant to Ohio Supreme Court Practice Rule 14.2(B)(1), via email and first class U.S. mail, postage prepaid, this 8th day of October, 2013, upon the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99745

CLINICAL TECHNOLOGY, INC.

PLAINTIFF-APPELLEE

vs.

NEUROTHERM, INC.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-789859

BEFORE: E.A. Gallagher, J., Jones, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 29, 2013

Appendix p. 1

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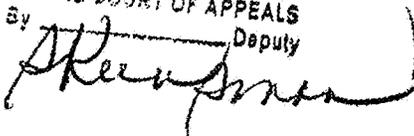
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FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG 29 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy



EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant, NeuroTherm Inc., appeals the order of the Cuyahoga County Court of Common Pleas granting a motion to compel discovery filed by plaintiff-appellee, Clinical Technology, Inc., and denying NeuroTherm's own motion for a protective order regarding the same document. For the reasons stated herein, we affirm.

{¶2} Clinical Technology, Inc. ("C.T.I.") filed a complaint against NeuroTherm on August 22, 2012 alleging that NeuroTherm had failed to pay a sales commission due and owing to C.T.I. C.T.I. filed an amended complaint on November 6, 2012 further asserting that NeuroTherm orchestrated the defection of certain C.T.I. sales representatives and misappropriated C.T.I. trade secrets. The catalyst of the dispute between C.T.I. and NeuroTherm surrounded C.T.I. vice president Dominic Verrilli III resigning from C.T.I. to join NeuroTherm in February 2011. In connection with the departure of Verrilli and other sales staff, C.T.I. asserted claims including misappropriation of trade secrets, tortious interference with contracts, tortious interference with business relations, civil conspiracy and aiding and abetting. NeuroTherm answered and filed a counterclaim asserting breach of contract and an action on account.

{¶3} During the course of discovery, it was learned that in February 2011 NeuroTherm CEO Laurence Hicks asked Verrilli to prepare a narrative, chronological summary (the "Verrilli timeline") of the events leading to his

departure from C.T.I. and his joining NeuroTherm. On March 6, 2013 the trial court conducted a pretrial concerning a discovery dispute regarding the Verrilli timeline and ordered the parties to submit briefs on the matter. On March 14, 2013 C.T.I. filed a motion to compel the production of the timeline and NeuroTherm filed a motion for a protective order regarding the document. On March 20, 2013 the trial court issued a journal entry granting C.T.I.'s motion to compel and denying NeuroTherm's motion for a protective order. This appeal followed.

{¶4} NeuroTherm argues in its sole assignment of error that the trial court abused its discretion in denying its motion for a protective order and granting C.T.I.'s motion to compel. We review a trial court's ruling on a motion to compel for an abuse of discretion. *Wolk v. Paino*, 8th Dist. Cuyahoga No. 93095, 2010-Ohio-1755, ¶ 19, citing *DeMeo v. Provident Bank*, 8th Dist. Cuyahoga No. 89442, 2008-Ohio-2936. The same standard applies to our review of a trial court's decision to deny a motion for a protective order. *Scanlon v. Scanlon*, 8th Dist. Nos. 99028 and 99052, 2013-Ohio-2694, ¶ 24. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

{¶5} NeuroTherm argues that the Verrilli timeline is protected from discovery under the work-product privilege found in Civ.R. 26(B)(3) which

states in relevant part:

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 (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor.

{¶6} The burden of showing that a document is confidential or privileged rests with the party seeking to exclude it. *Li v. Olympic Steel, Inc.*, 8th Dist. Cuyahoga No. 97286, 2012-Ohio-603, ¶9. The work-product claim requires that there exist a "real and substantial possibility of litigation" at the time the documents were written. *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-3358, 790 N.E.2d 817, ¶27, (8th Dist.). This court has held that the work-product privilege may not be invoked based on mere anticipation of future litigation as a result of general business experience or a general belief that litigation is a possibility. *Id.*

{¶7} Furthermore, "[m]aterial prepared by nonattorneys, even if prepared in anticipation of litigation, is protected from discovery only where the material is prepared exclusively and in specific response to imminent litigation." *Id.* at ¶27, citing *Occidental Chem. Corp. v. OHM Remediation Serv. Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y.1997).

{¶8} In the present case, the Verrilli timeline was not prepared by an attorney or at the direction of an attorney. The timeline was prepared roughly

a year and a half before litigation ensued. In an affidavit attached in support of NeuroTherm's motion for protective order, NeuroTherm CEO Laurence Hicks averred that based on communications exchanged with C.T.I. President Dennis Forchione and his son Jason Forchione, Hicks perceived C.T.I. to be angry with NeuroTherm over Dominic Verrilli and other former C.T.I. employees joining NeuroTherm. Based solely upon this perceived anger, Hicks averred that he believed litigation was imminent and, therefore, instructed Dominic Verrilli to prepare the Verrilli timeline.

{¶9} The above facts fail to demonstrate a "real and substantial possibility of litigation" or that the Verrilli timeline was prepared "in specific response to imminent litigation" as contemplated by this court in *Perfection Corp. v. Travelers Cas. & Sur.* Though Hicks may have perceived anger from C.T.I., anger, by itself, is not a basis for litigation. Hicks fails to offer an explanation for why he reasonably believed the perceived anger would translate to litigation. In light of the present record we cannot conclude that the trial court abused its discretion in granting C.T.I.'s motion to compel and denying NeuroTherm's motion for a protective order.

{¶10} Appellant's sole assignment of error is overruled.

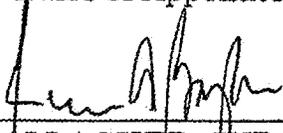
{¶11} The judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said lower 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.



EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
SEAN C. GALLAGHER, J., CONCUR