ORIGINAL

IN THE SUPREME COURT OF OHIO

NeuroTherm, Inc.,	:	Case No. 13-1595
	:	
Appellant,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
	:	Court of Appeals Case No. 99745
Clinical Technology, Inc.	:	
	:	
Appellee.	:	

APPELLEE CLINICAL TECHNOLOGY, INC.'S MEMORANDUM IN OPPOSITION TO JURISDICTION

MITCHELL G. BLAIR (0010892)
Counsel of Record
MATTHEW M. MENDOZA (0068231)
MATTHEW A. CHIRICOSTA (0089044)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East 6th Street
Cleveland, OH 44114
(216) 622-8200 (phone)
(216) 241-0816 (fax)
mblair@calfee.com
mmendoza@calfee.com
mchiricosta@calfee.com

Counsel for Appellant, NeuroTherm, Inc.

JEREMY GILMAN (0014144)
Counsel of Record
MATTHEW D. GURBACH (0076707)
LORI H. WELKER (0085109)
BENESCH, FRIEDLANDER, COPLAN & ARONOFF, LLP
200 Public Square, Suite 2300
Cleveland, OH 44114-2378
(216) 363-4500 (phone)
(216) 363-4588 (fax)
jgilman@beneschlaw.com
mgurbach@beneschlaw.com
lwelker@beneschlaw.com

Counsel for Appellee, Clinical Technology, Inc.

FILED
NOV 07 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

II. APPELLEE'S RESPONSE TO APPELLANT'S STATEMENT OF THE CASE AND FACTS 3

III. ARGUMENT 5

Appellant's 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.

IV. CONCLUSION 11

CERTIFICATE OF SERVICE 13

I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Trial courts in Ohio are commonly called upon to exercise their discretion and determine whether documents or information sought to be discovered in civil actions are, in fact, discoverable. Upon doing so, they are guided by long-established principles of law; principles frequently invoked by this Court and Ohio's intermediate appellate courts: "It is unquestioned that 'courts have broad discretion over discovery matters.'" *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, at ¶ 11. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983) (citations omitted).

In this case, Appellee Clinical Technology, Inc. ("CTI") requested that Appellant NeuroTherm, Inc. ("NeuroTherm") produce to it in discovery a document referred to by NeuroTherm as the "Verrilli Timeline." NeuroTherm objected, claiming that it constituted "attorney work product." CTI moved to compel discovery and NeuroTherm moved for a protective order. The trial court reviewed both motions and the materials accompanying them, as well as the "Verrilli Timeline" itself, which NeuroTherm filed under seal for *in camera* inspection, and then granted CTI's motion and denied NeuroTherm's. NeuroTherm appealed to the Eighth District Court of Appeals, assigning a single assignment of error: the trial court abused its discretion by denying NeuroTherm's motion for a protective order and granting CTI's motion to compel. *Clinical Technology, Inc. v. NeuroTherm, Inc. ("Clinical")*, 8th Dist. Cuyahoga No. 99745, 2013-Ohio-3739, ¶ 4. Following briefing and oral argument, the appeals court unanimously affirmed, finding no abuse of discretion.

NeuroTherm sought neither reconsideration nor en banc consideration of this ruling, nor did it move the appeals court to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution and Rule 25 of the Ohio Rules of Appellate Procedure. Instead, it now seeks to pursue a

jurisdictional appeal in this Court, claiming, with unfiltered hyperbole, that this case—involving two private litigants and a single document of decidedly no public significance—is "critically important" to Ohio jurisprudence, and that the Eighth District's opinion below "has plunged Civ.R. 26(B)(3)'s 'work product privilege' into a state of unacceptable inconsistency." Memorandum in Support of Jurisdiction of Appellant NeuroTherm, Inc. ("NeuroTherm's Memorandum") at 1.

Hyperbole, alone, cannot transform a routine discovery dispute into a case of public or great general interest and, indeed, this case is neither. What happened here is a scenario that repeats itself perhaps daily in courts throughout Ohio: a trial court determined in the broad exercise of its discretion that a document was discoverable, and an appeals court affirmed, finding no abuse of discretion. No new legal ground was broken, and no pressing issues were adjudicated. NeuroTherm is now simply seeking further appellate review of the trial court's discovery orders after its loss in the Eighth District, and is using heightened rhetoric as a pretext to achieve it. It is telling, though, that *not once* in its memorandum does NeuroTherm mention the word "discretion" when referring to the lower courts' decisions. It refuses, in other words, to even acknowledge the basic standard that governed the courts' dispositions below.

***

NeuroTherm's strategy for seeking to transform this case from a simple discovery dispute into one warranting this Court's jurisdiction is to claim that the Eighth District, upon affirming the trial court's discovery orders, applied a legal standard that is both "competing and irreconcilable" with that expressed by the Seventh District Court of Appeals in *Estate of Hohler v. Hohler ("Hohler")*, 185 Ohio App.3d 420, 2009-Ohio-7013, ¶ 46 (7th Dist.). It claims, histrionically, that the Eighth District's opinion "[l]eav[es] the work product privilege in flux and subject to ... irreconcilable rules" and "leaves Ohio's litigants and their attorneys uncertain about whether they may invoke Civ.R. 26(B)(3)'s protections during discovery." NeuroTherm's

Memorandum at 2. The Eighth District's decision does nothing of the sort. That court reviewed the *specific record* developed by the parties in the trial court—a record NeuroTherm does not comment on in its jurisdiction brief, let alone provide this Court with—and found that the trial court did not abuse its discretion upon ordering production of the "Verrilli Timeline." That record is unique to *this* case. Other cases involve different records. NeuroTherm's suggestion that this case somehow affects the application of the work product doctrine throughout the entire State of Ohio is wildly exaggerated, and this Court should decline jurisdiction.

II. APPELLEE'S RESPONSE TO APPELLANT'S STATEMENT OF THE CASE AND FACTS

NeuroTherm obliquely states in its memorandum that "[t]his case arises from the February 2011 transition of certain of [CTI] employees to NeuroTherm." NeuroTherm's Memorandum at 3. Actually, it arises from NeuroTherm's role, with a then-CTI Vice President named Dominic Verrilli ("Verrilli"), in clandestinely planning and then effectuating the defection of multiple sales representatives from CTI to its competitor, NeuroTherm. Once that defection was complete, Verrilli became a NeuroTherm Vice President.

During the second week of February 2011, soon after learning that NeuroTherm and Verrilli had been plotting this defection, a CTI employee contacted NeuroTherm to express his anger at this turn of events. No lawsuit was threatened, and no reference to lawyers was made.

Then, on or around February 22, 2011, NeuroTherm's then-President and Chief Executive Officer, Laurence M. Hicks ("Hicks"), a non-lawyer, asked Verrilli, also a non-lawyer, to prepare a written chronology of events culminating with the defection of CTI

personnel to NeuroTherm—a defection NeuroTherm referred to as the "CTI Transition."[1] Others at NeuroTherm also prepared similar written narratives at that time on the same topic. Hicks, himself, prepared such a narrative during the week of February 14, 2011, which he titled "CTI Transition." And a NeuroTherm sales director named Bryon Ley ("Ley") also prepared such a narrative at Hicks' request, titled "CTI Chronology," which he emailed to Hicks on or around February 22, 2011.

NeuroTherm produced Hicks' and Ley's chronologies to CTI during the course of discovery, but refused to produced Verrilli's—the so-called "Verrilli Timeline"—claiming that it, alone, constituted "attorney work product."

This evidence was presented to the trial court when it reviewed CTI's motion to compel and NeuroTherm's motion for protective order. CTI accompanied its motion with copies of Hicks' and Ley's timelines to support its arguments that Verrilli's timeline was not, in fact, "attorney work product," and that NeuroTherm waived any such claim by voluntarily producing Hicks' and Ley's timelines. Remarkably, NeuroTherm fails to apprise this Court of these salient facts in its memorandum.

NeuroTherm also fails to inform this Court that it presented no evidence to the trial court demonstrating that *any* lawyer had any involvement in the creation, drafting or review of the "Verrilli Timeline." That omission is baffling, given NeuroTherm's contention that the "Verrilli Timeline" constituted "attorney work product."

The trial court, as noted, was aware of these facts when considering the parties' competing motions. It reviewed, as did the Eighth District, the "Verrilli Timeline," as well as

---

[1] In an apparent typographical error, NeuroTherm states in its memorandum that "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." NeuroTherm's Memorandum at 5. Presumably, NeuroTherm meant to say 2011.

those of Hicks and Ley. It received no evidence that any attorney was involved in any capacity in creating or reviewing the "Verrilli Timeline." It also received no evidence that the timeline was prepared in response to any threat of litigation from CTI. Given this evidence and lack thereof, the trial court rendered its decision. Upon appealing to the Eighth District, NeuroTherm did not allege legal error by the trial court. It limited its appeal, instead, to contending that the trial court abused its discretion. Upon review, the Eighth District found no such abuse.

NeuroTherm's memorandum to this Court materially misstates the Eighth District's holding. NeuroTherm states that "[t]he 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.'" NeuroTherm's Memorandum at 5. That is not what the Eighth District held. It held, succinctly, that "[i]n 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." *Clinical*, 2013-Ohio-3739, at ¶ 9. Its holding was expressly confined to the record before it—a record that applies to this case alone, and no other.

III. ARGUMENT

> Appellant's 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.

Given the well-established standard of review applicable to NeuroTherm's appeal from the trial court's discovery orders, the only issue NeuroTherm *could* have raised before this Court is whether the Eighth District properly found that the trial court did not abuse its discretion upon

issuing those orders. *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St. 3d 270, 271 (1983) ("The existence of a Civ. R. 26 (B)(1) 'privilege' ... [is a] discretionary determination[] to be made by the trial court").

NeuroTherm did not raise that issue here—if anything, its memorandum assiduously avoids discussing the abuse of discretion standard—most likely because it realized that couching its memorandum in abuse-of-discretion terms would not lend itself to an argument that this case is one of public or great general interest.

Instead, NeuroTherm contends that the Eighth District's decision below, and specifically its reference to that court's decision in *Perfection Corp. v. Travelers Cas. & Surety ("Perfection")*, 153 Ohio App. 3d 28, 2003-Ohio-2750 (8th Dist.), conflicts with the Seventh District's 2009 decision in *Hohler*. Indeed, the pervasive theme of NeuroTherm's memorandum, presented with characteristic flourish, is that this purported inter-district conflict leaves "the work product privilege in flux and subject to ... irreconcilable rules." NeuroTherm's Memorandum at 2.

NeuroTherm fails, however, to mention that the Eighth District announced its decision in *Perfection* more than a decade ago, with no ensuing upheaval in Ohio's work product jurisprudence. And after the Seventh District decided *Hohler* some six years later, those two decisions have been coexisting peacefully in Ohio ever since. The chaos portended by NeuroTherm has never materialized.

If NeuroTherm truly believed that *Hohler* and the Eighth District's opinion below conflicted, why did it not move the Eighth District to certify that conflict for review by this Court? Article IV, Section 3(B)(4) of the Ohio Constitution, combined with Rule 25 of the Ohio Rules of Appellate Procedure, provide a specific mechanism for seeking such certification from

Ohio's appellate courts, and a court's certification of such a conflict provides an independent basis for seeking Ohio Supreme Court review. *See* Article IV, Section 4.2(B)(2)(f) of the Ohio Constitution ("The supreme court *shall* have appellate jurisdiction as follows: The Supreme Court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article") (emphasis added). NeuroTherm waived that opportunity, and in so doing, relinquished its right to ask the Eighth District to confirm what NeuroTherm now contends; namely, that the Eighth District's decision in *Clinical* conflicts with that of the Seventh District in *Hohler*.

Although NeuroTherm does not divulge in its memorandum the reason it waived its right to seek conflict certification in the Eighth District, one may surmise that the reason it did so is because it anticipated that the Eighth District would deny its motion, and for good reason: *Hohler* and *Clinical* do *not* conflict. *Hohler*, whose facts are not discussed in NeuroTherm's memorandum, is wholly distinguishable from this case, both factually and legally.

Hohler was a probate court action arising from a surviving spouse's being left nothing by her late husband's will. The spouse responded to that disinheritance by electing to take against the will. The decedent and his surviving spouse had been parties to a prenuptial agreement prepared by decedent's attorney, and upon decedent's death, his estate, represented by the same law firm, brought a declaratory judgment action "regarding the prenuptial agreement." The surviving spouse, in turn, brought her own action to "void the prenuptial agreement on the grounds that there was not full disclosure of assets and that she believed the agreement dealt with divorce but not death." The two cases were consolidated. *Hohler*, 185 Ohio App.3d 420, 2009-Ohio-7013, at ¶¶ 4, 5, and 6.

The surviving spouse then subpoenaed the attorney who drafted the prenuptial agreement, seeking both his deposition testimony and "all files related to the decedent." *Hohler*, 2009-Ohio-7013, at ¶ 7. The estate moved for a protective order and to quash the subpoena, claiming the attorney's files were protected by the attorney-client privilege and the "work-product privilege, which belongs to the attorney." *Id.* The surviving spouse moved to compel discovery. *Id.* at ¶ 8. The probate court granted the surviving spouse's motion, reasoning that "R.C. 2317.02(A) allows the surviving spouse to waive the attorney-client privilege for her deceased spouse without limitation." *Id.* at ¶ 10.

The estate appealed, and the Seventh District affirmed and remanded. It held that "the surviving spouse's statutory waiver of attorney-client privilege is not subject to judicially created policy limitations" and affirmed the probate court on that issue. *Id.* at ¶ 78. It also remanded so that the probate court could "conduct an in camera review of the contested portions of the file (those dealing with the prenuptial agreement) and determine whether any are relevant to the issue of full disclosure of assets and whether these specific items are necessary to establish the surviving spouse's claim." Upon remanding, the court instructed the probate court "to distinguish between ordinary fact items and opinions, mental impressions, or theories of the attorney, which are almost absolutely privileged from disclosure as the surviving spouse's brief concedes." *Id.* at ¶ 56.

On remand, the probate court conducted an *in camera* review and again ordered production of documents from the attorney's files to the surviving spouse. Another appeal followed—an appeal NeuroTherm neglects to mention in its memorandum—and the Seventh District affirmed in part and reversed in part. *Estate of Hohler v. Hohler (Hohler II)*, 197 Ohio App.3d 237, 2011-Ohio-5469 (7th Dist.). Specifically, it affirmed the court's order requiring the

production of all documents at issue in that appeal except for one, finding that it was "not relevant to the issues in this case." *Id.* at ¶ 40.

Given *Hohler's* facts, it is not surprising that NeuroTherm did not move to certify a conflict between that decision and the Eighth District's decision below. The two cases bear no resemblance to each other. In *Hohler*, the documents sought to be discovered were an *attorney's* work files. Not so here. NeuroTherm, as noted, adduced no evidence that any attorney was involved in any manner in the creation or preparation of the "Verrilli Timeline." This is a pivotal distinction. As noted by this Court in *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp. ("Givaudan")*, 127 Ohio St.3d 161, 2010-Ohio-4469, "the work-product doctrine provides a qualified privilege protecting the *attorney's* mental processes in preparation of litigation, establishing a zone of privacy in which *lawyers* can analyze and prepare their client's case free from scrutiny or interference by an adversary." *Id.* at ¶ 55, quoting *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (emphasis added; internal quotation marks omitted). The trial court, in its broad discretion, found that NeuroTherm failed to carry its burden of proving that the "Verrilli Timeline" was prepared in anticipation of litigation and failed to constitute work product, and ordered it produced. There was nothing unreasonable, arbitrary or unconscionable about its ruling, and the Eighth District unanimously so found. Its decision comported with long-settled Ohio law, and nothing about it raised issues of public or great general interest. Indeed, NeuroTherm does not even *question* the trial court's exercise of discretion in its submission to this Court, nor does it contend that the Eighth District applied the wrong standard of review.

NeuroTherm's attempt to fashion a rift between the Seventh District's decision in *Hohler* and the Eighth District's decision in *Clinical* is therefore for naught. Apart from the fact the two

cases factually diverge, both of them were ultimately decided by applying the same legal standard, one which NeuroTherm refuses even to mention in its memorandum. As the Seventh District noted in *Hohler II*:

> Under Ohio law, it is well established that the trial court is vested with broad discretion when it comes to matters of discovery, and the standard of review for a trial court's discretion in a discovery matter is whether the court abused its discretion. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 664 N.E.2d 1272. Absent a clear abuse of that discretion, the lower court's decision should not be reversed. *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839, 845, 649 N.E.2d 1247. * * * For a party seeking to overturn the lower court's discovery ruling, the aggrieved party must present evidence that the lower court's actions were unreasonable, arbitrary, or unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140." ***Perfection Corp v. Travelers Cas. & Sur.***, 153 Ohio App.3d 28, 2003-Ohio-2750, 790 N.E.2d 817, at ¶ 9.

2011-Ohio-5469, at ¶ 26 (emphasis added; internal quotation marks omitted). Indeed, it is ironic that NeuroTherm urges this Court to reject "the *Perfection* ... standard" in favor of *Hohler*, when both *Hohler* and *Clinical* cited *Perfection* with approval.

***

Thus, despite NeuroTherm's grim pronouncements, Ohio's work product jurisprudence remains preserved and intact by the Eighth District's decision below. The trial court engaged in a conventional work product analysis when adjudicating the parties' competing discovery motions. It reviewed those motions and the material accompanying them, the "Verrilli Timeline," and the contemporaneously-prepared Hicks and Ley timelines that NeuroTherm voluntarily produced to CTI. It received no evidence that any attorney was involved in creating or preparing the "Verrilli Timeline," or that litigation had been threatened or commenced by CTI against NeuroTherm prior to the creation of that timeline. Although Hicks claimed in his affidavit to have "perceived C.T.I. to be angry with NeuroTherm over Dominic Verrilli and other former C.T.I. employees joining NeuroTherm," *Clinical*, 2013-Ohio-3739, at ¶ 8, "anger, by

itself, is not a basis for litigation[, and] Hicks fail[ed] to offer an explanation for why he reasonably believed the perceived anger would translate to litigation." *Id.* at ¶ 9. Upon concluding its analysis, the trial court found in its discretion that the "Verrilli Timeline" did not constitute work product and that it was discoverable. Its ruling embodied its determination that the "Verrilli Timeline" was not prepared in anticipation of litigation—a determination bolstered by the fact that NeuroTherm voluntarily produced to CTI *Hicks' own* contemporaneously-prepared timeline, as well as Ley's. The Eighth District found the trial court's determination to be reasonable and neither arbitrary nor unconscionable. Its decision was confined to the specific facts of this case and does not warrant discretionary review by this Court.

IV. CONCLUSION

Throughout its memorandum, NeuroTherm asks this Court to reject the *Perfection* "standard" applied by the Eighth District and, instead, "adopt" the *Hohler* "test" for determining whether a document is prepared "in anticipation of litigation" and therefore subject to work product immunity. The Court should decline NeuroTherm's invitation to complicate Ohio's existing and eminently practical work-product jurisprudence. The proposition of law proffered by NeuroTherm, with its confounding admixture of "subjective" and "objective" elements, will spawn more litigation than it will resolve. The definition of work product is well-established in Ohio, *see, e.g., Givaudan, supra,* and need not be changed. Trial courts have broad discretion to determine whether a document is or is not immune from discovery under the work product doctrine, and their determinations are subject to the corresponding standard of review. That is what happened here, that is what happened in *Hohler,* and that is the settled law in Ohio. The "Verrilli Timeline" may be a sensitive document for NeuroTherm, and one that it is manifestly loath to produce, but those reasons do not immunize it from discovery.

For these reasons, this Court should decline jurisdiction in this case.

Respectfully submitted,

Jeremy Gilman by Mark D. Tucker
JEREMY GILMAN (0014144) per atty. 11/7/2013
Counsel of Record
MATTHEW D. GURBACH (0076707)
LORI H. WELKER (0085109)
BENESCH, FRIEDLANDER, COPLAN &
ARONOFF, LLP
200 Public Square, Suite 2300
Cleveland, OH 44114-2378
(216) 363-4500 (phone)
(216) 363-4588 (fax)
jgilman@beneschlaw.com
mgurbach@beneschlaw.com
lwelker@beneschlaw.com

Counsel for Appellee, Clinical Technology, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this Appellee Clinical Technology, Inc.'s Memorandum in Opposition to Jurisdiction, has been served pursuant to Ohio Supreme Court Practice Rule 3.11, via email and first class U.S. mail, postage prepaid, this 7th day of October, 2013 upon the following:

Mitchell G. Blair
Matthew A. Mendoza
Matthew A. Chiricosta
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East 6th Street
Cleveland, OH 44114
mblair@calfee.com
mmendoza@calfee.com
mchiricosta@calfee.com

Counsel for Appellant, NeuroTherm, Inc.

Jerry Lehner by Mark D. Tucker
One of the Attorneys for Appellee

7869168 v1