Supreme Court of Ohio Clerk of Court - Filed October 28, 2015 - Case No. 2015-1648

IN THE OHIO SUPREME COURT

DANIEL N. LAVIN, EXECUTOR OF THE ESTATE OF MARTHA K. LOTTMAN, DECEASED, Appellee, vs. **PAUL B. HERVEY, ESQ., ET AL.**, Appellants.	**CASE NO. 2015-1648**

APPELLEE'S RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Appellee, Daniel Lavin, Executor of the Estate of Martha Lottman, Deceased, through counsel, hereby responds in opposition to Appellants' Motion for Stay. A Memorandum in Opposition is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ Scott M. Zurakowski

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Appellants have filed a Notice of Appeal requesting this Court accept jurisdiction to review the Fifth District Court of Appeals' August 24, 2015 entry, which affirmed the trial court's January 21, 2015 interlocutory entry ordering the release of documentation vital to the effective administration of Ms. Lottman's Estate following an *in camera* inspection. Now, Appellants are requesting this Court stay the production of the documents which will create a hardship for the Executor in his continuing efforts in aid in the complete administration of the Estate. The Executor's time-sensitive interests require a finding against granting a stay, especially when Appellants' appeal has no merit. As a result, the Court should deny Appellants' Motion for Stay Pending Appeal.

II. FACTUAL BACKGROUND

Appellee, as his capacity of executor of the estate of Martha Lottman, filed the instant concealment action in the Stark County Court of Common Pleas, Probate Division, demanding that assets of the Estate be turned over. These assets included materials in the file of Appellants, former attorneys for Ms. Lottman. As part of discovery, and because it is impossible to know if Appellants are guilty of concealment without knowing what documents and assets they actually possessed and concealed, Appellee requested Appellants' file in discovery. Appellants refused, citing attorney-client privilege and confidentiality. The court ordered Appellants complete a privilege log, where it was revealed that the bulk of communications in the file involved third parties, whereby the privilege would never attach in the first instance. The trial court conducted an *in camera* inspection and issued a decision on January 21, 2015, ordering the disclosure of certain documents to Appellee.

Appellants appealed, though they did not challenge the merits of the trial court's decision regarding any of the specific documents the court ordered to be released, but instead assigned two broad errors: the lower court should have held an evidentiary hearing (the lower court did, in fact, hold an *in camera* inspection), and the lower should have discussed concepts of confidentiality and ethics within the purview of Professional Rule of Conduct 1.6 before rendering a decision (which it did, in fact, pass upon). In its error review, the Fifth District Court of Appeals affirmed the lower judgment, finding that an *in camera* inspection—which the lower court *did* complete—was a proper method for determining whether the documents should be disclosed. This Court also passed upon Rule 1.6, explaining that the trial court did not err with regard to the application of this rule of ethics.

III. **LAW & ARGUMENT**

A. **Compelling, time-sensitive interests support a finding against a stay.**

Appellants' motion fails to identify any authority, either rooted in statutory law or case law, which indicates or suggests a stay is mandatory in these circumstances. In fact, the converse is true: a stay is not mandatory and would only serve to frustrate the interests of judicial economy and unduly prejudice Appellee's timely and effective administration of his mother's Estate—the reason this litigation was initiated in the first instance.

The parameters of the instant action remain time sensitive as Appellee must prospectively supplement critical tax documents associated with the Estate's federal tax return. While Appellee was required to file the tax return as the sole extension of time expired in May 2015, the tax return is still subject to audit by the Internal Revenue Service, and the documents Appellee seeks may be pertinent to the Estate's position in an audit. Further, Appellee cannot close the Estate until this matter is extinguished. There is no compelling reason to grant a stay,

and every reason to deny one to ensure this matter can be fairly and fully adjudicated in a timely, effective fashion.

B. **Appellants' success on appeal is not likely.**

Appellants' success on the merits of their appeal is not likely. Appellants' plan is to raise alleged issues predicated on the lower courts' alleged failure "to address Rule 1.6 of the Rules of Professional Conduct in the context of confidentiality claims notwithstanding R.C. 2317.02(A)(1)." Both the trial court and the court of appeals set out an accurate and detailed factual recitation of the matter before analyzing Appellants' claim of attorney-client privilege and work product doctrine. This matter constitutes a routine *in camera* review—hardly a matter of first impression in this Court.

First, the trial court, guided by the law set forth in the Fifth Appellate District and this Court, affirmed that the client, in this case Appellee—*not* the client's attorney—holds the attorney-client privilege, pursuant to R.C. 2317.02(A), as the Executor of the former client's estate. Accordingly, the trial court aptly concluded that "so long as the Appellee expressly waives the attorney client privilege, the privilege does not operate to prevent production of the requested client file documents." Jan. 21 opinion, pg. 5. Additionally, the trial court affirmed bedrock principles of professional responsibility by also concluding the Appellants cannot claim the attorney-client privilege for communications made to individuals *who were not the client*. Finally, the trial court properly followed the well-settled work-product doctrine, concluding that the Appellants cannot claim work-product privilege for documents not prepared in anticipation of litigation.

The trial court's opinion was buttressed by the case law throughout Ohio interpreting R.C. 2317.02 and analogous issues. The trial court undertook the correct analysis pursuant to R.C. 2317.02(A) following an *in camera* inspection of the documents. Moreover,

throughout the court's Judgment Entry, it is clear that the court was weighing the need to respect the confidential nature of information provided to a persons' attorney against the nature of the information and the good cause for releasing the information. The trial court found by its *in camera* inspection that the documents Appellants are refusing to release were not of a confidential nature. In fact, the trial court was meticulous in its review, as it did select certain documents that it was not requiring Appellants to release because they were not needed by the Executor to fulfill his obligations.

The court of appeals affirmed this interlocutory order in a well-reasoned opinion. The court of appeals found that the trial court correctly undertook an *in camera* review of the disputed documents. The court of appeals also explained that "Appellant Hervey's ethical duties to his client pursuant to Rule 1.6 and the advice he received regarding his ethical duties may become relevant when the merits of the concealment action are considered by the court, but at this point the court has merely made a preliminary determination of what documents are not privileged and are to be turned over to the estate in discovery and for preparation of a tax return." See opinion, ¶ 21.

Additionally, this is hardly a matter of first impression by this Court, which previously harmonized R.C. 2317.02(A) and Rule 1.6 in *State v. Dow*, 101 Ohio St.3d 170, 2004-Ohio-705. There, this Court held that, while an attorney should preserve the confidences and secrets of his client within the purview of Rule 1.6, that obligation "does not preclude the lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by disciplinary rule, or when *required by law*." The Court found that, though the client was deceased, the surviving spouse held the attorney-client privilege and could lawfully waive said privilege in accordance with R.C.

2317.02(A). This is exactly what occurred in the instant case. Given that Appellants' appeal is not likely to succeed, this Court should deny Appellants' Motion to Stay so that the Executor can proceed with his time-sensitive obligations for administering the Estate, including the obligations associated with the filing of the federal estate tax return.

C. **A stay of <u>all</u> proceedings is not appropriate and the trial court can still proceed on other issues not related to the appealed entry.**

Even assuming this Court was to entertain staying proceedings, it is important to highlight the parameters of such a stay: the trial court can still proceed to decide whether sanctions are appropriate for Appellants' failure to comply with this Court's prior November 19, 2014, order—an entry which has not been appealed.

It is well founded that "[w]hen a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment." *Yee v. Erie County Sheriff's Department* (1990), 51 Ohio St.3d 43, 44, citing *In re Kurtzhalz* (1943), 141 Ohio St. 432, at paragraph two of the syllabus. For instance, "[t]rial courts retain jurisdiction to resolve collateral matters, such as motions for sanctions, pursuant to Civ.R. 11 or R.C. 2323.51." *Pullins v. Harmer*, 5th Dist. No. 09-CA-40, 2010-Ohio-2590, ¶38.

In the context of the instant matter, Appellee has also filed a motion for sanctions—a collateral matter in that it in no way affects this Court's jurisdiction. Indeed, Appellants' suggestion that *all* proceedings associated with this matter must be stayed is not only disingenuous, but also contrary to the case law throughout Ohio. While Appellee is opposing any stay, if a stay is imposed, it should be limited to the release of the documents in question such that other matters for which the trial court retains jurisdiction should be able to proceed.

D. **Assuming a stay is granted, a bond must be posted.**

In the event this Court disagrees and orders a stay, Appellants have pointed to no authority or reason why they should not be forced to post a bond. Instead, Appellants merely state in a bare, conclusory fashion that no bond should be posted. However, the documentation at issue is vitally important for tax purposes associated with the Estate. Failure to timely supplement or adhere to any IRS request would result in the Estate unduly incurring increased costs, fees, and possibly sanctions as penalty. There should be security posted by the Appellants.

IV. **CONCLUSION**

Appellants' Motion for Stay should be denied because of the Executor's compelling, time-sensitive interests in having access to Estate documents that Appellants are refusing to turn over, and because the success of an appeal is unlikely. The Court should therefore deny Appellants' Motion for Stay Pending Appeal.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served on October 28, 2015, pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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