

**IN THE SUPREME COURT OF OHIO**

**DANIEL LAVIN, EXECUTOR OF THE  
ESTATE OF MARTHA LOTTMAN,**

Plaintiff/Appellee,

vs.

**PAUL HERVEY, et al.**

Defendants/Appellants.

**CASE NO. 15-1648**

**On Appeal from the Court of  
Appeals, Fifth Appellate District,  
Case No. 2015CA0021**

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**MEMORANDUM IN OPPOSITION TO JURISDICTION OF  
DANIEL LAVIN, EXECUTOR OF THE ESTATE OF MARTHA  
LOTTMAN**

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G. Ian Crawford (0019243)  
(COUNSEL OF RECORD),  
116 Cleveland Ave., NW, Suite 800  
Canton, OH 44702  
Phone: (330) 452-6773 / Fax: (330) 452-2014  
icrawford@crawford-lowry.com

ATTORNEYS FOR  
PLAINTIFFS/APPELLANTS  
CRAIG S. BENTLEY, ET AL.

Scott M. Zurakowski (0069040),  
(COUNSEL OF RECORD), and  
James M. Williams (0087806), of  
KRUGLIAK, WILKINS, GRIFFITHS  
& DOUGHERTY CO., L.P.A.  
4775 Munson Street NW/PO Box 36963  
Canton, Ohio 44735-6963  
Phone: (330) 497-0700 / Fax: (330) 497-4020  
szurakowski@kwgd.com;  
jwilliams@kwgd.com

ATTORNEYS FOR PLAINTIFF/APPELLEE  
DANIEL LAVIN, EXECUTOR OF THE  
ESTATE OF MARTHA LOTTMAN

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE  
FOR PUBLIC OR GREAT GENERAL INTEREST**

The issues raised by Appellants are not of public or great general interest, nor do they raise a substantial constitutional question for the Court to decide. This matter involves a trial court's routine interlocutory discovery order which, following an *in camera* inspection, ordered Appellants, Paul Hervey and his law firm of Fitzpatrick, Zimmerman, and Rose Co., L.P.A. to turn over certain non-privileged documents involving their deceased client, Martha Lottman, to Appellee, Daniel Lavin, the Executor of the Estate of Martha Lottman, for purposes of administering the Estate.

Appellants argue this routine *in camera* inspection and subsequent discovery order is the first of its kind, and contends there is a conflict *as applied to this case* between the Ohio Rule of Professional Conduct 1.6 regarding confidentiality and R.C. 2317.02, regarding the attorney-client privilege. In fact, there exists no conflict. Rule 1.6 describes an attorney's duty of confidentiality, while R.C. 2317.02 codifies the circumstances where the court-appointed executor of a deceased client's estate can waive the attorney-client privilege. These are distinct issues because it is well-founded the client, not the attorney, holds the privilege. Simply because an individual who is authorized to waive the privilege knowingly exercises this right does not conflict with an attorney's ethical duty of confidentiality.

When a client names an executor, the client expects and wants her attorney to assist the executor in the proper administration of her estate. If the executor selects other counsel to represent the estate, it is usual and customary for prior counsel to release the client's records to the new counsel. The executor holds the attorney-client privilege of the decedent; it is therefore the executor, not the deceased client's attorney, who has the right to waive the attorney-client privilege so that the release of the client's records is not a breach of this privilege.

This is *not* a matter of first impression for this Court. In *State v. Doe*, 101 Ohio St.3d 170, this Court harmonized R.C. 2317.02 and Rule 1.6, holding that the attorney of a deceased client may not assert the attorney-client privilege when waived in conformity with R.C. 2317.02, emphasizing that the duty of confidentiality under the professional rules does not preclude an attorney from revealing information when authorized by the client, through the Executor, and when required by law. This Court should decline jurisdiction.

### **STATEMENT OF THE CASE AND FACTS**

Despite Appellants' attempt to divert this Court's attention to non-issues—including, unfortunately, unsubstantiated allegations related to Appellee in an individual capacity which have nothing to do with this case<sup>1</sup>—the factual recitation of the instant action is, in actuality, straight-forward. Appellee, Daniel L. Lavin, is the Executor of his mother's estate: the Estate of Martha K. Lottman, aka Martha Klein Lottman, deceased.<sup>2</sup> Appellants, Attorney Paul B. Hervey and his law firm of Fitzpatrick, Zimmerman and Rose, Co., former attorneys of Ms. Lottman, removed certain personal files and property from the home of Martha K. Lottman shortly after her death on February 17, 2014. Included in these files were original documents necessary to the administration of Ms. Lottman's Estate.

Appellants, as prior counsel to Ms. Lottman, possess pertinent documents and correspondence involving Ms. Lottman and corporations in which Ms. Lottman, individually or as a Trustee of her Trust, was a shareholder. Ms. Lottman's documents constitute assets of the Estate. The timely and effective administration of Ms. Lottman's Estate was, and continues to be hindered by Appellants' refusal to release the documentation, correspondence and other material they possess. Appellee, as the Executor of Ms. Lottman's Estate, has the right to receive these

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<sup>1</sup> A motion to strike these portions of Appellants' brief was filed by Appellee on October 28.

<sup>2</sup> Appellants' brief errantly refers to the Estate of Martha *Lavin*.

materials, and Appellants' refusal to comply with the Executor's request constitutes an act of concealment.

While it may be unusual for the prior counsel to hold some records the attorney considers confidential information, it is deeply unusual that all the clients' records would be treated as confidential vis-à-vis an executor. When counsel for the estate requests the prior counsel's records, if any records are considered confidential, it is the duty of the prior counsel to first release all the records that are not confidential, then ask for the probate court to review any specific documents that counsel believes to be confidential. In this case, prior counsel stonewalled and refused to even release the file taken from decedent's home, continually failing to cooperate with the release of the documentation relevant to the administration of the Estate and ultimately leading to the filing of the concealment action.

After a number of requests and Appellants' continued refusals, Appellee instituted this concealment action on September 15, 2014. On October 8, 2014, Appellants filed a motion to dismiss the action, arguing that the items sought by Appellee were protected by the attorney-client privilege and confidential in nature. The court determined it was appropriate to conduct an *in camera* inspection of the documents in Appellants' possession to determine if any documents should not be released to the Executor on the grounds that Appellants submitted. The court ordered Appellants to compile a log describing the documents and basis of it being protected, and to submit the contested documentation to the court *in camera*.

Following an *in camera* inspection, the court found most of the documents *not* protected by attorney-client privilege or by the work product doctrine, ordering the documents be turned over to Appellee. The court, in so doing, applied the well-founded law of Ohio, noting that the documents must be disseminated for numerous reasons.

At the outset, many of the communications Appellants submitted included individuals who were not the client. The court correctly noted Ohio law states communications are only protected when made between a client and an attorney. Appellants' privilege log identified over one dozen recipients of the communications who were not Martha Lottman, and who do not hold the attorney-client privilege, including her accountant, her bookkeeper, her stock advisor, and her stock advisor's assistant. The log also identified Appellee Daniel Lavin as a recipient of emails Appellants claim were privileged. The court noted the Appellants could not claim the attorney-client privilege for communications made to individuals who were not the client.

The court also noted that, under Ohio law, the client—*not* the client's attorney—holds the attorney-client privilege. When the client dies, Ohio law provides the privilege survives and passes to either the executor of the client's estate or the client's surviving spouse pursuant to the express language of R.C. 2317.02(A). The court also noted, Appellants could not claim work-product privilege for documents not prepared in anticipation of litigation.<sup>3</sup>

The trial court therefore ordered the disclosure and dissemination of the documentation. Appellants filed a motion for reconsideration, which was denied. Appellants then appealed to the Fifth District Court of Appeals in *Lavin v. Hervey*, 5th Dist. No. 15CA00021, 2015-Ohio-3458, wherein they raised two assignments of error: first, that the trial court should have held an evidentiary hearing and second, that the trial court erred in failing to address Ohio Rule of Professional Conduct 1.6.

Regarding the first assigned error, the court of appeals emphasized that the trial court had not yet determined appellants' guilt or innocence in the underlying concealment action. *Id.*, ¶16. Rather, “[t]he order appealed from is an interlocutory discovery order. While the

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<sup>3</sup> The court noted a small number of documents should be withheld from production because they either were not pertinent to the Estate or they constitute attorney opinion work product.

[concealment] statute requires an evidentiary hearing on the concealment action itself, appellants' assignment of error is premature, as the court has not yet made a determination of whether appellants are guilty of concealment." *Id.* The court of appeals further explained that an *in camera* inspection is a proper method for determining whether matters claimed to be privileged must be disclosed in discovery, noting that the trial court indeed conducted an *in camera* review of the requested documents which appellants claimed were protected by work-product or attorney-client privilege. *Id.*, ¶17. The court of appeals ultimately held that "[t]he court did not err in failing to hold an evidentiary hearing in addition to the *in camera* review at this stage of the proceedings." *Id.*

Regarding the second assigned error, the court of appeals aptly noted that "Rule 1.6 sets forth an attorney's responsibilities regarding confidentiality. The rule does not define what documents are protected by privilege. The trial court's opinion sets forth a detailed legal and factual analysis of what documents submitted to the court *in camera* were or were not protected by attorney-client privilege or work-product privilege. The trial court did not err in failing to discuss Rule 1.6." *Id.*, ¶ 20. The court of appeals noted, however, 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." *Id.* ¶21. The court of appeals therefore affirmed the trial court's judgment.

Appellants again filed a motion for reconsideration, which was denied, before seeking review in this honorable Court. The trial court, in the meantime, has set the matter for a concealment hearing to determine whether or not Appellants are guilty of concealment.

Interestingly, Appellants state throughout their brief that they are “eager” to attend this hearing (pg. 6), and that the probate court is committing error in not “promptly” holding this hearing—however, the hearing has not occurred due to Appellants’ continued appeals. Moreover, it would be difficult for Appellee to participate in the concealment hearing if the documents remain concealed.

Finally, as a diverting tactic designed to detract attention away from the core issue of the case, Appellants randomly filed, on October 8, 2014, an errant affidavit levying defamatory allegations against Mr. Lavin personally, which will not be reprinted here. These damaging allegations unfortunately have been already been reprinted in the briefing before this Court. See, e.g., pg. 5. Though having nothing to do with this case, Appellee must respond: these accusations not only are irrelevant, but are patently false and have been correctly sealed by this Court.

## **LAW AND ARGUMENT**

### ***Response to Appellants’ Proposition of Law No. 1***

- 1. An attorney’s obligation to maintain confidence under Professional Conduct Rule 1.6 does not supersede a client’s ability to waive the attorney-client privilege because, as previously held by this Court: (1) the client or, when deceased, the client’s surviving spouse or executor holds the privilege under R.C. 2317.02; (2) Ohio law, R.C. 2317.02, permits a client or a client’s surviving spouse or executor to waive the privilege; (3) the duty of confidentiality under Rule 1.6 does not preclude a lawyer from revealing information when authorized by the client or when required by law.**

Appellants incorrectly assert their duty of confidentiality under Rule 1.6 supersedes their client’s waiver of the attorney-client privilege under R.C. 2317.02, and is a matter of first impression by this Court. This is not a conflict, nor is it a matter of first impression; in fact, R.C. 2317.02 and Rule 1.6 have been previously harmonized by this Court, albeit in the context of a surviving spouse.

*Doe, supra*, concerned contempt proceedings brought against an attorney, Beth Goldstein Lewis, who relied upon the attorney-client privilege and duties of confidentiality in refusing to answer written interrogatories concerning her deceased client, propounded to her by a Montgomery County grand jury—even after having been ordered to do so by the Common Pleas Court of Montgomery County. The deceased client’s surviving husband expressly consented, pursuant to R.C. 2317.02(A), to the disclosure of all communications made to Lewis (the client’s former attorney) by the deceased client and to disclosure of any advice given to the deceased client by Lewis. Ultimately, Lewis failed to comply and was held in contempt of court.

This Court accepted discretionary review, noting that the resolution of the appeal depended on the interpretation of R.C. 2317.02. The statute explains:

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client \* \* \*.

*See also Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St. 3d 488, 488, 854 N.E.2d 487, 488, following *State v. McDermott* (1995), 72 Ohio St.3d 570, 651 N.E.2d 985, followed. (holding R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived.)

Counsel in *Doe*—just as Appellants here—contended that an attorney may choose to comply or refuse to comply with disclosure, in the attorney’s discretion, after a surviving spouse waives the attorney-client privilege due to obligations set forth in the ethical rules.

This Court flatly rejected such an argument. This Court started its analysis by setting forth the bedrock principle that “[t]he attorney-client privilege belongs solely to the client—not the attorney.” *Doe*, ¶15, citing *Lightbody v. Rust*, 137 Ohio App.3d 658 (2000). In

interpreting R.C. 2317.02(A), this Court relied upon the express language of the statute, holding that, “[i]n the event of the death of a client, R.C. 2317.02(A) entitles the surviving spouse of that client to waive the privilege on behalf of the deceased client. Ultimately, however, determination of whether an attorney must testify in judicial proceedings as to confidences received during representation of a deceased client lies with the court—not the attorney.” *Id.*

This Court expressly held: “Nor do we accept the argument that Lewis [decedent’s counsel] is ethically barred from answering the grand jury’s interrogatories. While an attorney should preserve the confidences and secrets of his client, that obligation ‘does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.’” *Id.*

Appellants’ arguments mirror those of the appellant in *Doe* as they too have continually argued R.C. 2317.02 should not apply under the misguided proposition that Rule 1.6 somehow permits them to hold the attorney-client privilege.<sup>4</sup>

They also contend that they know what Ms. Lottman would have wanted: they argue the decedent “did not intend for her youngest son to be the sole executor of her estate [merely the co-executor], nor did she intend for him to have control over financials she set aside for his benefit in her estate planning.” The same argument was passed upon in *Doe*: “Lewis contends that she knows better than [surviving spouse] Shane Franks whether [deceased client] Jan Franks would have wanted Lewis to disclose a communication Jan Franks made to her.” As this Court previously explained—“[w]hether this is true is irrelevant. The General Assembly made that policy decision. R.C. 2317.02(A) vests authority to waive the attorney-client privilege

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<sup>4</sup> *Doe* was decided in 2002, at which time the applicable ethical rules were the former Ohio Code of Professional Responsibility. Though the code was superseded, the Ohio Code of Professional Conduct Rule 1.6 corresponds to the former section analyzed in *Doe* in all material respects because the new section also permits disclosure to comply with the law or a court order. Rule 1.6(b)(6).

in a surviving spouse, and not in an attorney.” *Id.*, ¶16. This Court therefore affirmed the finding of contempt against the misguided attorney.

Similarly here, Daniel Lavin is the Executor of Ms. Lottman’s Estate and waived her privilege. Appellants therefore have no legal justification under Rule 1.6 to refuse to propound documents which they claim are privileged. Further, had Daniel Lavin served as a Co-Executor, which he was supposed to be along with his three other siblings, he still would have a right to the documents of prior counsel. The fact Mr. Lavin became sole executor, as emphasized by Appellants, should have no bearing on the Estate’s right to the documents.

Indeed, Appellants fail to direct this Court to any authority which suggests Rule 1.6 is somehow dispositive on whether documentation is privileged. The best Appellants can do is rely on highly distinguishable non-persuasive ethical opinions from different states. For instance, Appellants claim a Nassau County, New York, Bar Association opinion is instructive as it seems to vindicate an attorney’s efforts to not disclose information/documentation, or at least refuse until that attorney can take legal steps to seek clarification before making disclosure.

That ethical opinion, involving a husband and his deceased ex-wife’s estate, is indeed highly distinguishable. First, it was unclear whether the husband was in fact the lawfully-appointed Executor of the Wife’s estate under her probated Will (a critical question given the pair had divorced). Page 5. The Committee noted the easy answer is merely that the privilege may be waived by the client’s personal representative (i.e., a court-appointed representative) if and when acting in the interests of the decedent-client and his or her estate. The problem before the Committee was that the former spouse, who purportedly was the executor, was also an adversary to his wife due to the divorce. The Committee noted the husband may seek judicial intervention, upon which time an in camera examination would likely follow.

The ethical opinions relied upon by Appellants have little to do with whether or not certain documentation is privileged or not privileged. Rather, this Court need not look any further than its own precedent, which harmonizes R.C. 2317.02 and Rule 1.6.

***Response to Appellants' Proposition of Law No. 2***

- 2. The trial court did not need to hold an *ex parte* hearing—an *in camera* inspection was a sufficient method to determine whether the documentation was privileged. A full concealment hearing on Appellants' guilt or innocence is planned, but is being delayed by Appellants' continued appeals.**

Before ordering allegedly-privileged documents to be disseminated to a requesting party, a trial court is required to review the documentation to determine whether it is protected by the attorney-client privilege. Here, the trial court conducted an *in camera* inspection of all documents submitted by Appellants in a privilege log, and made an appropriate ruling on what was privileged and what was not privileged, which the court of appeals affirmed.

Appellants' argument is premised upon a mischaracterization of the trial court's January 21 entry. Nowhere in the entry does the court purport to pass upon the allegations contained in Appellee's Concealment Complaint, nor does it purport to impose a finding of guilt or bad faith, pursuant to the concealment statute, R.C. 2109.50. An evidentiary hearing would be necessary prior to making such determinations; however, an evidentiary hearing is not necessary before determining the applicability of any privilege—a point affirmed by the court of appeals.

Instead, the trial court and court of appeals properly concluded an *in camera* inspection was an appropriate method of determining whether documentation is privileged. The court did, in fact, conduct an *in camera* inspection, and therefore properly followed the necessary procedure before passing upon the applicability of any prospective privilege.

Even when the time comes for a concealment hearing, Appellants have no authority—nor could any be located—which suggests that an *ex parte* hearing is appropriate. There is no reason to accept jurisdiction over this proposition.

## CONCLUSION

The issues raised by Appellants are not of public or great general interest, nor do they raise a substantial constitutional question for the Court to decide. Rather, existing Ohio case law from this Court applies to the various points argued by Appellants. The memorandum in support of jurisdiction does not present the Court with any new or novel issues to be decided. Appellants merely want this Court to exercise its discretionary jurisdiction in order to second-guess the court of appeals' decision. For the foregoing reasons, Appellee respectfully requests that the Court decline to accept this case for review.

Respectfully submitted,

*/s/ Scott M. Zurakowski*

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Scott M. Zurakowski (0069040),  
(COUNSEL OF RECORD), and  
James M. Williams (0087806), of  
KRUGLIAK, WILKINS, GRIFFITHS  
& DOUGHERTY CO., L.P.A.  
4775 Munson Street NW/PO Box 36963  
Canton, Ohio 44735-6963  
Phone: (330) 497-0700 / Fax: (330) 497-4020  
ATTORNEYS FOR PLAINTIFF/APPELLEE

**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was served by Ordinary U.S. Mail

this 9<sup>th</sup> day of November 2015 upon:

G. Ian Crawford  
CRAWFORD, LOWRY &  
ASSOCIATES, LLC  
116 Cleveland Avenue NW, Suite 800  
Canton, Ohio 44702  
*Attorneys for Appellants/Defendants*

*/s/ Scott M. Zurakowski*  
\_\_\_\_\_  
Scott M. Zurakowski (0069040),  
(COUNSEL OF RECORD), of  
KRUGLIAK, WILKINS, GRIFFITHS  
& DOUGHERTY CO., L.P.A.  
ATTORNEYS FOR PLAINTIFF/APPELLEE