[Cite as *Ro-Mai Industries, Inc. v. Manning Properties*, 2010-Ohio-2290.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

RO-MAI INDUSTRIES, INC.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-P-0066**
- vs -	:	
MANNING PROPERTIES, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2006 CV 0356.

Judgment: Affirmed

Natalie F. Grubb and *John S. Lobur*, Grubb and Associates, L.P.A., 437 West Lafayette Road, Ste. 260-A, Medina, OH 44256 (For Plaintiff-Appellant).

Paul D. Eklund and *Shannon M. Fogarty*, Davis & Young Company, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Ro-Mai Industries, Inc., appeals the Order and Journal Entry of the Portage County Court of Common Pleas, compelling the discovery of certain documents alleged to be privileged. For the following reasons, we affirm the decision of the court below.

{¶2} The present case began on October 21, 2005, when Ro-Mai filed a Complaint in the Geauga County Court of Common Pleas. In 2006, the case was transferred to the Portage County Court of Common Pleas.

{¶3} On April 18, 2008, Ro-Mai filed a Third Amended Complaint against defendants-appellees, Manning Properties[1], Michael Manning, Highland Phoenix, Ltd., and Geis Construction, Inc. The Complaint alleged the following:

{¶4} In September 2001, Ro-Mai and Geis Construction entered into a month-to-month oral lease for storage space (the Highland Phoenix Building) located in Twinsburg, Ohio, and owned by Geis Construction. Ro-Mai used the leased space for the storage of more than one hundred pieces of commercial tool and die equipment.

{¶5} In 2002, Fred Geis, Geis Construction's president, and Manning created Highland Phoenix, Ltd., an operating company. In 2003, Highland Phoenix purchased the storage space from Geis Construction. Ro-Mai continued to lease the property and was current in its rent payments through September 2005.

{¶6} On September 2, 2005, Manning sent a letter to Ro-Mai, requiring the premises to be vacated by September 15, 2005, to accommodate new long-term tenants. On or after September 15, 2005, all but two pieces of Ro-Mai's equipment were removed from the building, improperly handled, and left in the parking lot. Ro-Mai was not aware of the equipments' removal until September 26, 2005, by which time the equipment was further damaged by exposure to the elements.

{¶7} Ro-Mai raised claims against Manning, Highland Phoenix, and Geis Construction for Wrongful Eviction, Negligence, Breach of Oral Lease, Breach of the

1. Manning Properties is a sole proprietorship operated by Michael Manning and was voluntarily dismissed from the case on October 7, 2009.

Covenant of Quiet Enjoyment, Trespass, and Conversion - Wrongful Removal of Property/Equipment.

{¶8} In December 2006, Motorists Mutual Insurance Company filed a Complaint against Ro-Mai in the Portage County Court of Common Pleas, subsequently transferred to the Summit County Court of Common Pleas (Case No. CV-2007-04-2718). Motorists Mutual sought a declaration that Ro-Mai was not entitled to "building and personal property coverage" for damage to the equipment stored at Highland Phoenix under a commercial insurance policy issued by Motorists Mutual.

{¶9} On May 17, 2007, Ro-Mai Industries filed counterclaims against Motorists Mutual for Breach of Contract, Negligence, and Breach of the Duty of Good Faith.

{¶10} On December 2, 2008, Motorists Mutual and Ro-Mai dismissed all pending claims, with prejudice, thus concluding the Summit County litigation.

{¶11} On January 26, 2009, Manning, Highland Phoenix, and Geis Construction served Motorists Mutual with a Subpoena Duces Tecum requesting: "A copy of the complete claims file including any reports produced during the case and a copy of any release and settlement agreements relative to the case known as Motorists Mutual Insurance Company v. Ro-Mai Industries, Inc., Summit County Case No. CV 2007-04-2718."

{¶12} On February 4, 2009, Ro-Mai filed a Motion to Quash Defendants' Subpoena Served upon Motorists Mutual Insurance Company and Motion for Protective Order.

{¶13} On September 9, 2009, a Magistrate's Order was issued, providing as follows:

{¶14} After examining the record, pleadings, briefs and arguments of the parties (inclusive of an *in camera* inspection of certain documents and reports submitted to the

Magistrate by Motorists Mutual Insurance Company), the Magistrate determines that the following documents held by Motorists Mutual concerning a similar case in Summit County Common Pleas Court may be released to the Defendants pursuant to discovery request:

{¶15} Complete copies of all reports, time sheets, curriculum vitae and other documents including four CD disc [sic], produced by expert witness Rolland Schaar [on behalf of Ro-Mai].

{¶16} A fully executed copy of Receipt, Release, and Trust Agreement between Motorists Mutual Insurance Company and Ro-Mai Industries executed January 16, 2009. No other correspondence negotiating the Agreement is discoverable.

{¶17} A document entitled "Determination of Losses" authorized by Ro-Mai Industries or its Counsel.

{¶18} On September 18, 2009, Ro-Mai filed a Motion to Set Aside the Magistrate's Order of September 9, 2009.

{¶19} On October 13, 2009, a hearing was held before the trial court on Ro-Mai's Motion.

{¶20} On October 15, 2009, the trial court issued its Order and Journal Entry, overruling Ro-Mai's Motion and adopting the Magistrate's Order, except with respect to the document entitled "Determination of Losses"/proof of loss form. The court held this document was not discoverable as it "was never signed and *** was an internal document prepared to be used for litigation only."

{¶21} On October 19, 2009, Ro-Mai filed a Notice of Appeal from the trial court's October 15, 2009 Order and Journal Entry. On appeal, Ro-Mai raises the following assignments of error:

{¶22} "[1.] The trial court erred to the prejudice of Appellant in concluding that the confidential settlement agreement and the notes/reports of appellant's expert are discoverable."

{¶23} "[2.] The trial court erred to the prejudice of Appellant as this case is not a tort action, and, thus, O.R.C. Section 2315.20 does not apply."

{¶24} "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Civ.R. 26(1).

{¶25} "The burden to show that testimony or documents are confidential or privileged is on the party seeking to exclude the material." *Grace v. Mastruserio*, 182 Ohio App.3d 243, 2007-Ohio-3942, at ¶19 (citation omitted); *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, at paragraph two of the syllabus; *Waldman v. Waldman*, (1976), 48 Ohio St.2d 176, 178.

{¶26} The trial court has discretionary power to regulate discovery and its decisions will generally not be overturned absent an abuse of that discretion. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592, 1996-Ohio-265 (citations omitted); *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57. "But whether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo." *Medical Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13 (citation omitted). "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." Id.[2]

2. Our ability to conduct a completely de novo review of the issues raised is compromised by the fact that the disputed documents are not in the record. According to the Privilege Log prepared by Ro-Mai Industries, there are 551 documents having their own Bates No. in the claims file. No other description of

{¶27} Ro-Mai asserts that the documents held discoverable by the trial court's October 15, 2009 Order and Journal Entry are protected as confidential communications, work product, and under the attorney-client privilege. "Ro-Mai's confidential Settlement Agreement and the reports/notes of Schaar are part of Motorists' claim and litigation file in the Summit County Case and are thus not discoverable in the Portage County case."

{¶28} As an initial matter, we agree with the appellees that documents and/or communications are not privileged for the purposes of Civ.R. 26(1) merely because the parties themselves have deemed them confidential. *Ex parte Frye* (1951), 155 Ohio St. 345, at paragraphs one and two of the syllabus; *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 11 ("[i]t is the policy of this state that in the absence of a privilege, a witness may not refuse to testify to pertinent facts in a judicial proceeding merely because such testimony involves information obtained in confidence from another party"). "Simply put, litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality." *DIRECTV, Inc. Puccinelli* (D.Kan.2004), 224 F.R.D. 677, 685. Cf. Evid.R. 501 ("[t]he privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience").

{¶29} "In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *State ex rel. Leslie v. Ohio Housing Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, at ¶18. The privilege prevents "[a]n attorney" from testifying "concerning a

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the documents is provided. Moreover, the trial court's Order identifies the documents held discoverable by description, rather than Bates No. Thus, it is impossible to correlate the Privilege Log with the Order.

communication made to the attorney by a client in that relation or the attorney's advice to a client," with certain exceptions. R.C. 2317.02(A)(1) and (2).

{¶30} Under the work-product doctrine, "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." Civ.R. 26(B)(3).

{¶31} With respect to the settlement agreement between Ro-Mai Industries and Motorists Mutual, i.e. the Receipt, Release, and Trust Agreement referenced in the trial court's Order, we agree with the appellees that the document does not constitute a privileged communication between an attorney and his or her client, but, rather, an agreement reached by opposing litigants in a civil action. Accordingly, the discovery of the settlement agreement is not barred by R.C. 2317.02(A) and/or the attorney-client privilege.

{¶32} On this issue, we find the similar holdings of numerous federal district courts to be persuasive. *LaForest v. Honeywell Internatl. Inc.* (W.D.N.Y. 2004), No. 03CV-6248T, 2004 U.S. Dist. LEXIS 30430, at *12 (a settlement agreement "represents more of 'an understanding among adversaries,' than among parties with identical or common legal interests" and, therefore, "does not satisfy the requirements of the attorney-client privilege"); *Conopco, Inc. v. Wein* (S.D.N.Y.2007), No. 05-CV-9899, 2007 U.S. Dist. LEXIS 27339, at *14 ("there is no privilege that precludes the discovery of settlement agreements") (citation omitted); *Thomas & Marker Constr. Co. v. Wal-Mart Stores, Inc.* (S.D.Ohio 2008), No. 3:06-CV-406, 2008 U.S. Dist. LEXIS 93717, at *8-*10 (holding the terms of a settlement agreement both discoverable and relevant); *Grupo*

Condumex, S.A. de C.V. v. SPX Corp. (N.D.Ohio 2004), 331 F.Supp.2d 623, 629 ("*existence* of the settlement and/or its terms generally not privileged") (emphasis sic).

{¶33} Nor does the agreement qualify as privileged under the work-product doctrine, inasmuch as it was not "prepared in anticipation of litigation or for trial." "A settlement agreement is not a record compiled in anticipation of or in defense of a lawsuit. It simply does not prepare one for trial. A settlement agreement is a contract negotiated with the opposing party to prevent or conclude litigation. Consequently, although the parties and their attorneys subjectively evaluated the litigation confronting them in order to reach a settlement, the settlement agreement itself contains only the result of the negotiation process and not the bargaining discourse which took place between the parties in achieving the settlement." *State ex rel. Kinsley v. Berea Bd. of Edn.* (1990), 64 Ohio App.3d 659, 663 (construing the definition of "trial preparation record" in R.C. 149.43(A)(4); *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, at ¶¶17-18 (citing, with approval, *Kinsley*'s observation that a "settlement agreement is not a record compiled in anticipation of or in defense of a lawsuit").

{¶34} Our holding is further supported by the Ohio Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Utils. Comm. of Ohio*, 111 Ohio St.3d 300, 2006-Ohio-5789. At issue in *Ohio Consumers' Counsel* was Cincinnati Gas & Electric Company's application for approval of its rate stabilization plan. Cincinnati Gas submitted to the Public Utilities Commission a stipulation reached by many of the parties before the Commission that would have resolved the pending issues in the application. Id. at ¶5. The Ohio Consumers' Counsel sought to compel the discovery of "undisclosed agreements" between Cincinnati Gas and the signatory parties to the stipulation. Id. at ¶6 and ¶77.

{¶35} The Commission denied the motion on the grounds that the information sought was privileged.[3] The Commission's decision was based, in part, on a Sixth Circuit decision, *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.* (C.A.6, 2003), 332 F.3d 976. "In *Goodyear*, the Sixth Circuit recognized a "settlement privilege" under federal law that protects statements made in furtherance of settlement from third-party discovery." 2006-Ohio-5789, at ¶88, citing *Goodyear*, 332 F.3d at 980-982.

{¶36} The Ohio Supreme Court acknowledged that federal case law, although not binding, "can be instructive where *** Ohio's rule is similar to the federal rule," as is the case with Ohio Civ.R. 26(B)(1) and Fed.R.Civ.P. 26(b)(1). Id. at ¶89. The Ohio court, however, did not find *Goodyear* persuasive and "decline[d] to recognize a settlement privilege applicable to Ohio discovery practice." Id. The court explained that "no Ohio statute or case law *** expressly creates a 'settlement privilege' pertaining to information sought at the discovery stage." Id. at ¶92. The court further stated that Ohio Evid.R. 408 "provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements is not always impermissible." Id.

{¶37} Finally, the Ohio Supreme Court held that, even under the privilege created by *Goodyear*, the settlement agreements are properly discoverable. "The Sixth Circuit stated that the settlement privilege *** extends only to the underlying discussions made during settlement negotiations and not the occurrence of settlement talks, the terms of any settlement, or the settlement agreement itself." Id. at ¶93, citing *Goodyear*, 332 F.3d at 981-982; accord *QSI-Fostoria, D.C., LLC v. BACM 2001-1 Cent. Park W., LLC* (N.D.Ohio 2006), No. 3:02CV07466, 2006 U.S. Dist. LEXIS 48245, at *4 (the

3. The Supreme Court's decision does not state precisely how the agreements were deemed privileged.

Goodyear settlement privilege "does not extend beyond actual negotiations to the terms of the final agreement").[4]

{¶38} With respect to the reports and other documents produced by the expert witness, Rolland Schaar, in the Summit County litigation, Ro-Mai argues broadly that "the insurance claims file of an insurance company is not discoverable by a third party," except "in situations involving first-party bad faith claims or motions for prejudgment interest." In *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, the Ohio Supreme Court rejected the "blanket assertion" that a claims file contained privileged communications. Id. at 166. Rather, the court "simply note[d] that 'the burden of showing that testimony [or documents] sought to be excluded *** rests upon the party seeking to exclude [them] ***.'" Id. (citation omitted).

{¶39} The appellees contend that discovery of Schaar's reports and notes are expressly authorized by Civ.R. 26(B)(5)(b), which provides "any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter." *Geesaman v. St. Rita's Med. Ctr.*, 183 Ohio App.3d 555, 2009-Ohio-3931, at ¶59 ("[a] litigant is not only entitled to know an opposing expert's opinion on a matter, but the basis for that opinion as well *** so that opposing counsel may make adequate trial preparations") (citation omitted).

{¶40} The fact that Schaar's prior reports and notes are contained in Motorists Mutual's claim file is not, without more, a sufficient reason to shield them from discovery.[5]

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4. We note that the Magistrate's Order essentially follows the Sixth Circuit's holding in *Goodyear*, by allowing discovery of the "Receipt, Release, and Trust Agreement between Motorist Mutual Insurance Company and Ro-Mai Industries," but excluding all "other correspondence negotiating the Agreement."

5. We note that, in addition to the February 4, 2009 Motion to Quash Defendants' Subpoena Served upon Motorists Mutual Insurance Company and Motion for Protective Order, Ro-Mai filed a Motion for a Protective Order for the Depositions of Robert G. Maier, Charles Cek, Dr. Rolland P. Schaar, PhD., and Dr. John F. Burke, PhD., on February 27, 2009. This Motion sought an order barring the named

{¶41} Ro-Mai also argues that the appellees have failed to demonstrate "good cause" for discovery of the settlement agreement and expert reports. Specifically, Ro-Mai rejects the appellees' contention that discovery of these documents is necessary to determine the real party in interest. We reject the position that appellees had to demonstrate "good cause" for the discovery of the subpoenaed documents. This standard applies where the documents sought are found to constitute work product/trial preparation materials, unlike the documents at issue herein. Civ.R. 26(B)(3). Also, the determination that the documents at issue herein are not privileged distinguishes the present case from *Schaefer v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, relied upon by Ro-Mai.

{¶42} In the present case, the appellees are entitled to discovery if "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Civ.R. 26(B)(1). The appellees have met that burden with respect to the settlement agreement and expert reports and notes, inasmuch as the Summit County litigation concerned the damages to the same equipment for which Ro-Mai seeks to hold the appellees liable.

{¶43} The first assignment of error is without merit.

{¶44} In its second assignment of error, Ro-Mai Industries claims the trial court erred by not applying the collateral-source rule, codified at R.C. 2315.20, to bar the discovery of the disputed documents. Ro-Mai characterizes the present action as fundamentally "a civil action for damages for breach of contract," thereby precluding the introduction of any evidence of collateral benefits it received as a result of the Summit County litigation. R.C. 2315.20(A) and (D)(1).

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deponents from testifying "concerning anything related to the Summit County matter." On March 5, 2010, the trial court stayed ruling upon any pending motions until a decision is issued by this court.

{¶45} The applicability of R.C. 2315.20 to the issue of whether the settlement agreement and expert reports and notes were privileged was not decided by the trial court, and is irrelevant to that determination. As noted above, the issue is whether the discovery is reasonably calculated to lead to the discovery of admissible evidence, not whether the agreement and reports themselves will be admissible. Civ.R. 26(B)(1). The collateral source rule/R.C. 2315.20 does not bar the discovery of evidence that is otherwise "reasonably calculated to lead to the discovery of admissible evidence." Whether R.C. 2315.20 will apply to the trial of Ro-Mai Industries' claims is not properly before us and need not be decided. Cf. *Buchman v. Bd. of Edn. of Wayne Trace Local School Dist.*, 73 Ohio St.3d 260, 272, 1995-Ohio-136 (a party is entitled to discovery regarding collateral source benefits under Civ.R. 26(B)(1), irrespective of an independent and separate legal basis for such discovery and irrespective of the issue of admissibility).

{¶46} The second assignment of error is without merit.

{¶47} For the forgoing reasons, the Order and Journal Entry of the Portage County Court of Common Pleas, compelling the discovery of the settlement agreement and expert reports and notes held by Motorists Mutual, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.