

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

B.F.G. EMPLOYEES CREDIT UNION, INC.

Plaintiff-Appellee

v.

KOPCO & COMPANY, etc.

Defendant-Appellee

v.

BRUCE W. IRELAND

Third-Party-Defendant-Appellee

C.A. No. 01CA007929

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 99 CV 124718

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

{¶1} Appellant, the Superintendent of the Division of Financial Institutions for the Ohio Department of Commerce (“Division”), has appealed from a judgment of the Lorain County Court of Common Pleas that denied its motion to quash a subpoena served by Defendant-Appellee Kopco & Co. (“Kopco”). This Court reverses and remands.

I

{¶2} This appeal stems from a complaint Plaintiff-Appellee B.F.G. Employees Credit Union, Inc. (“B.F.G.”) filed against Kopco for accounting malpractice, negligence and breach of fiduciary duty. B.F.G. hired Kopco to perform an audit of B.F.G.’s financial records. After Kopco completed the audit and issued its report, B.F.G. alleged that Kopco failed to report that Third-Party Defendant-Appellee Bruce Ireland, a former B.F.G. chief executive, had established a margin trading account and was trading government securities. In its complaint, B.F.G. alleged that it suffered a significant financial loss because of Kopco’s failure to report Ireland’s acts.

{¶3} As part of Kopco’s discovery, a subpoena duces tecum was issued to Ken Roberts, acting Deputy Superintendent of the Division, and Jeff Nedwick, a Division credit union examiner. Neither Mr. Roberts, Mr. Nedwick, nor the

Division is a party to the underlying action. The subpoena duces tecum required Mr. Roberts and Mr. Nedwick to produce the following documents:

{¶4} (1) All documents, files and communications concerning the rating of BFG Employees Credit Union, Inc. and how that rating was arrived at.

{¶5} (2) All documents, files and communications, including authority, whether administrative, statutory or regulatory, that prohibits/precludes a state credit union from investing on the margin or having a margin account.

{¶6} (3) All documents, files and communications concerning Kopco & Company.

{¶7} The Division filed a motion to quash the subpoena and the trial court denied the motion. The Division has appealed the decision, asserting one assignment of error.

II

{¶8} Assignment of Error

{¶9} The trial court erred when it denied the Division of Financial Institution's motion to quash [the] subpoena duces tecum because the subpoena required disclosure of statutorily protected information.

{¶10} In its sole assignment of error, the Division has argued that the trial court erred by denying the motion to quash the subpoena duces tecum because R.C. 1733.32 prevents the disclosure of the requested documents. The Division has asserted that the documents are confidential and that the exceptions for disclosure do not apply in this case. The Division did not argue the relevance of the requested documents, the scope of the subpoena or the burden of production

before the trial court. Therefore, this Court cannot reach those issues and is limited to a review of the confidentiality argument.

{¶11} A trial court enjoys broad discretion in the regulation of discovery proceedings. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668; see, also, *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469. Therefore, absent an abuse of discretion, an appellate court will not overturn the trial court's ruling on such matters. *Marshall*, 81 Ohio St.3d at 469. An abuse of discretion connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary, not a mere error of judgment. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. "Despite this broad discretion held by trial courts in discovery matters, trial courts must consider the interests of parties seeking discovery and the interests of parties and nonparties resisting discovery." *Martin v. The Budd Co., et al.* (1998), 128 Ohio App.3d 115, 119.

{¶12} Pursuant to Civ.R. 26(B)(1), "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action[.]" (Emphasis added.) Civ.R. 45(C)(3)(b) provides:

{¶13} On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

{¶14} (b) Requires disclosure of *privileged or otherwise protected matter* and no exception or waiver applies[.]

(Emphasis added.)

{¶15} R.C. 1733.32, the statute upon which the Division relies as exempting from discovery the materials requested by Kopco, states:

{¶16} [I]nformation obtained by the superintendent of credit unions and the superintendent's employees as a result of or arising out of the examination or independent audit of a credit union, from required reports, or because of their official position, *shall be confidential*. Such information may be disclosed only in connection with criminal proceedings or, subject to [R.C. 1733.32.7], when it is necessary for the superintendent to take official action pursuant to [R.C. Chapter 1733] and the rules adopted thereunder regarding the affairs of the credit union examined.

(Emphasis added.) R.C. 1733.32(H).

{¶17} The trial court cited *In re Frye* (1951), 155 Ohio St. 345, and *Cherry Grove S. & L. Co. v. Ohio Deposit Guarantee Fund* (1986), 33 Ohio Misc.2d 29, as its authority in denying the Division's motion to quash the subpoena duces tecum. This Court finds that the trial court erred in relying on *Frye* and *Cherry Grove*.

{¶18} The trial court's reliance on *Cherry Grove* was in error because that case is distinguishable from the case sub judice. First, the subpoena in question in *Cherry Grove* was issued to a party to the action. Plaintiff *Cherry Grove Savings and Loan Co.* sued the *Ohio Deposit Guarantee Fund* alleging negligence, fraud, conversion, and breach of fiduciary duty. *Cherry Grove* filed numerous document requests to which *Ohio Deposit* objected, claiming that R.C. 1155.16 imposed a mandatory secrecy requirement. Unlike the trial court in this case, the trial court

in *Cherry Grove* was not determining a disclosure issue based on a party's subpoena to a non-party. Also distinguishing *Cherry Grove* from the case sub judice is the fact that no outside party or government agency in *Cherry Grove* filed a protective order or any other motion objecting to the disclosure. *Cherry Grove*, 33 Ohio Misc.2d at 31. Finally, the decision in *Cherry Grove* was based on the trial court's interpretation of R.C. 1155.16, a regulation of savings and loan institutions that required the Superintendent of Building and Loan Associations and his subordinates to "keep secret" any information obtained in an examination or by reason of their positions, while the trial court in this case was charged with interpreting R.C. 1733.32. Based on the foregoing, the trial court erred in relying on *Cherry Grove*.

{¶19} The trial court also erred in its interpretation and application of *In re Frye*. The trial court erred because it did not follow the clear standard set out in *Frye* for the disclosure of requested materials. In determining when a party may refuse to testify, the court in *Frye* found:

{¶20} In the absence of a privilege created by constitution or statute not to disclose available information, a witness may not refuse to testify to pertinent facts in a judicial proceeding merely because such testimony comprehends a communication or report from himself as agent to his principal or as independent contractor to his employer, no matter how confidential may be the character of the communication itself or the relationship between the parties thereto.

Frye, 155 Ohio St. at 354. The trial court's interpretation and application of *Frye* in denying the Division's motion to quash was in error because the unambiguous

language of R.C. 1733.32 requires that the subpoenaed information is confidential and cannot be disclosed. R.C. 1733.32(H) provides that “information obtained by the superintendent of credit unions and the superintendent’s employees *** shall be confidential.” The statute allows for limited disclosure but “only in connection with criminal proceedings” or subject to R.C. 1733.32.7, neither of which apply in this case. See R.C. 1733.32(H).

{¶21} This Court finds that the information sought by Kopco falls under the protection of Civ.R. 45(C)(3)(b) and that the trial court erred in denying the motion to quash the subpoena. See *Burns v. Webb* (Oct. 9, 1998), 4th Dist. No. 97CA45, 1998 Ohio App. LEXIS 4896, at *18 (holding that when records sought were afforded confidentiality by statute, the trial court was required to quash the subpoena pursuant to Civ.R. 45(C)(3)(b)). A plain reading of Civ.R. 45(C)(3)(b) provides protection to the subpoenaed information because the statute requires a trial court to quash a subpoena if it “[r]equires disclosure of privileged or otherwise protected matter[.]” Accordingly, the trial court abused its discretion in not quashing the subpoena duces tecum.¹

{¶22} It has been asserted that the subpoenaed information in the case sub judice is not protected because the applicable discovery rules, Civ.R. 26(B)(1) and

¹ Kopco’s argument that the subpoenaed information is not protected because both Kopco and B.F.G. have consented to the disclosure is without merit. The Division, as the party R.C. 1733.32(H) intended to benefit, is the only party

Civ.R. 45(C)(3)(b), include the term “privileged” and R.C. 1733.32(H) includes the term “confidential.” This argument hinges on the assertion that confidentiality is not a privilege and that privilege is a subset of confidentiality. This Court

who has the power to waive the confidentiality. See *State ex rel. Wallace et al. v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431, 435.

disagrees with such an assertion because it misconstrues the relationship between confidentiality and privilege. Privilege is the legal protection given to certain communications and relationships, i.e., attorney-client privilege, doctor-patient privilege, and marital privilege. Confidential is a term used to describe a type of communication or relationship. Privilege and confidentiality are not dependent concepts. Confidentiality can be part of a privileged relationship, but confidentiality requirements can exist outside of a privileged relationship. Further, one can have a privilege without confidentiality. Therefore, the use of the terms “privilege” in Civ.R. 26(B) and Civ.R. 45 and “confidential” in R.C. 1733.32(H) does not prohibit the protection of the subpoenaed information.

{¶23} Based on the foregoing, this Court finds that the trial court’s denial of the Division’s motion to quash the subpoena duces tecum was unreasonable and arbitrary. Accordingly, the Division’s sole assignment of error is sustained.

III

{¶24} The Division’s sole assignment of error is sustained. The judgment of the trial court is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed, and
cause remanded for
proceedings consistent
with this opinion.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

BETH WHITMORE
FOR THE COURT

SLABY, P. J.
CARR, J.
CONCUR

APPEARANCES:

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