[Cite as *Schmidt v. Krikorian*, 2012-Ohio-683.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

JEAN SCHMIDT, :

Plaintiff-Appellant/Cross-Appellee, : CASE NO. CA2011-05-035

: O P I N I O N
2/21/2012

- vs -

:

DAVID KRIKORIAN, et al.,

:

Defendants-Appellees/Cross-Appellants. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010-CVC-1217

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GRADY, J.

{¶ 1} This appeal is from two final orders journalized on April 4, 2010. The first order denied a motion to admit an attorney pro hac vice. The second order denied, in part, and granted, in part, motions to quash subpoenas and for protective orders.

{¶ 2} Plaintiff, Jean Schmidt, represents the Second District of Ohio in the United States House of Representatives, a position Schmidt has held since 2005. Schmidt defeated David Krikorian ("Krikorian") in the 2008 general election to retain her congressional seat.

{¶ 3} In 2009, Schmidt filed two complaints with the Ohio Elections Commission ("OEC") regarding allegedly false statements made by Krikorian in violation of R.C. 3517.21. Those statements concerned support Schmidt allegedly received from the Turkish government and/or Turkish interests in connection with Schmidt's failure or refusal to support a Congressional resolution condemning as a genocide the deaths during World War I of a great many Armenians. The OEC issued letters of reprimand to Krikorian for making certain statements of fact the OEC found were false. Krikorian appealed the OEC's decision to the Franklin County Common Pleas Court, but the appeals were subsequently dismissed.

{¶ 4} On June 8, 2010, Schmidt commenced an action against Krikorian and the Krikorian for Congress Campaign Committee ("Committee") on claims for relief alleging defamation based on the same or similar statements by those defendants during the 2008 and 2010 campaign seasons. On September 27, 2010, Schmidt filed a motion to admit pro hac vice Bruce Fein, an out-of-state attorney. Defendants Krikorian and the Committee opposed the motion.

{¶ 5} On October 12, 2010, Schmidt and her counsel, Chester, Willcox & Saxbe, LLP, filed motions to quash subpoenas duces tecum served on counsel and on Schmidt's congressional office by defendants. Schmidt and her counsel argued that the

documents are protected by the attorney-client privilege and/or the Speech or Debate Clause of the United States Constitution, Article I, Section 6. Schmidt and her counsel also challenged the subpoenas on other grounds, including relevancy.

{¶ 6} On April 4, 2011, the trial court denied Schmidt's motion to admit Bruce Fein, pro hac vice. The trial court granted the motion to quash the subpoenas duces tecum defendants served on Schmidt's congressional office. The court also granted the motion to quash subpoenas defendant served on Schmidt's counsel, except with respect to fees they had been paid for representing Schmidt. Schmidt filed timely notices of appeal from these two orders. Krikorian and the Committee filed a notice of cross-appeal.

Schmidt's Assignments of Error

{¶ 7} FIRST ASSIGNMENT OF ERROR:

{¶ 8} THE TRIAL COURT ABUSED ITS DISCRETION AND WAS ARBITRARY AND UNREASONABLE IN DENYING APPELLANT JEAN SCHMIDT'S AND ATTORNEY BRUCE FEIN'S MOTION TO ADMIT PRO HAC VICE BRUCE FEIN, ESQ. (TRIAL COURT'S APRIL 4, 2011 ORDER, DECISION AND ENTRY DENYING PLAINTIFF'S MOTION TO ADMIT PRO HAC VICE BRUCE FEIN, ESQ.).

{¶ 9} Attorneys admitted to practice in other states but not admitted to practice in Ohio do not have a right to practice in courts in Ohio. *Royal Indem. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 33 (1986). They may nevertheless be permitted to appear in an action by the court pro hac vice, meaning "for this occasion or particular purpose." The decision whether to permit an attorney to appear pro hac vice is within the discretion of the court. *Id.* Consequently, a party challenging the trial court's denial of a motion to admit an out-of-state attorney pro hac vice must demonstrate that the trial court abused its discretion. *Id.* at 35.

{¶ 10} In *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990), the Supreme Court set forth the following test to determine whether the trial court had abused its discretion:

> "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.
>
> A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

{¶ 11} Previous appellate court decisions have identified several non-exclusive factors that a court should consider when determining whether or not to admit an attorney pro hac vice. These factors include: (1) whether a long-standing close personal relationship exists between the party requesting permission and the out-of-state counsel, (2) whether the out-of-state counsel is the customary counsel for the party in jurisdictions that allow pro hac vice admittance, (3) whether competent counsel in Ohio is available to represent the party, (4) the age of the case at the time the pro hac vice motion is filed, (5) the nature and complexity of the litigation, (6) the burden on the court and the nonmoving party if the motion is granted, (7) the prejudice to the moving party if the motion is denied, and (8) the prejudice to the nonmoving party if the motion is granted. *State v. Ross*, 36 Ohio App.2d 185, 197 (1973); *Walls v. City of Toledo*, 166 Ohio App.3d 349, 2006-Ohio-2111, ¶ 14 (citations omitted).

{¶ 12} In its April 4, 2011 order denying Schmidt's motion to admit pro hac vice attorney Bruce Fein (Dkt. 95), the trial court found:

> Attorney Fein had been permitted to represent Plaintiff Schmidt in two previous cases before the Ohio Elections Commission, and in a Federal lawsuit initiated by Defendant Krikorian. Plaintiff argues that this continued representation is essential in the pending matter before the Court. However, the Court is concerned that the representation in the previous matters is exactly what has led to some of the issues/defenses raised in this case. Currently, there apparently is an independent investigation being conducted in the Office of Congressional Ethics regarding approximately two hundred hours of legal services received by Plaintiff Schmidt that allegedly were not properly recorded on campaign contributions. This would create a potential conflict of interest with Attorney Fein being admitted in this current case. Therefore, because of the pending matters concerning the costs of the Plaintiff's legal representation, the Court finds that a substantial conflict of interest may exist with Attorney Fein, and he will likely be made a material witness in the current matter before the Court.
>
> Further, it does not appear that Plaintiff Schmidt will be unduly prejudiced if Attorney Fein is not permitted admission on this case. Plaintiff has excellent Ohio counsel hired on her behalf, who is quite competent to represent her in this matter. Further, Plaintiff has already pointed out that several of their claims may have issue preclusion effect, and will not need to be re-litigated in this instant case.

{¶ 13} Schmidt argues that the trial court abused its discretion in denying her motion to admit Attorney Fein pro hac vice because there exists a long-standing close personal relationship between Schmidt and Fein, Schmidt has been successful in every case in which Fein has represented her, and the trial court relied upon an erroneous belief that Fein was sanctioned by a California court. We do not agree.

{¶ 14} Although the trial court noted in its order that defendants had pointed the court's attention to the fact that Fein was sanctioned by a California court in 2009, the trial court did not state that it relied on that matter in denying Schmidt's motion. Rather, the trial court relied on three principal findings in denying Schmidt's motion: (1) Fein is likely to be a material witness in the case because of his knowledge concerning matters

relating to the source of payments for Schmidt's legal representation, (2) Schmidt will not be unduly prejudiced if the motion is denied because Schmidt has excellent and competent Ohio counsel and, (3) as Schmidt conceded, many of her claims concerning certain statements Defendants made and which the OEC found were false are subject to issue preclusion and may not be relitigated.

{¶ 15} Based on our review of the record before us, we find that this is not an instance where the trial court gave no sound reasoning process that would support its decision to deny Schmidt's motion to admit Attorney Fein pro hac vice. It appears that Fein may have represented or been compensated by Turkish interest groups that Krikorian and the Committee said have influenced Schmidt. Rule 3.7(a) of the Ohio Rules of Professional Conduct provides that a lawyer shall not act as an advocate at a trial if the lawyer is likely to be a necessary witness unless the lawyer's testimony relates to an uncontested issue or the nature and value of legal services rendered in the case, or the client would suffer substantial hardship as a result of the disqualification of the lawyer. The trial court explained its legitimate concerns with the likelihood of Fein becoming a witness in the case, and how any prejudice to Schmidt will be minimized. The fact that Fein has been successful in representing Schmidt in prior proceedings does not demonstrate that Chester, Willcox & Saxbe, L.L.P. cannot provide Schmidt fully adequate representation in prosecuting her defamation claims. The trial court did not abuse its discretion in denying Schmidt's motion to admit Attorney Fein pro hac vice.

{¶ 16} Schmidt's first assignment of error is overruled.

{¶ 17} SECOND ASSIGNMENT OF ERROR:

{¶ 18} THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING IN PART CHESTER, WILLCOX & SAXBE, LLP'S MOTION TO QUASH SUBPOENA DUCES TECUM AND FOR A PROTECTIVE ORDER (TRIAL COURT'S APRIL 4, 2011

DECISION, ENTRY AND ORDER ON THE MOTIONS TO QUASH AND PROTECTIVE ORDERS).

{¶ 19} Before addressing the merits of Schmidt's second assignment of error, we must consider whether we lack jurisdiction to review the error assigned. The appellate jurisdiction of this court is limited to review of final judgments or orders. Ohio Constitution, Article IV, Section 3(B)(2). "Final order" is defined in R.C. 2505.02(B)(1)-(7). The section applicable to the trial court's orders is R.C. 2505.02(B)(4).

{¶ 20} In *State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93, ¶ 12, the Supreme Court set forth the following test for determining when such an order is final:

> [A]n order is a "final order" if it satisfies each part of a three-part test: (1) the order must either grant or deny relief sought in a certain type of proceeding-a proceeding that the General Assembly calls a "provisional remedy," (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. See, also, R.C. 2505.02(A)(3) (defining "provisional remedy").

{¶ 21} Denial of a protective order and the resulting order to produce allegedly privileged materials meets prong (a) of R.C. 2505.02(B)(4) because it determines the action with respect to the provisional remedy and prevents judgment in respect to that provisional remedy. R.C. 2505.02(B)(4)(a); *Ramun v. Ramun*, 7th Dist. No. 08MA185, 2009-Ohio-6405, ¶ 24. Further, such an order meets prong (b) of R.C. 2505.02(B)(4), because forcing disclosure of allegedly privileged material will destroy the privilege and "the proverbial bell cannot be unrung." *Id.*, ¶ 26. As such, an order requiring disclosure of allegedly privileged material is a final order that is immediately appealable. *Id.*, ¶ 27.

{¶ 22} On the other hand, an order that bars disclosure of materials on a finding

that the materials are privileged or irrelevant is not a final order and therefore is not immediately appealable, because such an order does not preclude a meaningful or effective remedy after final judgment. That is so because the trial court's decision denying access to the requested information can be remedied on appeal following final judgment if the appellate court determines that the trial court's privilege or irrelevancy finding was incorrect. *Id.*, ¶ 25. In short, in such a situation, there is no concern that a proverbial bell cannot be unrung.

{¶ 23} Schmidt appeals from the portion of the trial court's order to the extent that it required disclosure of billing information that Schmidt claims is protected by the attorney-client privilege. That portion of the trial court's order is a final order that is immediately appealable. R.C. 2505.02(B)(4); *Ramun*, ¶ 27. Consequently, we have jurisdiction to consider the merits of Schmidt's second assignment of error.

{¶ 24} We review an order granting or denying a motion for a protective order for an abuse of discretion. *Ruwe v. Bd. of Springfield Twp. Trustees*, 29 Ohio St.3d 59, 61 (1987). Pretrial discovery orders pertaining to the issue of privilege are likewise reviewed for an abuse of discretion. *Smalley v. Friedman, Domiano & Smith Co. L.P.A.*, 8th Dist. No. 83636, 2004-Ohio-2351 (citations omitted).

{¶ 25} The trial court found:

> [I]t is clear that Defense counsel has demonstrated the relevancy of the payment of the legal expenses. Defendant alleges that the payment of the legal expenses for Plaintiff goes to the showing of actual malice for determining whether or not Plaintiff is a "puppet" of the Turkish Coalition of America. This information is not obtainable simply by investigating the campaign donation information readily available on the internet. Payment of legal fees has not been shown to fall under any privilege or protection. Therefore, Defendants are entitled to information for the payments received relevant to the case at hand. Clearly account numbers may be redacted. (Footnote omitted.)

> Therefore, Plaintiffs are only ordered to supply the existing payment information for the payments relevant to the legal expenses of Jean Schmidt. The rest of the information is unobtainable at this time as proper relevancy has not been shown, and is likely protected by the attorney-client privilege. The Motion to Quash is thus granted with respect to the fee agreements and billing records, but denied as to the payment information.

{¶ 26} Schmidt argues that the trial court abused its discretion in ordering disclosure of payment records because information relating to who has paid Schmidt's legal fees is irrelevant to this litigation and is protected by the attorney-client privilege as attorney work product. We do not agree.

{¶ 27} The issue of relevancy of the information sought by defendants is not properly before us. As we discussed above, a trial court's ruling on whether a document is relevant does not constitute a final order that is immediately appealable because the order does not satisfy R.C. 2505.02(B)(4)(b).

{¶ 28} Schmidt contends that the detailed payment records possessed by her attorney "may contain privileged information" and "may reflect work product materials concerning the pattern of investigation, assembly of information and strategic planning." The party claiming the attorney-client privilege has the burden of proving that the privilege applies to the requested information. *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178 (1976) (citation omitted).

{¶ 29} We agree that detailed billing records that identify specific work performed by counsel may be subject to the attorney-client privilege or may constitute attorney work product. However, the trial court did not order the disclosure of detailed billing records. Rather, the trial court ordered that defendants are entitled only to "the existing payment information for the payments relevant to the legal expenses of Jean Schmidt," and that "account numbers may be redacted." The records the court ordered disclosed

should reflect no more than the amount of Schmidt's fees her counsel was paid, who made the payment or payments, and when that was done. On the particular facts before us, we find the trial court did not abuse its discretion in finding that the records to be disclosed are not attorney work-product or otherwise protected by the attorney-client privilege.

{¶ 30} Schmidt's second assignment of error is overruled.

Defendants' Cross-Assignments of Error

{¶ 31} FIRST ASSIGNMENT OF ERROR:

{¶ 32} "THE TRIAL COURT ERRED IN GRANTING, IN PART, CHESTER, WILLCOX & SAXBE, LLP'S MOTION TO QUASH SUBPOENA DUCES TECUM AND FOR A PROTECTIVE ORDER.

{¶ 33} SECOND ASSIGNMENT OF ERROR:

{¶ 34} THE TRIAL COURT ERRED IN GRANTING, IN PART, THE MOTION OF THE OFFICE OF THE HONORABLE MRS. SCHMIDT, U.S. HOUSE OF REPRESENTATIVES TO QUASH SUBPOENA DUCES TECUM AND FOR A PROTECTIVE ORDER.

{¶ 35} Defendants' two cross-assignments of error concern the trial court's order granting Schmidt's motion and quashing subpoenas for certain documents on findings that the documents were irrelevant or are protected by the attorney-client privilege or the Speech or Debate Clause, or constituted attorney work product. As discussed above, any error the trial court may have committed in precluding disclosure on a finding that the documents are privileged or irrelevant can be remedied after final judgment by a reversal and remand to the trial court with an instruction to order the parties to produce the requested discovery. Therefore, defendants would be afforded a meaningful or effective remedy by an appeal following final judgment, R.C. 2505.02(B)(4)(b).

Therefore, the trial court's order denying discovery of privileged or irrelevant information is an interlocutory order and we are without jurisdiction to review it at this time. *Williams v. Nationwide Mutual Ins. Co.*, 4th Dist. No. 05CA15, 2005-Ohio-6798; *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, ¶10 (9th Dist.).

{¶ 36} The cross-appeal of defendants will be dismissed for lack of jurisdiction.

Conclusion

{¶ 37} Having overruled Plaintiff-Appellant Schmidt's two assignments of error, and because we must dismiss the cross-appeal filed by defendants Krikorian and the Krikorian for Congress Campaign Committee, we will affirm the final orders of the trial court from which the appeal and cross-appeal were taken.

FAIN and HALL, JJ. concur.

Grady, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

Fain, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

Hall, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.