[Cite as *Anton v. Flauto*, 2024-Ohio-4788.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

HANY ANTON, M.D., :

Plaintiff-Appellant, :

No. 113353

v. :

RONALD FLAUTO, D.O., :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED
RELEASED AND JOURNALIZED: October 3, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CV-18-905284 and CV-20-927762

Appearances:

Thrasher, Dinsmore, & Dolan, LPA, Ezio A. Listati, Leo M. Spellacy, Jr., and Elizabeth E. Collins; Warner Law and Tim Warner, *for appellant*.

Frantz Ward LLP, James B. Niehaus, and Angela D. Lydon, *for appellee*.

EMANUELLA D. GROVES, J.:

{¶ 1} Plaintiff-appellant, Dr. Hany Anton ("Dr. Anton"), appeals the decision of the trial court granting defendant-appellee, Dr. Ronald Flauto's ("Dr.

Flauto") motion to compel discovery. For the reasons that follow, we reverse the decision of the trial court.

{¶ 2} Dr. Anton and Dr. Flauto, along with others, were members of Advanced Vascular Access, LLC ("AVA"), a medical practice specializing in interventional nephrology. Due to conflict between the two as well as regulatory changes that affected AVA's business, Dr. Anton attempted to buy the practice. To that end, he circulated a Letter of Intent (the "LOI") to purchase AVA and a membership interest purchase agreement (the "Purchase Agreement") to the members on May 22, 2018. Dr. Anton secured the assistance of Attorney Cori Haper ("Haper") from Thompson Hine LLP ("Thompson Hine") to assist with the documentation. Dr. Anton learned that Dr. Flauto and/or his attorney representative informed AVA members, falsely, in his opinion, that the documents violated the law.

{¶ 3} Subsequently, Dr. Flauto began to dissolve the practice. In response, Dr. Anton sued Dr. Flauto alleging breach of fiduciary duty; breach of AVA's Operating Agreement; tortious interference with contracts, business relations, and prospective relations; defamation; false light; and intentional infliction of emotional distress. In a related case, Dr. Anton, Dr. Wassim El-Hitti, and Dr. Saurabh Bansal subsequently sued Benesch Friedlander Coplan & Aronoff, LLP ("Benesch") (*Dr. Hany Anton M.D., et al. v. Benesch, Friedlander, Coplan & Arnoff, LLP, et al.*, Cuyahoga C.P. No. CV 20-927762, the "Benesch case"), and Dr. El-Hitti and Dr. Bansal separately sued Dr. Flauto (*Dr. Wassim El-Hitti MD., et al. v. Dr. Ron Flauto*

DO FASN, Cuyahoga C.P. No. CV 22-963381). The three cases were consolidated by the trial court.

{¶ 4} During the course of the litigation, Dr. Anton hired Charles Oppenheim ("Oppenheim"), an attorney whose credentials identified him as a nationally recognized expert in the federal physician self-referral statute (the "Stark Law") and the federal anti-kickback statute. Oppenheim was asked to verify the legality of the LOI and the Purchase Agreement. Oppenheim utilized his knowledge and experience to create a report that was disseminated to the opposition. Oppenheim also spoke to Dr. Anton and Haper with Thompson Hine to prepare his report. Dr. Flauto subsequently subpoenaed Thompson Hine and requested the firm produce the following:

> All documents constituting, referencing or related to any communications between Cori Haper and Charles Oppenheim relating to:
>
> (a) Dr. Hany Anton or:
>
> (b) The nonbinding, letter of intent from Dr. Anton to the other physician members (the "Sellers") of AVA, which has seven paragraphs, contains Dr. Anton's offer to purchase all of the Sellers' membership units in AVA, and states that it anticipates a May 15, 2018, closing date (the "Nonbinding LOI") or
>
> (c) The Membership Interest Purchase Agreement dated May _, 2018 [1] among AVA, the Sellers, and Dr. Anton, as the buyer, which would more fully document the transaction described in the Nonbinding LOI (the "Purchase Agreement").
>
> All documents constituting, referencing or related to any communications between Charles Oppenheim and any other attorney

[1] Date left blank in original.

> at Thompson Hine LLP related to the Nonbinding LOI or the Purchase Agreement.
>
> All documents constituting, referencing or related to any communications between Dr. Hany Anton and Cori Haper related to the Nonbinding LOI or the Purchase Agreement.
>
> All documents constituting, referencing or related to any communications between Dr. Hany Anton and any other attorney at Thompson Hine LLP related to the Nonbinding LOI or the Purchase Agreement.
>
> All documents constituting, referencing or related to any communications between or among attorneys at Thompson Hine LLP related to the Nonbinding LOI or the Purchase Agreement.
>
> All invoices sent to Dr. Hany Anton by Thompson Hine in 2018.
>
> A copy of the engagement letter between Dr. Hany Anton and Thompson Hine.

Exhibit A Attached to Appellee's Motion to Compel.

{¶ 5} Thompson Hine responded to the subpoena by email and indicated they would assert all privileges of their client unless the client waived them. Specifically, Thompson Hine alleged the documents were protected by attorney-client privilege, work product, and that the request was unduly burdensome. Thompson Hine subsequently provided a privilege log listing communications via email between Dr. Anton and his attorneys involving the LOI and Purchase Agreement. Exhibit E Attached to Appellee's Motion to Compel. The log did not identify any communications between Thompson Hine attorneys and Oppenheim.

{¶ 6} On October 10, 2023, Dr. Flauto filed a motion to compel production of the documents pursuant to the subpoena. Dr. Flauto argued that Dr. Anton had waived attorney-client privilege based on statements contained in Oppenheim's

expert report. Dr. Anton and Thompson Hine filed briefs in opposition. Dr. Anton denied waiving attorney-client privilege. Thompson Hine agreed with Dr. Anton's position and added that the firm had not waived the protections of attorney work product. Further, there was no evidence that Thompson Hine or Dr. Anton provided privileged documents to Oppenheim. The trial court granted Dr. Flauto's motion and ordered Thompson Hine to comply with the subpoena, without conducting a hearing or undertaking an in camera review of the materials.

{¶ 7} Dr. Anton appeals assigning the following errors for our review.

Assignment of Error No. 1

> The trial court committed reversible error when it issued an order compelling appellant's attorneys to produce confidential and attorney-client privileged documents when appellant did not waive attorney-client privilege.

Assignment of Error No. 2

> The trial court committed reversible error when it issued an order compelling appellant's attorneys to produce confidential and attorney-client privileged documents without first holding an evidentiary hearing and conducting an in-camera inspection of the records.

Law and Analysis

Standard of Review

{¶ 8} We will begin with the first assignment of error as it is dispositive of this appeal. A trial court has wide discretion when determining discovery matters. *See v. Haugh*, 2014-Ohio-5290, ¶ 9 (8th Dist.). Ordinarily, a trial court's rulings on discovery do not constitute final appealable orders. However, when the order

addresses material that is allegedly protected by attorney-client privilege, an interlocutory appeal is allowed. *Id.*

{¶ 9} Generally, we review discovery matters for an abuse of discretion; however, if the issue involves alleged privilege "[a] trial court's discretion does not extend to determining whether a statement is protected by the attorney-client privilege; that is a question of law." *State v. Brunson*, 2022-Ohio-4299, ¶ 26. We review such questions de novo. *Id.; See v. Haugh,* 2014-Ohio-5290, ¶ 10 (8th Dist.).

Attorney-Client Privilege

{¶ 10} Attorney-client privilege is covered by statute pursuant to R.C. 2317.02(A) and any privilege not addressed in the statute is governed by common law. *Brunson* at ¶ 28. While the statute covers testimonial privilege, common-law attorney client privilege "'protects against any dissemination of information obtained in the confidential relationship.'" *Id.*, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, ¶ 26, quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991).

{¶ 11} The Ohio Supreme Court has held that while R.C. 2317.02(A) covers testimonial privilege, it also "provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." *Brunson* at ¶ 29, quoting *Jackson v. Greger*, 2006-Ohio-4968, paragraph one of the syllabus. Accordingly, a client waives attorney-client privilege as to his or her direct communications with his attorney only when the client gives the attorney express

consent to testify or if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context. R.C. 2317.02(A); *Id.* at ¶ 29.

{¶ 12} When a party asserts privilege, that party "carries the burden of proving that it applies to the requested information." *N.E. Monarch Constr., Inc. v. Morganti Ent.,* 2022-Ohio-3551, ¶ 14 (8th Dist.), citing *Lemley v. Kaiser*, 6 Ohio St.3d 258, 263-264 (1983). To satisfy the burden, the party must establish that

> (1) that an attorney-client relationship existed and (2) that confidential communications took place within the context of that relationship.

MA Equip. Leasing I, LLC v. Tilton, 2012-Ohio-4668, ¶ 21 (10th Dist.).

{¶ 13} The parties do not dispute that the communications Dr. Flauto requested from Thompson Hine were covered by attorney-client privilege. Dr. Flauto argued that Dr. Anton waived privilege by communicating privileged information to Oppenheim for preparation of the expert report and/or by alleging he acted pursuant to the advice of counsel. Dr. Anton challenges the trial court's ruling arguing that the record was insufficient to establish that he waived privilege. If, however, he did waive privilege, he argues that the order should have been limited to compelling his attorney to testify on the same subject that was revealed outside of privilege. The waiver, he argues, would not extend to any Thompson Hine documents. Further, any document production should have been preceded by either an evidentiary hearing or an in camera inspection.

Waiver of Attorney-Client Privilege by Disclosing Privileged Communication in a Nonprivileged Context

{¶ 14} To determine whether Dr. Anton waived privilege under R.C. 2317.02(A), we must consider whether (1) he spoke in a "nonprivileged context"; (2) whether he voluntarily revealed the information; and (3) if so, was the disclosure about the same subject as the privileged communication? *Brunson* at ¶ 31. The record before us, however, does not disclose the specific information Dr. Anton provided to Oppenheim.

{¶ 15} Oppenheim was hired to analyze "certain issues" in the Benesch case. In that case, Dr. Anton and the other plaintiffs alleged that Benesch had committed malpractice and tortious interference with business relations, among other claims, by advising AVA members that Dr. Anton's LOI and Purchase Agreement violated the Stark Law and anti-kickback laws.

{¶ 16} Oppenheim summarized his opinion as follows:

> Based on my experience, knowledge and command of industry standards, I am of the opinion that:
>
> (1) The [LOI] from Dr. Anton to the other physician members (the "Sellers") of [AVA], which has seven paragraphs, contains Dr. Anton's offer to purchase all of the Sellers' membership units in AVA, and states that it anticipates a May 15, 2018 closing date should be considered to fully comply with the federal anti-kickback statute; and
>
> (2) The [Purchase Agreement] dated May ____, [2] 2018 among AVA, the Sellers, and Dr. Anton, as the buyer, which would more fully document the transaction described in the [LOI] should also be considered to fully comply with the federal anti-kickback statute.

---

[2] Date left blank in original.

> In forming my opinion, I have communicated with Hany Anton, MD and Ms. Cori Haper, and I have reviewed the [LOI] and the Purchase Agreement.

Oppenheim Expert Report pp. 2-3 (Exhibit B Attached to Appellee's Motion to Compel).

{¶ 17} Per the report, Dr. Anton prepared the LOI. He received guidance from Terry Litchfield, who was "previously an executive at DaVita." He also obtained an informal oral opinion from Jason Greis of McGuire Woods, a law firm specializing in healthcare, who had represented AVA in the past. After Dr. Anton submitted the LOI to the members, he received feedback that their lawyers advised that a portion of the LOI that called for contingent payments was of "dubious legality." Dr. Anton obtained the assistance of Haper to prepare the Purchase Agreement and address any supposed illegality.

{¶ 18} It is unclear from Dr. Oppenheim's report whether Dr. Anton or Haper or both discussed Haper's legal advice or analysis regarding the LOI or Purchase Agreement with Oppenheim. Appellee acknowledged this in his motion to compel before the trial court noting: "Dr. Anton, either personally, or through his current and former counsel, disclosed to a third party (Mr. Oppenheim) that Ms. Haper had advised Dr. Anton that the LOI and the Purchase Agreement were legally compliant." Appellee's Motion to Compel p. 7.

{¶ 19} Dr. Flauto's claim that Dr. Anton waived privilege is speculative on this record. The attorney-client privilege belongs to the client and, absent an express waiver, may only be waived by the client's disclosure of privileged material.

Brunson, 2022-Ohio-4299, ¶ 31. "An attorney cannot waive the attorney client privilege on his client's behalf." *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, ¶ 48 (9th Dist.); *Sutton v. Stevens Painton Corp.*, 2011-Ohio-841, ¶ 15 (8th Dist.). Consequently, Oppenheim's expert report is insufficient to establish Dr. Anton as the source of the information regarding Haper's advice. Accordingly, the record does not support a finding that Dr. Anton waived privilege by disclosing privileged information in a nonprivileged context.

Effect on Attorney-Client Privilege of Asserting Advice of Counsel

{¶ 20} Dr. Flauto also alleged that Dr. Anton waived privileged by asserting an advice-of-counsel claim. Advice of counsel is most often described in the case law as an affirmative defense. "An advice-of-counsel affirmative defense presumes that the person asserting the defense engaged in actionable conduct 'on the advice of counsel.'" *State ex rel. Hicks v. Fraley*, 2021-Ohio-2724, ¶ 14, quoting *Mancz v. McHenry*, 2021-Ohio-82, ¶ 33 (2d Dist.). To prove an advice-of-counsel defense, a defendant must establish that "he sought the advice of counsel, that he fairly and impartially informed his attorney of all material facts, and that he followed his attorney's advice in good faith." *Mancz* at ¶ 32, citing *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 168 (10th Dist. 1985).

{¶ 21} When someone defends actionable conduct by saying they acted on the advice of counsel, that advice becomes relevant. *Fraley* at ¶ 14. Accordingly, assertion of the affirmative defense waives the attorney-client privilege with regard to the advice given. *Id.* at ¶ 13. The rationale is that someone cannot assert they

were acting under the advice of counsel and also argue that the advice given is privileged due to the attorney-client privilege. *See State v. Hale,* 2019-Ohio-3276, ¶ 75 (8th Dist.), *State v. Houck*, 2010-Ohio-743, ¶ 38 (2d Dist.). ("'The attorney-client privilege is a shield, to protect the confidentiality of a client's consultation with her attorney, not a sword to facilitate perjury concerning the substance of counsel's advice.'").

{¶ 22} The Ohio Supreme Court recognized the advice-of-counsel affirmative defense as a waiver of the attorney-client privilege because it is tantamount to the client voluntarily revealing attorney-client privileged information in a nonprivileged context. *See Brunson* at ¶ 39, citing *Meyers, Roman, Friedberg & Lewis v. Malm*, 2009-Ohio-2577, ¶ 23 (8th Dist.), and *Maddox v. Greene Cty. Bd. of Commrs.*, 2014-Ohio-1541, ¶ 12, as examples of advice-of-counsel claims leading to a waiver of the attorney-client privilege. The court also noted, however, that the context within which those statements are made must still be considered. *Brunson* at ¶ 39.

{¶ 23} Here, Dr. Flauto alleged that Dr. Anton raised an advice-of-counsel claim due to information in the Oppenheim report. Specifically, Oppenheim discussed the requirements of the anti-kickback statute, noting that it required a person to act knowingly and willfully to violate the law. Oppenheim Expert Report p. 5. Oppenheim opined that Dr. Anton did not act knowingly and willfully because he had been advised by counsel that the terms in the LOI and Purchase Agreement were lawful. *Id.* The record establishes that Dr. Anton accused Dr. Flauto and

Benesch of improperly advising AVA members that the LOI and Purchase Agreement violated federal law. In his answer, Dr. Flauto asserted an advice-of-counsel affirmative defense, i.e., asserting that any advice given regarding the legal documents was based on the advice of counsel. Dr. Anton had obtained the assistance of Thompson Hine to draft the LOI and Purchase Agreement. He merely utilized Oppenheim's expert opinion to independently evaluate the lawfulness of the LOI and Purchase Agreement. Oppenheim's opinion was based on his experience and area of expertise coupled with information obtained from Dr. Anton and Haper.

{¶ 24} The sole basis for Dr. Flauto's claim is the contents of the Oppenheim report and Dr. Anton's subsequent use of it in the pending litigation. The record does not reflect that there is any claim against Dr. Anton for which he is seeking to allege he acted on the advice of counsel. To the contrary, he sought the advice of counsel before litigation commenced to assist in the preparation of documents. The record before us does not establish that Dr. Anton waived attorney-client privilege by raising an advice-of-counsel claim.

{¶ 25} Accordingly, the trial court erred when it granted Dr. Flauto's motion to compel discovery and the first assignment of error is sustained. As the record fails to establish that Dr. Anton waived privilege, we need not consider whether the trial court erred in failing to hold an evidentiary hearing or an in camera inspection. The second assignment of error is therefore moot.

{¶ 26} Judgment reversed.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
EMANUELLA D. GROVES, JUDGE

MICHAEL JOHN RYAN, J., CONCURS;
LISA B. FORBES, P.J., CONCURS IN JUDGMENT ONLY