IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Richard Fravel, as the Personal Representative of the Estate of Jack Fravel (Deceased),	:	
Plaintiff-Appellee,	:	No. 15AP-782 (C.P.C. No. 14CV-7216)
v.	:	(REGULAR CALENDAR)
Columbus Rehabilitation and Subacute Institute et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on December 10, 2015

The Dickson Firm, L.L.C., Blake A. Dickson and *Daniel Z. Inscore*, for appellee.

Bonezzi Switzer Polito & Hupp Co. L.P.A., G. Brenda Coey and *Jennifer R. Becker*, for appellants.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellee, Richard Fravel, as the personal representative of the estate of Jack Fravel ("decedent"), brought this action alleging that the employees and/or agents of defendant-appellant Columbus Rehabilitation and Subacute Institute provided inadequate care to decedent and caused him to develop a pressure ulcer that became infected and resulted in his death. Appellants pled the affirmative defense that some of appellee's claims were subject to an arbitration agreement and were outside the jurisdiction of the Franklin County Court of Common Pleas. Decedent's surviving spouse, Nancy Fravel, executed the arbitration agreement on decedent's behalf. Appellants

moved to stay the matter and submit it to binding arbitration pursuant to the agreement. The motion was denied. On appeal, appellants ask this court to remand the matter with instruction to stay appellee's "survivorship" claim for referral to alternative dispute resolution, and to stay any claims not subject to the arbitration agreement pending resolution of the arbitrable claims.

{¶ 2} Appellants further submit that the trial court erred in requiring them to produce policies and procedures without a confidentiality agreement and protective order. They assert that the policies and procedures are protected by copyright and, therefore, request that we further instruct the trial court to enter a protective order.

I. MOTION TO DISMISS

{¶ 3} Appellee moves to dismiss the appeal and argues that no final appealable order has been entered pursuant to R.C. 2505.02. We do not agree.

{¶ 4} R.C. 2711.02(C) provides:

> [A]n order * * * that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

{¶ 5} The trial court denied the motion to stay solely on the ground that appellants had waived their right to pursue arbitration. Appellee filed this lawsuit on July 10, 2014, and the answer was filed on August 11, 2014. Appellants engaged in written discovery, and the parties scheduled depositions. Appellants filed the motion for stay just over one month prior to the original July 21, 2015 trial date and ten months after they had asserted their right of arbitration in their answer. The trial court's disposition of the motion for stay fell squarely within the description of a final order pursuant to R.C. 2711.02(C).

{¶ 6} In addition, the courts of the state have held that an order compelling the production of allegedly privileged documents to an opposing party, however interlocutory, is a final appealable order. *Csonka-Cherney v. ArcelorMittal Cleveland, Inc.*, 8th Dist. No. 100128, 2014-Ohio-836, ¶ 10; *Pinnix v. Marc Glassman, Inc.*, 8th Dist. No. 97998,

2012-Ohio-3263, ¶ 8; *Cobb v. Shipman*, 11th Dist. No. 2011-T-0049, 2012-Ohio-1676, ¶ 34, 35. These decisions treat such orders as granting or denying a provisional remedy and, thus, final orders pursuant to R.C. 2505.02(B)(4). As we observed in *Heinrichs v. 356 Registry, Inc.*, 10th Dist. No. 13AP-361, 2013-Ohio-4161, ¶ 13, "[d]iscovery orders have historically been held to be interlocutory and thus neither final nor appealable. * * * But with the amendment to R.C. 2505.02, the General Assembly recognized that a discovery order compelling the disclosure of privileged matter constituted a provisional remedy that could be final and appealable. * * * Similarly, an order that compels the discovery of confidential matter is also a provisional remedy." As long as an appellant presents a colorable claim that the documents in question are privileged and/or confidential, the proceeding which results in the discovery order is treated as a provisional remedy. *Id.* at ¶ 15. " 'Otherwise, an appellate court would be forced to decide the merits of the appeal in order to determine whether it has the power to hear and decide the merits of the appeal.' " *Id.*, quoting *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, ¶ 35 (10th Dist.).

{¶ 7} Both the order denying appellants' application for a stay and the discovery order requiring production of documents without a protective order were final orders from which an interlocutory appeal may lie. Appellee's motion to dismiss and for sanctions is denied. Appellants' motion to strike appellee's notice of supplemental authority is therefore moot.

II. ASSIGNMENTS OF ERROR

{¶ 8} On the merits of the appeal, appellants address an assignment of error to each of the orders at issue:

> [I.] THE TRIAL COURT ERRED IN DENYING DEFENDANTS-APPELLANTS' MOTION TO STAY PROCEEDINGS AND COMPEL/ENFORCE ALTERNATIVE DISPUTE RESOLUTION AGREEMENT.
>
> [II.] THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANTS TO PRODUCE THE POLICIES AND PROCEDURES WITHOUT A CONFIDENTIALITY AGREEMENT AND/OR STIPULATED PROTECTIVE ORDER BECAUSE THEY ARE PROTECTED BY THE COPYRIGHT PRIVILEGE.

III. DISCUSSION

{¶ 9} The first assignment of error concerns waiver of arbitration, while the second concerns the trial court's order compelling discovery, once it determined that appellants had waived arbitration. The question whether the arbitration agreement is valid or enforceable is a matter of law for de novo review. *Taylor Bldg. Corp. of Am. v. Benfield,* 117 Ohio St.3d 352, 2008-Ohio-938 ¶ 37. The contractual right to arbitration, like any other contractual right, may be waived. *Pinnell v. Cugini & Cappoccia Builders, Inc.*, 10th Dist. No. 13AP-579, 2014-Ohio-669, ¶ 17; *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 10th Dist. No. 10AP-353, 2011-Ohio-80, ¶ 19. However, a court will not lightly infer waiver of a right to arbitrate. *Morris v. Morris*, 189 Ohio App.3d 608, 2010-Ohio-4750, ¶ 18 (10th Dist.). To establish such a waiver, the party asserting waiver must prove that the waiving party knew of the right to arbitrate and, based on the totality of the circumstances, acted inconsistently with that right. *Pinnell* at ¶ 18; *Blackburn v. Citifinancial, Inc.*, 10th Dist. No. 05AP-733, 2007-Ohio-1463, ¶ 17. *Hunter v. Rhino Shield*, 10th Dist. No. 15AP-172, 2015-Ohio-4603, ¶ 16. The issue whether appellants have waived any right to arbitration is fact driven and reviewed for an abuse of discretion. *Pinnell* at ¶ 17. *See also Hunter* at ¶ 17 ("The standard under which an appellate court reviews an order granting or denying a stay pending arbitration depends on the nature of the issues involved. *Pinnell* at ¶ 17. When the issue is whether a party waived its right to arbitrate, appellate courts review a trial court's judgment for an abuse of discretion. *Id.*; *Morris* at ¶ 17. Appellate courts apply this standard because resolution of the waiver issue requires a fact-intensive analysis. *Pinnell* at ¶ 17; *Morris* at ¶ 17."). The phrase "abuse of discretion" implies that the trial court's attitude was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 10} Appellants argue that the circumstances of this case do not permit a finding of waiver. In their timely answer, they raised the affirmative defense that issues in dispute were subject to an arbitration agreement. Appellants acknowledge that they submitted written discovery and requested depositions, and when appellee did not comply they filed a motion for extension of time to conduct discovery. In their brief they insist that the discovery was essential for them "to adequately defend against Appellee's baseless allegations," including the claim that decedent's wife, Nancy, did not have

authority to sign the arbitration agreement on his behalf. (Appellant's Corrected Brief, 27.) Nancy signed on a line entitled "Signature of Legal Representative for Healthcare Decisions." (July 8, 2015 Reply Memorandum, second exhibit A.)

{¶ 11} Decedent was admitted to the nursing home on May 23, 2013 following a two-month hospitalization at Ohio State University Wexner Medical Center for a ruptured brain aneurysm. According to his Nancy, he was unable to hold any conversation. He communicated by squeezing a hand or blinking his eyes. He could not read or hold a pen to write. Nancy gave further deposition testimony that decedent was unable to wash his face or brush his teeth. He had a feeding tube, a tracheostomy tube, and a catheter. The staff bathed him. He was physically unable to use the call light and could not assist with turning and repositioning himself. Appellants maintain that under such extreme disability decedent clearly could not sign any agreement, and Nancy at least had apparent authority to consent to arbitration, as she was the one who decided to place her husband in the nursing home for post-hospital care and signed all of the admission-related paperwork.

{¶ 12} The trial court did not address the issue of authorization or other matters affecting enforceability because it first considered the issue of waiver. "A party asserting waiver must prove that the waiving party knew of the existing right to arbitrate and, based on the totality of the circumstances, acted inconsistently with that known right." *Dispatch Printing Co.* at ¶ 21, citing *Murtha v. Ravines of McNaughton Condominium Assn.,* 10th Dist. No. 09AP-709, 2010-Ohio-1325, ¶ 21.

> In determining whether the totality of the circumstances includes actions inconsistent with the right to arbitrate, a court may consider: (1) whether the party seeking arbitration invoked the court's jurisdiction by filing a complaint or claim without first requesting a stay, (2) the length of the delay, if any, in seeking arbitration, (3) the extent to which the party seeking arbitration has participated in the litigation, and (4) whether the inconsistent acts of the party seeking arbitration prejudiced the party asserting waiver. *Pinnell* at ¶ 18; *Dispatch Printing Co.* at ¶ 21. In short, waiver occurs when a party's active participation in a lawsuit evinces an acquiescence to proceeding in a judicial forum. *Pinnell* at ¶ 18; *Blackburn* at ¶ 19.

Hunter at ¶ 16.

{¶ 13} "Waiver attaches where there is active participation in a lawsuit evincing an acquiescence to proceeding in a judicial forum." *Tinker v. Oldaker,* 10th Dist. No. 03AP-671, 2004-Ohio-3316, ¶ 21. In *Pinnell*, the appellants invoked the trial court's jurisdiction by filing a counterclaim for breach of the operating agreement at issue without first requesting a stay. They did not request a stay until over 12 months after the appellees filed their complaint and over 11 months after the appellants filed their answer and counterclaim. The appellants in *Pinnell* participated in extensive discovery and finally filed the motion to stay less than two and one-half months before the trial date and only as an alternative in the event they received an unfavorable ruling on their summary judgment motion on the merits of the appellees' claims. Even though the appellees could assert prejudice only vaguely, in terms of additional legal fees and other costs of arbitration, we concluded that the trial court did not abuse its discretion in finding, under the totality of the circumstances, appellants acted inconsistently with their right to arbitrate. "The record supports the conclusion that appellants took an active role in this lawsuit, evincing their acquiescence to proceeding in a judicial forum, and only wanted arbitration in the event the trial court issued an unfavorable ruling on their motion for summary judgment." *Pinnell* at ¶ 24.

{¶ 14} Appellants in the matter under review did not evince such an attempt to seek judgment on the merits, but, nevertheless, they did not promptly move for a stay and instead actively used the court proceedings to obtain discovery. Moreover, enforcement of the arbitration agreement would engender proceedings in two separate forums, as appellants concede that only decedent's claims which survive him are subject to arbitration. The wrongful death claims of the statutory beneficiaries, pursuant to R.C. 2125.02(A)(1), may not be forced into arbitration where each of them did not sign the agreement. *Peters v. Columbus Steel Castings Co.,* 115 Ohio St.3d 134, 2007-Ohio-4787, ¶ 19-20. We overruled the first assignment of error. On account of the litigation activities of appellants, their delay in seeking an arbitration stay and the potential prejudice via piecemeal litigation to appellee, the trial court acted within its sound discretion to find waiver and deny appellants' motion for stay.

{¶ 15} Thereafter, the trial court compelled discovery from appellants. The discovery order on appeal compelled production of accurate copies of appellants'

institutional policies and procedures. Appellants refused to produce these policies and procedures on the basis that they are copyrighted but consented to turn them over if appellee agreed to a protective order. At paragraph four of its August 6, 2015 decision and entry, the trial court stated that it "in no way sees how the existence of a copyright prevents Defendants from having to produce the requested policies and procedures. The copyright itself provides Defendants with all the protection they need in regards to the subject materials and a further protective order is of no use."

{¶ 16} Our statement in *Nunez Vega v. Tivurcio,* 10th Dist. No. 14AP-327, 2014-Ohio-4588, ¶ 9, is apposite to the standard of review for appellants' assertion of a copyright privilege:

> A trial court "possesses broad discretion over the discovery process," and, therefore, appellate courts "generally review a trial court's decision regarding a discovery matter only for an abuse of discretion." *MA Equip. Leasing I, L.L.C. v. Tilton,* 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 13. Nevertheless, an abuse of discretion standard "is inappropriate for reviewing a judgment based upon a question of law, including an erroneous interpretation of the law." *Id.* In general, the issue as to "whether information sought in discovery is confidential and privileged 'is a question of law that is reviewed de novo.' " *Id.,* quoting *Med. Mut. of Ohio v. Schlotterer,* 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13. This court has also recognized, however, "with respect to a privilege claim, the appropriate standard of review depends on whether the privilege claim presents a question of law or a question of fact." *Randall v. Cantwell Mach. Co.,* 10th Dist. No. 12AP-786, 2013-Ohio-2744, ¶ 9. Accordingly, "[w]hen it is necessary to interpret and apply statutory language to determine whether certain information is confidential and privileged, a de novo standard applies." *Id.* By contrast, "[w]hen a claim of privilege requires review of factual questions, such as whether an attorney-client relationship existed, an abuse-of-discretion standard applies." *Id.*

{¶ 17} The trial court essentially held that appellants failed to establish legal grounds to shield their copyrighted policies and procedures from discovery in litigation against them, and so we review its decision compelling discovery de novo. " 'De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision.' " (Internal citations deleted.) *Deutsche*

Bank Natl. Trust Co. v. Thomas, 10th Dist. No. 14AP-809, 2015-Ohio-4037, ¶ 8, quoting *Holt v. State,* 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9.

{¶ 18} We have reviewed the record and the law relating to appellee's motion to compel production and find that appellants' copyright protection did not afford them the right to withhold policies and procedures potentially relevant to the care and treatment of decedent and appellee's claims of malfeasance. Although appellants may have obtained federal copyright protection for the materials, they remain amenable to "fair use" under 17 U.S.C. 107, which codified the exception to copyright protection the courts had carved:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The legislative history of this section indicates that "reproduction of a work in legislative or judicial proceedings or reports" was contemplated among "the sort of activities the courts might regard as fair use under the circumstances." House Committee on the Judiciary, H.R.Rep. No. 94-1476 (1976).

{¶ 19} In addition, courts considering the issue have found reproduction of copyrighted works for litigation to fall within the fair use doctrine. *See Bond v. Blum,* 317 F.3d 385, 396 (4th Cir.2003) (the defendant's use of the plaintiff's entire copyrighted work in a child custody proceeding "does not undermine the protections granted by the [Copyright] Act but only serves the important societal interest in having evidence before

the factfinder"); *Jartech, Inc. v. Clancy,* 666 F.2d 403 (9th Cir.1982) (city council's use of copyrighted material in legal proceedings was not "the same intrinsic use to which the copyright holders expected protection from unauthorized use"); *Denison v. Larkin,* 64 F.Supp.3d 1127, 1133-34 (N.D.Ill.2014) (using portions of the plaintiff's copyrighted blog as evidence against her in attorney disciplinary proceeding did not supersede blog's purpose as a forum to discuss purported courtroom corruption and otherwise was fair use consistent with 17 U.S.C. 107); *Stern v. Does,* 978 F.Supp.2d 1031, 1044-49 (C.D.Cal.2011) ("[r]eproduction of copyrighted material for use in litigation or potential litigation is generally fair use, even if the material is copied in whole"); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey,* 497 F.Supp.2d 627, 638 (E.D.Pa.2007) (law firm's copying of entire set of copyrighted web pages was justified since web pages were relevant evidence in litigation).

{¶ 20} The use of appellants' policies and procedures is not commercial in the context of litigation. Nor is creativity of the work a factor. Appellants do not dispute that some of their policies and procedures may be relevant, but they suggest that some policies, for example, those related to patient falls, have no relevance. However, appellants' objection to the discovery is based on copyright protection and privilege, and against the legal backdrop of fair use, they have established no basis to condition the requested production of documents on execution of an agreed protective order, nor privilege against discovery of their policies and procedures. Appellants also have indicated no market, let alone effect on a potential market for or value of the copyrighted materials, to support a need for confidentiality. The institution furnishes its policies and procedures to residents and its staff pursuant to R.C. 3721.12(A)(3)(c).

{¶ 21} Appellants' reliance on *Byrd v. U.S. Xpress, Inc.,* 1st Dist. No. C–140260, 2014-Ohio-5733, does not support its argument. The defendant in that case successfully argued that provisions of the protective order issued by the trial court permitted sharing of confidential/trade secret information with attorneys involved in other lawsuits in a manner that was overbroad and lacked procedural safeguards consistent with the Uniform Trade Secrets Act, R.C. 1333.61 et seq. Civ.R. 26(C)(7) authorizes a court to issue an order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Appellants do not

make the case that their policies and procedures should be afforded under the law protection beyond copyright, which does not include any privilege precluding or limiting use in the litigation at issue. Appellants do not, as a matter of policy, require a confidentiality agreement from its residents upon admission, and the law does not require this from a patient or his or her personal representative before patient care policies may be disclosed in litigation. The second assignment of error is overruled.

IV. CONCLUSION

{¶ 22} We overrule both of the assignments of error and affirm the orders of the Franklin County Court of Common Pleas denying appellants' motion to stay proceedings and granting appellee's motion to compel production of appellants' patient care policies. We further deny appellee's motion to dismiss and for sanctions and find moot appellants' motion to strike appellee's supplemental authority. We note that the trial court in its judgment entry held in abeyance appellee's motion for sanctions filed before the trial court and remains in the best position to monitor the progress of the litigation and adjudge the actions of the parties before it.

Judgment affirmed.

KLATT, J., concurs.
LUPER SCHUSTER, J., concurs in judgment only.