

Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.

BSMPH DEFENSE VERDICT



Steven J. Hupp, Esq.

BSMPH attorneys Steven J. Hupp and Bret C. Perry recently obtained a unanimous defense verdict for a physician in a wrongful death case.



Bret C. Perry, Esq.

In September, the trial team successfully defended an Otolaryngologist in a four day trial in Stark County Common Pleas Court. The case arose from the death of a 60 year old woman who was on a respirator due to an exacerbation of her Chronic Obstructive Pulmonary Disease. Plaintiff alleged that the E.N.T. surgeon was negligent during a tracheostomy tube change by misplacing the trach tube in the subcutaneous space outside of the trachea.

The undisputed cause of death was a bilateral tension pneumothorax. However, the plaintiff claimed that the patient died as a result of massive air inflating the subcutaneous space, which caused a compression of the heart and lungs. The defense presented compelling evidence that the patient died as a result of bilateral lung perforations due to aggressive bagging. All experts admitted that lung perforations are a known and recognized complication of bagging a patient with C.O.P.D.

The jury returned its verdict after three hours of deliberations. The jury found that the defendant-physician met the standard of care.

Can Plaintiff's Counsel Contact a Corporate Defendant's Current and Former Employees?

By Keith Hansbrough, Esq.

Defendant corporations are continually confronted with the question of whether or not a plaintiff's attorney may contact its current and former employees during the course of a lawsuit. It is common place in Ohio for defense attorneys to simply claim that his/her corporate client asserts a "blanket representation" as to all current and former employees and; therefore, plaintiff's counsel is ethically barred from any such communications. Unfortunately, such an assertion of

Cont'd on page 2



Ohio Recognizes Common-Law Tort Claim for Wrongful Discharge in Violation of Public Policy when an Injured Employee Suffers Retaliatory Employment Action After Injury on the Job but Before the Employee Files a Workers' Compensation Claim

Recently, the Supreme Court of Ohio held that: 1) R.C. 4123.90 expresses a clear public policy which prohibits retaliatory employment actions against injured employees, 2) a common-law tort claim exists for violation of this public policy where the worker has been injured but has not yet filed for workers' compensation and 3) that the remedies for the common-law tort claim are limited by R.C. 4123.90. *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, at syllabus paragraphs one, two and four. In order to establish causation for the common-law tort claim, one "must prove that the adverse employment action was retaliatory, which requires proof of a nexus between the adverse employment action and the potential workers' compensation claim." *Id.* at syllabus paragraph three.

In *Sutton*, the plaintiff-employee injured his back while at work and was discharged within an hour of providing notice of the injury to the president of the defendant-employer. *Id.* at ¶2. Although the company president did not provide the plaintiff-employee a reason for the termination, he informed plaintiff-employee that he was not fired because of work ethic, job performance, or violation of company rule or policy. *Id.*



By Jason A. Paskan, Esq.

Plaintiff - employee asserted two claims for relief, including unlawful retaliation under 4123.90 and a tort for wrongful discharge in violation of public policy. *Id.* at ¶3. The Court determined that the retaliation provisions in R.C. 4123.90 did not expressly apply to similarly situated workers like the plaintiff-employee in *Sutton*, because the workers' compensation claim had not yet been filed, instituted or pursued. *Id.* at ¶14.

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Ohio Recognizes Common-Law Tort Claim for Wrongful Discharge...Cont.

The Court focused its analysis on the wrongful discharge in violation of public policy, recognized by the Court in *Greeley v. Miami Valley Maintenance Contrs., Inc.*, (1990), 49 Ohio St. 3d 228. In order to prove a claim under *Greeley*, a plaintiff must prove: “(1) a clear public policy exists and is manifested in a state or federal constitution, statute or administrative regulation, or in common law (the clarity element), (2) dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element), (3) the plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element), and (4) the employer lacked an overriding legitimate business justification for the dismissal (the overriding-justification element).” *Sutton*, at ¶9.

Because this was an appeal, the Court only concerned itself with questions of law, i.e. the clarity and jeopardy elements. *Id.* at ¶¶9-10. However, the Court did lend guidance on what is necessary in order to establish the causation element - “the retaliatory nature of the discharge and its nexus with workers’ compensation must be established by a preponderance of the evidence”. *Id.* at ¶10. The Court also explained what is necessary to establish the overriding-justification element - “[plaintiff-employee] must prove that the [defendant-employer] lacked an overriding business justification for the employees termination”. *Id.*

In analyzing the clarity element, the Court determined that the General Assembly left a gap in R.C. 4123.90 “for conduct that occurs between the time immediately following injury and the time in which a [workers’ compensation] claim is filed, instituted or pursued.” *Id.* at ¶14. The Court determined that the “General Assembly did not intend to leave a gap in protection during which time employers are permitted to retaliate against employees who might pursue workers’ compensation benefits.” *Id.* at ¶22. Accordingly, the Court determined that R.C. 4123.90 expressed a clear public policy against the termination of injured workers, “including injured employees who have not filed, instituted, or pursued a workers’ compensation claim.” *Sutton*, at ¶22.

In analyzing the jeopardy element, the test “is whether the remedy provisions [set forth in R.C. 4123.90] adequately protect society’s interest by discouraging the wrongful conduct.” *Sutton*, at ¶25. The Court determined that because the remedies section of R.C. 4123.90 limits the class of employees to those who have actually pursued workers’ compensation claims for purposes of R.C. 4123.90, the statute did not provide adequate remedies, thereby satisfying the jeopardy element.

The Court found that the Workers’ Compensation act provides limited and exclusive remedies and “supplanted, rather than amended or supplemented the unsatisfactory common-law remedies.” *Sutton*, at ¶33. The Court determined that it “would be nonsensical to acknowledge a tort in violation of

public policy but fail to tailor the remedies in conformance with that public policy.” *Id.* at ¶36. Accordingly, the Court limited the remedies for violation of the public policy set forth in R.C. 4123.90 to those remedies listed in the statute. *Id.* at ¶35.

It is important to note that the causation and overriding-justification elements were not considered by the Court in this case because factual issues are not matters for appeal. Therefore, even though the plaintiff-employee may have won at the appellate level and his claim is recognized, he must still establish causation and a lack of an overriding business justification in order to obtain a judgment at the trial level.

Can Plaintiff’s Counsel Contact a Corporate Defendant’s Current and Former Employees?...Cont.

“blanket representation” may not have validity under any case law precedent from any Ohio state court or from the U.S. District Court for the Northern District of Ohio.

To date, the Supreme Court of Ohio’s Board of Commissioners on Grievances and Discipline has issued an Advisory Opinion dated February 4, 2005, on this issue, namely Ohio Advisory Opinion 2005-3, 2005 WL 375343. Of course, such Advisory Opinions are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the ethical rules governing attorneys practicing in the state of Ohio. Based upon Ohio Advisory Opinion 2005-3, it is clear that the answer to the question of whether a plaintiff’s attorney may ethically contact a defendant corporation’s current and/or former employees is: “sometimes.”

Generally speaking, a plaintiff’s attorney representing an interest adverse to a defendant corporation may in fact communicate without the consent of a corporation’s lawyer with certain current and/or former employees of the corporation, even when defense counsel asserts a “blanket representation” of the corporation and all of its current and former employees. In situations involving such contact by plaintiff’s counsel, it is critical to analyze the appropriateness of the contact based upon whether the individual contacted is a former or current employee of the defendant corporation. As such, below is a brief discussion of contact and the parameters for such contact as to employees distinguished between current and former employees of a defendant corporation.

Many people instantly tumble to the wrong conclusion that if an individual currently works for a defendant corporation then plaintiff’s counsel may not ethically contact that individual. Such a conclusion is erroneous. Ohio Advisory Opinion 2005-3 clearly states that such communication with a current employee of a defendant corporation is permissible under specific guidelines. Under Ohio’s ethical rules for

Can Plaintiff's Counsel Contact a Corporate Defendant's Current and Former Employees?...Cont.

legal counsel, such contact with current employees is only prohibited when one of three scenarios are present. The three instances where contact with a current employee is prohibited are:

1. The current employee supervises, directs or regularly consults with the defendant corporation's lawyer concerning the case; or
2. The current employee has authority to obligate the defendant corporation with respect to the case; or
3. The current employee's act or omission with the case may be imputed to the defendant corporation for purposes of civil or criminal liability.

Again, the ethical rules prohibit contact by plaintiff's counsel with a defendant corporation's current employees when any one of the above described scenarios is in place. It is not necessary that all three apply for contact to be deemed unethical.

While many corporations erroneously assume that all of its current employees are shielded from contact with plaintiff's counsel across the board, even more corporations wrongly believe that its former employees are protected from such contact by plaintiff's counsel. Plaintiff's legal counsel may contact all former employees irrespective of whether or not the three scenarios presented above for current employees are met. As to former employees of a defendant corporation, a plaintiff's attorney may contact them without the consent of the defendant corporation's legal counsel as long as:

1. The former employee is not represented by his or her own legal counsel in the case;
2. The former employee has not asked the defendant corporation's attorney to provide legal representation to him or her in the case;
3. The former employee has consented to speaking with the plaintiff's attorney;
4. The former employee has been informed by plaintiff's counsel not to divulge any communications that the former employee may have had with defendant corporation's attorney or other legal counsel; and
5. The former employee was fully informed that the plaintiff's counsel represents a client adverse to the defendant corporation.

It is important to note that all five of the above conditions must be met in order for contact between a former employee of a defendant corporation and plaintiff's counsel to be deemed appropriate.

Obviously, the guidelines for a plaintiff's attorney to contact a former employee are much more lax than that of the ethical guidelines for current employees. By way of example, a

current CEO of a defendant corporation would almost certainly be deemed out of bounds for a plaintiff's attorney to contact under Ohio Advisory Opinion 2005-3, but that same CEO could potentially be contacted by plaintiff's counsel after his or her employment with the defendant corporation has ended as long as all five of the conditions as to former employees detailed above are met.

While the state court system in Ohio has only Ohio Advisory Opinion 2005-3, the United States District Court for the Northern District of Ohio has formally weighed in on this issue with two separate legal opinions in cases handled by Judge Carr. Judge Carr is currently on Senior Judge status with the U.S. District Court and was nominated by former President Clinton. On the issue of contact with former employees, Judge Carr has expressly stated: "I hold that attorneys practicing in the Northern District of Ohio are not barred from ex parte communications with former employees of adverse corporations." *U.S. v. Beiersdorf-Jobst*, 980 F.Supp. 257 (1997). Judge Carr went on to discuss the major point that the rules of ethical conduct for lawyers in Ohio at the time he drafted his opinion were written to apply to current employees and did not directly speak to former employees.

Five years after his opinion in the *Beiersdorf-Jobst* case, Judge Carr again restated his holding as to contact with former employees while analyzing how to determine if contact is appropriate as to current employees in the case of *Johnson v. Ohio Department of Youth*, 231 F.Supp.2d 690 (2002). To summarize the *Johnson* case holding by Judge Carr, the Court's opinion gave the same guidance on this issue as contained in Ohio Advisory Opinion 2005-3.

In conclusion, defendant corporations should not assume at the start of litigation that plaintiff's counsel cannot and will not try to contact any of its current and/or former employees. The correct course of action is for the defendant corporation to confer with its legal counsel and determine which current and/or former employees may be sought out by the plaintiff's lawyer for interviews. Only once these potential current and/or former employees have been identified can the legal counsel for the defendant corporation analyze each potential current and/or former employee's status under Ohio Advisory Opinion 2005-3 to determine the parameters within which each specific individual may be ethically interviewed by the Plaintiff's attorney.



Keith Hansbrough, Esq.

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Expert Witness Discovery and the Increased Protection Afforded by the 2010 Amendments to Federal Civil Rule 26

In December 2010, Federal Civil Rule 26 was amended to address many of the problems surrounding expert disclosure and discovery. These changes under Rule 26 included, in part:

1. Amending Rule 26(a)(2) to limit the information expert witnesses must disclose to the "facts or data considered by the witness in forming" opinions. The revised language is narrower than the prior disclosure of all "data or other information" considered in forming an opinion, in an effort to limit disclosure.
2. Amending Rule 26(b)(4) to provide work-product protection to draft reports and attorney-expert communications (subject to three exceptions) to ensure that lawyers may freely interact with experts without disclosing the communications.

These amendments are designed to prevent and limit the extent to which opposing counsel can discover attorney-expert communications and draft reports, which was permitted under prior versions of the Rule. The ultimate intent of the amendments are to significantly limit the amount of information expert witnesses are required to disclose.

Importantly, the amendments to Rule 26 will provide work-product protection against discovery of draft expert reports and attorney-expert communications, and are designed to allow lawyers to work with testifying experts without exposing those communications. Rule 26(b)(4) will expand work-product protection to draft expert reports and attorney-expert communications, with the exception of: (1) expert compensation, (2) facts and data that the expert considered in forming opinions and (3) assumptions that the attorney provided and upon which the expert relied in forming his or her opinions.

Amended Rule 26 will strike a balance between the disclosure necessary for the parties to develop their cases and the burdens and expense of broad discovery obligations. The committee notes that accompany the amended Rule 26, provide specific guidance to ensure much of the information shared between attorneys and expert witnesses is protected from discovery with the express goal of encouraging the free flow of information to allow both experts and attorneys to better perform their important roles.

The effect of the amendments to this Rule is significant to lawyers practicing in areas requiring substantial expert witness involvement such as medical malpractice, long-term care litigation, product liability, drug and device defense and toxic tort defense to only name a few. Before the amendments, Rule 26 had been interpreted to require reports from all witnesses offering expert testimony, and to allow discovery of all communications between counsel and expert witnesses and all draft expert reports. This strict requirement resulted in lawyers and experts taking elaborate steps to avoid creating a discoverable record, thereby needlessly wasting time and expense in an effort to prevent the discovery of communications and draft reports.

As duly noted by Judge Lee Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, "[t]he artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts—one for consultation, to do the work and develop the opinions, and one to provide the testimony—to avoid creating a discoverable record of the collaborative interaction with the experts."

While the wholesale protections afforded pursuant to Federal Civil Rule 26 have not been adopted in sum by the Ohio Supreme Court, practitioners should be cognizant of the protections afforded by way of the Ohio Rules of Civil Procedure and judicial interpretation in order to protect from disclosure of vital attorney-expert communications. In Ohio, Civ.R. 26(B)(3), commonly referred to as the work-product doctrine, provides that "a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or trial by or for another party or by or for that party's representative *** only upon a showing of good cause therefor." In conjunction, Civ.R. 26(B)(4)(b) provides that the party may then "discover from the expert or the other party, facts known or opinions held by the expert which are relevant to the stated subject matter." The policy behind Ohio's discovery rules is "to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases" and "to prevent an attorney from taking undue advantage of his adversary's industry or efforts." Civ.R. 26(A).

In 2005, *Helton v. Kincaid* (12th App.), 2005-Ohio-2794, addressed the issue of attorney-expert communications stating, as follows:

"It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. A bright-line rule requiring discovery may encourage counsel to withhold material from an expert which may hamper the expert in forming opinions. The policy reasons supporting the bright line rule are not compelling and ignore the policy considerations that compel protection of core work product."

The *Helton* court held that "letters from an attorney to an expert are protected under the work-product doctrine and are not discoverable absent a showing of good cause as provided in Civ.R. 26(B)(3)." The *Helton* court concluded that the facts known and the opinions held by the expert are discoverable; nonetheless, the communications between an expert and attorney are protected work product and immune from discovery.

The amended language of Federal Civil Rule 26 is narrower in scope; thus, providing increased protection to work product information. The explicit limitations now afforded by Rule 26 prevent expert's draft reports from being discoverable, thereby promoting efficiency and cost-saving measures over the course of litigation. While the state courts of Ohio have not unanimously adopted this new language, the *Helton* decision, *supra*, arguably provides similar protections, potentially bridging the gap between the current state of Ohio Civil Rule 26 protections and the time the Supreme Court of Ohio uniformly adopts the amended language of Federal Civil Rule 26.

By Bret C. Perry, Esq.

