[Cite as *Hance v. Cleveland Clinic Found.*, 2021-Ohio-1493.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ELOISE L. HANCE, ET AL., :

Plaintiffs-Appellees, :

No. 110129

v. :

CLEVELAND CLINIC, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 29, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-929034

Appearances:

Kampinski & Roberts, Charles I. Kampinski, and Kristin M. Roberts, *for appellees*.

Reminger Co., L.P.A., Brian D. Sullivan, William A. Meadows, and Brian T. Gannon, *for appellant*.

MARY J. BOYLE, A.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1.

{¶ 2} Defendant-appellant, the Cleveland Clinic Foundation ("Clinic"), appeals the trial court's judgment ordering it to produce documents to plaintiffs-appellees, Eloise and William Hance.[1] The Clinic raises one assignment of error for our review:

> The trial court incorrectly compelled the production of privileged peer review documents that also contained confidential and proprietary trade secrets.

{¶ 3} Finding no merit to the assignment of error, we affirm the trial court's judgment.

I. Procedural History and Factual Background

{¶ 4} In February 2020, the plaintiffs filed a complaint against the Clinic for medical negligence, recklessness, and loss of consortium. They alleged that a physician, employed by the Clinic and acting within the scope of his duties with the Clinic, performed spinal surgeries on Eloise Hance after she sought a diagnosis and treatment for discomfort in her back. In the affidavit of merit supporting the complaint, a physician who practices in neurosurgery opined that the physician employed by the Clinic operated on Eloise Hance based on a misdiagnosis. The plaintiffs claimed that the negligence and recklessness of the physician decreased Eloise Hance's life expectancy and left her permanently paralyzed from the waist down. They allege that she suffers severe and persistent pain and will require medical care and treatment into the future. The plaintiffs demanded both

[1] The plaintiffs initially filed their complaint against the "Cleveland Clinic," but they later amended the complaint to name the "Cleveland Clinic Foundation" instead.

compensatory and punitive damages. The Clinic filed an answer and an amended answer, and discovery ensued.

{¶ 5} In July 2020, the plaintiffs moved to file an amended complaint, which the trial court granted. In the amended complaint, the plaintiffs added allegations that the physician who operated on Eloise Hance failed to inform her that the surgery could substantially and permanently worsen her condition.

{¶ 6} In September 2020, the plaintiffs filed a motion to compel the Clinic to produce documents in response to two document requests: Request No. 9 of their second set of discovery requests, and Request No. 1 of their third set of discovery requests.[2] The requests sought documents referring to the Clinic's efforts to motivate its neurosurgeons to increase patient access and revenue. The plaintiffs explained in their motion to compel that these requests were in response to deposition testimony of one of the Clinic's neurosurgeons.[3]

{¶ 7} Request No. 9 of the second set requests the following:

> Copies of all documents (including but not limited to emails, letters, memoranda, charts, graphs, and profit/loss analyses) of the type discussed by Dr. Krishnaney at pages 85-89 of his deposition transcript, which documents referred to or described any intent or desire to motivate the neurology staff to improve patient access, increase time slots, recapture market share, counter loss of patient volume to competitors, or otherwise increase revenues and/or numbers of patients.

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[2] The plaintiffs initially sought to compel the Clinic to produce documents in response to an additional three discovery requests, but in their reply brief, they withdrew those three requests.

[3] The plaintiffs attached an excerpt from the deposition transcript to their motion to compel, but the full transcript is not in our appellate record.

{¶ 8} Request No. 1 of the third set requests the following:

> Copies of the minutes of all Department of Neurological Surgery staff meetings held during the period January 1, 2016 through February 2019, during which meetings [sic] attendees discussed (in whole or in part) any intent or desire on the part of [the Clinic] or any of its officers, managers, or administrators to motivate or encourage the neurosurgery staff to improve patient access, increase timeslots, recapture market share, counter loss of patient volume to competitors, increase numbers of patients treated or procedures performed, or otherwise increase revenues produced[.]

{¶ 9} In opposition to the motion to compel, the Clinic argued that the documents responsive to these requests are protected by the peer-review privilege and contain trade secrets. The Clinic attached to its opposition the affidavit of Dr. Thomas Mroz, who was the Clinic's director for the Center of Spine Health from 2015 to 2019.

{¶ 10} After briefing, in November 2020, the trial court ordered the Clinic to submit any documents responsive to these two requests for in camera inspection. The Clinic filed a "Notice of Submission of Privilege - Objection Log and Documents for In-Camera Inspection," in which it stated that it was separately emailing to the court's staff attorney the documents subject to in camera inspection, Bates labeled MTC000001-MTC000048. The Clinic also explained that it had redacted from the documents it submitted to the trial court (1) most names, (2) information unresponsive to the plaintiffs' requests, and (3) "[r]aw data, specific numeral information, and/or dollar amounts, consistent with Plaintiffs' counsel's representation during the November 6, 2020 Court conference that the Plaintiffs' counsel was not requesting such data."

{¶ 11} On November 24, 2020, the trial court issued a judgment entry explaining that it had reviewed the documents and had determined that they "are not privileged and are subject to production." It ordered the Clinic to produce those documents, "as redacted," within ten days of the order.

{¶ 12} It is from this judgment that the Clinic timely appealed. Before oral argument, this court sua sponte ordered the Clinic to supplement the record with the documents it had submitted to the trial court for in camera inspection. The Clinic submitted the redacted documents under seal.

II. Final Order

{¶ 13} As a preliminary matter, we must determine whether the trial court's judgment granting the plaintiffs' motion to compel is a final, appealable order. Article IV, Section 3(B)(2) of the Ohio Constitution limits this court's jurisdiction to the review of "judgments or final orders of the [trial] courts." A trial court's discovery orders are generally interlocutory and, therefore, not immediately appealable. *Mezatasta v. Enter. Hill Farm*, 6th Dist. Erie No. E-15-037, 2016-Ohio-3371, ¶ 16.

{¶ 14} However, a judgment that compels the production of documents or information that is alleged to be protected by the peer-review privilege is a final order and, therefore, immediately appealable. R.C. 2305.252 ("An order by a court to produce for discovery or for use at trial the proceedings or records described in this section[, 'Confidentiality of proceedings and records; peer review'] is a final order."). This court has also found an order compelling the production of

documents that allegedly contain confidential trade secrets to be a final, appealable order. *Harris v. Belvoir Energy, Inc.*, 8th Dist. Cuyahoga No. 103460, 2017-Ohio-2851, ¶ 10. Accordingly, we have jurisdiction over this appeal.

III. Peer-Review Privilege

{¶ 15} The Clinic first argues that the peer-review privilege codified in R.C. 2305.252 shields the requested documents from discovery. The Clinic contends that information about how its Neurological Institute and Center for Spine Health uses its resources for patient care falls within the category of "utilization review," which R.C. 2305.25(E)(1) includes in the definition of "peer review committee."

{¶ 16} Generally, a discovery dispute is reviewed for abuse of discretion. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13, citing *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 110 Ohio St.3d 343, 2006-Ohio-4574, 853 N.E.2d 657, ¶ 9. However, whether the information sought in discovery is confidential and privileged "is a question of law that is reviewed de novo." *Id.*, citing *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist.1992). Accordingly, we review de novo whether the peer-review privilege applies. *See Squiric v. Surgical Hosp. at Southwoods*, 7th Dist. Mahoning No. 20 MA 0015, 2020-Ohio-7026, ¶ 60-69 (applying de novo standard to trial court's refusal to apply peer-review privilege).

{¶ 17} Civ.R. 26(B)(1) prohibits the discovery of privileged documents. The party claiming privilege has the burden of proving that the privilege applies to the requested information. *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178, 358 N.E.2d 521 (1976). Furthermore, the statutory peer-review privilege "must be strictly construed against the party seeking to assert it and may be applied only to those circumstances specifically named in the statute." *Smith v. Cleveland Clinic*, 197 Ohio App.3d 524, 2011-Ohio-6648, 968 N.E.2d 41, ¶ 9 (8th Dist.).

{¶ 18} R.C. 2305.252 states in relevant part:

> Proceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider[.]

In *Smith*, we explained that the purpose of R.C. 2305.252 is "to protect the integrity of the peer-review process" to "improve the quality of healthcare." *Smith* at ¶ 11. But the privilege "is not a generalized cloak of secrecy over the entire peer-review process." *Id.*

{¶ 19} The party asserting the peer-review privilege must "establish the existence of a committee that meets the statutory definition of 'peer review committee' contained in R.C. 2305.25(E)." *Smith* at ¶ 15. Next, the party must show that each of the documents it refuses to produce is a "record within the scope of a peer review committee." *Id.*, quoting R.C. 2305.252. The party seeking to assert the privilege "must provide evidence as to the specific documents requested, not

generalities regarding the types of documents usually contained in a peer-review committee's records." *Id.*

{¶ 20} R.C. 2305.25(E) defines "[p]eer review committee" as follows:

> "Peer review committee" means a utilization review committee, quality assessment committee, performance improvement committee, tissue committee, credentialing committee, or other committee that does either of the following:
>
> (a) Conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers, including both individuals who provide health care and entities that provide health care;
>
> (b) Conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions.

{¶ 21} The Clinic argues that the requested documents arose from a "utilization review committee" that involves the "quality of patient care." The Clinic contends that the documents "contain information regarding the deliberative process" that its Neurological Institute and Center for Spine Health uses to "increase patient access and improve patient care."

{¶ 22} The only evidence the Clinic produced in support of its peer-review argument is the affidavit of Dr. Mroz. But nothing in Dr. Mroz's affidavit supports the Clinic's contention that its "utilization review committee" fits the definition of a "peer review committee" or that the requested documents are within the scope of this committee. Indeed, the affidavit does not mention any committee at all, let alone a "utilization review committee" or any a committee that would fit the definition of "peer review." The contested documents themselves consist of emails from Dr. Mroz to his "Team" and Center for Spine Health staff meeting minutes.

The Clinic does not argue, or present evidence to show, that Dr. Mroz's team or the Center for Spine Health is a peer-review committee. The headings of the staff meeting minutes do not include any language related to a peer review committee or "utilization review committee," and they do not suggest that the documents were created for any purpose other than to record the material covered during the Center for Spine Health's staff meetings.

{¶ 23} Accordingly, we find that the Clinic has not satisfied its burden to establish that the peer-review privilege applies to prevent it from responding to the plaintiffs' document requests.

IV. Trade Secrets

{¶ 24} Lastly, the Clinic contends that the requested documents contain confidential trade secrets and are therefore protected from disclosure. The Clinic relies on Dr. Mroz's affidavit to establish that the documents contain trade secrets. It maintains that the documents are therefore shielded from discovery pursuant to Ohio's Uniform Trade Secrets Act ("UTSA") and R.C. 149.43.

{¶ 25} The Eighth District has applied a de novo standard of review to the question of whether certain documents contain trade secrets. *See Harris*, 8th Dist. Cuyahoga No. 103460, 2017-Ohio-2851, at ¶ 11-12. However, since this court decided *Harris*, the Ohio Supreme Court held in *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶ 35, that "[w]hether information constitutes a trade secret is a question of fact." Accordingly, we will follow the Ohio Supreme Court's holding and

review the trial court's finding that the requested documents do not contain trade secrets for abuse of discretion. *See also Squiric*, 7th Dist. Mahoning No. 20 MA 0015, 2020-Ohio-7026, at ¶ 60-69 (applying abuse of discretion standard to trial court's order to produce financial documents allegedly containing trade secrets).

{¶ 26} The UTSA is set forth in R.C. 1333.61 through 1333.69. The UTSA "forbids the unauthorized disclosure or acquisition of trade secrets by providing specific civil remedies, including injunction, R.C. 1333.62, a civil action for compensatory and punitive damages, R.C. 1333.63, attorney fees, R.C. 1333.64, and court preservation of trade secrets in a civil action under the Act, R.C. 1333.65." *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 539, 721 N.E.2d 1044 (2000) ("*Besser I*"). Contrary to the plaintiffs' argument that the UTSA applies only in cases alleging misappropriation of trade secrets, courts have also applied the UTSA's definition of "trade secret" in cases involving discovery disputes. *See, e.g.*, *Harris* at ¶ 15-17; *Splater v. Thermal Ease Hydronic Sys., Inc.*, 169 Ohio App.3d 514, 2006-Ohio-5452, 863 N.E.2d 1060, ¶ 9-12 (8th Dist.); *Squiric* at ¶ 85.

{¶ 27} R.C. 1333.61(D) defines a trade secret as follows:

> "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

{¶ 28} The Ohio Supreme Court has established the following "six-factor test for determining whether information constitutes a trade secret pursuant to R.C. 1333.61(D)":

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997), citing *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-135, 454 N.E.2d 588 (8th Dist.1983). No single factor is dispositive. *MNM & MAK Enters., LLC v. HIIT Fit Club, LLC*, 2019-Ohio-4017, 134 N.E.3d 242, ¶ 25 (10th Dist.).

{¶ 29} "In a discovery dispute, those asserting that the materials sought constitute trade secrets that are privileged from discovery bear the burden of establishing trade secret status." *Arnos v. MedCorp, Inc.*, 6th Dist. Lucas No. L-09-1248, 2010-Ohio-1883, ¶ 20. "Conclusory statements as to trade secret factors without supporting factual evidence are insufficient to meet the burden of establishing trade secret status." *Id.* at ¶ 28, citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 404, 732 N.E.2d 373 (2000) ("*Besser II*"). In addition, the party claiming to possess a trade secret must demonstrate that it has taken

"some active steps to maintain its secrecy in order to enjoy presumptive trade secret status." *Id.*

{¶ 30} We note that the Clinic submitted the requested documents to the trial court and to this court in a heavily redacted format. The small portions of the documents that are unredacted refer generally to a "budget" and the Center for Spine Health's progress in complying with it. The documents contain no unredacted details regarding specific data or dollar amounts, and the Clinic represents that the plaintiffs are not requesting such details. On its face, the general nature of the unredacted content would not appear to derive economic value from not being generally known by others.

{¶ 31} In its appellate brief, the Clinic quotes Dr. Mroz's affidavit to argue that these documents contain trade secrets. The Clinic explains that the requested material is "business information that derives independent economic value as it is not generally known to, and not ascertainable by" its competitors. The Clinic contends that it takes "reasonable efforts to maintain the secrecy of this information" and that the information is not known outside the Clinic or internally other than by its administrative leadership and "select individuals." The Clinic claims the "information is not made public or otherwise published for outside consumption." It states that it "expends significant time and resources to gather and analyze" the following: "the extent of its ability to provide patient access"; "the opportunities to increase patient access"; "the extent of the Center for Spine Health's market share"; "the comparative market share and number of patients [the Clinic]

has versus its competitors"; "how [the Clinic] will increase revenue"; and "how this information will be used to strategically market its services." Lastly, the Clinic asserts that how it allocates its resources, increases patient access, and generates revenue "go to the core aspects" of its business, and that this information "would create a competitive disadvantage" if known by the Clinic's competitors.

{¶ 32} The Clinic's argument and Dr. Mroz's affidavit consist of merely conclusory statements that mimic the trade secret factors without including any supporting evidence or demonstration of active steps the Clinic has taken to preserve the information's secrecy. *See Besser II*, 89 Ohio St.3d 396, at 400, 732 N.E.2d 373 (2000) (affidavit statement that memorandum was a trade secret because the hospital "derives potential economic value from not being generally known to, and not being readily ascertainable to, persons who can obtain economic value from its disclosure" was conclusory); *Arnos*, 6th Dist. Lucas No. L-09-1248, 2010-Ohio-1883, at ¶ 17-28 (affidavit that contained no factual detail was conclusory). Dr. Mroz included no factual detail to support his assertions, and the Clinic submitted no other evidence to support Dr. Mroz's affidavit or its opposition to the plaintiffs' motion to compel. The Clinic's reliance on conclusory affidavit statements is insufficient to satisfy its burden to show that the requested documents contain trade secrets. *See Besser II* at 404.

{¶ 33} Even if the requested documents did contain trade secrets, the Clinic has not shown that it would be entitled to withhold their production altogether. The Clinic contends that trade secrets are absolutely protected from discovery pursuant

to R.C. 149.43(A)(1)(v), which provides that "'[p]ublic record' does not mean * * * [r]ecords the release of which is prohibited by state or federal law[.]" The Clinic maintains that in *Besser II*, the Ohio Supreme Court determined that trade secrets fall within the category of documents "prohibited by state or federal law," and trade secrets are therefore "exempt from disclosure" pursuant to R.C. 149.43(A)(1)(v). However, R.C. 149.43 codifies the Ohio Public Records Act and does not involve civil discovery procedures. The Clinic acknowledges that the facts of *Besser II* involved a public records request but claims this distinction does not matter because the Ohio Supreme Court nonetheless determined that "state law prohibited the disclosure of trade secrets." We find no merit to this argument.

{¶ 34} As the Seventh District explained in *Squiric*, 7th Dist. Mahoning No. 20 MA 0015, 2020-Ohio-7026, there is a difference between cases involving civil discovery and cases involving public records requests: "In contrast to cases involving civil discovery and applying Civ.R. 26(C), * * * [a] public records request is per se denied if the record meets the trade secret definition because that is the statutorily-required result under the public records act." *Squiric* at ¶ 68, citing *Besser II*. The Revised Code and the Civil Rules, however, set forth different procedures for civil discovery. Both Civ.R. 26(C) and R.C. 1333.65 contemplate the disclosure of trade secret information through discovery as long as the secrecy of the information is preserved. Civ.R. 26(C)(7) provides that for good cause shown, the trial court may "make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including * * * that a

trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." R.C. 1333.65 provides that in an action under the UTSA, "a court shall preserve the secrecy of an alleged trade secret by reasonable means that may include granting protective orders in connection with discovery proceedings[.]"

{¶ 35} "Although confidential, trade secret information is not absolutely privileged." *Armstrong v. Marusic*, 11th Dist. Lake No. 2001-L-232, 2004-Ohio-2594, ¶ 23; *Svoboda v. Clear Channel Communications, Inc.*, 6th Dist. Lucas No. L-02-1149, 2003-Ohio-6201, ¶ 19. "The rules require the court to balance the need to preserve a trade secret with a party's right to discover material that is relevant and reasonably necessary." *Splater v. Thermal Ease Hydronic Sys., Inc.*, 169 Ohio App.3d 514, 2006-Ohio-5452, ¶ 11 (8th Dist.). The trial court, as appropriate, "may fashion a protective order which limits who may have access to the discovered evidence." *Id.* "The court must balance the competing interests to be served by allowing discovery to proceed against the harm which may result from disclosure of trade secrets." *Id.* However, the record does not reflect that the Clinic ever moved for a protective order.

{¶ 36} Given the lack of evidence that the requested documents, as redacted, contain trade secrets, we find that the trial court's decision that the documents contained no trade secrets was not unreasonable, arbitrary, or unconscionable. Therefore, we find that the trial court did not abuse its discretion.

{¶ 37} Having found that the peer-review privilege does not apply to the requested documents and that the trial court did not abuse its discretion in finding the documents did not contain trade secrets, we overrule the Clinic's sole assignment of error.

{¶ 38} Judgment affirmed.

It is ordered that appellees recover from appellant the 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.

MARY J. BOYLE, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
EMANUELLA D. GROVES, J., CONCUR