[Cite as *State v. E.I. Dupont De Nemours & Co.*, 2021-Ohio-2614.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 20CA30
vs.	:	
E.I. DU PONT DE NEMOURS AND CO., ET AL.,	:	DECISION & JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Marques P.D. Richeson, Cleveland, Ohio, and William L. Burton, Marietta, Ohio, for appellants.

David Yost, Columbus, Ohio, Robert A. Bilott, Cincinnati, Ohio, and Bill Markovits, Cincinnati, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:7-22-21
ABELE, J.

{¶1} This is an appeal from a Washington County Common Pleas Court order that directed E. I. Du Pont de Nemours and Company and The Chemours Company, defendants below and appellants herein, to respond to a request for production of documents "without regard to privilege" filed by the State of Ohio, plaintiff below and appellee herein. Appellants assign the following error for review:

> "THE COURT OF COMMON PLEAS ERRED IN ORDERING DEFENDANTS TO PRODUCE PRIVILEGED DOCUMENTS AND MATERIALS."

{¶2} In 2018, appellee filed a complaint that alleged that DuPont has inflicted years of harm and environmental damage upon Ohio's citizens and natural resources by dumping a toxic substance, perfluorooctanoic acid (PFOA), into the environment. Appellee further alleged that after DuPont's conduct became public, DuPont transferred its PFOA-related assets to Chemours. Appellee's complaint seeks to hold both parties liable for the damages that PFOA caused.

{¶3} In July 2019, the state served upon appellants its First Set of Requests for Production of Documents. On December 4, 2019, appellee filed a motion to compel discovery and asserted that, in response to its July 2019 discovery request, appellants "first asked for multiple extensions, and then asserted numerous baseless objections to providing the information and documents." Appellee stated that the parties then engaged in a "meet and confer" to attempt to resolve their differences and during the "meet and confer" the parties agreed upon "a handful of discrete items," but appellants have yet "to meaningfully respond to further correspondence."

{¶4} After the "meet and confer," appellee's counsel sent a letter to appellants' counsel that stated in part:

> "Defendants also object to several of the Requests because they purportedly seek privileged information or information subject to work product protection. To clarify, Plaintiff is not seeking information properly, and currently, protected from disclosure by attorney-client privilege. We expect that all responsive documents being withheld for privilege will appear on a privilege log. Additionally, we will challenge any documents that are improperly withheld on this basis, including, for example: (i) communications between and among Defendants and their counsel where any common interest or attorney-client privilege no longer exists due to the fact that Defendant are now in adverse litigation; and (ii) documents that have already been available to the public or over which privilege has been deemed waived or removed, nullified or otherwise no longer applicable by any court."

Appellee alleged that appellants have since failed to produce any documents or even a privilege log.

{¶5} Appellants, on the other hand, claimed that they legitimately objected to appellee's discovery requests, have started "to produce documents on a rolling basis," and "have been diligently supplementing." Appellants argued that they "have deemed produced nearly 1.2 million documents consisting of more than 8.6 million pages" that they have produced during the past 20 years in other litigation. Appellants additionally contended that the information that appellee sought "is irrelevant and/or not discoverable."

{¶6} On March 12, 2020, the trial court granted appellee's motion to compel. The court rejected appellants' arguments that

the information sought is not relevant, that appellants already produced most of the requested information, and that some terms used in appellee's request were ambiguous. The court thus ordered appellants to produce the requested information.

{¶7} In August 2020, appellee filed a letter with the trial court and asserted that appellants had not fully complied with the court's motion to compel. Appellee requested the court to schedule a telephonic conference to discuss the issues. Appellants also sent their own letter to the court and asserted they "have made significant progress," and "are on track" to complete discovery by the deadline.

{¶8} On September 21, 2020, appellee submitted a second letter and asked the court to schedule a conference to discuss imposing sanctions against appellants.

{¶9} On October 5, 2020, appellee sent a third letter to the court and asserted that appellants did not produce a privilege log relating to the non-fraudulent transfer claims, and that the privilege log appellants did produce relating to the fraudulent transfer claim is "not even useable." Consequently, appellee requested the court impose sanctions and specifically enter "[a]n order requiring Defendants to produce all documents responsive to the First RFPs (other than those already listed on the one privilege log from DuPont's fraudulent

transfer counsel), without regard to privilege; and providing that Defendants may assert a privilege within seven (7) days of the State's indication of its intent to utilize such document in a deposition or otherwise."

{¶10} On October 16, 2020, the trial court determined that appellants failed to comply with its previous order that granted appellee's motion to compel.[1] The court also found that because appellants had "failed to produce a usable privilege log," the court "ordered that [appellants] produce all documents responsive to [appellee's] First Request for Production of Documents without regard to privilege, provided that [appellants] may assert a privilege and seek an in camera review of a document to which [appellants] claim a privilege, within 7 days of the State's written notice of its intent to use such document in a deposition or otherwise." This appeal followed.

{¶11} In their sole assignment of error, appellants assert that the trial court erred by ordering appellants to produce privileged documents and materials. Before we consider the merits of appellant's appeal, however, we first note that,

[1] The record indicates that on October 6, 2020, the trial court held an in-person, oral hearing. Appellants attached an unofficial copy of a transcript of this hearing to a trial-court filing made after they filed their notice of appeal. Appellants have not, however, filed an official transcript as part of the appellate record. Nevertheless, we find it unnecessary to rely

shortly after appellants filed their notice of appeal, we asked the parties to address this court's jurisdiction to hear the appeal. After briefing, we provisionally determined that we have jurisdiction to hear the appeal. We now reconsider our jurisdiction to do so.

{¶12} Courts of appeals have jurisdiction to "affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Section 3(B)(2), Article IV, Ohio Constitution; *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.2d 414, ¶ 46; *State v. Thompson*, 141 Ohio St.3d 254, 23 N.E.3d 1096, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 37. "As a result, '[i]t is well-established that an order [or judgment] must be final before it can be reviewed by an appellate court. If an order [or judgment] is not final, then an appellate court has no jurisdiction.'" *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶ 14, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989); *Jackson* at ¶ 46 (stating that courts lack "jurisdiction over orders that are not final appealable"); *Thompson* at ¶ 37 (same). If a court's order is not final and appealable, we therefore must dismiss the appeal. *Eddie v. Saunders*, 4th Dist.

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upon the October 6, 2020 hearing to dispose of this appeal.

No. 07CA7, 2008-Ohio-4755, 2008 WL 4278039, ¶ 11.

{¶13} "An order is a final, appealable order only if it meets the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B)." *Lycan v. Cleveland*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶ 21, citing *Gehm* at ¶ 15; *accord Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus; *Mayberry v. Chevalier*, 2018-Ohio-781, 106 N.E.3d 89, ¶ 9 (4th Dist.). "As a general rule, discovery orders are interlocutory in nature, and not immediately appealable." *Dispatch Printing Co. v. Recovery L.P.*, 166 Ohio App.3d 118, 2006-Ohio-1347, 849 N.E.2d 297, ¶ 7 (10th Dist.) (citations omitted). However, "certain discovery orders may be final and appealable if they meet the requirements of R.C. 2505.02(B)(4)." *State ex rel. Thomas v. McGinty*, ___ Ohio St.3d ___, 2020-Ohio-5452, ___ N.E.3d ___, ¶ 43.

{¶14} Under R.C. 2505.02(B)(4)(a) and (b), an order is a final, appealable order if it "grants or denies a provisional remedy" and if both of the following apply: (1) "[t]he order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy"; and (2) "[t]he appealing party 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." A provisional remedy includes an ancillary proceeding involving the "discovery of privileged matter." R.C. 2505.02(A)(3).

{¶15} The Ohio Supreme Court has developed a two-part test for determining whether an order regarding the discovery of allegedly privileged matter constitutes a final, appealable order. *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 20. Under that test, "a provisional remedy such as the discovery of privileged or protected materials is final and appealable," if both of the following apply: (1) "the order determines the privilege issue and prevents a judgment in favor of the appellant regarding that issue"; and (2) "the harm caused by the privilege-related discovery order cannot be meaningfully or effectively remedied by an appeal after final judgment." *Id.* at ¶ 20, citing *State v. Muncie*, 91 Ohio St.3d 440, 446, 746 N.E.2d 1092 (2001).

{¶16} For example, an order that compels "the production of privileged or protected materials certainly satisfies R.C. 2505.02(B)(4)(a) because it would be impossible to later obtain a judgment denying the motion to compel disclosure if the party has already disclosed the materials." *Id.* at ¶ 21. To satisfy this condition, a party need not "conclusively prove the existence of privileged or protected information as a

precondition to appellate review." *DMS Construction Ent., LLC v. Homick*, 8th Dist. Cuyahoga No. 109343, 2020-Ohio-4919, ¶ 43. "To impose such a requirement would force an appellate court 'to decide the merits of an appeal in order to decide whether it has the power to hear and decide the merits of an appeal.'" *Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, 26 N.E.3d 858, ¶ 12 (1st Dist.), quoting *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, ¶ 35 (10th Dist.). A party must instead simply raise "a colorable claim" that the material is "protected by the attorney-client privilege." *Burnham* at ¶ 29; *accord DMS* at ¶ 43; *Bennett* at ¶ 35. A "colorable claim" means "[a] plausible claim that may reasonably be asserted, given the facts presented * * *." Black's Law Dictionary (11th ed. 2019); *accord DMS* at ¶ 44, quoting The Legal Information Institute, Wex, https://www.law.cornell.edu/wex/colorable_claim (access Sept. 22, 2020) ("A 'colorable claim' is one that is seemingly genuine or legally valid, i.e., a plausible legal claim' that has 'a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven.'").

{¶17} Thus, to establish "a colorable claim" that material is protected by the attorney-client privilege, a party must present more than "[s]peculation and unsubstantiated allegations" that the documents are privileged. *See generally*

State v. Ford, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 277, quoting *United States v. Wintermute*, 443 F.3d 993, 1003 (8th Cir.2006) (explaining that "'[s]peculation and unsubstantiated allegations do not present a colorable claim of outside influence of a juror'"). "[A]t a minimum, [a party] must make a plausible argument that is based on the particular facts at issue." *DMS* at ¶ 44.

{¶18} Civ.R. 26(B)(8)(a) states that when a party withholds information under a claim of privilege, "the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Generally speaking, "[w]ithout identification of the documents by the party seeking protection, the party seeking the information is unable to challenge the soundness of its claim." *Owens v. ACS Hotels, LLC*, 9th Dist. Summit No. 27787, 2016-Ohio-5506, 2016 WL 4449564, ¶ 9. Furthermore, without this type of information, a trial court is unable to determine whether the information sought is privileged. *See Nationwide Mut. Fire Ins. Co. v. Jones*, 4th Dist. Scioto No. 15CA3709, 2017-Ohio-4244, 2017 WL 2541259, ¶ 16 (concluding that order that denied insurer's motion to stay discovery regarding bad-faith claim did not determine privilege issue and noting that record did not

contain "specific documents that the trial court ordered appellant to produce or any specific findings concerning which documents, if any, are or are not protected under the attorney-client privilege"); *Scotts Co. v. Employers Ins. Of Wausau*, 3d Dist. Union No. 14-04-51, 2005-Ohio-4188, 2005 WL 1939422, ¶¶ 8-12 (discussing concept of "ripeness" and determining that insurer's concern "with releasing 'potential' attorney-client documents" did not present a real controversy but only a "hypothetical or abstract" question); *accord Gordon v. GEICO Ins. Co.*, 2019-Ohio-2437, 139 N.E.3d 548, ¶ 13 (8th Dist.) (quoting *Nationwide*, *supra,* with approval); *Texas Brine Co. LLC and Occidental Chemical Corp.*, 879 F.3d 1224, 1229 (10th Cir.2018), quoting *Holifield v. United States*, 909 F.2d 2014, 204 (7th Cir.1990) ("'Only when the district court has been exposed to the contested documents and the specific facts * * * can it make a principled determination as to whether the attorney-client privilege in fact applies. Any attempt to make this type of determination without this factual foundation amounts to nothing more than a waste of judicial time and resources.'").

{¶19} *Burnham, supra*, provides more concrete details that help explain the meaning of the foregoing principles. In *Burnham*, the court determined that the trial court's order to

compel disclosure of information was a final, appealable order when the defendants "plausibly alleged that the attorney-client privilege would be breached by disclosure of the requested materials." *Id.* at ¶ 3. In *Burnham*, the plaintiff requested the defendants to produce an incident report created after the plaintiff had slipped and fallen on the defendants' premises. The defendants asserted that the report was privileged and not discoverable.

{¶20} The plaintiff subsequently filed a motion to compel discovery. In response, the trial court ordered the defendants to provide the plaintiff "with a privilege log and directed the parties to brief the issue of privilege." *Id.* at ¶ 6. The defendants filed their privilege log under seal and included a copy of the incident report along with an affidavit from the defendants' chief legal officer. This affidavit asserted that the incident report had been prepared as part of the defendants' protocol to notify the legal department of any possible legal action.

{¶21} The trial court granted the plaintiff's motion to compel and ordered the defendants to produce the incident report. The defendants appealed, but the court of appeals dismissed the appeal for lack of a final, appealable order. On appeal to the Ohio Supreme Court, the court determined that the

defendants' trial-court briefings showed that the defendants "raised a colorable claim" that attorney-client privilege protected the incident report. *Id.* at ¶ 29. The court concluded that the trial court's order to compel disclosure of that incident report constituted a final, appealable order.

{¶22} Although *Burnham* did not explicitly define the contours of the meaning of "a colorable claim," the facts involved in the case help to illustrate the meaning of that phrase. In *Burnham*, the defendants presented some evidence that allowed the trial court to evaluate the validity of the privilege claim. The defendants submitted to the trial court for review a privilege log and a copy of the incident report alleged to be privileged. The defendants also submitted an affidavit from their chief legal officer that explained the basis for the claimed privilege. The defendants thus had a factual basis---the privilege log, a copy of the incident report and the affidavit---to support their privilege claim. *Burnham* therefore suggests that to establish a colorable claim that information is privileged, a party must produce some facts, rather than bare, unsubstantiated allegations, to allow a trial court to evaluate the validity of the privilege claim.

{¶23} In the case sub judice, we observe that appellants did not produce any facts to allow the trial court to evaluate the

validity of their privilege claims. Appellants did not present anything to the trial court beyond bare, unsubstantiated allegations that the requested information is subject to the attorney-client privilege.

{¶24} For example, by the time of the October 6, 2020 hearing, appellants had not complied with Civ.R. 26(B)(8), or offered any reason for their failure to do so. Civ.R. 26(B)(8) requires a party to support a privilege claim with "a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Appellants did not submit a privilege log or any other record to describe the nature of the materials, or that otherwise explained the specific reasons for their belief that the documents are privileged. Rather, appellants made a blanket assertion that certain documents are privileged. Appellants' unsubstantiated allegations are not, however, sufficient to raise a colorable claim that the information requested is privileged. *Hooten v. Safe Auto Ins. Co.*, 1st Dist. Hamilton No. C-061065, 2007-Ohio-6090, 2007 WL 3406914, ¶ 20 (concluding that trial court's order not final and appealable when party did not present any information to indicate that requested documents privileged, and instead, made "bare assertion * * * that the trial court's order would result

in the disclosure of confidential information"). Thus, without a colorable claim that the information is privileged, appellants cannot show that the trial court's order constitutes a final, appealable order.

{¶25} Moreover, the trial court's order that requires appellants to produce documents responsive to appellee's discovery requests "without regard to privilege" does not determine the privilege issue. An order to compel the discovery of allegedly privileged matter is final and appealable if "the order determines the privilege issue and prevents a judgment in favor of the appellant regarding that issue." *Burnham* at ¶ 20. In the case sub judice, however, the trial court's order does not determine the privilege issue. The court did not conclude that the documents that it ordered appellants to produce are, in fact, privileged. In view of appellants' failure to present any facts to support its attorney-client-privilege claim, the trial court made no finding at all regarding the privileged nature of any of the information that appellee requested. *Citibank, N.A. v. Hine*, 2017-Ohio-5537, 93 N.E.3d 108, 2017 WL 2778189, ¶ 15 (4th Dist.) (determining that trial court order did not determine privilege issue when the record was "insufficiently developed to establish that * * * deposition would result in the disclosure of any privileged materials"); *DMS* at ¶ 15, fn. 5

(noting that absence of privilege log meant court unable to determine whether any information requested privileged); *Williamson v. Recovery Ltd. Partnership*, 10th Dist. Franklin Nos. 15AP-638, 15AP-639, and 15AP-640, 2016-Ohio-1087, 2016 WL 1092354, ¶ 17 (determining that without "the identification of any purportedly privileged communications, it is impossible to determine whether attorney-client privilege applies to those communications"); Painter and Pollis, Ohio Appellate Practice, Section 2:19 (Oct.2020 Update) (observing that appellant should "place into the trial-court record adequate evidence to demonstrate the factual predicate for an appeal" based upon an order that ostensibly requires the production of privileged material)*; accord Smith v. Technology House, Ltd.*, 11th Dist. Portage No. 2018-P-0080, 2019-Ohio-2670, 2019 WL 2746868, ¶ 36 ("Without a descriptive itemization of the documents at issue, the applicability of the attorney-client privilege or work-product doctrine to a particular document or interrogatory is not possible."); *Brown v. Tax Ease Lien Servicing, LLC*, No. 3:15-CV-208-CRS, 2017 WL 6940735, at *4 (W.D. Ky. Aug. 21, 2017) (determining that a blanket assertion of the attorney-client privilege without providing any privilege log is insufficient to support a motion to quash).

{¶26} We recognize that some courts have reviewed similar trial court orders that compelled the discovery of allegedly privileged information and remanded to the trial court to conduct an in camera review of the documents to determine whether they contain privileged information. *Cousino v. Mercy St. Vincent Med. Ctr.*, 2018-Ohio-1550, 111 N.E.3d 529 (6th Dist.); *Grace v. Mastruserio*, 182 Ohio App.3d 243, 2007-Ohio-3942, 912 N.E.2d 608, ¶ 34–40 (1st Dist.). In those cases, however, the parties appeared to raise at least a colorable claim that the requested information was privileged. For example, in *Grace*, the trial court compelled the disclosing party to produce the entire contents of an attorney's case file without any in camera review or evidentiary hearing. Although the contesting party had not made the attorney's case file part of the record, the appellate court concluded that an attorney's case file seemingly would contain privileged information not subject to disclosure. Moreover, the contesting party identified a specific set of documents---the attorney's case file---that it claimed was privileged. Thus, the contesting party raised at least a plausible claim that the information requested was privileged.

{¶27} In *Cousino*, the contesting party asserted that requiring it to disclose listings of "all claims reviews" and

"risk management and/or liability prevention" measures would require the party to produce information subject to the attorney-client privilege. *Id.* at ¶ 40. To support its claim, the contesting party presented an affidavit from a risk manager who explained that the requested documents "are undertaken or prepared in anticipation of litigation under the direction of risk management, legal counsel and/or general counsel." *Id.* The appellate court determined that the affidavit, and the party's assertion that the materials are privileged, did not give the opposing party sufficient information to challenge the privilege claim. The court nevertheless did not conclude that the lack of information meant that the trial court's order to disclose the materials was a non-final order, but instead, stated that "in some circumstances it may be an abuse of discretion for the court to order discovery without conducting an in-camera inspection or providing the objecting party the opportunity to provide more specific information to support its privilege claims." *Id.* at ¶ 45. The court then decided, based upon its decision to remand the matter to the trial court to review a peer-review privilege claim, to also remand the matter to the trial court with an order to require the contesting party to support its attorney-client privilege claim with a privilege log. *Id.* at ¶ 47.

{¶28} In the case sub judice, by contrast, appellants' attorney-client privilege claim is not arguably colorable. Unlike *Grace,* who identified a specific set of documents claimed to be privileged, appellants did not identify any particular documents or sets of documents alleged to be privileged. Instead, appellant's made a broad and unsubstantiated allegation that some unspecified documents are privileged. Moreover, unlike *Cousino* in which the contesting party submitted an affidavit that attested to the privileged nature of the documents, in the case at bar appellants, again, presented nothing to support their attorney-client-privilege claim.

{¶29} Appellants nevertheless assert that on November 16, 2020, they served a privilege log on appellee and provided appellee with sufficient information to challenge their privilege claims. Appellants' after-the-fact disclosure does not, however, convert the trial court's October 16, 2020 order into a final, appealable order. At the time that the trial court entered its order, appellants had not produced a privilege log. The trial court, therefore, obviously had not reviewed the privilege log at the time of its October 16, 2020 decision. Additionally, as we noted above, the trial court did not make any determination whether the information appellee requested is, in fact, privileged.

{¶30} Consequently, under these circumstances we conclude that the trial court's order to compel discovery "without regard to privilege" does not determine the privilege issue. Therefore, the trial court's October 16, 2020 order does not constitute a final, appealable order and we must dismiss this appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that appellee recover of appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

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

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.