[Cite as *In re Special Grand Jury Investigation of Medicaid Fraud & Nursing Homes*, 2019-Ohio-2532.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: Special Grand Jury Investigation of Medicaid Fraud and Nursing Homes,	:	No. 18AP-730 (C.P.C. No. 16CM-41)
	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on June 25, 2019

Dave Yost, Attorney General, and *Anthony J. Molnar*, for appellee.

Webster & Associates Co., LPA, *Geoffrey E. Webster*, and *Conrad Dillon*, for appellants.

ON MOTION TO DISMISS

KLATT, P.J.

{¶ 1} This appeal arises from grand jury proceedings before the Franklin County Court of Common Pleas. The appellants are a rehabilitation and nursing center and its parent organization. The appellee is the state of Ohio, represented by the state attorney general.[1] Appellants seek relief from an order of the trial court compelling production of documents and rejecting appellants' contention that the subpoenaed materials are protected from discovery under the attorney work-product doctrine.

{¶ 2} The controversy began when appellee issued a subpoena requesting certain internal investigation documents related to a self-reported incident report submitted to the Ohio Department of Health by appellants' nursing facility. Appellants refused to produce

[1] Documents in this case are filed under seal and we accordingly refrain from identifying appellants by name. *In re Grand Jury Proceeding of Doe*, 150 Ohio St.3d 398, 2016-Ohio-8001.

certain documents that they considered to be attorney work-product. On May 12, 2017, the trial court determined that the documents did not qualify for the work-product privilege, and ordered production to appellee under penalty of contempt. An initial appeal to this court ensued. In *In re Special Grand Jury Investigation*, 10th Dist. No. 17AP-446, 2018-Ohio-760, hereinafter "*Grand Jury I*," this court sua sponte raised the issue of jurisdiction and dismissed the appeal. We held that while an order compelling discovery of allegedly privileged or protected information may constitute a final appealable order under R.C. 2505.02, appellants had not affirmatively established that an immediate appeal was necessary to afford a meaningful and effective remedy. *Id.* at ¶ 11, citing *Nami v. Nami*, 10th Dist. No. 17AP-265, 2017-Ohio-8330, ¶ 19.

{¶ 3} After remand from our March 1, 2018 decision in *Grand Jury I*, the court of common pleas, on August 2, 2018, entered an order lifting the stay imposed pending appeal and ordered appellants to produce all responsive information for the subpoenas at issue. This order also scheduled a show-cause hearing for August 27, 2018, to determine whether to hold appellants in contempt and impose sanctions for failure to comply with the state's subpoena. After the show-cause hearing, the court of common pleas entered an order on August 29, 2018 ordering appellants to provide certain documents directly to the state, and other documents for submission to the court for in camera inspection.

{¶ 4} The court then conducted its in camera inspection and on September 21, 2018 ordered all the documents to be produced in their entirety on or before October 1, 2018. On September 25, 2018, appellants filed their appeal with this court. On the same date, appellants filed a motion in the court of common pleas to stay the court's September 21, 2018 entry pending appeal. On October 16, 2018, the trial court entered an order denying the stay pending appeal based on the outcome of the prior appeal. The court formally found appellants in contempt for failure to produce the subpoenaed documents as described in prior orders of the court and deferred sanctions or purge of the contempt finding pending the outcome of the present appeal.

{¶ 5} On November 1, 2018, this court by journal entry granted the parties' joint motion to limit transmission of the record in this appeal to documents relevant to the appeal and to supplement the record with additional documents.

{¶ 6} The state filed its motion to dismiss this appeal for lack of a final appealable order on December 31, 2018. Appellants filed their memorandum in opposition to dismissal on January 10, 2019, further seeking an award of attorney fees on the basis that the motion to dismiss is frivolous. The state filed its reply memorandum on January 16, 2019.

{¶ 7} The state argues that the current appeal is repetitive and should be dismissed for the same reasons given in our dismissal of the first appeal. Appellants argue to the contrary that the appeal is not duplicative because, unlike the first appeal, appellants have now raised the argument that an immediate appeal satisfies R.C. 2505.02(B) because appellants would not be afforded a meaningful and effective remedy by an appeal after conclusion of litigation before the court of common pleas, including potential criminal proceedings. Once appellants are forced to disclose the documents allegedly subject to attorney-work product protection, there would be no way to "unring the bell" and preclude use of that information by the state in subsequent trial court proceedings; moreover, although no sanction has yet been imposed by the trial court for contempt, the remedy for the contempt sanctions might not be available in a subsequent appeal after final judgment.

{¶ 8} Our jurisdiction on appeal is limited to the review of final appealable orders, judgments, or decrees, and if an appeal is not taken from a final appealable order, we have no jurisdiction to review the matter and must dismiss it. *State ex rel. Ohio Academy of Nursing Homes, Inc. v. Ohio Dept. of Medicaid*, 10th Dist. No. 16AP-102, 2016-Ohio-1516, ¶ 4-5, citing *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, ¶ 44.

{¶ 9} The pertinent provisions of R.C. 2505.02provide that an order is final and appealable where it grants or denies a provisional remedy, in effect determines the action with respect to that remedy and prevents a judgment in the action in favor of the appealing party, and the appealing party would not be afforded a meaningful or effective remedy by appeal following final judgment. R.C. 2505.02(B)(4)(a) and (b).

{¶ 10} We first address appellants' argument that the trial court's order is final and appealable because it found appellants in contempt for failure to furnish the subpoenaed documents. We note that the trial court has deferred imposition of any sanction arising from the contempt finding. The contempt issue is therefore not ripe for appeal. "In Ohio,

the general rule for contempt proceedings is that a judgment of contempt becomes a final appealable order only when there is both a finding of contempt and the imposition of a penalty." *MD Acquisition, LLC v. Meyers*, 10th Dist. No. 11AP-390, 2013-Ohio-3825, ¶ 24.

{¶ 11} If the order at issue is to support an immediate appeal, therefore, it must do so on the basis that (1) the subpoenaed materials are privileged or otherwise protected from discovery, (2) the order is made in a special proceeding, and (3) appellants lack a meaningful remedy after final judgment. While trial court orders addressing discovery issues are usually deemed interlocutory and not subject to immediate appeal, an order compelling discovery of information alleged to be privileged or protected may be final and appealable if the requirements of R.C. 2505.02are met. *Ohio Academy of Nursing Homes* at ¶ 4-6; *Summit Park Apts., LLC v. Great Lakes Reinsurance, (UK), PLC*, 10th Dist. 15AP-820, 2016-Ohio-1514, ¶ 9-11.

{¶ 12} Three recent decisions from the Supreme Court of Ohio bear upon materials comparable to those in the case before us. All three lead opinions in these cases discuss the distinction between materials protected by attorney-client privilege and those protected as attorney work product, and across both lead and differing opinions the justices appear to agree on the distinguishable origins and purposes of the protection from discovery afforded to the two types of privilege or protection. None of these cases, however, clearly resolves the extent to which the two classes of evidence may differ in triggering a right to interlocutory appeal.

{¶ 13} In *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, the Supreme Court determined that this court had erred in accepting an appeal contesting the disclosure of attorney-work-product materials. The Supreme Court determined that the appellants had failed to articulate why an appeal after final judgment would not grant the appellants the relief they sought. Because the interlocutory appeal failed at this threshold level, the Supreme Court expressly chose not to resolve the question of whether attorney work product and attorney-client privilege should be treated identically in considering whether a corresponding discovery order could support immediate appeal. *Id.* at ¶ 7. Our decision in *Grand Jury I* followed *Chen* in all respects to reach the same truncated outcome.

{¶ 14} In *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, the Supreme Court accepted a discretionary appeal on similar facts to those in *Chen* "to resolve

whether an order compelling the production of documents allegedly protected by the attorney-client privilege is a final, appealable order under R.C. 2505.02(B)(4) [, and (2)] to clarify [its] holding regarding privilege, the attorney-work-product doctrine in R.C. 2505.02(B)(4)(b) [in *Chen*]." *Id.* at ¶ 1. The intent to clarify was ultimately hindered by the form of the resulting decision: a plurality decision with three justices concurring in a lead opinion, three concurring in judgment only, and one dissenting.

{¶ 15} The lead opinion in *Burnham* holds that "an order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal. Thus, a discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege satisfies R.C. 2505.02(B)(4)(b) and is a final, appealable order that is potentially subject to immediate review." *Id.* at ¶ 2. Thus, for attorney-client privilege questions, the appellant need only allege that materials are so privileged in order to maintain an immediate appeal. The lead opinion distinguished, however, "[o]ther discovery protections that do not involve common-law, constitutional, or statutory guarantees of confidentiality, such as the attorney-work-product doctrine," and for these required additional showings under R.C. 2505.02(B)(4)(b) beyond a mere statement that the matter is privileged. *Id*.

{¶ 16} The lead opinion in *Burnham* noted that "the attorney-client privilege and the attorney-work-product doctrine do not share the same origins or occupy the same provisions of statutory or common law." *Id* at ¶ 16. While the attorney-client privilege promotes broader public interests in observance and law of the administration of justice, the attorney-work-product doctrine promotes the less-entrenched principle that opposing counsel should not take undue advantage of an adversary's " ' "industry or effort." ' " *Id*., quoting *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 210 (2001) fn. 2, quoting former Civ.R. 26(A)(2). The lead opinion in *Burnham* therefore reasoned that, "[a]lthough both the attorney-client privilege and the work-product doctrine might often apply to the same material, the protections do not overlap completely." *Burnham* at ¶ 16, citing *In re Election of Nov. 6, 1990 for Office of Atty. Gen. of Ohio*, 57 Ohio St.3d 614, 615 (1991).

{¶ 17} To bolster this premise, the lead opinion in *Burnham* noted that Civ.R. 26(B)(3) and (B)(6) allow an opposing party to obtain opposing counsel's work product by

demonstrating a need for the materials. *Burnham* at ¶ 18, citing *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, paragraph two of the syllabus, and Civ.R. 26(B)(3). "Thus, the common law and judicial rules recognize the attorney-work-product doctrine as a rule that *may* provide protection from discovery." (Emphasis sic.) *Id.*

{¶ 18} Finally, the lead opinion in *Burnham* noted that this distinction between attorney-client privilege and attorney work product was not new to Ohio law. *Burnham* cited *Nelson v. Toledo Oxygen and Equip. Co., Inc.*, 63 Ohio St.3d 385, 389 (1992), which stated as follows:

> Because the work-product exemption protects materials that are peculiarly related to litigation, any harm that might result from the disclosure of those materials will likewise be related to litigation. An appellate court review of such litigation will necessarily be able to provide relief from the erroneous disclosure of work-product materials.

Nelson at 389.

{¶ 19} In summary, the lead opinion in *Burnham* concluded that "an order compelling production of material covered by attorney-client privilege is an example of that for which there is no effective remedy other than immediate appeal * * * [b]ut the same guarantee of confidentiality is not at risk with an attorney's work product." *Burnham* at ¶ 25-26. "This is not to say that compelling the disclosure of an attorney's work product pursuant to Civ.R. 26(B)(3) would never satisfy R.C. 2505.02(B)(4)(b) and require an interlocutory appeal. But it does not necessarily involve the inherent, extrajudicial harm involved with a breach of the attorney-client privilege." *Id.* at ¶ 26.

{¶ 20} Only three justices joined in the *Burnham* lead opinion as described above. Three justices concurred in judgment only, joining in an opinion by Justice Kennedy, who opined that the lead's opinion's distinction between attorney-client privilege and attorney-work product was "myopic" and did not "recognize the common-law origins of the work-product doctrine." *Id.* at ¶ 34 (Kennedy, J., concurring in judgment only). Justice Kennedy, therefore, would have held that "an order requiring the release of privileged documents, whether protected by the attorney-client privilege or work-product doctrine, is a final

appealable order because the proverbial bell cannot be unrung." (Internal quotations omitted.) *Id.* at ¶ 36.

{¶ 21} Justice Pfeiffer dissented entirely in *Burnham*, begging the question by asserting that the allegedly privileged materials at issue in that case were so obviously not privileged that no appeal could lie. *Id.* at ¶ 80 (Pfeiffer, J., dissenting).

{¶ 22} Subsequently, in the case of *In re Grand Jury Proceeding of Doe*, 150 Ohio St.3d 398, 2016-Ohio-8001, the Supreme Court, as in the case before us, addressed an order ordering a party to produce allegedly privileged information in grand jury proceedings. The Supreme Court clarified that grand jury proceedings constituted an "action" under R.C. 2505.02(B)(2). *Id.* at ¶ 16. The Supreme Court then held that an order denying a motion to quash a subpoena in such a proceeding, and consequently an order compelling a party to produce or testify regarding allegedly privileged documents, is an order granting or denying a provisional remedy as defined by R.C. 2505.02(A)(3). *Id.* at ¶ 19. Applying the final-appealable-order analysis for discovery disputes involving allegedly privileged materials as set forth in *Chen* and *Burnham*, the court in *Doe* concluded that "an order [compelling] production of allegedly privileged information is a final order pursuant to R.C. 2505.02(B)(4)." *Doe* at paragraph two of the syllabus. The majority decision in *Doe*, while maintaining the distinction between attorney-client privilege and attorney work product, did not particularly clarify the indeterminate analysis in *Burnham* regarding the distinction to be made in determining when an order compelling disclosure of these diverse materials is to be analyzed differently for purposes of determining whether it is final and appealable. Justice Kennedy, disagreeing again on the need to distinguish between attorney-client privilege and the attorney-work-product doctrine, dissented in *Doe* and noted that the "syllabus language causes confusion. Is the majority declaring that all a litigant need do to [establish a final appealable order] is *allege* that the material sought contains privileged information?" (Emphasis sic.) *Doe* at ¶ 31 (Kennedy, J., concurring in judgment only).

{¶ 23} Applying the precedent that can be distilled from the Supreme Court's recent cases, we first acknowledge and accept appellants' contention that the current appeal can be distinguished from the prior appeal that gave rise to our decision in *Grand Jury I*. Appellants have indeed argued here that they will suffer harm in the course of litigation

that cannot be remedied by appeal after final judgment. This is, under *Chen*, *Burnham*, and *Doe*, as much or more than they would need to allege to maintain the appeal if all the protected documents were alleged to be subject to attorney-client privilege. As discussed above, however, those cases leave us less direction regarding materials subject only to the attorney-work-product protection. Although the leading cases are subject to interpretation, we cannot accept appellants' assertion that *Doe* stands for the proposition that " ' "[a]ny order compelling 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." ' " *Grand Jury I* at ¶ 9, quoting *Doe* at ¶ 21, quoting *Burnham* at ¶ 21. *Doe* is not nearly so clear on this point, and our prior decision in *Grand Jury I* accordingly did not stand for such a blanket assertion.

{¶ 24} Nonetheless, appellants cogently argue in the present appeal that, once disclosed, the information in question cannot be neutralized, and the state will forever have the use of it in subsequent litigation before the trial court. The state, appellants argue, will therefore have the benefit of a "fishing expedition" into appellants' privileged and protected materials: "the State is building its entire case through the use of [appellants'] work-product, the information is shaping the State's prosecution, which precludes [appellants] from meaningful or effective remedy by an appeal following final judgment." (Jan. 10, 2019, Appellants' Memo. in Opp. at 12.) No subsequent appeal, they point out, could remove this unfair or improper advantage gained.

{¶ 25} We conclude that appellants have sufficiently established that the state's approach to discovery in the present case, while not strictly addressed in the Supreme Court's recent line of cases, falls on all fours with *Nelson*, 63 Ohio St.3d 385, and its assessment of whether the work-product exemption creates a harm resulting from disclosure that extends beyond current litigation. In the present case, to the extent that the trial court erred in ordering disclosure, appellants are deprived of remedy upon appeal after final judgment. Because the matter devolves from a grand jury proceeding, the state can establish no adequate remedy available to appellants if the matter proceeds to criminal prosecution. We therefore conclude that the state's motion to dismiss the appeal for lack of final appealable order is denied. Appellants' motion for sanctions is denied in light of

our prior decision in this case and the uncertain precedent we must apply to the issues on appeal.

Motion to dismiss denied.

BROWN and LUPER SCHUSTER, JJ., concur.