[Cite as *Gordon v. Geico Ins. Co.*, 2019-Ohio-2437.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GREGORY GORDON,	:	
Plaintiff-Appellee,	:	No. 107440
v.	:	
GEICO INSURANCE COMPANY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
RELEASED AND JOURNALIZED: June 20, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-896355

Appearances:

Ladi Williams and Tom Merriman, *for appellee*.

Williams, Moliterno & Scully Co., L.P.A., and Louis R. Moliterno, *for appellant*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant GEICO Insurance Company (AGEICO@) appeals the trial court's decision denying GEICO=s motion to stay discovery on

plaintiff-appellee Gregory Gordon=s (AGordon@) bad faith claim. We dismiss this appeal because it is not a final appealable order.

I. Facts and Procedural History

{¶ 2} On April 8, 2017, Gordon was involved in a car accident and was severely injured. The driver that caused the accident fled the scene and was never identified. Therefore, Gordon filed a claim pursuant to GEICO's Uninsured Driver policy provisions issued to Gordon. Gordon submitted his medical bills and records to GEICO. The bills totaled over $22,000, and GEICO offered Gordon $12,156.71. Gordon asked GEICO to revise its offer, and when GEICO refused, Gordon filed suit alleging that GEICO breached its contract with Gordon and engaged in bad faith regarding its evaluation and negotiation of Gordon's claims. Gordon requested punitive damages be awarded.

{¶ 3} GEICO claims that Gordon does not have medical payments coverage under his policy. GEICO also claims that Gordon never purchased such coverage, and that medical payments coverage is not identified on the declarations page of the policy of insurance issued to Gordon. In response to Gordon's complaint, GEICO filed its answer and a motion with the trial court to bifurcate the bad faith claim and all the discovery related to the bad faith claim. The trial court in its journal entry granted GEICO's motion to bifurcate and stay proceedings related to the bad faith claim, but denied GEICO's motion to stay discovery on Gordon's bad faith claim. GEICO appeals the trial court's decision.

II. Assignment of Error

{¶ 4} GEICO assigns one error for our review:

> I. The trial court erred to the prejudice of defendant-appellant GEICO in allowing discovery to proceed on all issues, and not staying discovery of the bad faith claim until after resolution of the underlying breach of contract claim.

III. Final Appealable Order

{¶ 5} Before we address the assigned error, we must first ascertain whether the trial court's order with regard to the denial of GEICO=s motion to stay discovery constitutes a final appealable order. GEICO argues that it does. GEICO relied on our decision in *DeVito v. Grange Mut. Cas. Co.*, 2013-Ohio-3435, 996 N.E.2d 547, & 9 (8th Dist.), which states,

> At least one court has determined that an order with regard to the discovery of a claims file constitutes a final, appealable order. *See Stewart v. Siciliano*, 2012-Ohio-6123, 985 N.E.2d 226 (11th Dist.). That decision recognized that although discovery issues are generally interlocutory in nature, provisional remedies ordering discovery of privileged material are final and appealable. *Id.* at & 42, citing *Cobb v. Shipman*, 11th Dist. Trumbull No. 2011-T-0049, 2012-Ohio-1676. We agree and also find that an order denying a stay of discovery with regard to attorney-client communications or work-product documents relating to a bad-faith denial-of-coverage claim meets the requirements of R.C. 2505.02(B)(4). As recognized in *Boone* [*v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 744 N.E.2d 154], a stay of disclosure may be necessary pending the outcome of the underlying claim when the court finds that the release of this information will inhibit the insurer=s ability to defend on the underlying claim. We find that in such a case, the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment. Because the requirements of R.C. 2505.02(B)(4) are satisfied, we conclude that there is a final, appealable order in this matter.

{¶ 6} However in that same opinion, the dissent stated,

> Respectfully, I dissent. This is an appeal from the trial court's judgment denying Grange and Zito's motion to stay discovery on DeVito's bad-faith insurance claim. The majority cites two Eleventh Appellate District opinions to support its finding that a trial court's judgment constitutes a final appealable order. But this court has held that such an order is not final and appealable. *See Holivay v. Holivay*, 8th Dist. Cuyahoga No. 89439, 2007-Ohio-6492, & 10 ("because the denial of a stay of proceedings is not a final appealable order, we must therefore dismiss this appeal for lack of jurisdiction"); *Marks v. Morgan Stanley Dean Witter Commercial Fin. Servs., Inc.*, 8th Dist. Cuyahoga No. 84209, 2004-Ohio-6419, & 13 ("a stay of discovery is not a 'provisional remedy,' the denial of which is subject to immediate appeal pursuant to R.C. 2505.02(B)(4)").

Id. at & 19 (Larry A. Jones, Sr., P.J., dissenting).

{¶ 7} Previous to the decision in *DeVito,* the Eighth Appellate District had decided in a host of cases that a motion to stay discovery did not constitute a final, appealable order. *See, e.g., Holivay* at & 9-10; *Marks* at & 11-13; and *Cleveland v. Zakaib,* 8th Dist. Cuyahoga Nos. 76928, 76929, and 76930, 2000 Ohio App. LEXIS 4756 (Oct. 12, 2000). However, after *DeVito,* the Ohio Supreme Court in *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, & 2 and 27, issued a clarifying opinion regarding what constitutes a final appealable order involving discovery. The Ohio Supreme Court provided guidance to the trial and appellate courts regarding whether an order compelling discovery satisfies R.C. 2505.02(B)(4) and is a final appealable order stating:

> [w]e hold 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. Other discovery protections that do not involve common-law, constitutional, or statutory guarantees of confidentiality, such as the attorney-work-product doctrine, may require a showing under R.C. 2505.02(B)(4)(b) beyond the mere statement that the matter is privileged.

{¶ 8} While *Burnham* did not involve a bad-faith claim, we are constrained by the Ohio Supreme Court's recent clarification and binding authority regarding when trial court orders involving the production of discovery constitute final appealable orders subject to review by this court.

{¶ 9} The court in *Burnham* explained that for a discovery order involving privileged or protected material to constitute a final appealable order subject to review, both of the following must apply: (1) "the order determines the privilege issue and prevents a judgment in favor of the appellant regarding the issue"; and (2) "the harm caused by the privilege-related discovery order cannot be meaningfully or effectively remedied by an appeal after final judgment." *Burnham* at ¶ 20, citing R.C. 2505.02(B)(4)(a) and (b).

{¶ 10} Based upon *Burnham*, the trial court's order denying GEICO'S motion to stay discovery does not satisfy the requirements set forth in R.C. 2505.02(B)(4) and is not a final appealable order.

{¶ 11} In this case, the trial court's order only denies GEICO'S motion to stay discovery regarding Gordon's bad faith claim. In fact, while Gordon served written discovery on GEICO, GEICO immediately appealed the trial court's order before it responded to any discovery requests. Thus, the trial court's order does not require

GEICO to produce any particular information — privileged or nonprivileged. Until the trial court issues an order or specific findings compelling production of documents or testimony and makes a determination whether the attorney-client privilege or other protection applies, typically after an in camera review, we have nothing yet to review. Rather, the trial court's general order denying GEICO'S motion to stay all discovery does not "determine the privilege issue" and fails to meet the requirements of R.C. 2505.02(B)(4)(a) per *Burnham*.

{¶ 12} Therefore, consistent with Ohio Supreme Court case law subsequent to *DeVito,* we do not believe that the trial court's order denying appellant's motion to stay discovery satisfies R.C. 2505.02(B)(4).

{¶ 13} The Fourth Appellate District recently addressed the denial of a motion to stay discovery in a bad faith case in *Nationwide Mut. Fire Ins. Co. v. Jones*, 4th Dist. Scioto No. 15CA3709, 2017-Ohio-4244, ¶ 15-16. The court in *Nationwide* also concluded that a denial of a motion to stay is not a final appealable order and held:

> [f]irst and foremost, the court's order does not compel appellant to produce any particular evidence. *See* Paul R. Rice, et al., 1 Attorney-Client Privilege: State Law Ohio, Section 11:32 (June 2016 Update) (stating that "Ohio appellate courts will not review orders that fall short of ordering the disclosure of privileged information" and that "an order denying a request to stay discovery is not a final appealable order, even if discovery includes additional document productions and depositions where privileged information may (but not ordered to be) revealed"); *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993) (concluding that "only * * * after * * * in camera review and a trial court order compelling disclosure" are substantial rights implicated); *Brahm v. DHSC, LLC*, 2016-Ohio-1207, 61 N.E.3d 726 (5th Dist.), &26 (determining that trial court order that does not compel the release of any particular documents not a final, appealable order); *Williamson v.*

Recovery Ltd. Partnership, 2016-Ohio-1087, 2016 WL 1092354, &10 (noting that discovery order concerning allegedly privileged information final and appealable when "it requires [party] to produce potentially privileged material"); *Cobb v. Shipman*, 2012-Ohio-1676, 2012 WL 1269128, &37 (concluding that trial court's order directing party to produce documents for in camera inspection and to appear for deposition not final and appealable when it did not compel the production of privileged materials; instead, parties "must wait until the trial court has ordered them to reveal confidences and to produce presumptively privileged material to the opposing party"); *Pepperad v. Summit Cty.*, 9th Dist. Summit No. 25057, 2010-Ohio-2862, & 10 (explaining that "[a] trial court's order is final and appealable to the extent it compels production of claimed privileged materials@); *Finley v. First Realty Property Mgt., Ltd.*, 9th Dist. Summit No. 23355, 2007-Ohio-288, &13 (stating that whether a trial court's order denying a protection motion is final and appeal depends upon whether the court issued a separate order that compelled the disclosure of the privileged information); *Scotts Co. v. Employers Ins. Of Wausau*, 2005-Ohio-4188, 2005 WL 193422, &14 (determining that "[o]nce the trial court orders the disclosure of specific documents, the insurers may have a proper appeal to this Court for review of whether those documents are within the purview of *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 744 N.E.2d 154 (2001)"); *Ingram v. Adena Health Sys.*, 144 Ohio App.3d 603, 606, 761 N.E.2d 72 (4th Dist.2001) (noting that "appellants' substantial rights would only be affected after an in-camera inspection and subsequent order compelling disclosure").

In the case at bar, the trial court has not ordered appellant to produce any specific purportedly privileged documents or communications. Instead, the court generally ordered that discovery regarding appellees' bad faith claim may proceed. Thus, we believe that the trial court's order does not satisfy R.C. 2505.02(B)(4)(a). *Branche v. Motorists Mut. Ins. Co.*, 2016-Ohio-3238, 2016 WL 3067810, &6 (concluding that trial court's decision that rejected insurer's request to stay discovery on bad faith claim not final and appealable and noting that trial court did not rule on insurer's privilege claim); *see Adams v. Community Support Services*, Inc., 9th Dist. Summit No. 21419, 2003-Ohio-3926, &12 (determining that order that "merely entitles [party] to conduct additional discovery" "does not mandate the discovery of privileged matters," and thus, "does not grant or deny a provisional remedy"); *see also Scotts Co. v. Employers Ins. Of Wausau*, 3d Dist. Union No. 14-04-51, 2005-Ohio-4188, & 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). The order does not "determine the privilege issue and prevent a judgment in favor of the appellant regarding that issue." *Burnham* at &20.

Nationwide at ¶ 15-16.

{¶ 14} In this case, the trial court did not order GEICO to produce specific privileged or protected documents. The trial court merely ordered that discovery on the bad faith claim could proceed. We find that the trial court's order does not satisfy R.C. 2505.02(B)(4), and thus the order is not a final, appealable order. As a result, we dismiss GEICO's appeal.

{¶ 15} Appeal dismissed.

It is ordered that appellee recover from appellant 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 common pleas 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.

_____
ANITA LASTER MAYS, JUDGE

SEAN C. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR