

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

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| DOUGLAS G. VIAFORA, INDIVIDUALLY | : | MEMORANDUM OPINION |
| AND AS ADMINISTRATOR OF THE | : | |
| ESTATE OF JENNIFER L. VIAFORA, | : | |
| DECEASED, | : | CASE NO. 2010-G-2987 |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | |
| - vs - | : | |
| | : | |
| NISSAR SUHAIL, et al., | : | |
| | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Court of Common Pleas, Case No. 10 P 000211.

Judgment: Appeal dismissed.

Thomas Mester and Brenda M. Johnson, Nurenberg, Paris, Heller & McCarthy Co., L.P.A., 1370 Ontario Street, #100, Cleveland, OH 44113-1792 (For Plaintiff-Appellee).

Michael A. Paglia, 1000 IMG Center, 1360 East Ninth Street, Cleveland, OH 44114 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} On September 2, 2010, appellant, Nissar Suhail, filed a notice of appeal from an August 4, 2010 entry of the Geauga County Court of Common Pleas. In that entry, the trial court denied appellant’s motion for a protective order.

{¶2} On September 10, 2010, appellee, Douglas G. Viafora, individually and as administrator of the estate of Jennifer L. Viafora, deceased, filed a “Motion to Dismiss Appeal or, in the alternative, Assign Appeal to Accelerated Calendar.” In the motion to

dismiss, appellee asserts that the appealed judgment entry of August 4, 2010, is an interlocutory discovery order and is not final and appealable pursuant to *In re Change of Name of Turnmire*, 5th Dist. No. 2007-CA-00228, 2008-Ohio-1074. Appellee further alleges that the trial court's August 4, 2010 entry does not compel appellant to respond to questions in violation of his Fifth Amendment rights. The order merely requires appellant to be present for discovery without limiting his right to invoke his Fifth Amendment rights as he deems necessary.

{¶3} Appellant filed a brief in opposition to the motion to dismiss on September 20, 2010, in which he posits that the August 4 entry is a final appealable order because he is intending on invoking his Fifth Amendment rights to every single question at deposition. Further, appellant contends that appellee will attempt to have the trial court judge order him to respond to questions in violation of his Fifth Amendment rights.

{¶4} The docket in this matter reveals that on July 7, 2010, appellant filed a motion for protective order with the trial court requesting that discovery not be had until the underlying criminal charges against him were resolved in order to protect his Fifth Amendment rights. In the August 4, 2010 entry, the essentially trial court denied appellant's motion and explained that it would not stay discovery or delay the action. Further, the court indicated that it anticipated and expected that appellee would not engage in fruitless discovery as long as the criminal case is pending and appellant exercises his Fifth Amendment privilege appropriately.

{¶5} We must determine whether the denial of a motion for protective order to stay all discovery pending resolution of related criminal charges to protect appellant's Fifth Amendment rights is a final appealable order. According to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be immediately reviewed by

an appellate court only if it constitutes a “final order” in the action. *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court’s order is not final, then an appellate court does not have jurisdiction to review the matter and the matter must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20.

{¶6} Pursuant to R.C. 2505.02(B), there are seven categories of a “final order,” and if a trial court’s judgment satisfies any of them, it will be considered a “final order” which can be immediately appealed and reviewed by a court of appeals.

{¶7} R.C. 2505.02(B) states that:

{¶8} “An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶9} “(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶10} “(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶11} “(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶12} “(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶13} “(a) The 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.

{¶14} “(b) The 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.

{¶15} “(5) An order that determines that an action may or may not be maintained as a class action;

{¶16} (6) An order determining the constitutionality of any changes to the Revised Code ***;

{¶17} (7) An order in an appropriation proceeding ***.”

{¶18} In the case at hand, the denial of appellant’s motion for protective order does not fall under any of the categories for being a final order pursuant to R.C. 2505.02(B). The protection afforded under the Fifth Amendment does not bar civil litigation while a related criminal proceeding is pending, nor does it relieve a witness in a civil case from appearing and responding to questions. See *State ex rel. Verhovec v. Mascio* (1998), 81 Ohio St.3d 334, 336. Furthermore, the Fifth Amendment does not forbid negative inferences against a party to a civil action where he or she declines to testify. *Id.* at 337. In general, blanket assertions of the Fifth Amendment privilege against self-incrimination are insufficient to justify a stay because a party is unable to determine whether such a privilege applies. *Rothstein v. Steinberg* (N.D. Ohio, 2008), No 5:08CV0673, 2008 U.S. Dist. LEXIS 107989, *9. Instead, the party seeking a stay should present themselves for questioning and answer specific questions by raising the privilege. *Id.* At *9-10. Only then can a trial court decide whether the assertion of the privilege is justifiable. *Id.* At *10.

{¶19} Here, appellant is asserting the privilege without answering any questions. Appellant cannot make a general assertion of his Fifth Amendment rights in order to avoid civil litigation without first raising the privilege in response to a particular question. The Fifth Amendment only applies to answers to specific questions propounded in civil discovery. Thus, the August 4, 2010 order is not a final appealable order.

{¶20} Accordingly, appellee's motion to dismiss is granted, and this appeal is hereby dismissed for lack of a final appealable order.

{¶21} Appeal dismissed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.