

[THE STATE EX REL.] ABNER ET AL., APPELLANTS, v. ELLIOTT, JUDGE,
APPELLEE.

[Cite as *State ex rel. Abner v. Elliott, 1999-Ohio-199.*]

*Prohibition to prevent common pleas court judge from enforcing any of his
discovery orders in an asbestos litigation—Dismissal of prohibition action
pursuant to Civ.R. 12(B)(6) affirmed.*

(No. 98-1786—Submitted January 26, 1999—Decided March 17, 1999.)

APPEAL from the Court of Appeals for Butler County, No. CA98-02-0038.

{¶ 1} Appellants, Donald Lee Abner and over eight hundred other persons, are workers and their representatives who filed actions in the Butler County Court of Common Pleas against various manufacturers, suppliers, installers, and distributors of products containing asbestos. Appellants claimed that they had been injured through exposure to asbestos. Respondent, Judge George Elliott, was assigned to hear all claims pending in these cases. Judge Elliott’s orders governing discovery in any single case were binding in the proceedings in all of the cases.

{¶ 2} In May 1997, Judge Elliott granted the motion of defendant O.K.I. Supply Co. for a protective order concerning appellants’ attorneys’ conduct during depositions in the asbestos cases. Among other things, Judge Elliott ordered that in future depositions in the asbestos litigation, counsel would refrain from making speaking objections or attempting to suggest answers or otherwise coach witnesses and that counsel would not confer with witnesses during depositions except to decide whether to assert a privilege.

{¶ 3} In August 1997, a document entitled “Preparing for Your Deposition/Attorney Work Product” authored by Baron & Budd, P.C., a law firm representing appellants in the Butler County asbestos litigation, was disclosed

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during the deposition of a plaintiff represented by Baron & Budd in unrelated asbestos litigation in Texas. The document was purported to advise plaintiffs in asbestos personal-injury cases to testify in a manner that would not necessarily be consistent with the truth.

{¶ 4} Defendant Raymark Industries, Inc. subsequently filed a motion to compel discovery, for a protective order, and for other relief based on its contention that the depositions in the Butler County asbestos litigation established that the plaintiffs had been improperly coached by either the same preparation document used by Baron & Budd in Texas or substantially similar advice. Judge Elliott held a hearing on Raymark's motion at which appellants' counsel conceded that some aspects of the Texas document were shocking and surprising and that the document should never have been used "in the first place." But appellants claimed that neither the Texas document nor anything similar had been used in the Butler County cases.

{¶ 5} In September 1997, following the hearing, the court granted Raymark's motion in part and ordered the following:

"1. Defendants may inquire into and obtain discovery respecting allegedly improper preparation or coaching of witnesses by plaintiffs' counsel, and, or plaintiffs' counsel's agents, representatives and employees.

"2. Defendants may redepose any plaintiff deposed prior to September 17, 1997 respecting alleged witness preparation and coaching.

"3. Discovery shall continue pursuant to the Case Management Order entered June 19, 1997. In any deposition taken after September 17, 1997 the matter of witness preparation and coaching shall be an appropriate area of inquiry.

"4. Any purported invasion of attorney-client privilege shall be brought to the court's attention for *in camera* review.

"5. Plaintiffs, plaintiffs' counsel, their employees, agents, and, or, representatives are enjoined and restrained from destroying, altering, or modifying in any way any documents, material, videos, photographs, or tangible things

whatsoever which have been used, are intended to be used, or are available for use for the preparation of witnesses in this or in any other asbestos litigation involving plaintiffs' counsel. Such documents, materials, and tangible things shall be produced and made available for inspection and, or, copying by defendants' counsel within ten (10) days after the date hereof. Any claim of privilege involving any such documents, material, or tangible things shall be submitted to the court for *in camera* inspection."

{¶ 6} On reconsideration of the September 1997 order, Judge Elliott entered an order in October 1997 that modified Paragraph 5 of the original order, so that the requested materials would be from asbestos litigation "pending in [Butler] county and in which Baron & Budd represent[s] plaintiffs."

{¶ 7} Despite Judge Elliott's September and October 1997 orders, appellants did not provide the defendants in the asbestos cases with any witness preparation documents and, although claiming that all of these materials were protected from disclosure by the attorney work product and attorney-client privileges, appellants did not submit the materials to Judge Elliott for an *in camera* inspection. In addition, at a November 1997 deposition, after Judge Elliott overruled appellants' objections, appellants' counsel instructed the deponent not to answer questions concerning witness preparation based on work-product and attorney-client privileges.

{¶ 8} As a result of the foregoing actions by appellants, defendant North American Refractories Company filed a motion for sanctions. In December 1997, after a hearing, Judge Elliott issued an order in which he found that the Texas deposition preparation document constituted evidence of improper coaching of prospective deponents, that it was reasonable to infer that similar deposition materials had been used to coach clients and witnesses in asbestos litigation in Butler County that had been filed by the same law firm that prepared the Texas document, that the court thereby issued its September and October 1997 discovery

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orders, and that appellants had not complied with those orders. Judge Elliott consequently ordered the following:

“Therefore, at the trial of this case, upon request of defense counsel, the jury will be instructed to accept and consider the following as being conclusively proved facts established by the greater weight of the evidence, *viz.*:

“1. Prior to trial plaintiff and his co-workers met with plaintiff’s attorneys and paralegals to prepare for this lawsuit.

“2. At least one such meeting occurred before (a) the preparation of plaintiff’s answers to written interrogatories, (b) the deposition of plaintiff by defendants’ counsel, and (c) the deposition of each co-worker.

“3. During each of those meetings, plaintiffs’ attorneys or paralegals either gave to or showed plaintiff and the co-workers certain lists, photographs, or other items which disclosed the product name, manufacturer name, product type, product description, packaging description, location of use, time of use, and typical trade or job of the Armco workers who used numerous products manufactured by defendants.

“4. Before, during, or immediately after the disclosure of that information to plaintiff and, or, the co-workers, plaintiff’s attorneys informed plaintiff and, or, the co-workers that it would be to their advantage for them to name as many of the defendants’ products as possible during their depositions.

“The foregoing instruction shall also be given to the jury in any other asbestos-related personal injury action in this county wherein court-ordered discovery of improper witness coaching techniques either has been or will be prevented by the objections of plaintiffs’ counsel.”

{¶ 9} In February 1998, after the Court of Appeals for Butler County dismissed appellants’ attempt to appeal Judge Elliott’s December 1997 order because it was not a final appealable order, appellants filed a complaint in the court of appeals for a writ of prohibition to prevent Judge Elliott from enforcing any of

his discovery orders in the asbestos litigation and to specifically find that there was no evidence of a waiver of the attorney-client privilege or any evidence of fraud in any of their cases so as to require an *in camera* inspection of the privileged materials and testimony. Appellants claimed that Judge Elliott's discovery orders and sanctions were entered without any jurisdiction because they violated their attorney-client privilege.

{¶ 10} The defendants in the Butler County asbestos litigation filed an *amici curiae* brief and Judge Elliott filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The court of appeals granted Judge Elliott's motion and dismissed the cause.

{¶ 11} This cause is now before the court upon appellants' appeal as of right as well as their request for oral argument.

Manley, Burke, Lipton & Cook and Andrew S. Lipton; Pratt & Singer Co., L.P.A., and Michael R. Thomas; Chester, Willcox & Saxbe, L.L.P., and J. Craig Wright, for appellants.

John F. Holcomb, Butler County Prosecuting Attorney, and Victoria Daiker, Assistant Prosecuting Attorney, for appellee.

Baker & Hostetler L.L.P. and Robin E. Harvey, urging affirmance for amici curiae, CBS Corp., f.k.a. Westinghouse Corp., Georgia Pacific Corp., and Uniroyal, Inc.

Baker & Hostetler L.L.P. and Wade Mitchell, urging affirmance for amicus curiae, Beazer East, Inc.

Barron, Peck & Bennie and Dave W. Peck, urging affirmance for amicus curiae, North American Refractories.

Israel, Wood & Puntil, P.C., and Chris Beck, urging affirmance for amicus curiae, General Refractories.

Willman & Arnold and Ruth Antinone, urging affirmance for amicus curiae,

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Combustion Engineering.

Regina M. Massetti, urging affirmance for *amicus curiae*, Ogelbay Norton Co.

Cash, Cash, Eagen & Kessel and *Thomas L. Eagen, Jr.*, urging affirmance for *amicus curiae*, Mallenkrodt, Inc.

Benesch, Friedlander, Coplan & Aronoff and *Frederic X. Shadley*, urging affirmance for *amicus curiae*, AndCo., Inc.

Gallagher, Sharp, Fulton & Norman and *Edward J. Cass*, urging affirmance for *amici curiae*, George Reintjes and Janos Industrial Corp.

Thompson, Hine & Flory and *Barbara J. Arison*, urging affirmance for *amicus curiae*, Flintkote Co.

Bonezzi, Switzer, Murphy & Polido and *Kevin O. Kadlec*, urging affirmance for *amicus curiae*, ICF Kaiser Engineers.

Vorys, Sater, Seymour & Pease and *Richard Schuster*, urging affirmance for *amicus curiae*, ACandS, Inc.

Buckingham, Doolittle & Burroughs and *Reginald S. Kramer*, urging affirmance for *amicus curiae*, PPG Industries, Inc.

Per Curiam.

Oral Argument

{¶ 12} Appellants request oral argument for this appeal pursuant to S.Ct.Prac.R. IX(2). Among the factors we consider in determining whether to grant oral argument under S.Ct.Prac.R. IX(2) are whether the case involves a matter of great importance, complex issues of law or fact, a substantial constitutional issue, or a conflict between courts of appeals. *State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 286, 690 N.E.2d 1273, 1276.

{¶ 13} Despite appellants' contentions to the contrary, oral argument is not warranted here. We recently decided a similar prohibition action challenging a trial

court's rulings on privilege issues. *State ex rel. Herdman v. Watson* (1998), 83 Ohio St.3d 537, 700 N.E.2d 1270. In addition, we have also recently addressed the crime-fraud exception to the attorney-client privilege. *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 700 N.E.2d 12. None of the pertinent criteria requires oral argument here. The parties and *amici curiae*'s briefs are sufficient to resolve this appeal.

{¶ 14} Based on the foregoing, we deny appellants' request for oral argument and proceed to determine the merits of their appeal based on the submitted briefs.

Merits

{¶ 15} Appellants assert in their propositions of law that the court of appeals erred in dismissing their prohibition action. Dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in relators' favor, it appears beyond doubt that they can prove no set of facts warranting relief. *Clark v. Connor* (1998), 82 Ohio St.3d 309, 311, 695 N.E.2d 751, 754. Appellants claim that dismissal was improper because Judge Elliott exercised unauthorized judicial power by ordering disclosure of privileged materials and issuing sanctions without first conducting an *in camera* inspection of the privileged matters. For the reasons that follow, however, appellants' claims lack merit, and the court of appeals properly dismissed their prohibition action.

{¶ 16} First, as we have consistently held, "trial courts have the requisite jurisdiction to decide issues of privilege; thus extraordinary relief in prohibition will not lie to correct any errors in decisions of these issues." *Herdman*, 83 Ohio St.3d at 538, 700 N.E.2d at 1271; *State ex rel. Children's Med. Ctr. v. Brown* (1991), 59 Ohio St.3d 194, 196, 571 N.E.2d 724, 726; *Rath v. Williamson* (1992), 62 Ohio St.3d 419, 583 N.E.2d 1308. Trial courts also have extensive jurisdiction over discovery, including inherent authority to direct an *in camera* inspection of

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alleged privileged materials and to impose sanctions for failure to comply with discovery orders, so a writ of prohibition will not generally issue to challenge these orders. See *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman* (1990), 51 Ohio St.3d 94, 95-96, 554 N.E.2d 1297, 1299-1300; see, also, *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 662 N.E.2d 1, syllabus (“A trial court has broad discretion when imposing discovery sanctions.”). In addition, the issue of whether there has been a sufficient factual showing of the crime-fraud exception to justify an *in camera* inspection is also for the trial court’s determination. See, *e.g.*, *Nix*, 83 Ohio St.3d at 383-384, 700 N.E.2d at 16-17.

{¶ 17} Second, absent a patent and unambiguous lack of jurisdiction on the part of Judge Elliott in issuing the challenged discovery orders, appellants have an adequate remedy by appeal to resolve any alleged error by Judge Elliott. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 338, 686 N.E.2d 267, 270. In other words, an appeal from the discovery orders challenged by appellants provides an adequate legal remedy because if appellants are victorious on appeal, a new trial would remedy any potential harm to them from Judge Elliott’s orders. The attorney-client privilege invoked here is peculiarly related to the underlying asbestos litigation. In *Nelson v. Toledo Oxygen & Equip. Co.* (1992), 63 Ohio St.3d 385, 388-389, 588 N.E.2d 789, 791-792, we similarly observed:

“[A]ppellant is questioning the ability of an appellate court after final judgment to remedy an erroneous work-product disclosure. We believe, however, that he takes too narrow a view of an appellate court’s ability to fashion appropriate relief. We can conceive of no circumstance, and appellant points to none, in which an appellate court could not fashion an appropriate remand order that would provide substantial relief from the erroneous disclosure of work-product materials. * * *

“In this regard, we distinguish appellant’s work-product claim from claims of physician-patient and informant confidentiality * * *. 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.”

{¶ 18} Third, appeal following a final judgment is not rendered inadequate due to the time and expense involved. *State ex rel. Willacy v. Smith* (1997), 78 Ohio St.3d 47, 50, 676 N.E.2d 109, 112. The large number of asbestos cases involved similarly does not establish inadequacy of the appellate remedy. Once the court of appeals resolves the propriety of the challenged discovery orders in the first appeal that raises these issues, it will necessarily resolve the issue for the other pending Butler County cases.

{¶ 19} Fourth, any further discovery rulings by Judge Elliott or other trial court judges in the asbestos cases may be subject to immediate appeal under R.C. 2505.02, as amended effective July 22, 1998. *Herdman*, 83 Ohio St.3d at 539, 700 N.E.2d at 1272. In fact, *amici curiae* defendants in the underlying asbestos litigation claim, and appellants do not dispute, that they have filed an appeal pursuant to amended R.C. 2505.02 to address these same issues.

{¶ 20} Fifth, the cases upon which appellants substantially rely, *State ex rel. Lambdin v. Brenton* (1970), 21 Ohio St.2d 21, 50 O.O.2d 44, 254 N.E.2d 681, and *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 25 OBR 207, 495 N.E.2d 918, are inapposite. *Lambdin* involved an “extreme and legally questionable” trial court ruling concerning applicability of the physician-patient privilege and the attachment of prejudicial conditions that rendered the remedy of appeal inadequate. *Lambdin*, 21 Ohio St.2d at 24, 50 O.O.2d at 46, 254 N.E.2d at 683. Here, as discussed previously, appeal provides an adequate legal remedy, and any harm imposed upon appellants is reparable. Judge Elliott additionally followed *Peyko* by ordering submission of claimed privileged materials to the court for an *in camera* inspection, and *Peyko* is not a prohibition case.

{¶ 21} Sixth, to the extent that appellants claimed in their prohibition

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complaint that Texas court decisions concerning the deposition preparation document precluded Judge Elliott's discovery orders, *res judicata* is not a basis for prohibition because it does not divest a trial court of jurisdiction to decide its applicability and it can be raised adequately by postjudgment appeal. *State ex rel. Soukup v. Celebrezze* (1998), 83 Ohio St.3d 549, 550, 700 N.E.2d 1278, 1280.

{¶ 22} Finally, appellants improperly requested in their prohibition complaint a declaration that there was no evidence of a waiver of the attorney-client privilege or any evidence of fraud in their cases so as to require an *in camera* inspection of the privileged materials and testimony. Courts of appeals lack original jurisdiction over claims for declaratory judgment. *State ex rel. Natl. Electrical Contractors Assn. v. Ohio Bur. of Emp. Serv.* (1998), 83 Ohio St.3d 179, 180, 699 N.E.2d 64, 66.

{¶ 23} Based on the foregoing, the court of appeals properly dismissed appellants' prohibition action pursuant to Civ.R. 12(B)(6). Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, COOK and LUNDBERG
STRATTON, JJ., concur.

PFEIFER, J., dissents and would reverse the judgment of the court of appeals.
