[Cite as *Frash v. Ohio Dept. of Rehab. & Corr.*, 2013-Ohio-2783.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mark J. Frash, Administrator of the Estate of Mark Wayne Frash, Deceased,	:	
Plaintiff-Appellant,	:	No. 13AP-14 (Ct. of Cl. No. 2011-04941)
v.	:	(REGULAR CALENDAR)
Ohio Department of Rehabilitation and Correction,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 28, 2013

Swope and Swope, and *Richard F. Swope*, for appellant.

Michael DeWine, Attorney General, *Stephanie D. Pestello-Sharf* and *Eric A. Walker*, for appellee.

APPEAL from the Court of Claims of Ohio

O'GRADY, J.

{¶ 1} Plaintiff-appellant, Mark J. Frash, administrator of the estate of Mark Wayne Frash, deceased, appeals from three orders of the Court of Claims of Ohio denying him access to the discovery of certain prison records in a wrongful-death action against defendant-appellee, Ohio Department of Rehabilitation and Correction. Because this court lacks jurisdiction to consider the Court of Claims' rulings on these orders, we dismiss the appeal.

{¶ 2} In September 2010, Mark Wayne Frash was assaulted by another inmate at Ross Correctional Institution. Frash died as a result of his injuries. In the wrongful-death action, appellant claimed that appellee failed to adequately protect decedent, because it

knew the inmate who attacked and killed him had a lengthy history of violence and an extensive mental-health history.

{¶ 3} In June 2011, appellant filed a motion for an order compelling appellee "to turn over all prison and psychiatric records of Inmate Eugene Groves * * *, [because] Inmate Groves brutally murdered Mark Wayne Frash in the Ross Correctional Institution on September 12, 2010." (R. 13.) On July 19, 2011, the Court of Claims allowed appellant access to portions of Groves' master inmate file pertaining to any violent or assaultive behavior, but denied access for the remainder of Groves' master inmate file and any of Groves' psychiatric or medical records.

{¶ 4} In September 2011, appellant filed a second motion to compel appellee to provide him with "a complete copy of the disciplinary records, a list of prisons he has been held in, including dates, and all psychological records, with a list of medications prescribed by Mental Health, regarding" Groves. (R. 22.) On September 22, 2011, the Court of Claims denied the motion, finding appellant failed to demonstrate the records sought were not privileged or relevant and thus likely to "lead to admissible evidence establishing the necessary elements of [appellant's] cause of action." (R. 24.)

{¶ 5} In November 2012, appellant renewed his motion to compel appellee to release copies of all of Groves' psychological and medical records. On December 5, 2012, the Court of Claims denied the motion, finding again appellant "has not persuaded the court that the documents sought are relevant and would lead to the admissible evidence establishing the necessary elements of plaintiff's cause of action." (R. 60.)

{¶ 6} On December 31, 2012, appellant filed a notice of appeal from the Court of Claims' July 19, and September 22, 2011, and December 5, 2012 entries denying his motions to compel the discovery of prison records.

{¶ 7} Appellant assigns the following single assignment of error for our review:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT REFUSED TO COMPEL DEFENDANT-APPELLEE TO PRODUCE ALL OF INMATE EUGENE GROVES' PRISON, PSYCHIATRIC AND PSYCHOLOGICAL RECORD, SINCE THE NATURE OF GROVES' ACTS OVERCOMES PRIVILEGE AND THE RECORDS ARE CLEARLY RELEVANT IN ESTABLISHING KNOWLEDGE OF THE DANGER GROVES POSED TO OTHER INMATES.

{¶ 8} As a threshold matter, we must determine whether the appeal is properly before us. Although the parties do not suggest that this court lacks jurisdiction, "litigants cannot vest a court with subject-matter jurisdiction by agreement," and subject-matter jurisdiction is properly raised by an appellate court sua sponte. *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 22; *State ex rel. Dunlap v. Sarko*, 135 Ohio St.3d 171, 2013-Ohio-67, ¶ 13.

{¶ 9} Ohio Constitution, Article IV, Section 3(B)(2) provides courts of appeals have "such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." "R.C. 2505.03(A) [also] limits the appellate jurisdiction of courts of appeals to the review of final orders, judgments, or decrees." *See State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, ¶ 44.

{¶ 10} Here, appellant asserts that the discovery orders at issue are final orders under R.C. 2505.02(B)(2) and (4), which provide:

> (B) 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:
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> * * *
>
> (2) An order that affects a substantial right made in a special proceeding * * *;
>
> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (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.
>
> (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.

{¶ 11} In general, discovery orders have historically been held to be interlocutory, and consequently, they were neither final nor appealable. *State ex rel. Steckman v.*

Jackson, 70 Ohio St.3d 420 (1994), paragraph seven of the syllabus. After a 1998 amendment to R.C. 2505.02, however, the General Assembly recognized that a discovery order of a privileged matter constituted a provisional remedy. *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶ 24; R.C. 2505.02(A)(3) (defining "[p]rovisional remedy" as "a proceeding ancillary to an action, including, but not limited to, a proceeding for * * * discovery of privileged matter"). Thus, even following the legislative amendment, "[v]ery few discovery proceedings qualify as provisional remedies." *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, ¶ 33 (10th Dist.); *Myers*, at ¶ 24 ("The General Assembly stopped short of including all discovery orders in the provisional-remedy section.").

{¶ 12} Regardless of whether the challenged orders constitute orders that grant or deny a provisional remedy, an order that denies a motion to compel the discovery of even privileged materials does not deprive the affected party of a meaningful or effective remedy on appeal following final judgment. *See Briggs v. Mt. Carmel Health Sys.*, 10th Dist. No. 07AP-251, 2007-Ohio-5558, ¶ 12 (although denial of the discovery of privileged materials is a provisional remedy under R.C. 2505.02(A)(3), appellant cannot satisfy R.C. 2505.02(B)(4) because he would be afforded a meaningful or effective remedy on appeal following a final judgment); *Curtis v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1214, 2005-Ohio-4781, ¶ 12 (trial court's "order denying plaintiff's motion to compel discovery meets none of the criteria set forth in R.C. 2505.02; thus, no justification exists for a departure from the general rule that such orders are not final and appealable"); *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, ¶ 10 (9th Dist.) ("Unlike an order compelling production of claimed privileged material, compliance with an order denying production will not destroy any privilege that may apply" so the order will not preclude a meaningful or effective remedy via appeal following final judgment.).

{¶ 13} In addition, the orders denying appellant's motions to compel the production of inmate Groves' prison records do not affect a substantial right made in a special proceeding. R.C. 2505.02(B)(2). It is true that these orders were made in a "special proceeding," because "[p]rior to the enactment of R.C. Chapter 2743, actions against the state of Ohio were barred by the doctrine of sovereign immunity." *See Taylor v. Ohio State Univ.*, 10th Dist. No. 94API11-1639 (May 11, 1995) (Court of Claims case is a special proceeding for purposes of R.C. 2505.02); R.C. 2505.02(A)(2) (defining "[s]pecial

proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity"). But a trial court order that does not deprive a party of the opportunity for meaningful review by way of appeal following final judgment does not affect a substantial right and is thus not appealable pursuant to R.C. 2505.02(B)(2). *See Terpenning v. Comfortrol, Inc.*, 10th Dist. No. 09AP-315, 2009-Ohio-6418, ¶ 16; R.C. 2505.02(A)(1) (defining "[s]ubstantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect"). None of the orders denying appellant's motions to compel discovery affected a substantial right.

{¶ 14} Therefore, because none of the discovery orders that appellant seeks to appeal are final orders, this court lacks jurisdiction to address the merits of the specified assignment of error.

{¶ 15} Finally, we observe that even if these orders constituted final, appealable orders under R.C. 2505.02, appellant did not file his notice of appeal within 30 days of the first two orders. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶ 10, citing App.R. 4(A) ("Generally, an appeal of a judgment or final order must be filed within 30 days from the entry of the judgment or order"); *State v Clayborn*, 10th Dist. No. 08AP-593, 2009-Ohio-1751, ¶ 4 ("Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal."). Although the notice of appeal was filed within 30 days of the December 5, 2012 order, the order merely denied appellant's "renewed" motion to compel. This successive motion could have been considered an improper motion for reconsideration of the rulings denying his previous motions to compel the same records, assuming that the initial orders could be considered to be final, appealable orders. *See McLaughlin v. McLaughlin*, 4th Dist. No. 09CA28, 2010-Ohio-694 (dismissing appeal from an entry denying successive motion seeking termination of spousal support and evidentiary hearing as an improper motion for reconsideration from a final order).

{¶ 16} Having determined that we lack jurisdiction to review the orders, which do not constitute final, appealable orders under R.C. 2505.02, we dismiss this appeal.

Appeal dismissed.

BROWN and DORRIAN, JJ., concur.

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