[Cite as *Daher v. Cuyahoga Cty. Community College Dist.*, 2017-Ohio-751.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104836

GEORGE DAHER

PLAINTIFF-APPELLEE

vs.

CUYAHOGA COUNTY COMMUNITY COLLEGE DISTRICT, ET AL.

DEFENDANTS

[Appeal By Cuyahoga County Court Reporter]

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-852177

BEFORE: Celebrezze, J., Boyle, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 2, 2017

ATTORNEYS FOR APPELLANT

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Nora E. Graham
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44111

ATTORNEYS FOR APPELLEES

For George Daher

John W. Gold
1947 Stony Hill Road
Hinckley, Ohio 44233

Also Listed

For Cuyahoga Community College District and Beverly Bankston

Barry Y. Freeman
Buckingham, Doolittle & Burroughs, L.L.C.
1375 East 9th Street, Suite 1700
Cleveland, Ohio 44114

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, a Cuyahoga County Court Reporter ("court reporter"), filed the instant appeal challenging the trial court's judgment holding the court reporter's motions to quash plaintiff-appellee George Daher's ("Daher") subpoena and for a protective order in abeyance and ordering the court reporter to produce grand jury materials to the trial court for an in camera inspection. Specifically, the court reporter argues that Daher failed to comply with R.C. 2939.11 and that the trial court lacked authority to order release of the grand jury materials. After a thorough review of the record and law, we dismiss the case for lack of a final appealable order.

I. Factual and Procedural History

{¶2} Daher was employed by Cuyahoga Community College District from September 2012 to April 2015. The events that led up to and resulted in his termination formed the basis for subsequent criminal and civil proceedings in the Cuyahoga County Court of Common Pleas. It is undisputed that the court reporter is not a party to the civil action from which the instant appeal arose.

{¶3} In Cuyahoga C.P. No. CR-15-599959, the Cuyahoga County Grand Jury returned an indictment in October 2015 charging Daher with two counts of unauthorized use of property — computer, cable, or telecommunication property, in violation of R.C. 2913.04. A second indictment was issued in December 2015 charging Daher with 24 counts of unauthorized use of property. The trial court granted the state's motion to dismiss the case without prejudice on February 3, 2016. On March 15, 2016, the trial

court amended its judgment entry and dismissed the case with prejudice. The trial court ordered the record of Daher's criminal case to be sealed pursuant to R.C. 2953.52.

{¶4} In Cuyahoga C.P. No. CV-15-852177, Daher filed a civil complaint against the college and Beverly Bankston, an administrative lieutenant with the campus police and security services, on October 6, 2015. Daher asserted claims for public policy violations, discrimination, retaliation, and intentional interference with prospective employment. Daher amended his complaint on April 21, 2016, to add a malicious prosecution claim. Specifically, Daher alleged that defendants maliciously instituted the criminal proceedings against him by filing a false, defamatory, and incomplete complaint to the Cuyahoga County Prosecutor's Office for the purpose of retaliating against him. Daher further alleged that the criminal prosecution was not supported by probable cause.

{¶5} On May 5, 2016, Daher filed a subpoena ordering the court reporter to produce "all transcripts, notes & exhibits from grand jury proceedings" pertaining to his criminal prosecution. The court reporter filed motions to quash Daher's subpoena and for a protective order, arguing that (1) grand jury proceedings are secret, (2) the requested materials were privileged, and (3) that Daher failed to demonstrate a particularized need for disclosure that outweighed the need for secrecy.[1]

{¶6} In opposing the court reporter's motions to quash the subpoena and for a protective order, Daher argued that he needed the grand jury materials to overcome the

[1] The court reporter directed the trial court to *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), syllabus, and *Petition for Disclosure of Evidence*, 63 Ohio St.2d 212, 216-218, 407 N.E.2d 513 (1980).

presumption that probable cause existed to prosecute him, establish the elements of his malicious prosecution claim, and to impeach Lieutenant Ronald Wynne of the college's campus police and security services. Daher further asserted that the motions were "a transparent attempt to prevent the discovery of potentially perjur[i]ous testimony that is directly relevant to [Daher's] malicious prosecution claims[.]"

{¶7} On July 15, 2016, the trial court held the court reporter's motions to quash and for a protective order in abeyance and ordered the court reporter to produce the grand jury materials requested in Daher's subpoena to the court for an in camera inspection.

{¶8} The court reporter filed the instant appeal challenging the trial court's judgment. The court reporter assigns one error for review:

> I. The trial court erred in ordering the court reporter to produce secret grand jury materials in violation of its statutory duty under R.C. 2939.11 to keep grand jury materials secret because the trial court in this civil action lacks authority to order disclosure of grand jury transcripts in response to a civil subpoena and [Daher] failed to file the mandatory petition with the supervising court of the grand jury.

II. Law and Analysis

A. Final Appealable Order

{¶9} We must first determine whether the trial court's July 15, 2016 order constitutes a final appealable order.

{¶10} Daher filed a motion to dismiss arguing that the instant appeal is premature because the court reporter was not ordered to produce the grand jury materials to him. Daher suggests that the trial court's order would only become a final appealable order if and when the court (1) determines that Daher demonstrated a particularized need for

disclosure and (2) orders the court reporter to produce the grand jury materials to Daher. The court reporter filed a motion in opposition to Daher's motion to dismiss, arguing that the trial court's judgment does, in fact, constitute a final appealable order because it involves the disclosure of privileged information.

{¶11} Both parties direct this court to *Stakich v. Russo*, 8th Dist. Cuyahoga No. 99488, 2014-Ohio-2526, in support of their arguments on the final appealable order issue. *Stakich* involved a civil action for, among other claims, malicious prosecution. The plaintiff-appellee had been previously indicted on three felony counts of menacing by stalking. *Id*. at _ 2. During the criminal proceedings, the plaintiff filed a motion for the grand jury transcript. After conducting an in camera inspection of the grand jury transcript, the criminal trial court made the transcript available to both parties. *Id*. at _ 10. The charges were dismissed at the state's request during pretrial proceedings. *Id*. at _ 2.

{¶12} After the criminal case was dismissed, the plaintiff filed a civil complaint against the defendant-appellant — a Cuyahoga County Sheriff's Deputy — a common pleas judge, and the Cuyahoga County Sheriff's Department. *Id*. at _ 3. During discovery, the plaintiff filed a copy of the grand jury transcript from his criminal case and attempted to use the grand jury transcript while deposing the prosecutor who handled the criminal case and appellant. *Id*. at _ 5, 7. Appellant refused to answer questions relating to his grand jury testimony during his civil deposition, and the plaintiff filed a motion to compel appellant to answer the questions at issue. *Id*. at _ 7.

{¶13} The trial court explained that appellant could not object to use of the grand jury transcript during the civil action based upon the secrecy of the grand jury proceedings because the grand jury transcript had already been released during the criminal case. *Id*. at _ 10. The trial court concluded that the plaintiff was allowed to use grand jury transcript during appellant's and the prosecutor's depositions. *Id*.

{¶14} Appellant filed an appeal challenging the trial court's ruling. The plaintiff filed a motion to dismiss, arguing that the trial court's order was not a final appealable order. Specifically, the plaintiff argued that because the grand jury transcript had been released during the criminal proceedings, the grand jury transcript was no longer privileged material, and thus, the trial court's order did not grant or deny a provisional remedy under R.C. 2505.02(B)(4). *Stakich*, 8th Dist. Cuyahoga No. 99488, 2014-Ohio-2526 at _ 12.

{¶15} This court denied the plaintiff's motion to dismiss, noting that "the determination that a discovery matter is or is not privileged is an appealable issue." *Id*. at _ 15. This court further explained that the trial court's order was a final appealable order because it determined the action with respect to a provisional remedy:

> By definition, a "provisional remedy" is "a proceeding ancillary to an action" and includes a proceeding for discovery of privileged matter. R.C. 2505.02(A)(3). Whether or not the grand jury transcript is privileged is the central issue in this appeal. Thus, the trial court's order allowing the parties to use the grand jury transcript determined the action with respect to a provisional remedy within R.C. 2505.02(A)(3)'s definition.

Id. at _ 18. Finally, this court concluded that the trial court's judgment was a final appealable order because "appellant would not be afforded a meaningful remedy by an appeal after a final judgment in the action because his grand jury testimony would have already been used at his deposition." *Id*. Aside from the final appealable order issue, this court concluded that the trial court did not abuse its discretion by permitting the plaintiff to use the grand jury transcript during the civil depositions. *Id*. at _ 34.

{¶16} In the instant matter, Daher cites *Stakich* for the proposition that a trial court's production order regarding grand jury materials is only a final appealable order when the court orders the party opposing the disclosure to disclose the grand jury materials to the party who requested disclosure. On the other hand, the court reporter emphasizes that in *Stakich*, this court denied plaintiff-appellee's motion to dismiss on the basis that "the determination that a discovery matter is or is not privileged is an appealable issue." *Id*. at _ 15.

{¶17} The instant matter is readily distinguishable from *Stakich*. First, there has been no in camera inspection of the grand jury materials that Daher requested in his subpoena. Second, neither the grand jury transcript nor materials from the grand jury proceedings have been released. In fact, as noted above, the record from Daher's criminal case has been sealed. Third, the plaintiff in *Stakich* sought to use the previously released grand jury transcript during his civil depositions; here, Daher's subpoena requested "all transcripts, notes & exhibits" from the grand jury proceedings, without specifying the purpose for which he requested the materials.

{¶18} In *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 65, 616 N.E.2d 181 (1993), *modified on other grounds, Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994), the plaintiff-appellee filed a medical malpractice action against defendants-appellants Mount Sinai Medical Center and two of its doctors. At the close of a jury trial, the jury returned a verdict in favor of the doctors, but was unable to reach a verdict with respect to the hospital. After a second jury trial, the jury returned a verdict in favor of the plaintiff against the hospital. The plaintiff filed a motion for prejudgment interest and subpoenaed the attorneys representing the nonparty doctors, directing them to bring various documents to the trial court's prejudgment interest hearing. The doctors filed joint motions to quash the subpoenas and for a protective order. The trial court granted the motion for a protective order to the extent that the doctors sought to prevent the subpoenaed documents from being disclosed to the plaintiff. However, the trial court ordered the doctors to submit the subpoenaed documents to the trial court for an in camera inspection during which the trial court would determine whether the documents were privileged.

{¶19} The doctors appealed the trial court's production order, arguing that the subpoenaed materials were privileged. This court dismissed the appeal, without opinion, finding that the trial court's production order did not constitute a final appealable order under R.C. 2505.02.[2]

---

[2] 8th Dist. Cuyahoga No. 63061 (Jan. 17, 1992), motion no. 123678.

{¶20} The doctors appealed this court's dismissal in the Ohio Supreme Court. The Ohio Supreme Court held that a trial court's order directing a party opposing a discovery request to submit the requested materials to the court for an in camera inspection during which the court may determine the materials' discoverable nature is not a final appealable order under R.C. 2505.02. *Bell* at syllabus. In analyzing the "substantial right" prong of R.C. 2505.02, the court explained that the doctors' substantial rights would only be implicated if the trial court issued an order compelling disclosure of the subpoenaed materials after conducting the in camera inspection. *Id*. at 64.

{¶21} This court applied the *Bell* rationale in *Keller v. Kehoe*, 8th Dist. Cuyahoga No. 89218, 2007-Ohio-6625. In *Keller*, the trial court ordered the defendant-appellant to file documents relating to the operation of a law business under seal for an in camera inspection. *Id*. at _ 5. Appellant challenged the trial court's order on appeal, arguing that the documents were privileged and confidential. *Id*. at _ 10. This court held that the trial court's order did not constitute a final appealable order:

> this issue is directly on point with *Bell v. Mount Sinai Medical Center* (1993), 67 Ohio St.3d 60, 65, 616 N.E.2d 181, which states as follows: "We therefore conclude that the action of a trial court directing a witness opposing a discovery request to submit the requested materials to an in camera review so that the court may determine their discoverable nature is not a final appealable order pursuant to R.C. 2505.02." *See, also, King v. American Standard Ins. Co.*, Lucas App. No. L-06-1306, 2006-Ohio-5774 (holding that a court's directing "a plaintiff to submit requested materials to an in camera review so the court can determine whether the documents are protected from disclosure on some alternative basis, including other bases of privilege or confidentiality, * * * is no[t] a final appealable order * * * "); *Gupta v. Lima News* (2001), 143 Ohio App.3d 300, 2001-Ohio-2142, 757 N.E.2d 1227 (holding that only if the court compelled disclosure of the documents after an in camera inspection would the order become final, and

> thus, appealable); *Ingram v. Adena Health System* (2001), 144 Ohio App.3d 603, 2001-Ohio-2537, 761 N.E.2d 72; *Niemann v. Cooley* (1994), 93 Ohio App.3d 81, 637 N.E.2d 943.

Id. at _ 11.

{¶22} The instant matter is also analogous to *Cobb v. Shipman*, 11th Dist. Trumbull No. 2011-T-0049, 2012-Ohio-1676. There, the Eleventh District recognized that "an order compelling the production of privileged documents to an opposing party does constitute a final appealable order." *Id*. at _ 34. However, the court held that the trial court's discovery order requiring appellants to produce certain documents for an in camera review was not a final appealable order:

> [t]he trial court has only ordered [appellants] * * * to produce certain documents for in camera review. At this juncture, *no production of privileged materials to the opposing party has been compelled*; therefore, pursuant to *Bell*, no final appealable order exists. [Appellants] must wait until the trial court has ordered them to reveal confidences and to produce presumptively privileged material to the opposing party before [they] may appeal.

(Emphasis added.) *Id*. at _ 37.

{¶23} In *Huntsman v. Aultman Hosp.*, 5th Dist. Stark No. 2006-CA-00316, 2008-Ohio-2553, the trial court ordered the production of documents for an in camera inspection that the defendant-appellant asserted were protected by the peer review privilege. *Id*. at _ 40. Appellant insisted that an in camera inspection "would essentially open the documents to some review which would compromise the confidential nature of the documents and violate the [peer review] privilege." *Id*. at _ 57. The Fifth District rejected this argument, explaining that "[a] private review, prior to any order for

the production of the documents to an adverse party, by a competent judge who is sworn to maintain confidentiality does not compromise the free flow of information that the privilege is meant to protect." *Id*. at _ 63. The court concluded that the trial court's production order was not a final appealable order. *Id*. at _ 65.

{¶24} In the instant matter, after reviewing the record, we find that the trial court's production order does not constitute a final appealable order. The trial court ordered the court reporter to *produce* the grand jury materials requested in Daher's subpoena *to the court* for an in camera inspection — the court reporter was not ordered to *disclose* the grand jury materials *to Daher or his counsel*. The in camera inspection will facilitate the trial court's determination regarding the discoverable nature of the grand jury materials. If, after conducting the in camera inspection, the trial court orders the court reporter to disclose the grand jury materials to Daher, such an order would certainly implicate the court reporter's substantial rights under R.C. 2505.02(B)(1). *Bell*, 67 Ohio St.3d at 64, 616 N.E.2d 181. However, at this juncture in the trial court's proceedings, a final appealable order does not exist.

{¶25} The court reporter, like *Huntsman*, argues that appealing the trial court's order after a final judgment is entered in the civil action would not be a meaningful or effective remedy: "[the trial court's] erroneous order cannot be undone after the fact because once the [grand jury] transcripts are disclosed, the paramount secrecy of the grand jury will already have been violated." Appellant's brief at 8. We disagree.

{¶26} Although we agree with the court reporter's assertion that disclosure of the grand jury transcript or materials to Daher would compromise the secrecy of the grand jury proceedings, there is neither an obligation nor an order for the court reporter to do so at this juncture in the civil case. As noted above, the court reporter is only obligated to produce the grand jury materials to the trial court for an in camera inspection. We cannot say that the trial court's private review of the grand jury materials will compromise the secrecy of the grand jury proceedings that R.C. 2939.11 is meant to protect. Furthermore, we find that the court reporter's compliance with the trial court's order will not violate the court reporter's obligation of secrecy under R.C. 2939.11, which provides, in relevant part:

> [t]he official reporter of the county, or any reporter designated by the court of common pleas * * * may take notes of or electronically record testimony before the grand jury, and furnish a transcript to the prosecuting attorney or the attorney general, and to no other person. * * * Such reporter shall take an oath to be administered by the judge after the grand jury is sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to the grand jury, prosecuting attorney, or attorney general, *unless called upon in court to make disclosures*.

(Emphasis added.)

{¶27} Our holding does not conflict with the principle set forth in *Burnham v. Cleveland Clinic*, Slip Opinion No. 2016-Ohio-8000, where the Ohio Supreme Court reversed this court's dismissal in *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044, for lack of a final appealable order. In *Burnham*, the plaintiff-appellee sought the production of an incident report documenting her slip and

fall that occurred in a hospital room at the Cleveland Clinic. Defendants-appellants, the Cleveland Clinic and certain employees, did not disclose the incident report to the plaintiff, asserting that it was protected by, among other things, the attorney-client privilege. The plaintiff filed a motion to compel discovery. The trial court granted the plaintiff's motion to compel discovery and ordered appellants to disclose the incident report to the plaintiff.

{¶28} Appellants challenged the trial court's ruling, arguing that the incident report was not discoverable because it was protected by the attorney-client privilege. This court dismissed the appeal for lack of a final appealable order, concluding that appellants failed to affirmatively establish that disclosure would result in prejudice. *Burnham* at _ 13, citing *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, _ 7.

{¶29} The Ohio Supreme Court accepted appellants discretionary appeal to determine whether the trial court's order compelling appellants to produce documents allegedly protected by the attorney-client privilege is a final appealable order under R.C. 2505.02(B)(4). *Burnham*, Slip Opinion No. 2016-Ohio-8000, at _ 1. The Ohio Supreme Court reversed this court's dismissal of the appeal, holding 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.

{¶30} In the instant matter, the court reporter asserts that the grand jury materials "are more than just privileged, they are secret under Ohio law[.]" Appellant's brief at 6. However, unlike *Burnham*, the trial court's discovery order only required the court reporter to produce the grand jury materials to the trial court for a private, in camera inspection. Accordingly, the discovery order will neither violate the secrecy of the grand jury proceedings nor cause harm and prejudice.

{¶31} For all of the foregoing reasons, we find that the trial court's order requiring the court reporter to produce the grand jury materials to the trial court for an in camera inspection does not constitute a final appealable order under R.C. 2505.02. Accordingly, we lack jurisdiction to entertain this appeal on the merits.

{¶32} Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
ANITA LASTER MAYS, J., CONCUR