[Cite as *Novak v. Studebaker*, 2009-Ohio-5337.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

BEVERLY NOVAK, et al.	C. A. No. 24615
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ROBERT STUDEBAKER, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2008-09-6709

DECISION AND JOURNAL ENTRY

Dated: October 7, 2009

CARR, Judge.

{¶1} Appellants, Robert Studebaker and Tri-County Area Services, appeal the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On June 29, 2008, Beverly Novak was operating an automobile with passengers, Nick Novak and Karen Novak. Studebaker, who was employed by Tri-County Area Services ("Tri-C"), was driving an automobile owned by Tri-C. As Studebaker traveled northbound on Martin Road in Portage County, Ohio, he collided with the Novak's automobile. Karen Novak was killed as a result of the accident. Beverly and Nick Novak suffered serious injuries.

{¶3} On September 25, 2008, Beverly Novak, Nick Novak and Edward Novak, administrator of the Estate of Karen Novak (hereinafter referred to as "Appellees"), filed a negligence action against Studebaker and a negligent entrustment claim against Tri-C relating to the automobile accident. Appellants answered the complaint admitting that Studebaker was

driving an automobile owned by Tri-C; but denying that Studebaker was an employee of Tri-C, acting in the course and scope of employment with Tri-C, or driving with the permission of Tri-C. Appellants generally denied the remaining allegations in the complaint and asserted numerous affirmative defenses. Upon filing the complaint, appellees served appellants with one request for production of documents. Specifically, appellees requested all statements given by any employees of Tri-C, including Studebaker, to Harleysville Insurance regarding the June 29, 2008 accident. Appellants formally objected to the request for production on the grounds that the documents and statements are subject to the work product privilege as well as the attorney-client privilege.

{¶4} On December 23, 2008, appellees filed a motion to compel production of the statements. Subsequently, on December 31, 2008, appellants filed a brief in opposition to the motion to compel, as well as a motion for a protective order.

{¶5} On January 6, 2009, Studebaker was charged with vehicular homicide in the Portage County Municipal Court, pursuant to R.C. 2903.06(A)(3). On that same day, appellees filed a motion in the civil case in which they responded to the motion for a protective order and replied to Studebaker's response to the motion to compel.

{¶6} On January 13, 2009, appellants filed a motion to stay the proceedings pending the resolution of criminal traffic charges related to the automobile accident in conjunction with a supplement to his motion for a protective order.

{¶7} By order of January 21, 2009, the trial court granted appellees' motion to compel, in part, denied appellants' motion for a protective order as well as their motion to stay. Appellants filed a notice of appeal on February 5, 2009.

{¶8} Appellants have raised two assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLANT ROBERT STUDEBAKER'S SUPPLEMENT TO HIS MOTION FOR PROTECTIVE ORDER AND MOTION TO STAY THIS CIVIL CASE PENDING RESOLUTION OF FELONY CRIMINAL CHARGES AGAINST HIM ARISING FROM THE AUTOMOBILE ACCIDENT AT ISSUE."

{¶9} Appellants argue the trial court erred by denying their motion to stay the civil case pending resolution of criminal charges against Studebaker.

{¶10} As a preliminary matter, this Court is obligated to raise sua sponte questions related to its jurisdiction. *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.* (1972), 29 Ohio St.2d 184, 186. This Court has jurisdiction to hear appeals only from final judgments. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2501.02. In the absence of a final, appealable order, this Court must dismiss the appeal for lack of subject matter jurisdiction. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.* (Jan. 26, 2000), 9th Dist. No. 2930-M. The trial court has not entered judgment in this case. Several matters may be appealed on an interlocutory basis pursuant to R.C. 2505.02(B), which states, "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

"(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

"(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

"(3) An order that vacates or sets aside a judgment or grants a new trial;

"(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} R.C. 2505.02(A)(3) defines "provisional remedy" as "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code."

{¶12} In *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, at ¶31, the Supreme Court of Ohio held that the imposition of a stay is not an ancillary proceeding which is immediately reviewable by an appellate court pursuant R.C. 2505.02. Unlike a preliminary injunction proceeding which is "parallel, expedited, and separate from the main action," the imposition of a stay merely ceases activity on a case and does not provide for a "provisional remedy." Id. at ¶28-31. Because the imposition of a stay is not considered a separate proceeding "with its own life," it is not a final order subject to immediate appellate review. Id. at ¶30-31. It follows that the trial court's denial of Studebaker's motion to stay proceedings pending the outcome of the criminal case cannot be considered a "provisional remedy" under R.C. 2505.02(A)(3). It is axiomatic that if the imposition of a stay is not considered a "provisional remedy" as defined by R.C. 2505.02(A)(3), then the trial court's denial of a motion to stay falls outside of that definition as well. Therefore, this portion of appellants' appeal is dismissed.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLANTS' MOTION FOR PROTECTIVE ORDER AND GRANTING PLAINTIFFS-APPELLEES' MOTION TO COMPEL DEFENDANTS-APPELLANTS TO SUPPLY PLAINTIFFS-APPELLEES WITH ALL STATEMENTS GIVEN BY ALL EMPLOYEES OF DEFENDANT TRI-COUNTY AREA SERVICES TO ITS INSURER."

{¶13} In their second assignment of error, appellants argue that the trial court erred by denying their motion for a protective order and granting appellees' motion to compel discovery. Specifically, appellants argue the trial court should have prevented appellees from discovering the statements made by employees of Tri-C to Harleysville Insurance Co. because those statements were privileged under the work product doctrine as well as the Fifth Amendment to the United States Constitution. This Court disagrees.

{¶14} This Court has recognized that as a general rule, trial court orders dealing with discovery are considered interlocutory and are not immediately appealable. *Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 164 Ohio App.3d 829, 2005-Ohio-6914, at ¶7, citing *Walters v. Enrichment Ctr. of Wishing Well, Inc*. (1997), 78 Ohio St.3d 118, 120-121. However, there are several exceptions to this general rule. As noted above, an appellate court may review a trial court order which grants or denies a provisional remedy when the order: 1) effectively determines the action with respect to the provisional remedy and prevents judgment in the action in favor of the appealing party with respect to the provisional remedy; and 2) 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. R.C. 2505.02(B)(4).

{¶15} In this case, the trial court's order which partially granted appellees' motion to compel discovery falls within the definition of a "provisional remedy." The order mandates that appellants disclose communications between employees of Tri-C, including Studebaker, and

Harleysville Insurance Co. Should appellants be forced to wait for a final judgment in this case prior to appealing this matter, they would have no viable recourse should they prevail on the merits of their appeal. By that time, appellees would already have had the luxury of using the privileged communications in preparing their litigation strategy. It is also possible that the information could be admitted as evidence at trial. Because the grant of the motion to compel falls within the definition of a provisional remedy as defined by R.C. 2505.02(B)(4), it is a final order which may be reviewed by this Court.

{¶16} Turning to the merits of appellant's argument, we note that absent an abuse of discretion, a reviewing court must affirm a trial court's disposition of discovery issues. *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469. The term "abuse of discretion" connotes more than an error of judgment; it implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶17} Pursuant to Civ.R. 26(B)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" Trial preparation materials, also called attorney work product, are considered privileged and are discoverable only upon a showing of good cause. Civ.R. 26(B)(3). Work product consists of "documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)" and may be discovered

only upon a showing of good cause. Civ.R. 26(B)(3); see, also *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, 210.

{¶18} Generally, statements made by an insured to an insurer fall within the scope of attorney work product. "Where an insurer receives a report from its insured concerning a casualty covered by its policy of insurance, such report becomes the property of the insurer and subject to its complete control; and, when the insurer transmits it to its counsel for the purpose of preparing a defense against a possible lawsuit growing out of such casualty, such report constitutes a communication from client to attorney and is privileged against production and disclosure[.]" *In re Klemann* (1936), 132 Ohio St. 187, paragraph one of the syllabus.

{¶19} However, the party seeking protection under a privilege carries the burden of demonstrating that a privilege exists. See, generally, *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-2750, at ¶12. In their January 6, 2009 motion which both responded to the motion for a protective order and replied to appellants' response to the motion to compel, appellees disputed whether any facts existed which would have demonstrated the existence of a privilege. A review of the record indicates that appellants offered no evidence to substantiate that the statements were gathered in anticipation of litigation or were prepared at the direction of an attorney. Therefore, because appellants did not meet their burden of demonstrating that a privilege existed, the trial court did not err in concluding that the records were not covered by the work product doctrine.

{¶20} We note that appellants further claim that the Fifth Amendment privilege against self-incrimination prohibits appellees from seeking the telephone statements Studebaker made to Harleysville Insurance regarding the June 29, 2008 accident. Without deciding whether the Fifth Amendment is implicated in this case, this Court notes that Studebaker entered a plea of "no

contest" to the charge of vehicular manslaughter in the criminal case that was pending in the Portage County Municipal Court. By entering a plea of "no contest," Studebaker knowingly, intelligently and voluntarily waived his constitutional rights with regard to the criminal case. Studebaker's plea in his criminal case renders any arguments in this case relating to the Fifth Amendment moot.

{¶21} Appellants' second assignment of error is overruled.

III.

{¶22} This Court lacks jurisdiction to address Studebaker's first assignment of error. Studebaker's second assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J .CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

RAYMOND J. SCHMIDLIN, JR, Attorney at Law, for Appellants.

WILLIAM T. WHITAKER, and ANDREA WHITAKER, Attorneys at Law, for Appellees.