[Cite as *Peppeard v. Summit Cty.*, 2010-Ohio-2862.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
NICHOLAS PEPPEARD, et al. Appellees v. SUMMIT COUNTY, OHIO, et al. Appellants	C.A. No. 25057 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 207-12-8488

DECISION AND JOURNAL ENTRY

Dated: June 23, 2010

CARR, Judge.

{¶1} Appellant, Summit County (hereinafter referred to as "the County"), appeals the judgment of the Summit County Court of Common Pleas denying its motion for a protective order. This Court dismisses for lack of a final, appealable order.

I.

{¶2} In February 2004, N.P., a minor, was shot in the abdomen by K.W., a minor. N.P. sustained a severed spinal cord, leaving him with permanent paralysis from the chest down. The incident occurred in front of a residence owned by Charlene Walker. Ms. Walker was the foster parent of K.W. The Summit County Children Services Board is responsible for placing children in foster care and works with agencies such as the Ohio Youth Advocate Program to accomplish that goal. At the time of the shooting, K.W. was still under probation in Summit County on juvenile charges. K.W.'s juvenile probation officer was Allen Kelly of the Summit County Juvenile Court.

{¶3} In her deposition, Ms. Walker testified that she found bullets in K.W.'s possession two days before the shooting, that she was concerned K.W. might also have a weapon, and that she promptly brought these concerns to Mr. Kelly's attention. Ms. Walker's deposition testimony indicates that when she shared her concerns with Mr. Kelly, she was told to "keep an eye" on K.W. and that the matter "was going to have to wait until the next day." Ms. Walker brought K.W. to meet with Mr. Kelly the next day. According to her deposition testimony, Mr. Kelly told K.W., "[b]y having any firearms, be it a gun or a bullet, you violated your parole. *** I am supposed to be locking you up right now *** [b]ut today is your lucky day. *** I am sending you home[.]" N.P. was shot by K.W. on February 3, 2004.

{¶4} On January 28, 2005, Tracy Peppeard and Julie Tynes, individually and as parents of N.P. (hereinafter referred to as "appellees"), filed a personal injury complaint against the County, Summit County Children Services, Ohio Youth Advocacy Program, Inc., Charlene Walker, K.W., and the Ohio Department of Human Services. On October 13, 2006, Summit County Children Services Board moved for summary judgment. On October 30, 2006, the appellees voluntarily dismissed Summit County Children Services Board. On November 21, 2006, the County moved for summary judgment. Subsequently, on December 6, 2006, appellees voluntarily dismissed all claims against all parties.

{¶5} On December 6, 2007, appellees re-filed their personal injury complaint against the County, Ohio Youth Advocate Program, Inc., and John Doe agents and employees of the County. All parties engaged in discovery.

{¶6} On July 24, 2009, appellees filed a notice to take the deposition of Mr. Kelly with duces tecum. Appellees demanded that Mr. Kelly produce K.W.'s probation file and other information about K.W. On July 28, 2009, the County filed a motion for a protective order on

behalf of Mr. Kelly claiming that the information Mr. Kelly had acquired about K.W. was a juvenile probation record, and, therefore, confidential pursuant to R.C. 2151.14(B). On October 6, 2009, the trial court denied the motion for a protective order. On October 22, 2009, the County filed the instant interlocutory appeal.

{¶7} The County raises two assignments of error on appeal.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN DENYING APPELLANT SUMMIT COUNTY'S MOTION FOR A PROTECTIVE ORDER."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY FAILING TO ESTABLISH PROCEDURES TO MAINTAIN THE CONFIDENTIALITY OF THE JUVENILE'S INFORMATION."

{¶8} In its first assignment of error, the County argues the trial court erred in denying its motion for a protective order. In its second assignment of error, the County argues that, assuming appellees have satisfied their burden to compel the disclosure of Kelly's deposition testimony and K.W.'s file, the trial court erred in failing to establish procedures to maintain the confidentiality of the juvenile's information. This Court lacks jurisdiction to consider the County's arguments.

{¶9} 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. Because the trial

court order from which the County appeals did not resolve the ultimate controversy between the parties, the order is interlocutory. Several matters may be appealed on an interlocutory basis pursuant to R.C. 2505.02(B), which states:

> "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:
>
> "(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."

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."

{¶10} Orders regarding discovery are considered interlocutory and, in general, are not immediately appealable. *Walters v. Enrichment Ctr. Of Wishing Well, Inc*. (1997), 78 Ohio St.3d 118, 120-121. This Court has held that "an order requiring production of privileged materials may constitute a final, appealable order." *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 22387, 2005-Ohio-5103, at ¶28. A trial court's order is final and appealable to the extent it

compels production of claimed privileged materials. See *Giusti v. Akron Gen. Med. Ctr*., 178 Ohio App.3d 53, 2008-Ohio-4333, at ¶6. In *Finley v. First Realty Property Mgt., Ltd.*, 9th Dist. No. 23355, 2007-Ohio-2888, at ¶13, this Court stated that whether a trial court's order denying a motion for a protective order was appealable was dependent upon whether a separate order which was issued simultaneously compelled the disclosure of privileged information.

{¶11} There is no dispute that if a party is ordered by the trial court to disclose privileged materials or confidential information and such materials are actually disclosed, the party resisting discovery will have no adequate remedy on appeal. *Gibson-Myers & Assoc., Inc. v. Pearce* (Oct. 27, 1999), 9th Dist. No. 19358. "The proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage." Id.

{¶12} In this case, however, the order from which the County appeals merely denies its motion for a protective order. The order, dated October 6, 2009, contains no language which compels the production of privileged materials. In light of the aforementioned line of cases, this Court recognizes a distinction between a trial court order which merely denies a motion for a protective order and an order which specifically compels the discovery of privileged information. While the denial of a motion for a protective order may foreshadow how the trial court might rule on a future motion to compel discovery, the parties have not yet reached the point in the proceedings where the privileged information must be disclosed. As was the case in *Gibson-Myers*, supra, the trial court in this case did not conduct an in camera inspection of the privileged materials prior to issuing its order. Under these circumstances, there is no way of knowing whether the trial court would deem it necessary to include certain limitations in an order compelling the discovery of privileged materials. Until the trial court issues an order which actually requires a party to produce privileged materials, it cannot be said that the action has

been determined with respect to a provisional remedy and that the party must be afforded the opportunity to file an interlocutory appeal. See R.C. 2505.02(B).

{¶13} Accordingly, the appeal must be dismissed.

III.

{¶14} The judgment entry from which the County appeals does not constitute a final, appealable order. Accordingly, the appeal is dismissed for lack of jurisdiction.

Appeal dismissed.

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 Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶15} I respectfully dissent from the majority's decision as I would conclude that the order appealed from was a final, appealable order.

{¶16} In this case the Appellees filed a notice to take the deposition of non-party Allen Kelly with duces tecum demanding that Kelly produce "[a]ll files, records, materials, notes, documents, data, etc. that Allen Kelly has or has obtained concerning [K.W.] and/or Charlene Walker." The County filed a motion for a protective order on behalf of Kelly asserting the records were confidential and that the plaintiffs were not entitled to them, and requesting that the court issue a protective order either (1) denying appellees the ability to depose Kelly at all; or (2) sealing the deposition testimony and having an in camera inspection conducted by the court. Appellees opposed the motion requesting that the court "deny the motion for protective order, [] conduct [] in camera review of [K.W.'s] probation file(s), and to permit [Appellees] to depose Mr. Kelly." Alternatively, Appellees asked that the discovery be granted subject to being filed under seal.

{¶17} The trial court's entry denying Kelly's motion states the following:

> "Upon Plaintiffs' Brief in Opposition to the Motion for Protective Order of Proposed Deponent Allen Kelly, this Court finds said Motion to [be] well-taken; and
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Protective Order filed by Defendant Summit County on behalf of proposed deponent Allen Kelly is hereby denied."

{¶18} Here, the majority concludes there is a substantive difference between an order compelling discovery of alleged privileged information, which the majority correctly notes is final, and an order that "merely" denies a protective order, which the majority concludes is not final. This conclusion is premised upon the notion that an order denying a request to be shielded from the production of allegedly privileged or confidential information is different from an order compelling the production of the information. Certainly there is a procedural difference between bringing a motion for protective order and a motion to compel given that the posture of the

movants is entirely different. The movant seeking a protective order is asking the court to shield one from the production of discovery, while the movant who files a motion to compel is asking the court to compel the production of discovery from one who is refusing to furnish it. Typically, the one follows the other, that is, upon one party filing the motion for protective order, the other party will in turn file a motion to compel. However, that is not what occurred in this case.

{¶19} In the case sub judice, the County requested that Kelly not be deposed or that his deposition be sealed. It further requested an in camera inspection of the documents that it alleged were confidential. The majority reasons that the trial court's denial of the motion for protective order is not a final, appealable order because it merely foreshadows a future ruling by the trial court as to whether any limits will be placed upon discovery. However, the trial court issued a blanket denial of the County's motion for a protective order. In so doing, it rejected the request for in camera inspection or placement of the deposition under seal and placed no qualification or limitation on discovery. The trial court's order placed the County in the position of having to proceed with the discovery as requested by effectively ordering the production of the information sought. Given the trial court's absolute and unequivocal denial of the motion for the protective order, there is no reason to conclude that the trial court would take any further action on the matter.

{¶20} Given that the trial court has in effect ordered unqualified discovery, the parties were able to fully understand their rights and obligations under the order. In *Ramun v. Ramun*, 7th Dist. No. 08 MA 185, 2009-Ohio-6405, the Seventh District concluded that an order denying a motion for protective order was final and appealable. Id. at ¶27. In analyzing this Court's case law concerning the finality of orders granting motions to compel, the *Raman* court concluded

that "the Ninth Appellate District was insinuating that the granting of a motion to compel alleged privileged material or the denial of a protective order is a final appealable order pursuant to R.C. 2505.02(B)(4) because once the material is disclosed and is public, * * * 'the proverbial bell cannot be unrung.'" Id. at ¶26, quoting *Concheck v. Concheck*, 10th Dist. No. 07AP-896, 2008-Ohio-2569, at ¶10. In this case, because the trial court declined to grant the County's motion for a protective order, the County was put in the position of being required to comply with the discovery of allegedly confidential or privileged material. Thus, the order appealed from placed the Appellant in the same position it would have been in had the Appellee successfully filed and obtained an unqualified motion to compel discovery. Thus, under the facts of this case, the majority's distinction between a grant of a motion to compel and a denial of a motion for protective order is a distinction without a difference.

{¶21} I am also concerned that in order to gain meaningful review of the discovery issue before us, the majority's decision essentially places a party confronted with a trial court's denial of a motion for a protective order in the untenable position of ignoring the trial court's order while waiting for the opposing side to file a motion to compel. In turn, the frustrated trial court would ultimately grant the motion to compel because it already ruled upon the substantive issue when it denied the motion for a protective order. Only then could the party appeal. However, such an onerous and unnecessary requirement could subject the party to sanctions under Civ.R. 37 when the party disobeys the trial court's original order denying the motion for the protective order. I do not believe it is necessary to require the parties to expend additional time, effort and expense in filing an additional motion to compel or even seeking an additional order from the court in order to secure appellate review of an unqualified denial of a motion for protective order such as the one in this case. Accordingly, I dissent.

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and CORINA STAEHLE GAFFNEY, Assistant Prosecuting Attorney, for Appellant.

DAVID R. GRANT, Attorney at Law, for Appellees.