Case No. 2018-1489

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CV-16-865052

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,

Plaintiff,

v.

MMCO, LLC,

Cross-Claim Defendant-Appellant,

and

MEDICAL MUTUAL OF OHIO,

Intervening Defendant, Counterclaimant, Cross-Claimant, Third-Party Plaintiff-Appellee,

and

BFG HOLDINGS 2000, LLC; BENTLEY FORBES GROUP, LLC; GFW II TRUST; C. FREDERICK WEHBA; SUSAN D. WEHBA; C. FREDERICK WEHBA II; and GFW Trust,

Third-Party Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS MMCO, LLC, BFG HOLDINGS 2000, LLC, BENTLEY FORBES GROUP, LLC, GFW II TRUST, C. FREDERICK WEHBA, SUSAN D. WEHBA, C. FREDERICK WEHBA II, AND GFW TRUST

Christopher S. Williams (0043911)
Ronald M. McMillan (0072437)
Daniel J. Bollinger (0091564)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth St.
Cleveland, OH 44114
Tel: 216.622.8200
Fax: 216.241.0816
cwilliams@calfee.com
rmcmillan@calfee.com
dbollinger@calfee.com

Attorneys for Appellee Medical Mutual of Ohio

Susan M. Audey (0062818)
(*Counsel of Record*)
Chad M. Eggspuehler (0094094)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
susan.audey@tuckerellis.com
chad.eggspuehler@tuckerellis.com

Attorneys for Appellants MMCO, LLC, BFG Holdings 2000, LLC, Bentley Forbes Group, LLC, GFW II Trust, C. Frederick Wehba, Susan D. Wehba, C. Frederick Wehba II, and GFW Trust

TABLE OF CONTENTS

Page

APPENDIX **Appx. Page**

I. Explanation of why this appeal is one of public or great general interest

This business dispute appears procedurally complex when viewed as a whole but the issue before this Court is narrow, straightforward, and extremely important to the privacy concerns of all Ohio citizens and those who do business in Ohio: is an order requiring disclosure of tax returns a final order capable of immediate review when there is no evidence or finding that the party ordered to disclose has any personal liability? Stated differently, what is the appropriate analysis an appellate court should undertake to determine whether an order requiring disclosure of tax returns is immediately reviewable?

The courts below have not been consistent. Some courts have directly addressed whether the order is final and immediately appealable by undertaking a final-order/provisional-remedy analysis and concluding the order is immediately reviewable when confidentiality is asserted. *See Mezatasta v. Enterprise Hill Farm*, 6th Dist. Erie No. E-15-037, 2016-Ohio-3371; *cf. Colombo v. Mismas Law Firm, L.L.C.*, 11th Dist. Lake No. 2014-L-069, 2015-Ohio-812, ¶ 21, 22 (undertaking provisional-remedy analysis yet finding order not immediately reviewable because appealing party did not contend information was confidential or privileged).

Other courts have simply reviewed whether the order to disclose was appropriate without conducting a final-order/provisional-remedy analysis, implicitly finding that the order was capable of immediate review. *See Nonemployees of Chateau Estates Resident Assn. v. Chateau Estates, Ltd.*, 2d Dist. Clark No. 2005CA109, 2006-Ohio-3742, ¶ 6, 21 (reviewing on the merits an order denying a protective order as to the disclosure of financial and tax records, and finding disclosure premature without a finding of liability). And still another

court reviewed a disclosure order on the merits but did so after concluding from earlier motion-to-dismiss briefing not discussed in the opinion that the order contained Civ.R. 54(B) certification. *Garver Road Investment, LLC v. Diversapack of Monroe, LLC*, 12th Dist. Butler Nos. CA2013-10-181, CA2013-10-183, 2014-Ohio-3551 (finding, in the end, that the order of disclosure was appropriate but nonetheless reviewing the order on its merits). The Twelfth District's order on the motion to dismiss—available from the court's online docket[1] but not available on Westlaw—denied the motion, not because it satisfied any section of R.C. 2505.02, but because the order contained Civ.R. 54(B) certification. This Court has made clear, however, that Rule 54(B) certification cannot make a nonfinal order final (*Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354-55 (1993)), nor does a provisional remedy require certification (*State ex rel. Butler Cty. Children Serv. Bd. v. Sage*, 95 Ohio St.3d 23, 25 (2002)).

With mounting confusion on the appropriate analysis for determining whether an order of disclosure is immediately appealable, other courts faced with the same type of order have simply refused to review the order, concluding that an order requiring disclosure of tax returns does not involve a privileged or confidential matter. *See G.S. v. Khavari*, 11th Dist. No. 2016-T-0036, 2016-Ohio-5187, ¶ 11.

The Eighth Appellate District's decision in this case falls in the last category, but is even more restrictive in its analysis. Succinctly, Appellee Medical Mutual of Ohio and

---

[1] The Twelfth District's December 17, 2013 order on the motion to dismiss is *available at* http://pa.butlercountyclerk.org/eservices/;jsessionid=41226605CD1F3B5383B24FCAF943DB86?x=1U-lQt9ENOBMT1JyK90N5RRgPTTDQUy5S08nK1TRS00cU*8vQRg4Ju-Z9RTDQXEIc5KnQNCqE-ZNdrXAzv3SdutKsppYsQTuNPoASegEDrYJshDR0rhRcBWlWjzQs9QNiTeU9W-z3DU3GvlQ*gG5-RVrVje1SD3bugjXgAt9BUE (last accessed November 14, 2018).

Appellants MMCO, LLC, BFG Holdings 2000, LLC, Bentley Forbes Group, LLC, GFW II Trust, C. Frederick Wehba, Susan D. Wehba, C. Frederick Wehba II, and GFW Trust have a longstanding business relationship with respect to certain commercial buildings in Northeast Ohio. This case pertains to a business transaction involving the sale and leaseback of the Rose Building in Cleveland, and subsequent litigation on a promissory note and guaranty in favor of Medical Mutual. In particular, Medical Mutual seeks to hold C. Frederick Wehba II (Wehba II) personally liable on a guaranty he never signed in his personal or individual capacity—a fact that Medical Mutual acknowledges. Yet, without any evidence or finding of personal liability, Medical Mutual sought, and the trial court ordered, Wehba II and the other appellants to disclose their tax returns. *See* 7/19/18 J. Entry, Appx. 3. On appeal to the Eighth District, the court dismissed, summarily concluding that tax returns are not privileged—with no analysis for confidentiality—and therefore the July 19 order is not a provisional remedy under R.C. 2505.02(A)(3). Instead, the July 19 order is simply an interlocutory discovery order can that be appealed following final judgment. *See* 10/2/18 J. Entry, Appx. 1. It conducted no R.C. 2505.02(B)(4) analysis.

Appellants acknowledge, as they did in the appellate court, that an order requiring disclosure of tax returns does not involve a privileged matter just as they acknowledge that discovery orders *generally* are interlocutory orders not capable of immediate review. But this Court in *State ex rel. Fisher v. Cleveland* made clear that "tax returns reflect intimate private details of an individual's life" and specifically found that there must be some showing that the seeking party's need for the information contained in a tax return outweighs the "negative implications for an individual forced to disclose significant personal information" unrelated to the particular issue. 109 Ohio St.3d 33, 2006-Ohio-

1827, ¶ 32. *Fisher* likewise made clear that part of the disclosure analysis includes analyzing whether the seeking party made any showing that it is unable to obtain elsewhere the information it expects to obtain from the tax returns. *Id*.

Yet intermediate appellate courts, including the Eighth District, have largely ignored *Fisher* when determining whether an order requiring disclosure is immediately reviewable. Only one court—the Sixth Appellate District in *Mezatasta v. Enterprise Hill Farm*, 6th Dist. Erie No. E-15-037, 2016-Ohio-3371—relied on *Fisher* and its recognition of the privacy concerns at issue when it found the order to be a provisional remedy capable of immediate review. In that case, the plaintiff sought the tax returns of a nonparty neurologist who had conducted an independent medical examination. Relying on *Fisher* and noting the privacy concerns at stake, the Sixth District was rightfully reluctant to adopt a blanket rule, but it nonetheless concluded that "citizens have an expectation of privacy with respect to their tax returns" and, once disclosed, have no meaningful or effective remedy without an immediate appeal. *Id*. at ¶ 18. The important lesson from *Mezatasta* is that courts should at least undertake a provisional-remedy analysis instead of summarily concluding that tax returns are not privileged and therefore can never be subject to immediate review as a provisional remedy. Indeed, the statutory definition of provisional remedy under R.C. 2505.02(A)(3) is not so limited; instead, "discovery of a privileged matter" is but one example contained within a nonexhaustive list of provisional remedies

Mezatasta and *Fisher* are consistent with this Court's decision in in *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000—decided after both *Mezatasta* and *Fisher*. This Court made clear in *Burnham* that certain confidential information, even though not technically privileged, may fall under the definition of a provisional remedy and

therefore requires R.C. 2505.02(B)(4) analysis. Accepting review will clarify the analysis intermediate courts need to undertake in determining appealability and will prevent continuing the analytical chaos that currently exists. Indeed, the Second, Sixth, Eleventh, and Twelfth Districts—and now the Eighth District—have analyzed these types of orders differently and undertaken various analyses that have led to inconsistent results. Without clarification from this Court, Ohio citizens and those doing business in Ohio will be left with uneven treatment of orders requiring disclosure of information this Court in *Fisher* has already recognized as involving "intimate, private details of an individual's life." 109 Ohio St.3d 33, 2006-Ohio-1827, ¶ 32. Whether and under what circumstances these intimate details can be compelled to be disclosed without immediate review will remain unsettled, further frustrating Ohio citizens and businesses, and the attorneys advising them.

At bottom, an order requiring disclosure of well-established private and confidential matters—matters that cannot be undisclosed once disclosed—should be immediately reviewable as a provisional remedy under R.C. 2505.02(B)(4) when confidentiality is asserted, as it was in this case. As long as the appealing party has "plausibly alleged" that an order requiring disclosure of information falls under the definition of a provisional remedy, "the order compelling disclosure is a final, appealable order," to the extent the order satisfies R.C. 2505.02(B)(4). *Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, ¶ 3. Wehba II has done so here and the order compelling disclosure of his tax returns should be subject to immediate review.[2]

[2] While certain appellants have acknowledged personal liability and are willing to disclose available tax returns as long as doing so will not moot the appeal, Wehba II has no such personal liability, nor has the trial court entered any such finding that Wehba II is personally liable.

II. Statement of the case and facts

A. Medical Mutual sells the Rose Building to MMCO in a 20-year financing deal and leases it back.

This case started as a foreclosure action filed by U.S. Bank in June 2016 against MMCO as borrower and GFW Trust as guarantor over unpaid monies owed on a mortgage U.S. Bank held on the Rose Building property in downtown Cleveland. The foreclosure component of this case is over and U.S. Bank is no longer a party—U.S. Bank sold the Rose Building to Intervening Defendant/Third-Party Plaintiff Medical Mutual in a foreclosure sale in August 2017. Medical Mutual nonetheless seeks to recover from appellants, Wehba II in particular, more than $4 million it claims remains unpaid as part of a sale-leaseback transaction between Medical Mutual and MMCO.

Succinctly, Medical Mutual sold the Rose Building to MMCO in September 2000 for $47,770,000 plus interest over 20 years for a total of $58,864,682.40. MMCO obtained a loan from a U.S. Bank predecessor for $35,400,000, while the remaining amount—$12,370,000—was to be financed through a promissory note between BFG Holdings 2000 and Medical Mutual. The Medical Mutual Promissory Note was personally guaranteed by four entities/individuals: (1) GFW Trust (later replaced by GFW Trust II); (2) C. Frederick Wehba; (3) Susan D. Wehba; and (4) Bentley Forbes Group. Wehba II is neither a signatory of the Promissory Note nor a signatory of the Guaranty in his individual capacity—a fact to which Medical Mutual agrees. True, Wehba II signed the Guaranty as co-trustee of the GFW Trust, but he did not sign the Guaranty in his individual capacity.

Medical Mutual is and has been the only tenant of the Rose Building. From September 2000 to sometime in 2016, Medical Mutual paid monthly lease payments of $419,968.33 to MMCO, of which MMCO made monthly payments of $304,291 on the U.S.

Bank loan and $97,770 on the Promissory Note. Up to mid-2016, MMCO paid approximately $54 million towards the purchase of the building, which, as stated, was around $58 million total with interest.

B. MMCO defaults; Medical Mutual buys back the Rose Building in the ensuing foreclosure sale and sues the Wehbas and others.

When a balloon payment became due on the U.S. Bank loan, MMCO was unable to obtain refinancing and eventually defaulted. MMCO contends, in a separate lawsuit, that Medical Mutual interfered with MMCO's refinancing efforts and interfered with its attempts to sell the Rose Building. *See generally* Compl., *MMCO, LLC v. Medical Mutual of Ohio*, Cuyahoga C.P. No. CV-18-899133. Be that as it may, U.S. Bank nonetheless foreclosed on MMCO and sold the property at a foreclosure sale to Medical Mutual for $37.9 million—$10 million less than what Medical Mutual had sold it to MMCO in September 2000 and what it had already been paid.

Medical Mutual nonetheless claims that more than $4 million is still owed to it under the Promissory Note and Guaranty. It intervened in the foreclosure action and asserted claims for declaratory judgment, breach of promissory note, breach of guaranty, fraud and fraudulent concealment, fraudulent transfer, unjust enrichment, and set off against MMCO, GFW Trust, BFG Holdings 2000, Bentley Forbes Group, GFW Trust II, C. Frederick Wehba, Susan D. Wehba individually and as co-trustee of GFW Trust and GFW II Trust, and Wehba II individually and as co-trustee of GFW Trust and GFW Trust II.

Wehba II, however, is not a signatory of the Promissory Note or Guaranty in his individual capacity—which Medical Mutual acknowledges—and therefore has no personal liability under either the Promissory Note or the Guaranty.

C. Medical Mutual seeks disclosure of tax returns.

Medical Mutual nonetheless sought to compel disclosure of the tax returns, bank statements, and financial statements of all appellants, and for sanctions. MMCO produced its bank statements but the defendants otherwise opposed the motion, in particular, the disclosure of tax returns. Appellants also moved for a protective order. They argued that neither Wehba II nor MMCO are personally liable on the Guaranty, and that the relevant appellants who are liable have stipulated to judgment on Medical Mutual's claims for breach of promissory note and breach of guaranty. Medical Mutual opposed, arguing that the tax returns are relevant under its purported alter-ego theory of liability, although there has been no finding in this case that Wehba II is liable under any alter-ego theory.

The trial court denied sanctions, but also denied the protective order and granted the motion to compel. It ordered all defendants to produce the "[r]equested tax returns and bank statements from the years 2016 until the present[.]" 7/19/18 J. Entry, Appx. 3. It further ordered "[a]ll tax returns shall be produced and marked as confidential" and "shall be filed under seal" if any of these documents are filed with the court. *Id*.

At the time of the July 19 order, the trial court still had pending before it the parties' various motions for summary judgment. Medical Mutual sought partial summary judgment on its claim for breach of guaranty and separately sought summary judgment on its claims for breach of promissory note, fraud and fraudulent concealment, and unjust enrichment. Appellants, in response, did not oppose finding BFG Holdings 2000 liable for breach of the promissory note, nor did they oppose finding against the guarantors under the Guaranty for breach of the guaranty. They also combined their opposition with their own motion for summary judgment. They otherwise opposed the motion on Medical Mutual's claims for

damages based on fraud and unjust enrichment, and those based on an alter-ego theory. The summary judgment motions remain pending before the trial court, although that court has since stayed the case pending appeal.

D. Appellants appeal to the Eighth District Court of Appeals, which dismisses for lack of a final appealable order.

On appeal, Medical Mutual moved to dismiss the appeal contending the July 19 order was not a final appealable order. The appellate court granted the motion. Confining its analysis to "privileged matters" provisional remedies, the court found that tax returns are not privileged and, even so, the court's filing-under-seal directive "protect[ed] the documents." 10/2/18 J. Entry, Appx. 1. To the court, any concerns about the propriety of the trial court's order could be addressed in a direct appeal following final judgment. *Id*.

Appellants filed an appeal of this order on October 22, 2018, accompanied by a motion to stay. This Memorandum in Support of Jurisdiction follows.

III. ARGUMENT

Proposition of Law

> An order denying a protective order and ordering disclosure of tax returns when there is no evidence or finding of personal liability is a provisional remedy capable of immediate review.

A. The July 19 order requiring disclosure of tax returns is a final appealable order.

An appellate court's jurisdiction is limited to review of "final" orders. *See* Section 3(B)(2), Article IV, Ohio Constitution ("Courts of appeals shall 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 * * *."). An order is final under R.C. 2505.02(B) when the order "grants or denies a provisional remedy." R.C.

2505.02(A)(3) defines a provisional remedy as a "proceeding ancillary to an action," and includes, but is not limited to, an order for the "discovery of a privileged matter."

The statute is purposefully nonexhaustive in its definition. Even so, a provisional remedy ordinarily involves some type of order that would otherwise prejudice a party if the party had to wait until final judgment to appeal the order. No Rule 54(B) certification is necessary because a provisional remedy "is a remedy other than a claim for relief." *State ex rel. Butler Cty. Children Serv. Bd. v. Sage*, 95 Ohio St.3d 23, 25 (2002).

1. The order satisfies R.C. 2505.02(A)(3) because it requires disclosure of confidential information.

Even though the disclosure of tax returns may not technically involve discovery of a privileged matter, Ohio courts have held that an order requiring disclosure of confidential material constitutes a provisional remedy. *See Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, ¶ 19 (finding an order disclosing attorney work product is not technically a privileged matter but is nonetheless a provisional remedy requiring R.C. 2505.02(B)(4) analysis). Even the case Medical Mutual relied upon in the Eighth District—*Colombo v. Mismas Law Firm, L.L.C*—acknowledged this rule of law. 11th Dist. Lake No. 2014-L-069, 2015-Ohio-812, ¶ 19; *see also Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, 26 N.E.3d 858, ¶ 11; *Northeast Professional Home Care, Inc. v. Advantage Home Health Serv., Inc.*, 188 Ohio App.3d 704, 2010-Ohio-1640, ¶ 32; *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. 22387, 2005-Ohio-5103, ¶ 29; *Armstrong v. Marusic*, 11th Dist. Lake No. 2002-L-232, 2004-Ohio-2594, ¶ 12; *Gibson–Myers & Assocs. v. Pearce*, 9th Dist. Summit No. 19358, 1999 WL 980562, at *2 (Oct. 27, 1999).

The Sixth District Court of Appeals in *Mezatasta v. Enterprise Hill Farm* also acknowledged this rule of law—and in the context of an order requiring disclosure of tax

returns. There, the court acknowledged that "[w]hile tax returns are not, in a strict sense, 'privileged,'" the Supreme Court of Ohio "has recognized that 'tax returns reflect intimate, private details of an individual's life,' and citizens have an expectation of privacy with respect to their tax returns." 6th Dist. Erie No. E-15-037, 2016-Ohio-3371, ¶ 18, quoting *Fisher*, 109 Ohio St.3d 33, 2016-Ohio-3371, ¶ 27, 32. It thereafter found the order requiring disclosure of tax returns to be a provisional remedy that was immediately reviewable because it satisfied R.C. 2505.02(B)(4). *Mezatasta* at ¶ 18.

It is anticipated that Medical Mutual will attempt to distinguish *Mezatasta* because it involved a nonparty expert witness ordered to disclose his tax returns. This is a distinction without a difference because Wehba II in his individual capacity is not and never has been a guarantor on the Promissory Note that is the subject of Medical Mutual's claims—a fact Medical Mutual has acknowledged. Thus, even though Wehba II is a party here, he is a party who has no liability as a guarantor. The nonparty distinction is therefore immaterial because the order to disclose tax returns when Wehba II is not a guarantor has the same implications as the nonparty ordered to do the same in *Mezatasta*. Because the very same privacy and confidentiality interests are at stake, the final-order analysis should result in the same conclusion: the order involves disclosure of confidential information and is therefore a provisional remedy that is immediately reviewable because it satisfies R.C. 2505.02(B)(4).

It is also anticipated that Medical Mutual will argue that Wehba II is personally liable under an alter-ego theory of liability. Relying on a California judgment involving different entities decided under California law—a judgment that is currently on appeal—Medical Mutual has essentially argued that Wehba II is personally liable as an alter ego and,

therefore, as a party, his tax returns are relevant to its recovery of damages. But there has been no finding or evidence of personal liability *in this case* nor any finding that the California judgment currently on appeal has any binding effect *in this case*. Without either, this case is no different from *Nonemployees of Chateau Estates Resident Assn. v. Chateau Estates, Ltd.* where the court found a seeking party's request for disclosure of tax returns premature where liability has not yet been established. 2d Dist. Clark No. 2005CA109, 2006-Ohio-3742, ¶ 21.

At bottom, the July 19 order is a provisional remedy under R.C. 2505.02(A)(3).

2. The order is a provisional remedy because it meets both prongs of R.C. 2505.02(B)(4).

Satisfying the definition of provisional remedy, however, does not end the analysis because not all provisional remedy orders are immediately appealable. *See Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 16. Instead, the provisional remedy order must also satisfy these additional requirements:

> (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(B)(4).

a. The order satisfies R.C. 2505.02(B)(4)(a).

Satisfying R.C. 2505.02(B)(4)(a) is not ordinarily difficult and, indeed, was not even disputed in Medical Mutual's motion-to-dismiss briefing below To satisfy this prong, the

order must do two things: it must determine the action *as to the provisional remedy* and prevent a judgment in favor of Wehba II *as to the provisional remedy*. R.C. 2505.02(B)(4)(a).

It easily does both here. The order to disclose tax returns determines the action with respect to the issue of disclosure of these documents and prevents a judgment in Wehba II's favor that he does not have to disclose them. Indeed, it "would be impossible to later obtain a judgment" in his favor as to disclosure "if [he] has already disclosed the materials." *Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, ¶ 21; *see also Sinnott*, 116 Ohio St.3d 158, 2007-Ohio-584, ¶ 20-22 (rejecting argument that the order must determine the "entire action"); *State v. Muncie*, 91 Ohio St.3d 440, 450-51 (1991) (finding the first prong "easily answered" as to a forced-medication order).

b. The order satisfies R.C. 2505.02(B)(4)(b).

The second prong, although ordinarily more difficult to establish, is also easily established here. As recognized by this Court, "[i]n some instances, '[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage' suffered by the appealing party." *Muncie*, 91 Ohio St.3d at 451, quoting *Gibson–Myers*, 9th Dist. Summit No. 19358, 1999 WL 980562, at *2 (Oct. 27, 1999).

Here, there is no way to undisclose private and confidential tax returns once they are disclosed. Wehba II's private and confidential tax return information cannot be made private or confidential again once it loses that status upon disclosure. No appeal following final judgment can make that happen.

Yet the irreversible nature of the order is not dispositive. *Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, ¶ 21. The analysis also looks to the *Amato v. Gen. Motors Corp.*, 67 Ohio St.2d 253 (1981) standard when necessary—as did the *Burnham* court—and

determines whether the privacy interests implicated "'extend[] beyond any particular litigation.'" *Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, ¶ 24, quoting *Nelson v. Toledo Oxygen & Equip. Co., Inc.*, 63 Ohio St.3d 385, 389 (1992).

In this case they do. As stated, the parties have a longstanding business relationship and are involved in not only this litigation, but other litigation pending in Cuyahoga County. And the parties' business relationship extends beyond the Cuyahoga County litigation; indeed, they are involved in other commercial business transactions in Northeast Ohio. There simply is no way to unlearn the information learned from the initial disclosure and keep it separate from other ongoing business concerns. The risk of even inadvertent misuse is too great.

Thus, filing the tax returns under seal—as ordered by the trial court if Medical Mutual uses the tax returns in a court filing—does not alleviate any concerns regarding confidentiality as the Eighth District reasoned. *See* 10/2/18 J. Entry, Appx. 1. But the Eighth District did not reach this conclusion as part of its provisional-remedy analysis. Indeed, the court stopped its analysis after finding that the July 19 order was not a provisional remedy under R.C. 2505.02(A)(3) because it did not involve a "privileged matter." *Id*. It never reached the analysis under R.C. 2505.02(B)(4)(a) or (b).

But even if otherwise, this reasoning is out of step with the provisional-remedy analysis. Disclosure of the tax returns in the first instance is the act that strips the tax returns of their privacy and confidentiality. As the *Mezatasta* court recognized, tax returns lose their private and confidential status once disclosed and therefore deprive the disclosing party of a meaningful or effective remedy following final judgment. *Mezatasta*, 6th Dist. Erie No. E-15-037, 2016-Ohio-3371, ¶ 18. Indeed, the tax returns cannot be made

private or confidential once disclosed because the act of disclosure has effectively taken that privacy and confidentiality away. It therefore makes no difference that *subsequent disclosures* are protected by filing under seal if the *initial disclosure* is what makes the returns no longer private and confidential. There can be no do-over to make what was previously private and confidential, private and confidential again.

IV. Conclusion

Intermediate appellate courts throughout the state have inconsistently analyzed orders requiring disclosure of tax returns. Accepting jurisdiction will clarify the analysis and bring a measure of certainty to Ohio citizens and those doing business in Ohio so that it will be clear that an order requiring disclosure of tax returns when there is no evidence or finding of personal liability is a provisional remedy capable of immediate review.

Respectfully submitted,

s/ *Susan M. Audey*
Susan M. Audey (0062818)
(Counsel of Record)
Chad M. Eggspuehler (0094094)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
susan.audey@tuckerellis.com
chad.eggspuehler@tuckerellis.com

Attorneys for Appellants MMCO, LLC, BFG Holdings 2000, LLC, Bentley Forbes Group, LLC, GFW II Trust, C. Frederick Wehba, Susan D. Wehba, C. Frederick Wehba II, and GFW Trust

PROOF OF SERVICE

A copy of the foregoing was served on November 15, 2018 per S.Ct.Prac.R. 3.11(C)(1) by electronic mail to:

Christopher S. Williams
Ronald M. McMillan
Daniel J. Bollinger
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth St.
Cleveland, OH 44114
cwilliams@calfee.com
rmcmillan@calfee.com
dbollinger@calfee.com

Attorneys for Appellee Medical Mutual of Ohio

s/ *Susan M. Audey*
Susan M. Audey (0062818)
(Counsel of Record)
Chad M. Eggspuehler (0094094)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
susan.audey@tuckerellis.com
chad.eggspuehler@tuckerellis.com

Attorneys for Appellants MMCO, LLC, BFG Holdings 2000, LLC, Bentley Forbes Group, LLC, GFW II Trust, C. Frederick Wehba, Susan D. Wehba, C. Frederick Wehba II, and GFW Trust

APPENDIX

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE

Appellee

COA NO. 107560

LOWER COURT NO. CV-16-865052

COMMON PLEAS COURT

-vs-

MMCO, LLC, ET AL.

Appellant

MOTION NO. 520462

Date 10/02/18

Journal Entry

Motion by appellee, Medical Mutual of Ohio, to dismiss the appeal with brief in support is granted. Orders regarding discovery are interlocutory and in general not immediately appealable. Walters v. Enrichment Ctr. of Wishing Well, Inc., 78 Ohio St.3d 118, 676 N.E.2d 890 (1997). However, pursuant to R.C. 2505.02(A)(3) discovery of a privileged matter falls under the definition of a provisional remedy, and as such, could constitute a final appealable order if the elements of R.C. 2505.02(B)(4) are met. Appellants fail to demonstrate that the discovery proceeding regarding the tax returns involves a privileged matter and therefore constitutes a provisional remedy. Myers v. Toledo, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176. "Tax returns, while subject to a heightened protection from disclosure, are not privileged." G.S. v Khavari, 11th Dist. No. 2016-T-0036, 2016-Ohio-5187, P10; Garver Rd., Inv., LLC v. Diversapack of Monroe, LLC, 12th Dist. No. CA2013-10-181, CA2013-10-183, 2014-Ohio-3551, P14. The trial court did take measures to protect the documents by ordering the tax returns to be filed under seal. Any concerns regarding the relevancy of the tax documents can be raised in a direct appeal after final judgment is entered.

Judge Eileen T. Gallagher, Concurs

Tim McCormack
Presiding Judge

RECEIVED FOR FILING
10/02/2018 14:23:01
NAILAH K. BYRD, CLERK
Docket ID: 105725152

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE

Appellee

COA NO. 107560

LOWER COURT NO. CV-16-865052

COMMON PLEAS COURT

-vs-

MMCO, LLC, ET AL.

Appellant

MOTION NO. 521608

Date 10/02/18

Journal Entry

Sua sponte, this appeal is dismissed at appellant's cost for lack of a final appealable order. See R.C. 2505.02. See entry 520462 dated October 2, 2018.

Judge Eileen T. Gallagher, Concurs

Tim McCormack
Presiding Judge

RECEIVED FOR FILING
10/02/2018 14:25:20
NAILAH K. BYRD, CLERK
Docket ID: 105725270

104681315

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
Plaintiff

MMCO, LLC, ET AL
Defendant

Case No: CV-16-865052

Judge: CASSANDRA COLLIER-WILLIAMS

JOURNAL ENTRY

PRETRIAL HELD ON 07/19/2018. PRETRIAL WAS CONDUCTED BY PHONE. ALL PARTIES WERE PRESENT THROUGH COUNSEL. THE COURT MAKES THE FOLLOWING RULINGS:

THIRD-PARTY DEFENDANTS BFG HOLDINGS 2000,LLC, BENTLEY FORBES GROUP, LLC, GFW II TRUST, C. FREDERICK WEHBA, SUSAN D. WEHBA AND C. FREDERICK WEHBA MOTION SEEKING PROTECTIVE ORDER, FILED 06/25/2018, IS DENIED. THIRD PARTY DEFENDANTS SHALL FORWARD ALL REQUESTED TAX RETURNS FROM THE YEAR 2016 UNTIL THE PRESENT TO DEFENDANT MEDICAL MUTUAL BY NO LATER THAN 14 DAYS FROM THE DATE OF THIS ORDER. ALL TAX RETURNS SHALL BE PRODUCED AND MARKED AS CONFIDENTIAL. IF ANY OF SAID DOCUMENTS ARE FILED THEY SHALL BE FILED UNDER SEAL IN THIS MATTER.

THIRD PARTY DEFENDANTS' BFG HOLDINGS 2000,LLC, BENTLEY FORBES GROUP, LLC, GFW II TRUST, C. FREDERICK WEHBA, SUSAN D. WEHBA AND C. FREDERICK WEHBA DEFENDANTS' MOTION FOR LEAVE TO FILE INSTANTER SUR REPLY IN FURTHER SUPPORT OF ITS OPPOSITION TO MEDICAL MUTUAL OF OHIO'S MOTION FOR SANCTIONS, FOR AN ORDER TO SHOW CAUSE AND OR TO COMPEL ADDITIONAL DISCOVERY, FILED 06/25/2018, IS DENIED. THIS COURT DOES NOT PERMIT SUR REPLIES.

DEFENDANT MEDICAL MUTUAL'S MOTION FOR SANCTIONS, MOTION TO SHOW CAUSE AND TO COMPEL, FILED 01/31/2018, IS GRANTED IN PART. REQUESTED TAX RETURNS AND BANK STATEMENTS FROM THE YEARS 2016 UNTIL THE PRESENT SHALL BE FORWARDED TO DEFENDANT MEDICAL MUTUAL BY NO LATER THAN 14 DAYS FROM THE DATE OF THIS ORDER.

FAILURE TO COMPLY WITH ANY COURT ORDER MAY RESULT IN SANCTIONS.

SO ORDERED.

Judge Signature 07/19/2018

07/19/2018

RECEIVED FOR FILING
07/19/2018 16:36:26
NAILAH K. BYRD, CLERK