[Cite as *Ashley v. Kevin O'Brien & Assocs. Co., L.P.A.*, 2022-Ohio-24.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stacia Ashley,	:	
Plaintiff-Appellee,	:	No. 20AP-354 (C.P.C. No. 16CVH-1795)
v.	:	(REGULAR CALENDAR)
Kevin O'Brien & Associates Co., L.P.A. et al.,	:	
Defendants-Appellants.	:	

Kevin O'Brien & Associates Co., L.P.A. et al.,	:	
Relators,	:	No. 20AP-393
v.	:	(REGULAR CALENDAR)
The Honorable David C. Young,	:	
Respondent,	:	
Stacia Ashley et al.,	:	
Intervenor-Respondents.	:	

D E C I S I O N

Rendered on January 6, 2022

On brief: *Ice Miller, LLP, John P. Gillian*, and *Amy Flowers*, for appellee. **Argued**: *John P. Gilligan*.

On brief: *Organ Law LLP*, and *Ashley T. Merino*, for Scott Torguson, Jacqueline Gutter, and Gregory Reichenbach. **Argued**: *Ashley T. Merino*.

On brief: *G. Gary Tyack*, and *Thomas W. Ellis*, for respondent The Honorable David C. Young. **Argued**: *Thomas W. Ellis*.

APPEAL from the Franklin County Court of Common Pleas/
and IN MANDAMUS and PROHIBITION

NELSON, J.

{¶ 1} Lawyer Kevin O'Brien and his law firm, Kevin O'Brien & Associates Co., L.P.A. (separately and together, "O'Brien") filed a "Motion for Sanctions" asking the Franklin County Court of Common Pleas Court to punish Stacia Ashley and her legal aid counsel (separately and together, "Ashley") for having sued O'Brien over alleged violations of the Fair Debt Collection Practices Act ("FDCPA"). Feb. 6, 2020 Motion for Sanctions. After O'Brien listed himself and his own lawyer in the FDCPA case as potential witnesses for the motion hearing, *see* May 11, 2020 O'Brien Supplemental Disclosure of Witnesses at 1 (naming "Kevin O'Brien Esq." and "Jeffery Catri Esq." as the second and third witnesses on their list), Ashley moved to compel discovery from them, *see* May 27, 2020 Motion to Compel. O'Brien then filed what he styled a "Motion to Enjoin the Court" from providing for discovery, arguing among other things that the trial court had been "divested of jurisdiction" because Ashley had voluntarily dismissed her complaint. June 9, 2020 Motion to Enjoin at 3-5 (quoting, however, from *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 88, 2002-Ohio-3605 (citations omitted) in reciting that a "trial court retains jurisdiction to determine * * * [a] sanctions [motion] after the principal suit has been terminated").

{¶ 2} The trial court declined O'Brien's invitation to enjoin itself. Focusing not on the merits of the dismissed FDCPA case but on the pending sanctions motion, the trial court deemed O'Brien's argument that it simultaneously lacked and had jurisdiction over that matter "illogical." June 23, 2020 Decision and Entry at 2. The trial court pointed out that it had jurisdiction to consider the sanctions motion that O'Brien himself had promulgated. *Id.* at 2. The civil rules apply, the trial court said, and in any event a trial court has " 'inherent authority to control its own docket and manage the cases before it.' " *Id.* at 3 (citation omitted). Ruling that discovery was needed in this instance "to avoid surprise," the trial court added that "[i]f the Defendants [O'Brien] wish to avoid discovery, they can withdraw their request for sanctions." *Id.* at 4. And with depositions not having begun, the trial court was not in a position to rule in a vacuum on unspecified "attorney client privilege" issues at which O'Brien hinted: "Taking a blanket approach to that privilege – especially regarding requests for attorney fees – is simply wrong," it said, observing that the targets

of the sanctions motion "are entitled to discover the size and the scope of the claimed fees prior to the hearing." *Id.* at 7. Thus, "[i]f at a deposition, the [motion targets] ask question(s) clearly covered by the attorney client privilege, [O'Brien] may object. But that existence of that privilege does not extend so far as to preclude any deposition of the material witnesses as listed on [O'Brien's] May 11, 2020 filing." *Id.* at 8.

{¶ 3} In denying O'Brien's Motion to Enjoin and granting Ashley's Motion to Compel, the trial court was "very clear that [O'Brien is] **not** being ordered to provide[] answers etc., covered by the attorney client privilege. They are being **ORDERED** to cooperate with the discovery process. They are to appear at a deposition and answer valid questions pursuant to the rules of discovery. If they truly believe that a question is protected by attorney client or some other valid privilege – then they are to timely state the objection. A new question or area of inquiry may continue until the deposition is finished. After the deposition, the [sanction targets] can decide on how to proceed. Again, that is how discovery should work." *Id.* (emphasis in original).

{¶ 4} O'Brien has responded to the trial court's Decision and Entry in two ways that potentially are in some analytical tension with each another. In case No. 20AP-354, he has appealed to us from the trial court's Decision and Entry, positing as his single assignment of error that "the trial court erred in overruling Appellants' motion to enjoin discovery and sustaining Ashley's motion to compel, among other matters." Appellants' Brief in 20AP-354 at IV (capitalizations adjusted). In case No. 20AP-393, he has filed what he calls a "Complaint for Writs of Mandamus and Prohibition" against the trial court judge, David C. Young, asking us "to prevent Judge Young from permitting [the targets of O'Brien's sanctions motion] to conduct discovery of O'Brien and his firm * * *." Complaint for Writs at 1-2. We heard argument on these interrelated matters together, and this decision considers and resolves both. *See* Nov. 2, 2020 Journal Entry at 1 (coordinating cases "for purposes of oral argument and determination").

{¶ 5} We start with O'Brien's petition for a writ against Judge Young. As an initial matter, we observe that what O'Brien styles a "Complaint" is not presented in the manner of a complaint: highly discursive, it lacks numbered paragraphs reasonably susceptible of an answer in the normal format, and many of the unnumbered paragraphs are not limited to a discreet allegation or point. *See, e.g.*, Complaint paragraph starting at top of page 5 and running to top of page 7.

{¶ 6} In that style, the "Complaint" purports to trace the history of various lawsuits and appeals that were precursors to Ashley's FDCPA complaint against O'Brien. For purposes of this discovery matter, we need not get enmeshed in those details, but in a nutshell, the complaint describes a collection action brought by O'Brien on behalf of his client First National Financial Services, Ltd., to recover a sum of less than $2,000; O'Brien's negotiation with a then-unrepresented Ms. Ashley of a "cognovit promissory note"; subsequent use by O'Brien on behalf of First National of the cognovit note to obtain a "confessed" judgment against Ashley in municipal court; litigation efforts by Ashley to vacate that judgment; disputes over whether the underlying transaction had been a consumer loan rather than having the commercial character ascribed to it by the cognovit note; certain preliminary wins by Ashley in this court; and Ashley's common pleas court filing of her FDCPA complaint and her January 2020 dismissal of that complaint after this court in December of 2019 upheld a municipal court finding that the cognovit note had related to a commercial loan. Complaint for Writ at 3-19.

{¶ 7} The Complaint then relates that counsel for O'Brien had advised counsel for Ms. Ashley, "in no uncertain terms, that the deposition of O'Brien would not take place as [Ashley's counsel] had no legal authority to notice same," and further describes various back and forth between counsel and the trial court on that subject. *Id.* at 20-25 (raising service issues, too). After contending that the Civil Rules do not obtain in this circumstance, *id.* at 25-26, and noting (as read in a charitable light) that while the trial court had lost jurisdiction over the claims of the dismissed matter, it had jurisdiction to consider O'Brien's sanctions motion, *id.* at 26-30, the Complaint then rests on the point that where " 'a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition and mandamus will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.' " *Id.* at 31-32, quoting *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶ 12; *State ex rel. Powell v. Markus*, 115 Ohio St.3d 219, 2007-Ohio-4793.

{¶ 8} The Complaint seems to recognize that Judge Young *does* have jurisdiction here to "proceed on a cause": O'Brien has asked for sanctions, and wants the trial court to resolve that matter. *See* Complaint for Writs at 29-30 (citations omitted; noting that trial court retains jurisdiction for the limited purpose of resolving sanctions motion). The Complaint seeks, however, to elide jurisdiction to proceed on that cause with a question of

whether the trial court has authority to require depositions in resolving the matter before it: "[T]here is no legal authority which permits Ashley * * * to engage in discovery" on the matter, the Complaint continues, and "Judge Young patently and unambiguously lacks jurisdiction to permit Ashley[] to conduct any discovery of O'Brien in this case * * *." *Id.* at 33. "[P]rohibition and mandamus must issue," the Complaint therefore concludes, "to prevent any future unauthorized exercise of jurisdiction by Judge Young and to correct the results of prior jurisdictionally unauthorized actions on the part of Judge Young." *Id.* at 33-34.

{¶ 9} By Journal Entry of November 2, 2020, this court granted Ashley leave to intervene as respondents in the writ action. They have moved for judgment on the pleadings, and Judge Young has moved to dismiss the action for failure to state a claim for relief. Counsel for all parties presented argument to us on O'Brien's request for a writ and on his appeal on November 9, 2021.

{¶ 10} O'Brien's request for a writ of mandamus fails immediately. Contrary to statute, and as Ashley noted at page 2 of her motion for judgment on the pleadings, it is not brought "in the name of the state on the relation of the person applying," but instead is brought directly by O'Brien in his name; nor is it "verified by affidavit." *Compare* Complaint for Writs *with* R.C. 2731.04 (requirements for mandamus application); *see, e.g.*, *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, ¶ 15 (" 'If * * * a respondent in a mandamus action raises this R.C. 2731.04 ["name of the state"] defect and relators fail to seek leave to amend their complaint to comply with R.C. 2731.04, the mandamus action must be dismissed,' " quoting *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, ¶ 36); *Shoop v. State*, 144 Ohio St.3d 374, 2015-Ohio-2068, ¶ 10 ("a petition for a writ of mandamus may be dismissed for failure to bring the action in the name of the state"; citations omitted); *U.S. Bank, N.A. v. Conrad*, 2d Dist. No. 28375, 2019-Ohio-4103, ¶ 7 ("That the petition was not brought in the name of the state on the relation of the person requesting the writ * * * was alone sufficient grounds to deny the petition"; citations omitted). To any extent that O'Brien's Complaint purports to sound in mandamus, we dismiss that request.

{¶ 11} As the Supreme Court of Ohio has noted, "[t]here is no comparable statutory [captioning] requirement for prohibition cases, and we have not implied one." *Rosen*, 2008-Ohio-853, at ¶ 16. O'Brien's Complaint sounds more in prohibition than in

mandamus anyway. And while the document may not rise to the dignity of a "complaint" in its structure, despite our local rule that original actions brought here "shall be initiated by the filing of a complaint," *see* Local Rule 13(A) of the Tenth District Court of Appeals, the Ashley respondents did file a Response to the Complaint in addition to their motion for judgment on the pleadings. *See* Sept. 18, 2020 Response. We will consider the Complaint as a petition for a writ of prohibition.

{¶ 12} A "writ of prohibition is an 'extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.' " *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 73 (1998), quoting *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73 (1981) (further citation omitted). The Supreme Court of Ohio has said that "a writ of prohibition 'tests and determines "solely and only" the subject matter jurisdiction' of the lower court." *Id*., quoting *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409 (1988) (further citations omitted). Normally, "[i]n order for a writ of prohibition to issue, the relator must prove that (1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied." *Jones* at 74, citing *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 178 (1994). But "where there appears to be a total lack of jurisdiction of the lower court to act," that is, where there is a " ' "patent and unambiguous" lack of jurisdiction to hear a case,' " prohibition may issue even where an adequate remedy in the ordinary course of law may exist. *Id*. at 74, quoting *Ohio Dept. of Adm. Serv. Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 51 (1990) (further citation omitted). *See also, e.g., State ex rel. Vanni v. McMonagle*, 137 Ohio St.3d 568, 2013-Ohio-5187, ¶ 6 ("If the absence of jurisdiction is patent and unambiguous, a relator need not establish the lack of an adequate remedy at law") (citation omitted).

{¶ 13} O'Brien argues vociferously, if unconvincingly, that "Judge Young patently and unambiguously lacks jurisdiction to permit discovery in connection with Relators' Motion for Sanctions filed, post-dismissal." Nov. 24, 2020 Relators' Memo Contra Intervenor Respondents' Motion for Judgment on the Pleadings at 7 (repeating at page 8 that "Relators are firmly of [that] position"). As noted above, that is not an argument that Judge Young lacks jurisdiction "to proceed in [the sanctions] cause" (*Mayer*) or to go forward with that part of the "case" (*Jones*). O'Brien not only *concedes* that the trial court

has jurisdiction to proceed with the sanctions motion, he *requests* that exercise. The trial court does not patently and unambiguously lack jurisdiction to proceed in the matter, and O'Brien is not relieved from having to meet the normal standards that apply to a request for a writ of prohibition.

{¶ 14} Indeed, even were we to adopt O'Brien's (entirely incorrect) view that the question of the trial court's "jurisdiction" over the matter is synonymous with its "authority" to order discovery therein, *see, e.g.*, Complaint for Writs at 33, we would be constrained to observe that O'Brien's own briefing undermines any sense that the trial court's alleged lack of authority is "patent and unambiguous." *See, e.g.*, Relators' Memo Contra Motion for Judgment on the Pleadings at 2 ("no courts in Ohio have expressed an opinion as to whether the terms of the Ohio Civil Rules, in particular, the rules of discovery, apply to a sanctions hearing, post-dismissal"); *id.* at 5 ("The issue before this Court is an issue of first impression and requires serious analysis"); Relators' Oct. 23, 2020 Memo Contra Respondents' Motion to Dismiss at 4-5 ("Relators present a serious legal issue to this Court, however. This Court has recently remarked that 'Ohio case law addressing the propriety of discovery to support the imposition of sanctions is scant' "; citation omitted); *id.* at 10 ("This case affords the Court an opportunity to *adopt* a bright line test or rule regarding the conduct of discovery upon a motion for sanctions, post-dismissal") (emphasis added). O'Brien's own words belie his oft repeated but wholly unsupported contention that the trial court "patently and unambiguously" lacks the power to order the depositions at issue (a question which in any event is very different from whether the trial court lacks subject matter jurisdiction over O'Brien's sanctions motion). *Compare, e.g., Sadler*, 2002-Ohio-3605, at ¶ 26-31 (patent and unambiguous lack of jurisdiction means something more even than a lack of jurisdiction, comprehending a lack of jurisdiction that is both patent and unambiguous).

{¶ 15} Even further still, and contrary to the "bright line" rule that O'Brien urges us to fashion, we have recognized that Ohio case law establishes that trial courts *do* in the context of adjudicating sanctions motions have authority to "allow [we would add, limited] discovery in extraordinary circumstances." *See Calypso Asset Mgt., LLC v. 180 Indus., LLC*, 10th Dist. No. 18AP-53, 2019-Ohio-2, ¶ 36 (noting, importantly, that "[s]uch an approach prevents collateral proceedings on sanctions from expanding into full blown litigation"). That recognition is entirely consistent with the other Ohio case law to which O'Brien cites. Judge Bergeron's useful concurrence in *Fannie Mae v. Hirschhaut*, 1st Dist.

No. C-180473, 2019-Ohio-3636, cited in Relators' Memo Contra Motion for Judgment on the Pleadings at 10, similarly envisions "*limiting* discovery in the sanctions context" lest such proceedings balloon into " 'full blown relitigation.' " *Id.* at ¶ 50 (Bergeron, J., concurring; emphasis added). Limitation is not always a flat preclusion, and we recognized in *Calypso* that trial courts do have some "discretion" in the area. 2019-Ohio-2 at ¶ 35 (reciting abuse of discretion standard in context of discovery on sanctions motion). *See also Huntington Natl. Bank v. Abbott*, 10th Dist. No. 89AP-432, 1989 Ohio App. Lexis 3778, *12 (Sept. 26, 1989) (because of trial court latitude in imposing sanctions, "it is within the sound discretion of the court to decide the procedure" used); *Holloway v. Holloway Sportswear, Inc.*, 3d Dist. No. 17-11-24, 2012-Ohio-2135, ¶ 28-29 ("Generally speaking, a trial court's decision regulating the procedure of a Civ.R. 11 sanctions proceeding should not be disturbed on appeal absent an abuse of discretion," citations omitted; citing federal authorities for point that in federal Rule 11 proceedings, " ' "discovery should be conducted only by leave of the court, and then only in extraordinary circumstances," ' " citations omitted); *Marconi v. Savage*, 8th Dist. No. 102619, 2016-Ohio-289, ¶ 45-46 (same quotation, with finding of no extraordinary circumstances); *Stevens v. Kiraly*, 24 Ohio App.3d 211, 214 (9th Dist.1985) (discretion as to procedure).

{¶ 16} *Calypso* and its counterparts thus obviate O'Brien's argument that the Civil Rules themselves do not authorize such discovery. *See* Relators' Memo Contra Motion to Dismiss at 5-9. Submitting that a sanctions hearing is a "special statutory proceeding," and noting that the Civil Rules do not apply to such proceedings to any extent that "by their nature [they would] be clearly inapplicable," Civ.R. 1 (C), he simply assumes that discovery would be "clearly inapplicable" in the context of a sanctions hearing without explaining why. *Id.* at 6-7. He points to no bar on such discovery either in the Civil Rules or in statute. And whether limited discovery when warranted in this context is had directly through the Civil Rules or flows from a trial court's inherent powers to manage the proceedings before it (as informed, perhaps, by the Civil Rules) is of no particular relevance that O'Brien identifies: the case law consensus is that limited discovery for sanctions hearings may be had in "extraordinary circumstances." *See Calypso* at ¶ 36.

{¶ 17} We then note that under our *Calypso* formulation, O'Brien provides us with no reason to determine that his sanctions motion does not present extraordinary circumstances (so that the trial court therefore would patently and unambiguously lack

what O'Brien misconceives as jurisdiction). His counsel could not begin to tell us at argument roughly what amount of attorney fees he is asking the trial court to award. More to the point, his pleadings and briefing have suggested that his motion envisions recovery for fees incurred in cases *other* than the one pursuant to which this motion was brought. *See, e.g.*, Relators' Memo Contra Motion for Judgment on the Pleadings at 9 ("Relators presently have in excess of $120,000 in attorney fees incurred in five (5) cases over the course of the last five years"). Thus, O'Brien has told us that: "To say that [Ashley's] interest [in the subject of O'Brien's Complaint for Writs] is 'potentially financial' is an understatement. The Relators' attorney fees in the * * * Motion for Sanctions now exceed one hundred and twenty thousand dollars ($120,000) on account of [Ashley's] fraud." Oct. 26, 2020 Relators' Memo Contra Renewed Motion to Intervene [as subsequently granted] at 3. O'Brien's contention, therefore, has been that the fees claimed as sanctions can have been incurred in cases beyond the one in which the sanctions motion at issue here was filed.

{¶ 18} More confusingly still, for the most part in those other cases O'Brien was a lawyer rather than a party. *Compare, e.g.*, Complaint for Writs at 3-15 (describing litigation between First National and Stacia Ashley, with O'Brien as First National's lawyer), *with, e.g.*, O'Brien's Feb. 6, 2020 Motion for Sanctions at 3 ("In the Municipal Court case, Ashley appealed the decisions of Judge Morehart three (3) times causing *First National* to spend huge sums of money in defense of Ashley's frivolous Motion to Vacate") (emphasis added). The statute under which O'Brien purports to proceed permits "any *party* adversely affected by frivolous conduct" to move for fees "incurred in connection with *the* civil action or appeal" pursuant to which the sanctions motion is brought. R.C. 2323.51(B)(1) (emphasis added). At argument here, O'Brien's counsel seemed on occasion to retreat from the five-case, $120,000 total fee figure, but that retreat did not strike us as always clear or consistent. On this record, and for purposes limited to addressing O'Brien's ill-conceived view that the trial court "patently and unambiguously" lacks jurisdiction, we cannot rule out his sanctions request as other than "extraordinary" in its inchoate scope and nature.

{¶ 19} Suffice it to say that the trial court does not patently and unambiguously lack jurisdiction over this matter. We move, then, to the usual, exacting standard for assessing a request for a writ of prohibition. We deny the writ under the standard that obtains in motions to dismiss and for judgments on the pleadings (by which we presume the truth of

all factual allegations in the complaint and draw all reasonable inferences therefrom in O'Brien's favor, *see, e.g.*, *Hummel* at 87) because O'Brien will at an appropriate point be able to pursue a remedy in the ordinary course of law.

{¶ 20} O'Brien essentially has staked his writ request on his unavailing argument that the trial court here patently and unambiguously lacks jurisdiction. Responding to Ashley's position that O'Brien's proper course is through later appeal, O'Brien sees "two issues with the * * * argument." Relators' Memo Contra Motion for Judgment on the Pleadings at 7. First, he reverts to his view that "Judge Young patently and unambiguously lacks jurisdiction to permit discovery." *Id.* "Second, * * * Relators maintain that they are not required to respond to Intervenors' discovery, sit for deposition and have a sanctions hearing before they are permitted to *appeal*." *Id.* (emphasis added). We already have given the first contention more analysis than it is worth. And the second contention goes to the timing of an appeal, and whether or not interlocutory appeal is permitted in these circumstances: at best, it is not an argument *for* a writ of prohibition.

{¶ 21} O'Brien perhaps seeks to expand somewhat on his second contention by stating that "[d]iscovery of [O'Brien] is just another club in [Ashley's] arsenal to require [O'Brien] to expend more time and effort on this case." *Id.* at 10. He hints at something of the same argument in opposing Judge Young's motion to dismiss: he states he does not want to "endure yet more abuse from a party (Ashley) who has already perpetrated a fraud upon the Court and the Relators. Enough is enough. In this case, the trial court patently and unambiguously lacks jurisdiction to proceed." Relators' Memo Contra Motion to Dismiss at 13. But "contentions that appeal from any subsequent adverse final judgment would be inadequate due to time and expense [from the subsequent proceedings] are without merit." *State ex rel. Lyons v. Zaleski*, 75 Ohio St.3d 623, 626 (1996) (citations omitted); *see also, e.g.*, *Vanni*, 2013-Ohio-5187, at ¶ 16 (" '[a]ppeal following judgment is not rendered inadequate,' such that a party may secure a writ of prohibition, 'due to the potential time and expense involved' " [citations omitted]); *State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 16-17 (1999) (affirming dismissal of prohibition petition that sought to prevent judge from enforcing discovery orders: "a writ of prohibition will not generally issue to challenge these orders"; "absent a patent and unambiguous lack of jurisdiction on the part of [the judge] in issuing the challenged discovery orders, appellants have an adequate remedy by appeal to resolve any alleged error").

{¶ 22} Prohibition "is * * * not a remedy for an [asserted] abuse of discretion." *Eaton Corp*. at 409 (nor is it meant "to prevent or correct an erroneous decision" where subject matter jurisdiction exists); *see also, e.g., State ex rel. Sladoje v. Belskis*, 149 Ohio App.3d 190, 2002-Ohio-4505, ¶ 11 (10th Dist.) (same). Even if the trial court has misjudged these circumstances (a possibility not unambiguously apparent from this record) and therefore errs in permitting the two depositions ordered (subject to privilege and presumably other objections), a writ of prohibition would not lie. We grant Ashley's motion for judgment on the pleadings and Judge Young's motion to dismiss with regard to O'Brien's Complaint for Writs in case number 20AP-393.

{¶ 23} That brings us to O'Brien's appeal of the discovery order and the trial court's rejection of his "Motion to Enjoin the Court."

{¶ 24} Ashley has moved to dismiss the appeal for want of jurisdiction as not from a final, appealable order. Aug. 14, 2020 Motion to Dismiss. Article IV, Section 3(B)(2) of the Ohio Constitution restricts our appellate role to the review of final orders. " 'A final order * * * is one disposing of the whole case or some separate and distinct branch thereof.' " *Noble v. Colwell*, 44 Ohio St.3d 92, 94 (1989) (citations omitted). "If an order is not a final, appealable order, the appellate court lacks jurisdiction and the appeal must be dismissed." *K.B. v. Columbus*, 10th Dist. No. 14AP-315, 2014-Ohio-4027, ¶ 8 (citation omitted); *see also, e.g., Nami v. Nami*, 10th Dist. No. 17AP-265, 2017-Ohio-8330, ¶ 12 ("An appellate court must dismiss an appeal taken from an order that is not final and appealable").

{¶ 25} "The Supreme Court of Ohio has set forth a two-step analysis for determining whether an order is final and appealable." *Nami* at ¶ 13, citing *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 21 (1989). "First, the appellate court must determine whether the order constitutes a final order as defined by R.C. 2505.02." *Id.*, citing *Gen. Acc. Ins. Co.* at 21. "If the order is final under R.C. 2505.02, the court must determine whether Civ.R. 54(B) applies." *Id.* That rule specifies in part that a court may enter a final judgment as to fewer than all of the claims or parties before it "only upon an express determination [not made here] that there is no just reason for delay." Civ.R. 54(B).

{¶ 26} O'Brien asserts that he "meet[s] the criteria set forth in Section 2505.02(B)(2)." Sept. 8, 2020 Memo Contra Motion to Dismiss at 3. Subsection (B)(2) is the only subsection of R.C. 2505.02 that O'Brien cites in specific terms and the only subsection of the statute that he invokes apart from reference to cases bearing on his

secondary argument that "[d]iscovery orders which impair or violate the attorney-client privilege" are final, appealable orders, *see id.* at 5. (His counsel confirmed at argument that their reliance is on the (B)(2) subsection).

{¶ 27} Pursuant to R.C. 2505.02(B)(2), an order is a final order if it is "[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment." A "substantial right" means a right that the federal or state constitutions or statute, common law, or rule of procedure "entitles a person to enforce or protect." R.C. 2505.02(A)(1).

{¶ 28} O'Brien's brief never directly specifies the protected "right" that he seeks to enforce. He does say: "This appeal is not about a discovery dispute. It is about the trial court's lack of subject matter jurisdiction to issue any kind of an order in favor of [Ashley] in view of Ashley's dismissal of all of her claims against O'Brien." Memo Contra Motion to Dismiss at 3. And he returns to that point: "In this case, the trial court lacks subject matter jurisdiction to issue any rulings respecting discovery * * *." *Id.* at 4. Again, that flat jurisdictional assertion is incorrect: the trial court does have jurisdiction to process his motion for sanctions. And to the extent that he means to say that the trial court is abusing its discretion to permit limited discovery in this case, he does not explain why such a decision somehow "affects" a substantial "right" (or even why the opaque nature and scope of his sanctions request is not extraordinary). The onus would be on him to do that, if that is what he means.

{¶ 29} O'Brien's pursuit of his sanctions motion, after all, is not a matter like a petition for pre-suit discovery where the object of the proposed discovery is not party to any other pending action capable of later resolution and where the special proceeding itself is limited to and ends with the discovery effort. *Compare, e.g., Lieberman v. Screen Machine Advertising Specialties & Screen Print Design*, 10th Dist. No. 96APE05-665, 1997 Ohio App. Lexis 410 (Feb. 4, 1997) (pre-suit discovery case) *with Prakash v. Prakash*, 181 Ohio App.3d 584, 2009-Ohio-1324, ¶ 20 (10th Dist.) (in context of contempt proceeding, trial court's order requiring parties and their minor child to submit to a psychological examination pursuant to Civ.R. 35(A) was not a final, appealable order under R.C. 2505.02(B)(2)); *compare also Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶ 22 (party to a special proceeding in which his physical condition is at issue "does not have a substantial right to prevent a court from ordering a physical examination"). Thus, for

example, the Court of Appeals for the Second District has held, in the context of a special proceeding, that "[t]here is no basis for concluding that the Rules of Civil Procedure create 'substantial rights' " based on the general constraints against intrusive discovery and an argument that there is a " 'right' not to be burdened with expense resulting from the demanded production of information." *Fredricks v. Good Samaritan Hosp.*, 2d Dist. No. 22502, 2008-Ohio-3480, ¶ 22-23.

{¶ 30} The Supreme Court of Ohio has held (in the context of what it then deemed a special proceeding, there involving a post-trial motion for prejudgment interest) that a trial court's discovery order compelling a witness to submit requested materials for *in camera* review to allow the court to assess them for attorney client privilege does not affect a substantial right and therefore is not a final, appealable order. *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63-64 (1993), modified by *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994) (prejudgment interest motions are not special proceedings). In that context, the court observed, substantial rights of the witness would be implicated only by a subsequent order compelling disclosure of assertedly privileged information. *Id.* at 64; *see also id.* at fn. 1 (citing favorably to *In re Coastal States Petroleum, Inc.*, 32 Ohio St.2d 81 (1972), where "a unanimous court concluded that the refusal of the trial court to quash an investigatory subpoena * * * was not a final appealable order").

{¶ 31} O'Brien leans very heavily on the point that "[d]iscovery orders which impair or violate the attorney-client privilege * * * are final, appealable orders." Sept. 8, 2020 Appellants' Memo Contra Motion to Dismiss at 5-6 (citations omitted; also citing cases involving doctor-patient privilege). But he offers us no argument that the trial court has ordered any response to any question that would trench on privileged matters. *Id.* Nor could he at this juncture, in light of the trial court's express permission for O'Brien to object to and await later court ruling on any questions claimed to intrude into privileged matters. Decision and Entry at 8 (also noting, with emphasis in original, that O'Brien is "**not** being ordered to provide[] answers * * * covered by attorney client privilege"). Just as the trial court was not in a position to rule on questions that have not been formulated or posed, neither are we in a position to evaluate trial court rulings that have not yet been made on objections that have not yet been interposed to the unknown questions. *Bell* made the same point in finding the *in camera* production order not final and appealable. *Bell*, 67 Ohio St.3d at 64 ("If the trial court [after review] determines that all of the requested information

is privileged, any issues which may have been the subject of an appeal would be rendered moot. Conversely, if some documents are determined to be subject to disclosure, an appeal on narrowed issues would be available").

{¶ 32} O'Brien does not even attempt an argument here that every conceivable question designed to elucidate the scope of his sanctions motion would require disclosure of privileged information. After all, he has listed himself and his counsel as witnesses at the sanctions hearing. Supplemental Disclosure of Witnesses at 1. And O'Brien touts the fact that he testified and "was cross-examined, at length" (presumably with privilege either not breached, or waived) in the municipal court case. Complaint for Writs at 21-22.

{¶ 33} Finally, O'Brien turns to cases involving argued limitations to the doctrine of mootness, apparently urging us significantly to expand the logic there to override constraints on our jurisdiction more generally. Memo Contra Motion to Dismiss at 7-8. We lack the power as well as the inclination to do that.

{¶ 34} *State ex rel. Dispatch Printing Co. v. Geer*, 114 Ohio St.3d 511, 2007-Ohio-4643, ¶ 10, granted a writ of prohibition against an unconsidered trial court rule restricting press photography: the Supreme Court of Ohio found that "a claim 'is not moot' " under certain exceptional circumstances when the same complaining party is likely to be subject to the same action again and the type of challenged action is too short to allow remedy before its expiration. That analysis was not designed for determining the question before us, which is whether Judge Young's ruling is a final, appealable order. Moreover, we already have considered, and denied, O'Brien's request for a writ of prohibition: he has lost under the standards that apply to that petition.

{¶ 35} O'Brien's attempted invocation of a "great public or general interest" exception to the mootness doctrine is even more strained and far afield. As we have said before, "any rare ' "public or general interest" exception' [to mootness] tends to exist, if at all, within the exclusive preserve of the Supreme Court of Ohio rather than for 'a court whose decision does not have binding effect over the entire state.' " *Doe v. Upper Arlington Bd. of Edn.*, 10th Dist. No. 21AP-31, 2021-Ohio-3805, ¶ 8 (citations omitted); *see also, e.g., Haueisen v. Worthington*, 10th Dist. No. 19AP-253, 2019-Ohio-5085, ¶ 20 and concurrence at ¶ 25. That doctrine does not apply to this case, or here.

{¶ 36} Tangentially, we note that O'Brien's effort to return to his jurisdictional argument by repeating his "claim that the trial court is without jurisdiction to make *any*

order respecting discovery[,]" Memo Contra Motion to Dismiss at 8 (emphasis added), is itself somewhat at odds with his appeal of the trial court's rejection of his motion "for an Order enjoining the Court, the Plaintiff and the Respondent, from conducting any discovery in this matter." *See* O'Brien's June 9, 2020 Motion to Enjoin at 1.

{¶ 37} Returning, then, to the two-step final, appealable order analysis, we note that the trial court made no certification of the deposition issue pursuant to Civil Rule 54(B).

{¶ 38} We grant Ashley's motion to dismiss O'Brien's Appeal for want of jurisdiction. Having already granted Judge Young's Motion to Dismiss O'Brien's Complaint for Writs and Ashley's Motion for Judgment on the Pleadings, we dismiss the Complaint in case No. 20AP-393 and we dismiss the appeal in case No. 20AP-354. We remand this cause to the Franklin County Court of Common Pleas for further proceedings on O'Brien's request for sanctions, consistent with these decisions. In doing so, we note that if a new date is established for (limited) deposition, any questions about whether O'Brien is sufficiently notified of the deposition time and date can be addressed by the trial court if and as appropriate.

Complaint dismissed in 20AP-393;
appeal dismissed in 20AP-354; cause remanded.

KLATT and BEATTY BLUNT, JJ., concur.

NELSON, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

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