

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TERRY HAMILTON, ET AL.

C.A. No. 31667

Appellees

v.

SUMMA HEALTH, ET AL.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2023-09-3525

DECISION AND JOURNAL ENTRY

Dated: September 16, 2026

DICKEY, Judge.

{¶1} Appellants, Summa Health, Summa Health System, Summa Health System Corp., and Summa Physicians, Inc. (“Summa”), appeal from the September 24, 2025 judgment of the Summit County Court of Common Pleas ordering Summa to produce Hamilton_Summa_Priv000001 through Hamilton_Summa_Priv000163 (the “Stewart Documents”) finding they are not protected by attorney-client or work-product privileges and are discoverable following an in-camera review. The Stewart Documents are emails and attachments to and from Robert Stewart, Summa’s System Director of Laboratories (“Stewart”), with Summa’s legal department.

{¶2} This appeal arises from a medical negligence action. Summa contends the Stewart Documents are protected by the attorney-client privilege and/or the work-product doctrine and are, in any event, irrelevant and disproportionate under Civ.R. 26(B). Appellees, Terry and Gregory Hamilton (“the Hamiltons”), on the other hand, argue the appeal must be dismissed for lack of

jurisdiction because any privilege was forfeited before the judgment issued, and alternatively that the judgment should be affirmed.

{¶3} For the reasons that follow, this court has jurisdiction under R.C. 2505.02(B)(4). Regarding the merits, we hold that the trial court erred in resolving the competing claims without a proper document-by-document attorney-client privilege and work-product analysis, and reverse and remand for further proceedings. Any waiver and Civ.R. 26(B) discoverability questions shall be addressed in the first instance by the trial court.

FACTS AND PROCEDURAL HISTORY

{¶4} In March 2022, Ms. Hamilton underwent a bilateral mastectomy performed by Kristina Gulotta, M.D. (“Dr. Gulotta”), a physician formerly employed by Summa. In September 2022, Ms. Hamilton discovered a mass at the site of the right mastectomy which was later diagnosed as malignant. Dr. Gulotta subsequently spoke with physicians at Cleveland Clinic, whom Ms. Hamilton saw for a second opinion. They expressed belief that her cancer was retained, not recurrent.

{¶5} Ms. Hamilton then returned to Summa for treatment, this time with Victoria Van Fossen, M.D. (“Dr. Van Fossen”). In February 2023, Ms. Hamilton had a second surgery to remove the mass. She now continues treatment with The Ohio State University Medical Center.

{¶6} On September 19, 2023, the Hamiltons filed suit against Summa and individual physicians alleging medical negligence and claiming that Summa’s hiring and retention of Dr. Gulotta was hospital negligence. Summa filed an answer.

{¶7} The Hamiltons sought extensive discovery. On July 15, 2024, the Hamiltons moved to compel. The parties later entered a stipulated order resolving that motion. On January 29, 2025, the trial court acknowledged Summa provided comprehensive responses to the

discovery requests and noted Summa would do a final review to identify and provide any additional responsive information to the Hamiltons' requests.

{¶8} Thereafter, Summa provided a privilege log identifying two emails, both of which were to or from Stewart and Summa's in-house counsel, dated February 7, 2023, and copied non-party surgeon Dr. Van Fossen. Summa claimed attorney-client privilege and work-product protection. On June 6, 2025, following an in-camera review, the trial court agreed that both emails were protected under the attorney-client privilege.

{¶9} The Hamiltons sought to depose Stewart over Summa's objection. The trial court allowed the deposition to proceed, noting that Stewart had an apparent lack of knowledge concerning the facts and circumstances related to the treatment Ms. Hamilton received at Summa. Stewart testified he does not oversee the practice of medicine, never spoke with Dr. Gulotta, and had no communications regarding Ms. Hamilton other than those resulting from the legal department's February 7, 2023 communication with him. Stewart reiterated several times that the only communication he had about Ms. Hamilton was from Summa's legal department and all other communications were directly related to that request from the legal department.

{¶10} At a reconvened deposition, the trial court intervened over a dispute about collection and production of Stewart's emails. The court directed Stewart and Summa's IT personnel to search and certify searches of his emails. The court ordered a privilege log to be produced and in-camera production of the emails. On August 12, 2025, Summa complied and produced a privilege log to the court, along with the Stewart Documents for an in-camera review under seal.

{¶11} Despite the trial court's prior June 6, 2025 ruling that both February 7, 2023 emails were protected under the attorney-client privilege, on September 24, 2025, the court determined

that all of the Stewart Documents, including those two February emails, are not protected and are discoverable. The court found in favor of the Hamiltons and against Summa, ordered production of the Stewart Documents and stated in two sentences: “After review of the documents submitted in-camera, this Court finds that they are not protected by attorney-client or work-product privileges. Moreover, the documents submitted for in-camera review are discoverable.” (9/24/2025 Judgment Entry, p. 1). The judgment ordered that the Stewart Documents shall be provided to the Hamiltons within three days. The judgment further provided that should Summa fail to comply with this order, the court will deem their claims of privilege as waived and the court will disclose the Stewart Documents. This conditional waiver clause is a future coercive sanction, not a ruling that privilege was already forfeited.

{¶12} Summa filed a timely appeal. Thereafter, the Hamiltons filed a motion to dismiss the appeal for lack of jurisdiction and for sanctions. Summa filed a response in opposition. The Hamiltons later filed a response in support of their motion to dismiss the appeal and for sanctions. On November 3, 2025, this court found Summa had made a colorable claim under *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, and denied the Hamiltons’ motion to dismiss at that time. However, this court noted that “the issue of jurisdiction may be revisited during the final disposition of the appeal[.]” (11/3/2025 Judgment Entry, p. 2). This court additionally noted that the Hamiltons’ motion for sanctions “is deferred for determination by the panel upon review of the merits of the appeal.” (*Id.*).

{¶13} Summa raises a single assignment of error.

ASSIGNMENT OF ERROR

THE COURT OF COMMON PLEAS ERRED IN ORDERING DEFENDANTS-APPELLANTS TO PRODUCE, AFTER AN IN-CAMERA INSPECTION, HAMILTON_SUMMA_PRIV000001 THROUGH HAMILTON_SUMMA_PRIV000163, BECAUSE THE DOCUMENTS ARE

PROTECTED FROM DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE AND/OR THE WORK-PRODUCT DOCTRINE, AND ARE IRRELEVANT AND DISPROPORTIONATE TO THE NEEDS OF THE CASE.

{¶14} In its sole assignment of error, Summa argues the trial court erred in ordering it to produce the Stewart Documents following an in-camera review. Summa advances four issues:

1. The attorney-client privilege and work-product doctrine protections are different. The Trial Court, in one fell swoop with no analysis, determined after an in-camera review that neither applied. Did the Trial Court err as a matter of law when it failed to distinguish between the attorney-client privilege and work-product doctrine protection when it ordered Summa to produce Hamilton_Summa_Priv000001 through Hamilton_Summa_Priv000163?

2. Under Civ.R. 26(B)(1) and the common law, discovery is limited to “nonprivileged matter[s].” The documents at issue stem solely from Robert Stewart’s communications with Summa’s legal department concerning this case. Did the Trial Court err as a matter of law when it determined the documents submitted for in-camera review, Hamilton_Summa_Priv000001 through Hamilton_Summa_Priv000163, are not protected from disclosure by the attorney-client privilege?

3. Under Civ.R. 26(B)(4) and the common law, discoverability of work-product doctrine protected material requires a showing of “exceptional circumstances” or “good cause.” The documents at issue stem solely from Robert Stewart’s communications with Summa’s legal department concerning this case. Did the Trial Court err as a matter of law when it determined the documents submitted for in-camera review, Hamilton_Summa_Priv000001 through Hamilton_Summa_Priv000163, are not work-product protected without addressing “exceptional circumstances” or “good cause”?

4. Under Civ.R. 26(B)(1), nonprivileged matters that are “relevant to any party’s claim or defense and proportional to the needs of the case” are discoverable. The documents at issue are unrelated to Ms. Hamilton’s care and treatment or Dr. Gulotta’s employment and are not proportional to the needs of this case. Did the Trial Court err as a matter of law when it determined the documents submitted for in-camera review, Hamilton_Summa_Priv000001 through Hamilton_Summa_Priv000163, are discoverable?

(12/15/2025 Appellants’ Brief, p. 7).

{¶15} Before proceeding to the merits, we will first address the Hamiltons’ position that this court lacks jurisdiction. Regarding jurisdiction, the main point is whether the trial court’s

September 24, 2025 judgment is a final, appealable order under R.C. 2505.02(B)(4), i.e., whether it grants or denies a provisional remedy compelling disclosure of a privileged matter for which there is no meaningful post-judgment remedy.

{¶16} The Hamiltons believe the appeal must be dismissed because this court lacks jurisdiction. Relying on *Smith v. Chen*, 2015-Ohio-1480 (Declined to Extend by *Burnham*, 2016-Ohio-8000), the Hamiltons note an appellant must affirmatively show the order compels disclosure of privileged material and that post-judgment review would not provide a meaningful or effective remedy. Absent that showing, the Hamiltons state jurisdiction does not exist. The Hamiltons stress this court reserved the jurisdictional question for final disposition and that the completed record now establishes forfeiture.

{¶17} Summa, on the other hand, contends any order compelling production of privileged or protected materials satisfies R.C. 2505.02(B)(4)(a) because it would be impossible to obtain relief after disclosure, and an order compelling production of attorney-client material is the paradigm case for which there is no effective remedy other than immediate appeal under R.C. 2505.02(B)(4)(b). Summa argues the Hamiltons' waiver theory improperly conflates jurisdiction with merits: at the jurisdictional stage a court need not resolve the question whether the trial court's order definitively compels the disclosure of protected material, and an appellant need only raise a colorable claim of privilege, which this court already found on November 3, 2025.

{¶18} Ordinarily a discovery order is reviewed for abuse of discretion; but where the dispute turns on an alleged privilege, as in this case, it presents a question of law reviewed de novo. *Ward v. Summa Health Sys.*, 2010-Ohio-6275, ¶ 13; *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 2013-Ohio-3508, ¶ 7 (9th Dist.).

{¶19} R.C. 2505.02, "Final order," states in part:

(A) As used in this section:

...

(3) “Provisional remedy” means a proceeding ancillary to an action, including, but not limited to . . . discovery of privileged matter . . .

(B) 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:

...

(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) and (B)(4)(a)-(b).

{¶20} The Hamiltons’ reliance on *Chen* is misplaced. The Hamiltons’ central move is to read *Chen* as requiring Summa to affirmatively establish a valid, un-waived privilege before jurisdiction attaches. That over-reads *Chen*. In *Chen*, the Supreme Court of Ohio dismissed a discovery appeal because the appellant never affirmatively established prong (b) under R.C. 2505.02(B)(4). *Chen*, 2015-Ohio-1480, at ¶ 7. *Chen* did not require the appellant to prove the merits of privilege, including the absence of waiver, as a jurisdictional predicate. The Supreme Court of Ohio in *Burnham* later clarified and limited *Chen*: an order compelling production of attorney-client privileged material “causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal,” so it satisfies prong (b) automatically. *Burnham*, 2016-Ohio-8000, at ¶ 2.

{¶21} In this case, the trial court’s order satisfies both prongs. Regarding R.C. 2505.02(B)(4)(a), any order compelling production of privileged materials qualifies “because it

would be impossible to later obtain a judgment denying the motion to compel disclosure if the party has already disclosed the materials.” *Burnham* at ¶ 21. Regarding R.C. 2505.02(B)(4)(b), an order compelling attorney-client-privileged material “is an example of that for which there is no effective remedy other than immediate appeal[.]” *Id.* at ¶ 25. Orders requiring the production of work-product protected materials may also satisfy R.C. 2505.02(B)(4)(b). *See Id.* at ¶ 26. Jurisdiction requires only a colorable claim of privilege, not a merits ruling, and this court has already determined Summa “made a colorable claim under *Burnham*.” *See Id.* at ¶ 29; *State v. Glenn*, 2021-Ohio-3369, ¶ 13 (chicken/egg quandary); (11/3/2025 Judgment Entry, p. 2).

{¶22} Thus, the trial court’s September 24, 2025 judgment is a final, appealable order under R.C. 2505.02(B)(4). Because this court finds we have jurisdiction, we will proceed to the merits.

{¶23} Regarding the merits, the main point is whether the trial court erred in holding the Stewart Documents are unprotected by the attorney-client privilege and the work-product doctrine and are discoverable under Civ.R. 26(B).

{¶24} Rulings on disclosure of privileged information are reviewed de novo and other discovery rulings are reviewed for abuse of discretion. *Med. Mut. of Ohio v. Schlotterer*, 2009-Ohio-2496, ¶ 13. Because the trial court order’s core holding is that the Stewart Documents are unprivileged, de novo review governs the central question.

{¶25} The attorney-client privilege and the work-product doctrine are distinct: the privilege protects confidential attorney-client communications absolutely, whereas work product provides a qualified protection for materials prepared in anticipation of litigation. *See Buckeye Corrugated*, 2013-Ohio-3508, at ¶ 23 (9th Dist.).

{¶26} Summa argues, and the record confirms, that the trial court’s two-sentence order on this issue collapsed both protections into a single, blanket ruling with no document-by-document analysis and no explanation of which protection applied, or did not apply, to which document. The judgment under review is an undifferentiated ruling that: (1) does not separate the absolute attorney-client privilege from the qualified work-product protection; (2) does not include any analysis of the Stewart Documents; and (3) does not explain the reversal of the trial court’s own June 6, 2025 privilege determination as to the two February 7, 2023 emails.

{¶27} This district has held that a trial court’s “fail[ure] to distinguish between attorney-client communications and attorney work-product” is reversible error. *Id.* at ¶ 24. This defect alone, at the threshold, supports a reversal and remand for an analysis under the correct framework by the trial court.

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 937 N.E.2d 533, 2010-Ohio-4469, ¶ 16, quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). “The privilege is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’ ” *Swidler & Berlin* at 403, quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). “In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.” *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 824 N.E.2d 990, 2005-Ohio-1508, ¶ 18.

Id. at ¶ 8.

{¶28} “It is widely recognized that the attorney-client privilege applies to communications between corporations and their attorneys.” *Jacobs v. Equity Tr. Co.*, 2020-Ohio-6882, ¶ 12 (9th Dist.), citing *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, ¶ 22, citing *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) and *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343 (1991). “The attorney-client privilege rules set forth in *Upjohn* have been

expanded to include ‘communications between non-attorney corporate employees where the communications were made for purposes of securing legal advice from counsel’ and ‘relay[ing] legal advice.’” *Jacobs* at ¶ 13, quoting *Graff v. Haverhill N. Coke Co.*, S.D.Ohio No. 1:09-cv-670, 2012 WL 5495514, *7 (Nov. 13, 2012) and *McCall v. Procter & Gamble Co.*, S.D.Ohio No. 1:17-cv-406, 2019 WL 3997375, *4 (Aug. 22, 2019).

{¶29} Summa argues all of the Stewart Documents flow from the February 7, 2023 request from legal. As stated, the Stewart Documents are emails and attachments to and from Stewart, Summa’s System Director of Laboratories, with Summa’s legal department. The trial court already found, on June 6, 2025, that two February 7, 2023 emails were privileged before reversing course as to those same emails, and all of the other emails and attachments, without any explanation on September 24, 2025. Additionally, Summa asserts that Dr. Van Fossen’s inclusion on the February 7, 2023 emails does not destroy privilege, because the trial court had the full recipient list before it when it first found the emails privileged and because corporate communications remain privileged even when relayed among non-attorneys. *See Jacobs*, 2020-Ohio-6882, ¶ 13 (9th Dist.).

Distinct from the issue of attorney-client privilege is the issue of work product. The work-product doctrine “provides a *qualified* privilege protecting the attorney’s mental processes in preparation of litigation, establishing ‘a zone of privacy in which lawyers can analyze and prepare their client’s case free from scrutiny or interference by an adversary.’” (Emphasis sic.) *Squire, Sanders & Dempsey, L.L.P.*, 127 Ohio St.3d 161, 937 N.E.2d 533, 2010-Ohio-4469, at ¶ 55, quoting *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir.2006).

Buckeye Corrugated, 2013-Ohio-3508, at ¶ 23 (9th Dist.).

{¶30} Summa claims it reasonably anticipated litigation as of February 7, 2023, the date of the second surgery, following Cleveland Clinic’s retained-cancer opinion, and that every other Stewart Document post-dates the filing of suit. Summa further contends the trial court improperly

assumed good cause because the Hamiltons never moved to compel the Stewart Documents for good cause and never carried their burden to show the materials are directly at issue, needed, and unavailable elsewhere.

{¶31} At this juncture, regarding the Stewart Documents, because the trial court failed to distinguish between attorney-client privilege and attorney work product in its September 24, 2025 judgment, we reverse and remand. *See Id.* at ¶ 24 (the absence of an in-camera review was a separate assignment this court expressly declined to reach as unripe). Summa's main issue with respect to the attorney-client privilege and work-product doctrine protections has merit to the extent provided. Summa's remaining arguments involving waiver (with respect to forfeiture), which the trial court never reached below, and Civ.R. 26(B) discoverability questions are not yet ripe for review and we decline to address them as they are for the trial court to address in the first instance on remand. *See, e.g., Id.* at ¶ 26.

CONCLUSION

{¶32} For the foregoing reasons, Summa's sole assignment of error is well-taken to the extent provided. Regarding jurisdiction, the September 24, 2025 judgment of the Summit County Court of Common Pleas is a final, appealable order under R.C. 2505.02(B)(4) and thus, the Hamiltons' motion for sanctions is denied. Regarding the merits, the trial court erred in resolving the competing claims without a proper document-by-document attorney-client privilege and work-product analysis, and any waiver and Civ.R. 26(B) discoverability questions shall be addressed in the first instance by the trial court. Accordingly, the court's judgment is reversed and the matter remanded for further proceedings consistent with this Opinion.

Judgment reversed and remanded.

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(C). 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 Appellees.

KATELYN DICKEY
SEVENTH DISTRICT COURT OF APPEALS,
SITTING BY ASSIGNMENT, FOR THE COURT

WAITE, P.J., Seventh District Court of Appeals, sitting by assignment
ROBB, J., Seventh District Court of Appeals, sitting by assignment
CONCUR

APPEARANCES:

S. PETER VOUDOURIS, ETHAN W. WEBER, AARON P. HOWELL and LUCILLE R. ZELINA, Attorneys at Law, for Appellants.

SUSAN E. PETERSEN and TODD E. PETERSEN, Attorneys at Law, for Appellees.

LOUIS E. GRUBE, Attorney at Law, for Appellees.