[Cite as *Cobb v. Shipman*, 2012-Ohio-1676.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DEBRA R. COBB, INDIVIDUALLY AND AS PARENT AND LEGAL GUARDIAN OF H.N.C., A MINOR, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2011-T-0049**
- vs -	:	
TARA A. SHIPMAN, M.D., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2006-CV-2992.

Judgment: Dismissed in part; reversed in part and remanded.

Martin F. White, Martin F. White Co., L.P.A., 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482-1150; and *Michael M. Djordjevic* and *Peter W. Marmaros*, Djordjevic, Casey & Marmaros, 17 S. Main Street, Suite 201, Akron, OH 44308; and *Norman A. Moses*, 100 Marwood Circle, Boardman, OH 44512 (For Plaintiffs-Appellees).

Douglas G. Leak, Roetzel & Andress, L.P.A., 1375 E. 9th Street, 9th Floor, One Cleveland Center, Cleveland, OH 44114; *Joseph A. Farchione*, *John V. Jackson, II*, and *Brian M. Dodez*, Sutter, O'Connell & Farchione, 3600 Erieview Tower, 1301 East 9th Street, Cleveland, OH 44114 (For Defendants-Appellants).

MARY JANE TRAPP, J.

{¶1} Appellants, Tara A. Shipman, M.D. and Associates in Female Health, Inc. (collectively, "Dr. Shipman"), appeal from three discovery orders of the Trumbull County Court of Common Pleas issued in prejudgment interest proceedings. Dr. Shipman

argues that the trial court abused its discretion in ordering the production of certain documents from the file of her defense attorneys, and in compelling her and her defense attorneys to submit to a judicially-supervised deposition, in which they anticipate being asked to reveal information usually protected by attorney-client privilege, as well as produce documents usually protected by the attorney-client privilege and the work-product doctrine for an *in camera* review.

{¶2} In prejudgment interest proceedings, all materials are discoverable except for those revealing the theory of defense, regardless of where they are found – be they in an insurance carrier's claim file or the defense attorney's file. While it appears that the trial court properly employed this rule, some inconsistencies exist in its application of the rule to the documents contained in the defense attorneys' file. Further, because an order compelling or denying an *in camera* review of privileged documents, or appearance for deposition in which one anticipates being asked to reveal privileged information, in a prejudgment interest action, pursuant to R.C. 1343.03(C), is not a final order, as described in R.C. 2505.02, we have no jurisdiction to consider it.

{¶3} Thus, we affirm in part and reverse in part the trial court's orders granting the Cobbs' motion to compel the production of certain records from the defense attorneys' file issued after an *in camera* review, and we remand this matter to the trial court for further proceedings consistent with our opinion relating to those documents.

{¶4} A third order compelling further deposition of Dr. Shipman and her attorneys, and ordering the production of her file for *in camera* review, is not ripe for review.

Substantive Facts and Procedural History

{¶5} This appeal involves three discovery orders issued in a post-verdict prejudgment interest proceeding arising from a multi-million dollar jury verdict against Dr. Shipman and her employer, Associates in Female Health, Inc., in favor of H.N.C. and her parents. The Cobbs submitted discovery requests seeking materials from both Dr. Shipman's insurance company's claim file and that of her defense counsel. The Cobbs also issued a notice of deposition *duces tecum* to Dr. Shipman, requesting correspondence between the doctor and her insurer and legal counsel, as well as any handwritten notes regarding the Cobb case. Dr. Shipman filed a motion for protective order asserting that the Cobbs were obligated to first demonstrate they themselves had acted in good faith before she was required to provide any discovery responses.

{¶6} The trial court denied the motion and ordered the discovery process to go forward, stating that it would review *in camera* any documents Dr. Shipman, in good faith, claimed to be protected from disclosure, pursuant to *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St.3d 638 (1994).

{¶7} As a result of the discovery order, Dr. Shipman submitted 1,972 documents from her insurance carrier's file for *in camera* review, and produced no documents voluntarily to the Cobbs. Following inspection, the trial court ordered Dr. Shipman to produce to the Cobbs all but 15 of the documents. Dr. Shipman also issued a request for production of documents to the Cobbs, seeking much of the contents of the Cobbs' attorneys' file. The Cobbs complied with the request.

{¶8} After reviewing billing notices in the insurance claims file, and failing to find in the documents produced certain retained experts' reports documented in the billing, the Cobbs suspected that Dr. Shipman had not turned over everything

requested. The Cobbs filed a motion to compel production of documents from Dr. Shipman's attorneys' file, but shortly withdrew it, as the parties were attempting to resolve the dispute.

{¶9} The Cobbs did attempt to depose Dr. Shipman. Following her counsel's direction to assert her attorney-client privilege, however, she refused to answer most of the questions posed regarding pre-trial settlement negotiations, and she failed to bring with her the requested documents.

{¶10} A second motion to compel discovery was filed requesting that the trial court order Dr. Shipman to produce her attorneys' entire file for an *in camera* review. The Cobbs alleged that Dr. Shipman was withholding documents from her attorneys' file that should have been produced for the initial *in camera* review. The trial court held a hearing on the Cobbs' motion to compel, during which Dr. Shipman argued that the deposition testimony sought and documents requested were privileged. In an apparent effort to obviate the need for her deposition regarding pre-trial settlement efforts, Dr. Shipman stipulated that she had given her consent to settle to her insurance carrier prior to trial. Her attorney stated that "[s]he did, in fact, consent * * * to there being negotiations to attempt to settle the case and she did not interfere with the negotiations to attempt to settle the case."

{¶11} The trial court ordered Dr. Shipman to produce the entirety of her attorneys' file for an *in camera* inspection, and over 4,000 documents from her attorneys' file were delivered to the trial court under seal. The trial court reviewed the documents, and ordered the production of thousands of additional documents to the

Cobbs.[1] After having reviewed the first attempted deposition, and determining that many of the questions Dr. Shipman had refused to answer were relevant and material to the issue of prejudgment interest, the trial court issued a second order directing Dr. Shipman and three of her defense attorneys to submit to deposition.[2] These new depositions were to be conducted in the presence of the court, in order to allow for immediate rulings should any claim of privilege arise. In the same order, the trial court ordered Dr. Shipman to produce the documents requested in the notice of deposition *duces tecum* for an *in camera* inspection by the court.

{¶12} The court also issued an order correcting an earlier order compelling production of certain documents.

{¶13} It is from these three orders that Dr. Shipman has taken her appeal, raising the following assignments of error:

{¶14} "[1.] The trial court erred in ordering the production of Defendants-Appellants' attorney's privileged file during the course of discovery in pre-judgment proceedings."

{¶15} "[2.] The trial court erred in ordering the depositions of defendant-appellant Tara Shipman, M.D. and her attorneys during the course of discovery in prejudgment interest proceedings."

{¶16} We will review assignment of error two first.

Standard of Review

{¶17} Generally, "[a] trial court's decision in a discovery matter is reviewed under an abuse of discretion standard." *Simeone v. Girard City Bd. of Edn*., 171 Ohio App.3d

1. This order was signed May 11, 2011 and journalized May 17, 2011.
2. This order was signed and journalized on May 17, 2011.

633, 2007-Ohio-1775, ¶21 (11th Dist.), citing *Masek v. Jean Gehring,* 11th Dist. No. 2001-G-2373, 2002-Ohio-5151, ¶8. As this court has stated, the term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id*. at ¶67.

{¶18} "However, if the discovery issue involves an alleged privilege, as in this case, it is a question of law that must be reviewed de novo." *Ward v. Summa Health Sys.,* 128 Ohio St.3d 212, 2010-Ohio-6275, ¶13, citing *Med. Mut. of Ohio v. Schlotterer,* 122 Ohio St.3d 181, 2009-Ohio-2496.

Preliminary Issue

{¶19} In reviewing the law that has developed regarding discovery disputes in prejudgment interest proceedings, it is clear that the order relative to the depositions of Dr. Shipman and her defense counsel and the submission of documents by Dr.

Shipman for *in camera* review presented to this court on appeal is not a final, appealable order. Thus we have no jurisdiction to consider the merits of Dr. Shipman's second assignment of error at this juncture. The order compelling the production of certain documents from the attorney file to the Cobbs, issued *after* an in camera review, however, is final and appealable.

{¶20} The Supreme Court of Ohio has considered discovery disputes related to prejudgment interest proceedings a number of times, and the issue of final, appealable orders as they relate to prejudgment interest proceedings twice.

{¶21} In *Peyko v. Frederick*, 25 Ohio St.3d 164 (1986), the Supreme Court of Ohio recognized the role of discovery in prejudgment interest proceedings. The sole issue before the court was whether a plaintiff was permitted access to an insurance carrier's claims file through discovery during prejudgment interest proceedings. The appeal was made at the completion of prejudgment interest proceedings, upon denial of the plaintiff's motion for prejudgment interest.

{¶22} The Supreme Court of Ohio affirmed the appellate court's determination that the plaintiff was entitled to discovery of otherwise privileged materials, and that the party claiming privilege was obligated during an *in camera* inspection to demonstrate the privileged nature of the materials.

{¶23} "[W]hen a plaintiff, having obtained a judgment against a defendant, files a motion for prejudgment interest on the amount of that judgment pursuant to R.C. 1343.04(C), the plaintiff, upon showing of 'good cause' pursuant to Civ.R. 26(B)(3), may have access through discovery to those portions of the defendant's insurer's 'claims file' that are not shown by the defense to be privileged attorney-client communications. If

the defense asserts the attorney-client privilege with regard to the contents of the 'claims file,' the trial court shall determine by *in camera* inspection which portions of the file, if any, are so privileged. The plaintiff shall then be granted access to the non-privileged portions of the file." *Peyko* at 167.

{¶24} In *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60 (1993), the appellate court considered an appeal from an order of the trial court directing the appellant to produce presumptively privileged documents to the trial court for an *in camera* review. The trial court then intended to determine through this review which documents were protected from discovery and which were discoverable. The Supreme Court of Ohio determined the order was not final, stating that "[i]n the present case, it would only be after this *in camera* review and a trial court order compelling disclosure that the substantial rights of appellants would be implicated. If the trial court 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 pursuant to *Humphry* [*Riverside Methodist Hosp*., 22 Ohio St.3d 94 (1986)] and [*State v.] Port Clinton Fisheries* [12 Ohio St.3d 114 (1984)]. Such an appeal need not await 'final judgment' in the prejudgment interest proceeding but merely the final determination of the rights of appellants with respect to the allegedly privileged materials. * * * We therefore conclude that the action of a trial court directing a witness opposing a discovery request to submit the requested materials to an *in camera* review so that the court may determine their discoverable nature is not a final appealable order pursuant to R.C. 2505.02." *Id.* at 64-65.

{¶25} However, a year later in *Moskovitz, supra*, the supreme court modified its holding in *Bell,* when it determined that prejudgment interest discovery issues were not appealable until the trial court had rendered a final prejudgment interest determination. "In *Bell*, we held that the order of a trial court directing a witness opposing a request for discovery in an R.C. 1343.03(C) prejudgment interest hearing *to submit* materials to an *in camera* inspection is not a final appealable order. This court in *Bell* also, however, indicated that an order in an R.C. 1343.03(C) proceeding permitting discovery *after submission* of alleged privileged materials for an *in camera* inspection is an order affecting a substantial right made in a special proceeding. *Id.* at 64, 616 N.E.2d at 184-185. Thus, according to *Bell*, such an order is a final order subject to immediate appeal. We now find this statement in *Bell* to be incorrect. The statement was based upon the assumption that prejudgment interest was not known at common law and thus a prejudgment interest proceeding was a special proceeding. As pointed out above, prejudgment interest *was* known at common law and, thus, any order made in a prejudgment interest proceeding is not one made in a special proceeding. * * * Accordingly, we further modify *Bell* to correct our error. In doing so, we hold that an order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of 'final order' set forth in R.C. 2505.02. Such an order does not determine the action or prevent a judgment, nor is it rendered in a special proceeding. Thus, an appeal from such an order must await final judgment in the prejudgment interest proceeding." *Moskovitz* at 663.

{¶26} According to Section 3(B)(2), Article IV of the Ohio Constitution, an appellate court can immediately review a judgment of a trial court only if it constitutes a

"final order" in the action. *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter and the matter must be dismissed. *Gen. Accident Ins. Co. v. Ins. of N. Am.*, 44 Ohio St.3d 17, 20 (1989). R.C. 2505.02(B) states that: "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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

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

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

{¶30} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶31} "(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.

{¶32} "(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."

{¶33} This observation was clarified in the court's decision in *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420 (1994), as it found that discovery orders are "interlocutory and, as such, are neither final nor appealable." *Id*. at paragraph seven of the syllabus.

{¶34} The discovery of privileged documents, however, is a different matter, and an order compelling the production of privileged documents to an opposing party does constitute a final appealable order. Despite *Moskovitz's* proclamation in 1994 that no discovery orders within prejudgment interest proceedings constitute final appealable orders, R.C. 2505.02 specifically states otherwise. R.C. 2505.02 was amended in 1998, subsequent to the *Moskovitz* decision, and, as result, narrowly modified the *Moskovitz* holding. Now included in R.C. 2505.02's definition of "provisional remedy" is the "discovery of privileged matter." R.C. 2505.02(A)(3).

{¶35} Thus, an order compelling the production of presumptively privileged material to an opposing party now constitutes a final appealable order and will be reviewable by an appellate court. R.C. 2505.02(B)(4).

Depositions of Dr. Shipman and Her Attorneys

{¶36} In her second assignment of error, Dr. Shipman argues that the trial court erred when it ordered the deposition of Dr. Shipman and her defense attorneys, as well as the production for *in camera* review of specific documents described in the notice of deposition *duces tecum*.

{¶37} The trial court has only ordered Dr. Shipman to present herself and her attorneys for deposition and to produce certain documents for *in camera* review. At this juncture, no production of privileged materials to the opposing party has been compelled; therefore, pursuant to *Bell,* no final appealable order exists. Dr. Shipman and her attorneys must wait until the trial court has ordered them to reveal confidences and to produce presumptively privileged material to the opposing party before she may appeal.

{¶38} Thus, the error claimed in assignment of error two is not ripe for review.

Order Compelling Production of Documents to the Cobbs

{¶39} In her first assignment of error, Dr. Shipman argues that the trial court erred as a matter of law when it compelled the production of thousands of documents from her attorneys' file. She raises six issues under this assignment of error.

Issue One: Whether the Cobbs Are Entitled to Discovery Without Having First Demonstrated Their Own Good Faith Effort to Settle

{¶40} Dr. Shipman suggests that the party seeking prejudgment interest is not entitled to discovery in a prejudgment interest proceeding until that party has first demonstrated a good faith effort to settle the case. This assertion is mistaken.

{¶41} R.C. 1343.03(C)(1) states that "[i]f, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows * * *."

{¶42} The Supreme Court of Ohio has clearly articulated the standard to be applied in awarding prejudgment interest under R.C. 1343.03(C). "First, a party seeking interest must petition the court. * * * [A]nd in no event later than fourteen days after entry of judgment. * * * Second, the trial court must hold a hearing on the motion. Third, to award prejudgment interest, the court must find that the party required to pay the judgment failed to make a good faith effort to settle and, fourth, the court must find

that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case." *Moskovitz* at 658. This court has repeatedly been guided by *Moskovitz's* four-prong standard. *See, e.g.*, *Myres v. Stucke*, 11th Dist. No. 98-T-0132, 1999 Ohio App.LEXIS 5100, *5 (Oct. 29, 1999); *Loder v. Burger*, 113 Ohio App.3d 669 (11th Dist.1996).

{¶43} *Moskovitz* reiterates the clear and unambiguous statutory language creating a binary test that must be passed for an *award* of prejudgment interest – the losing party failed to make a good faith effort to settle and the prevailing party did not fail to make a good faith effort to settle.

{¶44} It is equally clear that neither the statute, nor *Moskovitz,* require the prevailing party to first demonstrate their good faith effort to settle as a prerequisite to discovery, and Dr. Shipman is unable to bring to this court's attention any case law to support this proposition. The supreme court has unwaveringly recognized that "a post-trial proceeding for prejudgment interest is amenable to the general discovery process established by the Civil Rules. Indeed, in *Cotterman* [*v. Cleveland Elec. Illum. Co.,* 34 Ohio St.3d 48 (1987)], paragraphs two and three of the syllabus, this court held that:

{¶45} '2. The R.C. 1343.03(C) proceeding is amenable to the discovery process. The trial court should exercise such governance so as to speedily resolve the post-trial discovery.

{¶46} '3. The Rules of Civil Procedure, as utilized in the general discovery process, are applicable to R.C. 1343.03(C) proceedings.'" *Moskovitz* at 660. *See also Peyko*, *supra*.

{¶47} Pursuant to the Ohio Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Civ.R. 26(B)(1).

{¶48} Furthermore, "a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor." Civ.R. 26(B)(3).

{¶49} *Moskovitz* and *Cotterman* instruct us that the general rules of discovery utilized in pretrial proceedings are equally applicable to discovery in R.C. 1343.03(C) proceedings, and, while those rules may require a good cause showing for the production of certain documents, they do not require a showing that a good faith effort to settle was made by the party seeking the discovery post-trial. We can find no authority to support the proposition put forth by Dr. Shipman, therefore, the Cobbs were not required to demonstrate such good faith before conducting discovery, and we find the discovery process proceeded appropriately.

Issues Two and Three: Whether the Holding in *Moskovitz* Factually and Legally Applies to Both an Insurer's Claims File and a Defense Attorney's File

{¶50} Dr. Shipman further argues that while *Moskovitz* established the discoverability of an insurance carrier's claims file during prejudgment interest proceedings, its holding does not extend to a defense attorney's file. The Cobbs, on the other hand, argue that "the scope of discovery in prejudgment interest proceedings extends to any documents or records or materials, no matter where they happen to be stored, in possession of the adverse party or her representatives, including her attorney, consultant, surety, indemnitor, insurer, or agent, that do not go directly to the theory of the defense * * *."

{¶51} After carefully reviewing *Moskovitz*, we hold that, under certain circumstances, a defense attorney's file may be equally discoverable as an insurer's, and the trial court did not err in finding this case to be one of those instances.

{¶52} While Dr. Shipman is correct that *Moskovitz* "never involved the discovery of the attorneys' file," she is mistaken that "the Ohio Supreme Court never intended to extend prejudgment interest discovery to attorneys' files." Dr. Shipman suggests, in fact, that any discussion in *Moskovitz* of discovery in prejudgment proceedings is mere dicta, because the "only appellate issue concerning prejudgment interest in *Moskovitz* was: 'Should prejudgment interest have been allowed?'" The court's syllabus, however, touches on issues related to discovery, indicating that the discussion of discovery is more than mere dicta, and, in fact, constitutes a holding of the court.

{¶53} "[S]tatements, memoranda, documents, etc. generated in an attorney-client relationship tending to establish the failure of a party or an insurer to make a good faith effort to settle a case contrary to the purposes of R.C. 1343.03(C) are not protected from discovery in an R.C. 1343.03(C) proceeding for prejudgment interest.

Stated otherwise, if, through the lack of a good faith effort to settle, the purposes of R.C. 1343.03(C) have been thwarted by a party and/or the attorneys involved in the case, a search for the truth of that fact cannot be hindered by claims of attorney-client privilege. Documents and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege." *Moskovitz* at 661. Thus, documents and materials, regardless of their location, will be discoverable if they tend to show a lack of good faith, despite any claims of attorney-client privilege.

{¶54} Such an expansive interpretation of R.C. 1343.03(C) discovery is further supported when the *Moskovitz* court clarified its holding, stating that in "an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered. Additionally, on occasion, this rule might also apply to the file of a party's attorney." *Id*. at 662-663.

{¶55} Although *Moskovitz* dealt specifically with the discoverability of an insurance carrier's claims file (because that file was the only target of discovery), it specifically contemplated that other cases may present scenarios in which the production of documents from an attorney's file can and will be deemed appropriate.

{¶56} The parties failed to present, and this court was unable to find in the *Moskovitz* progeny, any definitive precedent addressing the discoverability of the attorney file. Because *Moskovitz* specifically noted the potential for discovery from the

attorney file, we cannot hold here today that such discovery is completely precluded, as argued by Dr. Shipman. In certain cases, access to an attorney's file may be the only way a prevailing plaintiff can demonstrate a lack of a good faith effort to settle by the defense.

{¶57} Necessarily, the decision to permit discovery from an otherwise protected source will be factually driven. Should a party demonstrate good cause pursuant to Civ.R. 26(B) for the need to review opposing counsel's file at the prejudgment interest proceeding stage, *and* the documents sought cannot be obtained from any other source, we hold that a trial court does not err in ordering discovery of those documents, so long as they do not go to the theory of the defense of the case.

{¶58} In this case, a review of the record demonstrates that the trial court did not err in compelling the production of documents from Dr. Shipman's attorneys' file. The Cobbs point out that "Defendants were ordered by the court to produce any documents that they claimed to be privileged for an *in camera* inspection * * * in response to discovery requested of both the insurer's file and the attorneys' file. It is now evident that Defendants deliberately withheld documents from even the trial court's review. These are documents that would have been expected to be kept in the insurer's file and are known to exist because of itemized billing statements demonstrating their creation. The absence of these documents from the materials produced to the trial court for the initial *in camera* inspection leads to an inescapable conclusion: either ProAssurance has sanitized its file on the Cobb case, or it has been using the attorneys' file as a hiding place in an effort to thwart legitimate discovery."

{¶59} Because the documents sought do not appear to have been obtainable from another source (the Cobbs had already failed to find them in the insurance carrier's claim file) and the trial court, in response to the Cobbs' requested discovery of the defense attorneys' files, found good cause, reviewed the file *in camera*, and excluded from production those documents going to the theory of defense, we find it did not err in determining that certain portions of the attorney file were discoverable at the prejudgment interest proceedings stage of litigation.

Issue Four: Whether the 2007 Amendment to R.C. 2317.02 Eliminated a Plaintiff's Right to Discover Documents in Prejudgment Interest Proceedings

{¶60} Dr. Shipman argues that the 2007 amendment of R.C. 2317.02 and accompanying section note specifically address this issue of attorney file discoverability, and modify *Moskovitz'* applicability only to cases in which bad faith (not merely a lack of good faith) has been alleged. A review of the amendment and section note do not support such a contention.

{¶61} "The following persons shall not testify in certain respects: (A) (1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject." R.C. 2317.02. Further on, R.C. 2317.02(A)(2) states that "[a]n attorney, concerning a communication made to the

attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client."

{¶62} In section note 6, the legislature stated that "[t]he General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The common law established in *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, and *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, is modified accordingly to provide for judicial review regarding the privilege."

{¶63} A careful reading of the statute and section note reveal that they apply only in cases of alleged bad faith in insurance coverage cases, where the client is an insurance company. Dr. Shipman has provided no authority to support her contention, but the Cobbs have called our attention to *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.,* 127 Ohio St.3d 161, 2010-Ohio-4469.

{¶64} In *Squire*, the supreme court reaffirmed *Moskovitz,* and held that the lack of good faith exception to attorney client privilege was still alive and well. "Because the attorney-client privilege does not apply when the client seeks to abuse the attorney-client relationship, the court in *Moskovitz* held that '[d]ocuments and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege' * * *." *Squire* at ¶30.

{¶65} The *Squire* court reaffirmed the *Moskovitz* exception. In fact, *Squire* supports this court's reading of *Moskovitz,* and suggests the *Moskovitz* holding can and will extend beyond insurance carrier claims files under certain circumstances in the prejudgment interest setting. *Squire* presents the holding in *Moskovitz* as focused, not on the location of documents, but, on the nature of documents for the purposes of determining privilege and discoverability. We agree.

{¶66} The 2007 amendment does not apply in cases related to prejudgment interest proceedings and the determination of a lack of a good faith effort to settle, and the trial court correctly followed *Moskovitz* as it determined the discoverability of otherwise privileged documents at this stage of the case.

Issue Five: Whether *Moskovitz* Removed the Good Cause Requirement of Civ.R. 26(B)(3)

{¶67} Dr. Shipman argues that *Moskovitz* "in no way nullifies Civ.R. 26 which sets forth the general provisions of discovery, including proof of 'good cause' for the discovery of privileged matters." We agree, but find that the Cobbs have demonstrated good cause for the discovery of Dr. Shipman's attorneys' file.

{¶68} *Moskovitz*, in acknowledging the continued application of Civ.R. 26 to prejudgment interest discovery matters, states that "Civ.R. 26(B)(3) provides, in part, that 'a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor.' In a prejudgment interest proceeding, the good-cause requirement of Civ.R. 26(B)(3) is that which is appropriate to effectuate the General Assembly's purposes of enacting R.C. 1343.03(C) – to encourage and bring about settlements." *Moskovitz* at 662. Thus, the application of Civ.R. 26 was clearly contemplated and embraced by the *Moskovitz* court and the good cause requirement remains as Dr. Shipman suggests.

{¶69} The trial court, in its judgment entry ordering the production of documents from Dr. Shipman's attorneys' file, made a specific finding of good cause. "The Court once again finds that the Plaintiffs have good cause to review the documents provided to this Court that are part of the attorney file in this case. Good cause was established upon the Affidavit of Attorney White, whereupon he stated that the highest pre-trial offer from the remaining Defendants herein was $20,000.00." Although a large disparity between the last offer made and the ultimate verdict is not necessarily dispositive, it can weigh heavily on a determination of good cause. *See Peyko*, *supra*, at 167, fn. 3 ("In light of the disparity between the defendant's highest settlement offer and the jury's verdict, and because the plaintiff has clearly demonstrated that without access to the insurer's claims file he is unable to effectively show that the defendant * * * failed to

make a good faith effort to settle the instant case, the plaintiff has shown good cause, pursuant to Civ. R. 26(B)(3) * * *.").

{¶70} Not only did Attorney White aver to the large difference between ProAssurance's final offer of $20,000 and the substantial verdict of $13,900,000 in the affidavit in support of the Cobbs' motion for prejudgment interest, the Cobbs also demonstrated that documents referred to in itemized billing statements were not found in the insurance carrier's claims file. This discrepancy further supports the trial court's finding of good cause for production of the attorneys' file. Therefore, we find that the Cobbs have met the good cause requirements of Civ.R. 26(B), and that discovery of otherwise privileged materials was appropriately granted.

Issue Six: Whether the Trial Court Erred in Interpreting Theory of the Defense in Ordering Certain Documents to be Produced

{¶71} Finally, Dr. Shipman argues that even if the trial court was correct to apply the *Moskovitz* holding to discovery of attorney files, the trial court erred in its application. She contends that the trial court incorrectly deemed certain documents discoverable from the attorney file and the identical document privileged from the insurer file, and vice versa. To the extent inconsistencies exist in the trial court's order of production, we find this assignment of error meritorious.

{¶72} A review of the trial court's orders of production and the documents submitted by Dr. Shipman from both her insurance carrier file and attorney file, while not exhaustive, reveal a number of inconsistencies. In her brief, Dr. Shipman alleged that a number of identical documents ordered to be produced from her insurance carrier were ordered protected from her attorney file, and vice versa. This court reviewed only those specific allegations and found the following:

Atty. File Doc. No.	Identical?	Ins. File No.	Parties	Date	Pages	Previously Ordered to be Disclosed from Ins. File?	Ordered Disclosed from Atty. File?
DOCUMENTS ALLEGED TO BE IDENTICAL, BUT ORDERED PRODUCED FROM ATTORNEY FILE AND NOT INSURANCE FILE							
SOF 00055	yes	S 00636	Atty. to Ins. Carrier	10/11/2010	1	No	yes
SOF 00125	no	S 00636	Atty. to Ins. Carrier	9/10/2010	2	Not sure b/c not identical	no
SOF 00130	no	S 00636	Atty. to Ins. Carrier	9/9/2010	3	Not sure b/c not identical	yes
SOF 00085	yes	S 01737	Atty. to Ins. Carrier	9/20/2010	1	No	yes
SOF 00110	In content but not in form	S 01737	Atty. to atty.	9/14/2010	1	no	yes
DOCUMENTS ALLEGED TO BE IDENTICAL, BUT ORDERED PROTECTED FROM ATTORNEY FILE AND PRODUCED FROM INSURANCE FILE							
SOF 00081	In content but not in form	S 00733	Atty. to Ins. Carrier	9/24/2010	1	yes	no
SOF 00081	In content but not in form	S 01729	Atty. to Ins. Carrier	9/24/2010	1	no	no
SOF 00089	yes	S 00734	Atty. to Ins Carrier	9/17/2010	2	yes	no
SOF 00089	yes	S 01753	Atty. to Ins Carrier	9/17/2010	2	no	no
SOF 00125	yes	S 00736	Atty. to Ins. Carrier	9/9/2010	2	no	no
SOF 00125	yes	S 01768	Atty. to Ins. Carrier	9/9/2000	2	no	no

SOF 00147	yes	S 00738	Atty. to Ins. Carrier	8/27/2010	2	yes	no
SOF 00147	yes	S 01780	Atty. to Ins. Carrier	8/27/2010	2	yes	no
SOF 00149	yes	S 01784	Atty. to Ins. Carrier	8/19/2010	1	yes	no
SOF 00150	yes	S 01783	Atty. to Ins. Carrier	8/19/2010	1	yes	no
SOF 00239	In content, but not in form	S 01149	Atty. to Ins. Carrier and back	8/29/2010	1	no	no
SOF 00239	In content, but not in form	S 01853	Atty. to Ins. Carrier and back	8/29/2010	1	yes	no
SOF 00239	yes	S 01855	Atty. to Ins. Carrier and back	8/29/2010	1	yes	no
SOF 00242	yes	S 01151	Atty. to Ins. Carrier	8/26/2010	2	no	no
SOF 00242	yes	S 01857	Atty. to Ins. Carrier	8/26/2010	2	no	no
SOF 01455-01457	n/a	S 02778-S 02780 (don't exist as, only 1972 docs submitted from insurer)	Atty. to atty.	10/6/2010	2	n/a	yes

Conclusion

{¶73} This court was presented with three orders, two of which are final and appealable, and a third which is not yet ripe for review. Inasmuch as there are more depositions to be taken, more documents to be reviewed *in camera* by the trial court, and inconsistencies in the trial court's order compelling production of certain documents already reviewed *in camera* that must be resolved, we find justice will be best served by avoiding a piecemeal review by this court.

{¶74} With the affirmation of the appropriate parameters for discovery in a prejudgment interest proceeding, the additional depositions may be conducted and the documents produced as ordered by the trial court.

{¶75} Regarding the defense attorney file already submitted to the trial court and Dr. Shipman's file that has been ordered produced at deposition, counsel for Dr. Shipman shall submit to the trial court an index for each file identifying each document that Dr. Shipman claims is protected from discovery on the sole basis that the document reveals the theory of defense, by date and document number.

{¶76} Thus, we affirm in part and reverse in part the trial court's orders granting the Cobbs' motion to compel the production of the defense attorney file, and we remand this matter to the trial court for further proceedings relating to the production of documents from the defense attorney file consistent with our opinion. The appeal of the order compelling further deposition of Dr. Shipman, the production of her file, and compelling the deposition of her defense attorneys is hereby dismissed.

SEAN C. GALLAHER, J., Eighth Appellate District, sitting by assignment, concurs,

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

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DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

{¶77} I agree with the majority's decision to affirm in part and reverse in part the trial court's order compelling production of certain records. I write separately to expand upon and clarify the law as to two issues.

{¶78} First, I agree that the order compelling the deposition of Dr. Shipman and ordering the production of certain documents for *in camera* review is not a final appealable order. It is necessary to further discuss this issue to clarify why such an order is not final, while the court's order compelling production of documents it had already reviewed *in camera* is a final order.

{¶79} An order determining the discovery of a privileged matter is construed as a final order since "appealing subsequent to [such a judgment] would not be meaningful because the * * * privilege would have already been compromised." *Grove v. Northeast Ohio Nephrology Assoc., Inc.,* 164 Ohio App.3d 829, 2005-Ohio-6914, 844 N.E.2d 400, ¶ 9 (9th Dist.). Once privileged material is ordered to be revealed, "the bell will have rung, and, if in fact the file contains sensitive material, [the appellant] would have no adequate remedy on appeal." *Schottenstein, Zox & Dunn v. McKibben*, 10th Dist. No. 01AP-1384, 2002-Ohio-5075, ¶ 19. Such a concern is raised in cases where the court compels production of privileged information to the opposing party. These concerns are not raised, however, when the trial court requires that documents be produced for *in camera* review or when a party is directed to submit to deposition, since no privileged material has been revealed. At that point in the process, it is unknown what, if any,

privileged material may ultimately be ordered to be provided to the opposing party and a meaningful review of such matters is not yet required.

{¶80} Under R.C. 2505.02(B)(4), in order to find an order granting a provisional remedy to be final, the appellate court must determine that "[t]he 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." In the present matter, the trial court's order to submit to deposition and to provide documents for *in camera* review cannot be final, since it does not require disclosure of the materials to the opposing party or settle the discovery dispute. *See Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, ¶ 36 (10th Dist.) (an order that requires dissemination of privileged material determines that action because it settles the discovery dispute and prevents a judgment in favor of the appellant by requiring the dissemination of matter that the appellant seeks to keep confidential).

{¶81} The view that a final order must actually require that privileged information be disclosed, not just submitted for *in camera* review, has been supported by many courts reviewing this issue. *See Guider v. Am. Heritage Homes Corp.*, 3rd Dist. No. 8-07-16, 2008-Ohio-2402, ¶ 6 (a final order existed where the trial court required production of certain documents to the opposing party *after* conducting an *in camera* review); *Radovanic v. Cossler*, 140 Ohio App.3d 208, 212, 746 N.E.2d 1184 (8th Dist.2000) (the trial court's order compelling discovery of documents after *in camera* review was final); *Grove* at ¶ 4.

{¶82} Second, it is necessary to expand upon this court's holding regarding the inconsistencies in the trial court's order to produce certain privileged materials.

{¶83} The case law supports an appellate court's reversal of a trial court's order to produce documents if the order contains an inconsistent review of the documents. In *Jerome v. A-Best Prods. Co.*, 8th Dist. Nos. 79139, et al., 2002-Ohio-1824, the court found that the trial court's admission of certain documents was inconsistent, since some documents were excluded as protected but similar documents were required to be disclosed. In that case, the court remanded for a full *in camera* review of the inconsistent documents. *Id.* at ¶ 32-33. *See also Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 214, 744 N.E.2d 154 (2001) (the court's ruling was inconsistent with regard to the production of documents when identical information was ordered to be redacted from some documents but not from other documents).

{¶84} Upon remand, the trial court must review the documents to resolve the inconsistencies outlined in the majority opinion. Since additional documents will be reviewed by the trial court, including the missing documents not already provided, it is best to consider all of these documents together in order to ensure consistency.

{¶85} For the reasons stated herein, I concur with the decision to affirm in part and reverse in part the trial court's order compelling production of certain records.