

No. 13-2008

---

**IN THE SUPREME COURT OF OHIO**

---

**APPEAL FROM THE COURT OF APPEALS  
TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY, OHIO  
CASE NO. 12AP-001027**

---

**HENRY SMITH**

Plaintiff-Appellee

v.

**YING H. CHEN, D.O.**

Defendants-Appellants

---

**DEFENDANTS-APPELLANTS YING H. CHEN, D.O. AND ORTHONEURO'S  
MOTION FOR RECONSIDERATION**

---

David I. Shroyer (0024099)  
Colley Shroyer & Abraham, LPA  
536 S. High Street  
Columbus, OH 43215  
Ofc: 614-228-6453/Fax: 614-228-7122

Attorney for Plaintiff-Appellee Henry Smith

Douglas G. Leak (0045554)(Counsel of Record)  
Hanna, Campbell & Powell, LLP  
3737 Embassy Parkway, Suite 100  
Akron, OH 44333  
Ofc: 330-670-7307/Fax: 330-670-2387  
dleak@hcplaw.net

AND

Frederick A. Sowards (0046647)  
Hammond Sowards & Williams  
556 E. Town Street  
Columbus, OH 43215  
Ofc: 614-228-6061/Fax: 614-228-5883

Attorneys for Defendants-Appellants  
Ying H. Chen, D.O., and OrthoNeuro

## MOTION FOR RECONSIDERATION

Pursuant to S. Ct. Prac. R. 18.02, Defendants-Appellants Ying H. Chen, D.O. and OrthoNeuro hereby move this Court to reconsider its four-to-three Decision of April 21, 2015 holding that the Trial Court Order compelling discovery of a privileged video surveillance protected by the work-product doctrine was not a final appealable order. Mindful that a motion for reconsideration shall not constitute a reargument of the issues, Defendants reemphasize the significant legal implications and collateral consequences for litigants throughout all of Ohio that will arise if this Court's Decision is not reconsidered.

More specifically, Defendants request that this Court reconsider its determination that:

[t]his ruling does not adopt a new rule, nor does it make an appeal from an order compelling disclosure of privileged material more difficult to maintain. An order compelling disclosure of privileged material that would *truly* render a post judgment appeal meaningless or ineffective may still be considered on an immediate appeal.

*Smith v. Chen*, Slip Opinion No. 2015-Ohio-1480 at ¶9.

First, as the three dissenting justices of this Court aptly noted, this Court's Decision does indeed change Ohio's longstanding and well-established law in all appellate districts in Ohio. *Id.* at ¶14. Since as long ago as 1988, courts in Ohio have consistently held that orders compelling disclosing of privileged information/documents are final and appealable in light of the sanctity and importance of privileged matters. *Id.* at ¶¶13-16. This Court's Decision completely changes this law.

Not only does this Court's Decision change the law in all Appellate Districts, it is also inconsistent with previous decisions from this Court and, therefore, changes this Court's own precedents. For example, this Court in *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514 accepted jurisdiction and decided a case that involved an order compelling a non-party to disclose privileged and protected physician-patient information. In

deciding the *Ward* case on the merits, this Court did not address any final appealable order issue because none of the parties challenged the Ninth District Court of Appeals' Decision that there was a final appealable order. *Id.* at fn. 2.

This Court's Decision is inconsistent with the *Ward* case for two reasons. First, this Court accepted jurisdiction and decided an interlocutory discovery order pertaining to a claimed privilege just like this case. There is no difference between the discovery orders in the *Ward* and this case yet, in this case, this Court determined that there exists no final appealable order. Second, while this Court in *Ward* did not address the final appealable issue because it was not challenged by the parties, this Court herein *sua sponte* and summarily addressed the issue of whether there exists a final appealable order. This Court's Decision clearly is a change of law as set forth in the *Ward* Decision.

Similarly, this Court in *Roe v. Planned Parenthood*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61 accepted and decided a privilege case in which the Trial Court initially compelled the production of confidential abuse reports and medical records of non-parties in a private action for damages. The Trial Court's Order was reversed by the First District Court of Appeals and then this Court accepted jurisdiction. Pursuant to this Court's Decision herein, this Court should have summarily vacated the First District's Decision on the basis that the Trial Court's Order appealed from was not a final appealable order. However, this Court in *Roe* did not do so – it decided the *Roe* case on the merits. Likewise, this Court should hear and decide the merits of Appellants' appeal that also involves an order compelling the production of privileged matters.

In *Cepeda v. Lutheran Hospital*, 123 Ohio St.3d 161, 2009-Ohio-4901, 914 N.E.2d 1051, this Court accepted jurisdiction over a case in which a defendant-physician was compelled to produce the billing statements of non-party patients. The *Cepeda* case was an interlocutory

appeal from a discovery order compelling the production of privileged physician-patient materials. This Court reversed the Eight District Court of Appeals' Decision on the authority of *Roe, supra*. Once again, it was determined that a final appealable order existed simply because a party was compelled to produce privileged materials. *See, Medical Mutual v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237 (This Court accepted jurisdiction and decided a privilege case where the Trial Court ordered the production of medical records claimed to be protected by physician-patient privilege).

As is evident in the *Ward, Roe, Cepeda* and *Medical Mutual* cases, among others, this Court has consistently accepted jurisdiction over interlocutory appeals involving the disclosure of privileged information. Not one of these decisions from this Court held that a final appealable order did not exist, contrary to this Court's Decision in this case. As such, this Court's Decision has adopted a new rule of law with respect to final appealable orders on privileged matters.

If this Court's Decision is not reconsidered, it will effectively "change the law" as set forth by this Court's precedents and all appellate districts in Ohio. Moving forward, it will practicably be impossible for litigants to appeal from an interlocutory discovery order compelling the production of privileged information/documents.

Additionally, it is Defendants' intention to seek reconsideration of this Court's Decision in order to bring to the attention of all Justices of this Court, as three Justices have already acknowledged, the grave ramifications this Decision will have on all Ohio cases involving all discovery orders pertaining to privileged matters, *i.e.*, physician-patient (R.C. 2317.02); attorney-client (R.C. 2317.02); work-product (Civ. R. 26(B)(3)); peer review (R.C. 2305.251); quality assurance (R.C. 5120.21); and incident reports (R.C. 2305.253). Reconsideration should be granted in order to allow interlocutory discovery orders involving privileged matters to be immediately reviewed upon appeal.

In Ohio, privileges are paramount but this Court's Decision has created a judicial elimination of a litigant's right to challenge an unwarranted invasion of privilege and confidential matters during the course of litigation. This Court's Decision now requires litigants to disclose or produce privileged information/documents immediately and then "wait" and subsequently challenge that disclosure. If this Court's Decision is allowed to stand, the well-known colloquialism of "letting the cat out of the bag" is now applicable in Ohio with respect to the disclosure of privileged matters, *i.e.*, divulging privileged and confidential information without any appellate recourse.

It is unfair and unreasonable to deny a litigant the opportunity to pursue an interlocutory appeal from an order compelling the production or disclosure of privileged matters. Under this scenario, privileged matters can be immediately required to be disclosed only to learn later in a subsequent appeal that the materials/information should have been protected in the first place. Once again, "the cat is out of the bag" situation inevitably applies to all discovery orders involving privileged matters.

Permitting this Court's Decision to stand will inevitably perpetuate the contradictory and inconsistent application of R.C. 2505.02 to interlocutory appeals involving privileged matters. Ohio courts and litigants alike deserve fair, consistent and predictable application of this statute and, more importantly, litigants should not be denied the right to appeal discovery orders compelling the production or disclosure of privileged and protected matters, information and/or documents.

### **CONCLUSION**

Left undisturbed, this Court's Decision effectively changes Ohio law with respect to final appealable orders involving the discovery of privileged and confidential matters. This Court has consistently reviewed cases involving interlocutory appeals pertaining to the discovery of

privileged matters, *i.e.*, *Ward, Roe, Cepeda, Medical Mutual*, etc. All of these prior Decisions are no different than this. Yet, for the first time, this Court *sua sponte* and summarily changed the law with respect to the appellate review of privileged matters.

This Court's Decision will cause confusion and conflicts among Ohio's trial and appellate courts. The likelihood of continued and unnecessary confusion caused by this Court's Decision is, therefore, highly probable.

Of importance, the effect of this Court's Decision is not limited to the parties of this case. Rather, the Decision of this Court, if left intact, will have a resounding effect on all litigants and courts throughout Ohio. Reconsideration is justified because this case clearly presents a situation where litigants should be reassured that they have the right to challenge upon appeal an order compelling the discovery of privileged and protected material.

Respectfully submitted,

/s/ Douglas G. Leak  
Douglas G. Leak (0045554)  
Hanna, Campbell & Powell, LLP  
3737 Embassy Parkway, Suite 100  
Akron, OH 44333  
Ofc: 330-670-7307  
Fax: 330-670-2387  
dleak@hcplaw.net

AND

Frederick A. Sowards (0046647)  
Hammond Sowards & Williams  
556 E. Town Street  
Columbus, OH 43215  
Ofc: 614-228-6061  
Fax: 614-228-5883

Attorneys for Defendants-Appellants  
Ying H. Chen, D.O., and OrthoNeuro

**CERTIFICATE OF SERVICE**

A copy of this document has been served via by U.S. Mail on April 30, 2015 to:

David I. Shroyer (0024099)  
Colley Shroyer & Abraham, LPA  
536 S. High Street  
Columbus, OH 43215  
Ofc: 614-228-6453  
Fax: 614-228-7122

Attorney for Plaintiff-Appellee

Frederick A. Swards (0046647)  
Hammond Swards & Williams  
556 E. Town Street  
Columbus, OH 43215  
Ofc: 614-228-6061  
Fax: 614-228-5883

Attorney for Defendants-Appellants Ying H.  
Chen, D.O., and OrthoNeuro

*/s/ Douglas G. Leak*

<<HCP #803087-v1>>