

IN THE SUPREME COURT OF OHIO
CASE NO.

ON APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CASE NO. CA 14 102038

DARLENE BURNHAM
Plaintiff-Appellee,
-vs-
CLEVELAND CLINIC, et al.
Defendants-Appellants.

**MEMORANDUM IN SUPPORT OF JURISDICTION ON BEHALF OF DEFENDANTS-
APPELLANTS CLEVELAND CLINIC AND CLEVELAND CLINIC HEALTH SYSTEM**

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I. EXPLANATION OF WHY THIS CASE IS ONE OF GREAT PUBLIC INTEREST

This case is of great public interest because the right to preserve statutory and common law privileges in Ohio will be irreparably damaged if the lower court's decision is permitted to stand. This Court's narrow holding in *Smith v. Chen*, Slip Opinion No. 2013-2008, 2015-Ohio-1480, is being used to justify the dismissal of proper interlocutory appeals of orders requiring the production of privileged materials. Currently, the *Smith* decision is being interpreted by the Eighth District to have held that the compelled production of privileged materials no longer satisfies R.C. 2505.02(B)(4)(b), **despite long-standing Ohio law that such an order deprives the producing party of a meaningful and effective remedy and therefore establishes the need for an interlocutory appeal.** See also *Howell v. Park East Care & Rehabilitation*, 8th Dist. Cuyahoga No. 102111, 2015-Ohio-2403.

The intended effect of *Smith* on lower courts is a matter of first impression and if left untouched will create uncertainty, be jurisdiction dependent and be used to further eradicate useful and well-reasoned precedent on this important issue. The Eighth District Court of Appeals' decisions in this case and *Howell, supra* have completely removed the protection afforded by recognized privileges in the State of Ohio, attorney-client privilege and unauthorized disclosure of non-party medical information, respectively, and have paved the foundation for the destruction of other privileges at the trial court level. Given the lower court's misinterpretation of *Smith, supra*, it is anticipated that other privileges will similarly be rendered meaningless because any review of orders requiring the disclosure of privileged materials would not come until after trial and subsequent to the exchange of the privileged material as foreshadowed by the dissenting Justices in *Smith*. Further, the ambiguity created by the *Smith* decision and the Eight

District's recent holdings will result in this Court being bombarded with jurisdictional briefs on the issue addressed in this case.

If Defendants-Appellants Cleveland Clinic and Cleveland Clinic Health System (hereinafter "Appellants"), or any other similarly situated defendant in the State of Ohio, are ordered to produce privileged documents and are left without recourse until the matter has been adjudicated, the purpose of the asserted privilege will have been obliterated because the proverbial bell will have already rung, thereby establishing the requisite R.C. 2505.02(B)(4)(b) element for a final, appealable order. Simply put, the party compelled to produce attorney-client communications, work-product information and/or statutorily privileged documents cannot return to a point in time prior to the mandated production, thereby precluding a meaningful and effective remedy. The *Smith* decision from this Court, if left undisturbed, will destabilize this area of law and will create a new jurisdictional rule contrary to the expressed intent of this Court.

Accordingly, Appellants request that this Honorable Court accept jurisdiction over the instant matter to reestablish well-settled Ohio precedent and to clarify the *Smith* decision to ensure that this Court's decision is applied as intended.

II. STATEMENT OF THE CASE AND FACTS

On March 20, 2014, Plaintiff-Appellee Darlene Burnham (hereinafter "Appellee") filed a personal injury action against Appellants. (See Trial Docket, "T.d."). Appellee's Complaint asserted that on July 26, 2012, Appellants, by and through their employees, were negligent in permitting or creating a hazardous condition to exist on their premises, to wit: Appellants' employee pouring liquid onto the floor causing Appellee to slip and fall. (T.d.). Appellee also alleged that Appellants created the dangerous condition and failed to warn her about the condition. (T.d.).

Appellee propounded Interrogatories and Requests for Production of Documents which sought, among other information, the incident report pertaining to Appellee's slip and fall as alleged in this case.¹ Appellants objected to Appellee's discovery requests, noting that the requested SERS Report and the information contained therein was subject to the attorney-client privilege, work product privilege and/or the peer review/quality assurance privileges set forth under R.C. 2305.25, 2305.252, 2305.24 and 2305.253.

Appellee alleged in correspondence to Appellants that their discovery responses were deficient and requested that a privilege log be submitted for the trial court's *in-camera* review. Appellants responded to Appellee's concerns, noting that the witness to the event at issue and the care providers attending to Appellee immediately after the fall were identified in their discovery responses. It was Appellants' position that the information sought by Appellee, i.e. the facts and circumstances at or around the time of the accident could be ascertained without trampling Appellants' right to privileged attorney-client communications. Relevant witnesses were identified and information from these individuals as to their knowledge of the accident could be obtained without requiring production of the SERS Report and the ensuing destruction of the attorney-client privilege. The issue was raised with the trial court during the July 16, 2014, hearing and the parties each briefed the issue of discoverability and privilege. (T.d.).

Appellants maintained the attorney-client privilege afforded to the SERS Report by not disseminating information included therein to Appellee or her counsel. In fact, Appellants relied upon a case which specifically held that the SERS Report was subject to the attorney client privilege, *Cleveland Clinic Health System – East Region v. Innovative Placements, Inc.*, 283 F.R.D. 362, (N.D. Ohio 2012), as well as a number of other jurisdictions that concluded that Risk

¹ The incident report in this case is titled "Safety Event Reporting System" and is hereinafter referred to as the "SERS Report".

Management Reports used to communicate with counsel were also precluded from production in accordance with R.C. 2317.02. (T.d.). Additionally, Appellants submitted an unrefuted affidavit establishing that the purpose of the SERS Report is to notify and advise counsel of an incident that may form the basis of litigation has occurred so that appropriate measures and investigation can be undertaken. (T.d.).

Appellants provided a copy of the SERS Report to the trial court, under seal for *in-camera* inspection. The trial court subsequently ordered that the SERS Report be produced to Appellee. (T.d.). Appellants timely filed an appeal, asserting that the SERS Report is subject to the attorney-client privilege and the trial court erred in ordering its production. (T.d.).

During the week that oral argument was to take place before the Eighth District Court of Appeals, this Court issued its decision in *Smith, supra*. At oral argument, the parties were requested to brief the issue as to how, in light of this Court's decision in *Smith*, the appellate court had subject matter jurisdiction over the appeal. (See Appellate Docket, "A.d."). Appellants relied upon the decision in *Smalley v. Friedman, Domiano & Smith Co., L.P.A.*, 8th Dist. Cuyahoga No. 83636, 2004-Ohio-2351 and several other Ohio decisions, **including the litany of authority noted by dissenting Justices Kennedy, O'Donnell and French**, which had previously held that trial court orders to disclose privileged information are final, appealable orders pursuant to R.C. 2505.02(B)(4) because the bell cannot be unring once the privileged documents have been produced. (A.d.). Appellants also noted that *Smith* did not adopt a new rule, but rather, this Court reached its conclusion based solely on the fact that the parties failed to establish the applicability of R.C. 2505.02(B)(4), notwithstanding the fact that they were instructed to brief the issue. (A.d.).

The Eighth District dismissed the appeal pursuant to an erroneous analysis of *Smith, supra*, concluding that Appellants “failed to establish that they would not be afforded a meaningful or effective remedy through an appeal after a final judgment is entered” while simultaneously recognizing that Appellants argued “that the SERS report is subject to the attorney-client privilege, and once the report is disclosed ‘the bell will have rung’[.]” *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044, ¶13. The Eighth District continued, stating:

While the Cleveland Clinic contends that “the bell will have rung,” it does not affirmatively establish that an immediate appeal is necessary, nor does it demonstrate how it would be prejudiced by the disclosure. Without an indication that the requirement in R.C. 2505.02(B)(4)(b) has been met, we do not have a final, appealable order.

Id.

Appellants timely filed their Notice of Appeal with this Court and now request that this Court accept jurisdiction over the instant matter pursuant to R.C. 2505.02(B)(4).

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1

AN ORDER REQUIRING PRODUCTION OF PRIVILEGED DOCUMENTS, CONVERSATIONS OR OTHER MATERIALS IS A FINAL, APPEALABLE ORDER PURSUANT TO R.C. 2505.02(B)(4), THEREBY CONFERRING JURISDICTION OVER THE ISSUE TO THE COURT OF APPEALS UNDER ARTICLE IV, SECTION 3(B)(2).

As noted by this Court’s decision in *Smith v. Chen*, Slip Opinion No. 2013-2008, 2015-Ohio-1480, “The Ohio Constitution grants courts of appeals jurisdiction ‘to review and affirm, modify or reverse judgments or final orders’” under Article IV, Section 3(B)(2) and “[t]he legislature has enacted a law that specifies which orders are final[, pursuant to]R.C. 2505.02.” *Smith*, at ¶8. In order to constitute a final, appealable order for purposes of R.C. 2505.02(B)(4), the following criteria must be met:

(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.

For purposes of R.C. 2505.02(B)(4), a “provisional remedy” is defined as “a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, **discovery of privileged matter**, suppression of evidence, a *prima-facie* showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a *prima-facie* showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.” R.C. 2505.02(A)(3), emphasis added.

The underlying issue in this case is the compelled production of attorney-client communications in the form of a SERS Report. (T.d.).² Appellants were ordered to produce the SERS Report despite the existence of clear applicable precedent, an unrefuted affidavit establishing that the purpose of the SERS Report was to communicate with counsel, and the availability of other methods of obtaining the information sought, i.e. the recollection of witnesses to the accident and/or medical providers who intervened shortly thereafter. (T.d.).

Denial of the protective order and the granting of the motion to compel of alleged privileged materials meets prong (a) because it

² While the issue at bar is the compelled production of attorney-client privileged materials, this Court’s decision would have far ranging effect to cover all other methods of statutory and common law privileged documents, communications, etc.

does determine the action with respect to the provisional remedy and prevents judgment in respect to that provisional remedy.

As to prong (b), *** the Ninth Appellate District has explained that an order denying a motion to compel discovery of purported privileged material was not a final appealable order because it did not preclude a “meaningful or effective remedy” after final judgment. This is so because, “The trial court’s decision denying *** access to the requested information can be remedied on appeal following final judgment if this court determines that the privilege did not apply to the written discovery requests. It then went on to add that an order denying the production of documents is different than an order compelling the production of a claimed privileged material, because denying the motion to compel “will not destroy any privilege that may apply.

Thus, the Ninth Appellate District was insinuating that the granting of a motion to compel alleged privileged material or the denial of a protective order is a final appealable order pursuant to R.C. 2505.02(B)(4) because once the material is disclosed and is public, there is no way “that the proverbial bell cannot be unrung.”

Ramun v. Ramun, 7th Dist. No. 08 MA 185, 2009-Ohio-6405, ¶¶24-26, internal citations omitted; see also *Concheck v. Concheck*, 10th Dist. Franklin No. 07AP-896, 2008-Ohio-2569, ¶10.

Accordingly, the law in Ohio is that when an order is issued denying a request for privileged materials a final, appealable order is not created, but when an order is entered compelling the production of privileged materials is entered a final, appealable order is made. *Id.* The latter category results in a final, appealable order because a party who is compelled to produce privileged documents, including, but not limited to, attorney-client communications, will be left without an adequate remedy because once the production occurs, the bell will have already rung and the privilege cannot be restored through a later appeal. *Id.*

In *Smith*, this Court *sua sponte* dismissed an appeal because the parties failed to establish that the trial court’s order to disclose attorney work product was a final, appealable order. *Id.* at ¶1. Despite noting that “[a] proceeding for ‘discovery of privileged matter’ is a ‘provisional remedy’ within the meaning of R.C. 2505.02(A)(3)” the matter was dismissed because neither

party established that the trial court's order had the effect of "determining the action with respect to the provisional remedy and preventing a judgment in the action in favor of the appealing party with respect to the provisional remedy and 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" as required under R.C. 2505.02(B)(4). *Smith*, at ¶5.

This Court concluded that "[a] plain reading of the statute shows that an order must meet the requirements in *both* subsections of the provisional-remedy section of the definition of final, appealable order in order to maintain an appeal" and the parties balked at the Supreme Court of Ohio's order to show cause. *Id.* at ¶6, emphasis in original. The parties' refusal to brief the issue, despite an order to show cause from the this Court, warranted dismissal **notwithstanding the fact that long standing precedent held that an order compelling disclosure of privileged material is subject to an interlocutory appeal over which the appellate court has jurisdiction.** See *Smith*, at ¶6 and ¶14-16. The parties' respective failure to establish that a final, appealable order warrants a narrow reading and interpretation of this Court's decision because had the parties complied with this Court's order, the prevailing law on the issue would have conferred jurisdiction over the matter. See *Smith*, at ¶7-8.

It is clear that this Court's decision in *Smith* was not intended to do away with longstanding precedent that an order compelling the production of privileged materials was a final, appealable order pursuant to R.C. 2505.02(B)(4). Importantly, *Smith* "does not adopt a new rule, nor does it make an appeal from an order compelling disclosure of privileged material more difficult to maintain [because] [a]n 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." *Id.* at ¶9, emphasis in original. Rather, this Court merely required the parties

to meet the procedural requirements of advising how it was that the order at issue conveyed jurisdiction to the appellate court and/or Supreme Court of Ohio pursuant to R.C. 2505.02(B)(4)(a) and (b); merely citing to case law on the issue would have resulted in compliance and an appropriate exercise of jurisdiction over the matter in accordance with Article IV, Section 3(B)(2). See *Smith, supra*. The parties in *Smith* opted not to brief the issue and thereby failed to meet the requirements of R.C. 2505.02(B)(4) as ordered by this Court. *Smith*, at ¶8.

In the instant matter, the Eighth District has jurisdiction over the final, appealable order of the trial court pursuant to R.C. 2505.02(B)(4) because the order at issue is a provisional remedy as defined by R.C. 20505.02(A)(3), “[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 [and] [Appellants] 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.” See R.C. 2505.02(B)(4) and *Smith, supra*.

As noted by Justices Kennedy, O’Donnell and French in the dissent of *Smith*, “[o]rders compelling discovery of privileged information have been considered final, appealable orders under R.C. 2505.02(B)(4) in every district.” *Smith*, at ¶14-16. The dissenting Justices specifically cited the following passage from *Schmidt v. Krikorian*, 12th Dist. Clermont No. CA2011-05-035, 2012-Ohio-683:

Denial of a protective order and the resulting order to produce allegedly privileged materials meets prong (a) of R.C. 2505.02(B)(4) because it determines the action with respect to the provisional remedy and prevents judgment in respect to that provisional remedy. **Further, such an order meets prong (b) of R.C. 2505.02(B)(4), because forcing disclosure of the allegedly privileged material will destroy the privilege and “the proverbial bell cannot be unrung.”** As such, an order requiring

disclosure of allegedly privileged material is a final order that is immediately appealable.

Smith, at ¶14 citing *Schmidt*, at ¶21, emphasis added, internal citations omitted.

The Eighth District has a similar controlling precedent on the issue. See *Smalley v. Friedman, Domiano & Smith Co. L.P.A.*, 8th Dist. Cuyahoga No. 83836, 2004-Ohio-2351, which states:

In this instance, the challenged order grants a provisional remedy, as the discovery of privileged matter is expressly listed as a provisional remedy under R.C. 2505.02.

In addition, the order determined the action with respect to the provisional remedy and prevented a judgment with respect to [the party seeking to prevent discovery of attorney-client privileged communications] as to that remedy. Moreover, we hold that if [the party seeking to prevent discovery of attorney-client privileged communications] were required to wait until there is a final judgment as to all proceedings, issues, claims and parties before obtaining review of the order, [they] would be denied a meaningful or effective remedy.

See also *Calihan v. Fullen*, 78 Ohio App.3d, 266, 268, 604 N.E.2d 761 (1st Dist. 1992); *Whitt v. ERB Lumber*, 156 Ohio App.3d 518, 2004-Ohio-1302, 806 N.E.2d 1034 (2nd Dist.); *Nester v. Lima Mem. Hosp.* 139 Ohio App.3d 883, 885, 745 N.E.2d 113 (3rd Dist. 2000); *Hollis v. Finger*, 69 Ohio App.3d 286, 292, 590 N.E.2d 784 (4th Dist. 1990); *Brown v. Yothers*, 56 Ohio App.3d 29, 30, 564 N.E.2d 714 (5th Dist. 1988); *King v. Am. Std. Ins. Co. of Ohio*, 6th Dist. Lucas No. L-06-1306, 2006-Ohio-5774, ¶20; *Delost v. Ohio Edison Co.*, 7th Dist. Mahoning No. 07-MA-171, 2007-Ohio-5680, ¶4; *Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 164 Ohio App.3d 829, 2005-Ohio-6914, 844 N.E.2d 400 (9th Dist.), ¶9; *Legg v. Hallet*, 10th Dist. Franklin No. 07AP-170, 2007-Ohio-6595, ¶16; and *Cobb v. Shipman*, 11th Dist. Trumbull No. 2011-T-0049, 2012-Ohio-1676.³

Prior to this Court's decision in *Smith*, this Court previously accepted jurisdiction over matters compelling the production of privileged information on a number of occasions. See *Ward*

³ Appellants incorporated these cases into their Supplemental Brief by reference as stated in Footnote No. 1 at p. 3, ("In the interest of preserving this Court's time and resources, Appellants incorporate the authority relied upon by Justice Kennedy on the issue as if fully set forth herein.").

v. Summa Health Sys., 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514 (Court accepted jurisdiction and decided case involving order to disclose non-party privileged medical information without addressing R.C. 2505.02(B)(4) issues); *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61 (Accepted jurisdiction of matter involving privileged medical information of non-parties); *Cepeda v. Lutheran Hospital*, 123 Ohio St.3d 161, 2009-Ohio-4901, 914 N.E.2d 1051 (Court accepted jurisdiction of interlocutory appeal in case pertaining to order compelling production of billing statements of non-party patients); and *Medical Mutual v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-24986, 909 N.E.2d 1237 (Jurisdiction accepted in case where trial court ordered production of privileged medical records).

From these cases, as well as *Ramun, supra*, it is indisputable that the party being compelled to produce privileged documents, communications, etc. would not be afforded an effective remedy following the complete adjudication of the case. See *Martin v. Martin*, 11th Dist. Trumbull No. 2011-T-0034, 2012-Ohio-4889; see also *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. Civ.A.22387, 2005-Ohio-5103, ¶¶28-29, (Appellant would have no adequate remedy on appeal if required to disclose attorney case file generated in the course of representation), citing *Cuervo v. Snell*, 10th Dist. Nos. 99AP-1442, 99AP-1443 and 99AP-1458, 2000 WL 1376510 (Sept. 26, 2000), *3, (“Communications between an attorney and his or her client may be considered privileged matter pursuant to R.C. 2505.02(A)(3); [t]herefore, a trial court's ruling concerning the discovery of this information should be appealable because once that information is disclosed, the “proverbial bell cannot be unrung.”). Denying jurisdiction in the instant case will result in a changing of the law, despite this Court’s express statement that *Smith* “does not adopt a new rule” and has certainly made obtaining a meaningful or effective

remedy from orders compelling production of privileged materials difficult, if not impossible. *Id.* at ¶9; see also R.C. 2505.02(B)(4)(b).

Unlike the parties in *Smith*, Appellants herein have established that the trial court's September 19, 2014, Order is final, and appealable pursuant to R.C. 2505.02(B)(4)(a) and (b). Appellants, **in relying upon each and every case cited above**, specifically argued that prong (b) of R.C. 2505.02(B)(4) was satisfied, thereby giving the Eighth District jurisdiction, because "[t]he disclosure of privileged attorney-client communications to Appellee in this matter cannot be undone once it occurs." (A.d.).

Appellants further noted, "The provisional remedy, i.e. the trial court's order to disclose the SERS Report, both determines the action and prevents Appellants from a meaningful or effective remedy after final judgment has occurred in this case." (A.d.). Therefore, in accordance with this Court's decision in *Smith*, the Eighth District's instruction at oral argument, and R.C. 2505.02(B)(4), Appellants herein established that the trial court's order is a final, appealable order which allows the Eighth District to consider the merits of the appeal pursuant to Article IV, Section 3(B)(2). Stated differently, in order to provide a meaningful and effective remedy to the party compelled to produce privileged materials, an immediate interlocutory appeal is necessary. Accordingly, the Eighth District erred in dismissing the appeal under a flawed *Smith* analysis. See *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044.

IV. CONCLUSION

The trial court's Order requiring the disclosure of the SERS Report is ripe for interlocutory appeal because the elements of R.C. 2505.02(B)(4)(a) and (b) have been conclusively established as recognized by well-established Ohio law. Appellants herein would be left without a meaningful or effective remedy if they were forced to litigate the underlying case

to completion before they were permitted to appeal the order compelling production of the attorney-client communication. It is imperative that this Court accept jurisdiction of the instant matter in order to rescue the longest recognized privilege and cornerstone of the American Justice System from the precarious position the Eighth District's holding has created.

Appellants appropriately relied upon the controlling authority for each Ohio Appellate District for this proposition of law, as considered by the dissenting Justices in *Smith*, asserting that the compelled production of the attorney-client SERS Report rings the proverbial bell and disclosure cannot be undone once it occurs. This argument has been the basis for determining whether every appellate district in the State of Ohio, including the Eighth District, had jurisdiction over an interlocutory appeal under R.C. 2505.02(B)(4), as required by Article IV, Section 3(B)(2) of the Ohio Constitution. The upheaval of this long-standing precedent caused by the lower courts' misinterpretation of this Court's decision in *Smith* requires this Court to revisit and clarify the issue to restore the right of parties compelled to produce privileged materials to have such orders be immediately reviewed lest they be left without a meaningful and effective remedy. See R.C. 2505.02(B)(4)(b). Denying jurisdiction at this time would result in the destabilization of Ohio law as feared by Justices Kennedy, O'Donnell and French as noted in their dissent in *Smith*, ¶16.

For these reasons, Defendants-Appellants Cleveland Clinic and Cleveland Clinic Health System request that this Court accept jurisdiction over the instant matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served by Regular U.S. Mail on this 10th day of July, 2015

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102038

DARLENE BURNHAM

PLAINTIFF-APPELLEE

vs.

CLEVELAND CLINIC, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-823973

BEFORE: Kilbane, P.J., Boyle, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 28, 2015

Appendix "A"



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MARY EILEEN KILBANE, P.J.:

{¶1} Defendants-appellants, Cleveland Clinic and Cleveland Clinic Health Systems (“Cleveland Clinic”), appeal from the trial court’s decision granting plaintiff-appellee, Darlene Burnham’s (“Burnham”), motion to compel discovery. For the reasons set forth below, we dismiss for lack of final, appealable order.

{¶2} In March 2014, Burnham filed a complaint against the Cleveland Clinic for injuries she sustained while visiting her sister at the main campus of the Cleveland Clinic Hospital. Burnham alleges that a Cleveland Clinic employee negligently poured liquid on the floor and failed to warn her of this condition, causing her to slip and fall. Burnham propounded interrogatories and a request for production of documents with her complaint.

{¶3} Burnham’s discovery requests sought information pertaining to the identity of witnesses, witness statements, and the incident report pertaining to her slip and fall.¹ Cleveland Clinic objected to the majority of Burnham’s requests, citing either the attorney-client privilege, work-product doctrine, or peer review and quality assurance privilege. It did provide the names of the employees involved in the incident and the employee who was present at the time of Burnham’s fall. In June 2014, Burnham filed a motion compelling the

¹The incident report is titled “Safety Event Reporting System” and is referred to as “SERS.”

Cleveland Clinic to produce discovery responses, including the SERS report. The trial court then ordered the parties to submit a brief regarding the privilege issue and ordered the Cleveland Clinic to file a privilege log. The trial court also conducted an in camera inspection of the SERS report. After considering both parties' arguments and the in camera inspection, the trial court found that the report was not privileged and granted Burnham's motion to compel. The court ordered the Cleveland Clinic to respond to Burnham's discovery requests and produce the SERS report to Burnham.

{¶4} It is from this order that the Cleveland Clinic appeals, raising the following single assignment of error for review.

Assignment of Error

The trial court erred in ordering the production of the privileged SERS report.

{¶5} The Cleveland Clinic argues that the SERS report is protected under the attorney-client privilege. It maintains that the report was prepared to aid its risk management and law departments, as well as outside counsel, in the investigation of a potential lawsuit.

{¶6} As an initial matter, however, we must determine whether the trial court's order compelling the production of the SERS report is a final, appealable

order in light of the Ohio Supreme Court's recent decision in *Smith v. Chen*, Slip Opinion No. 2015-Ohio-1480.²

{¶7} In *Smith*, the Ohio Supreme Court reviewed an appeal from a judgment affirming a trial court's order compelling discovery of attorney work product. The plaintiff, Henry Smith ("Smith"), sued defendant Dr. Chen, D.O., and his employer, alleging that he suffered from spinal injuries resulting from their medical malpractice. During pretrial discovery, Smith became aware that defendants had surveillance video of him. The defendants refused to give Smith the video, "insisting that it was attorney work product that they intended to use only as impeachment evidence and it therefore was not discoverable." *Id.* at ¶ 2. After several discovery motions, the trial court ordered defendants to produce it. *Id.*

{¶8} The defendants then appealed to the Tenth District Court of Appeals, which affirmed the trial court's decision. On the issue of whether the discovery order was final and appealable, the court of appeals found that the order was final and appealable because the surveillance video was attorney work-product. *Id.* at ¶ 3. The defendants appealed from the court of appeals to the Ohio Supreme Court. *Smith*, Slip Opinion No. 2015-Ohio-1480, at ¶ 4.

²At appellate oral argument, both parties agreed to submit supplemental briefs on the issue in light of the Ohio Supreme Court's decision in *Smith*.

{¶9} At the outset, the Ohio Supreme Court stated that it did not agree with the court of appeals finding that the trial court's order compelling discovery was final and appealable. *Id.* at ¶ 5. In looking at R.C. 2505.02, the *Smith* court stated that “[a] proceeding for ‘discovery of privileged matter’ is a ‘provisional remedy’ within the meaning of R.C. 2505.02(A)(3)” and an order granting or denying a provisional remedy is final and appealable

only if it [1] has the effect of “determin[ing] the action with respect to the provisional remedy and prevent[ing] a judgment in the action in favor of the appealing party with respect to the provisional remedy” and [2] “[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4).

(Emphasis sic.) *Id.*

{¶10} The court noted that a plain reading of the statute shows that an order must meet the requirements in both subsections of the provisional-remedy section of the definition of final, appealable order in order to maintain an appeal. *Id.* The court further stated:

For an order granting discovery of privileged matter to be a final order, an appellant must affirmatively establish that an immediate appeal is necessary in order to afford a meaningful and effective remedy. R.C. 2505.02(B)(4)(b). This burden falls on the party who knocks on the courthouse doors asking for interlocutory relief. Rendering a judgment on the merits of this appeal would signal to litigants that if they are unhappy with discovery orders that might result in their losing their case, they can spend a few years appealing the matter all the way up to this court without proving a real need to do so.

Id. at ¶ 8.

{¶11} In applying the foregoing to the case before it, the Ohio Supreme Court noted that while the trial court's order determined the discovery issue against the defendants preventing a judgment in their favor, the defendants failed to establish that they would not be afforded a meaningful or effective remedy through an appeal after a final judgment is entered by the trial court resolving the entire case. *Id.* at ¶ 6. Without indication that the requirement in R.C. 2505.02(B)(4)(b) was met, there was no final, appealable order. Therefore, the *Smith* court concluded that it could not reach the merits of the appeal. *Id.* at ¶ 7.

{¶12} The court noted that its 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 postjudgment appeal meaningless or ineffective may still be considered on an immediate appeal.

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

{¶13} Likewise, in the instant case, the Cleveland Clinic failed to establish that they would not be afforded a meaningful or effective remedy through an appeal after a final judgment is entered. Burnham seeks the production of the incident report (SERS) documenting her slip and fall. In its supplemental brief, the Cleveland Clinic argues that the SERS report is subject to the attorney-client privilege, and once the report is disclosed "the bell will

have rung” if it contains sensitive material, and it would have no adequate remedy on appeal. While the Cleveland Clinic contends that “the bell will have rung,” it does not affirmatively establish that an immediate appeal is necessary, nor does it demonstrate how it would be prejudiced by the disclosure. Without an indication that the requirement in R.C. 2505.02(B)(4)(b) has been met, we do not have a final, appealable order. As a result, we cannot reach the merits of this appeal. *Id.* at ¶ 7.

{¶14} Accordingly, we lack jurisdiction to review the matter and must dismiss the case.

It is ordered that appellee recover of appellant costs herein taxed.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 28 2015

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