Supreme Court of Ohio Clerk of Court - Filed July 10, 2015 - Case No. 2015-1127

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

CA14102038

ATTORNEYS FOR APPELLANTS

Bret C. Perry
Jason A. Paskan
Bonezzi Switzer Polito & Hupp Co., L.P.A.
1300 East 9th Street
Suite 1950
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEE

Alexander L. Pal
Obral, Silk & Associates
55 Public Square
Suite 1700
Cleveland, Ohio 44113

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

---

[1]The 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.

---

[2]At 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

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

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy