

IN THE SUPREME COURT OF OHIO

DARLENE BURNHAM, : Case No. 2015-1127
: :
Plaintiff-Appellee, : On Appeal from the Cuyahoga County
: Court of Appeals, Eighth Appellate
: District, Case No. CA 14 102038
-vs- :
: :
CLEVELAND CLINIC, ET AL. :
: :
Defendants-Appellants. :
:

**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE THE
ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO**

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Academy of Medicine of Cleveland & Northern Ohio (“AMCNO”) is a professional medical association serving the northern Ohio community. AMCNO functions as a non-profit 501(c)(6) professional organization in representing Northern Ohio’s medical community through legislative action and community outreach programs. This professional organization has been in existence since 1824, and became known as The Academy of Medicine in 1902. Now known as the AMCNO, it has a membership of over 5,000 physicians, making it one of the largest regional medical associations in the entire United States.

AMCNO strives to provide legislative advocacy for its physician members before the Ohio General Assembly, state medical board, other state and federal regulatory boards, and Ohio courts. AMCNO also sponsors numerous community initiatives. AMCNO further works collaboratively with hospitals, chiefs of staff, and other related organizations, on a myriad of different projects of interest and/or concern to its members. Simply put, AMCNO is the voice of physicians in northern Ohio, and has been so for over 190 years.

As this Court is aware, physicians, including those in the northern Ohio community, are often litigants in a wide variety of civil litigation. Thus, it is appropriate that AMCNO weigh in on matters of important policy, when such matters implicate the interests of its physician members.

AMCNO has an interest in the present subject matter because the outcome of this appeal directly impacts AMCNO membership. AMCNO’s membership has an interest in the fair and predictable regulation of discovery in medical malpractice litigation and in

promoting predictability in the law governing the discoverability of privileged documents and in protecting quality assurance and peer review documents from disclosure. AMCNO's specific interest in this litigation includes opposing attempts to require the production of privileged documents in medical malpractice litigation. The availability of interlocutory appeals is critical to preserving these privileges. The eroding of these privileges will in turn erode the strong public policy considerations supporting the existence of quality assurance and peer review privilege.

For all the foregoing reasons, AMCNO has a strong and vested interest in the outcome of this matter. AMCNO urges on behalf of its entire membership that the decision of the Eighth District Court of Appeals below be accepted for review on the merits.

II. EXPLANATION OF WHY THIS CASE PRESENTS A CASE OF GREAT PUBLIC INTEREST

This case involves extremely important questions of public policy and general interest because the effect of the decision of the Eight District Court of Appeals will be to severely restrict the ability of all parties to institute an immediate appeal from an order requiring production of arguably privileged documents. It has been well-established law in Ohio for a long period of time that such orders are final and appealable, as defined by R.C. 2505.02. The instant case, *Burnham v. Cleveland Clinic, et al.*, 2015-Ohio-2044, 8th App. No. 102038, if left undisturbed, will have the impact of making it extremely difficult to institute an immediate appeal from an order requiring the production of privileged documents in the Eighth District, and throughout the state of Ohio.

The Eighth District decision sets up a system where by a party attempting such an interlocutory appeal must first prosecute "an appeal within an appeal." That is, it will be

incumbent upon an appellant not only to present law and facts, and assignment of errors in support of the privileged argument, but also to separately brief and argue the issue of jurisdiction within the merit brief. Such an approach is not contemplated by the Ohio Rules of Appellate Procedure, as it certainly has never been the case that it is necessary for an appellant to affirmatively establish jurisdiction.

Obviously, in appeals where jurisdiction is in question, the court of appeals can order jurisdiction briefed *sua sponte*, and/or an opposing party can file a motion to dismiss for lack of jurisdiction. The *Burnham* decision takes this several steps further by requiring proactive briefing on jurisdiction in **all** interlocutory appeals involving the production and privileged information.

The end result of the new mechanism required to establish jurisdiction will be that judges at both the trial court level and the court of appeals level will now have discretion to either refuse to recognize applicable privileges, and/or to dismiss appropriate interlocutory appeals on tenuous jurisdictional grounds. This is exactly what happened in this case.

Obviously, this Court is a public policy court, not an error court, and such matters cannot be routinely appealed to this Court. Thus, if the status quo is left undisturbed, there will be many, many instances throughout Ohio where various privileges, including quality assurance privilege, peer review privilege, attorney client privilege, and physician patient privilege, are violated without recourse.

As pointed out in the Memorandum in Support of Jurisdiction of Appellant Cleveland Clinic, the court of appeals found that an interlocutory appeal was premature, even though the privilege at issue cannot be retrieved once pierced. The court concluded simply that an immediate appeal was not necessary in order to afford a

meaningful and effective remedy, but provided little insight into its reasoning. *Id.* at ¶13.

The AMCNO is concerned with the ramifications of this decision for a number of reasons, most prominently, the potential adverse impact on the sanctity of the quality assurance privilege and the peer review privilege. These privileges are well-established in Ohio, for reasons well familiar to this Court. It has always been the case that a trial court's order compelling production in violation of one of these privileges is immediately appealable. With the uncertainty now created by the *Burnham* decision, amicus fears that these privileges will be severely eradicated.

It is no secret that the existence, the application, and the parameters of the quality assurance and peer review privileges are matters that are highly contested in most major medical malpractice litigation. It also no secret that those parties wishing to impose liability on physicians and medical institutions often look for ways to skirt these privileges. The status quo pre-*Burnham* was to permit interlocutory appeals from orders compelling production of privileged documents, without the necessity of prosecuting an appeal within an appeal. The availability of such an appeal was a critical check on the ability of a trial court to regulate discovery. This was not an area of law that was in need of revising, yet it has been completely overhauled.

The *Burnham* court expressly relied on this Court's decision in *Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, to buttress its position that appellants must prosecute an appeal within an appeal in order to establish jurisdiction. Yet, this Court in *Smith v. Chen*, expressly stated that the decision would not make it more difficult to prosecute an interlocutory appeal from an order or arguably requiring the production of

privileged documents, and stated that the decision did not make an interlocutory appeal more difficult to maintain. *Id.* at ¶9.

Not only in *Burnham* but also in *Howell v. Park East*, 2015-Ohio-2403, 8th App. No. 102111, Motion for Reconsideration pending, the Eighth District retroactively applied its interpretation of *Smith v. Chen* to dismiss appeals based upon appellants' failure to affirmatively establish jurisdiction in their merit briefs. Remarkably, the Eighth District took these measures despite the fact that both of these cases were fully briefed well before this Court's release of *Smith v. Chen, supra*. The Court in *Howell* cited *Burnham* as authority for its actions in this respect.

Burnham presents a direct threat to the ability of the member physicians and institutions of the AMCNO to protect documents under the quality assurance privilege and the peer review privilege. Both of these privileges are not only well-established, but based on sound public policy, the wisdom of which has been tested over many decades. It would be unfortunate if the *Burnham* precedent were permitted to create confusion and uncertainty where none previously existed.

For the foregoing reasons, this Court should accept jurisdiction of this matter in order to hear the Proposition of Law on its merits.

III. STATEMENT OF FACTS

Amicus AMCNO adopts the Statement of Facts of Appellant Cleveland Clinic.

IV. PROPOSITION OF LAW NO. 1

AN ORDER REQUIRING PRODUCTION OF PRIVILEGE 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).

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.

It has long been settled that “[w]hen an order is entered compelling the production of privileged materials is entered a final, appealable order is made. *Ramun v. Ramun*, 2009-Ohio-6405, ¶24-26, 7th App. No. 08 MA 185. In *Chen*, the matter was dismissed as not final and appealable due to a failure to brief an issue as requested. In *Burnham*, the issue was raised by the appellant (albeit without knowledge that there was an affirmative duty to establish jurisdiction) but the court of appeals still concluded

that there was no showing that appellant would be denied an effective remedy post judgment. The *Burnham* court also expressly rejected the reasoning from *Ramun* and other court that once privileged information is disclosed, a reviewing court cannot “unring the bell.” *Ramun*, supra, ¶26.

In *Howell*, there was no briefing of any kind permitted, and the court of appeals dismissed an appeal from an order requiring the production of medical records belonging to a third party on the highly questionable basis that no affirmative showing had been made demonstrating that appellant in that case would not have an effective post-judgment remedy. This Court should accept jurisdiction in this case (if for no other reason) to opine on what is meant by the verbiage “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)” as there seems to be considerable confusion on this point. Although the appellants cited a plethora of case law for the proposition that there would be no effective remedy following final judgment, the court of appeals disagreed. Yet, it is no clearer after reading the opinion below what the controlling standard is than it was prior to the issuance of the decision.

There is undoubtedly confusion and discrepancy in the application of R.C. 2505.02(B)(4) throughout Ohio. Guidance from this Court is sorely needed.

V. CONCLUSION

For all of the foregoing reasons, *curiae* AMCNO requests that this Court review the decision of the Eighth District Court of Appeals below on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by ordinary United States Mail on this 13th day of

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