

IN THE SUPREME COURT OF OHIO

DARLENE BURNHAM)	Supreme Court Case No. 2015-1127
)	
Appellee,)	
)	
v.)	On Appeal from the Cuyahoga County
)	Court of Appeals, Eighth Appellate District
)	
CLEVELAND CLINIC, et al.)	Court of Appeals
)	Case No. CA 14 102038
Appellants)	
)	

MEMORANDUM IN RESPONSE OF APPELLEE

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THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This matter is not a case of public or great general interest. This matter is extremely fact and case specific. As the Court knows, this matter involves a slip and fall that occurred at the Cleveland Clinic. While the fall happened inside of a hospital, this case is not a medical claim.¹ Like in almost every other place of business, whether it be a grocery store, a country club or a restaurant, an incident report was immediately made at the scene of the fall to gather information about what happened.

Information was being gathered about the fall directly from the Appellee Ms. Burnham, right there at or near the scene of the fall. During the attempted exchange of ordinary and customary discovery, Ms. Burnham requested this incident report that documents *her* fall. She requested the document that contains *her* statements made to the security and/or other personnel from the Cleveland Clinic.

Such a document is extremely relevant and helpful in learning the facts of what happened on that day when Ms. Burnham fell. Such a document would give the trier of fact more evidence to consider when deciding this case on the merits. For some reason, the Cleveland Clinic does not want the facts of this fall in their building to come to light. The Cleveland Clinic has couched its argument to make it seem as if this incident report is a top secret, legal analysis-filled document. The Clinic refers to this document as a “SERS Report”. As demonstrated in the cases cited by the Appellants in their brief, “SERS Reports” are usually completed when a horrible medical mistake occurs for which litigation is imminent. This was not the situation in the case *sub judice*. The Clinic did not prove to the Eighth District Court of Appeals that this matter was truly privileged, thus it failed to meet both prongs of R.C. §2505.02(B)(4).

¹ Interestingly both Amici Curia are organizations involving the defense of medical facilities and physicians in medical negligence claims.

This Court's up-to-the-minute decision in *Smith v. Chen*, 142 Ohio St. 3d 411; 2015-Ohio-1480; 31 N.E.3d 633 makes it clear that a party claiming a privilege must meet its burden of proving to the Courts that the item being claimed privileged is **truly** privileged. Without meeting this burden, there is no final appealable order. Without changing longstanding law, this Court reminded the Appellate Courts that the denial of a provisional remedy is only a final and appealable order if **both** prongs of R.C. §2505.02(B)(4) are established. At issue in this case, as was in *Smith v. Chen*, is whether the Appellants have established that they 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.

Other than simply telling the Court of Appeals that if they turn over the incident report, the bell cannot be unrung, the Cleveland Clinic did not and could not say how, or why the bell could not be unrung. It did not argue to the Court of Appeals that it 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.

This matter is not a case of public or great general interest because this issue was just made clear by this Court in *Chen*. The Cleveland Clinic's argument that this matter is of public or great general interest invites every single litigant who does not agree with the trial court's discretionary discovery rulings to come knocking on the Court of Appeals doors. Unless the matter is demonstrated to be truly privileged, a party should not be permitted to file countless resource and time expending appeals. Such behavior draws out simple litigation unnecessarily for years and years. Individuals attempting to seek justice at the Courthouse doors are worn down and pummeled by the opposing party filing appeal after appeal, instead of allowing the matter to be decided on its merits.

BRIEF STATEMENT OF THE CASE AND FACTS:

On March 20, 2014, Plaintiff/Appellee, Darlene Burnham, filed the within action in the Cuyahoga County Court of Common Pleas. The Complaint resulted from injuries sustained in a fall while Ms. Burnham was visiting her sick sister at the Cleveland Clinic. In the Complaint, Ms. Burnham alleged John Doe Cleveland Clinic Employee (later identified through discovery as Tahesia Hill) created a dangerous condition in placing a clear liquid on the floor, and failing to warn her of the presence of such dangerous condition.

On April 3, 2014, through its attorneys, Defendants/Appellants Cleveland Clinic and Cleveland Clinic Health Systems filed their Answer to the Complaint. Discovery commenced and Appellee was met with many discovery roadblocks by counsel for the Cleveland Clinic. As a result of Cleveland Clinic's refusal to respond to Interrogatories and Requests for Production of Documents, Burnham filed a Motion to Compel Discovery responses on June 23, 2014. On June 26, 2014, counsel for Appellee received a set of discovery responses from the Cleveland Clinic, but the responses were heavily unresponsive and nineteen of the twenty-four Interrogatories contained Objections citing not only attorney-client and work product privileges, but also the completely inapplicable quality assurance and peer review privileges. The Clinic had also refused to indicate the names of the person that took the statements and/or incident reports. The names were requested so that the depositions of the person or persons who took the report could be taken regarding their personal knowledge of the incident.

Appellee requested an *in camera* inspection and a privilege log for a determination of whether the incident report and witnesses statements are privileged, and for the trial court to make a determination as to the propriety of the myriad of objections raised in the discovery responses. The trial court ordered that the Cleveland Clinic provide a privilege log of the

documents it claimed were privileged, and that the parties brief the issue of privilege by August 13, 2014, with response briefs due by August 20, 2014. It should be noted that at no time did the Cleveland Clinic file a Motion for Protective Order. The parties briefed the privilege issue and the trial court conducted an *in camera* inspection of the incident report with witness statements.

On September 19, 2014, the trial Court granted Plaintiff's Motion to Compel Responses to Discovery, and ordered that the Defendant answer the Interrogatories and provide the incident report/witness statements reviewed *in camera* to Appellee. The Cleveland Clinic appealed to the Eighth District Court of Appeals. Both parties briefed the matter, which proceeded to oral argument on April 23, 2015. At oral argument, the appellate court permitted the parties time to file supplemental briefs as to whether the matter was a final appealable order pursuant to this Court's April 21, 2014 decision in *Smith v. Chen*, 142 Ohio St. 3d 411; 2015-Ohio-1480; 31 N.E.3d 633. The matter was briefed by both parties, and the Eighth District Court of Appeals issued its opinion dismissing the appeal for lack of final appealable order.

**ARGUMENT IN SUPPORT OF APPELLEES' POSITIONS REGARDING
APPELLANT'S PROPOSITIONS OF LAW**

**APPELLANT'S PROPOSITION OF LAW I: 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).**

This case, in no way changes the current status of Ohio law involving a litigant's ability to appeal an order that grants or denies a provisional remedy and which meets **both** prongs of R.C. §2505.02(B)(4). The appellant has not satisfied the statutory requirements. The Statute specifically states:

(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.

In no way, has the Cleveland Clinic established that the production of the incident report documenting the slip and fall of Ms. Burnham will cause the Clinic to “not be afforded a meaningful or effective remedy by an appeal following final judgment as to **all proceedings, issues, claims and parties to the action**. Ms. Burnham’s claims are that the Cleveland Clinic’s employee was negligent in creating a dangerous condition on the floor, and failing to warn Ms. Burnham of the dangerous condition. The Clinic’s argument that the bell cannot be unrung is farcical. The Clinic did not affirmatively establish that an immediate appeal is necessary, nor did it demonstrate **how** it would be prejudiced by the disclosure of the incident report.

As stated by the Court of Appeals in *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044:

...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.

After deciding *Burnham*, and following this Court's ruling in *Smith v. Chen*, the Eighth District Court of Appeals also dismissed the appeal in *Howell v. Park East Care & Rehab.*, 8th Dist. Cuyahoga No. 102111, 2015-Ohio-2403 for lack of appealable order. In *Howell*, both prongs of R.C. §2505.02(B)(4) were analyzed and again, the Eighth District found that when there is no evidence that the second prong is satisfied, then the matter is not a final appealable order.

As Justice O'Neill stated in his Opinion in *Smith v. Chen*, 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. Discovery is supposed to be the free flowing exchange of information relevant to the claims made in the action. Discovery takes place as a step towards reaching the merits of case. In part, this is why decisions made regarding discovery are generally not final appealable orders. It is difficult to understand why the Appellant has wasted almost a year of time appealing the trial court's order, without ever establishing that the slip and fall incident report contains truly privileged information.

The Cleveland Clinic has failed to establish that disclosing the incident report would *truly* render a post-judgment appeal meaningless in this case. As such, The Cleveland Clinic has not satisfied **both** prongs of R.C. §2505.02(B)(4), and therefore it should not be held that the Eighth District erred in dismissing the appeal.

CONCLUSION:

The Eighth District Court of Appeals was correct in holding that that the Cleveland Clinic had not affirmatively established that an immediate appeal is necessary, nor did it demonstrate how it would be prejudiced by the disclosure of the slip and fall incident report of the Appellee, Darlene Burnham.

Unless both prongs of R.C. §2505.02(B)(4) are affirmatively met, then the matter cannot and should not be deemed a final appealable order. The litany of cases cited by the Appellant where the various courts of appeals had deemed that the matters were ripe for appeal are distinguished with the simple fact that in *this* case, the Cleveland Clinic failed to affirmatively establish why an immediate appeal was necessary. The Courts of Appeals should continue to follow *Smith v. Chen*, 142 Ohio St. 3d 411; 2015-Ohio-1480; 31 N.E.3d 633 and both prongs of R.C. §2505.02(B)(4), to ensure that unnecessary and improper appeals are not being filed to delay the resolution of matters that should be decided on their merits, or resolved prior to trial.

For these reasons, Appellee Darlene Burnham respectfully requests that this Honorable Court find that this matter is not a case of public or great general interest, and decline jurisdiction over this matter.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Response of Appellee was sent by ordinary U.S. Mail on this 6th, day of August, 2015 to the following:

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