

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-1127

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

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DARLENE BURNHAM

Plaintiff-Appellee,

-vs-

CLEVELAND CLINIC, et al.

Defendants-Appellants.

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**MERIT BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS CLEVELAND CLINIC  
AND CLEVELAND CLINIC HEALTH SYSTEM**

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Bret C. Perry, Esq. (0073488)  
Jason A. Paskan, Esq. (0085007)  
Bonezzi Switzer Polito & Hupp Co LPA  
1300 East 9<sup>th</sup> Street, Suite 1950  
Cleveland, Ohio 44114  
Tel: (216) 875-2767  
Fax: (216) 875-1570  
E-Mail: bperry@bsmph.com  
jpaskan@bsmph.com

*Attorneys for Defendants-Appellants*

Martin T. Galvin, Esq. (0063624)  
Reminger Co., LPA  
101 West Prospect Avenue, Suite 1400  
Cleveland, Ohio 44115  
Tel: (216) 687-1311  
Fax: (216) 687-1841  
E-Mail: mgalvin@reminger.com

*Attorney for Amicus Curiae The Academy  
of Medicine of Cleveland & Northern Ohio*

Alexander L. Pal, Esq. (0085100)  
Obral, Silk & Associates  
55 Public Square, Suite 1700  
Cleveland, Ohio 44113  
Tel: (216) 696-4421  
Fax: (216) 696-3228  
E-Mail: apal@lawmjo.com

*Attorney for Plaintiff-Appellee*

Anne Marie Sferra, Esq. (0030855)  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
Tel: (614) 227-2394  
Fax: (614) 227-2390  
E-Mail: asferra@bricker.com

*Attorney for Amici Curiae Ohio Hospital  
Association and Ohio State Medical  
Association*

Sean McGlone, Esq. (0075698)  
Ohio Hospital Association  
155 East Broad Street, Suite 301  
Columbus, Ohio 43215  
Tel: (614) 221-7614  
Fax: (614) 917-2258  
E-Mail: sean.mcglone@ohiohospitals.org

*Attorney for Amicus Curiae Ohio Hospital  
Association*

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## **I. STATEMENT OF THE CASE AND FACTS**

On March 20, 2014, Plaintiff-Appellee Darlene Burnham (hereinafter “Appellee”) filed a personal injury action against Defendants-Appellants Cleveland Clinic and Cleveland Clinic Health System (hereinafter “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.<sup>1</sup> 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

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<sup>1</sup> The incident report in this case is titled “Safety Event Reporting System” and is hereinafter referred to as the “SERS Report”.

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; through the depositions of the identified witnesses, it would have been possible for Appellee to obtain information to the facts at issue in this case without trampling on the attorney-client privilege asserted by Appellants. Relevant witnesses were identified and information from these individuals could be ascertained 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 preserved the attorney-client privilege afforded to the SERS Report, and the information contained therein, by not disseminating it 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 had concluded that Risk 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.). Rather than divulge the privileged document, Appellants timely filed an interlocutory 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 v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.23d 633. 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." 10).

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, specifically 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 unrung once the privileged documents have been produced. (A.d. 10). 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 by this Court. (A.d. 10). Despite the bevy of case law relied upon by Appellants and the assertion that the disclosure of privileged documents cannot be undone once the compelled production occurs, Appellee simply stated that Appellants failed to establish both prongs of R.C. 2505.02(B)(4) without providing any substantive discussion on the issue. (A.d. 11).

The Eighth District dismissed the appeal under 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, attached hereto. 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.*<sup>2</sup>

Contrary to the conclusions of the Eighth District and Appellee, Appellants satisfied each of the elements of R.C. 2505.02(B)(4) and have appealed a final, appealable order. The order of the trial court at issue herein is one “compelling disclosure of privileged material that would *truly* render a postjudgment appeal meaningless or ineffective” and subject to immediate appeal. See *Smith*, at ¶9, emphasis in original.

Appellants timely filed their Notice of Appeal with this Court and now request that this Court enter an Order reversing the decision of the Eighth District and remand the matter to the lower court with instructions to issue a decision on the merits.

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<sup>2</sup> Importantly, the trial court specifically ordered the disclosure of the privileged SERS Report in this case, requiring the reviewing courts to analyze whether actual prejudice would result to Appellants, or other similarly situated premises owners, if the compelled disclosure of privileged documents was determined to be inappropriate for an immediate, interlocutory appeal under R.C. 2505.02(B)(4).

## II. 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).**

This Court's decision in *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.23d 633 needs clarification if it is to be applied consistently throughout the State of Ohio and in a manner that provides a meaningful and effective remedy to litigants who are compelled to produce arguably privileged documents. Absent further discussion as to what is required in order to comply with R.C. 2505.02(B)(4), Ohio citizens will be at risk of being deprived an immediate interlocutory appeal which is the only means of preserving their right to enforce those privileges afforded under common law, statute or the Rules of Civil Procedure.

As noted by this Court in *Smith*, "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:

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- (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.).<sup>3</sup> Appellants were

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<sup>3</sup> 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.

ordered to produce the SERS Report despite the existence of clear applicable precedent, an unrefuted affidavit establishing that the purpose of the SERS Report is 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 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**

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because the Eighth District’s decision is not limited to the SERS Report/attorney-client communication at issue in this case.

**and is public, there is no way “that the proverbial bell cannot be unrung.”**

*Ramun v. Ramun*, 7<sup>th</sup> Dist. No. 08 MA 185, 2009-Ohio-6405, ¶¶24-26, emphasis added, internal citations omitted; see also *Concheck v. Concheck*, 10<sup>th</sup> 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.* Simply put, if the party compelled to produce the privileged document is not afforded the right to an immediate appeal, there can be no remedy after trial has concluded or the matter is otherwise resolved because there can be no return to the time when the privileged information was not disclosed to the adversarial party.

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 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.

Notwithstanding the parties' failure to brief the issue in *Smith*, it is clear that this Court's decision 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 postjudgment 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 establish how the order that was subject to the interlocutory appeal met the procedural requirements of R.C. 2505.02(B)(4) and therefore conveyed jurisdiction to the appellate court and/or Supreme Court of Ohio; citing to controlling case law on the issue and/or asserting that the disclosure would preclude a meaningful remedy would have satisfied this Court's Order and permitted an exercise of jurisdiction over the matter in accordance with Article IV, Section 3(B)(2). See *Smith, supra*. Instead, the parties in *Smith* opted not to brief the issue and thereby failed to meet the requirements of R.C. 2505.02(B)(4) despite an express Order from this Court. *Smith*, at ¶8.

In the instant matter, the Eighth District had 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*. See also (A.d. 10).

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.<sup>4</sup>

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.),

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<sup>4</sup> Notably, Justice Kennedy referenced the *Smalley* decision in her dissent stating that the majority's holding in *Smith* "destabilizes the law with regard to whether orders compelling production of allegedly privileged material are final and appealable." See *Smith*, at ¶14-16. In her dissent, Justice Kennedy provided that "[o]rders compelling discovery of privileged information have been considered final, appealable orders under R.C. 2505.02(B)(4) in every district", identifying the controlling decisions on the issue for each district, including *Smalley, supra*. See *Smith*, at ¶14-16.

¶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.<sup>5</sup>

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 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).

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<sup>5</sup> 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.").

Recently, the Fifth District Court of Appeals analyzed a pair of cases under this Court's decision in *Smith, supra*. See *McVay v. Aultman Hosp.*, 5th Dist. Stark No. 2015CA00008, 2015-Ohio-4050 and *Lavin v. Hervey*, 5th Dist. No. 2015CA00021, 2015-Ohio-3458. In each of the Fifth District cases, the appellate court conducted a separate analysis of whether there was a final, appealable order conferring jurisdiction as required under *Smith*. See *McVay*, at ¶¶12-15 and *Lavin*, at ¶¶10-12. In *McVay*, the Fifth District specifically concluded:

Under R.C. [2505].02(B)(4), the issues are whether the order determines the action as to the provisional remedy and prevents a judgment in favor of the appellant and whether appellant would not be afforded a meaningful or effective remedy by appeal following a final judgment. Unlike the issue raised in [*Smith v.* ]*Chen*, the argument in this case is that the work product claim asserts a specific privilege, i.e. a "note" prepared by an employee of appellant's risk management regarding the investigation of the incident after the claimed act of malpractice/negligence.

**The trial court ordered the note from risk management released, thereby forever disclosing the matter to appellee. Although the admissibility of the note might well remain an issue for trial, any facts gained from the disclosure would not be barred.**

**Therefore, we find the only time for a meaningful and appropriate appeal is at the present time. The determination of the provisional remedy is final now as to the rights asserted by appellant. We conclude the order in this case meets all the requirements of R.C. 2505.02(B)(4).**

*McVay*, at ¶¶13-15, emphasis added.

In *Lavin*, the Fifth District first noted that this Court “clarified that some interlocutory discovery orders would remain appealable”, reiterating that *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.” *Lavin*, at ¶11, citing *Smith*, at ¶9. The Fifth District continued its R.C. 2505.02(B)(4) analysis under the *Smith* decision, stating:

In the instant case, appellants addressed both prongs of R.C. 2505.02(B)(4) in their brief. Appellants argued as to R.C. 2505.02(B)(4)(b) that the entry which ordered disclosure of confidential and privileged information falls within the category of provisional remedies for which no meaningful or effective remedy could be granted following final resolution of the underlying action, since there would no longer be an opportunity for the attorney to preserve the subject information. Accordingly, we find that appellants have demonstrated that the instant order is a final, appealable order and we address the merits on appeal.

*Lavin*, at ¶12.<sup>6</sup>

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<sup>6</sup> The Ninth District also recently issued a decision in line with this Court’s analysis of *Smith, supra*, appropriately concluding that an order denying a motion to quash was not a final, appealable order under R.C. 2505.02(B)(4) because the order at issue provided that “although the Court will not quash the subpoenas at issue, the parties are not required to disclose privileged or otherwise protected materials, and shall support any such claims in accordance with the requirements of Civil Rule 45(D)(4).” See *McDade v. Morris*, 9th Dist. Summit No. 27454, 2012-Ohio-4670, ¶19. Unlike *McDade*, the trial court’s order in the instant case ordered the disclosure of privileged materials, i.e. the SERS Report, therefore, a final, appealable order was entered. (T.d.). See *McVay, supra* and *Lavin, supra*.

The Fourth District Court of Appeals also concluded in a February 9, 2016 decision that an order to produce attorney-client communications and attorney work product was a final appealable order and met the requirements of R.C. 2505.02(B)(4). See *Nationwide Mutual Fire Insurance Company v. Mark Jones*, 4th Dist. Scioto No. 15CA3709, 2016-Ohio-513. The Fourth District continued its analysis of the issue noting that the order requiring the disclosure of privileged information constituted a final, appealable order and went on to address the merits of the appeal.

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 would make obtaining a meaningful or effective remedy from orders compelling production of privileged materials impossible. *Id.* at ¶9; see also R.C. 2505.02(B)(4)(b).

Unlike the parties in *Smith* and *McDade*, 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). As noted above, Appellants were ordered to submit a supplemental brief on this specific issue in light of this Court’s decision in *Smith, supra.* (A.d.) Appellants, **in relying upon each and every case cited in Justice Kennedy’s dissent in *Smith*,** 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.). See also *McVay, supra* and *Lavin, supra.*

Appellants specifically 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 September 19, 2014 order is final and appealable, allowing the Eighth District to consider the merits of the appeal as required under Article IV, Section 3(B)(2). Stated differently, in order to provide a meaningful and effective remedy to Appellants who have been compelled to produce privileged materials, an immediate interlocutory appeal under R.C. 2505.02(B)(4) is necessary. See *McVay, supra* and *Lavin, supra*.

Despite the need for an immediate appeal to provide a meaningful review as to the appropriateness of an order disclosing privileged materials, the Eighth District erroneously applied the *Smith* decision in concluding that Appellants failed to establish the elements of R.C. 2505.02(B)(4). If this Court does not clarify the *Smith* decision and provide an outline as to what is necessary to satisfy R.C. 2505.02(B)(4), the controlling law of the State of Ohio on this issue would result in disparate treatment of litigants seeking to preclude discovery of privileged materials solely dependent on jurisdiction. See *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044; *Howell v. Park East*, 8th Dist. Cuyahoga No. 102111, 2015-Ohio-2403; *McVay, supra*; *Lavin, supra*; and *Nationwide, supra*.

Further, uncertainty as to whether the differing application of *Smith* is prejudicial to litigants in this state and would work to coerce them into settlement

to ensure that their privileged communications, documents and work-product remain undiscoverable and outside the scope of discovery as provided under Civ. R. 26(B). Finally, the ambiguity of whether a final appealable order is created would render R.C. 2305.24 to R.C. 2305.253 (Ohio's Peer Review/Quality Assurance Statutes) superfluous because medical providers would cease to investigate the cause of adverse and/or unfortunate medical events at the risk that the investigative materials would become discoverable in litigation but they would be entirely without appellate remedy or review until the conclusion of the lawsuit.

Simply put, the *Smith* decision, and the lower court's misinterpretation of the same, constitutes a potentially devastating legal hurdle to Ohio citizens who will be left without meaningful recourse in the event that they are compelled to produce privileged documents. If the *Smith* decision continues to be applied incorrectly as the lower court did in this case, each and every privilege created and permitted under Ohio law will be subject to this detrimental interpretation, posing risk to every Ohio citizen. Accordingly, Appellants herein request that this Court correct the lower court's errant *Smith* analysis and reverse the Eighth District's dismissal.

### **III. 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. As noted in *McVay, supra*, “The trial court ordered the note from risk management released, thereby forever disclosing the matter to appellee. Although the admissibility of the note might well remain an issue for trial, any facts gained from the disclosure would not be barred.” *Id.* at ¶14.

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 a determination by every appellate district in the State of Ohio, including the Eighth District, that it had jurisdiction over an interlocutory appeal under R.C. 2505.02(B)(4) when the compelled disclosure of privileged information was at issue. In disregarding this precedent, the Eighth District inappropriately dismissed the interlocutory appeal of a final, appealable order after incorrectly analyzing this Court’s decision in *Smith, supra*.

Accordingly, Defendants-Appellants Cleveland Clinic and Cleveland Clinic Health System respectfully request that this Court issue an Order remanding the case to the lower court so that a decision on the merits can be rendered on the final,

appealable order issued by the trial court on September 19, 2014 to disclose the privileged SERS Report.

Respectfully submitted,

/s/ *Bret C. Perry*

Bret C. Perry, Esq. (0073488)

Counsel of Record

Jason A. Paskan, Esq. (0085007)

Bonezzi Switzer Polito & Hupp Co LPA

1300 East 9<sup>th</sup> Street, Suite 1950

Cleveland, Ohio 44114

Tel: (216) 875-2767

Fax: (216) 875-1570

E-mail: [bperry@bsphlaw.com](mailto:bperry@bsphlaw.com)

[jpaskan@bsmhlaw.com](mailto:jpaskan@bsmhlaw.com)

Attorneys for Defendants-Appellants  
Cleveland Clinic and Cleveland Clinic  
Health System

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served by Regular U.S. Mail on this \_\_\_\_ day of

February, 2016 to the following:

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

Counsel for Plaintiff-Appellee  
Darlene Burnham

Anne Marie Sferra, Esq.  
Bricker & Eckler, LLP  
100 South Third Street  
Columbus, Ohio 43215

Counsel for Amici Curiae  
Ohio Hospital Association and  
Ohio State Medical Association

Sean McGlone, Esq.  
155 East Broad Street, Suite 301  
Columbus, Ohio 43215

Counsel for Amicus Curiae  
Ohio Hospital Association

Martin T. Galvin, Esq.  
Reminger Co., LPA  
101 West Prospect Avenue  
Suite 1400  
Cleveland, Ohio 44115

Counsel for Amicus Curiae  
The Academy of Medicine of Cleveland and  
Northern Ohio

/s/ *Bret C. Perry*

Bret C. Perry, Esq. (0073488)

Counsel of Record

Jason A. Paskan, Esq. (0085007)

## APPENDIX

NOTICE OF APPEAL FROM A COURT OF APPEALS  
IN THE SUPREME COURT OF OHIO

Darlene Burnham,	:	
	:	
Plaintiff-Appellee,	:	On Appeal from Eighth Appellate District,
	:	Cuyahoga County, Ohio
	:	
vs.	:	
	:	
Cleveland Clinic, et al.	:	Court of Appeals Case No. CA 14 102038
	:	
Defendants-Appellants.	:	

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**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS CLEVELAND CLINIC AND  
CLEVELAND CLINIC HEALTH SYSTEM**

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Bret C. Perry, Esq. (0073488)  
Jason A. Paskan, Esq. (0085007)  
Bonezzi Switzer Murphy Polito  
& Hupp Co LPA  
1300 East 9<sup>th</sup> Street, Suite 1950  
Cleveland, Ohio 44114  
Tel: (216) 875-2767  
Fax: (216) 875-1570  
E-mail: bperry@bsmph.com  
jpaskan@bsmph.com

Alexander L. Pal, Esq. (0085100)  
Obral, Silk & Associates  
55 Public Square, Suite 1700  
Cleveland, Ohio 44113  
Tel: (216) 696-4421  
Fax: (216) 696-3228  
E-Mail: apal@lawmjo.com

Attorney for Plaintiff-Appellee

Attorneys for Defendants-Appellants

**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS**

Defendants-Appellants Cleveland Clinic and Cleveland Clinic Health System hereby give Notice of Appeal to the Supreme Court of Ohio from the judgment of the Eighth Appellate District, Cuyahoga County, journalized in Court of Appeals Case No. CA 14 102038 on May 28, 2015. (Attached hereto as "Appendix A").

This case raises a substantial question of great public and general interest and is a matter of first impression.

Respectfully submitted,

*/s/ Bret C. Perry*

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Bret C. Perry (0073488)  
Jason A. Paskan (0085007)  
Bonezzi Switzer Polito & Hupp Co LPA  
1300 East 9<sup>th</sup> Street, Suite 1950  
Cleveland, Ohio 44114  
Tel: (216) 875-2767  
Fax: (216) 875-1570  
E-mail: bperry@bspplaw.com  
jpaskan@bsmph.com

*Attorneys for Defendants-Appellants Cleveland  
Clinic and Cleveland Clinic Health System*

**CERTIFICATE OF SERVICE**

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

to the following:

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

/s/ Bret C. Perry  
Bret C. Perry, Esq. (0073488)  
Counsel of Record  
Jason A. Paskan, Esq. (0085007)

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102038

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**DARLENE BURNHAM**

PLAINTIFF-APPELLEE

vs.

**CLEVELAND CLINIC, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
DISMISSED**

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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



**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.<sup>1</sup> 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

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<sup>1</sup>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.<sup>2</sup>

{¶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.

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<sup>2</sup>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, 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

## 2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means 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.

(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:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(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.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007