

**IN THE SUPREME COURT OF OHIO**

<b>DARLENE BURNHAM,</b>	)	<b>Case No. 2015-1127</b>
	)	
<b>Plaintiff-Appellee,</b>	)	<b>On Appeal from the</b>
	)	<b>Eighth Appellate District,</b>
<b>v.</b>	)	<b>Cuyahoga County</b>
	)	<b>Case No. CA-14-102038</b>
<b>CLEVELAND CLINIC, et al.,</b>	)	
	)	
<b>Defendants-Appellants.</b>	)	

**MERIT BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION AND OHIO STATE MEDICAL ASSOCIATION, IN SUPPORT OF APPELLANTS**

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## STATEMENT OF INTEREST OF AMICI

The Ohio Hospital Association (“OHA”) is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For the past 100 years, the OHA has provided a mechanism for Ohio’s hospitals to come together and advocate for health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of over 200 hospitals and 13 health systems, collectively employing more than 280,000 employees in Ohio.

The Ohio State Medical Association (“OSMA”) is a nonprofit professional association established in 1835 and is comprised of approximately 16,000 physicians, medical residents, and medical students in Ohio. The OSMA’s membership includes most Ohio physicians engaged in the private practice of medicine.

The OHA and OSMA (collectively “Amici”) represent the vast majority of hospitals and physicians in Ohio. They have a strong interest in legal and legislative developments impacting their members, including developments affecting the sanctity of privileged information. Health care providers are somewhat unique in the sheer volume of privileged information they generate on a daily basis. Every time a physician treats a patient, the task is steeped in the patient-physician privilege. It must be because candor and trust between health care providers and their patients is crucial for effective treatment. Further, health care providers must consult attorneys to respond to allegations of medical negligence, which implicates the attorney-client privilege. Candor and trust are also the necessary hallmarks of the attorney-client relationship. Amici know firsthand how crucial the protection of privileged information is to both the provision of health care services and the practice of medicine.

For this reason, Amici urge this Court to reverse the Eighth District’s decision in *Burnham v. Cleveland Clinic*, 8<sup>th</sup> Dist. Cuyahoga No. 102038, 2015-Ohio-2044. The Eighth

District overturned years of precedent on this issue and misapplied this Court’s recent decision in *Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶¶ 8-9, to require a hospital to produce information protected by the attorney-client privilege to its litigation adversary without permitting an immediate right to appeal the discovery order. Amici are concerned that *Burnham* will be used by other courts to bar appellate review of discovery orders compelling the production of privileged information, including medical information protected by the physician-patient privilege and information protected by the attorney-client privilege.

If this Court does not reverse on the facts of *Burnham*, Amici nonetheless urge it to provide clarification regarding *Smith* and to reaffirm a party’s long-recognized right to an interlocutory appeal from a discovery order denying the assertion of a privilege. Otherwise, meaningful review of orders requiring the production of privileged material<sup>1</sup> will be eviscerated, jeopardizing the ability of Ohio’s health care providers to protect their own privileged information as well as the privileged information of their patients.

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

Amici defer to the Statement of the Case and the Statement of Facts as set forth in Appellants’ Brief.

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<sup>1</sup> The terms “privileged material,” “privileged communication,” and “privileged information” are used interchangeably throughout this brief.

## LAW AND ARGUMENT

**Proposition of Law:** 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 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.”*

*Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 9.

### **A. The History and Development of R.C. 2505.02(B)(4)’s “Provisional Remedy” Final Order**

In Ohio, what constitutes a “final order” from which an appeal lies is primarily found in R.C. 2505.02.

Prior to 1998, orders were not final (and, thus, not appealable) under R.C. 2505.02 until after: (1) the entry of a judgment disposing of all claims in the case; (2) the entry of a judgment properly invoking Civ.R. 54(B); or, (3) the filing of an entry where the order affected a substantial right made in a special proceeding. Mark P. Painter & Andrew S. Pollis, *Ohio Appellate Practice*, Section 2:18 (2014-15 ed.) (hereafter “*Ohio Appellate Practice*”). Under this framework, “courts recognized orders compelling discovery of alleged privileged material as final and appealable, given the nature of the privilege.”<sup>2</sup> *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶16 (Kennedy, J., dissenting). *See, e.g., Calihan v. Fullen*, 78 Ohio App.3d 266, 268, 604 N.E.2d 761 (1<sup>st</sup> Dist. 1992) (“the harm caused by compelled production of this privileged information cannot be remedied by appellate review of the order after the entry of final judgment”); *Hollis v. Finger*, 69 Ohio App.3d 286, 292, 590 N.E.2d 784 (4<sup>th</sup> Dist. 1990).

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<sup>2</sup> In addressing whether the compelled disclosure of privileged material was a final order from which an immediate appeal could be taken, courts usually applied the test of whether the entry appealed from “affected a substantial right made in a special proceeding.”

In 1998, the Ohio General Assembly amended R.C. 2505.02 and codified what Ohio courts and litigants already knew: that some interlocutory orders, like those compelling the production of privileged information, are so prejudicial that they trigger the right to an immediate appeal. R.C. 2505.02. That year, the legislature amended R.C. 2505.02 to add a new class of final, appealable orders – those involving certain types of “provisional remedies.” R.C. 2505.02(A)(3) and (B)(4). The amended statute defines “provisional remedy” as “a proceeding ancillary to an action, including, but not limited to a proceeding for a preliminary injunction, attachment, discovery of privileged matter \* \* \*.” R.C. 2505.02(A)(3). An order that grants or denies a provisional remedy is appealable under R.C. 2505.02(B)(4).

Years ago, this Court set forth a three-part analysis to be used in determining whether an order is a final order that may be immediately appealed under R.C. 2505.02(B)(4):

- (1) the order must either grant or deny relief sought in a certain type of proceeding that the General Assembly defines as a “provisional remedy”;
- (2) the order must determine the action with respect to the provisional remedy and present a judgment in favor of the appealing party with respect to the provisional remedy; and
- (3) the reviewing court must decide that the appealing party would not be afforded a meaningful or effective remedy by an appeal following a final judgment as to all proceedings, issues, claims, and parties in the action.

*State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93, 746 N.E.2d 1092. *Muncie* was the first time this Court construed the provisional remedy provision of R.C. 2505.02(B)(4).

Regarding the first prong of this analysis, as stated above, the General Assembly expressly included “discovery of privileged matter” in the definition of “provisional remedy” set

forth in R.C. 2505.02. Hence, there is no question that “discovery of privileged matter” is a “provisional remedy” under R.C. 2505.02(B)(4), and was clearly within the General Assembly’s contemplation at the time it amended the statute.

Regarding the second prong of this analysis, courts have consistently held that this requirement is met if the order actually compelled disclosure of potentially privileged material. *See Smith v. Chen*, 142 Ohio St. 3d 411, 413, 2015-Ohio-1480, 31 N.E.3d 633 (Kennedy, J., dissenting) (citing numerous decisions to this effect). When there is no compelled disclosure, but simply an order to submit the documents for *in camera* review, this requirement is not met. *Ingram v. Adena Health System*, 144 Ohio App. 3d 603, 2001-Ohio-2357 (4<sup>th</sup> Dist.); *Keller v. Kehoe*, 8<sup>th</sup> Dist. Cuyahoga No. 89218, 2007-Ohio-6625, ¶ 11 (explaining why order to seal records and submit for *in camera* inspection does not meet the second requirement of R.C. 2505.02(B)(4)). This makes perfect sense because a court could determine, based on an *in camera* inspection, that the documents are privileged and thus not discoverable. *See Ingram*, 144 Ohio App.3d at 606.

Regarding the third and final prong of this analysis, whether a remedy is meaningful or effective is determined by the detrimental impact or consequence of deferring appellate review. Orders requiring the disclosure of privileged material, by definition, have historically met (and inherently meet) this standard. Courts have explained the inherent prejudice created by this type of discovery order in expressive, indisputable ways such as: (1) “[t]he proverbial bell cannot be unrung”<sup>3</sup> and (2) “[once] the cat is let out of the bag \* \* \* [it] can never be put back in.”<sup>4</sup> See

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<sup>3</sup> *State v. Muncie*, 91 Ohio St.3d 440, 451, 2001-Ohio-93, 746 N.E.2d 1092 (quoting *Gibson-Myers & Associates, Inc. v. Pearce*, 9<sup>th</sup> Dist. Summit No. 1958, 1999 Ohio App. LEXIS 5010 (Oct. 27, 1999)).

<sup>4</sup> *Mansfield Family v. CGS Worldwide, Inc.*, 5<sup>th</sup> Dist. Richland No. 00-CA-3, 2000 Ohio App. LEXIS 6187 (Dec. 28, 2000), \*7.

*Ohio Appellate Practice*, Section 2:21. Once the cloak of secrecy is lifted by a court compelling disclosure of confidential material, it cannot be restored. *State v. Muncie*, 91 Ohio St.3d at 451.

Since *Muncie*, Ohio appellate courts have generally followed its rationale and held that orders requiring the disclosure of privileged material (such as medical records or attorney-client communications) categorically satisfy the third part of the analysis because once the information is handed to an adversary “the damage is done and cannot be undone” by the appellate court. *Walker v. Firelands Community Hospital*, 6<sup>th</sup> Dist. Erie No. E-03-009, 2003-Ohio-2908, ¶ 12; *see, e.g., Randall v. Cantwell Machinery Co.*, 10<sup>th</sup> Dist. Franklin No. 12AP-786, 2013-Ohio-2744, ¶ 7 (“An order requiring the release of privileged or confidential information in discovery \* \* \* prevents the appealing party from obtaining an effective remedy because the privileged information has already been released.”); *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, ¶ 33 (10<sup>th</sup> Dist.) (recognizing that “[i]njury results from the dissemination of the [confidential or privileged] information itself, which cannot be remedied absent an immediate appeal.”); *Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 164 Ohio App. 3d 829, 2005-Ohio-6941, 844 N.E.2d 400, ¶ 9 (holding that R.C. 2505.02 (B)(4) is satisfied since appealing after a final judgment “would not be meaningful because the physician-patient privilege would have already been compromised.”)

In short, Ohio courts have long recognized that the compelled disclosure of privileged material is inherently prejudicial and irreparable to the party forced to produce it. Accordingly, historically a party compelled to produce privileged information was not required to make a special, fact-based showing of how it has been (or will be) injured by the compelled production. After all, once the sanctity of the attorney-client or physician-patient privileged has been broken,

there is no way to put the pieces back together or, put another way, to restore the parties to their pre-disclosure status.

From a legal and practical standpoint, construing R.C. 2505.02(B)(4) as it has historically been construed by Ohio courts makes sense. Otherwise, an appellant seeking an interlocutory appeal from an order to produce privileged material would be required to affirmatively establish, during the discovery phase of litigation, that a meaningful remedy is not, or will not be, available to it *after* a final adjudication on the merits. Parties rarely know exactly how a case is going to unfold, especially during the discovery phase of litigation, thereby requiring speculation or clairvoyant power to establish how an appellant would be harmed in the absence of an immediate appeal from an order compelling the disclosure of privileged material. But, even if a party were able to determine how it would be harmed by the disclosure of its privileged information to its litigation adversary, it should not have to do so by spelling out how the privileged information could be used to inflict such harm. Put another way, a party whose privileged information is required by court order to be disclosed should not have to provide a road map to its adversary regarding how that information can be used against it.

In the nearly two decades since R.C. 2505.02(B)(4) has been on the books, Ohio courts have not required a party appealing the forced disclosure of privileged communications to prove specifically how it will be harmed by such disclosure before it is entitled to immediate appellate review, and there is no reason to upset this settled area of law.

**B. *Smith v. Chen***

In *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, this Court addressed R.C. 2505.02(B)(4) in the context of a claim that “attorney work-product” material need not be produced under Civ.R. 26. *Smith* involved an appeal from an order compelling discovery of a surveillance video that appellants claimed was protected attorney work-product.

*Id.* at ¶ 2. Attorney work-product is protected in many instances, but it does not share the same “privilege” status as attorney-client or physician-patient communications. Rather, attorney work-product is entitled to “a qualified privilege protecting the attorney's mental processes in preparation of litigation.” *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 2010-Ohio-4469; 937 N.E.2d 533, ¶ 55. “[T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system,’ and the privilege afforded by the work-product doctrine is not absolute.” *Id.* quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975). Attorney work-product is discoverable “upon a showing of good cause.” *Id.* at ¶ 56, citing Civ.R. 26(B)(3).

Attorney-client and physician-patient communications, by contrast, are created by statute and expressly protected from discovery. R.C. 2317.02; Civ.R. 26. These privileges cannot be overcome by a mere showing of “good cause,” but only through the operation of limited exceptions (*i.e.*, where necessary to prevent a crime). *See Squire Sanders*, at ¶¶ 24-53 (discussing exceptions to attorney-client privilege).

In *Smith*, this Court determined, based on the record before it, that there was no final order under R.C. 2505.02(B)(4). In reaching this conclusion, the Court noted that appellants “never argued, much less established, 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,” and that the only reference to whether there was a final order was in the docketing statement filed with the court of appeals. 142 Ohio St.3d 411 at ¶ 6. Further, even after the Court ordered the appellants to brief the issue of whether there was a final order under R.C. 2505.02(B)(4), the *Smith* appellants “again failed” to do so. *Id.* Based on this record, the Court dismissed the appeal for lack of jurisdiction.

In so ruling, the Court made clear that its decision “does not adopt a new rule, nor does it make an appeal from an order compelling disclosure of *privileged* material more difficult to maintain.” *Smith* 2015-Ohio-1480 at ¶ 9 (emphasis added). “An order compelling disclosure of privileged material that would *truly* render a postjudgment appeal meaningless or ineffective may still be considered an immediate appeal.” *Id.* (emphasis sic.) Therefore, per the Court’s own directive, *Smith* was not intended to affect litigants’ long-settled right of immediate appellate review of orders compelling the production of truly (or absolutely) privileged information.

Since *Smith*, some appellate courts have correctly continued to allow appeals of discovery orders requiring the disclosure of privileged information. *McVay v. Aultman Hosp.*, 5<sup>th</sup> Dist. Stark No. 2015CA0008, 2015-Ohio-4050, ¶ 13 (allowing appeal because “[u]nlike the issue raised in *Chen* . . . the work product claim asserts a specific privilege i.e., a ‘note’ prepared by an employee of appellant’s in risk management regarding the investigation of the incident after the claimed act of malpractice/negligence.”); *see also Lavin v. Hervey*, 5<sup>th</sup> Dist. Stark No. 2015CA00021, 2015-Ohio-3458 (same). These courts understand that, when a trial court orders the appellant to disclose privileged material, it is “forever disclosing the matter to appellee” and no appeal can undo that harm. *McVay* at ¶¶ 14-15. (“[W]e find the only time for meaningful and appropriate appeal is at the present time.”)

But other courts have applied *Smith* expansively and have effectively barred appeals of discovery orders regarding even privileged material. *See, e.g., Walker v. Taco Bell*, 1<sup>st</sup> Dist. Hamilton No. C-150182, 2016-Ohio-124; *Howell v. Park East Care & Rehabilitation*, 8<sup>th</sup> Dist. Cuyahoga No. 102111, 2015-Ohio-2403. The Eighth District applied *Smith* in *Burnham* in a way that makes it much more difficult, if not impossible, for appellants to obtain immediate

appellate review of an alleged erroneous order compelling the disclosure of privileged material. The Eighth District's conclusion in *Burnham* is inconsistent with this Court's ruling in *Smith*, contrary to well-settled precedent in Ohio, and should be reversed.

**C. *Burnham* Recasts the Rule in *Smith v. Chen***

In *Burnham*, the Eighth District erroneously interpreted and expanded this Court's decision in *Smith*, dismissing the Cleveland Clinic's appeal of a discovery order requiring the disclosure of privileged information. The Eighth District found that the Cleveland Clinic had failed to state with specificity *how* it would be harmed if it is denied an immediate appeal of the order. *Burnham*, at ¶ 13. In sum, the Eighth District found that Cleveland Clinic could effectively appeal the disclosure order only *after* it was carried out and after the trial court had reached a decision on the merits of the underlying case.

In so doing, the Eighth District rejected decades of case law explaining that orders requiring the dissemination of privileged information are inherently harmful and must be reviewed *before* disclosure takes place, and it ignored this Court's clear directive that appeals of such orders should not now be "more difficult to maintain." *Smith*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 9. This sets the stage for other lower courts to erroneously apply *Smith*, and it creates confusion as to whether orders compelling privileged information to be divulged are immediately appealable, as they have been since R.C. 2505.02 was amended to add the "provisional remedy" right to appeal almost two decades ago.

Unlike the appellant in *Smith*, the Cleveland Clinic: (1) made arguments addressing R.C. 2505.02(B)(4); (2) relied on decisions holding that similar incident reports were determined to be privileged communications or attorney work-product protected from disclosure; and, (3) submitted evidence (an affidavit) to establish that the information at issue (an incident report) was privileged and not discoverable. (See Brief of Appellant, filed in Court of Appeals, at 6-13.)

Further, one of the decisions cited in the Cleveland Clinic’s brief below involved the very same hospital and the same type of incident report. *See Cleveland Clinic Health System- East Region v. Innovative Placements, Inc.*, 283 F.R.D. 362 (N.D. Ohio 2012) (determining that the incident report was privileged and not discoverable.) Despite its showing and reliance on relevant authority, the Eighth District refused to hear Cleveland Clinic’s appeal.<sup>5</sup> It is difficult to fathom what else the Cleveland Clinic could have done to avoid dismissal of its appeal. If a prior decision holding that the same exact type of incident report is privileged and an affidavit in support of the privileged nature of the incident report are not sufficient to allow an interlocutory appeal, then what is? If allowed to stand, the Eighth District’s decision in *Burnham* not only makes it more difficult to immediately appeal from an order compelling the production of privileged information, it makes it virtually impossible to obtain appellate review until after disclosure of the privileged information and adjudication of the entire case on the merits.

The Eighth District’s decision in *Burnham* is contrary to almost 20 years of jurisprudence construing R.C. 2505.02(B)(4) and plainly imposes a higher burden on parties appealing from orders compelling them to produce privileged or confidential material in discovery, contrary to this Court’s directive in *Smith*.

Amici urge this Court to reaffirm prior Ohio law and to stem the harm caused by the Eighth District’s misinterpretation of *Smith*. The well-established standards for appealing an

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<sup>5</sup> A few weeks after deciding *Burnham*, the Eighth District addressed the same issue in *Howell v. Park East Care & Rehabilitation*, 8<sup>th</sup> Dist. Cuyahoga No. 102111, 2015-Ohio-2403 and again dismissed the appeal. In reaching this conclusion, the Eighth District noted that “[u]nlike in *Burnham*, the appellant in *Howell* did not even attempt to establish the necessity of an immediate appeal. Instead, the *Howell* appellant merely referenced R.C. 2505.02(B)(4) in the docketing statement.” *Id.* at ¶¶ 11-13. “Only referencing this section in the docketing statement was insufficient in *Smith* and likewise insufficient in this case.” *Id.* at ¶ 11. Thus, despite significantly different “proofs,” the same court of appeals reached the same result in both *Burnham* and *Howell*, relying on *Smith*.

order compelling disclosure of privileged information, such as information subject to the physician-patient privilege or the attorney-client privilege, have not changed. In order for an appeal of such an interlocutory order to mean anything, it must come immediately after the decision compelling disclosure.

### **CONCLUSION**

Being forced to divulge privileged information in litigation is, by its very nature, harmful and irreparable. Once a party's privileged information is shared, there is no way to erase it from the knowledge of those who receive it and no way to restore the parties to the same position they were in prior to the disclosure. For example, once a patient's privileged communication with her doctor is divulged, her privacy (and trust in that privacy) can never be restored.

This Court must instruct Ohio's appellate courts that meaningful appellate review *before* the material is disclosed is appropriate and necessary. Otherwise, litigants, including hospitals and physicians in the thousands of cases per year they are involved in, will be left without meaningful recourse to address decisions compelling disclosure of sensitive confidential and privileged communications.

Respectfully submitted,

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