

IN THE SUPREME COURT OF OHIO

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

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MERIT BRIEF OF AMICUS CURIAE THE ACADEMY OF MEDICINE OF CLEVELAND  
& NORTHERN OHIO ON BEHALF OF APPELLANTS

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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, representing northern Ohio’s medical community through legislative action and community outreach programs. AMCNO 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 United States.

AMCNO strives to provide legislative advocacy for its physician members before the Ohio General Assembly, state medical boards, other state and federal regulatory boards, and Ohio courts. AMCNO also sponsors numerous community initiatives for public education purposes. AMCNO works collaboratively with hospitals, medical charities, 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, practice groups, and hospitals, 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 the interests of its physician and members are implicated. One of these important public matters is protecting the privilege afforded by the peer review and quality assurances processes, which are directly implicated by this appeal. Without the ability to

immediately appeal orders abrogating this privilege, the privilege becomes illusory. If that happens the entire peer review process will be undermined.

AMCNO's interest in the present subject arises from its desire of its membership to constantly improve the quality of medical treatment offered to Ohioans. Critical to continuous improvement is peer review of treatment decisions and strategies. The peer review/quality assurance process encourage improvements and positive modifications in care and treatment by examining what was done, as well as what else might have been done, under a particular set of facts. Yet, if these privileged proceedings become subject to discovery it will result in the documentation being improperly used to attempt to prove deviation from standard of care.

Another example of where the need for an immediate appeal can arise in medical malpractice litigation is when a trial court orders the production of medical records belonging to third parties. Such production is not uncommonly sought to establish different treatment methods by a physician or to investigate alleged patient-on-patient altercations.

AMCNO's membership also has an interest in the fair and predictable regulation of discovery in medical malpractice litigation; in promoting predictability in the law governing the discoverability of privileged documents; and in protecting quality assurance and peer review documents from disclosure. AMCNO is specifically interested in preserving the availability of interlocutory appeals from trial court orders requiring production of privileged documents. The eroding of these underlying privileges will in turn erode the strong public policy considerations supporting them.

For all the foregoing reasons, AMCNO is highly interested in the outcome of this matter. AMCNO recognizes that the facts of this appeal are different from those usually

involving its membership, because the underlying claim sounds in premises liability, not medical malpractice. But the question of entitlement to an interlocutory appeal herein presented is directly relevant to issues frequently implicated in medical malpractice lawsuits. AMCNO urges on behalf of its entire membership that the decision of the Eighth District Court of Appeals below be reversed.

## **II. STATEMENT OF FACTS/STATEMENT OF CASE**

AMCNO adopts the Statement of Facts/Statement of Case of appellant Cleveland Clinic. Essentially, appellee Darlene Burnham claims to have been injured when she slipped on liquid on the floor at the Cleveland Clinic. A premise liability lawsuit ensued. During discovery the Cleveland Clinic objected to production of a report titled Safety Event Reporting System ("SERS") report. This objection was based on the attorney client privilege, work product privilege, and the peer review/quality assurance privilege. The documents were nevertheless ordered produced. On appeal the Eighth District held that the order appealed from was not final and appealable because the Cleveland Clinic did not establish that it would not have a meaningful remedy post judgment.

## **III. LAW & ARGUMENT**

### **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).

*A. The decision below is inconsistent with long standing interpretations of R.C. 2505.02.*

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 decision below was based largely on *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480. This Court’s ruling in *Smith* on the existence of a final and appealable order was made after supplemental briefing (that was requested by the Court) was concluded on this specific issue. *Smith* stands for the proposition that an order requiring discovery of a privileged matter is a provisional remedy within the meaning of R.C. 2505.02(A)(3), and that such an order is only final appealable if it has the effect of 1) 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 2) 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. See R.C. 2505.02(B)(4).

It has long been settled that “[w]hen an order is entered compelling the production of privileged materials a final, appealable order is made.” *Ramun v. Ramun*, 2009-Ohio-6405, ¶24-26, 7<sup>th</sup> App. No. 08 MA 185. In *Chen*, the appeal was dismissed as not final and appealable due to a failure to brief the jurisdictional issue as requested. Obviously, courts have the right to determine their own jurisdiction and requesting supplemental briefing from the parties seems an appropriate way to do so. The decision below, on the other hand, stands for the proposition that appellants must always affirmatively raise the issue and affirmatively prove jurisdiction through appropriate evidence. *Burnham v. Cleveland Clinic*, 8<sup>th</sup> App. No. 102038, 2015-Ohio-2044, at ¶21-26.

Below, the issue of jurisdiction was initially raised by appellant (albeit without knowledge that there was an affirmative duty to establish jurisdiction). Thereafter the issue was separately briefed. Yet, 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 courts that once privileged information is disclosed, a reviewing court cannot “unring the bell.” *Ramun*, supra, ¶26.

In a similar case, *Howell v. Park East Care and Rehabilitation*, 2015-Ohio-2403, 8<sup>th</sup> App. No. 10211, appeal denied 2016-Ohio-172 (motion for reconsideration pending), there was no briefing of any kind permitted. In *Howell* the Eighth District again dismissed an appeal (from an order requiring the production of medical records

belonging to a third party) on the questionable premise that no affirmative showing had been made demonstrating that the appellant would not have an effective post-judgment remedy. *Id.* at ¶11-12. The *Howell* court noted that appellants had not offered “any evidence” of entitlement to an immediate appeal. This finding begs the question “*what ‘evidence’ is appropriately submitted to an appellate court to make such an evidentiary showing?*” Another unanswered question is whether appealing parties must, when filing a notice of appeal, establish that the documents in question are actually privileged, or only that *if* the documents are privileged, *then* an interlocutory appeal would be appropriate.

In *Howell*, the merit briefing had been completed prior to the issuance of *Chen*. But even in appeals commenced after *Chen*, it is not evident where and how the affirmative showing of entitlement to an interlocutory appeal is to be made. Is this showing henceforth required in the notice of appeal, or in the merit brief, or should parties wait for the court to raise the issue *sua sponte*? Essentially, the Eighth District faulted the *Howell* appellants for failing to unilaterally raise the question of the court of appeals’ jurisdiction, per R.C. 2505.02(B), to hear an interlocutory appeal from an order to produce privileged information. The *Burnham* court below permitted briefing but still concluded that there was no right to appeal an order requiring disclosure of privileged information. Left unanswered is how appellants could have an effective remedy post judgment for the wrongful disclosure of privileged information.

Although the appellants below cited a plethora of case law for the proposition that there would be no effective remedy following final judgment, the court of appeals disagreed. Further, the appellants below established that it would be impossible to “unring the bell” post-judgment if privileged documents were ordered disclosed, but the

Eighth District was not persuaded even by this argument. *Id.* at ¶11. The controlling standard is no clearer after *Burnham* than it was prior. The vacuum created by this decision has resulted and will continue to result in inequitable and disparate results.

App.R. 16 outlines the permissible contents of the Brief of Appellant. Included are a statement of assignment of errors presented for review, a statement of issues presented for review, a statement of the case, a statement of facts, an argument with respect to each assignment of error with citations to appropriate authorities, statutes, and parts of the record where each assignment is reflected, and a conclusion. There is no provision for preemptively arguing the jurisdiction of the court of appeals and/or the parameters of R.C. 2505.02.

This Court should clarify the meaning of 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.

In *Lavin v. Hervey*, 2015-Ohio-3458, 5<sup>th</sup> App. No. 2015CA00021, ¶10-11, the court applied *Chen* in a much more practical and easily understood manner. The Fifth District noted this Court’s holding that *Chen* did not adopt a new rule, nor did it make an appeal from an order compelling disclosure of privileged material more difficult to maintain. The *Lavin* court concluded that the order in that case requiring production of confidential and privileged information fell within the category of provisional remedy because “there would no longer be an opportunity for the attorney to preserve the subject information”, once the disclosure occurred:

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 of the appeal. *Id.* (Emphasis added)

It is respectfully submitted that the *Lavin* court got it right when it framed the issue in terms of ability to preserve a challenged privilege. Additionally, *Lavin* is more persuasive than *Burnham* or *Howell* because it recognized that *Chen* was not intended to make interlocutory appeals more difficult to maintain.

As many courts have recognized there is no way to “unring the bell”, once privileged documents are produced. See e.g., *Schottenstein, Zox, & Dunn v. McKibben*, 2002-Ohio-5075, 10<sup>th</sup> App. No. 01AP-1384, at ¶19. It is imperative that physicians, hospitals, or nursing homes, and other holders of these privileges have recourse to a meaningful appeal from such orders. Yet, the Eighth District below held that an appellant must affirmatively demonstrate “how it would be prejudiced by disclosure,” which seems to assume that sometimes privileges can be abrogated without prejudice to the party holding the privilege. *Burnham* at ¶13. This suggestion that some privileges are more important than other is ill-advised in terms of public policy and is unworkable as a legal standard.

Respectfully, there is no way to know exactly how a party will be prejudiced by improper disclosure until the disclosure actually happens. Requiring speculation on not only prejudice, but also on the projected impact of the prejudice resulting from improper disclosure on litigation will result in unpredictable and inconsistent results.

*B. The ruling appealed presents a grave danger to the continued viability of the medical peer review process in Ohio.*

It is widely known, and cannot be meaningfully disputed, that in medical malpractice litigation, (as well as the lawsuits against long term care institutions) there are seemingly never-ending disputes over the discoverability and/or admissibility of documents created as part of the peer review process. The legislature has spoken several times on this issue and in its most recent pronouncement, has made it as clear as possible that such matters are simply not discoverable.

A critical corollary to these legislative enactments is the availability of an interlocutory appeal when privileged matters are ordered disclosed, including peer review documents. Without the availability of an interlocutory appeal, the peer review privilege afforded by R.C. 2305.252 will be rendered illusory in many cases.

R.C. 2305.252(A) provides:

(A) Proceedings and records within the scope of a peer review committee of a health care entity **shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action** against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, arising out of matters that are the subject of evaluation and review by the peer review committee. **No individual** who attends a meeting of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee **shall be permitted or required to testify in any civil action** as to any evidence or other matters produced or presented during the proceedings of the peer review committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or a member thereof.

The decision below has weakened these protections afforded by R.C. 2305.252. It will no longer be enough for health care providers (and others) to show that documents ordered produced fall within the scope of the peer review/quality assurance privilege.

The question concerning entitlement to immediate appeal is no longer whether privileged documents have been ordered produced (which is mostly objective) but rather whether “the appealing party would not be afforded a meaningful or effective remedy” (which is mostly subjective). As recognized by *Lavin*, the correct inquiry (even post *Chen*) is whether the ability to protect privileged information has been eliminated. If it has, an immediate appeal is both necessary and appropriate.

The lower decision not only shifts the burden of demonstrating that an interlocutory appeal is necessary to the party asserting the privilege, but it vests new discretion in courts of appeals to determine that trial court orders requiring production of privileged materials do not warrant an immediate appeal. In turn, most of these appellate orders will never be reviewed by this Court for the simple reason that this Court is a policy court rather than an error court.

Simply, if trial courts would enforce R.C. 2305.252 as written, this issue would not present itself as often as it does. *Amicus* urges that this Court not only reinstate the right to an immediate appeal from an order requiring production of privileged documents, but also to reiterate that legislative pronouncements on these matters are not to be disregarded or distorted.

In enacting R.C. 2305.252, which protects the peer review process, the legislature discussed the important public policy considerations of improving the delivery of health care services:

The general public has a great interest in the continuing improvement of medical and health care services as delivered on a daily basis. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures* (2002), 86 Mass. L. Rev. 4. Thus, through R.C. 2305.252, **the legislature enacted a privilege giving complete confidentiality to the peer review process.** The

legislature's enactment determined that the public's interest was to be protected from the particular interest of the individual litigant. Therefore, this statutory privilege is unlike other general privileges arising out of common law. It is designed to protect the overall process of peer review, including all the administrators, nurses, doctors, committees, and various entities who participate in the gathering of information, fact-finding, and formation of recommendations, to advance the goal of better services with better results. Bravo & Lovering, *The Peer Review Privilege: When and How Is It Subject to Waiver?* (2010), 9 *MedStaff News* 1. Protecting the process is imperative for peer review to meet its paramount goal of improving the quality of healthcare. *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 896 N.E.2d 769, 2008–Ohio–4333. **The privilege provides those in the medical field the needed promise of confidentiality, the absence of which would make participants reluctant to engage in an honest criticism for fear of loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions.** See, also, *Browning v. Burt* (1993), 66 Ohio St.3d 544, 562, 613 N.E.2d 993, (noting that a purpose of the statute is not to hinder lawsuits, but rather to afford protection so as to promote a process whereby individuals will provide information to review committees or boards and are encouraged to freely, completely, and candidly produce information without fear of reprisal or civil liability). See, also, Bravo & Lovering; and Kohlberg.

In order to preserve the integrity of this process with meaningful self-examination and frank recommendations, the peer review process and its resulting information are clearly intended to have a privilege of confidentiality providing a **“complete shield to discovery.”** 55 Ohio Jurisprudence 3d, Hospitals & Health Care Providers, Section 41. Prior to 2003, judicial decisions were diluting the legislature's intention to protect the peer review *process*. (Emphasis sic) Thus the Ohio General Assembly revised its previous version in 2003, **making the current statute more resolute: peer review committee meetings and the information “arising out of” the peer review evaluation are confidential.** The current version of the statute uses clear language expressing the legislature's intent, such as “shall be held in confidence,” and “shall not be subject to discovery,” **to establish an express mandate** that peer review proceedings and records are to remain confidential. See *Manley v. Heather Hill, Inc.*, 175 Ohio App.3d

155, 885 N.E.2d 971, 2007-Ohio-6944, ¶30, (noting that the 2003 amendment contained stronger language than previous statutes).

*See, Stewart v. Vivian, M.D.*, 2012-Ohio-228, ¶25-26, 12<sup>th</sup> App. No. CA2011-06-050, *case dismissed, Stewart v. Vivian*, 2012-Ohio-4838, ¶21-23, 133 Ohio St. 3d 1418.

*Stewart* also discussed the legislature’s desire to make the peer review privilege nearly absolute and not to permit waiving or voiding of the privilege.

The legislature amended the statute to direct peer review committee participants to testify only as to their personal knowledge, and clearly states that the participants cannot discuss their testimony arising out of, or before, a peer review committee. This includes “any finding, recommendation, evaluation, opinion, or other action.” In order to be balanced and fair, the statute does not prohibit or prevent the use of documents, records, or information that originates from a source *other than* the peer review process. Thus the statute granting absolute confidentiality to peer review also protects the particular interests of the individual litigant. (Emphasis sic)

Nowhere in the statute is there any language that suggests the peer review process can be waived, voided, or otherwise “destroyed.” The Ohio Supreme Court has warned against enacting “common-law pronouncement” when the legislature has or could have spoken, to the subject of privileges and how they can be waived emphasizing that “[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, superseded by statute on other grounds. (Emphasis added)

*Id.* at ¶21-23.

The decision below will serve to lessen the protections afforded to privileged documents and proceedings, including, but certainly not limited to, the peer review privilege. The ability of litigants to immediately appeal the court ordered production of privileged information is crucial to preserving the underlying privilege and to promoting

the important public policy considerations supporting R.C. 2305.252, and similar statutes.

**V. CONCLUSION**

The decision below is an unnecessary deviation from long standing principles governing the availability of interlocutory appeals where the discovery of privileged information is ordered. This Court should reverse the Eighth District and hold that the information at issue is non-discoverable, and that parties required to produce privileged documents continue to have the right to an immediate appeal.

Respectfully submitted,

*/s/ Martin T. Galvin*

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was filed with the Court's electronic filing system and was served by ordinary U.S. Mail on this 26<sup>th</sup> day of February, 2016 to the following:

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