

IN THE SUPREME COURT OF OHIO

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

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INTRODUCTION:

The party seeking an interlocutory appeal must **affirmatively establish** that an immediate appeal is required from a trial court ruling. They must **affirmatively establish** that an appeal after judgment would not leave them with an effective remedy as to all of the claims, issues, and parties in the case. The party seeking interlocutory appeal must demonstrate that a post judgment appeal would **truly** be meaningless and that they would have no effective remedies.

This Court's decision in *Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633 makes it clear that a party claiming a privilege must meet its burden of proving to the Courts that the item being claimed privileged is **truly** privileged, and the prejudice faced by releasing the document or information would leave them without a meaningful remedy after judgment. Without meeting this burden, there is no final appealable order.

STATEMENT OF THE CASE AND FACTS:

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

On April 3, 2014, through its attorneys, Defendants/Appellants Cleveland Clinic and Cleveland Clinic Health Systems filed their Answer to the Complaint. Discovery commenced and Appellee was met with many discovery roadblocks by counsel for the Cleveland Clinic. As a result of Cleveland Clinic's refusal to respond to Interrogatories and Requests for Production of

Documents, Burnham filed a Motion to Compel Discovery responses on June 23, 2014. On June 26, 2014, counsel for Appellee received a set of discovery responses from the Cleveland Clinic, but the majority of the responses were wholly unresponsive with nineteen of the twenty-four Interrogatories containing objections citing not only attorney-client and work product privileges, but also the completely inapplicable quality assurance and peer review privileges. The Clinic had **also refused to indicate the names of the person(s) that took the statements and/or incident reports.** To this day, the Appellee has no idea who initiated, completed and contributed to this incident report. The names of those involved with the incident report were requested during discovery so that the depositions of the person or persons who took the report could be taken regarding their personal knowledge of the incident. The Appellant refused to release the identities of the persons involved in completing the report, claiming that even the names are privileged.¹

Appellee requested an *in camera* inspection and a privilege log for a determination of whether the incident report and witnesses statements are privileged, and for the trial court to make a determination as to the propriety of the myriad of objections raised in the discovery responses. The trial court ordered that the Cleveland Clinic provide a privilege log of the documents it claimed were privileged, and that the parties brief the issue of privilege by August 13, 2014, with response briefs due by August 20, 2014. It should be noted that at no time did the Cleveland Clinic file a Motion for Protective Order. The parties briefed the privilege issue and the trial court conducted an *in camera* inspection of the incident report with witness statements.

On September 19, 2014, after reviewing the briefs and the incident report itself and exercising its inherent discretion, the trial Court granted Plaintiff's Motion to Compel Responses

¹ To date, the names of the persons involved with documenting the incident report have not been released, but names of nurses who may have responded to the slip and fall scene and/or who treated the Plaintiff were released. It is unknown whether these persons were involved in creating the slip and fall incident report.

to Discovery, and ordered that the Defendant answer the Interrogatories and provide the incident report/witness statements reviewed *in camera* to Appellee. The Cleveland Clinic appealed to the Eighth District Court of Appeals. Both parties briefed the matter, which proceeded to oral argument on April 23, 2015. At oral argument, the appellate court Ordered the parties to file supplemental briefs as to whether the matter was a final appealable order pursuant to this Court's April 21, 2015 decision in *Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633. The matter was briefed by both parties, with the Appellant only arguing that once the proverbial bell is rung, it can't be undone. The Appellant failed to provide any explanation as to how it would be prejudiced by releasing the slip and fall incident report, and how it would not have a meaningful remedy after final judgment. The Appellee argued that the Cleveland Clinic did not meet its burden of proof in satisfying R.C. §2505.02(B)(4)(b). The Eighth District Court of Appeals issued its opinion in *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044 dismissing the appeal for lack of final appealable order, holding that :

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.

LAW AND ARGUMENT:

Appellee's Proposition of Law: The Eighth District Court of Appeals Correctly Held that the Defendant Failed to Affirmatively Establish that it Would not be Afforded a Meaningful Remedy Through an Appeal After Final Judgment is Entered Pursuant to R.C. 2505.02(B)(4)(b) and Also that the Appellant Failed to Demonstrate how it Would be Prejudiced by the Disclosure of the Slip and Fall Incident Report.

The unnecessary filing of interlocutory appeals has contributed to the protraction of litigation and to the great expenditure of time and financial resources for litigants in the State of Ohio. While large and lucrative corporations such as the Cleveland Clinic Foundation continue

to use a broad brush to claim privilege as a way of filing interlocutory appeals when a trial court's discovery order does not go its way, the acceptance of such appeals delays and whittles away our citizens' access to justice.

The Appellant wants this Court to hold that **every time** a party *merely claims* that an attorney client privilege exists, and if the trial court determines that the document is not privileged, that the entire litigation must be halted and an appeal may ensue. Such a holding will inevitably open the flood gates for parties to be permitted to persistently use the shelter of asserting a mere *claimed privilege* to attempt to hide relevant information and to delay litigation by creating piecemeal litigation prolonged for years at a time.

A. The Holding in Smith v. Chen:

This Court's decision in *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633 clarified that in order to receive the statutory benefit of an immediate appeal pursuant to R.C. 2505.02(B)(4), the matter must **truly** be one that requires an immediate appeal. The *Smith* decision in no way changes the current status of Ohio law involving a litigant's ability to appeal an order that grants or denies a provisional remedy and which meets **both** prongs of R.C. §2505.02(B)(4).

Without changing longstanding law, this Court reminded the Appellate Courts that the denial of a provisional remedy is only a final and appealable order if **both** prongs of R.C. §2505.02(B)(4) are established. At issue in this case, as was in *Smith v. Chen*, is whether the Appellants have established that they would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.

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

could not be unrun. It did not argue to the Court of Appeals that it would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.

In its Merit Brief, the Appellant argues that simply "asserting that the disclosure would preclude a meaningful remedy" is enough for the court of appeals to exercise jurisdiction over the matter in accordance with Article IV, Section 3(B)(2). A mere assertion cannot be enough to confer jurisdiction upon the appellate court. This Court in *Smith* indicated that a mere assertion is not enough when it stated at p. 8:

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).

Emphasis added. Affirmatively establishing that an immediate appeal is necessary is quite different than the Appellant's request that a mere assertion of a privilege is enough to satisfy R.C. 2505.02(B)(4)(b).

The First Appellate District Court of Appeals has recently affirmed this Court's reasoning in *Smith* that merely asserting that there is privilege and that its disclosure would preclude a meaningful post judgment remedy is not enough. In *Walker v. Taco Bell*, 1st Dist. Hamilton No. C-150182, 2016-Ohio-124, the First District applied *Smith v. Chen, supra* stating that the Appellant did not meet its burden of proving that an immediate appeal is necessary under R.C. 2505.02(B)(4)(b). *Walker* involved the trial court compelling the Plaintiff to sign medical authorizations, and such a claim of the physician-patient privilege was made. The appellate court dismissed the case for lack of final appealable order stating:

Walker has failed to establish why an immediate appeal of the trial court's order is necessary. Walker contends only that if privileged records are released "the proverbial bell cannot be unrun." But *Chen* makes clear that the disclosure of privileged documents during discovery, in and of itself, is insufficient to establish

why an immediate appeal is necessary under R.C. 2505.02(B)(4)(b). *Chen* at ¶ 8. Therefore, the maxim cited by Walker, without more, does not demonstrate why Walker cannot wait until the underlying lawsuit has been resolved to appeal the trial court's discovery order. *See Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044, ¶ 13.

The Fifth District Court of Appeals has also followed *Smith v. Chen, supra*, in holding that it is the burden of the party seeking appellate relief to prove that an immediate appeal is truly necessary, *see State DOT v. Bluescope Bldgs. North Am., Inc.*, 5th Dist. Tuscarawas No. 2015 AP 06 0027, 2016-Ohio-576.

In the matter of *Howell v. Park East Care & Rehab.*, 8th Dist. Cuyahoga No. 102111, 2015-Ohio-2403, the Eighth District also harmonized *Smith v. Chen, supra*, in dismissing the Appellant's appeal of a discovery order for lack of final appealable order when the Appellant failed to **affirmatively establish** that an immediate appeal is necessary, nor [did] it demonstrate how it would be prejudiced by the disclosure. *Howell* at p. 12.

Despite the Appellant's argument that clarification is needed regarding this Court's holding in *Smith v. Chen, supra*, the various courts of appeals have not demonstrated a need for clarification. Cases in which the appealing party has **affirmatively demonstrated** that a meaningful appeal could not be taken and/or a meaningful or effective remedy could not be had with an appeal at the end of the case are still being deemed final appealable orders.

Namely, cases cited by the Appellant such as *McVay v. Aultman Hosp.*, 5th Dist. Stark No. 2015 CA00008, 2015-Ohio-4050; *Lavin v. Hervey*, 5th Dist. No. 2015 CA 00021, 2015-Ohio-3458, and *Nationwide Mutual Fire Insurance Company v. Mark Jones*, 4th Dist. Scioto No. 15 CA 3709, 2016-Ohio-513 all have accepted jurisdiction of the appeals claiming a privilege, as the reviewing courts determined that the appellant **met the burden of proving both prongs of R.C. 2505.02(B)(4)**. By the various decisions being rendered throughout our appellate districts,

the appellate courts seem to be clear as to what the holding in *Smith v. Chen*, supra, is, and further clarification is not necessary.

B. The Second Prong of R.C. 2505.02(B)(4)(b) has not been met by the Cleveland Clinic:

The appellant has not satisfied the statutory requirements. The Statute specifically states:

(4) An order that grants or denies a provisional remedy and to which **both** of the following apply:

- (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
- (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

As stated by the Eighth District Court of Appeals, The Cleveland Clinic failed to establish that it would not be afforded a meaningful or effective remedy through an appeal after a final judgment is entered. This burden is solely on the Cleveland Clinic to prove, which it failed to do.

The trier of fact in this case will need to decide whether the Cleveland Clinic was negligent, and if so, what damages were caused to Ms. Burnham as a result of that negligence. Assuming *arguendo* that the matter proceeded to trial to decide these issues, the Appellant would still be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

The Cleveland Clinic has several legal remedies regarding the disclosure of information from the slip and fall incident report. First, it may file motions in *limine* pertaining to the admissibility of the document itself, and/or any information contained within the document. Then, post judgment, the Appellant has a meaningful remedy by appealing the disclosure of the

slip and fall incident report if the Appellant feels that **it was prejudiced and justice was obstructed by the disclosure of the report.**

Other than contending that the "bell will have rung" the appellant has not met its burden of proof of demonstrating why it must appeal now, creating piecemeal litigation, when it could appeal the matter after judgment with an appropriate remedy at the end of the litigation. Post judgment, the **appellate court could find that the Appellant was truly prejudiced** by being compelled to turn over a slip and fall incident report. Only those orders which truly require an immediate appeal should be permitted to be appealed early. This was explained by Justice O'Neill in *Smith v. Chen*, at p. 8:

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.

C. The Cleveland Clinic has Not Demonstrated How It Would Be Prejudiced by the Disclosure of the Slip and Fall Incident Report:

Once again, other than repeatedly arguing that the disclosure of the incident report "rings the proverbial bell and disclosure cannot be undone once it occurs" the Appellant failed to demonstrate how it would be prejudiced by releasing this slip and fall report. In this matter, the Appellant is essentially hiding the truth of what happened from the Appellee, the very person who provided a statement and the information to create the report. The parties should strive to share and exchange all relevant information pursuant to the Rules of Civil Procedure and in the pursuit of justice. In addition, the Cleveland Clinic is not prejudiced because pursuant to Civ. R. 26(B)(3) **A statement concerning the action or its subject matter previously given by the**

party seeking the statement may be obtained without showing good cause. Civ.R. 26(B)(3)

provides:

Subject to the provisions of subdivision (B)(5) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. **A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause.** * * * (Emphasis added).

Although the Appellee does not affirmatively know whether a direct statement of Ms. Burnham exists on the slip and fall report, as the report was never produced, it is extremely likely, and it has not been challenged by the Appellant, that the majority of the incident report is the very statement of Ms. Burnham, and therefore is discoverable **without good cause shown.**

A party should not be permitted to interrupt the free flow of relevant and discoverable evidence by using a giant proverbial rubber stamp with the words "attorney client privilege" on it to hide the contents of an incident report. How will the Cleveland Clinic be prejudiced if Darlene Burnham's slip and fall incident report is released to Darlene Burnham to see? How has justice been obstructed or hindered? How has the sacred doctrine of the attorney client privilege been breached? These are the questions that the Cleveland Clinic has not addressed and is unable to answer, simply because there would be no prejudice.

A document created in the ordinary course of business, when a slip and fall incident occurs, and which contains the statement of the slip and fall victim is not a communication between a client and its lawyer. It is not a document for which the Appellant met its burden of proof to be awarded an immediate appeal.

The incident report documenting Mrs. Burnham's slip and fall is extremely relevant and helpful in learning the facts of what happened on that day when Ms. Burnham fell. Such a document would give the trier of fact more evidence to consider when deciding this case on the merits. For some reason, the Cleveland Clinic does not want the facts of this fall in their building to come to light. The Cleveland Clinic has couched its argument to make it seem as if this incident report is a top secret, legal analysis-filled document. The Clinic refers to this document as an "SERS Report". As demonstrated in *Cleveland Clinic Health Sys. - E. Region v. Innovative Placements, Inc.*, 283 F.R.D. 362, 370 (N.D. Ohio 2012), cited by the Appellant's in their brief, "SERS Reports" are usually completed when a horrible medical mistake occurs for which litigation is imminent, and the Legal Department comes and gathers information regarding that medical mistake. This was not the situation in the case *sub judice*. The Appellant did not prove to the Eighth District Court of Appeals that this matter was truly privileged and that it would be prejudiced by not being able to appeal this matter prior to final judgment and thus it failed to meet both prongs of R.C. §2505.02(B)(4).

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

...in the instant case, the Cleveland Clinic failed to establish that they would not be afforded a meaningful or effective remedy through an appeal after a final judgment is entered. Burnham seeks the production of the incident report (SERS) documenting her slip and fall. In its supplemental brief, the Cleveland Clinic argues that the SERS report is subject to the attorney-client privilege, and once the report is disclosed "the bell will have rung" if it contains sensitive material, and it would have no adequate remedy on appeal. While the Cleveland Clinic contends that "the bell will have rung," it does not affirmatively establish that an immediate appeal is necessary, nor does it demonstrate how it would be prejudiced by the disclosure. Without an indication that the requirement in R.C. 2505.02(B)(4)(b) has been met, we do not have a final, appealable order. As a result, we cannot reach the merits of this appeal. *Id.* at ¶ 7.

As Justice O’Neill stated in his Opinion in *Smith v. Chen, supra* an order compelling disclosure of privileged material that would *truly* render a post-judgment appeal meaningless or ineffective may still be considered on an immediate appeal. Discovery is designated to promote the free flowing exchange of information relevant to the claims made in the action. Discovery takes place as a step towards reaching the merits of case. In part, this is why decisions made regarding discovery are generally not final appealable orders.

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

CONCLUSION:

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

The litany of cases cited by the Appellant where the various courts of appeals had deemed that the matters were ripe for appeal are distinguished with the simple fact that in *this* case, the Cleveland Clinic failed to affirmatively establish why an immediate appeal was necessary. This matter does not involve a communication from a lawyer to a client, it involves a slip and fall incident report that is created in the ordinary course of business when someone falls on the premises to document such.

A trial court's discovery order compelling the production of a document created in the ordinary course of business to document a slip and fall incident, which presumably contains the

statement of the party who fell, does not meet the burden of a communication between an attorney and his or her client which would require an immediate appeal. The truth of the facts of the incident cannot prejudice the Cleveland Clinic in any way. The information gathered in the incident report may very well help the Cleveland Clinic defeat Ms. Burnham's claims on the merits.

It is true that cases involving the compelled disclosure of privileged documents have been accepted as final orders in every appellate district in our state. What *Smith v. Chen, supra* has done is it has clarified that a simple assertion of a privilege is not enough. The party seeking the appeal has the burden of proving that both prongs of R.C. §2505.02(B)(4) are met. Unless the Appellate Courts follow the law, litigants will continue the practice of appealing discovery orders and delaying the administration of justice for years at a time. The proverbial giant rubber stamp with the word "privilege" should not be used as a way of protracting litigation, and delaying the resolution of cases on their merits unless the party who knocks on the courthouse doors can meet its burden.

For these reasons, Appellee Darlene Burnham respectfully requests that this Honorable Court Affirm the Eighth District Court of Appeal's dismissal of the appeal for lack of final appealable order in *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044.

Respectfully Submitted,

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I certify that a copy of this Memorandum in Response of Appellee was sent by ordinary U.S. Mail on this 24th, day of March, 2016 to the following:

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