Supreme Court of Ohio Clerk of Court - Filed March 28, 2016 - Case No. 2015-1127

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-1127

DARLENE BURNHAM
Plaintiff-Appellee,

-vs-

CLEVELAND CLINIC; CLEVELAND CLINIC HEALTH SYSTEM
Defendant-Appellants.

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT
CASE NO. CA 14 102038

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE

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INTRODUCTION OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice ("OAJ"). The OAJ is comprised of approximately one thousand five hundred attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The OAJ is submitting this Brief in support of the sound decision that was rendered by the Eighth Judicial District Court of Appeals. Prior to the release of *Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E. 3d 633, Ohio's intermediate appellate courts were devoting substantial time and effort to adjudicating one interlocutory appeal after another claiming that an order compelling discovery had to be immediately overturned because the "bell could not be unrung." These appeals have been routinely filed even without an actual threat that the release of the materials to opposing counsel would produce any personal embarrassment or financial harm. This appears to be such a case, as there is no claim that the Safety Event Report System (SERS) report contains any private patient information or other sensitive matters. Defendant-Appellants, Cleveland Clinic and Cleveland Clinic Health System, have predicated this appeal solely upon the novel theory that any incident report that might someday pass under an attorney's eyes is privileged and immune from disclosure. By simply filing their notice they have successfully delayed this straightforward premises liability lawsuit by a year-and-a-half, while driving up the costs of prosecuting the claim.

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Rather than acceded to Defendants' demands for a complete overhaul of a decision that is not yet a year old, this Court should reaffirm *Smith v. Chen*. Defendants' Merit Brief relies heavily upon the dissenting opinion precisely because their outdated position cannot be reconciled with the majority's holding. Nothing will be gained

through a return to the days of "anything goes," other than crowded dockets and increased legal fees. It should never be forgotten that justice delayed is justice denied. *Kyes v. Pennsylvania R. Co.*, 158 Ohio St. 362, 367, 109 N.E. 2d 503, 506 (1952).

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ARGUMENT

This Court has accepted a single proposition of law for consideration, which is as follows:

> **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 JURISIDCTION OVER THE ISSUE TO THE COURT OF APPEALS UNDER ARTICLE IV, SECTION 3(B)(2).**

This is an unremarkable premises liability case in which the property owner is refusing to produce an incident report that, no one seriously disputes, contains potentially relevant information. Such reports are not only routinely prepared when an injury is sustained by a business invitee, but are also regularly produced during discovery without objection. In the experience of the OAJ, property owners attempt to conceal such evidence only when the report contains damaging information that undermines the defenses that have been fashioned.

The instant Defendants have sought suppression of their SERS report on the grounds that the document was prepared in case litigation ensued. This convenient one-size-fits all rationalization can always be asserted to preclude discovery of all post-accident investigatory materials. The demand for immediate review of the trial court's unsurprising ruling is predicated upon R.C. 2505.02(B)(4). Following the 1998 amendments, an order that "grants or denies a provisional remedy" is appealable provided that both of the following conditions 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

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> 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); see Painter & Pollis, OHIO APPELLATE PRAC. (2014-15 Ed.) 113, §2:18. The phrase "provisional remedy" is defined to mean:

> "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. [emphasis added]

R.C. 2505.02(A)(3).

Eleven months ago, this Court rejected a line of authorities adopting a virtually unlimited interpretation of the provisional remedy clause. Nearly all of these short-sighted rulings are now being cited by the Defendants in support of a reversal. Collectively they essentially authorized an automatic right to an immediate appeal that could be invoked any time a claim of privilege was overruled, no matter how far fetched and unsubstantiated the objection might have been.

But in *Smith v. Chen*, 142 Ohio St.3d 411, an osteopath who had been sued for malpractice refused to produce a surveillance video that had been taken of his patient on the grounds of the work-product privilege. Just as in the instant case, an appeal was commenced under authority of R.C. 2505.02(B)(4) after the trial judge ordered disclosure. *Id.*, 142 Ohio St.3d at 412, ¶5. Writing for the majority, Justice O'Neill observed that the entry must not only grant or deny a provisional remedy, but the appealing party must also lack "a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." *Id.*, quoting R.C. 2505.02(B)(4). However, the osteopath "never argued, much less established" this statutory requirement. *Id.*, ¶6. This Court emphasized that this

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precondition for immediate review is not easily satisfied, and explained that:

> *** 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. *** [emphasis added]

Id., at 413, ¶ 8. The appeal of the discovery order was thus dismissed.

The instant appeal demonstrates why *Smith v. Chen* should remain intact, if not significantly fortified. Despite their protests to the contrary, Defendants will suffer no harm at all if Plaintiffs' counsel is allowed to review the SERS report. No personal information will be disclosed. No financial information will be divulged. It is inconceivable that the release of the investigator's findings could impair any legitimate interests that Defendants could possess. Defendants' vacuous position amounts to nothing more than an appeal is necessary "because it's privileged!" But that is not actual harm, and hardly serves to justify the delay and expense necessitated by immediate review.

Once the actual prejudice requirement is properly understood, the authorities Defendants have offered are easily distinguished. In *McVay v. Aultman Hosp.*, 5th Dist. Stark No. 2015CA00008, 2015-Ohio-4050, a work-product privilege had been asserted over a "note" that had been prepared by a hospital risk management employee in anticipation of litigation, which addressed a discrepancy in the patient's cardiac monitor readings. *Id., ¶3-4.* By itself, the release of such trial preparation materials would have alerted the opposing party to additional evidence that could be used against

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the defense. *Id., ¶14.* Such disclosures furnish an unfair advantage, and are protected for that very reason by the work-product doctrine. *Hickman v. Taylor*, 329 U.S. 495, 509-510, 67 S.Ct. 385, 392-393, 91 L.Ed. 451 (1947). No such demonstration has been offered in the instant case, as there is nothing untoward or inequitable about allowing review of an accident investigation report in premises liability action.

The decision that was rendered in *Lavin v. Hervey*, 5th Dist. No. 2015CA00021, 2015-Ohio-3458, is equally inapposite. The appeal had been commenced by an attorney and his law firm challenging the trial court's order to disclose records that had been prepared in the course of the representation of a deceased client. *Id., ¶1-6.* Once again, forcing the production of such confidential materials threatens to place the attorney and/or client into a seriously disadvantageous position, which cannot be corrected later through a direct appeal. That is not the case in this instance, as the SERS report was not prepared by an attorney and will not divulge any strategies or plans to defend the lawsuit. Defendants simply do not want Plaintiff to obtain information that an investigator obtained that apparently supports the premises liability claim. Because actual prejudice has not been established in the record, the premature appeal was properly dismissed.

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CONCLUSION

In order to prevent further abuses of the appellate court system and promote the prompt administration of justice, this Court should reaffirm the validity of *Smith v. Chen* and uphold the Eighth Judicial District's sound dismissal order in all respects.

Respectfully Submitted,

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