Supreme Court of Ohio Clerk of Court - Filed April 13, 2016 - Case No. 2015-1127

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-1127

ON APPEAL FROM

THE EIGHTH DISTRICT COURT OF APPEALS

CUYAHOGA COUNTY, OHIO

CASE NO. CA 14 102038

DARLENE BURNHAM

Plaintiff-Appellee,

-vs-

CLEVELAND CLINIC, et al.

Defendants-Appellants.

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

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I. INTRODUCTION

Plaintiff-Appellee Darlene Burnham (hereinafter "Appellee") and her Amicus partner ignore the unrefuted averment that the "Safety Event Reporting System" (hereinafter "SERS Report") is an attorney-client communication, in addition to controlling authority which previously determined that similar risk management reports are not subject to discovery pursuant to R.C. 2317.02. Appellee requests that this Court affirm the decision of the Eight District Court of Appeals and continue the practice of denying parties compelled to produce attorney-client communications the right to have such orders reviewed via interlocutory appeal. Appellee's contention disregards the simple fact that the mere production of the document at issue obliterates the purpose and intent of this common law and statutorily enumerated privilege, the destruction of which cannot be undone at a later time. <u>This fact is not in dispute</u>.

Defendants-Appellants Cleveland Clinic and Cleveland Clinic Health System (hereinafter "Appellants") seek to prevent the proverbial bell from ringing in an effort to protect this cornerstone tenet of American jurisprudence in this case, and every case that would be the subject of the "new rule" Appellee, her Amicus, and multiple lower courts are trying to manufacture out of this Court's decision in *Smith v. Chen,* 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.23d 633, despite this Court's express statement that *Smith* was never intended to create the same. *Id.* at ¶9.

Expanding *Smith* beyond the facts of that case, i.e. the parties' respective disobeying of this Court's order to assert how the procedural requirements of R.C. 2505.02(B)(4), without any further clarification as requested by Appellant's herein, would subject <u>any</u> privilege to irreversible damage.

Appellee's erroneous conclusion that there would be a meaningful and effective remedy available to Appellants <u>after</u> the attorney-client communication was disclosed underscores the need for clarification of *Smith, supra* to ensure that it is applied consistently and not utilized as a device to coerce. Simply put, without access to an interlocutory appeal, the only method to ensure that privileged material is not disclosed would be to settle or dismiss the case, depending on which party was compelled to disclose the information.

For purposes of this appeal, the sanctity of the attorney-client privilege cannot be restored absent an interlocutory appeal because once the content is disclosed, there can be no returning to a point in time where the harm could be undone. The compelled disclosure of the privileged material is a final, appealable order that warrants an interlocutory appeal because without an immediate review of such an order, the affected party would be left without a meaningful and effective remedy. Accordingly, the procedural requirements of R.C. 2505.02(B)(4) have been satisfied and the Eighth District Court of Appeals erred in dismissing this matter for lack of

a final, appealable order under a flawed analysis of this Court's decision in *Smith, supra.*

II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Appellee and her Amicus concede that the trial court's order in this case is a "provisional remedy" for purposes of R.C. 2505.02(B)(4), as it compels the discovery of privileged material as defined under R.C. 2505.02(A)(3), or that the order "determines the action with respect to the provisional remedy" as required under R.C. 2505.02(B)(4)(a). (See Appellee's Brief). Accordingly, the only issue that needs to be addressed for purposes of R.C. 2505.02(B)(4) is the "meaningful or effective remedy" prong set forth under R.C. 2505.02(B)(4)(b).

Appellants would be left without a meaningful and effective remedy for purposes of R.C. 2505.02(B)(4)(b) because the "privilege" enjoyed by the communication cannot be restored once the communications have been disclosed. See *Ramun v. Ramun,* 7th Dist. Mahoning No. 08 MA 185, 2009-Ohio-6405, ¶24-26.

> The attorney-client privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 660, 635 N.E.2d 331. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn v. United States* (1981), 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584.

Sutton v. Stevens Painton Corp., 193 Ohio App.3d 68, 74, 2011-Ohio-841, 951 N.E.2d 91, 96, ¶16 (8th Dist.).

In their dissent, Justices Kennedy, O'Donnell and French specifically noted that "[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. Quoting *Schmidt v. Krikorian,* 12th Dist. Clermont No. CA2011-05-035, 2012-Ohio-683, the dissenting Justices referenced the "proverbial bell" analogy relied upon by Appellants as follows:

> 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.

Appellee and her Amicus contend that Appellants have not established the second prong of R.C. 2505.02(B)(4) by relying solely on the "proverbial bell cannot be unrung" maxim; however, this conclusion is unsupported by longstanding Ohio law on the issue and ignores the seminal fact that a privilege is eradicated once the communication is distributed beyond the attorney-client relationship and cannot be restored at any point thereafter. See *McVay v. Aultman Hosp.,* 5th Dist. Stark No.

2015CA00008, 2015-Ohio-4050, ¶14 ("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."). **The fact that the party's communications with their counsel cannot be retracted is the harm that precludes a meaningful and effective remedy and thereby establishing the second prong of R.C. 2505.02(B)(4)**. See *McVay, supra.* That is a sufficient explanation as to how Appellants and any other similarly situated litigant would be prejudiced and left without a meaningful and effective remedy after final judgment. (See Appellee's Brief at p. 6).

Contrary to Appellee's assertion that "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", Appellants are instead concerned with preserving the statutory and common law privileges available to civil litigants in this State. (See Appellee's Brief at p. 7, emphasis in original). Notwithstanding, a party's right to an immediate appeal for truly privileged documents, like the SERS Report in this case, warrants such a review, even at the expense of hasty litigation, to ensure the viability of the various privileges.

Further, Appellants agree that "parties should not be permitted to persistently use the shelter of asserting a mere ***claimed privilege*** to attempt to hide relevant information and delay litigation", but Appellants in this case went beyond "merely claiming" a privilege in this case, thereby establishing the need for appellate review on the issue. (See Appellee's Brief at p. 7; see also T.d.). Specifically, Appellants submitted an unrefuted affidavit establishing that the SERS Report is an attorney-client communication and 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.).

Notably, Appellee never attempted to depose the affiant nor did she challenge the veracity of the sworn statements set forth in the affidavit. (T.d.). The trial court's decision to order the disclosure of the SERS Report, despite any contrary evidence that the document was not an attorney-client communication, is a conclusion that warrants an immediate appeal under R.C. 2505.02(B)(4). Simply put, the trial court's order at issue in this case compelled "disclosure of privileged material that would *truly* render a postjudgment appeal meaningless or ineffective" and must be "considered on an immediate appeal." *Smith,* at ¶9, emphasis in original.

As noted above, unlike the parties in *Smith, supra,* Appellants herein established the second prong of R.C. 2505.02(B)(4) when asked to do so in the wake of this Court's decision. (See Appellate Docket, "A.d." 10). Appellees' discussion

of this Court's decision seeks to capitalize on the Eight District's erroneous reading of *Smith* in concluding that "[a]ffirmatively establishing that an immediate appeal is necessary is quite different than the Appellant[s'] request that a mere assertion of privilege is enough to satisfy R.C. 2505.02(B)(4)(b)." (See Appellee's Brief at p. 8). However, Appellants have affirmatively established that an immediate appeal is necessary because an interlocutory appeal is the **only** manner to preserve the privilege at issue.

The flawed analysis by the Eighth District has been relied upon by the First District Court of Appeals, further expanding this Court's decision in *Smith* toward the unintentional creation of a new rule. See *Walker v. Taco Bell,* 1st Dist. Hamilton No. C-150182, 2016-Ohio-124, citing *Burnham v. Cleveland Clinic,* 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044; see also *Smith, supra* at ¶9. Appellee's contention that "further clarification" from this Court "is not necessary" is subverted by her own citation to case law that is in direct conflict with other appellate jurisdictions in this State. See *McVay, supra* and *Lavin v. Hervey,* 5th Dist. Stark No. 2015CA00021, 2015-Ohio-3458.

Moreover, Appellee's attempt to distinguish *McVay* and *Lavin* from the instant matter falls short because in each of these cases, there is no indication that the appellants did anything more than simply indicate that the privilege could not be restored once the documents were disclosed. **Nonetheless, the reviewing courts**

concluded R.C. 2505.02(B)(4)(b) had been satisfied. See *McVay, supra* and *Lavin, supra.* In this case Appellants "affirmatively established" that each of the R.C. 2505.02(B)(4) prongs has been satisfied conferring jurisdiction to the Eighth District Court of Appeals over the issue and a decision on the merits should have been issued. See *Smith,* supra; see also *McVay, supra* and *Lavin, supra.*

Appellee and her Amicus take their analysis one step further, ostensibly laying the groundwork for further appeal on this issue, and contend that Appellants have failed to establish that they would be prejudiced as a result of the disclosure of attorney-client communication as ordered by the trial court. Appellee and her Amicus take the unreasonable position that the communication between the client and counsel must be a "top secret, legal analysis-filled document" in order to come under the umbrella of the attorney-client privilege and that because this is a slip and fall report, the SERS Report cannot be all that important. (See Appellee's Brief at p. 13; see also Amicus Brief).

However, as noted at length above, it is the invasion of the attorney-client privilege itself that is the prejudice. If this basic tenet of the American justice system requires further explanation to Appellee or her Amicus then nothing short of having their own client communications ordered to be disclosed will get the point across; should this Court affirm the Eighth District's decision, Appellee could set herself up

for such a disclosure in the future, while depriving herself of the right to an immediate appeal.

Appellee additionally asserts that the SERS Report is "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." (See Appellee's Brief at p. 13). This contention ignores the simple fact that the same procedure for investigating medical negligence and slip and falls occurs when potential for litigation arises. The procedure for reporting potentially adverse events could have been more fully explored had Appellee considered challenging the uncontested affidavit that established the SERS Report is an attorney-client communication. Once again, it is the invasion of the privileged communication that is the prejudicial and irrevocable harm, not the content itself.

Further, Appellee was advised of the witnesses present at or around the time of the fall and other discovery routes would have enabled her to obtain the identity of the SERS Report author, whether any statements were made or any other relevant information from that time frame, without invading Appellants right to the asserted privilege. While the content of the SERS Report and any communication related thereto is subject to the attorney-client privilege, the facts surrounding the reporting are not. Appellee can therefore obtain the information she is seeking as outlined in

her Brief from sources other than the privileged SERS Report without violating the attorney-client privilege in this case.

This Court has been presented with the opportunity to further clarify its decision in *Smith* so that it is not misconstrued to create the new rule that it was expressly seeking to prevent. The limited holding of *Smith* must be clarified to ensure that lower court's orders that infringe upon a party's asserted privilege are subject to immediate appeal so that a meaningful and effective remedy can be had at that time. The failure to clarify the decision in *Smith* will only result in the further degradation of long-standing common law and statutory privileges in future litigation.

III. CONCLUSION

It is unequivocal that the trial court's order to produce the SERS Report in this case is a provisional remedy that determines the action and that Appellants would be left without a meaningful and effective remedy after final judgment if denied an interlocutory appeal; Appellants have therefore 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). Appellee's assertion that anything more is required is unfounded and runs contrary to the well-established law on this subject as well as this Court's explicit instruction that the *Smith* 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[.]" *Id.* at ¶9. The fact that the "proverbial bell cannot be unrung" concisely establishes the prejudice and the lack of a meaningful and effective remedy that would be caused if an interlocutory appeal was not permitted to review matters of privilege. See *McVay, 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,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served by Regular U.S. Mail on this 13th day of April, 2016 to the following:

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