

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. : :

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

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I. INTRODUCTION

A. Appellee's Proposed "Truly Privileged" Standard Is Amorphous And Unworkable.

In the Brief of Appellee, Darlene Burnham argues repeatedly that both R.C. 2505.02, as well as this Court's recent decision in *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, stand for the proposition that parties are entitled to an immediate appeal from an order compelling disclosure of privileged information if, and only if, the information ordered disclosed is "truly privileged." (Emphasis added) In fact, appellee bolds and underscores the terminology "truly privileged" over and over throughout her Merit Brief, but does not give any indication to this Court what the standard for "truly privileged" as opposed to merely "privileged" might be. Nor does appellee seem to meaningfully dispute that the decision below is not consistent with this Court's mandate in *Smith* that interlocutory appeals from orders requiring production of privileged information not be made more difficult.

In The Academy of Medicine of Cleveland and Northern Ohio's ("AMCNO") Amicus Brief, *Lavin v. Hervey*, 2015-Ohio-3458, 5th App. No. 20, is discussed at length for several propositions, including that:

- Requiring production of confidential and privileged information falls within the category of provisional remedy because **there will no longer be an opportunity for the attorney to preserve the subject information, once the disclosure occurred.**

This is a very basic point that appellee seems to have either not picked up on or ignored. Once privileged information is disclosed, it can never again be preserved. Nor may it be recovered.

B. R.C. 2505.02(B)(4) Guarantees An Effective Remedy From Orders Requiring Disclosure of Privileged Information.

Per R.C. 2505.02(B)(4), an order is immediately appealable if the appealing party will not be afforded a meaningful remedy by an appeal following final judgment:

(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:

(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.

This essential framework was preserved by *Smith*. Only subsection (b) is at issue in this appeal. The sole question raised by this subsection is whether an appealing party will have an effective appellate remedy following final judgment. As pointed out by the court in *Lavin*, once privileged information is ordered disclosed, the ability to protect the privilege is eliminated. At that juncture no subsequent appellate remedy can be “meaningful” or “effective.” If the point of an interlocutory appeal is to protect a privilege jeopardized by a trial court discovery order, then the only “effective” appellate remedy is review prior to the time of disclosure to the opposing party. Once disclosure occurs, the privilege is forever lost.

Smith permits appellate courts to require briefing on the question of whether all requirements of R.C. 2505.02(B)(4) have been complied with i.e., whether the order

appealed from determined the action with respect to the provisional remedy. The decision below takes this holding much further by establishing a hierarchy of privileges, some of which will be subject to an immediate appeal when breached, but some of which will not.

C. The Decision Below Threatens Ohio’s Peer Review Protection.

Additionally, Ohio’s peer review statute, as well as the legislative intent behind the statute to make peer review documents immune from discovery or from use in civil proceedings, was discussed extensively in AMCNO’s Merit Brief. These arguments were raised while discussing *Stewart v. Vivian, M.D.*, 2012-Ohio-228, ¶25-26, 12th App. No. CA2011-06-050, and its mandate (in the context of Ohio’s peer review statute, R.C. 2505.252) that:

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.

Although this appeal is not from an order requiring production of peer review file materials, there is no question that the holding below will be applied with equal force to those types of discovery disputes, which occur frequently. Plaintiffs will be able to argue that production of peer review file materials are not immediately appealable based on the same sort of tenuous arguments made herein, i.e., that that a post-judgment appeal is good enough. These determinations will not only be almost entirely subjective, but the standard being applied will likely prove unworkable.

Appellee has not addressed any of these important points. In fact with regard to the issue of whether *Smith* will make interlocutory appeals from orders compelling production of privileged information more difficult, appellee seems to have assumed that will be case. Appellee even cites the *Walker v. Taco Bell*, 2016-Ohio-124, 1st App. No. C-150182, for the proposition that sometimes a party is not entitled to an appeal from an order requiring disclosure of privileged information, even if the information ordered disclosed is actually privileged. Again, appellee seems to assume that some privileged information is more important than others. Left unanswered is the question of how these determinations will actually be made.

II. LAW AND 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 *Burnham* Standard Is Unworkable.

Appellee fails to address how this Court should define when an appellant will not have a “effective remedy post-judgment,” even though that is the essence of the challenged holding. For example, assuming that 1) Ms. Burnham was actually injured in the fall that is the subject to this litigation, and 2) assuming further that a jury determines that the acts or omissions of the defendant were the proximate cause of her injuries, and 3) assuming further that she incurred compensable damages as the result of this injury, how will a post-judgment appeal play out logistically? Based on the foregoing assumption, if Ms. Burnham received a large verdict, then defendants would

need to show reversible error. The paramount question of the improper disclosure of privileged information will become secondary.

Certainly, in such cases, if an appellate court determines that the information ordered disclosed was in fact privileged, the case will not automatically be reversed. Rather prejudicial error will need to be established, i.e., demonstrating that but for the production of privileged information, the verdict likely would have been different.

This scenario will result in a situation where there is an incentive for plaintiffs to seek discovery of privileged information, even privileged information such as that at issue here that has been legislatively deemed to be immune from use either in discovery or in civil litigation.

The protection of privileged information is a bedrock principle of the American system of jurisprudence. The concept of permitting the widespread production of privileged information without the benefit of interlocutory review is a very serious one. Yet, the ramifications of allowing discovery of privileged information do not seem to have been thought through by appellee, at least not as reflected in her Merit Brief.

B. Appellee's Claim That Interlocutory Appeals Are A Pretense For Delay Is Wrong.

Appellee makes the argument that interlocutory appeals by institutional defendants, such as the Cleveland Clinic, are merely delay tactics. This argument is a weak canard and should be rejected by this Court. Institutional defendants, or other defendants who are perceived to have significant resources, have no greater desire to delay civil litigation than any other party. In fact, these defendants have the exact same motivations as other parties to see a case quickly and efficiently processed through the court system. There is not scintilla of evidence contained in the record that the

Cleveland Clinic engaged in any sort of delay, intentional or otherwise, in the present matter. To suggest that any delay somehow automatically benefits defendants is not serious.

The delay in this case was caused by Ms. Burnham's request for discovery that she knew to be privileged, with the hope that a trial court would fail to enforce case and legislative precedent and order the information produced. This is exactly what has happened.

If there is truly an inordinate delay caused by the institution of an interlocutory appeal, the various appellant districts may set up an accelerated system for reviewing such matters, or they may automatically assign such matters to the accelerated dockets that already exist in many appellate jurisdictions. Defendants have no control over the speed of case handling in the court of appeals and it is fundamentally unfair to deny them due process via procedural remedies that have long been in place, based on an arbitrary belief that avoiding delay is more important than preserving privilege. Further, the appeals in *Smith* or *Burnham* were not dismissed until well after oral arguments. It is hard to see how the new standard is self-evidently more time efficient than the former standard.

C. Appellee Has No Right To Or Need For The Disputed Discovery.

The assertion that Ms. Burnham needs the contents of the Cleveland Clinic's SERS ("Safety Event Reporting System") to prosecute her claims is flimsy. If such a need exists, it certainly is not established in appellee's brief. As admitted by Ms. Burnham, there is no evidence of any written or oral statement from her contained in the privileged information, nor is there any indication in the record that such a statement was sought in discovery, but not produced. The post-incident investigation

by the Cleveland Clinic, as pursuant to well-established Ohio public policy, was done for the purpose of determining not only potential the cause(s) of the incident from the perspective of the Cleveland Clinic employees involved, but also the existence of any remedial measures that might be implemented to prevent future incidents. Obviously, if such documentation becomes admissible during discovery and/or trial, the result will be to disincentive such proactive measures.

D. The *Burnham* Standard For Demonstrating Lack of Effective Post-Judgment Remedy Relies Entirely On Speculation And Conjecture.

As argued in the AMCNO's Merit Brief, it calls for speculation for defendants to predict exactly how, when, and to what degree they will be prejudiced by the lack of appellate remedies, at the time that an interlocutory appeal is commenced. Defendants have no way of knowing in advance how such information will be used by opposing counsel or whether such information will be allowed as evidence at trial. Nor can defendants predict the impact of the improper use of the privileged information at trial on a jury's deliberations and verdict.

The AMCNO's Merit Brief also discussed at some length the existing state of uncertainty as to how and when an appellant appealing the required production of privileged information must "affirmatively establish" the insufficiency of a post-judgment appeal. Again, is this an issue that must be raised at the time of the filing of the notice appeal, as was done by the Cleveland Clinic in this case? Or must such arguments be included as an additional section in the appellant's Merit Brief? Or should there be supplemental briefing, if and when requested by the court, as occurred in both the present case and *Smith*?

Another issue not addressed by appellee is whether an appellant has an obligation to “affirmatively establish” that the information required to be produced in the order appealed from is actually privileged (or “truly privileged”) i.e., whether the privileged status of information will be assumed for the purpose of meeting the requirements of *Smith*.

R.C. 2505.02, as well as the long line of cases interpreting this statute prior to *Smith* and the decision below, appropriately protected against the disclosure of privileged information, and served as a check on improper discovery requests and on a trial court’s refusal to protect against the forced disclosure of privileged information. These legislative and statutory pronouncements should not be discarded. But, that will be the precise result if the decision below is permitted to stand.

III. CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Eighth District Court of Appeals, and permit an appeal on the merits from the trial court’s order of production of privileged information. In so doing, this Court should also clarify its holding in *Smith*, particularly the portion of that opinion providing that interlocutory appeals should be no more difficult to maintain post-*Smith* than they were pre-*Smith*.

Respectfully submitted,

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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 13th day of April, 2016 to the following:

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