

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION AND OHIO STATE MEDICAL ASSOCIATION, IN SUPPORT OF APPELLANTS

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LAW AND ARGUMENT

The Court’s decision in this case will impact all litigants who seek to protect privileged information from compelled disclosure to a litigation adversary. Appellee and its supporters, however, argue that this case is limited to what they characterize as an unremarkable incident report. (*See generally* Appellee Merit Brief, “Appellee Brief,” filed March 28, 2016; Brief of Amicus Curiae, Ohio Association for Justice, in Support of Appellee, filed March 28, 2016, “OAJ Brief,” at 3.) Although Appellee has not seen the report, she concludes that it is not privileged. (Appellee Brief at 11-14.) Similarly, an amicus filing in support of Appellee urges this Court to affirm *Burnham*’s refusal to allow interlocutory appeal because “there is nothing untoward or inequitable about allowing review of an accident investigation report in premises liability action.” (OAJ Brief at 6.)

Despite Appellee’s assertion to the contrary, the matter before the Court is much broader than the single report at issue in this case. It would be a mistake for this Court to focus only on the specific report at issue in this case, as the Appellee and OAJ have done. What is at issue is not whether appellate review ultimately determines that the trial court was right and the incident report is discoverable, or whether it determines that the trial court was wrong and the incident report is privileged. In the bigger picture, what matters is *when* appellate review occurs—before or after disclosure of the document—and *what* a party seeking an immediate appeal of allegedly privileged material must show to invoke the appellate court’s jurisdiction.

If review is delayed until after disclosure of the document, as Appellee and her amicus curiae argue, then appellate review is meaningless in any case where the discovery of privileged material has been compelled. When this happens, privileged information—which by its very

nature is not discoverable¹—is revealed to the opposing party and the status quo could never be restored. When this occurs, the harm can never be undone to the producing party, even if the appellate court ultimately determines that the produced documents are privileged. That result, the wholesale denial of meaningful appellate review, is what is “untoward” and “inequitable.”

In contrast, if an appellate court reviews the trial court’s interlocutory order immediately, before forced disclosure of privileged information, the privileged information can be protected. If an appellate court agrees that the trial court correctly determined that the assertion of privilege was unwarranted, it will affirm the order and production will occur. The only harm to either party may be a short delay. If the trial court’s order was wrong, however, the appellate court would reverse and prevent the erroneous and irreparable disclosure of privileged information. A short delay in the litigation proceedings is a small price to pay for ensuring privileged information is not inappropriately ordered to be produced to the detriment of the party claiming the privilege.

Under the process historically followed by Ohio courts before *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, trial court orders compelling the production of potentially privileged material were immediately appealable. (*See Amici Merit Brief*, filed February 25, 2016, at 3-7.) This method squares with the well-established law that privileged material is not discoverable in the absence of a clearly recognized exception (*i.e.*, the crime-fraud exception). *See Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶¶ 24-54. If a party was compelled to disclose privileged information, which by its nature is not discoverable, there was a presumption of harm. *See State*

¹ “Parties may obtain discovery regarding any matter, ***not privileged***, which is relevant to the subject matter involved in the pending action * * *.” Civ.R. 26(B)(1) (addressing scope of discovery) (emphasis added).

v. Muncie, 91 Ohio St.3d 440, 451, 2001-Ohio-93, 746 N.E.2d 1092 (“The proverbial bell cannot be unrung.”); *Walker v. Firelands Community Hospital*, 6th Dist. Erie No. E-03-009, 2003-Ohio-2908, ¶ 12 (“[T]he damage is done and cannot be undone”).

Despite this Court’s statement that its decision in *Smith v. Chen* was not meant to change Ohio law or make appeals of discovery orders “more difficult to maintain,”² the Eighth District significantly raised the bar on establishing lack of a meaningful appellate remedy in this case. *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044. In *Burnham*, the Eighth District misapplied *Smith v. Chen* (a case involving the attorney work-product qualified privilege)³ to overturn years of precedent by requiring a hospital to produce information potentially protected by the attorney-client privilege to its litigation adversary, without permitting an immediate appeal of the discovery order. It did so by imposing an impossibly high burden on the hospital to show that it will be prejudiced if appellate review is delayed until the end of the action. *Id.* at 13. In so doing, the Eighth District declined to recognize the inherent prejudice created by the disclosure of privileged information. It also improperly rejected the hospital’s arguments as to why the information at issue warranted immediate review under R.C. 2505.02(B)(4).

In this regard, the hospital: (1) submitted an unrefuted affidavit to show that the incident report was privileged because it was drafted to notify and advise counsel of an incident that could lead to litigation; (2) relied on well-established Ohio case law that allowed immediate appeal of discovery of material claimed to be privileged; and (3) relied on a recent federal court decision holding that a similar incident report (submitted by the same hospital in a different case)

² *Smith v. Chen*, 142 Ohio St. 3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 9.

³ Material protected under the attorney work-product doctrine is discoverable upon a showing of good cause. *See* Civ.R. 26(B)(3).

was a privileged communication protected from disclosure. (*See* Brief of Appellant, filed February 25, 2016, at 2-4, 8, 18.) Thus, the hospital did not simply assert a privilege without evidentiary or legal support (as was done in *Smith v. Chen*). Despite the hospital’s affirmative showing that the report at issue is privileged, the Eighth District, nonetheless, declined appellate review of the discovery order under *Smith v. Chen*. What matters most to the Ohio Hospital Association and the Ohio State Medical Association (“Amici”), is not how the Eighth District would have ruled in reviewing the lower court’s order, but that it refused to do so at all under these circumstances.

In contrast, the Tenth District recently applied *Smith v. Chen* the way it should be applied. *State ex rel. Ohio Academy of Nursing Homes, Inc. v. Ohio Dept. of Medicaid*, 10th Dist. Franklin No. 16AP-102, 2016-Ohio-1516. The Tenth District considered what an appellant must show to survive a motion to dismiss an interlocutory appeal under *Smith v. Chen*. The appellant had been ordered to produce witnesses for depositions which it claimed were covered by the attorney-client privilege. In its analysis, the Tenth District recognized that where there is no “safeguard against the release of the allegedly privileged material” and the order “requires the final disclosure of allegedly confidential matter,” the second part of the R.C. 2505.02(B)(4) test has been met.⁴ *Id.*, ¶ 9. The appellant was not required to show precisely how it would be harmed or the specific prejudice it would suffer if the depositions were taken and it appealed after the final judgment. Instead, the court recognized the inherent harm resulting from compelled disclosure of attorney-client privileged information to one’s litigation adversary and the lack of a meaningful remedy if the producing party was required to wait until final judgment

⁴ The second part of this test is that “[t]he 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.” R.C. 2505.02(B)(4)(b).

to appeal. *See also Bausman v. American Family Insurance Group*, 2d Dist. Montgomery No. 26661, 2016-Ohio-836 (applying *Smith v. Chen* sua sponte and finding “an immediate appeal is necessary in this case * * * [because] producing the disputed emails would likely make a meaningful and effective appellate remedy impossible”).

Appellee and her amicus curiae caution that the hospital’s “vacuous position” invites abusive appeals for the purpose of delay, “no matter how far fetched and unsubstantiated the objection might have been.” (OAJ Brief at 7-8.) But this is an empty warning; they have not cited a single example of an abusive appeal. (*See generally*, Appellee Merit Brief and OAJ Brief.) This could be because, regardless of *Smith v. Chen*, attorneys are ethically and legally prohibited from filing “far fetched” and “unsubstantiated” appeals. Attorneys and parties may not, for example, file an appeal in order to cause an “unnecessary delay or a needless increase in the cost of litigation.” R.C. 2323.51(A)(2)(a). If such a frivolous appeal were filed, the injured party would have a remedy under Civil R. 11 and/or R.C. 2323.51. Thus, Appellee’s unsupported fear of abusive litigation could be dealt with in other ways. It does not justify denying litigants a right to a meaningful appeal to protect privileged information.

The Eighth District’s erroneous interpretation of *Smith v. Chen* jeopardizes far more than the content of the specific incident report at issue here. Instead, the reasoning set forth in *Burnham* jeopardizes the ability of Ohio’s litigants to protect privileged information by precluding their ability to seek any meaningful appellate review of trial court orders requiring the disclosure of privileged information. Of special concern to Amici, the Eighth District’s decision puts Ohio’s health care providers at risk, in each of the hundreds of cases per year they are involved in, of erroneously compelled disclosure of their own privileged information as well as

the privileged information of their non-party patients (which Amici's members are often required to protect).

CONCLUSION

It is a general rule of our judicial system that privileged information is not discoverable. *See* Civ.R. 26. Being forced to divulge privileged information in litigation is not only contrary to the Ohio Rules of Civil Procedure, it is by its very nature irreparable. Once a party's privileged information is shared, there is no way to erase it from the knowledge of those who receive it and no way to restore the parties to the same position they were in prior to the disclosure. For example, once a patient's privileged communication with her doctor is divulged, her privacy (and trust in that privacy) can never be restored.

This Court must instruct Ohio's appellate courts that meaningful appellate review *before* the material is disclosed is appropriate and necessary. This is particularly true where, as here, a legitimate claim for privilege, supported by evidence and legal authority, has been made. Otherwise, litigants, including hospitals and physicians will be left without meaningful recourse to address decisions compelling disclosure of sensitive confidential and privileged communications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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