

Ohio Supreme Court Decision Impacts Discovery Issues in Medical Malpractice Cases

By Martin T. Galvin, Reminger Co., LPA

In *Burnham v. Cleveland Clinic Foundation*, Case No. 2015-1127, the Ohio Supreme Court recently issued a decision that will make it easier to file immediate (aka, "interlocutory") appeals from trial court decisions requiring production of privileged information during discovery. Reminger was honored to prepare and file *Amicus* briefs in *Burnham* at both the jurisdictional and merit levels of the Supreme Court process, on behalf of AMCNO.

This issue often arises in the context of medical malpractice plaintiff attorneys demanding to see records of hospital quality assurance committees, or other peer review materials. Another context is when plaintiff attorneys request information to identify roommates, or information concerning other patients at the same facility who had a similar procedure performed, or were treated by the same physician. Although these materials are all privileged under the law, and thus should not need to be produced, some trial courts in the past have ordered them produced nonetheless. The remedy for this situation (prior to April 2014) was always to take an immediate appeal to the appropriate court of appeals, per Ohio Revised Code 2505.02.

In 2014, the Supreme Court made it much more difficult to take such an immediate appeal, in the decision of *Smith v. Chen*. In *Chen*, the Supreme Court said that in order to take such an immediate appeal, the appealing party needed to demonstrate that he would not have a "meaningful remedy" if he waited until after trial to file an appeal. It was widely believed that many appellate districts were taking a very narrow view of this standard. As a result, a large number of appeals from decisions requiring the production of privileged information were dismissed soon after they were filed, without a decision on whether they were privileged.

The *Chen* decision created a very confusing situation. The twelve Ohio district courts of appeals had no guidance as to what constituted a "meaningful remedy." More fundamentally, once a privileged document is ordered disclosed, it can never be retrieved. The damage is done forever. As they say, once a bell is rung, it can never be unring. Simply, the application of the *Chen* decision by the lower courts proved inconsistent.

The *Burnham* decision does not go quite as far as we had hoped. Nevertheless, most adverse discovery orders in the medical malpractice context should once again be immediately appealable, if they involve quality assurance or peer review materials. This is so because the Court said that matters involving constitutional protections, statutory protections, or attorney/client protection are always final and appealable. The decision is definitely a major step in the right direction.

The quality assurance privilege was created by a statute, and thus fits squarely into the category of immediately appealable matters under the new *Burnham* standard. The majority opinion did state that other matters, such as attorney work product privilege disputes, are only appealable at the discretion of the court of appeals.

The concurring opinion would have went further and simply reinstated the status quo prior to *Smith v. Chen*. Under the concurring decision, all trial court orders requiring production of privileged information would be subject to an interlocutory appeal as a matter of right. This approach would have offered the benefit of superior predictability, which is always important in litigation.

Generally, we are pleased with the opinion of the Ohio Supreme Court, as we believe that it will enhance our ability to effectively defend physicians and hospitals in medical malpractice actions. We hope and believe that *Amicus* briefing on behalf of AMCNO helped produce the decision rectifying this area of the law. The *Burnham* decision will also ensure that quality assurance and peer review committees can continue to operate in private, without concern that confidential reviews will be disclosed during subsequent lawsuits.

As a side note, although the *Burnham* decision actually involved a slip and fall lawsuit, not medical malpractice, the discovery issues implicated are unquestionably directly relevant to malpractice litigation.

If you have any questions concerning this issue, please feel free to contact the AMCNO or the author of this article. ■

(Editor's Note: Mr. Galvin was the recipient of the AMCNO 2016 Presidential Citation Award.)

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