

SUPREME COURT OF OHIO

KENNETH C. HAGEMAN )  
 )  
 Plaintiff-Appellant )  
 )  
 vs. )  
 )  
 SOUTHWEST GENERAL HEALTH )  
 CENTER, et al. )  
 )  
 Plaintiff-Appellees )

SUPREME COURT CASE NUMBER:  
2007-0376

On Appeal From The Court of Appeals  
Eighth Appellate District, Cuyahoga  
County, Ohio

Court of Appeals Case No. CA 06 87826

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**APPELLEE SOUTHWEST GENERAL HEALTH CENTER'S MEMORANDUM IN  
RESPONSE TO APPELLANT KENNETH C. HAGEMAN'S MEMORANDUM IN  
SUPPORT OF JURISDICTION**

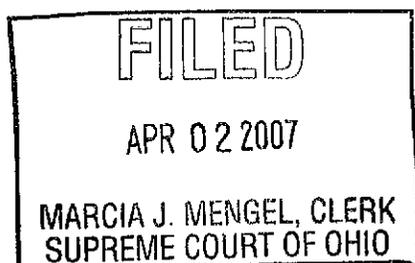
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**NO PUBLIC OR GREAT GENERAL INTEREST EXISTS IN AN UNAUTHORIZED DISCLOSURE OF MEDICAL RECORD CASE WHERE THE CLAIMANT WAIVED THE PRIVILEGE AND REQUESTED HIS PHYSICIAN PARTICIPATE IN THE CASE PRIOR TO THE RELEASE OF THE RECORD**

The lower court appropriately applied Ohio law to the record evidence and affirmed the dismissal of Appellant's unauthorized disclosure of medical record and agency liability claims because Appellant had waived his privilege prior to the release of the medical record. Pursuant to R.C. § 3113.31, the domestic relations court correctly restrained Appellant's parental rights within the domestic violence protective order proceeding. Pursuant to Civil Rule 45, Appellant's physician responded to a Trial Subpoena *Duces Tecum* because Appellant had waived his patient-physician privilege at least twice within the domestic relations case prior to the release of his record. In light of Appellant's waiver, the trial court appropriately dismissed Appellant's claims against the medical provider.

Appellant sought no limitation on or scope of the waiver and asserted no objection to the release of his record within the domestic relations action. Appellant took no affirmative action to seal or protect the record. Thus, Appellant requests this Court review an issue that he failed to timely raise within the domestic relations action.

Appellant's argument regarding the scrutiny required for the disclosure of mental health records or his proposed limitation for the disclosure of records upon a privilege waiver rightfully belongs with a legislature and not a court. The courts should not be bound to police that which the patient has every opportunity to protect.

Ohio law adequately governs the patient-physician confidentiality and waiver. Appellant's conduct alone resulted in the release of his medical record. The lower courts correctly held that Appellant's claims against the medical provider lacked merit. Therefore, Appellant has not presented an issue of public or great general interest.

## I. STATEMENT OF THE CASE

Appellant Kenneth C. Hageman filed this civil action against Thomas J. Thysseril, M.D. (“Dr. Thysseril”), Oak Tree Physician, Inc. (“Oak Tree”), Southwest General Health Center (“SWGHC”), Barbara A. Belovich, Esq., and Janice Galehouse-Hageman on October 12, 2004 seeking damages for the release of Appellant’s medical information in the course of his divorce litigation titled, *Janice Galehouse-Hageman v. Kenneth C. Hageman*, Cuyahoga County Court of Domestic Relations, No. DR-03-291086 (“Hageman divorce action”).<sup>1</sup>

Appellant alleges that Dr. Thysseril and Oak Tree improperly disclosed his record of Appellant’s treatment without proper authorization and release within the Hageman divorce action. Appellant also alleged that SWGHC was liable under *respondeat superior* or by an agency theory. Appellant claimed that Attorney Belovich and Ms. Galehouse-Hageman induced the disclosure and distributed the medical record to third parties. The trial court granted each defendant’s motion for summary judgment. (Journal Entry (“JE”), vol. 3485, pg. 0585-0591).

Upon appeal, the Eighth District Court of Appeals held that Appellant “waived his doctor-patient privilege when he authorized his physician to submit a report detailing his treatment to the domestic relations court and when he filed an action seeking child custody.” *Hageman v. Southwest Gen. Health Ctr.* (Dec. 21, 2006), Cuyahoga App. No. 87826, 2006-Ohio-6765, 2006 Ohio App. LEXIS 6670. The Eighth District affirmed summary judgment for Dr. Thysseril, Oak Tree, SWGHC, and Ms. Galehouse-Hageman but reversed summary judgment in favor of Attorney Belovich. *Id.*

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<sup>1</sup> Defendant/Third-Party Plaintiff Barbara A. Belovich (“Attorney Belovich”) represented Ms. Galehouse-Hageman and Third-Party Defendant and Appellant’s counsel, James E. Boulas (“Attorney Boulas”) represented Mr. Hageman in the Hageman divorce action. Attorney Belovich filed a counterclaim and a third-party claim against Attorney Boulas. Although the trial court granted the cross motions for summary judgment on the third-party claims, those issues are not addressed to this Court.

On March 1, 2007, Attorney Belovich filed her Notice of Appeal on the limited issue of the Eighth District's reversal of summary judgment in her favor. On March 9, 2007, Appellant filed his Notice of Appeal regarding the appellate court's decision affirming the trial court's decision for Dr. Thysseril, Oak Tree, SWGHC, and Ms. Galehouse-Hageman.

## **II. STATEMENT OF THE FACTS**

On January 10, 2003, Appellant and his wife presented to Dr. Thysseril for Appellant's psychiatric treatment. Dr. Thysseril documented that Appellant had "homicidal thoughts toward [his] wife [Ms. Galehouse-Hageman]." (Office Record of Dr. Thysseril: BHA (Jan. 10, 2003); Deposition Testimony of Kenneth C. Hageman ("Hageman Tr."), pp. 79-80)). Appellant and Ms. Galehouse-Hageman had one minor child.

On February 19, 2003, Ms. Galehouse-Hageman initiated the Hageman divorce action and requested a restraining order which the domestic relations court granted immediately. (JE, vol. 4091, pgs. 0303-0304). Ms. Galehouse-Hageman informed the court of Appellant's bipolar disorder with psychotic paranoid episodes diagnosis and threatening behavior toward her and her children. (Affidavit of Janice Galehouse-Hageman). In his Answer and Counterclaim, filed *pro se*, Appellant requested custody and support of the child.

On July 9, 2003, Ms. Galehouse-Hageman filed her Petition for Domestic Violence Civil Protection Order ("DV CPO") within the Hageman divorce action. (Hageman Tr., p. 152; Petition for Domestic Violence and Civil Protection Order (filed July 9, 2003)). On July 4, 2003, while in his truck and with his young child strapped into her car seat, Appellant drove over Ms. Galehouse-Hageman.<sup>2</sup> The domestic relations court immediately issued the DV CPO. (JE, vol. 4164, pg. 60-64 "Warning Concerning the attached Domestic Violence

Protection Order . . . DV CPO Ex Parte (R.C. 3113.31) . . . Full Hrg before Mag. Pellegrin on 7-17-03 at 9:00 a.m. . . . OSJ). The court restrained Appellant from any and all contact with Ms. Galehouse-Hageman and their child.<sup>3</sup> (JE, vol. 4164, pgs. 60-64; Hageman Tr., pp. 136, 144).

On July 21, 2003, Attorney Boulas filed his Notice of Appearance for Appellant in the Hageman divorce action. On July 29, 2003, at Appellant's request, Dr. Thysseril corresponded with the domestic relations court regarding Appellant's treatment and prognosis. (Correspondence of Dr. Thysseril to the Cleveland Domestic Relations Court (Jul. 29, 2003) ("Dr. Thysseril's correspondence")). Dr. Thysseril reported that "[a]s long as [Mr. Hageman] remains compliant with treatment recommendations and follow up visits, his prognosis is good."<sup>4</sup> (Dr. Thysseril's correspondence).

On October 10, 2003, Attorney Belovich issued a Trial Subpoena *Duces Tecum* to Dr. Thysseril for Appellant's medical record. At Attorney Belovich's instruction, Dr. Thysseril provided the record in lieu of appearing at the court's DV CPO hearing. (Deposition Testimony of Thomas Thysseril, M.D. (Aug. 10, 2005), p. 18).

Appellant and his counsel asserted no objection to the subpoena or the release of record. At the court's hearing, the parties stipulated to an agreement regarding the DV CPO. (JE, vol. 4217, pgs. 0271-0272). As a result of the stipulated agreement and after Dr. Thysseril released the medical record, **Appellant gained supervised visitation with his minor child after October 17, 2003.** (Hageman Tr., p. 136).

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<sup>2</sup> On September 26, 2003, the State indicted Appellant for aggravated vehicular assault in *State of Ohio v. Kenneth C. Hageman*, Cuyahoga County Court of Common Pleas, 03-CR-442569 ZA. At trial, the jury returned a not guilty verdict on March 8, 2004.

<sup>3</sup> From July 2003 until October 2003, the court restrained Appellant from any contact with his minor child. (Hageman Tr. pp. 136, 144).

<sup>4</sup> Appellant stopped treating with any mental health physician in July 2003 and stopped taking his medication as of October 2003. (Hageman Tr., p. 146).

The domestic relations court appointed a guardian *ad litem* for the minor child. (JE, vol. 4245, pg. 992). In December 2003, the guardian *ad litem* requested and reviewed Dr. Thysseril's medical record. (Authorization of Kenneth Hageman).

Appellant demanded custody until the parties entered into their September 2004 separation agreement. (Correspondence of James E. Boulas to Barbara A. Belovich (Sept. 10, 2004); JE, vol. 4386, pgs. 100-133). Appellant resumed treatment with another physician in October 2004. (Hageman Tr., p. 146). Appellant's visitation remained supervised until 2005 pursuant to the guardian *ad litem*'s recommendation. (Hageman Tr., pp. 146-149).

### **III. APPELLEE SWGHC'S RESTATEMENT OF THE ISSUES**

#### **APPELLANT WAIVED HIS PATIENT-PHYSICIAN PRIVILEGE IN THE DOMESTIC RELATIONS ACTION PRIOR TO AND AFTER THE COURT ENTERED A DV CPO AND PRIOR TO THE RELEASE OF HIS RECORD.**

#### **THE PHYSICIAN DISCLOSED THE APPELLANT'S INFORMATION PURSUANT TO A VALID, UNDISPUTED SUBPOENA *DUCES TECUM*.**

Appellant waived his patient-physician privilege when he sought custody and when he caused Dr. Thysseril's participation in the Hageman divorce action. The evidence establishes that Appellant waived his privilege before Dr. Thysseril responded to the trial subpoena. Dr. Thysseril responded to the Subpoena *Duces Tecum*, pursuant to Civil Rule 45, without objection from Appellant. Moreover, Appellant entered into a consent agreement in lieu of the DV CPO hearing and asserted no objection to the procedure or the record evidence. Appellant's misapplication of R.C. § 3113.31 and his proactive waiver of his medical privilege indicate that this appeal should be denied. The trial and appellate courts below appropriately applied the law and determined that Appellant's claims against the medical provider were unfounded. Thus, this court should deny Appellant's request for jurisdiction.

**A. APPELLANT WAIVED HIS PATIENT-PHYSICIAN PRIVILEGE IN THE DOMESTIC RELATIONS ACTION PRIOR TO AND AFTER THE COURT ENTERED A DV CPO AND PRIOR TO THE RELEASE OF HIS RECORD.**

There can be no dispute that the domestic relations court restrained Appellant from visitation and custody of his child on July 9, 2003 when it granted the DV CPO.<sup>5</sup> Appellant's right to visitation was restored when he entered into a stipulated agreement in lieu of the DV CPO hearing. The domestic relations court had the jurisdiction to rule upon the parties' respective requests for custody as well as Ms. Galehouse Hageman's Petition for a DV CPO. Even if the matters were filed separately, the court would have consolidated the actions.

Ohio's R.C. § 3113.31 provides a domestic relations court with the jurisdiction to enter protection orders to protect the victims of domestic violence.<sup>6</sup> R.C. § 3113.31(E)(1)(d) provides:

(E)(1) After an ex parte or full hearing, the court may grant any protection order, with or without bond, or approve any consent agreement to bring about a cessation of domestic violence against the family or household members. The order or agreement may:

\* \* \*

(d) Temporarily allocate parental rights and responsibilities for the care of, or establish temporary parenting time rights with regard to,

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<sup>5</sup> Several weeks later, at Appellant's request, Dr. Thysseril corresponded with the court regarding Appellant's diagnosis, treatment, and prognosis.

<sup>6</sup> Domestic violence is defined as:

[T]he occurrence of one or more of the following acts against a family or household member:

- (a) Attempting to cause or recklessly causing bodily injury;
- (b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 [2903.21.1] or 2911.211 [2911.21.1] of the Revised Code;
- (c) Committing any act with respect to a child that would result in the child being an abused child . . . ;
- (d) Committing a sexually oriented offense. R.C. § 3113.31(A)(1).

minor children, if no *other* court has determined, or is determining, the allocation of parental rights and responsibilities for the minor children or parenting time rights; \* \* \* (emphasis added)

Section 3113.31 specifically mentions *other courts* because not all Ohio counties have domestic relations courts to handle both procedures and not all custody/visitation issues are determined in the domestic relations courts.

In the Hageman divorce action, one court considered the domestic relations matters, including the divorce issues and the DV CPO. Thus, there was no *other court* involved in Appellant's custody, divorce, or the DV CPO proceeding.

The Hageman domestic relations court concluded that Appellant's conduct on July 4, 2003 constituted domestic violence. In addition to determining if domestic violence occurred, the court had the jurisdiction to issue an order that effectively protected the family members from the domestic violence. R.C. § 3113.31(E) provides eight detailed subsections setting forth the court's discretion in ordering the protection of family or household members from domestic violence. The subsections of 3113.31(E) include in part the court's authority to: order the cessation of domestic violence; evict the aggressor from the home; grant possession of the household to the petitioner; order support; temporarily allocate parental rights; require counseling; prohibit contact; and order other relief within the court's discretion.

Where cross petitions for a DV CPO are filed, the court is restricted in what it can require or restrict for one party and not the other. Pursuant to R.C. § 3113.31(E)(4)(a-d):

(E)(4) A court may not issue a protection order that requires a petitioner to do or to refrain from doing an act that the court may require a respondent to do or to refrain from doing under division (E)(1)(a), (b), (c), (d), (e), (g), or (h) of this section unless all of the following apply:

(a) The respondent files a separate petition for a protection order in accordance with the section.

(b) The petitioner is served notice of the respondent's petition at least forty-eight hours before the court holds a hearing with respect to the respondent's petition, or the petitioner waives the right to receive this notice.

(c) If the petitioner has requested an ex parte order pursuant to division (D) of this section, the court does not delay any hearing required by that division beyond the time specified in that division in order to consolidate the hearing with a hearing on the petition filed by the respondent.

(d) After a full hearing at which the respondent presents evidence in support of the request for a protection order and the petitioner is afforded an opportunity to defend against the evidence, the court determines that the petitioner has committed an act of domestic violence or has violated a temporary protection order issued pursuant to *section 2919.26 of the Revised Code*, that both the petitioner and the respondent acted primarily as aggressors, and that neither the petitioner nor the respondent acted primarily in self-defense. (emphasis in original)<sup>7</sup>

Ms. Galehouse-Hageman was the *sole* petitioner of the DV CPO since Appellant was the only aggressor in the July 4, 2003 incident. Thus, R.C. § 3113.31(E)(4)(d) does not apply to the domestic relations court's consideration of the Hageman DV CPO.

When filed in the same court, the DV CPO and the divorce/custody proceedings must be consolidated, if possible, so that the court may retain jurisdiction to timely rule on custody or visitation issues and to avoid prejudice to the parties regarding the statutory restrictions of the DV CPO proceeding. At least one Ohio appellate court has ruled that a trial court abused its discretion for failing to *sua sponte* consolidate the civil protection order with the divorce proceedings. *Yazdani-Isfehani v. Yazdani-Isfehani* (Dec. 26, 2006), Athens App. No. 06CA6, 2006-Ohio-7105, 2006 Ohio App. LEXIS 7059 (since R.C. 3113.31 does not provide for continuing jurisdiction to modify an allocation of parental rights after a final appealable order

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<sup>7</sup> Appellant cited to R.C. § 1331.31(E)(4)(d) for the erroneous proposition that a court may only determine at the DV CPO hearing whether an act of domestic violence occurred. Yet, R.C. §

and the court loses jurisdiction, the court abused its discretion by failing to consolidate the DV CPO proceeding with the divorce matter so it could retain jurisdiction over the visitation issues). The *Yazdani-Isfahani* petitioner filed for a DV CPO but was unable to simultaneously file for divorce in the same court because of venue issues. *Id.* The wife later filed for divorce but failed to request a consolidation of the matters. The father mistakenly requested a modification of visitation within the DV CPO action and after one year, the court denied the request for lack of jurisdiction. *Id.* The Fourth District held that had the lower court *sua sponte* consolidated the matters, it would have had the jurisdiction to timely rule on the father's request. *Id.*

The *Yazdani-Isfahani* court held that R.C. § 3113.31 permits a court to temporarily allocate parental rights and responsibilities and its order terminates when a domestic relations or juvenile court issues an order allocating parental rights for the care of the children. *Id.* ¶22-23. “[A]lthough the court did not possess the requisite jurisdiction to modify visitation in the context of the CPO proceeding, under the particular facts of this case, we find that the trial court abused its discretion by failing to sua sponte consolidate the CPO and divorce proceedings and determine Father's motion for visitation in the context of the divorce proceeding.” *Id.* ¶38.

“A party seeking custody of a child in a divorce action makes his or her mental and physical condition an issue to be considered by the court in awarding custody, and the physician-patient privilege does not apply.” *Gill v. Gill* (Jan. 16, 2003), Cuyahoga App. No. 81463, 2003-Ohio-180, ¶¶18-21; *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St. 3d 395 1999-Ohio-115, 175 N.E. 2d 518; *Neftzer v. Neftzer* (2000), 140 Ohio App. 3d 618, 748 N.E.2d 608; *Whiteman v. Whiteman* (June 26, 1995), Butler App. No. CA94-12-229, 1995 Ohio App. LEXIS 2700. Ohio law provides no shield to mental health medical records of a patient who files for

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1331.31(E)(4)(d) pertains to cross petitions and R.C. § 1331.31(E)(1)(d) provides the court with

custody of his or her child because the patient's civil action waives that patient's physician-patient privilege. *Gill*, 2003-Ohio-180, ¶¶18-21.

Pursuant to R.C. § 3113.31, the domestic relations court exercised its jurisdiction to allocate parental rights in the wake of Appellant's act of domestic violence. *See also Yazdani-Isfehani*, 2006-Ohio-7105. The Hageman divorce court had the obligation to consider Appellant's medical record pursuant to statute and Appellant's waiver of his patient-physician privilege. *Gill*, 2003-Ohio-180; R.C. § 3109.04 (a parent's mental health is at issue whenever considering disputed child custody); R.C. § 3113.31(E)(1)(d). The domestic relations court was obligated to consider the parents' mental health status, including Appellant's medical record at the October 2003 hearing. *Gill*, 2003-Ohio-18; R.C. § 3109.04.

In the Hageman divorce action, Appellant waived his patient-physician privilege prior to and after the domestic relations court entered its DV CPO. *Gill*, 2003-Ohio-180, ¶¶18-21. If Appellant wanted a limitation to his privilege waiver, he could have asserted a limitation to the waiver. Appellant was represented by counsel at the time he waived his privilege and at the time his record was released. Yet, Appellant asserted no objection to the release of his record and made no effort to limit the use of or protect the record.

Furthermore, Appellant entered into a stipulated agreement to conclude the DV CPO hearing. Appellant made no objection to the DV CPO proceeding. Appellant was neither an involuntary participant to the domestic violence act, the DV CPO hearing, or the waiver of his patient-physician privilege for the purpose of establishing visitation with his child after the court's DV CPO.

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authority to allocate parental rights.

**B. THE PHYSICIAN DISCLOSED THE APPELLANT'S INFORMATION PURSUANT TO A VALID, UNDISPUTED SUBPOENA *DUCES TECUM*.**

Dr. Thysseril responded to a valid, unopposed Subpoena *Duces Tecum* after he corresponded with the domestic relations court about Appellant's medical issues. Ohio Civil Rule 45 requires a party to respond to the subpoena in person or by the production of documents. Neither Appellant nor his attorney objected to the subpoena or the release of Appellant's record by Dr. Thysseril within the domestic relations court. In fact, Appellant failed to raise any indication on the record or by motion that his patient-physician privilege was at issue.

Pursuant to Ohio law, Appellant had waived confidentiality of his record for purposes of the domestic relations action, including the custody and visitation issues arising from the DV CPO. *Gill v. Gill*, 2003-Ohio-180, ¶¶18-21; *Biddle v. Warren Gen. Hosp.*, 86 Ohio St. 3d 395; *Neftzer v. Neftzer*, 140 Ohio App. 3d 618; *Whiteman v. Whiteman*, Butler App. No. CA94-12-229, 1995 Ohio App. LEXIS 2700. Where custody is at issue, Ohio law provides for the safety and well being of the child, even to the detriment of the parent's medical privacy interest. *Gill v. Gill*, 2003-Ohio-180.

Once Appellant caused Dr. Thysseril's participation and interaction with the domestic relations court, Appellant knew that his record was relevant. In *Gill*, the court compelled the disclosure of records because the spouse would not waive the privilege. 2003-Ohio-180. Unlike *Gill*, Appellant proactively waived his privilege and caused his physician's participation in the matter prior to the release of his record. Since Appellant waived his privilege, he has no foundation for his claims of the unauthorized disclosure of his medical record against the medical provider.

In the event that Appellant disputed the subpoena or the release of his records, he waived his objections at the time he submitted to the consent agreement or upon the expiration of

the appeal period. *Prince v. St. Luke's Hosp.* (Nov. 19, 1987), Cuyahoga App. No. 52775, 1987 Ohio App. LEXIS 9646; Evid. R. 103(A)(1). Appellant stipulated to an agreement in lieu of the DV CPO hearing where he could have objected to the evidence or sought protection of the record and preserved the issue for appeal. Evid. R. 103. Even after the consent agreement, Appellant made no effort to protect the record evidence, seal the file, or raise the issue with the court.

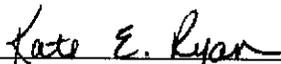
In the Hageman divorce action, Appellant waived his patient-physician privilege prior to the release of his record, the court had the jurisdiction over custody issues in the DV CPO proceeding, and Dr. Thysseril appropriately responded to a valid, uncontested Trial Subpoena *Duces Tecum*.

#### **IV. CONCLUSION**

Appellant independently placed his medical information at issue by waiving his patient-physician confidentiality when he filed a custody suit and involved Dr. Thysseril's participation in the court action. Dr. Thysseril responded to a valid, uncontested subpoena. Since Appellant had previously waived his privilege relative to Dr. Thysseril's medical record, Dr. Thysseril was permitted to respond to the subpoena. Absent admissible evidence to the contrary, the trial court properly granted summary judgment in SWGHC's favor and the Eighth District affirmed the decision. Since the lower courts ruled appropriately, Appellant cannot

establish an issue of public concern. For the foregoing reasons, including the undisputed evidence in support of Appellee SWGHC's legal arguments, SWGHC requests this Honorable Court deny Appellant's request for jurisdiction.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellee Southwest General Health Center's Memorandum In Response To Appellant Kenneth C. Hageman's Memorandum In Support Of Jurisdiction was served by regular U.S. mail, postage prepaid, on the 30<sup>th</sup> day of March 2007, on the following:

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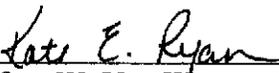
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