

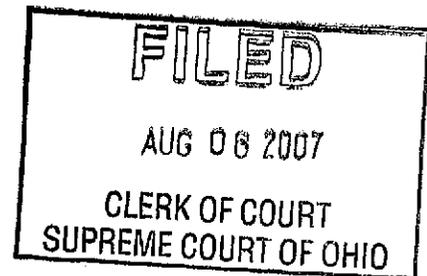
IN THE SUPREME COURT OF OHIO

KENNETH C. HAGEMAN	:	Case No. 2007-0376
	:	
Appellees	:	
	:	
vs.	:	On Appeal From
	:	Cuyahoga County Court of Appeals
SOUTHWEST GENERAL HEALTH	:	Eighth Appellate District
CENTER, et al.	:	
	:	
	:	Court of Appeals
Appellees	:	Case No. CA-06-87826

MERIT BRIEF OF APPELLANT, BARBARA A. BELOVICH

JACOB A. H. KRONENBERG (#0015574) [Counsel of Record]
Law Office of Jacob Kronenberg
4403 St. Clair Avenue, N.E.
Cleveland, Ohio 44103-1125
(216) 426-2970
(216) 431-0164 facsimile
E-mail: JAHKronenberg@aol.com
**Attorney for Appellant-Defendant,
Barbara A. Belovich**

JAMES E. BOULAS (#0070007) [Counsel of Record]
JIM PETROPOULEAS (#0075272)
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
(440) 526-8822
(440) 838-8822 facsimile
Attorneys for Appellee-Plaintiff



DONALD H. SWITZER (#0017512) [Counsel of Record]
PETER A. HOLDSWORTH (#0075211)
Bonezzi Switzer Murphy Polito & Hupp Co., L.P.A.
1300 East 9th Street
1950 Penton Media Building
Cleveland, Ohio 44114
(216) 875-2767
(216) 875-1570 facsimile
**Attorneys for Appellees-Defendants,
Oaktree Behavioral Health and Thomas J. Thysseril, M.D.**

JEFFREY W. VAN WAGNER (#0021913)
KATE E. RYAN (#0068248) [Counsel of Record]
ulmer|berne|llp
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
(216) 583-7000
(216) 583-7001 facsimile
E-mail: jvanwagner@ulmer.com
kryan@ulmer.com
**Attorneys for Appellee-Defendant,
Southwest General Health Center**

SHEILA A. McKEON (#0012067) [Counsel of Record]
Gallagher Sharp
420 Madison Avenue, Suite 1250
Toledo, Ohio 43604
(419) 243-7724
(419) 241-4866 facsimile
E-mail: smckeon@gallaghersharp.com
**Attorney for Appellee-Defendant,
Janice Galehouse-Hageman**

JIM PETROPOULEAS (#0075272) [Counsel of Record]
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
(440) 526-8822
(440) 838-8822 facsimile
**Attorney for Appellees-Third Party Defendants,
James E. Boulas, Esq. and James E. Boulas Co., LPA**

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STATEMENT OF THE FACTS AND THE CASE

This Appeal arises from Kenneth C. Hageman's ("Hageman") filing and prosecuting a civil action against a number of parties in which he sought damages from each arising out of what Hageman claimed was the unauthorized release of his medical/psychiatric treatment records. The parties he named as Defendants included his treating psychiatrist, Dr. Thomas Thysseril ("Thysseril"), the entity which employed Dr. Thysseril, Oaktree Behavioral Health ("Oaktree"), the hospital which housed Oaktree and in which Dr. Thysseril practiced, Southwest General Health Center ("Southwest"), his former wife, Janice Galehouse-Hageman ("Galehouse-Hageman"), and Barbara A. Belovich ("Belovich"), counsel for his former wife in consolidated proceedings, comprehending a divorce action and a petition for a domestic violence civil protection order (O.R.C. §3113.31), in the Domestic Relations Division of the Cuyahoga County Court of Common Pleas.

Hageman's claim is based upon an independent negligence tort recognized and established by this Court in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395. The *Biddle* decision gives rise to a cause of action for either the unauthorized, unprivileged disclosure to a third party or the inducement by a third party of such a disclosure.

Belovich and the other Defendants, sought, and were granted, in accordance with O.R.Civ.P. Rule 56, summary judgment by the trial court upon their individual motions seeking that relief, over the opposition of Hageman. The trial court dismissed the entire matter, as to all claims asserted against all parties. A copy of the dispositive journal entry in the trial court is annexed as part of the Appendix.

Hageman appealed the summary judgment granted each defendant to the Court of Appeals of Ohio, Eighth Appellate District.

The court of appeals determined unanimously that every Defendant, save Belovich, was properly granted summary judgment. As to Belovich, the court of appeals, with a dissenting opinion, determined that summary judgment was improper as to Belovich. A copy of the Decision, and Dissent, journalized in the court of appeals is annexed as part of the Appendix.

Belovich moved this Court to exercise its jurisdiction to review the portion of the court of appeals decision overruling the grant of summary judgment to her, and Hageman separately moved this Court to exercise its jurisdiction to review the portion of the court of appeals decision affirming the grant of summary judgment to the other defendants.

This Court granted Belovich's motion, and denied Hageman's motion.

ARGUMENT

Proposition of Law No. I: An attorney cannot be held liable for unauthorized disclosure of health care information, under *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, for having given health care records, which were lawfully obtained and which were not subject to a protective order, to a prosecuting attorney at the prosecuting attorney's request.

Hageman's claim is based upon an independent negligence tort recognized and established by the Ohio Supreme Court in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395. The *Biddle* decision's syllabus recites, in its entirety:

1. In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.
2. In the absence of prior authorization, a physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality.
3. A third party can be held liable for inducing the unauthorized, unprivileged disclosure of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship. To establish liability the plaintiff must prove that (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship, (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information, and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.

Biddle, at pgs. 407-8, explicitly and specifically defined the tort it creates as either the disclosure of unauthorized, unprivileged information by a medical provider, or the inducement by a third party of the unauthorized, unprivileged disclosure by the medical provider. Either explicitly,

or implicitly, there is no cause of action recognized in *Biddle* for the disclosure of medical information by a person not a medical provider to some third party.

The court of appeals in its decision, which it journalized January 16, 2007, (“the Decision”), determined that the trial court erred by granting summary judgment upon Hageman’s claim against Belovich. In doing so, it has established explicitly a new cause of action beyond *Biddle*’s holding. That new cause of action would provide that an individual who receives, from a medical provider, information which has been found to be an authorized, unprivileged disclosure by the medical provider, no longer subject to any claim of privilege by Hageman, and who did not induce an unauthorized or unprivileged disclosure may still be liable under *Biddle* for the transmission of that information to a third party.

In the Decision, the court of appeals unanimously affirmed the granting of summary judgment as to all the Appellees save one (Belovich), those being the medical providers (Defendants Dr. Thysseril, Oaktree and Southwest General) and one third party, Hageman’s spouse (Galehouse-Hageman). The Decision, p. 10.

In support of that determination as to every Defendant, **including Belovich**, the Decision expressly found, consistent with the court of appeals’ earlier ruling in *Gill v. Gill*, 2003-Ohio-180, that Hageman had waived his privilege as to the records at issue when he authorized Dr. Thysseril “... to submit a report as to his treatment to the domestic relations court and when he filed an action seeking child custody.” The Decision, at 9. Further, the Decision detailed “... that at the time appellant authorized the release of his medical information to the domestic relations court, his counsel was present.” *Ibid.* Beyond that, the Decision stated: “It is clear from appellant’s actions that he effectively waived his doctor-patient privilege.” *Ibid.* (Emphasis supplied.) Given the

explicit language of the syllabus in *Biddle* detailing the exact tort which was created, that waiver of privilege in the transmission of Hageman's records by Thysseril, Oaktree and/or Southwest to Belovich would negate the claim the Decision creates, without support in *Biddle's* syllabus or its opinion, let alone citing to any other authority.

Nevertheless, with a concurring opinion and a dissenting opinion, the court of appeals determined that the Trial Court had erred when it granted summary judgment to Belovich. The Decision, pages 10-13, inclusive.

The court of appeal's majority, in determining that there was error in granting summary judgment as to Belovich, a third party and not a medical provider, attempts to draw a distinction between the action in the Cuyahoga County Court of Common Pleas' Domestic Relations Division as to the consolidated actions in that Court, a divorce, a civil matter which it terms "the divorce action", and the action in the Cuyahoga County Court of Common Pleas' General Division, a criminal matter which it terms "the domestic violence matter" in its Decision at pgs 10-11.

The only criminal matter in that time period in which Hageman was prosecuted to trial bears the Cuyahoga County Court of Common Pleas' General Division's Case No. CR-03-442569-ZA. The majority held that "Belovich overstepped her bounds as Galehouse's divorce attorney when she disseminated information regarding appellant's psychiatric condition to the prosecution in the domestic violence matter." The Decision, p. 11.

First, while the majority's opinion recognizes Belovich's representation of her client in "the divorce action", it does not explicitly acknowledge, as is clear from the record below, which included the docket of the matter in which Belovich represented Galehouse-Hageman, that Belovich represented Galehouse-Hageman both in the divorce and in a proceeding filed subsequent to the

divorce complaint and which was consolidated into “the divorce action”, a proceeding for a civil protection order. Plaintiff’s Brief in Opposition to Defendants, Oaktree Behavioral Health’s and Thomas J. Thysseril, M.D.’s, Motion for Summary Judgment on All Claims, Exhibit 7, (“The Docket”), S17-S18. The facts giving rise to the request for the civil protection order, a civil proceeding for domestic violence (“the civil domestic violence proceeding”), arose from the same incident which gave rise to the criminal charges which the court of appeals labels “the domestic violence matter”.

The medical records, whose privilege the Decision determined that Hageman had waived for the purposes of the divorce action in the Domestic Relations Division, because of the pending custody claims and the releases detailed in the Decision, were in fact sought by Belovich, and produced by Dr. Thysseril, for the scheduled October 15, 2003, trial of the civil domestic violence proceeding.

The civil domestic violence proceeding included claims for custody and visitation. The *ex parte* civil protection order, which was the subject of the October 15, 2003, proceeding, named both Galehouse-Hageman herself and the child of Hageman and Galehouse-Hageman as protected parties, and it provided for a complete suspension of contact between Hageman and his daughter. The court of appeal’s reasoning in the Decision, including its determination that Dr. Thysseril’s, Oaktree’s and/or Southwest’s transmission of the records to Belovich was authorized, and not violative of Hageman’s privilege since he had waived it, implicitly recognizes that those custody issues were a part of the civil domestic violence proceeding.

Beyond that, though, the court of appeals, in the Decision, at p. 10, states that “... Belovich forwarded information regarding appellant’s psychiatric condition to the prosecution.” And, it is,

based upon this assertion, that the Court determined that it was error for the trial court to grant Belovich summary judgment and to dismiss Hageman's claim against her.

Belovich testified, in her deposition, concerning the transmission of those records to the prosecutor. Barbara A. Belovich, Deposition of February 2, 2005, filed in the trial court April 15, 2005, pages 29-31 (S5-S7), 86-90 (S8-S12).

As the domestic relations docket in the consolidated divorce action and civil domestic violence proceeding (Domestic Relations Case No. DR-03-291086) clearly details, the trial of the civil domestic violence proceeding did not take place on the scheduled date of October 15, 2003; it was rescheduled to allow Hageman to take Galehouse-Hageman's deposition. The Docket, S16.

In addition that same docket reflects that, immediately preceding the October 15, 2003, trial date for the civil domestic violence proceeding, on October 14, 2003, Hageman's legal team in the consolidated divorce action and civil domestic violence proceeding was augmented by the entry of appearance of Scott Korpowski as additional counsel of record for Hageman. Mr. Korpowski is the only counsel of record reflected for Hageman in the criminal case, the General Division's Case No. CR-03-442569-ZA. *Ibid.*

Nothing in the record reflects that the prosecutor's presence on October 15, 2003, was secreted from anyone. And, as part of the proceedings in domestic relations court on that day, Hageman was represented, of record, by both the counsel prosecuting this matter (who was his initial domestic relations counsel), but also the counsel defending the criminal domestic violence matter (who became his second domestic relations counsel).

In his concurring and dissenting opinion to the Decision, Judge Corrigan correctly notes that the majority opinion determined that "...Hageman waived the disclosure of his mental health records

for purposes of the domestic relations action,....” Decision, p. 13. And, that opinion also correctly states “...., Hageman took no action to quash the subpoena or otherwise limit the use of information.” *Ibid.* Judge Conway Cooney’s concurring opinion seeks to respond to Judge Corrigan’s dissent by stating that “.. the records were never submitted to the domestic relations court nor admitted into evidence before that court” and, thus, were not “...public records, available to anyone.” Decision, p. 12.

In fact, whether or not those records went into evidence as part of a formal trial, or not, a *Biddle* claim rises and falls on **EITHER** the *medical provider’s* unauthorized, unprivileged disclosure of medical records **OR** a *third party’s* inducement of that disclosure by a medical provider. Nothing in *Biddle* discusses any duty upon a third party beyond that stated duty not to induce an unauthorized, unprivileged disclosure by a medical provider. In this instance, the release of Hageman’s records by Dr. Thysseril, Oaktree and/or Southwest to Belovich was neither unauthorized, nor unprivileged, as the court of appeals noted, so Belovich, the third party here, cannot be alleged to have induced an unauthorized or unprivileged disclosure of records by those providers.

Once the court of appeals has found, as it has here, that those medical providers were not liable under *Biddle* to Hageman for an unauthorized, unprivileged disclosure of Hageman’s records (and once it has found that there was no inducement by Belovich to disclose unauthorized, unprivileged information), there is no support within the language of *Biddle* to impose any duty upon Belovich (or any third party receiving medical records) to maintain those records in any privileged or quasi-privileged manner.

Her actions in allowing the prosecutor access to those records was neither an unauthorized nor an unprivileged release by a medical provider (since she is not a medical provider), nor in any way actions which induced an unauthorized or unprivileged disclosure (since the release of the records by the medical providers was neither unauthorized nor unprivileged).

Beyond that, the court of appeals determined that Galehouse-Hageman, the other third party (and the complaining witness in “the domestic violence matter” being prosecuted criminally and the petitioner in the civil domestic violence proceeding), had not induced such an unauthorized, unprivileged disclosure. As Galehouse-Hageman’s agent, it is difficult, under common principles of agency law, to understand how Belovich, as an agent, would have different liability from Galehouse-Hageman as a principal.

Indeed, Hageman’s inaction in the civil proceedings in not seeking any limitation, whether by protection order or otherwise, should, as Judge Corrigan’s dissent points out, be fatal to his belated claim in this matter, after the resolution of the divorce, to pursue Belovich, among others. Had Hageman been concerned about further promulgation by anyone of those records, he had a remedy: seeking a protection order. His failure to pursue that remedy should prevent any claim here.

As a different panel of the same court of appeals whose opinion is the subject of this appeal stated, less than six weeks prior to the Decision here, in *Herman v. Kratche*, 2006-Ohio-5938, at ¶23:

The tortious conduct of an unprivileged disclosure occurs the moment the nonpublic medical information is disclosed to an unauthorized third-party. The tortious conduct...does not depend on what the duties of the third party are or what the third party subsequently does with that information. Any duties the third party may have had do not transform it into an “authorized” party. The key is whether the receiving party is “authorized” to receive the record.

Once the court of appeals has determined that the disclosure by the medical provider defendants was neither unauthorized, nor unprivileged, Belovich was “authorized” to receive the records. Belovich’s subsequent actions *vis a vis* the prosecutor are not relevant within the context of the tort established in *Biddle*. As Judge Corrigan so precisely and poetically stated in his concurring and dissenting opinion, “Pandora’s box had been opened.” The Decision, p. 13.

To impose a different duty upon Belovich, the duty which the court of appeals has imposed upon Belovich here, would, in some strained and tortuous way, make again privileged health care records which had, in this instance, by Hageman’s own actions become unprivileged, by his having authorized their release by Drs. Thysseril, Oaktree and/or Southwest.

The duty created by the court of appeals not only expands *Biddle* beyond this Court’s mandate in its pronouncement in *Biddle*, it also unreasonably limits and imposes an onerous duty upon the actions of an attorney in a child custody action who is seeking to assist trial courts in determining one of the most important issues that courts decide for a large portion of the populace with whom courts have contact.

Although this Court entertains review of relatively few cases which arise from child custody actions, the volume of such cases which are heard by trial courts throughout the State, and by courts of appeal, reflects that actions of this kind are among the most common instances of contact between the general population of Ohio and its legal system.

In particular, and regrettably, disputes about child custody between parents who are married and have determined not to remain married fuel divorce actions to a great degree and contribute to the time it takes to conclude divorce actions. Similarly, a significant, and growing, portion of the

caseload of juvenile courts arises from disputes about the custody of children between parents who are not married.

Even after a determination is made as to the allocation of parental rights and responsibilities, whether between parents who are married to each other or between parents who are not married to each other, the trial courts have further contact with these matters when one parent or both parents seeks a change in the then-existing custody determination.

Although this matter is not a direct appeal of such a determination of custodial rights by a juvenile or domestic relations court, it does arise from the conduct of a divorce and related civil and criminal proceedings between Hageman and Galehouse-Hageman, a substantial part of which dealt with issues of child custody. Hageman's claim against Belovich (and the other Defendants) flows from those consolidated proceedings, and Belovich's actions in representing Galehouse-Hageman.

Whether it is a domestic relations court dealing with married parents or a juvenile court dealing with unmarried parents (and sometimes with married parents, when a parent seeks a custody determination but does not wish to seek a divorce or legal separation), the trial court must assess, as one of the statutory factors determinative of an allocation of parental rights, the mental and physical health of the parents. O.R.C. §3109.04(F)(1)(e).

In the Hageman divorce, allocation of parental rights was squarely at issue from the time that Hageman filed his counterclaim for divorce (before any acts occurred which gave rise to claims of civil or criminal domestic violence), including an affirmative request for his being designated the residential parent of the parties' child. That claim continued to pend past the actions which gave rise to the civil complaint Hageman filed in this matter.

That proceedings alleging domestic violence were filed civilly and criminally as a result of an incident when Hageman was driving his truck, with the minor child in the truck, and ran over his then-wife, Galehouse-Hageman, causing her severe physical injuries, including injuries to both her arms, significantly impeding her use of those limbs. As a result of that incident and those serious injuries, not only did Belovich's client seek a protection order, but also filed a criminal complaint, resulting in Hageman's being named in a felony, criminal indictment, which was also pending when the actions which gave rise to this complaint transpired.

As part of prosecuting the divorce and the domestic violence action and because of her client's concerns about the mental health status of Hageman, Belovich sought Hageman's psychiatric treatment records, by issuing a subpoena to Hageman's treating psychiatrist, Thysseril, who was employed by and/or practiced at the other parties to this action, Oaktree and Southwest.

As noted above, Thysseril, Oaktree, Southwest, and, even, Galehouse-Hageman were not determined to have acted in violation of *Biddle*. Despite that, the Decision has determined that, after Belovich received those records, the release of which by the health care providers was not in conflict with those health care providers' duties under *Biddle* (in large measure because of the records relevance to the pending domestic relations proceedings for which Hageman himself was, by the court of appeals, found to have released them) and despite Belovich's not having induced, in violation of *Biddle*, the improper release of the records by the health care providers, Belovich then had some new and additional duty, under *Biddle*, not to accede to the request of the county prosecutor involved in Hageman's criminal prosecution for a copy of those records.

The imposition of this duty upon Belovich is one which will act unreasonably to constrain custody lawyers in the representation of their clients' interests, and that constraint would impact not

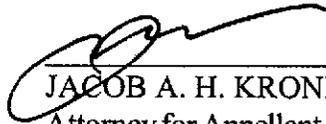
just counsel for the parents, but also any Guardian ad Litem and/or Legal Counsel for the minor child, whose custody is part of the proceeding. It will give any counsel for a party to such a proceeding or any party directly the fear that attempting to assure that relevant information as to a parent's mental or physical health is available will result in a claim for damages, as happened, precisely, here.

In *Kelm v. Kelm* (2001), 92 Ohio St.3d 223, the Court recognized that the duties incumbent upon the trial courts of this state under the doctrine of *parens patriae* to take care in determining and to monitor closely issues surrounding the allocation of parental rights and responsibilities could not be delegated to arbitration, an otherwise highly-regarded means of dispute resolution. It should be no less diligent in assuring that the ability of parties and counsel assisting the trial courts in upholding that duty are not unreasonably constrained.

CONCLUSION

For all the foregoing reasons, the Court should determine that the scope of its decision in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, should not have been extended in the manner that the court of appeals did, in an unwarranted and illogical way, beyond the limits of the decision, and the Court should reverse the decision of the Court of Appeals and affirm the trial court's grant of summary judgment to Belovich.

Respectfully submitted,



JACOB A. H. KRONENBERG
Attorney for Appellant-Defendant Barbara A. Belovich

PROOF OF SERVICE

I certify that a copy of this Merit Brief of Appellant, Barbara A. Belovich, has been served by ordinary U.S. Mail, this 3rd day of August, 2007, upon:

James E. Boulas
Jim Petropouleas
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
Attorneys for Appellee-Plaintiff

Donald H. Switzer
Peter A. Holdsworth
Bonezzi Switzer Murphy Polito & Hupp Co., L.P.A.
1300 East 9th Street
1950 Penton Media Building
Cleveland, Ohio 44114
Attorneys for Appellees-Defendants, Oaktree Behavioral Health and Thomas J. Thysseril, M.D.

Jeffrey W. Van Wagner
Kate E. Ryan
ulmer|berne|llp
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
**Attorneys for Appellee-Defendant,
Southwest General Health Center**

Sheila A. McKeon
Gallagher Sharp
420 Madison Square, Suite 1250
Toledo, Ohio 43604
**Attorney for Appellee-Defendant,
Janice Galehouse-Hageman**

Jim Petropouleas
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
**Attorney for Appellees-Third Party Defendants,
James E. Boulas, Esq. and James E. Boulas Co., LPA**



JACOB A. H. KRONENBERG

Attorney for Appellant-Defendant, Barbara A. Belovich

APPENDIX

IN THE SUPREME COURT OF OHIO

KENNETH C. HAGEMAN

Appellees

vs.

SOUTHWEST GENERAL HEALTH
CENTER, et al.

Appellees

Case No.

07-0376

On Appeal From
Cuyahoga County Court of Appeals
Eighth Appellate District

Court of Appeals
Case No. CA-06-87826

NOTICE OF APPEAL OF APPELLANT, BARBARA A. BELOVICH

JAMES E. BOULAS (#0070007)
JIM PETROPOULEAS (#0075272)
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
(440) 526-8822
(440) 838-8822 facsimile
Attorneys for Appellee-Plaintiff

DONALD H. SWITZER (#0017512)
PETER A. HOLDSWORTH (#0075211)
KIMBERLY A. THOMAS (#0077485)
Bonezzi Switzer Murphy & Polito Co., L.P.A.
526 Superior Avenue
1400 Leader Building
Cleveland, Ohio 44114
(216) 875-2767
(216) 875-1570 facsimile
Attorneys for Appellees-Defendants,
Oaktree Behavioral Health and Thomas J. Thysseril, M.D.

FILED
MAR 01 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

KATE E. RYAN (#0068248)
ulmer|berne|llp
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
(216) 931-6000
(216) 931-6001 facsimile
Attorney for Appellee-Defendant,
Southwest General Health Center

SHEILA A. McKEON (#0012067)
ANNA S. FISTER (#0076531)
Gallagher Sharp
420 Madison Avenue, Suite 1250
Toledo, Ohio 43604
(419) 241-4860
(419) 241-4866 facsimile
Attorneys for Appellee-Defendant,
Janice Galehouse-Hageman

JACOB A. H. KRONENBERG (#0015574)
Law Office of Jacob Kronenberg
4403 St. Clair Avenue, N.E.
Cleveland, Ohio 44103-1125
(216) 426-2970
(216) 431-0164 facsimile
E-mail: JAHKronenberg@aol.com
Attorney for Appellant-Defendant,
Barbara A. Belovich

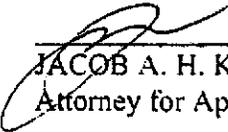
JIM PETROPOULEAS (#0075272)
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
(440) 526-8822
(440) 838-8822 facsimile
Attorney for Appellees-Third Party Defendants,
James E. Boulas, Esq. and James E. Boulas Co., LPA

Notice of Appeal of Appellant, Barbara A. Belovich

Appellant, Barbara A. Belovich, hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eight Appellate District, entered in Court of Appeals Case No. 87826 on January 16, 2007.

The case raises a question which is one of public or great general interest.

Respectfully submitted,



JACOB A. H. KRONENBERG
Attorney for Appellant, Barbara A. Belovich

Certificate of Service

I certify that a copy of this Notice of Appeal has been served by ordinary U.S. Mail. this 28th day of February, 2007. upon:

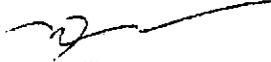
James E. Boulas, Esq.
Jim Petropouleas, Esq.
James E. Boulas Co., LPA
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
Attorneys for Appellee-Plaintiff

Jim Petropouleas, Esq.
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147
Attorney for Appellees-Third Party Defendants
James E. Boulas, Esq. & James E. Boulas Co, LPA

Kate E. Ryan, Esq.
ulmer|berne|llp
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
Attorney for Appellee-Defendant
Southwest General Health Center

Donald H. Switzer, Esq.
Peter A. Holdsworth, Esq.
Kimberly A. Thomas, Esq.
Bonezzi Switzer Murphy & Polito Co., LPA
526 Superior Avenue - 1400 Leader Building
Cleveland, Ohio 44114
Attorney for Appellees-Defendants
Oak Tree Behavioral Health and Thomas J. Thysseril, M.D.

Sheila A. McKeon, Esq.
Anna S. Fister, Esq.
Gallagher Sharp
420 Madison Avenue, Suite 1250
Toledo, Ohio 43604
Attorneys for Appellee-Defendant
Janice Galehouse-Hageman



JACOB A. H. KRONENBERG
Attorney for Appellant, Barbara A. Belovich

JAN 16 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87826

KENNETH C. HAGEMAN

PLAINTIFF-APPELLANT

vs.

**SOUTHWEST GENERAL HEALTH
CENTER, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545116

BEFORE: Celebrezze, P.J., Cooney, J., and Corrigan, J.

RELEASED: December 21, 2006

JOURNALIZED:

JAN 16 2007
VOL 9628 PG 0004

CA06087826

43345973



For Appellant Kenneth C. Hageman

James E. Boulas
Jim Petropouleas
James E. Boulas Co., L.P.A.
Raintree Plaza
7914 Broadview Road
Broadview Heights, Ohio 44147-1202

For Appellee Southwest General Health Center

Kate E. Ryan
Jeffrey W. Van Wagner
Jane F. Warner
Ulmer & Berne, L.L.P.
1100 Skylight Office Tower
1660 West 2nd Street
Cleveland, Ohio 44113-1448

Anna S. Fister
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115

Kimberly A. Thomas
Bonezzi, Switzer, Murphy & Polito
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114-1491

For Third-Party Claimant/Appellee Barbara A. Belovich

Jacob A. H. Kronenberg
Kronenberg & Kronenberg
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103-1125

-CONTINUED-

For Appellee Janice Galehouse-Hageman

Sheila A. McKeon
Gallagher Sharp
420 Madison Avenue
Suite 1250
Toledo, Ohio 43604

Kristie M. Weibling
Collins & Scanlon, L.L.P.
3300 Terminal Tower
50 Public Square
Cleveland, Ohio 44113

FILED & JOURNALIZED
PER APP. R. 22(E)

JAN 16 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY Jm DEP.

For Appellee Oaktree Behavioral Health

Donald H. Switzer
Bonezzi, Switzer, Murphy & Polito
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

CA06087826 42957752


For Appellee Thomas J. Thysseril, M.D.

Peter A. Holdsworth
Bonezzi, Switzer, Murphy & Polito
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

DEC 21 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY Jm DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE TO COUNSEL
FOR ALL FURTHER COSTS TAKEN

FRANK D. CELEBREZZE, JR., P.J.:

Appellant, Kenneth Hageman, appeals the trial court's decision granting summary judgment in favor of appellees. After a thorough review of the arguments and for the reasons set forth below, we affirm.

On October 12, 2004, appellant filed a civil complaint against Oak Tree Physicians Inc. ("Oak Tree"); Oak Tree's employee, Thomas J. Thysseril, M.D.; Southwest General Health Center ("Southwest"); Barbara A. Belovich Esq.; and appellant's ex-wife, Janice Galehouse-Hageman ("Galehouse"). The complaint alleged that Dr. Thysseril and Oak Tree improperly authorized the release of his medical records during the course of his divorce proceedings. In addition, appellant argued that Galehouse and Belovich disclosed his medical records to third parties without his permission.

Appellant and Galehouse were parties to a domestic relations case, and Belovich served as legal counsel for Galehouse.

On April 12, 2005, the trial court ordered appellant to provide expert reports by August 15, 2005 and scheduled trial for February 13, 2006. Dr. Thysseril and Oak Tree responded by filing a joint motion for summary judgment. Shortly thereafter, motions for summary judgment were also filed by Southwest, Galehouse, Belovich and Boules, and appellant filed a motion for summary judgment in response to Belovich's counterclaim.

On February 3, 2006, the trial court granted the motions for summary judgment of Dr. Thysseril, Oak Tree, Southwest, Belovich and Galehouse. Appellant timely appealed.

The incident that gave rise to the present case began on January 10, 2003, when appellant received psychiatric treatment from Dr. Thysseril. During that initial appointment, Dr. Thysseril diagnosed appellant as having bipolar disorder and documented that he had homicidal thoughts toward his wife. Galehouse was present during that initial appointment. At the time appellant began psychiatric treatment, he and Galehouse were living in the same home with their young daughter.

On February 19, 2003, Galehouse filed for divorce against Hageman. Because of her husband's erratic and threatening behavior, Galehouse also requested a restraining order, which was granted by the trial court. On March 26, 2003, appellant filed a pro se answer and counterclaim to Galehouse's complaint. In the counterclaim, appellant sought legal custody of their minor child.

On July 4, 2003, appellant and Galehouse had an altercation at their home during which appellant ran over Galehouse with his truck, breaking her wrists. The altercation occurred while their daughter was present. As a result

of this incident, appellant was charged with aggravated vehicular assault. A jury found him not guilty on March 9, 2004.

Because of the July 4th incident, Galehouse sought a domestic violence civil protection order on July 9, 2003, which the domestic relations court granted. In that order, the court gave Galehouse temporary residential legal custody of the couple's minor child and suspended appellant's contact and visitation rights. The court scheduled the matter for a full hearing on July 17, 2003; however, it was continued until October 17, 2003.

On July 21, 2003, appellant retained legal counsel, and Boulas entered his first appearance on behalf of appellant. Knowing that appellant was currently receiving psychiatric treatment, Boulas determined that a positive prognosis from Dr. Thysseril was essential to appellant's case. On July 23, 2003, appellant and Boulas met with Dr. Thysseril. During their meeting, appellant requested that Dr. Thysseril author a report indicating that appellant's prognosis was good, as long as he continued with treatment, recommendations and follow-up visits. The report was submitted to the trial court on July 29, 2003.

In preparation for the civil protection order hearing, Belovich issued a trial subpoena ordering Dr. Thysseril to appear with appellant's psychiatric records for use during the hearing. Thysseril contacted Belovich and informed her that, because of scheduling conflicts, he would not be able to appear. Belovich

requested that, in lieu of appearing at the hearing, Dr. Thysseril send her a copy of appellant's psychiatric medical records. Appellant filed no objection to the production of his medical records, nor did he seek to exclude the records from the proceedings.

Prior to the civil protection hearing, the parties had stipulated to an agreed order of protection, which was adopted by the domestic relations court. Soon after, the parties entered into a separation agreement and agreed that Galehouse would be the residential parent, and appellant would have visitation with his daughter for 60 days out of the year, supervised by either his father or brother. In addition, appellant agreed to continue psychiatric treatment and further agreed that he would only be permitted unsupervised visitation with his daughter when the guardian ad litem determined that he was fully complying with his treatment plan.

Less than one month later, appellant filed a complaint in the common pleas court alleging unauthorized disclosure of medical records. In his complaint, he argued that his psychiatric records that were at issue during his domestic relations matter were unlawfully released to the prosecution during his domestic violence case. After the parties filed numerous cross motions for summary judgment, the common pleas court granted summary judgment in favor of the defendants named in appellant's complaint.

Appellant brings this appeal asserting four assignments of error.¹ Because the assignments of error are substantially interrelated, they will be addressed together.

At the crux of appellant's appeal is his argument that the trial court erred when it granted summary judgment in favor of the appellees. More specifically, he asserts that because he did not waive his doctor-patient privilege, genuine issues of material fact exist to be litigated, making summary judgment improper in this instance.

"Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex*

Appellant's four assignments of error are included in Appendix A of this Opinion.

Corp. v. Catrett (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, “*** the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party’s claim.” *Id.* at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The nonmoving party must set forth “specific facts” by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id.*

This court reviews the lower court’s granting of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). “The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***.

[T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

Appellant's first, second and fourth assignments of error assert that the trial court erred when it granted summary judgment in favor of Dr. Thysseril, Oak Tree, Southwest, and Galehouse. The record indicates that appellant waived his doctor-patient privilege with respect to his divorce action. In addition, the facts of this case strongly suggest that the court's interest in protecting the safety of appellant's minor child far outweighed his patient confidentiality.

This court's holding in *Gill v. Gill*, Cuyahoga App. No. 81463, 2003-Ohio-180, directly addresses the doctor-patient privilege and how it is impacted by child custody proceedings. *Gill* states:

"Under this statute, the filing of any civil action by a patient waives the physician-patient privilege as to any communication that relates causally or historically to the physical or mental injuries put at issue by such civil action. Whenever custody of children is in dispute, the party seeking custodial authority subjects him or herself to extensive investigation of all factors relevant to the permanent custody award. Of major importance, as stated in R.C. 3109.04

(F)(1)(e), is the mental and physical health of not only the child, but also the parents. R.C. 3109.04 places the mental conditions of all family members squarely in issue.

“We have also held that 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 that the physician-patient privilege does not apply.”

Additionally, the Ohio Supreme Court’s judgment in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, addresses countervailing interests versus patient confidentiality during court proceedings. *Biddle* provides in pertinent part:

“In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.

“In the absence of prior authorization, a physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest that outweighs the patient’s interest in confidentiality.”

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. Appellant's hearing directly involved the care and custody of his minor child. Knowing that the trial court's determination regarding custody would strongly hinge upon the state of his mental health, appellant authorized his physician to submit a report to the trial court detailing his condition, treatment, and prognosis.

It is important to note that at the time appellant authorized the release of his medical information to the domestic relations court, his counsel was present. Appellant's authorization waived the doctor-patient privilege. Additionally, as held in *Gill*, when an individual requests child custody, his mental health is directly at issue, which waives the doctor-patient privilege as well. It is clear from appellant's actions that he effectively waived his doctor-patient privilege.

In addition, appellant's interests in confidentiality are far outweighed by the concerns surrounding the care of his daughter. Appellant suffers from bipolar disorder, yet was requesting custody of his minor child. In order for the domestic relations court to make an effective decision regarding appellant's ability to adequately care for his child, it was necessary for the court to evaluate his medical information and prognosis. Similarly, it was important for opposing

counsel, as well as the guardian ad litem, to have access to the medical reports in order to make the most informed decisions regarding custody and visitation.

It is clear that no genuine issue of material fact remained to litigate at trial. Not only did appellant effectively waive his doctor-patient privilege, but the facts strongly indicate that the safety of his daughter far outweighed his confidentiality as a patient. Accordingly, the trial court did not abuse its discretion when it granted summary judgment in favor of Dr. Thysseril, Oak Tree, Southwest, and Galehouse. Appellant's first, second and fourth assignments of error are overruled.

With respect to appellant's third assignment of error, this court agrees with his argument that the trial court erred in awarding summary judgment in favor of attorney Barbara Belovich. Belovich represented Galehouse in the divorce action. While their divorce action was pending, appellant and Galehouse were involved in an alleged domestic violence matter that was prosecuted in the Cuyahoga County Court of Common Pleas. During that case, Belovich forwarded information regarding appellant's psychiatric condition to the prosecution. Appellant waived disclosure of his mental health information in the divorce action; however, he did not assert the same waiver with respect to the domestic violence matter. Although this information could have aided the

prosecution's case, it was the duty of the prosecution to conduct proper discovery in order to gain access to it.

Belovich overstepped her bounds as Galehouse's divorce attorney when she disseminated information regarding appellant's psychiatric condition to the prosecution in the domestic violence matter. On the basis of her actions, it is clear that a genuine issue of material fact remains to be litigated at trial. Accordingly, the trial court erred when it awarded summary judgment in favor of Belovich, and we find merit in appellant's third assignment of error.

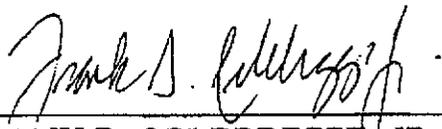
Judgment affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., CONCURS (WITH SEPARATE OPINION);
MICHAEL J. CORRIGAN, J.*, CONCURS IN PART AND DISSENTS IN PART
(WITH SEPARATE OPINION).

(*SITTING BY ASSIGNMENT: JUDGE MICHAEL J. CORRIGAN,
RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.)

COLLEEN CONWAY COONEY, J., CONCURRING:

I concur with the majority opinion and write separately to make the essential point that the records were never submitted to the domestic relations court nor admitted into evidence before that court. Therefore, I disagree with the dissent's conclusion that they became public records, available to anyone.

MICHAEL J. CORRIGAN, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the affirmation of the first, second and fourth assignments of error. I disagree with the reversal of the third assignment of error. Having concluded that Hageman waived the disclosure of his mental health records for purposes of the domestic relations action, it cannot consistently be asserted that Hageman still retained a right of privacy for any subsequent litigation. After the records were requested pursuant to a subpoena, Hageman took no action to quash the subpoena or otherwise limit the use of the information. Moreover, having divulged the records, Hageman took no action to have them sealed or otherwise subjected to a confidentiality order. Since that information became a public record, anyone could have access to it, including the state. So it makes no difference whether Belovich willingly forwarded that information to the state or the state demanded it by subpoena. Pandora's box had been opened.

APPENDIX A

Appellant's four assignments of error:

I. The trial court abused its discretion and committed prejudicial error in granting defendant-Appellee Thomas J. Thysseril and Oak Tree Physicians, Inc.'s motion for summary judgment.

II. The trial court abused its discretion and committed prejudicial error in granting defendant-Appellee Southwest General Health Center's motion for summary judgment.

III. The trial court abused its discretion and committed prejudicial error in granting defendant-Appellee Barbara A. Belovich's motion for summary judgment.

IV. The trial court abused its discretion and committed prejudicial error in granting defendant Appellee Janice Galehouse-Hageman's motion for summary judgment.



37771751

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KENNETH C. HAGEMAN
Plaintiff

SOUTHWEST GENERAL HEALTH CENTER ETAL
Defendant

Case No: CV-04-545116

Judge: MICHAEL P DONNELLY

JOURNAL ENTRY

89 DIS. W/ PREJ - FINAL

DEFENDANT BELOVICH'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.
COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

02/03/2006

- 89
02/03/2006

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[Appx. 22]



37771688

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KENNETH C. HAGEMAN
Plaintiff

SOUTHWEST GENERAL HEALTH CENTER ETAL
Defendant

Case No: CV-04-545116

Judge: MICHAEL P DONNELLY

JOURNAL ENTRY

89 DIS. W/ PREJ - FINAL

DEFENDANT(S) OAKTREE BEHAVIORAL HEALTH(D2) AND THOMAS J THYSSERIL(D3) MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS IS GRANTED.
COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

02/03/2006

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02/03/2006

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37771718

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KENNETH C. HAGEMAN
Plaintiff

SOUTHWEST GENERAL HEALTH CENTER ETAL
Defendant

Case No: CV-04-545116

Judge: MICHAEL P DONNELLY

JOURNAL ENTRY

89 DIS. W/ PREJ - FINAL

DEFENDANT SOUTHWEST GENERAL HEALTH CENTER'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.
COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

02/03/2006



37771915

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KENNETH C. HAGEMAN
Plaintiff

SOUTHWEST GENERAL HEALTH CENTER ETAL
Defendant

Case No: CV-04-545116

Judge: MICHAEL P DONNELLY

JOURNAL ENTRY

DEFENDANT JANICE GALEHOUSE-HAGEMAN'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. FINAL.

Judge Signature

02/03/2006

02/03/2006

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[Appx. 25]



37771981

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KENNETH C. HAGEMAN
Plaintiff

SOUTHWEST GENERAL HEALTH CENTER ETAL
Defendant

Case No: CV-04-545116

Judge: MICHAEL P DONNELLY

JOURNAL ENTRY

JOINT MOTION OF JAMES BOULAS AND JAMES BOULAS CO., L.P.A FOR SUMMARY JUDGMENT ON DEFENDANT BELOVICH'S COUNTERCLAIM IS GRANTED. FINAL.

Judge Signature

02/03/2006

02/03/2006

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[Appx. 26]



37771848

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KENNETH C. HAGEMAN
Plaintiff

SOUTHWEST GENERAL HEALTH CENTER ETAL
Defendant

Case No: CV-04-545116

Judge: MICHAEL P DONNELLY

JOURNAL ENTRY

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT BELOVICH'S COUNTERCLAIM IS GRANTED.

Judge Signature

02/03/2006

02/03/2006

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[Appx. 27]

§ 3109.04**Statutes & Session Law****TITLE [31] XXXI DOMESTIC RELATIONS – CHILDREN****CHAPTER 3109: CHILDREN****3109.04 Allocating parental rights and responsibilities for care of children - shared parenting.****3109.04 Allocating parental rights and responsibilities for care of children - shared parenting.**

(A) In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, upon hearing the testimony of either or both parents and considering any mediation report filed pursuant to section 3109.052 of the Revised Code and in accordance with sections 3127.01 to 3127.53 of the Revised Code, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

(2) If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting pursuant to that division and if a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. If the court issues a shared parenting order under this division and it is necessary for the purpose of receiving public assistance, the court shall designate which one of the parents' residences is to serve as the child's home. The child support obligations of the parents under a shared parenting order issued under this division shall be determined in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code.

(B)(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

(b) The court first shall determine the reasoning ability of the child. If the court determines that the child does not have sufficient reasoning ability to express the child's wishes and concern with respect to the allocation of parental rights and responsibilities for the care of the child, it shall not determine the child's wishes and concerns with respect to the allocation. If the court determines that the child has sufficient reasoning ability to express the child's wishes or concerns with respect to the allocation, it then shall determine whether, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation. If the court determines that, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation, it shall not determine the child's wishes and concerns with respect to the allocation and shall enter its written findings of fact and opinion in the journal. If the court determines that it would be in the best interests of the child to determine the child's wishes and concerns with respect to the allocation, it shall proceed to make that determination.

(c) The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview.

(3) No person shall obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the child's wishes and concerns regarding the allocation of parental rights and responsibilities concerning the child. No court, in determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child or for purposes of resolving any issues related to the making of that allocation, shall accept or consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters.

(C) Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

If the court determines that either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being a neglected child, that either parent previously has been determined to be the perpetrator of the neglectful act that is the basis of an adjudication that a child is a neglected child, or that there is reason to believe that either parent has acted in a manner resulting in a child being a neglected child, the court shall consider that fact against naming that parent the residential parent and against granting a shared parenting decree. When the court allocates parental rights and responsibilities for the care of children or determines whether to grant shared parenting in any proceeding, it shall consider whether either parent or any member of the household of either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an

abused child. If the court determines that either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, it may designate that parent as the residential parent and may issue a shared parenting decree or order only if it determines that it is in the best interest of the child to name that parent the residential parent or to issue a shared parenting decree or order and it makes specific written findings of fact to support its determination.

(D)(1)(a) Upon the filing of a pleading or motion by either parent or both parents, in accordance with division (G) of this section, requesting shared parenting and the filing of a shared parenting plan in accordance with that division, the court shall comply with division (D)(1)(a)(i), (ii), or (iii) of this section, whichever is applicable:

(i) If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is in the best interest of the children, the court shall approve it. If the court determines that the plan or any part of the plan is not in the best interest of the children, the court shall require the parents to make appropriate changes to the plan to meet the court's objections to it. If changes to the plan are made to meet the court's objections, and if the new plan is in the best interest of the children, the court shall approve the plan. If changes to the plan are not made to meet the court's objections, or if the parents attempt to make changes to the plan to meet the court's objections, but the court determines that the new plan or any part of the new plan still is not in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motion requesting shared parenting of the children and proceed as if the request in the pleadings or the motion had not been made. The court shall not approve a plan under this division unless it determines that the plan is in the best interest of the children.

(ii) If each parent makes a request in the parent's pleadings or files a motion and each also files a separate plan, the court shall review each plan filed to determine if either is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that neither filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections, or may select one of the filed plans and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the requests in the pleadings or the motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the parents' pleadings or denies their motions requesting shared parenting under this division and proceeds as if the requests in the pleadings or the motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(iii) If each parent makes a request in the parent's pleadings or files a motion but only one parent files a plan, or if only one parent makes a request in the parent's pleadings or files a motion and also files a plan, the court in the best interest of the children may order the other parent to file a plan for shared parenting in accordance with division (G) of this section. The court shall review each plan filed to determine if any plan is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that no filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections or may select one filed plan and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny the parents' motion or reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the request or requests or the motion or motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the pleadings or denies the motion or motions requesting shared parenting under this division and proceeds as if the request or requests or the motion or motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(b) The approval of a plan under division (D)(1)(a)(ii) or (iii) of this section is discretionary with the court. The court shall not approve more than one plan under either division and shall not approve a plan under either division unless it determines that the plan is in the best interest of the children. If the court, under either division, does not determine that any filed plan or any filed plan with submitted changes is in the best interest of the children, the court shall not approve any plan.

(c) Whenever possible, the court shall require that a shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with any parent would not be in the best interest of the child.

(d) If a court approves a shared parenting plan under division (D)(1)(a)(i), (ii), or (iii) of this section, the approved plan shall be incorporated into a final shared parenting decree granting the parents the shared parenting of the children. Any final shared parenting decree shall be issued at the same time as and shall be appended to the final decree of dissolution, divorce, annulment, or legal separation arising out of the action out of which the question of the allocation of parental rights and responsibilities for the care of the children arose.

No provisional shared parenting decree shall be issued in relation to any shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section. A final shared parenting decree issued under this division has immediate effect as a final decree on the date of its issuance, subject to modification or termination as authorized by this section.

(2) If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers

necessary or as the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction.

(E)(1)(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

(b) One or both of the parents under a prior decree allocating parental rights and responsibilities for the care of children that is not a shared parenting decree may file a motion requesting that the prior decree be modified to give both parents shared rights and responsibilities for the care of the children. The motion shall include both a request for modification of the prior decree and a request for a shared parenting order that complies with division (G) of this section. Upon the filing of the motion, if the court determines that a modification of the prior decree is authorized under division (E)(1)(a) of this section, the court may modify the prior decree to grant a shared parenting order, provided that the court shall not modify the prior decree to grant a shared parenting order unless the court complies with divisions (A) and (D)(1) of this section and, in accordance with those divisions, approves the submitted shared parenting plan and determines that shared parenting would be in the best interest of the children.

(2) In addition to a modification authorized under division (E)(1) of this section:

(a) Both parents under a shared parenting decree jointly may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree. Modifications under this division may be made at any time. The modifications to the plan shall be filed jointly by both parents with the court, and the court shall include them in the plan, unless they are not in the best interest of the children. If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications to the proposed modifications or the plan that are in the best interest of the children. Modifications jointly submitted by both parents under a shared parenting decree shall be effective, either as originally filed or as modified by the court, upon their inclusion by the court in the plan. Modifications to the plan made by the court shall be effective upon their inclusion by the court in the plan.

(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

(d) Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.

(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

(a) The wishes of the child's parents regarding the child's care;

(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been

convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

(2) In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:

(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

(3) When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition.

(G) Either parent or both parents of any children may file a pleading or motion with the court requesting the court to grant both parents shared parental rights and responsibilities for the care of the children in a proceeding held pursuant to division (A) of this section. If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents. If each parent files a pleading or motion requesting shared parenting but only one parent files a plan or if only one parent files a pleading or motion requesting shared parenting and also files a plan, the other parent as ordered by the court shall file with the court a plan for the exercise of shared parenting by both parents. The plan for shared parenting shall be filed with the petition for dissolution of marriage, if the question of parental rights and responsibilities for the care of the children arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children. A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance.

(H) If an appeal is taken from a decision of a court that grants or modifies a decree allocating parental rights and responsibilities for the care of children, the court of appeals shall give the case calendar priority and handle it expeditiously.

(I) As used in this section:

(1) "Abused child" has the same meaning as in section 2151.031 of the Revised Code, and "neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(2) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(J) As used in the Revised Code, "shared parenting" means that the parents share, in the manner set forth in the plan for shared parenting that is approved by the court under division (D)(1) and described in division (K)(6) of this section, all or some of the aspects of physical and legal care of their children.

(K) For purposes of the Revised Code:

(1) A parent who is granted the care, custody, and control of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(2) A parent who primarily is allocated the parental rights and responsibilities for the care of a child and who is designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(3) A parent who is not granted custody of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(4) A parent who is not primarily allocated the parental rights and responsibilities for the care of a child and who is not designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(5) Unless the context clearly requires otherwise, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, both parents have "custody of the child" or "care, custody, and control of the child" under the order, to the extent and in the manner specified in the order.

(6) Unless the context clearly requires otherwise and except as otherwise provided in the order, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, each parent, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, is the "residential parent," the "residential parent and

legal custodian," or the "custodial parent" of the child.

(7) Unless the context clearly requires otherwise and except as otherwise provided in the order, a designation in the order of a parent as the residential parent for the purpose of determining the school the child attends, as the custodial parent for purposes of claiming the child as a dependent pursuant to section 152(e) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended, or as the residential parent for purposes of receiving public assistance pursuant to division (A)(2) of this section, does not affect the designation pursuant to division (K)(6) of this section of each parent as the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.

(L) The court shall require each parent of a child to file an affidavit attesting as to whether the parent, and the members of the parent's household, have been convicted of or pleaded guilty to any of the offenses identified in divisions (C) and (F)(1)(h) of this section.

Effective Date: 03-22-2001; 04-11-2005; 01-02-3007

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§ 3113.31**Statutes & Session Law****TITLE [31] XXXI DOMESTIC RELATIONS – CHILDREN****CHAPTER 3113: NEGLECT, ABANDONMENT, OR DOMESTIC VIOLENCE****3113.31 Domestic violence definitions - hearings.**

3113.31 Domestic violence definitions - hearings.

(A) As used in this section:

(1) "Domestic violence" means the 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 or 2911.211 of the Revised Code;

(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code;

(d) Committing a sexually oriented offense.

(2) "Court" means the domestic relations division of the court of common pleas in counties that have a domestic relations division, and the court of common pleas in counties that do not have a domestic relations division.

(3) "Family or household member" means any of the following:

(a) Any of the following who is residing with or has resided with the respondent:

(i) A spouse, a person living as a spouse, or a former spouse of the respondent;

(ii) A parent or a child of the respondent, or another person related by consanguinity or affinity to the respondent;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.

(b) The natural parent of any child of whom the respondent is the other natural parent or is the putative other natural parent.

(4) "Person living as a spouse" means a person who is living or has lived with the respondent in a common law marital relationship, who otherwise is cohabiting with the respondent, or who otherwise has cohabited with the respondent within five years prior to the date of the alleged occurrence of the act in question.

(5) "Victim advocate" means a person who provides support and assistance for a person who files a

(b) An ex parte order issued under this section does not expire because of a failure to serve notice of the full hearing upon the respondent before the date set for the full hearing under division (D)(2)(a) of this section or because the court grants a continuance under that division.

(3) If a person who files a petition pursuant to this section does not request an ex parte order, or if a person requests an ex parte order but the court does not issue an ex parte order after an ex parte hearing, the court shall proceed as in a normal civil action and grant a full hearing on the matter.

(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:

(a) Direct the respondent to refrain from abusing or from committing sexually oriented offenses against the family or household members;

(b) Grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent, by evicting the respondent, when the residence or household is owned or leased solely by the petitioner or other family or household member, or by ordering the respondent to vacate the premises, when the residence or household is jointly owned or leased by the respondent, and the petitioner or other family or household member;

(c) When the respondent has a duty to support the petitioner or other family or household member living in the residence or household and the respondent is the sole owner or lessee of the residence or household, grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent, by ordering the respondent to vacate the premises, or, in the case of a consent agreement, allow the respondent to provide suitable, alternative housing;

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

(e) Require the respondent to maintain support, if the respondent customarily provides for or contributes to the support of the family or household member, or if the respondent has a duty to support the petitioner or family or household member;

(f) Require the respondent, petitioner, victim of domestic violence, or any combination of those persons, to seek counseling;

(g) Require the respondent to refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member;

(h) Grant other relief that the court considers equitable and fair, including, but not limited to, ordering the respondent to permit the use of a motor vehicle by the petitioner or other family or household member and the apportionment of household and family personal property.

(2) If a protection order has been issued pursuant to this section in a prior action involving the respondent and the petitioner or one or more of the family or household members or victims, the court may include in a protection order that it issues a prohibition against the respondent returning to the residence or household. If it includes a prohibition against the respondent returning to the residence or household in the order, it also shall include in the order provisions of the type described in division (E)

(7) of this section. This division does not preclude the court from including in a protection order or consent agreement, in circumstances other than those described in this division, a requirement that the respondent be evicted from or vacate the residence or household or refrain from entering the residence, school, business, or place of employment of the petitioner or a family or household member, and, if the court includes any requirement of that type in an order or agreement, the court also shall include in the order provisions of the type described in division (E)(7) of this section.

(3)(a) Any protection order issued or consent agreement approved under this section shall be valid until a date certain, but not later than five years from the date of its issuance or approval unless modified or terminated as provided in division (E)(8) of this section.

(b) Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(d) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues an order allocating parental rights and responsibilities for the care of children or on the date that a juvenile court in an action brought by the petitioner or respondent issues an order awarding legal custody of minor children. Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(e) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues a support order or on the date that a juvenile court in an action brought by the petitioner or respondent issues a support order.

(c) Any protection order issued or consent agreement approved pursuant to this section may be renewed in the same manner as the original order or agreement was issued or approved.

(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 this 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 that 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.

(5) No protection order issued or consent agreement approved under this section shall in any manner affect title to any real property.

(6)(a) If a petitioner, or the child of a petitioner, who obtains a protection order or consent agreement

pursuant to division (E)(1) of this section or a temporary protection order pursuant to section 2919.26 of the Revised Code and is the subject of a parenting time order issued pursuant to section 3109.051 or 3109.12 of the Revised Code or a visitation or companionship order issued pursuant to section 3109.051, 3109.11, or 3109.12 of the Revised Code or division (E)(1)(d) of this section granting parenting time rights to the respondent, the court may require the public children services agency of the county in which the court is located to provide supervision of the respondent's exercise of parenting time or visitation or companionship rights with respect to the child for a period not to exceed nine months, if the court makes the following findings of fact:

- (i) The child is in danger from the respondent;
- (ii) No other person or agency is available to provide the supervision.

(b) A court that requires an agency to provide supervision pursuant to division (E)(6)(a) of this section shall order the respondent to reimburse the agency for the cost of providing the supervision, if it determines that the respondent has sufficient income or resources to pay that cost.

(7)(a) If a protection order issued or consent agreement approved under this section includes a requirement that the respondent be evicted from or vacate the residence or household or refrain from entering the residence, school, business, or place of employment of the petitioner or a family or household member, the order or agreement shall state clearly that the order or agreement cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence, school, business, or place of employment or by the respondent's entry into one of those places otherwise upon the consent of the petitioner or other family or household member.

(b) Division (E)(7)(a) of this section does not limit any discretion of a court to determine that a respondent charged with a violation of section 2919.27 of the Revised Code, with a violation of a municipal ordinance substantially equivalent to that section, or with contempt of court, which charge is based on an alleged violation of a protection order issued or consent agreement approved under this section, did not commit the violation or was not in contempt of court.

(8)(a) The court may modify or terminate as provided in division (E)(8) of this section a protection order or consent agreement that was issued after a full hearing under this section. The court that issued the protection order or approved the consent agreement shall hear a motion for modification or termination of the protection order or consent agreement pursuant to division (E)(8) of this section.

(b) Either the petitioner or the respondent of the original protection order or consent agreement may bring a motion for modification or termination of a protection order or consent agreement that was issued or approved after a full hearing. The court shall require notice of the motion to be made as provided by the Rules of Civil Procedure. If the petitioner for the original protection order or consent agreement has requested that the petitioner's address be kept confidential, the court shall not disclose the address to the respondent of the original protection order or consent agreement or any other person, except as otherwise required by law. The moving party has the burden of proof to show, by a preponderance of the evidence, that modification or termination of the protection order or consent agreement is appropriate because either the protection order or consent agreement is no longer needed or because the terms of the original protection order or consent agreement are no longer appropriate.

(c) In considering whether to modify or terminate a protection order or consent agreement issued or approved under this section, the court shall consider all relevant factors, including, but not limited to, the

following:

(i) Whether the petitioner consents to modification or termination of the protection order or consent agreement;

(ii) Whether the petitioner fears the respondent;

(iii) The current nature of the relationship between the petitioner and the respondent;

(iv) The circumstances of the petitioner and respondent, including the relative proximity of the petitioner's and respondent's workplaces and residences and whether the petitioner and respondent have minor children together;

(v) Whether the respondent has complied with the terms and conditions of the original protection order or consent agreement;

(vi) Whether the respondent has a continuing involvement with illegal drugs or alcohol;

(vii) Whether the respondent has been convicted of or pleaded guilty to an offense of violence since the issuance of the protection order or approval of the consent agreement;

(viii) Whether any other protection orders, consent agreements, restraining orders, or no contact orders have been issued against the respondent pursuant to this section, section 2919.26 of the Revised Code, any other provision of state law, or the law of any other state;

(ix) Whether the respondent has participated in any domestic violence treatment, intervention program, or other counseling addressing domestic violence and whether the respondent has completed the treatment, program, or counseling;

(x) The time that has elapsed since the protection order was issued or since the consent agreement was approved;

(xi) The age and health of the respondent;

(xii) When the last incident of abuse, threat of harm, or commission of a sexually oriented offense occurred or other relevant information concerning the safety and protection of the petitioner or other protected parties.

(d) If a protection order or consent agreement is modified or terminated as provided in division (E) (8) of this section, the court shall issue copies of the modified or terminated order or agreement as provided in division (F) of this section. A petitioner may also provide notice of the modification or termination to the judicial and law enforcement officials in any county other than the county in which the order or agreement is modified or terminated as provided in division (N) of this section.

(e) If the respondent moves for modification or termination of a protection order or consent agreement pursuant to this section, the court may assess costs against the respondent for the filing of the motion.

(F)(1) A copy of any protection order, or consent agreement, that is issued, approved, modified, or terminated under this section shall be issued by the court to the petitioner, to the respondent, and to all

law enforcement agencies that have jurisdiction to enforce the order or agreement. The court shall direct that a copy of an order be delivered to the respondent on the same day that the order is entered.

(2) All law enforcement agencies shall establish and maintain an index for the protection orders and the approved consent agreements delivered to the agencies pursuant to division (F)(1) of this section. With respect to each order and consent agreement delivered, each agency shall note on the index the date and time that it received the order or consent agreement.

(3) Regardless of whether the petitioner has registered the order or agreement in the county in which the officer's agency has jurisdiction pursuant to division (N) of this section, any officer of a law enforcement agency shall enforce a protection order issued or consent agreement approved by any court in this state in accordance with the provisions of the order or agreement, including removing the respondent from the premises, if appropriate.

(G) Any proceeding under this section shall be conducted in accordance with the Rules of Civil Procedure, except that an order under this section may be obtained with or without bond. An order issued under this section, other than an ex parte order, that grants a protection order or approves a consent agreement, that refuses to grant a protection order or approve a consent agreement that modifies or terminates a protection order or consent agreement, or that refuses to modify or terminate a protection order or consent agreement, is a final, appealable order. The remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies.

(H) The filing of proceedings under this section does not excuse a person from filing any report or giving any notice required by section 2151.421 of the Revised Code or by any other law. When a petition under this section alleges domestic violence against minor children, the court shall report the fact, or cause reports to be made, to a county, township, or municipal peace officer under section 2151.421 of the Revised Code.

(I) Any law enforcement agency that investigates a domestic dispute shall provide information to the family or household members involved regarding the relief available under this section and section 2919.26 of the Revised Code.

(J) Notwithstanding any provision of law to the contrary and regardless of whether a protection order is issued or a consent agreement is approved by a court of another county or a court of another state, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of a petition pursuant to this section or in connection with the filing, issuance, registration, or service of a protection order or consent agreement, or for obtaining a certified copy of a protection order or consent agreement.

(K)(1) The court shall comply with Chapters 3119., 3121., 3123., and 3125. of the Revised Code when it makes or modifies an order for child support under this section.

(2) If any person required to pay child support under an order made under this section on or after April 15, 1985, or modified under this section on or after December 31, 1986, is found in contempt of court for failure to make support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

(L)(1) A person who violates a protection order issued or a consent agreement approved under this

section is subject to the following sanctions:

(a) Criminal prosecution for a violation of section 2919.27 of the Revised Code, if the violation of the protection order or consent agreement constitutes a violation of that section;

(b) Punishment for contempt of court.

(2) The punishment of a person for contempt of court for violation of a protection order issued or a consent agreement approved under this section does not bar criminal prosecution of the person for a violation of section 2919.27 of the Revised Code. However, a person punished for contempt of court is entitled to credit for the punishment imposed upon conviction of a violation of that section, and a person convicted of a violation of that section shall not subsequently be punished for contempt of court arising out of the same activity.

(M) In all stages of a proceeding under this section, a petitioner may be accompanied by a victim advocate.

(N)(1) A petitioner who obtains a protection order or consent agreement under this section or a temporary protection order under section 2919.26 of the Revised Code may provide notice of the issuance or approval of the order or agreement to the judicial and law enforcement officials in any county other than the county in which the order is issued or the agreement is approved by registering that order or agreement in the other county pursuant to division (N)(2) of this section and filing a copy of the registered order or registered agreement with a law enforcement agency in the other county in accordance with that division. A person who obtains a protection order issued by a court of another state may provide notice of the issuance of the order to the judicial and law enforcement officials in any county of this state by registering the order in that county pursuant to section 2919.272 of the Revised Code and filing a copy of the registered order with a law enforcement agency in that county.

(2) A petitioner may register a temporary protection order, protection order, or consent agreement in a county other than the county in which the court that issued the order or approved the agreement is located in the following manner:

(a) The petitioner shall obtain a certified copy of the order or agreement from the clerk of the court that issued the order or approved the agreement and present that certified copy to the clerk of the court of common pleas or the clerk of a municipal court or county court in the county in which the order or agreement is to be registered.

(b) Upon accepting the certified copy of the order or agreement for registration, the clerk of the court of common pleas, municipal court, or county court shall place an endorsement of registration on the order or agreement and give the petitioner a copy of the order or agreement that bears that proof of registration.

(3) The clerk of each court of common pleas, the clerk of each municipal court, and the clerk of each county court shall maintain a registry of certified copies of temporary protection orders, protection orders, or consent agreements that have been issued or approved by courts in other counties and that have been registered with the clerk.

Effective Date: 03-31-2003; 08-03-2006; 01-02-2007

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[Appx. 43]

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§ RULE 56

Ohio Court Rules

RULES OF CIVIL PROCEDURE

TITLE VII. JUDGMENT

RULE 56 Summary Judgment

RULE 56. Summary Judgment

(A) For party seeking affirmative relief.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion.

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the amount to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed

established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable.

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1997; July 1, 1999.]

Staff Note (July 1, 1999 Amendment)

RULE 56(C) Motion and proceedings thereon

The prior rule provided that "transcripts of evidence in the pending case" was one of the items that could be considered in deciding a motion for summary judgment. The 1999 amendment deleted "in the pending case" so that transcripts of evidence from another case can be filed and considered in deciding the motion.

Staff Note (July 1, 1997 Amendment)

RULE 56(A) For party seeking affirmative relief.

The 1997 amendment to division (A) divided the previous first sentence into two separate sentences for clarity and ease of reading, and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

RULE 56(B) For defending party.

The 1997 amendment to division (B) added a comma after the "may" in the first sentence and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

RULE 56(C) Motion and proceedings thereon.

The 1997 amendment to division (C) changed the word "pleading" to "pleadings" and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

RULE 56(E) Form of affidavits; further testimony; defense required.

The 1997 amendment to division (E) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

RULE 56(F) When affidavits unavailable.

The 1997 amendment to division (F) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

RULE 56(G) Affidavits made in bad faith.

The 1997 amendment to division (G) replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

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