

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE, KENNETH C. HAGEMAN

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED.....	iii
ARGUMENT.....	1
Proposition of Law No. I	1
The disclosure and use of medical records pursuant to an implicit waiver should be limited to that use for which the law created the implicit waiver.	
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8
APPENDIX	
R.C. §2903.08	Appx. 1

All other documents required or referenced in this Merit Brief appear in Appellant’s Appendix.

TABLE OF AUTHORITIES

CASES:

Biddle v. Warren General Hospital (1999), 86 Ohio St.3d 395..... 1-2

Herman v. Kratch, 2006-Ohio-5938 3

Gill v. Gill, Cuyahoga App. No. 81463, 2003-Ohio-180 6

STATUTES:

R.C. §2903.08 2

R.C. §3109.04(F)(1)(e) 6

ARGUMENT

Proposition of Law No. I: The disclosure and use of medical records pursuant to an implicit waiver should be limited to that use for which the law created the implicit waiver.

The issue in this case is limited to Appellant Belovich's release of Appellee Hageman's mental health records to the Cuyahoga County Assistant Prosecutor for use in a criminal proceeding. The criminal proceeding arose out of an allegation that Hageman caused his then wife, Janice Galehouse-Hageman, bodily injury with his motor vehicle. Mr. Hageman was charged with Aggravated Vehicular Assault. The matter proceeded to trial and Mr. Hageman was acquitted.

Belovich obtained Hageman's medical records during the course of a divorce proceeding wherein Belovich represented Hageman's wife. The medical records were obtained by way of a subpoena issued by Belovich to Hageman's psychiatrist. The Eighth District Court of Appeals determined that Hageman had waived the doctor-patient privilege in the divorce action. However, the Court of Appeals held that Hageman "did not assert the same waiver with respect to the [criminal matter]." See Eighth District Court of Appeals Decision, p. 10.

Initially, Belovich claims that, since she is not a medical provider, *Biddle v. Warren General Hospital (1999)*, 86 Ohio St.3d 395 does not impose liability upon her. This is largely an argument of semantics. Belovich asserts that the Court of Appeals decision creates a new cause of action beyond *Biddle* which provides for third party liability when the release of confidential medical information by a medical provider is found to be authorized. Belovich fails to recognize the intent of *Biddle* and the import of her actions in transmitting Hageman's medical records to the prosecutor in Hageman's

criminal matter. She focuses on the medical providers' transmission of the records being authorized and Hageman's implicit waiver of privilege in the custody/divorce matter to justify her actions. The basic principal of *Biddle* is to protect against the unauthorized disclosure of non-public medical records. The policy furthered by *Biddle* limiting the unauthorized disclosure of non-public medical information should be equally applicable to a third party who has obtained the medical information.

Although the initial disclosure of Hageman's medical records to Belovich for use in the divorce proceeding may have been proper, Belovich's subsequent dissemination of those medical records to the prosecutor was inappropriate and had no bearing on the divorce action or the issue of child custody. It should be noted that in her Merit Brief, Belovich references the Court of Appeals' decision coining the criminal matter against Hageman as the "criminal domestic violence matter." This is an inaccurate description of Cuyahoga County Case No.: CR-03-442569ZA, titled *State of Ohio v. Kenneth Hageman* before Judge Daniel Gaul. Nowhere in the charges of the criminal matter against Hageman is there a reference to a criminal domestic violence charge. The charge actually brought against Hageman was under R.C. 2903.08 for aggravated vehicular assault. Belovich attempts to guise the criminal matter as being very closely related to the custody/domestic matter. Belovich argues that she represented her client in a civil domestic violence proceeding for a civil protective order that was based upon the same facts as the criminal case. However, Belovich's disclosure of Hageman's psychiatric records to the prosecutor had no bearing on Belovich's representation of her client in the civil domestic violence matter. And while Belovich could have used the medical records in the civil domestic violence hearing, had it gone forward, she overstepped her bounds

by giving copies of the records to the prosecutor for use in the criminal proceeding against Mr. Hageman.

Notwithstanding Belovich's attempts to blur the distinction between the civil domestic violence hearing and the criminal case of aggravated vehicular assault, it is clear that these were two separate proceedings, brought by two different parties, prosecuted in two different venues and with two very different potential outcomes. The issue in the civil domestic violence hearing was whether a civil protective order would be issued. The criminal matter could have resulted in Mr. Hageman's incarceration. Belovich represented her client in the civil domestic violence hearing. The criminal matter was handled by the Cuyahoga County Prosecutor. It has been held that Mr. Hageman waived his doctor patient privilege when he sought custody of his minor child. Child custody was not one of the issues in the criminal case, nor did Belovich's disclosure of Mr. Hageman's mental health records to the Cuyahoga County Prosecutor further Belovich's representation of her client in the divorce proceedings.

Belovich then argues that Hageman did not attempt to have the subpoena quashed or move for a protective order. As cited by Belovich, *Herman v. Kratch*, 2006-Ohio-5938, at ¶23 provides that "the tortious conduct of an unprivileged disclosure occurs the moment the nonpublic medical information is disclosed to an unauthorized third party." Thus, Mr. Hageman's cause of action against Belovich arose the moment she handed the medical records to the prosecutor. Her argument that Hageman should have moved for a protective order is moot. Nonetheless, Belovich argues that Hageman's inaction in not seeking limitation to the records, whether by a protective order or otherwise should also be "fatal to his belated claim" and should save her from any liability in this matter. She

cites a portion of the dissenting opinion of the Honorable Judge Michael J. Corrigan in support of her position. Judge Corrigan states that since Hageman took no action to have the records sealed or subjected to a confidentiality order, those records became public record and anyone could have access to them including the State. Judge Colleen Conway Cooney, in her concurring opinion clarifies Judge Corrigan in stating that the medical records were, in fact, never submitted to the domestic relations court nor admitted into evidence before that court and, as such, never became public records available to anyone.

Belovich is essentially claiming that Hageman should have somehow prevented her from acting unlawfully. Ironically, these records were never used in the divorce proceeding. As such, Hageman could not foresee Belovich handing the records to the prosecutor or to anyone else for that matter. The Court of Appeals properly recognized that Belovich had overstepped her bounds. Furthermore, the Court of Appeals found that although Hageman had waived disclosure of his mental health records in the custody/divorce action, he did not waive his rights in the criminal matter.

Belovich's argument stands for the principal that the waiver of the doctor-patient privilege for the purposes of a divorce action constitutes a global waiver of the privilege as to the whole world. To accept Belovich's "global waiver" argument would allow an attorney who obtains a party's medical records during the course of litigation to disclose those records to any third party without limitation. This is not good policy. Ohio law provides for the waiver of the doctor patient privilege in the context of determining child custody. The waiver and use of the medical records must be limited accordingly. An attorney who obtains medical records for use in a child custody proceeding must be limited to using those records only in that context. To allow an attorney to

indiscriminately disclose those medical records to third parties creates the potential for abuse, harassment and embarrassment.

Belovich claims that the Court of Appeals' decision "imposes an onerous duty upon the actions of an attorney in a child custody action¹" and that it will act "unreasonably to constrain custody lawyers in the representation of their clients' interests²." Belovich disclosed Mr. Hageman's sensitive mental health records to the prosecutor for use in a criminal proceeding against Mr. Hageman. It challenges the imagination to understand how this furthered Belovich's representation of her client in the divorce proceeding.

Nothing in the Court of Appeals' ruling limited Belovich's use of the medical records in the context of the divorce proceeding or the civil domestic violence hearing. In fact, the Court of Appeals held that Belovich properly obtained the medical records for use in the divorce proceeding. The Court of Appeals' ruling simply limited the Belovich's disclosure of those records outside of the divorce proceedings. There is nothing onerous or unreasonable about such a limitation.

The Court of Appeals' ruling follows a clear logic. Although Mr. Hageman waived the privilege for the purposes of the divorce proceeding, the waiver must be limited for that purpose only. This is good public policy. Individuals with mental health disorders should be encouraged to obtain medical treatment. The purpose of the doctor-patient privilege is to encourage the free flow of information from the patient to the doctor. To adopt Belovich's position will detract from that purpose.

¹ See *Merit Brief of Appellant* p. 10, ¶3.

² See *Merit Brief of Appellant* p. 12, ¶4

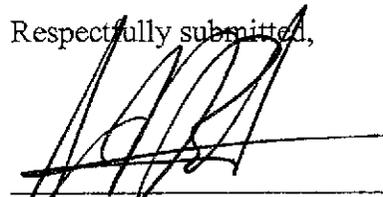
The Court of Appeals looked to *Gill v. Gill*, Cuyahoga App. No. 81463, 2003-Ohio-180 to support Hageman's waiver of privilege in the child custody proceeding. The Court in *Gill* found "that a party seeking custody of a child in a divorce action makes his or her mental and physical condition an issue to be considered by the court in awarding custody and that the physician-patient privilege does not apply." *Gill*, at ¶19 citing to *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618. The Court of Appeals also looked to R.C. 3109.04(F)(1)(e) which establishes that not only is the mental and physical health of the child important in a proceeding but the mental and physical health of the parents is also of importance. The Court of Appeals in this matter also found that Hageman's interests in confidentiality were outweighed by the concerns surrounding the care of his daughter. The focus of the Court of Appeals was upon the implicit waiver established by the Revised Code and followed in *Gill*. The above rationale used by the Court of Appeals in reaching its decision as to the medical providers in this matter certainly has no relation to Belovich's disclosure of Mr. Hageman's records to the prosecutor for use in a criminal proceeding, in which child custody was not at issue.

Appellant Belovich puts forth many claims in attempting to defend her action. Conspicuously missing from Belovich's Merit Brief, however, is *any* explanation as to how her disclosure of Mr. Hageman's mental health records to the Cuyahoga County Prosecutor for use against Mr. Hageman in a criminal proceeding furthered Belovich's representation of her client in the divorce proceeding. The use of Mr. Hageman's mental health records should be limited to that use for which the law created an implicit waiver.

CONCLUSION

For the foregoing reasons, it should be held that the disclosure and use of medical records pursuant to an implicit waiver should be limited to that use for which the law created the implicit waiver and the Court of Appeals' decision should be affirmed and this matter should be remanded to the trial court for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellee, Kenneth C. Hageman, was sent by ordinary U.S. mail, postage prepaid, this 4th day of September 2007 to:

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§ 2903.08**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2903: HOMICIDE AND ASSAULT****2903.08 Aggravated vehicular assault; vehicular assault.**

2903.08 Aggravated vehicular assault; vehicular assault.

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (E) of this section;

(b) Recklessly.

(3) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (E) of this section.

(B)(1) Whoever violates division (A)(1) of this section is guilty of aggravated vehicular assault. Except as otherwise provided in this division, aggravated vehicular assault is a felony of the third degree. Aggravated vehicular assault is a felony of the second degree if any of the following apply:

(a) At the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code.

(b) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(c) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(d) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 4511.19 of the Revised Code or a substantially equivalent municipal ordinance within the previous six years.

(e) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(f) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(g) The offender previously has been convicted of or pleaded guilty to three or more prior violations of any combination of the offenses listed in division (B)(1)(d), (e), or (f) of this section.

(h) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of section 4511.19 of the Revised Code.

(2) In addition to any other sanctions imposed pursuant to division (B)(1) of this section, except as otherwise provided in this division, the court shall impose upon the offender a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code. If the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, the court shall impose either a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of that section or a class one suspension as specified in division (A)(1) of that section.

(C)(1) Whoever violates division (A)(2) or (3) of this section is guilty of vehicular assault and shall be punished as provided in divisions (C)(2) and (3) of this section.

(2) Except as otherwise provided in this division, vehicular assault committed in violation of division (A)(2) of this section is a felony of the fourth degree. Vehicular assault committed in violation of division (A)(2) of this section is a felony of the third degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, or if, in the same course of conduct that resulted in the violation of division (A)(2) of this section, the offender also violated section 4549.02, 4549.021, or 4549.03 of the Revised Code.

In addition to any other sanctions imposed, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of that section.

(3) Except as otherwise provided in this division, vehicular assault committed in violation of division (A)(3) of this section is a misdemeanor of the first degree. Vehicular assault committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code.

(D)(1) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section.

(2) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) of this section or a felony violation of division (A)(3) of this section if either of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.06 of the Revised Code.

(b) At the time of the offense, the offender was driving under suspension under Chapter 4510. or any other provision of the Revised Code.

(3) The court shall impose a mandatory jail term of at least seven days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3) of this section and may impose upon the offender a longer jail term as authorized pursuant to section 2929.24 of the Revised Code.

(E) Divisions (A)(2)(a) and (3) of this section do not apply in a particular construction zone unless signs of the type described in section 2903.081 of the Revised Code are erected in that construction zone in accordance with the guidelines and design specifications established by the director of transportation under section 5501.27 of the Revised Code. The failure to erect signs of the type described in section 2903.081 of the Revised Code in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1) or (2)(b) of this section in that construction zone or the prosecution of any person who violates either of those divisions in that construction zone.

(F) As used in this section:

(1) "Mandatory prison term" and "mandatory jail term" have the same meanings as in section 2929.01 of the Revised Code.

(2) "Traffic-related homicide, manslaughter, or assault offense" and "traffic-related murder,

felonious assault, or attempted murder offense" have the same meanings as in section 2903.06 of the Revised Code.

(3) "Construction zone" has the same meaning as in section 5501.27 of the Revised Code.

(4) "Reckless operation offense" and "speeding offense" have the same meanings as in section 2903.06 of the Revised Code.

(G) For the purposes of this section, when a penalty or suspension is enhanced because of a prior or current violation of a specified law or a prior or current specified offense, the reference to the violation of the specified law or the specified offense includes any violation of any substantially equivalent municipal ordinance, former law of this state, or current or former law of another state or the United States.

Effective Date: 01-01-2004; 06-01-2004; 09-23-2004; 04-04-2007

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