

IN THE SUPREME COURT OF OHIO
Case No. 07-1832

On Appeal From The
Court Of Appeals First Appellate District
Hamilton County, Ohio
Court of Appeals Case No. C060557
Trial Court No. A0502691

JAMIE WALLACE AND BRENDA WALLACE, et al.
Plaintiffs-Appellants,

-v-

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, et al.
Defendants-Appellees.

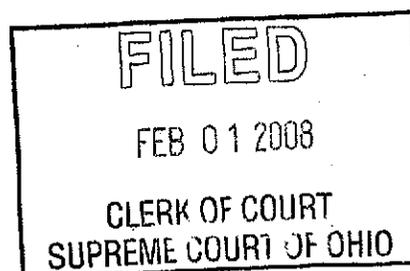
APPELLANTS'
MOTION FOR RECONSIDERATION TO ACCEPT
JURISDICTION OF PROPOSITIONS OF LAW NOS. 2, 4, 5 AND 6

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Appellants respectfully request this Court to reconsider its 4-3 decision of January 23, 2008 not to exercise jurisdiction of their appeal. Specifically, Appellants move this Court to reconsider its decision not to exercise jurisdiction over their Propositions of Law Nos. 2, 4, 5 and 6.

MEMORANDUM IN SUPPORT

A. Introduction

This case involves the important duty, under R.C. 2151.421, for certain individuals and entities to report instances of suspected or known sexual abuse of children and the public's compelling interest to protect children and stop abuse.¹ This Court is aware of the great importance of this issue. It is also aware of the scale of the problem, having found that it is one of "epidemic proportions."² By Propositions of Law Nos. 2, 4, 5 and 6 Appellants have raised issues of great public and general interest relating to the duties of mandatory reporters under R.C. 2151.421 and the ability of private citizens and Prosecuting Attorneys to determine whether those duties are being ignored.

This case also involves the "profound" and "substantial" interest Ohio and the United States have in protecting pregnant women and the unborn.³ Further, by Proposition of Law No. 2 Appellants have not only raised an issue that this Court had previously stated was of public and great general interest;⁴ they have also raised an issue that relates directly to the public's compelling interest in protecting pregnant children and women and the unborn.

¹ *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112.

² *Yates v. Mansfield Bd. of Educ.* (2004), 102 Ohio St.3d 205, 207.

³ *Pre-Term Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684; *Carhart v. Gonzalez*, 550 U.S._____, 127 S. Ct. 1610, 167 L. Ed.2d 480 (2007).

⁴ *Alcorn v. Fransiscan Hospital* (2006), Case No. 06-2357, 3/28/06 Entry.

B. Proposition Of Law Nos. 2, 4, 5 and 6 Raise Novel And Important Issues Involving The Public's Compelling Interest In Protecting Children From Abuse And Eliminating Sources Of Abuse.

Of all victims of crime, children who are abused are the most vulnerable, the most trusting and the most innocent. For that reason, all reasonable steps must be taken to protect our children from abuse and eliminate sources of abuse. R.C. 2151.421 is one of the steps Ohio has taken to achieve those goals.⁵

As stated above, this Court is very aware of this problem, in part through its review of jurisdictional petitions involving convictions of child molesters. The factual patterns of those cases are chilling. Moreover, this Court has correctly stated that child abuse already is a "pervasive and devastating force in our society."⁶ The broad extent of the child abuse problem is also well known by this Court (It is "a problem of epidemic proportions"⁷), the general public,⁸ and the General Assembly.⁹ Finally, Ohio Prosecuting Attorneys are concerned that certain mandatory reporters under R.C. 2151.421 may be intentionally breaching their reporting duties under the statute.¹⁰

Appellants submit that this Court should accept Propositions of Law Nos. 2, 4, 5 and 6 for review because they raise a number of issues of first impression that are of great public and general interest. Moreover, by accepting these propositions for review this Court will be able to provide

⁵ *Brodie*, 51 Ohio St.3d 112.

⁶ *Yates*, 102 Ohio St.3d at 207.

⁷ *Id.*

⁸ See e.g. as *To Catch a Predator*. See <http://www.msnbc.msn.com/id/12503802/> (episode recorded in Greenville, Ohio); <http://www.msnbc.msn.com/id/12619066/> (list of 16 men arrested in the Greenville episode).

⁹ See http://www.dispatch.com/live/content/local_news/stories/2007/10/31/arrest.htm.

¹⁰ See Brief *Amicus Curiae* Of The Honorable Joseph T. Deters, Prosecuting Attorney Of Hamilton County, Ohio, And The Honorable Rachel A. Hutzler, Prosecuting Attorney Of Warren County, Ohio, In Support Of Plaintiffs'-Appellants' Motion For Reconsideration.

all Ohioans the right and means to verify whether mandated reporters are meeting or ignoring their duties under R.C. 2151.421.

C. Ohio Has A Compelling Interest In Identifying And Stopping Individuals And Entities Who Intentionally Fail To Comply With R.C. 2151.421, And "Pattern And Practice" Evidence Is Necessary To Achieve That Goal (Proposition of Law No. 4).

As discussed above, R.C. 2151.421, which imposes an affirmative duty to report suspected illicit sex with children, is one of the weapons Ohio uses in its fight to reduce sexual abuse. Unfortunately, not everyone covered by R.C. 2151.421 cooperates. Indeed, two Ohio Prosecuting Attorneys are "concerned that certain mandated reporters may be intentionally breaching those duties"¹¹ Further, certain organizations and individuals are routinely suspected of intentionally failing to comply with R.C. 2151.421 and similar statutes in other states.¹² Thus, the issue raised by Proposition of Law No. 4 – i.e., whether Appellees intentionally ignore R.C. 2151.421 – is of great public importance.

In this case, Appellants sought redacted medical records and abuse reports¹³ to establish that Appellees were engaged in a pattern and practice of intentionally breaching their duty to report suspected abuse. The Trial Court correctly recognized this request to fall well within the bounds of permissible discovery and granted the motion to compel. Judge Painter mocked the use of pattern and practice evidence, stating in a conclusory manner that Appellants "offered no evidence to support this artifice." Contrary to Judge Painter's pronouncement, pattern and practice evidence

¹¹ *Id.*

¹² See, e.g., <http://www.childpredators.com/Tapes.cfm> (recording of conversations with Planned Parenthood employees evading reporting requirements); http://youtube.com/watch?v=LA4cM7x_o4M (*O'Reilly Show* segment on the topic).

¹³ At issue in this appeal is a discovery order by which Appellees were directed to produce certain documents and information. Among the documents Appellees were ordered to produce are redacted non-party medical records and redacted abuse reports made pursuant to R.C. 2151.421. Specifically, the Trial Court stated that it "will enforce a complete protection of any and all patient's identity regarding discovery," and ordered the redaction of the identities of third parties and "correlated specific medical information." Decision/Entry of 6/21/06, pp. 6, 7.

is no artifice. In fact, it is rudimentary that other bad acts evidence can be used to establish motive, intent, plan, and absence of mistake, as well as to ascertain the appropriate level of punitive damages.

The intermediate court's penultimate paragraph best demonstrates the flaw in its legal reasoning: "Whether Planned Parenthood has violated Ohio law in the past bears no relevance to, and is not necessary in determining, whether Planned Parenthood violated the law as to Jane." This holding is directly contradictory to Ohio law.¹⁴ Moreover, the evidence is also relevant to the punitive damages issue.¹⁵ Because the intermediate court's opinion conflicts with jurisprudence from both State and Federal courts in Ohio, this Court should resolve this conflict.

More troubling, the intermediate court prematurely evaluated the merits of the case and used that prejudgment to reverse the Trial Court's resolution in this discovery dispute. As noted above, the intermediate court stated that Appellants "offered no evidence" that the defendants engaged in a pattern and practice of violating R.C. 2151.421. At this early state of the case, Appellants are *collecting evidence*, not proffering evidence.¹⁶ The intermediate court's use of this questionable logic to substitute its judgment for that of the Trial Court is not merely suspect; it is flat-out wrong.

This Court might normally overlook such indiscretions because its duty is not "error correction." However, the multitude of errors in this case, combined with the conspicuous absence of citation to controlling law, the intermediate courts creation of a right to privacy in abortion

¹⁴ *State v. Smith* (1990), 49 Ohio St.3d 127, 141, 551 N.E.2d 19 (other acts evidence admissible to show similar act under an "identifiable scheme, plan, or system"); *State v. Elersic*, 9th Dist. App. No. 21150, 2003-Ohio-721 (pattern and practice evidence can establish circumstantially the defendant committed an act by demonstrating that he has committed similar bad acts within a period of time reasonably near to the date of the alleged offense and that a similar pattern, scheme, plan, or system was utilized to commit both the offense at issue and other crimes.); Evid. R. 404(B).

¹⁵ *Poneris v. Pa. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 80685 (S.D. Ohio 2007) (ordering discovery of claims files – redacted of identifying information of the insureds – for plaintiff to use to establish a pattern and practice of bad faith.

¹⁶ See, *Poneris*, *supra*.

records out of whole cloth,¹⁷ and the great general interest and public importance of the underlying issue of the organizations internally hiding cases of statutory rape, make it incumbent upon this Court to decide the significant issues presented herein.

D. The Public's Interest In Protecting Children, Pregnant Women And The Unborn Outweighs The Privacy Interests Of Non-Parties In Their Redacted Medical Records And Abuse Reports.

As discussed above, Ohio has a compelling interest in protecting children from abuse. Ohio and the United States also have a "substantial" and "profound" interest in protecting pregnant women and the unborn.¹⁸ To help protect the latter the Ohio Legislature enacted a number of statutes, including two (R.C. 2919.12 and R.C. 2317.56) that are the subject of this litigation. These are two of the interests the Trial Court weighed when it considered Appellants' discovery requests for information and documents necessary to help prove their claims, their right to an award of punitive damages, and the amount of punitive damages they should be awarded.

Individuals have an interest in protecting confidential information in their medical records and abuse reports made pursuant to R.C. 2151.421. Appellants agree with the Trial Court's finding that this interest "is of tremendous importance."¹⁹ This is the third interest the Trial Court weighed when it conducted the balancing test to determine if Appellants' "interest outweighs the patient's confidentiality."²⁰

Appellants acknowledge that, if the medical records and abuse reports they seek are *not* redacted in the manner ordered by the Trial Court, this balancing test would be a more difficult one.

¹⁷ This was the purpose of the citation to *Planned Parenthood of Indiana v. Carter* (Ind. App. 2006), 854 N.E.2d 853.

¹⁸ *Pre-term Cleveland*, (1993) 89 Ohio App.3d 684; *Carhart*, *supra*.

¹⁹ Decision/Entry of 6/21/06 at p. 6.

²⁰ *Id.*, at p. 5.

However, where the redaction completely protects *all* private and confidential information, the public's interest in protecting children, pregnant women and the unborn clearly outweighs any theoretical confidentiality interests in those records and reports.

This case presents this Court with the opportunity to balance the public's compelling, profound and substantial interest in protecting children, pregnant women and the unborn with the confidentiality rights in redacted medical records and abuse reports of non-parties. Appellants submit that this Court should accept this issue for review because it is one of first impression and of great public and general interest.

E. Proposition Of Law No. 2 Raises An Issue That This Court Has Already Found To Be A Matter Of Public And Great General Interest.

In *Alcorn v. Fransiscan Hospital*²¹ this Court accepted for review the issue of whether and when a plaintiff is entitled to obtain from a medical provider redacted, third-party issues. By doing so, this Court correctly found that this issue was of public and great general interest. Because the parties in *Alcorn* settled their claims, this Court lost the opportunity to address and resolve this issue. The issue is still unresolved, but it remains a matter of public and great general interest. For this reason, Appellants respectfully submit that this Court should accept to for review and resolve it.

F. Conclusion.

For the reasons stated above, Appellants respectfully move this Court to grant their Motion For Reconsideration.

²¹ 2006, Case No. 06-2357, 3/28/06 Entry.

Respectfully submitted,

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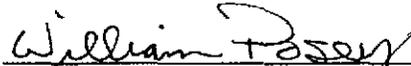
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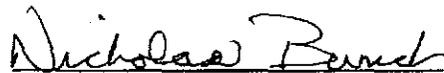
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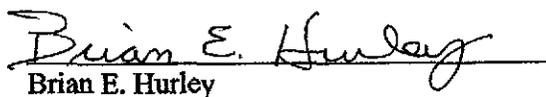
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular mail this 1st day of February, 2008 to the following attorney of record:

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