

IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, Individually :  
and as parents and next friends of : On appeal from the Hamilton County Court of  
: Appeals, First Appellate District  
Jane Roe, a minor :  
: CASE NO. 07-1832  
Appellants, :  
: APPEAL NO. C060557  
vs. : TRIAL NO. A0502691  
: PLANNED PARENTHOOD :  
SOUTHWEST OHIO REGION, et al. :  
: Appellees. :

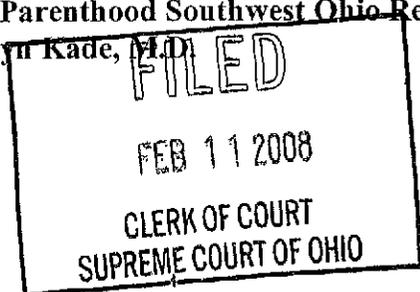
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MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION OF  
DEFENDANTS-APPELLEES PLANNED PARENTHOOD SOUTHWEST OHIO  
REGION AND ROSLYN KADE, M.D.

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## I. PRELIMINARY STATEMENT

For all their sound and fury, plaintiffs and amici present no grounds for reconsideration. They reargue points presented in the Roes' memorandum in support of jurisdiction and purport to raise an argument waived below. By rule, therefore, the motion for reconsideration should be denied.

It is still the case that the Court of Appeals applied established law to resolve a civil discovery dispute about the intimate gynecological records of unrepresented minors. That decision did not restrict criminal prosecution or investigation. Indeed, *amicus* Hamilton County Prosecutor investigated and did not indict in this case. This motion presents a misguided effort to build punitive damages onto a claim predicated on admitted falsehoods.<sup>1</sup> Respectfully, this Court should not take it up.

## II. ARGUMENT

### A. **Because Plaintiffs' Submission Is a Reargument of the Case, It Should Be Denied**

The Roes' motion for reconsideration and the *amici* briefs reargue the same merits arguments already made in the Roes' memorandum in support of jurisdiction and considered by the Court.<sup>2</sup> Ohio Supreme Court Rule of Practice XI expressly prohibits reargument in a motion for reconsideration:

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<sup>1</sup> See *Roe v. Planned Parenthood of Southwest Ohio Region*, 173 Ohio App.3d 414, 416-18, 2007-Ohio-4318, ¶¶3-14 (1st Dist. 2007).

<sup>2</sup> Compare, e.g., Motion for Reconsideration at 5 with Memo. in Support of Jurisdiction at 2, 7 (arguing Court of Appeals improperly required plaintiffs to produce evidence in support of their claims); Mot. for Reconsideration at 5-6 with Memo. ISO Jurisdiction at 10-13 (arguing plaintiffs entitled to other patients' medical records to establish punitive damages claim); Brief of *Amicus Curiae* Women Influencing the Nation, Citizens for Community Values, Ohio Right to Life, Cleveland Lawyers for Life, Lifeworks Ohio, Right to Life of Greater Cincinnati, Life Issues Institute, et al., In Support of Plaintiffs-Appellants' Motion for Reconsideration at 22-24 with Memo. ISO Jurisdiction at 8-9 (arguing there is a conflict regarding the standard of review).

A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, [and] shall not constitute a reargument of the case.

Rule XI, §2(B). Rule XI could not be more clear. Nor could the Roes' violation of it. The rehash of the same argument – and violation of the rules – is no reason for reconsideration.

The Roes also impermissibly attempt to introduce new matter into the record in violation of Rule V. *See* Rule V §1 (“In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits.”); Motion for Reconsideration at 3, 4 n. 8, 9, 12 (citing to various websites not part of the record). As such matter is not part of the record, it cannot justify reconsideration.

*Amici* do present one new issue not previously raised, namely that there was no final, appealable order.<sup>3</sup> As this issue was not presented as a basis for appeal, it has been waived and cannot justify reconsideration. *See* Rule III, §1; *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation and Developmental Disabilities*, 102 Ohio St.3d 230, 233-34, 2004-Ohio-2629, ¶18. Even if not waived, it cannot be a grounds for reconsideration. If the case is not ripe for appellate review before the Court of Appeals, it is also not ripe for review by this Court. Further, if this argument were worth the Court's consideration in deciding whether to accept jurisdiction, *amici* ought to have asserted it in support of the Roes' memorandum in support of jurisdiction, rather than waiting until the Court declined jurisdiction. There is nothing they say now that could not have been said earlier. The motion for reconsideration should be denied.

#### **B. This Is a Civil Case, Not a Criminal Prosecution**

Further, and importantly, the Court's denial of jurisdiction will not hamper criminal prosecution of individuals and entities that fail to report abuse. There is no support for the suggestion that the criminal process was restrained or would be in other cases. Indeed, the same

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<sup>3</sup> *See* Brief of *Amicus Curiae* Women Influencing the Nation, et al., at 24-26.

Hamilton County Prosecutor that writes as *amicus* investigated Planned Parenthood’s conduct in this matter and did not indict.<sup>4</sup>

This discovery dispute is about punitive damages based on the records of non-parties, not criminal prosecution. “This is not a criminal case. It is *Roe v. Planned Parenthood* – not *State v. Planned Parenthood*.” *Roe v. Planned Parenthood of Southwest Ohio Region*, 173 Ohio App.3d 414, 424, 2007-Ohio-4318, ¶40 (1st Dist. 2007). Because the Court of Appeals expressly distinguished criminal cases from this case, its opinion does not limit prosecutors’ investigative or prosecutorial capabilities. Prosecutors need not rely on civil plaintiffs to obtain evidence in discovery; they have their own avenues of investigation.

### **C. Bad Cases Make Bad Law**

By injecting the politics of abortion, the Roes invite this Court to enter a cultural thicket in a case premised on falsehoods<sup>5</sup> and an undeveloped record. Because their case is premised on falsehoods, and Jane Roe’s factual allegations of Planned Parenthood’s treatment of her contradict the conclusory allegations of intentional violation of the law, the Roes’ only hope is for punitive damages based on other patients’ medical records. But “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. . . . we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for

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<sup>4</sup> See also *Roe*, 173 Ohio App.3d at 418, 2007-Ohio-4318, ¶16 (“A criminal investigation was also conducted into Planned Parenthood’s culpability, but the Hamilton County Prosecutor chose not to prosecute Planned Parenthood for any statutory violation.”); see also *id.* at 424, ¶40 (“Though the Roes alleged that Planned Parenthood had systematically and intentionally violated Ohio law, they offered no evidence to support this artifice – and the record is devoid of any.”).

<sup>5</sup> See *Roe*, 173 Ohio App.3d at 416-18, 2007-Ohio-4318, ¶¶3-14.

harming others.” *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063, 166 L.E.2d 940 (2007); *see also* Memo. in Opp. at 11 n.9.

This discovery dispute is about the privacy interests of unrepresented medical patients and three civil plaintiffs’ interest in punitive damages. Abortion providers are not the only mandatory abuse reporters under R.C. §2151.421.<sup>6</sup> If the Roes are entitled to ten years of non-party medical records – records that include other patients’ gynecological and sexual histories – it follows that civil plaintiffs in any lawsuit against a doctor, hospital, or other health care provider summarily alleging failure to report abuse could discover ten-years’ worth of non-party medical records, regardless of whether the health care provider performed abortions.

The Court of Appeal’s recognition that the trial court’s discovery order could not stand raises no matter of great general or public interest. It was but a unanimous and reasoned application of this Court’s precedent.

### III. CONCLUSION

The Court appropriately declined jurisdiction in this matter, and the motion for reconsideration should be denied.

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<sup>6</sup> Other mandatory reporters include attorneys, physicians, dentists, nurses, other health care professionals, coroners, school teachers, social workers, counselors, and persons other than clerics “rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion.” R.C. §2151.421(b).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served via electronic and U.S. mail on this 11th day of February, 2008, to the following:

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