

IN THE SUPREME COURT OF OHIO

08-0598

MEDICAL MUTUAL OF OHIO, )

*Appellant,* )

vs. )

WILLIAM SCHLOTTERER, D.O., )

*Appellee.* )

On Appeal from the Cuyahoga County  
Court of Appeals, Eighth Appellate District  
  
Court of Appeals  
Case No. CA-07-089388

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
MEDICAL MUTUAL OF OHIO

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Stephen F. Gladstone (#0012128) (COUNSEL OF RECORD)

*sgradstone@frantzward.com*

Brian E. Roof (#0071451)

*broof@frantzward.com*

Brendan M. Gallagher (#0080663)

*bgallagher@frantzward.com*

FRANTZ WARD LLP

2500 Key Tower, 127 Public Square

Cleveland, Ohio 44114-1230

Phone: (216) 515-1660

Fax: (216) 515-1650

*Attorneys for Appellant Medical Mutual of Ohio*

D. Jeffery Rengel (#0029069)

Thomas R. Lucas (#0071916)

RENGAL LAW OFFICE

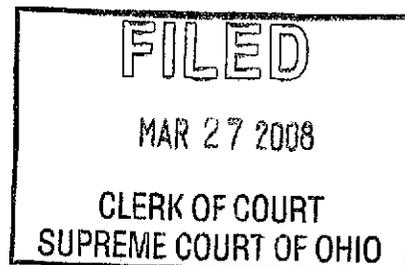
421 Jackson Street

Sandusky, Ohio 44870-2736

Phone: (419) 627-0400

Fax: (419) 627-1437

*Attorneys for Appellee William Schlotterer, D.O.*



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## I. THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

This appeal presents the following query: May dishonest medical practitioners wield the shield of the physician-patient privilege as a self-serving sword to conceal fraudulent conduct under the pretense of protecting patient confidentiality? Unfortunately, allowing the Court of Appeals decision to stand in this case answers this question in the affirmative. The Court of Appeals decision flies in the face of Ohio's well-established policy of protecting its citizens from health care fraud. If permitted to stand, the decision will severely handicap efforts to detect and prevent health care fraud – fraudulent billing, which costs the public billions of dollars each year – and fraudulent behavior, which calls into question the fitness for medical practice of fraudulent medical providers.

The health care insurance reimbursement system uniquely depends primarily upon the honesty of medical practitioners. Allowing unscrupulous practitioners to insulate fraud under the veil of privilege would severely impact health insurance providers, including Appellant Medical Mutual of Ohio (“Medical Mutual”), and the public alike by increasing the costs of providing, as well as obtaining, quality health insurance coverage. Further, insurance providers and the public have an undeniable interest in ensuring that medical providers, who are often entrusted to diagnose, advise, and treat the most personal of affairs, are ethical and trustworthy. As such, the Court of Appeals’ decision, which vacated the Trial Court’s order allowing the limited disclosure of non-party medical records under a protective order to substantiate claims of insurance fraud, jeopardizes the ability of health insurance providers to meet the critical health care needs of their insureds in a timely, efficient, and affordable manner and threatens to undermine the public’s trust in its medical providers.

This case presents an opportunity for the Court to reject this gross distortion of the physician-patient privilege and affirm that the Trial Court’s order was not an abuse of discretion,

given this Court's precedent in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, 402. The investigation of practitioner insurance fraud is a special situation in which the dual interests of the public and third-party insurance providers in eradicating the harmful effects of insurance fraud outweigh non-party patients' interests in absolute confidentiality and allow for the limited disclosure of physician-patient privileged information. Otherwise, medical practitioners, like Appellee, will have an unrestricted and unchallengeable license to conceal fraudulent conduct from scrutiny, merely by invoking the physician-patient privilege.

This Court also can resolve a conflict among the Ohio appellate courts as to the proper standard of review that should govern trial court decisions involving the disclosure of privileged information during discovery. The majority of Ohio appellate districts, prior Eighth District precedent, and the dissent in the present case have applied the abuse of discretion standard in cases involving the assertion of privilege in discovery disputes. The Eighth District's apparent reliance on the *de novo* standard of review in its announced decision, citing to the First Appellate District's recent decision in *Roe v. Planned Parenthood Southwest Ohio Region*, First Dist. No. C-060557, 2007-Ohio-4318, ¶18, demonstrates that there is confusion among Ohio's appellate districts as to which standard of review to apply in these circumstances. This Court's definitive determination on this issue would provide necessary clarity and could prevent future, unwarranted litigation, given the frequency of discovery disputes regarding privilege.

This Court historically has recognized "questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254. The decision in this case impacts the core of the health care and health insurance industries and, as such, affects us all.

## II. STATEMENT OF THE CASE AND FACTS

Medical Mutual provides its approximately 1.5 million insureds with quality, affordable, and effective health care coverage. On average, Medical Mutual handles approximately 100,000 claims each business day for medical services provided to its insureds. Medical Mutual works with approximately 28,500 contracting healthcare practitioners throughout the claims handling process to ensure its insureds receive the care they need and practitioners receive payment on claims for services provided.

### A. The Contractual Relationship.

Medical Mutual and Appellee Schlotterer entered into a Participation Agreement in 1990. Medical Mutual agreed to pay Schlotterer for certain medically necessary services provided by Schlotterer to Medical Mutual's insureds. The Participation Agreement requires that Schlotterer document the services provided and submit requests for payment using the standard Common Procedural Terminology codes ("CPT") created by the American Medical Association ("AMA") to describe specific medical services.

The AMA's CPT codes are the universal language of medical service practitioners and insurers. Each five digit code number in the CPT system designates a specific medical procedure or service. The AMA requires that practitioners maintain the appropriate patient medical records supporting the use of code designations.

The insurance reimbursement system depends on medical providers' honesty. Thus, the potential exists for practitioners to abuse the system by submitting claims using improper CPT codes. The physician can submit a claim for greater financial reimbursement than the treatment the physician actually provided to the patient – a practice commonly known as "up-coding."

Fortunately, the vast majority of medical practitioners report services in good faith. Nevertheless, health care fraud amounts to billions of dollars annually. To protect itself and its insureds from the small minority of dishonest practitioners, Medical Mutual has procedures established to detect fraudulent billing. For example, Medical Mutual periodically runs computer checks of claims submitted under a particular CPT code to ascertain whether that code may be the subject of abuse. If a particular practitioner has a pattern of submitting claims using numerous high value CPT codes, far above the normal code use for that provider's specialty, Medical Mutual will investigate further.<sup>1</sup> The Participation Agreement specifically authorizes Medical Mutual to examine a doctor's records (records the doctor is required by the AMA to maintain) to ensure the records verify the performance of the medical services and that claims for payment are properly coded.

**B. Medical Mutual's Discovery of Appellee's Fraudulent Conduct.**

Medical Mutual discovered that Schlotterer was engaging in up-coding by submitting a substantial number of unwarranted reimbursement claims under the 99215 CPT code, the highest value code reserved for intensive evaluation and treatment. This code designation is to be used rarely, and only where the practitioner faces significant and complex medical decisions.

Medical Mutual requested, and Schlotterer provided, the medical records of a limited number of Medical Mutual insureds for which Schlotterer had submitted claims under the 99215 Code. The records unequivocally failed to document the required criteria for using 99215 and showed evidence of other fraudulent billing activity.

Medical Mutual then sought, and Schlotterer agreed to provide, additional records. Schlotterer, at that point, acknowledged his improper billing practices and offered to reimburse

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<sup>1</sup> These fraud prevention procedures are undertaken in accordance with Medical Mutual's anti-fraud program mandated by R.C. 3999.41.

Medical Mutual for payments made on improperly submitted claims. However, upon learning of the amount owed to Medical Mutual, Schlotterer changed his position, asserted that he had never acknowledged any wrongdoing and refused to produce additional records.

**C. The Underlying Litigation and Discovery Dispute.**

Medical Mutual filed this lawsuit for breach of contract, fraud and an accounting. Medical Mutual proceeded with discovery, and sought non-party patient records, which Schlotterer was required under the CPT code and the Participation Agreement to maintain and make available for review. These patient records are necessary for Medical Mutual to substantiate its claims and to defend itself against Appellee's counterclaim. To facilitate such essential discovery, while simultaneously protecting the patients' privacy, Medical Mutual submitted a proposed Protective Order to Appellee substantially identical to others approved by the Cuyahoga County Common Pleas Court in numerous other health care fraud cases.

Medical Mutual was not, as the Court of Appeals suggests, unreasonably seeking to pry into confidential information concerning a patient's identifying information, diagnosis, or treatment. Indeed, in processing claims for payment pursuant to CPT Codes, Medical Mutual already has that information, including the patient's name, address, social security number, medical diagnosis and treatment. Medical Mutual, through its discovery requests, sought only the back-up documentation Schlotterer is required to maintain with respect to the claims submitted to verify whether Schlotterer provided the level of treatment for which he billed.

The Protective Order limited access to, and the disclosure of, patient materials (*i.e.*, patient records, notes, summaries, etc.). Further, the Protective Order was to remain binding following the conclusion of the case and provided that any recipient of patient information was to return or destroy these materials at the producing party's election.

Schlotterer refused to sign the Protective Order. After a conference with the Trial Court failed to resolve the discovery issue, Medical Mutual filed a Motion for a Protective Order and for an Order Directing Defendant to Respond to Discovery. The Trial Court granted Medical Mutual's motion and Schlotterer appealed.

**D. The Eighth District Opinion.**

The majority of the Eighth District panel, citing to the First District's decision in *Roe*, applied the *de novo* standard of review to the trial court's order, stating: "[q]uestions of privilege, however, including the propriety of disclosure, are questions of law and are reviewed de novo." *Roe*, 2007-Ohio-4318, ¶18. The majority then vacated the Trial Court's order, holding that this situation does not fall within one of the judicially created exceptions to the physician-patient privilege previously recognized by this Court in *Biddle* and *Ohio State Medical Bd. v. Miller* (1989), 44 Ohio St.3d 136.

Conversely, the dissent, upholding the Trial Court's order under the abuse of discretion standard, held that insurance fraud investigations and their corresponding lawsuits constitute special situations under *Biddle* and that the interests of third-party insurance providers and the public outweigh non-party patients' interest in absolute confidentiality.

On January 18, 2008, Medical Mutual filed a Motion for Reconsideration, given the inconsistency between the *de novo* standard of review applied by the majority, the abuse of discretion standard applied by the dissent, and the significant precedent from the Eighth District applying the abuse of discretion standard in reviewing trial court decisions involving the disclosure of privileged information during discovery. Medical Mutual also filed a Motion to Certify a Conflict on February 11, 2008, to address the apparent conflict as to the proper standard of review among Ohio's appellate districts.

On February 12, 2008, the Eighth District journalized its decision pursuant to App.R. 22(E) and denied Medical Mutual's Motion for Reconsideration by a separate journal entry.

Appellee filed a motion to strike as untimely Medical Mutual's Motion to Certify a Conflict. Medical Mutual opposed the motion based on the explicit language of App.R. 25, which provides that a motion to certify a conflict must be filed "before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, **whichever is the later.**" (emphasis added). Medical Mutual's Motion to Certify was filed on February 11, 2008, one day **before** the Eighth District's judgment was filed with the clerk for journalization.

Despite the unambiguous language of App.R. 25 and the indisputable filing dates preserved on the docket, the Eighth District granted Appellee's motion to strike, deeming Medical Mutual's Motion to Certify a Conflict as untimely. In addition, the Eighth District denied Medical Mutual's motion for good measure.

### III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. 1: The investigation of practitioner insurance fraud is a special situation in which the dual interests of the public and third-party insurance providers in eradicating the harmful effects of insurance fraud outweigh non-party patients' interests in absolute confidentiality and allow for the limited disclosure of physician-patient privileged information.**

The Eighth District erred in its vacating the Trial Court's order because the investigation of practitioner insurance fraud represents a special situation under this Court's precedent in *Biddle*. The dual interests of the public and third-party insurance providers in eradicating the harmful effects of insurance fraud outweigh non-party patients' interests in absolute confidentiality and allow for the qualified, limited disclosure of privileged information.

The physician-patient privilege is codified under R.C. 2317.02. The privilege, however, is not absolute and must yield to those countervailing interests that outweigh the patient's interest in confidentiality. *See Biddle*, 86 Ohio St.3d at 402. “[S]pecial situations may exist where the interest of the public, the patient, the physician, or a third person are of sufficient importance to justify the creation of a conditional or qualified privilege to disclose [physician-patient privileged information] in the absence of any statutory mandate or common law duty.” *Id.* “We hold that 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 necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality.” *Id.* Thus, in its holding and reasoning, *Biddle* created four classes of individuals: the public, patients, physicians, or third parties, who in special situations may have a countervailing interest in the disclosure of privileged information that outweighs the patient's interest in confidentiality. *Id.* at 402. This Court then applied its holding to the case's specific facts, where the interests of only one of the four classes were at issue – those of the patient.

Here, the investigation of practitioner insurance fraud constitutes a special situation in which Medical Mutual's and the public's combined interests in eradicating the harmful effects of insurance fraud outweigh the non-party insureds' interests in confidentiality, and therefore, warrant the limited disclosure of the insureds' records. *Id.* Insurance fraud concealed by the physician-patient privilege, which the Eighth District's judgment condones, will (1) increase the cost of providing, as well as obtaining, quality, affordable health insurance, (2) undermine insurers' and the public's trust in their medical providers, and (3) result in considerable delays in the claims handling process, causing delays in treatment.

First, the detection and prevention of fraud has a substantial economic impact on Medical Mutual and the public's interests. Medical Mutual is a not-for-profit entity. Therefore, the recovery by Medical Mutual of payments made upon fraudulent claims impacts all groups and premium rates. Conversely, if insurance providers, like Medical Mutual, cannot effectively investigate fraudulent conduct, premium rates would necessarily rise and all groups would have to absorb such losses.

The incontestable reality that insurance fraud increases health insurance costs for insurers and the public alike is supported by Ohio's unambiguous public policy against this harmful practice. Ohio law mandates that insurers, such as Medical Mutual, adopt anti-fraud programs, outlining the procedures they must follow when insurance fraud is found or suspected. R.C. 3999.41. Insurance providers also must report any suspected insurance fraud to the Ohio Department of Insurance. R.C. 3999.42.<sup>2</sup>

Further, R.C. 3904.13 also supports Medical Mutual's position. Section 3904.13 provides that, in varying circumstances, an insurance institution may disclose privileged records in its possession, without patient consent, to outside parties when it is reasonably necessary to detect or prevent fraud in connection with insurance transactions. While this statute does not govern this exact instance (since Medical Mutual is seeking privileged records not in its possession), the statute is instructive, nonetheless, and unmistakably demonstrates that the Ohio legislature views the investigation of insurance fraud as an interest that supersedes the interests served by the physician-patient privilege on certain occasions.<sup>3</sup>

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<sup>2</sup> Indeed, contrary to what is stated in the Eighth District's opinion, Medical Mutual did, in fact, report Appellee's fraudulent behavior to the Ohio Department of Insurance on July 5, 2005.

<sup>3</sup> In addition, this statute is further proof that neither Ohio courts nor its legislature view R.C. 2317.02 as the exclusive means by which records protected by the patient-physician privilege can be disclosed.

Second, Medical Mutual and the public have a fundamental interest in knowing whether physicians upon whom they rely for diagnosis and treatment are honest and ethical. To preserve the public's trust in the medical field and in the health insurance industry, insurers need to review patient records, and if necessary, pursue litigation for fraud based on that review. If physicians are willing to fraudulently seek payment for services never rendered, who is to say that those same physicians would not be willing to order superfluous procedures on patients to more effectively perpetrate their fraud? Thus, the disclosure of non-party patient records is necessary to protect and further the countervailing interests of the public and insurance providers, which outweigh the patients' interest in absolute confidentiality.

Third, from a functional standpoint, insurance fraud concealed by the physician-patient privilege would cause considerable delays in the claims handling process and could jeopardize the public's ability to get necessary treatment in a timely fashion. Under the Eighth District's opinion, the privilege irrevocably attaches and permanently shrouds the physician's conduct as soon as he/she treats the patient. As such, if insurance providers are not able to effectively review medical records after the fact for evidence of fraud, but instead, are forced to leverage their ability to monitor the physician's conduct only at the pre-approval stage, the claims handling process would grind to a halt. Prior to its insureds receiving treatment, Medical Mutual would be required to evaluate the approximately 100,000 claims it handles daily to assess whether the treatment sought is warranted; otherwise, Medical Mutual would risk not being able to verify that the treatment for which it reimbursed the provider was actually necessary or was in fact performed. Simply stated, the Eighth District's decision creates an unworkable, chaotic process for the handling of health care claims.

Ohio courts, both pre and post-*Biddle*, have recognized the privilege to disclose otherwise confidential medical information where the public's and/or a third-party's interest outweighs the patient's interest in confidentiality or where such information was necessary to substantiate a party's claims. *Soehrlen v. Aultman Hospital*, (N.D. Ohio May 4, 2007), No. 5:06 CV 1594, 2007 U.S. Dist. LEXIS 33064 (granting motion to compel non-party medical records necessary to substantiate plaintiff's negligence claim against hospital following her unexplained exposure to hepatitis); *Varghese v. Royal Maccabees Life Ins. Co.* (S.D. Ohio Jan. 27, 1998), No. C-1-95-699, 1998 U.S. Dist. LEXIS 12886 (requiring the disclosure under a protective order of privileged non-party medical records that were indispensable to the defense of plaintiff's disability claim because "to permit the [physician] to hide behind the physician-patient privilege would greatly impair defendant's ability to defend itself."); *see Miller*, 44 Ohio St.3d at 140-41 ("the interest of the public at large, served here through the medical board's investigation of possible wrongdoing by a licensed physician, outweighs the interests to be served by the invocation of the physician-patient privilege."); *Alcorn v. Franciscan Hosp. Mt. Airy Campus*, First District No. C-060061, 2006-Ohio-5896 (allowing the disclosure of non-party patient's medical records in third party plaintiffs' negligence suit against a hospital because "[a]bsent the [non-party] medical records, the [plaintiffs] would, as a practical matter, have been prevented from proving... a breach of duty on the part of the hospital."); *Richards v. Kerlakian* (Hamilton Cty. 2005), 162 Ohio App.3d 823, 825-26 (allowing the production of non-party medical records because "[i]t is difficult to imagine how else the [plaintiffs'] negligent-credentialing claim [against the hospital] could have been investigated without the disputed documents."); *Fair v. St. Elizabeth Medical Center* (Montgomery Cty. 2000), 136 Ohio App.3d 522 (granting plaintiff's motion to compel non-party medical records in plaintiff's negligence suit against hospital); *State*

v. *McGriff* (Logan Cty. 1996), 109 Ohio App.3d 668, 670 (properly censored, non-party medical records containing evidence of physician's criminal activity may be used as evidence in criminal prosecution); *Ohio State Dental Bd. v. Rubin* (Hamilton Cty. 1995), 104 Ohio App.3d 773, 775 (holding that the public is better served by permitting discovery of non-party medical records during dental board investigation rather than allowing pretext of dentist-patient privilege). Thus, these decisions demonstrate that the Trial Court's order, allowing the limited disclosure of essential, non-party privileged information under a protective order to substantiate claims of insurance fraud, was warranted or, at the very least, was not an abuse of discretion.

Similar to the parties seeking non-party medical information in *Soehrlen*, *Fair*, *Alcorn*, *Richards*, and *Varghese*, Medical Mutual needs access to Appellee's records to determine the magnitude of Appellee's up-coding, to prove its case, and to defend against Schlotterer's counterclaim. See *Soehrlen*, 2007 U.S. Dist. LEXIS 33064, at \*14, *Varghese*, 1998 U.S. Dist. LEXIS 12886, at \*\*8; *Alcorn*, 2006-Ohio-5896, at ¶11; *Richards*, 162 Ohio App.3d at 825-26; *Fair*, 136 Ohio App.3d at 527. Without the non-party patient records, which detail the actual treatment the insureds received, Medical Mutual cannot compare the treatment legitimately provided, with the treatment for which Appellee has fraudulently sought reimbursement. Thus, without these records, Medical Mutual's ability to prosecute its case and defend against Schlotterer's counterclaim is jeopardized. See *id.*

Also, similar to the hospital in *Fair*, Appellee's motives in invoking the physician-patient privilege are dubious and self-serving. In *Fair*, a patient brought suit against a hospital after a non-party patient had beaten him on multiple occasions. The plaintiff sought disclosure of the non-party attacker's medical records to prove the attacker's propensity for violence and that the hospital had breached its duty to protect him. See *Fair*, 136 Ohio App.3d at 524-25. Weary of

the hospital's motives in refusing to produce the records, the court stated "we cannot determine if SEMC is pursuing the underlying [for the] purpose of confidentiality and the physician-patient privilege, or if SEMC is asserting [the privilege for] the self-serving purpose of precluding any further investigation and thus protecting the hospital from potential liability." *Id.* at 527. Ultimately, the court held the situation constituted a "special situation" under *Biddle* that warranted disclosure of privileged records. *See id.*

By invoking the privilege after initially producing incriminating files, Appellee is merely attempting to preclude further investigation to shield himself from greater liability. As such, this case typifies the type of special situation under *Biddle* in which the countervailing interests of the public and a third-party, Medical Mutual, trump the interest of non-party patients. *Id.* This is especially so given that these documents are essential and will be appropriately protected.<sup>4</sup>

Accordingly, the Trial Court's decision allowing the disclosure of the non-party insureds' information under a protective order was justified under Ohio law, or at the very least, was not an abuse of discretion. Schlotterer's pretextual attempt to invoke the physician-patient privilege should be rejected. The investigation of practitioner insurance fraud is a special situation in

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<sup>4</sup> The Eighth District's reliance on *Roe* is misplaced. In *Roe*, parents of a minor brought statutory claims, alleging an unlawful abortion, against an abortion clinic after their daughter had an abortion. The trial court ordered the production of ten years worth of non-party minors' abortion records during discovery. *Roe*, 2007-Ohio-4318, ¶17. The First District reversed, concluding that the plaintiffs' interest in the non-party records did not warrant their disclosure under *Biddle* because the records were not necessary to substantiate the plaintiffs' statutory claims, the liability for which was based solely on the abortion at issue. *Id.* at ¶40 ("the medical records were not necessary for the Roes to establish whether Planned Parenthood had violated Ohio statutes in its treatment of Jane... Even if the Roes rooted around in these patients' medical records and found evidence that Planned Parenthood had violated Ohio law 1,000 times, it would not assist the Roes in showing that Planned Parenthood had violated Ohio law in Jane's case.) Thus, *Roe* is profoundly dissimilar to the present case, in which Appellee's non-party medical records are essential for Medical Mutual to prove its claims and to defend against Appellee's counterclaims. *See Soehrlen*, 2007 U.S. Dist. LEXIS 33064, at \*14, *Varghese*, 1998 U.S. Dist. LES 12886, at \*\*8; *Alcorn*, 2006-Ohio-5896, at ¶11; *Richards*, 162 Ohio App.3d at 825-26.

which the dual interests of the public and third-party insurance providers outweigh non-party patients' interests in absolute confidentiality and allow for the qualified disclosure of physician-patient privileged information.

**Proposition of Law No. 2: The abuse of discretion standard of review should govern trial court decisions as to the disclosure of privileged information during discovery.**

On appeal, both Medical Mutual and Appellee recognized that the abuse of discretion standard applied to the Trial Court's order. However, in its announced decision, the majority, citing the First Appellate District's decision in *Roe*, stated: "[q]uestions of privilege, however, including the propriety of disclosure, are questions of law and are reviewed *de novo*." The dissent applied the abuse of discretion standard. Thereafter, following Medical Mutual's Motion for Reconsideration, which cited contradictory decisions from the Eighth District that applied the abuse of discretion standard of review to similar issues, the majority indicated that, notwithstanding its citation to the application of the *de novo* standard, it had in fact applied the abuse of discretion standard.

The First District's use of the *de novo* standard in *Roe* to review a trial court discovery order under *Biddle* conflicts with established precedent from the majority of the other appellate districts in Ohio, which overwhelmingly apply the abuse of discretion standard when reviewing similar orders.<sup>5</sup> There is obviously a conflict among Ohio's appellate districts as to which

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<sup>5</sup> See *Smalley v. Friedman Damiano & Smith Co. L.P.A.* (Cuyahoga Cty. 2007), 172 Ohio App.3d 108, 115; *Gialousis v. Eye Care Associates, Inc.*, Seventh Dist. No. 05MA163, 2007-Ohio-1120, at ¶8; *Riggs v. Richard*, Fifth Dist. No. 2006CA00234, 2007-Ohio-490, at ¶15; *Richards*, 162 Ohio App.3d at 826; *Sweet v. Sweet*, Eleventh Dist. No. 2004-A-0062, 2005-Ohio-7060, at ¶7; *Grove v. Northeast Ohio Nephrology Associates, Inc.* (Summit Cty. 2005), 164 Ohio App.3d 829, 834-835; *Akers v. Ohio State University Medical Center*, Tenth Dist. No. 04AP-575, 2005-Ohio-5160, at ¶7; *McMahon v. Shumaker, Loop & Kendrick, LLP* (Lucas Cty. 2005), 162 Ohio App.3d 739, 743-746; *Grantz v. Discovery for Youth*, Twelfth Dist. Nos. CA2004-09-216-217, 2005-Ohio-680, at ¶12; *Whitt v. ERB Lumber* (Clark Cty. 2004), 156 Ohio App.3d 518, 523; *Ingram v. Adena Health System* (Ross County 2002), 149 Ohio App.3d 447, 450; *G. Rand*

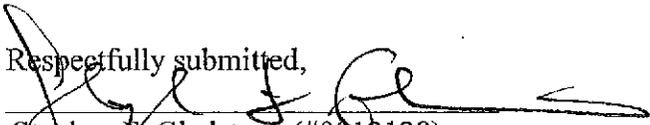
standard of review should apply to trial court decisions concerning the disclosure of privileged information during discovery. Thus, in light of the frequency of discovery disputes regarding issues of privilege, this case presents the Court with the opportunity to articulate a clear standard of review that should govern trial court decisions regarding the disclosure of privileged information during discovery.

Although under the special circumstances of this case the Trial Court's decision was proper under either standard of review, Medical Mutual submits that the disparity in terms of the degree of deference given to a trial court's decision under the abuse of discretion and the *de novo* standard can be significant. Thus, the Supreme Court of Ohio's determination as to this issue would resolve this apparent conflict and provide firm guidance on how frequent discovery disputes that occur regarding privilege should be handled.

#### IV. CONCLUSION

For the stated reasons, Medical Mutual requests that this Honorable Court accept jurisdiction to hear its appeal.

Respectfully submitted,

  
Stephen V. Gladstone (#0012128)

*sgladstone@frantzward.com*

Brian E. Roof (#0071451)

*broof@frantzward.com*

Brendan M. Gallagher (#0080663)

*bgallagher@frantzward.com*

FRANTZ WARD LLP

2500 Key Tower - 127 Public Square

Cleveland, Ohio 44114-1230

(216) 515-1660; Fax: (216) 515-1650

*Attorneys for Appellant*

*Medical Mutual of Ohio*

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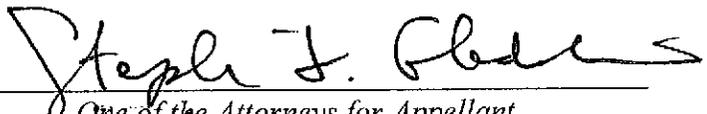
*Smith Co., L.P.A. v. Footbridge Capital, LLC*, Third Dist. Nos. 14-01-39, 14-01-40, 2002-Ohio - 2189, at ¶¶6-18.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Appellant's foregoing Memorandum in Support of Jurisdiction was served upon the following by deposit in regular, United States mail, postage prepaid, this 26<sup>th</sup> day of March, 2008:

D. Jeffery Rengel (#0029069)  
Thomas R. Lucas (#0071916)  
RENGAL LAW OFFICE  
421 Jackson Street  
Sandusky, Ohio 44870

Attorneys for Appellee William Schlotterer, D.O.

  
\_\_\_\_\_  
*One of the Attorneys for Appellant  
Medical Mutual of Ohio*

## APPENDIX

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 89388

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**MEDICAL MUTUAL OF OHIO**

PLAINTIFF-APPELLEE

vs.

**WILLIAM SCHLOTTERER, D.O.**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
VACATED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-589806

**BEFORE:** Rocco, J., Calabrese, P.J., and Kilbane, J.

**RELEASED:** January 10, 2008

**JOURNALIZED:** FEB 12 2008

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VOL 651 PG 0855



KENNETH A. ROCCO, J.:

In this appeal brought pursuant to R.C. 2505.02(B)(4) and (A)(3), defendant-appellant William Schlotterer, D.O. ("the doctor"), appeals from the order of the trial court that directed him to respond to a discovery request made by plaintiff-appellee Medical Mutual of Ohio ("Med Mutual"), and, further, directed him to sign "The Agreed Qualified Protective Order" submitted by Med Mutual. The foregoing order would permit disclosure by the doctor of matters otherwise covered by R.C. 2317.02(B)(1), i.e., the physician-patient testimonial privilege.

The doctor presents two assignments of error. Of relevance to this appeal, he first asserts the trial court abused its discretion in entering the order. He also asserts the trial court abused its discretion in denying his motion for a change of venue.

This court agrees with the doctor's first assertion; therefore, the trial court's order directing the doctor to abrogate the physician-patient privilege is vacated, and this matter is remanded for further proceedings.

The doctor's second assertion cannot be addressed by this court because it is premature. An order denying a change of venue does not constitute a final order pursuant to R.C. 2505.02(B); hence, this court lacks jurisdiction to consider the doctor's second assignment of error.

This appeal presents a unique situation. Med Mutual is a company which "provides insurance benefits to covered persons pursuant to health care insurance" policies.<sup>1</sup> In order to facilitate the insurance process, Med Mutual also contracts with doctors, agreeing to reimburse the doctors for services rendered to individuals covered by the company's policies. These individuals thus become the doctors' patients.

Med Mutual instituted this civil action against the doctor on April 1, 2006, presenting claims of fraud and breach of contract along with a demand for an accounting. Med Mutual's claims were based upon the "Participation Agreement," which the doctor and Med Mutual's predecessor-in-interest, Blue Cross Blue Shield of Ohio, signed in 1990. Med Mutual asserted that the doctor failed to comply with the terms of the "Provider Manual" incorporated into the agreement.

In its complaint, Med Mutual explained that the "Provider Manual" assigned certain codes, referred to as Common Procedure Technology ("CPT") codes, which were used by physician-providers for reporting to Med Mutual their assessment of their patients' conditions. The highest "evaluation and management code" was assigned code number "99215." This particular number

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<sup>1</sup>Quotes are taken from documents contained in the record.

indicated the "extent of the [physician's] examination, the comprehensiveness of the medical history [obtained from the patient], and the complexity of the medical decision making involved" was of the most intensive level. Since such a condition required the most extensive treatment, it was the code for which the physician-provider, correspondingly, received the highest compensation from Med Mutual for providing his or her services. Med Mutual claimed in its complaint that the doctor had engaged in unnecessary "up-coding" of his patients' conditions.

According to paragraphs twelve through sixteen, Med Mutual's "routine" review, conducted in late 2004, of the doctor's past billing submissions showed "an unusually high percentage of 99215 submissions." Med Mutual "requested and received" from the doctor in February 2005 "the medical records of ten (10) families for which [he] had submitted claims." Med Mutual's review of those records indicated that they "did not support the criteria for that code."

Med Mutual asserted that in June 2005 Med Mutual's investigators confronted the doctor about the discrepancy, and that he "admitted\*\*\*that he had been up-coding\*\*\*for three to four years." Med Mutual further asserted that its "investigation disclosed that [the doctor] had been overpaid" by Med Mutual in the amount of "\$269,576.00 for submissions he had made under the 99215 code which did not meet the criteria for [that] code payment."

Despite the precision of the foregoing figure, Med Mutual demanded damages against the doctor in the amounts of only \$25,000.00 each for its claims of fraud and breach of contract. It, however, with respect to Count III of its complaint, demanded a "formal accounting" of the doctor's "liabilities" to it.

The doctor initially responded to the complaint with a motion for change of venue. He argued that since he lived and practiced medicine in Sandusky, Ohio, the action should be heard by the Sandusky County Court of Common Pleas. Med Mutual filed a brief in opposition to the doctor's motion. Subsequently, the trial court denied the doctor's motion for a change of venue.

The doctor then filed his answer to the complaint, denying the pertinent allegations, setting forth several affirmative defenses, and also presenting a five-count counterclaim against Med Mutual.<sup>2</sup> In essence, the doctor asserted that Med Mutual used the instant action to justify its refusal to honor any of his subsequent submissions for reimbursement with respect to its insureds.

On October 13, 2006 Med Mutual filed a motion it labeled as one "for a protective order and for an order directing Defendant to respond to discovery." In its brief in support of the motion, Med Mutual asserted that the doctor's

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<sup>2</sup>The trial court later granted Med Mutual's ~~motion~~ to dismiss "counts two and three" of the doctor's counterclaim. The doctor does not raise any challenge in the instant appeal to the trial court's order of dismissal.

“patient records are necessary for each side to substantiate its/his claims and defend against the other parties’ claims.”

Med Mutual stated it sought to “assist in the production of \*\*\*non-party patient records, while still protecting the patients’ confidential information,” therefore, it had drafted and provided the doctor with a “proposed Qualified Protective Order” but the doctor had “refused to execute this Protective Order and to produce his patient records\*\*\*.” Med Mutual argued the doctor’s refusal was unwarranted under the Participation Agreement, the language of the proposed protective order, Ohio law, and the terms of the “Certificates of Coverage” issued to its insureds.<sup>3</sup> In effect, therefore, although Med Mutual sought to use a sword against the doctor, it was labeled as a shield.

The doctor filed a brief in opposition to Med Mutual’s motion. The doctor noted that Med Mutual’s claims against him were limited neither in time nor in scope when it came to his coding practices. He asserted that, under these circumstances, Med Mutual’s motion sought an order from the court that required him “to waive physician-patient privilege on behalf of his patients,

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<sup>3</sup>In pertinent part, a patient insured by Med Mutual agrees when he or she applies for benefit coverage for medical consultation or treatment that Med Mutual “may require [the medical] Provider’s notes or other medical records” before it determines the availability of coverage. Thus, in applying each and every time for benefit coverage, the insured is “also giving\*\*\*consent to release medical information to Medical Mutual.” Without such consent, Med Mutual “has the right to refuse to reimburse for Covered Services\*\*\*.”

without the patient's consent, with respect to all patient medical records for the period January 1, 2000 through February 26, 2006." The doctor asserted that pursuant to R.C. 2317.02(B)(1), he lacked authority to do so. He further argued that the "Certificates of Coverage" were not intended to permit Med Mutual unlimited access to the patient's medical records.

After Med Mutual filed a reply brief in support of its motion, the trial court issued an order on January 10, 2007 that stated, in pertinent part, Med Mutual's "motion for a protective order and for an order directing Deft. to respond to discovery\*\*\*is granted. Defendant is directed to respond to the discovery requests propounded by Plaintiff subject to the Protective Order to be executed by the parties."

Since the foregoing order constitutes a final order pursuant to R.C. 2505.02(B)(4) and (A)(3), the doctor filed the instant appeal. He presents two assignments of error.

The doctor's first assignment of error states:

**"I. The Trial Court Erred As A Matter Of Law In Ordering Appellant To Produce Privileged, Non-Party, Physician-Patient Medical Records, Pursuant To Court Order Dated January 10, 2007."**

The doctor argues the trial court's order is improper under Ohio law; therefore, the trial court abused its discretion in granting Med Mutual's motion,

which, although designated as one seeking a "protective order," was actually a motion for discovery of privileged material.

A trial court's decisions on the management of discovery matters are reviewed under an abuse of discretion standard. *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 1998-Ohio-329. Questions of privilege, however, "including the propriety of disclosure, are questions of law and are reviewed de novo." *Roe v. Planned Parenthood Southwest Ohio Region*, Hamilton App. No. C-060557, 2007-Ohio-4318, ¶18.

Civ. R. 26 limits the scope of discovery to "any matter not privileged, which is relevant to the subject matter involved in the pending action." In determining the scope of discovery with respect to privileged matters, therefore, the countervailing interest must, by its very nature, outweigh the privilege. *Roe v. Planned Parenthood Southwest Ohio Region*, supra.

Med Mutual counters the doctor's argument by asserting that this case presents a "recognized" exception to the privilege set forth in R.C. 2317.02(B), i.e., the "combined interests" of it and "the public outweigh the non-party patients' interests in absolute confidentiality." Following a review of the record, this court finds Med Mutual's assertion unpersuasive.

Med Mutual concedes, as it must, that R.C. 2317.02(B)(1) contains mandatory language that prohibits a physician from testifying "concerning a

communication made to the physician\*\*\*by a patient in that relation or the physician's\*\*\*advice to a patient\*\*\*.”

It has been stated that, because the “the law of privilege is substantive in nature,” courts are not free to “promulgate an amendment\*\*\*which would deny a statutory privilege\*\*\*.” The physician-patient privilege, therefore, is not “subject to judicial policy preferences.” *State v. Smorgala* (1990), 50 Ohio St.3d 222 at 223. The statute allows certain exceptions; none, however, applies in this case.

Nevertheless, Med Mutual asserts that this case presents one of those “special situations” as envisioned in *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115. In that case, the Ohio Supreme Court observed that certain situations “may exist where the interest of the public, the patient, the physician, or a third person are of sufficient importance to justify the creation of a conditional or qualified privilege to disclose in the absence of any statutory mandate or common-law duty.”

The supreme court indicated that, in such “special” situations, “disclosure is necessary to protect or further a countervailing interest which outweighs the patient’s interest in confidentiality.” *Id.* at 402 (emphasis added). Such a situation exists, for example, when the patient is committing a crime; under these circumstances, the privilege cannot be asserted as a cover for wrongdoing.

*State v. Jackson*, Cuyahoga App. No. 80051, 2002-Ohio-2746; ¶28, citing *State v. Spencer* (1998), 126 Ohio App.3d 335. The language used in *Biddle* was intended to be narrow in scope, and the supreme court recently reiterated the admonition that judicially created exceptions to statutory privileges are disfavored. *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, ¶13.

In an attempt to utilize the *Biddle* language, Med Mutual likens the facts of this case to those cases that affirmed a trial court's decision to allow limited disclosure of privileged matters because, for example, the physician was facing either revocation of his license to practice medicine or criminal charges related to his practice of medicine, or another patient presented a claim based upon a breach of a professional duty. *Ohio State Med Bd. v. Miller* (1989), 44 Ohio St.3d 136; *State v. McGriff* (1996), 109 Ohio App.3d 668; *Alcorn v. Franciscan Hosp. Mt. Airy Campus*, Hamilton App. No. C-060061, 2006-Ohio-5896; *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414.

In such cases, the "countervailing interest" that permitted disclosure concerned the welfare of the patients themselves. Med Mutual seeks to put itself in the shoes of a patient who allegedly is wronged by a doctor's unprofessional conduct; Med Mutual, however, is not that kind of plaintiff.

This case presents a situation that is somewhat similar to the situation faced by the First Appellate District Court in *Roe v. Planned Parenthood*

*Southwest Ohio Region*, supra. That is, Med Mutual's claims involve neither a patient's class action nor a criminal case. *Id.*, ¶40. Abrogations of the physician-patient testimonial privilege, as allowed in the cases cited by Med Mutual, were not intended as "a judicial endorsement of [plaintiffs] acting as private attorneys general." *Id.*, ¶41.

In this context, it must be noted that although Med Mutual's complaint makes a claim of fraud against the doctor, nothing in the record indicates that Med Mutual has complied with R.C. 3999.42, which imposes a statutory duty upon an insurer to report that belief to the state board of insurance. Nor is Med Mutual without any statutory remedy, since claims of insurance fraud primarily are covered by R.C. 2913.47, and, should the doctor be found guilty of the crime, the court may order restitution as a part of the sentence imposed. The legislature thus has indicated a preference for such matters to be handled by the state, rather than by a private party.

The facts demonstrate that Med Mutual has no concern for the interests of any of the doctor's patients. Instead, Med Mutual has only its own pecuniary interest, seeking disclosure of privileged matters as a "fishing expedition" in order to conduct an audit of the doctor's billing practices. Such a situation does not fall within the exceptions to the physician-patient privilege which, in Ohio, previously have been judicially created. *Biddle v. Warren Gen. Hosp.*, supra;

*State Medical Board v. Miller*, supra; cf., *Frederick V. Harris, M.D., Inc. v. Univ. Hosps. of Cleveland*, Cuyahoga App. Nos. 76724, 76785, 2002-Ohio-983.<sup>4</sup>

Indeed, Med Mutual obviously possesses its own records which contain information relating the use of the "99215" code to a specific insured. Med Mutual made no representation to the court that it could not obtain current releases from the patients themselves of the information it sought. *Walker v. Firelands Comm. Hosp.*, Erie App. No. E-03-009, 2004-Ohio-681, ¶25. It follows there is nothing to substantiate Med Mutual's actual need for the privileged material. *Jackson v. Greger*, supra, ¶¶15-17.

Moreover, even if an order of disclosure of privileged material falls within an exception envisioned by the Ohio Supreme Court, the order must be limited. See, e.g., *Richards v. Kerlakian*, supra, ¶4. Although Med Mutual presented what it termed a "Proposed Qualified Protective Order," no time frame was included and, it was not limited to patients who were treated under the "99215" code.

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<sup>4</sup>In this context, it is important to note that "the regulations protecting the physician-patient privilege in Ohio are more stringent" even than those put forward in the federal government's Health Insurance Portability and Accountability Act, more commonly known as "HIPAA." *Grove v. Northeast Ohio Nephrology Assoc.*, 164 Ohio App.3d 829, 2005-Ohio-6914, ¶23; *G. D. v. Riley* (S.D. Ohio, 2007), Case No. 2:05-CV-980.

The trial court's order of disclosure to Med Mutual thus, as a practical matter, is unlimited; even with redactions, "it is arguable that disclosure would result in a privacy invasion\*\*\*\*in the same vein that a voyeur observing in secret invades the subject's privacy\*\*\*." *Roe v. Planned Parenthood Southwest Ohio Region*, supra, ¶ 44. This alone makes it improper. *Grove v. Northeast Ohio Nephrology Assoc.*, 164 Ohio App.3d 829, 2005-Ohio-6914, ¶ 26; *Miller v. Bassett*, Cuyahoga App. No. 86938, 2006-Ohio-3590; cf., *Walker v. Firelands Comm. Hosp.*, supra at ¶ 26; *G. D. v. Riley* (S.D. Ohio, 2007), Case No. 2:05-CV-980.

Since the trial court's order of disclosure violated the stricture of R.C. 2317.02(B)(1), the doctor's first assignment of error, accordingly, is sustained.

The doctor's second assignment of error challenges the trial court's denial of his motion for a change of venue. Although it might in a sense be convenient to decide the issue presented, this court cannot do so. A trial court's decision with respect to a motion for a change of venue does not constitute a final, appealable order. *Johnson v. Pohlman*, 162 Ohio App.3d 240, 2005-Ohio-3354, ¶ 3. Since this court lacks jurisdiction to consider non-final orders, the doctor's second assignment of error cannot be addressed. R.C. 2505.02.

The trial court's order of January 10, 2007 is vacated.

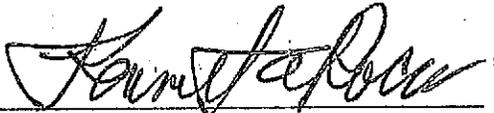
This case is remanded for further proceedings.

It is ordered that appellant recover from appellee 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.



KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, J., CONCURS  
ANTHONY O. CALABRESE, JR., P.J., DISSENTS  
WITH SEPARATE DISSENTING OPINION

ANTHONY O. CALABRESE, JR., P.J.:

I respectfully dissent, in part, from my learned colleagues in the majority. While I agree with the majority in regard to their ruling on appellant's second assignment of error, I disagree with the ruling on appellant's first assignment of error.

Insurance fraud investigations and their corresponding lawsuits constitute special situations under *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115. These are situations in which the interest of third-party insurance providers and the public outweigh nonparty patient's interests in absolute confidentiality and warrant the limited disclosure of otherwise privileged information under certain protections. The trial court did not abuse its

discretion in ordering Dr. Schlotterer to produce the patient's records under the protective order as part of discovery in Medical Mutual's fraud lawsuit.

Accordingly, I would overrule the first assignment of error.



# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

MEDICAL MUTUAL OF OHIO

Appellee

COA NO.  
89388

LOWER COURT NO.  
CP CV-589806

COMMON PLEAS COURT

-vs-

WILLIAM SCHLOTTERER, D.O.

Appellant

MOTION NO. 406054

Date 03/04/2008

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Journal Entry

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MOTION BY APPELLANT TO STRIKE APPELLEE'S MOTION TO CERTIFY A CONFLICT IS GRANTED.

RECEIVED FOR FILING

MAR 4 - 2008

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.

Presiding Judge ANTHONY O. CALABRESE, JR.,  
Concurs

---

Judge MARY EILEEN KILBANE, Concurs

---

*[Signature]*  
Judge KENNETH A. ROCCO

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NOTICE MAILED TO COUNTEE

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

MEDICAL MUTUAL OF OHIO

Appellee

COA NO.  
89388

LOWER COURT NO.  
CP CV-589806

COMMON PLEAS COURT

-vs-

WILLIAM SCHLOTTERER, D.O.

Appellant

MOTION NO. 405794

Date 03/04/2008

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Journal Entry

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MOTION BY APPELLEE TO CERTIFY A CONFLICT IS DENIED.

RECEIVED FOR FILING

MAR 4 - 2008

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DER.

Presiding Judge ANTHONY O. CALABRESE, JR.,  
Concurs

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Judge MARY EILEEN KILBANE, Concurs

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*[Signature]*  
Judge KENNETH A. ROCCO

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CA07089388

50360362



YOC 653 #00034

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED