

IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, :
INDIVIDUALLY AND AS PARENTS :
AND NEXT FRIENDS OF JANE ROE, A :
MINOR :

Plaintiffs-Appellants, :

-v- :

PLANNED PARENTHOOD :
SOUTHWEST OHIO REGION, et al. :

Defendants-Appellees. :

No. 2007-1832

On Appeal from Hamilton County Court
of Appeals, First Appellate District

Appeals Case No. C060557
Trial Court No. A0502691

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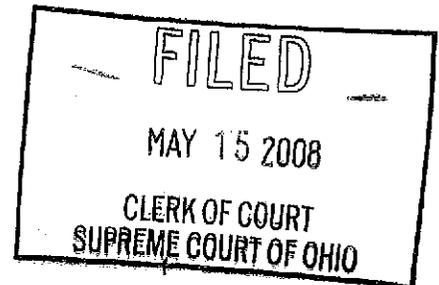


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STATEMENT OF FACTS

Introduction

This appeal arises from the decision by the Hamilton County Court of Appeals to substitute its judgment for that of the Trial Court and reverse two carefully considered and well-reasoned discovery orders of the Trial Court (hereinafter referred to as the “Discovery Orders”).

Shortly after filing this lawsuit, Appellants served written discovery requests on Appellants to begin the process of collecting the information they need to establish their claims. When Appellees refused to produce some of the information Appellants had requested, Appellants filed a motion to compel, and Appellees filed a motion for protective order. (Td. 52 and 55) The Trial Court granted the motion to compel and overruled the motion for protective order, finding that Appellants were “unequivocally” entitled to the information because their interest in the information is “tremendous.” The Trial Court also found that, although Planned Parenthood’s interest in protecting certain of the documents they were ordered to produce was of “tremendous importance,” Appellants’ need for the information and documents outweighed that interest. Moreover, the Trial Court fully protected the confidentiality rights of Planned Parenthood’s patients by ordering the redaction of all information from which the identities of the patients could be discerned. (Td. 103 and 104) Appellees appealed the Discovery Orders. (Td. 106)

Using a *de novo* standard of review, the Appellate Court substituted its own judgment for that of the Trial Court, and reversed the Discovery Orders. (App. 60)

**The Facts That Form The Basis Of Appellants' Claims
And The Context Within Which Appellants Seek The
Information And Documents That Are The
Subject Of The Discovery Orders**

In connection with their motion to compel, Appellants were not required to introduce any evidence to support their claims. Indeed, contrary to the Appellate Court's statement,¹ at this state of the litigation Appellants are *collecting*, not proffering, evidence. However, to address the Appellate Court's mis-characterization of Appellants' pattern and practice claims as an "artiface," Appellants have below provided a brief statement of allegations and facts to put the discovery requests that are the subject of the Discovery Orders in their proper context.

In the Fall of 2003, Appellant Jane Roe, then 13 years old, began a sexual relationship with John Haller, her 21 year old soccer coach. (Td. 34, ¶ 7) Haller impregnated Roe, and she learned of the pregnancy in March, 2004. (Id., ¶ 9) After being pressured by Haller, Roe agreed to have an abortion. (Id., ¶ 10)

When Roe called Planned Parenthood to schedule her abortion, she provided Planned Parenthood with her correct name and age, as well as her father's correct name and address. However, as part of her attempt to conceal her pregnancy and abortion from her parents and continue her relationship with Haller, Roe gave Planned Parenthood Haller's cell phone number, and informed Planned Parenthood that the number was her father's. (Id., ¶ 13, 14)

Planned Parenthood repeatedly asserts that it places great importance on the relationship between parents and their minor children. However, its actions in this case tell a very different

¹ "Though the Roes alleged that Planned Parenthood had systematically and intentionally violated Ohio law, they offered no evidence to support this artiface . . . The facts and evidence nowhere indicates that Planned Parenthood systematically and intentionally evaded its statutory duties." (App. 60, at 14)

story.² Appellees never notified or obtained the consent of either of Roe's parents about her abortion, and Planned Parenthood did *nothing* to determine whether the telephone number Roe had provided was her father's correct telephone number. When Appellee Roslyn Kade, M.D., Planned Parenthood's Medical Director, called that number, she had no basis to reasonably believe, let alone know, that the person who answered the call was Roe's father. (In fact, it was Haller, not her father, who answered the call.) Moreover, when Roe arrived at Planned Parenthood's clinic, she was accompanied by a 21 year old man – not her parents – who claimed to be her brother but had a different last name. (Id., ¶ 19-24)

In connection with her abortion, Planned Parenthood had a duty to obtain Roe's informed consent before performing the abortion. To meet this duty, Planned Parenthood was required to take into consideration Roe's age, maturity and ability to understand, as well as provide complete and accurate information about the medical benefits and risks of the abortion. Appellees did not fulfill these duties, and did not obtain Roe's informed consent. (Id., ¶ 18, 28-29, 63-71)³

Planned Parenthood also asserts that it always meets its duty under RC 2151.421 to report suspected abuse of minors. Again, Planned Parenthood's history and actions in this case do not support its assertion.⁴ Appellants have explicitly alleged that Planned Parenthood breached its duty when Roe arrived at its clinic on March 30, 2004, and it did so as a matter of policy and practice.

² This conduct forms the basis of Appellants' 1st and 2nd Causes of Action under RC2919.121 and RC 2919.12.

³ This conduct forms the basis of Appellants' 3rd and 8th Causes of Action under RC 2317.56 and their 4th Cause of Action.

⁴ This conduct forms the basis of Appellants' 5th Cause of Action and part of their basis of the 7th Cause of Action.

Some of the information that is the subject of this appeal is evidence that, in conjunction with other evidence already collected by Appellants, will establish that Planned Parenthood has a “don’t ask/don’t tell” practice with respect to its reporting obligations. That other evidence includes the following:

1. During telephone conversations, Planned Parenthood employees coached minors on what *not* to say when they arrive at Planned Parenthood’s clinic so that the minors will not disclose the information that will trigger Planned Parenthood’s duty to report sexual abuse.

2. Planned Parenthood employees intentionally did not ask minor patients to disclose the most important piece of information – i.e. the age of the minor’s sexual partner – to avoid determining whether the minors are victims of sexual abuse. When Roe arrived at Planned Parenthood’s clinic on March 30, 2004, Planned Parenthood did not attempt to learn the age of the father of her child.

3. Before Roe arrived at Planned Parenthood’s clinic, Appellees knew that 70% of all babies born to teenaged girls are fathered by men older than 20 and adult men fathered over 50% of babies born to girls 15-17 years old. As such, once Appellees learned Roe’s age, they knew that there was at least a 50% probability that the father of Roe’s child was an adult.

4. When Roe arrived at Planned Parenthood’s clinic, Appellees learned that Roe was suffering from a sexually transmitted infection (STI). This piece of information is significant in the context of this case because, on March 30, 2004, Appellees also knew that the majority of teenagers infected with STI’s are infected by adult males. With just this information, Appellees knew that there was at least a 50% probability that Roe was a victim of abuse. However, this information, when viewed in conjunction with Appellees’ knowledge of Roe’s age, means that Appellees knew that there was a very high probability that Jane Roe was a victim of abuse.

5. Between January 1, 2000 through December 31, 2004, Planned Parenthood did not make even one report of “suspected” abuse.

6. Roe went to Planned Parenthood with a 21 year-old man (Haller), who had a different last name, but was identified as Roe’s brother. (Td. 34, ¶ 25 - 36, 72 - 77, 81- 84)

7. Haller used his own credit card to pay for Roe’s abortion and the birth control shot Planned Parenthood provided Roe. (Id.)

In sum, the evidence will establish Planned Parenthood’s affirmative efforts to turn a blind eye to its duty to report the suspected abuse of minors.

The Prosecuting Attorney's Role

Appellees have throughout this litigation asserted that the Hamilton County, Ohio Prosecutor investigated Planned Parenthood's conduct with respect to Roe "and found that Planned Parenthood complied with the state statutes upon which plaintiffs base their claims." (App. 2, "Probable Issues For Review") As Appellees are well aware, that assertion is false.

When the Hamilton County, Ohio Prosecutor's Office investigated the sexual relationship between Haller and Roe, it also considered whether Appellees had breached their duties under RC 2919.121. However, contrary to Appellees' assertion, the Prosecutor did not find that Planned Parenthood had met its duties under RC 2919.121, but instead declined to bring charges against Planned Parenthood under RC 2919.121 because an injunction had been issued by the United States District Court, Southern District of Ohio.⁵ Moreover, the Prosecutor did not even consider whether Appellees had breached their duties under RC 2317.56 and RC 2151.421, let alone make a decision not to prosecute Appellees for their violations of those statutory provisions. (App. 33)

Appellants' Claims

Appellants sued Appellees Planned Parenthood and Kade, alleging that they breached their duties under statutes enacted to regulate the abortion industry (RC 2191.121, RC 2919.12 and RC 2317.56). The express language of these statutes provides a plaintiff the right to an award of punitive/exemplary damages for the single violation of the statutes. (They are, however, silent on how the jury is to determine the *amount* of punitive damages that should be awarded.) Moreover, the express language of RC 2317.56 provides a plaintiff the right to seek, and the court with the

⁵ In *Cincinnati Women's Services, et al. v. Taft, et al.*, Case No. C-1-98-289, U.S. District Court, Southern District of Ohio ("CWS v. Voinovich"), the Court had enjoined the State of Ohio and all county prosecutors from enforcing the criminal aspects of RC 2919.121. (See footnote number 8.)

power to order, any injunctive relief the court deems appropriate. (Td. 34, ¶ 51-68, 85, 86) Appellants also brought a claim under RC 2151.421, a statute enacted to protect minors from abuse. (Td. 34, ¶ 72-77) Appellants allege that Appellees' breaches of their duties under this statute were caused by and as part of Appellees' pattern and practice, and they seek punitive damages for the breaches. (Td. 34, ¶ 40)

Finally, Appellants bring a claim for intentional infliction of emotional distress, and they seek an award of punitive damages for Appellees' conduct that constitutes this tort. (Td. 34, ¶ 81-84)

The Trial Court's Denial Of Appellees' Motion To Dismiss

Appellees filed a motion to dismiss four of Appellants' claims, which was overruled. (Td. 47, 62) By overruling Appellees' motion to dismiss, the Trial Court gave Appellants a "green light" to collect the evidence they need for trial. The information that is the subject of this appeal is part of the evidence Appellants are attempting to collect.

Appellants' Discovery Requests That Are The Subject Of This Appeal

Appellants served written discovery requests on Appellees, comprised of interrogatories, document requests and requests for admission. (Td. 53, Ex. 1-5, Td. 77, Ex. D,E) Part of the information and documents Appellants seek through the discovery requests are the subject of this appeal. The Trial Court found Appellants' need for the information and documents was "tremendous," and held that they were "unequivocally" entitled to them. (Td. 104, at 3 and 6).

The Raw, Statistical Data Appellants Seek

Through certain of their discovery requests, Appellants seek nothing more than raw, statistical data concerning the *number* of abortions Planned Parenthood performed over a specified

period of time and the *number* of abuse reports Planned Parenthood made during the same period of time.⁶ No names and no confidential information from which the identities of Planned Parenthood's patients can be discovered. Just numbers! As such, despite Planned Parenthood's repeated protests to the contrary, the privacy and confidentiality rights of its patients will not be impaired in any way by the disclosure of this raw, statistical data. Indeed, Planned Parenthood in its ordinary course of business routinely collects and maintains precisely the same type of statistical data in its software system(s) and various documents, and it voluntarily published the same or similar types of statistical data in its annual reports and communications to third parties such as its insurance carrier and Planned Parenthood Federation of America. Further, the Ohio Department of Health publishes the same type of data in its Annual Induced Abortions In Ohio report.

The Records Appellants Seek

Appellants also seek redacted medical and abuse report records. Recognizing Planned Parenthood's interest in protecting the identities of its patients and their confidential information, Appellants, both in the discovery requests themselves and correspondence to Planned Parenthood's counsel, explicitly agreed that Planned Parenthood could redact *all* information in the records from which the identities of its patients could be discerned. (Td. 53, Ex.1, 3, 5 and 7) In short, Appellants acknowledged that Planned Parenthood could fully protect its patients' identities and confidentiality rights because Planned Parenthood has total control over the redaction of the records.

⁶ As part of discovery, Appellants obtained training documents from Planned Parenthood that establish that it knows that the majority of minors who are suffering from an STI have been the subject of abuse. Appellants thereafter made a discovery request that Planned Parenthood state the number of minors Planned Parenthood had seen who were suffering from a STI and, in connection with those, how many reports of suspected abuse were made. If, as Appellants suspect, no or very few reports were made, this is additional evidence to support their claims and attack Appellees' credibility. In any event, at this state of the litigation, Appellants are entitled to the information.

Appellees' Discovery Responses

Appellees refused to produce the raw, statistical data and the patient records Appellants requested, asserting in a conclusory manner that they are protected by the physician-patient privilege and their patients' privacy rights. However, Appellees did not explain, and have never explained, how the production of mere numbers and documents from which all information from which the patients' identities could be discerned has been redacted could result in the violation of their patients' privilege and confidentiality rights.

Planned Parenthood did produce certain of the redacted abuse reports the Trial Court had ordered them to produce.⁷ Those reports establish that, during those five years, Planned Parenthood did not make a single report of *suspected* abuse of minors, having made reports only after a patient had disclosed information (e.g., the ages of the patient and her sexual partner or an explicit allegation of abuse) that left Planned Parenthood with no choice but to make a report of *known* abuse. However, after having produced these records, Appellees belatedly took the position that Appellants could not use them as evidence in this case.

When the parties could not resolve their disagreements on Appellees' discovery responses, Appellants filed a motion to compel and Appellees filed a motion for a protective order. (Td. 52, 55)

The Discovery Orders

After extensive briefing by the parties, a long hearing, and the Trial Court's month-long deliberation, the Trial Court granted Appellants' motion to compel, denied Appellees' motion for a protective order, and issued the Discovery Orders. (Td. 103, 104) In the Discovery Orders, the Trial Court clearly identified and weighed the interests of the parties, and set forth its analysis of why

⁷ These are for the years 2000 - 2004.

it had concluded that Appellants are “unequivocally” entitled to the information and documents that are the subject of this appeal.

The Trial Court began its analysis with a thoughtful discussion of the scope of discovery permitted under Ohio Rule of Civil Procedure 26(B)(1). (Td. 104, at 1, 2) In connection with this discussion, the Trial Court correctly stated that it “must consider the totality of the claims and allegations of [Appellants], not limiting discovery to what [Planned Parenthood] may deem discoverable.” It also rejected what has been a repeated attempt by Appellees to turn the discovery process on its head, stating that the “[a]llegations and claims proffered by Roe cannot be dismissed without basis for discovery [merely] because Planned Parenthood disputes the validity of the allegations or claims.” (Id., at 3, 4)

The Trial Court next determined that much of the information Appellees claimed is protected by the physician-patient privilege is, in fact, *not* privileged. (This includes the raw, statistical data (i.e. the numbers) Appellants seek.) Further, the Trial Court found this information and these documents appropriate for discovery. (Id., at 4)

The Trial Court then found that Appellants’ need for the redacted records was “tremendous” and Appellees’ interest in protecting the records to be one “of tremendous importance.” (Id., at 6) After carefully balancing those interests, the Trial Court determined that Appellants’ need for the records “weigh[ed] heavily” in their favor and “law and justice demand Planned Parenthood provide the requested discovery.” (Id., at 7, 12)

The Trial Court also fully protected the confidentiality rights of Planned Parenthood’s patients. The Trial Court ordered the redaction of all “personal patient information.” (Id., at 7) As such, since all of the records are in Planned Parenthood’s possession, *none* will be produced until

Planned Parenthood has carefully reviewed the records and redacted all of the personal patient information from which the identities of its patients could be discerned. The Trial Court also stated that it “would issue a protective order to ensure that the patient records were not disclosed to any party outside of the litigation.” (Id., at 12)

Finally, the Trial Court addressed Planned Parenthood’s repeated and conclusory argument that, even though the records would be redacted by it to fully protect its patients’ identities, the non-parties’ confidentiality rights were still at risk. After carefully considering Planned Parenthood’s argument, the Trial Court rejected it, stating that Planned Parenthood’s reasoning is “end-oriented and by-pass[es] any logical assessment.” (Td. 104, at 10)

The Appeal

Appellees filed a notice of appeal of the Discovery Orders, (Td. 106), and thereafter filed their Amended Brief. (App. 30) By the appeal, Appellees raised one assignment of error, and it relates exclusively to their medical records, not the raw, statistical data (i.e. numbers) Appellants’ seek. (“The Trial Court Erred In Ordering Defendants To Disclose To Civil Plaintiffs The Medical Records Of Unrepresented Non-Party Minors.” (App. 30, at ii))

The Reversal Of The Discovery Orders

Ignoring that it had twice in the previous two years explicitly held that its review of precisely the same type of discovery order is under the “abuse of discretion” standard, (*Richards v. Kerlakian* (2005), 162 Ohio App.3d 363, 205 Ohio 4414, 835 N.E.2d 678; *Alcorn v. Franciscan Hospital* (2006) 1st Dist. No. C-06061, 2006 Ohio 5896, Ohio Supreme Court Case No. 06-2357, 3-28-07 Entry), the Court of Appeals chose to review the Discovery Orders *de novo*. It thereafter, without finding any abuse of discretion, simply substituted its judgment regarding the Appellants’ need for

information for that of the Trial Court. Specifically, the Appellate Court not only rejected the Trial Court's findings that Appellants' need for the information was "tremendous;" it found that Appellants had absolutely no need for the information. (App. 60, 13-16) ("Because of the lack of necessity, we need not further address or weigh the parties' interests . . ." (App. 60, at 15))

The Appellate Court also put the cart before the horse, and, in doing so, turned the discovery process on its head. Ignoring that Appellants had met their burden under Rule 26, the Appellate Court stated that, to prevail on their Motion to Compel, Appellants were required to "offer [] evidence to support" their claims, and held that the Discovery Orders must be reversed because "the record is devoid of any" evidence to support their claims. (Id., at 14) In other words, the Appellate Court held that, before Appellants are entitled to discover the evidence necessary to prove their claims, they had the burden of introducing evidence that established those claims. This is in direct conflict with the dictate and spirit of Rule 26, and it imposed a duty on Appellants that does not exist for any other litigants. In effect, the Appellate Court, without notice, converted Appellants' Motion to Compel discovery into Appellees' motion for partial summary judgment, and then did not provide Appellants with a chance to respond.

Finally, the Appellate Court improperly narrowed the scope of the claims to which Appellants could seek discovery by adjudicating their claims, something the court was not empowered to do under the limited jurisdiction it had over the interlocutory appeal. The Appellate Court did not, as it contended, "evaluate" Appellants' claims. Rather, it treated the appeal of the Discovery Orders as a mechanism to rule on substantive legal issues over which it had no jurisdiction. These issues were not before the Appellate Court, and were never briefed by the

parties.⁸ Indeed, the only substantive order that has been issued in this case is the Trial Court's order overruling Appellees' Motion to Dismiss, and the appeal of that decision was dismissed because the decision is not a final, appealable order.

ARGUMENT

The Scope Of Discovery Under Civ. R. 26

The Ohio Rules of Civil Procedure permit discovery on any matter relevant to a claim or defense of any party in the pending action that is not privileged. *Rossman v. Rossman* (1975), 47 Ohio App.2d 103, 352 N.E.2d 149; *Schoffstall v. Henderson*, (8th Cir. 200), 223 F.3d 818, 823. (Federal Rule 26 is identical to its Ohio counterpart.) The civil rules and interpretive case law provide vast leeway to discover nearly everything there is to know about a case, and discovery requests are proper if there is *any* possibility that the information sought may be relevant to any issue (e.g. matters relating to a claim or defense and/or credibility of a witness) in the action. Further, the party who opposes discovery carries a "heavy burden" of showing why discovery should not be allowed. *Hickman v. Taylor* (1947), 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 471.

The Trial Court correctly stated that the scope of Appellants' discovery is not limited merely

⁸ One example of this occurred in connection with the Appellate Court's treatment of Appellants' claim under RC 2919.121. In the lower court Appellees had moved to dismiss that claim on the grounds that the statute "was enjoined at the time of the acts giving rise to this case" by the United States District Court in *CWS v. Voinovich*. The Trial Court rejected Appellees' argument, finding that: (1) the parties to *CWS v. Voinovich* are not parties in this action; (2) the order enjoined only the "defendants [in *CWS v. Voinovich*] and their employees, agents, servants and those acting in concert with them;" and (3) "Appellants had the legal means and the legally established authority to pursue a civil action under RC 2919.121 because the order enjoined solely the criminal [not civil] aspects of the statute." (Td. 62) This issue was *not* before the Appellate Court as a result of Appellees' appeal of the Discovery Orders. However, the Appellate Court, ignoring that it lacked jurisdiction over the issue, opined that the injunction issued in *CWS v. Voinovich* did, in fact, preclude Appellants from bringing a claim under RC 2919.121.

because Appellees deny Appellants' claims and dispute the validity of Appellants' allegations. Moreover, contrary to what the Appellate Court held, Appellants are not required to prove their claims *before* they are permitted to obtain the discovery necessary to prove those claims. In short, at this early state of the case, Appellants are collecting, not proffering evidence.

In this case, Appellants have explicitly alleged that Appellees have intentionally and systematically breached their duties to them and have done so pursuant to Appellees' policies and practices. Appellants have brought claims under three statutes that explicitly provide for awards of punitive damages if they are able to establish that Appellees breached the duties owed Appellants under those statutes, a claim under another statute the violation of which is a crime, and a claim of intentional infliction of emotional distress. Moreover, Appellants' claims withstood Appellees' Motion to Dismiss, and all of Appellants' discovery requests that are the subject of this appeal relate directly to those claims and Appellees' defenses to those claims.

**The Profound And Substantial Interests
Protected by RC 2919.121/12,
RC 2317.56, And RC 2151.421**

Appellants seek the information and documents that are the subject of this appeal to protect their own interests. However, by bringing their claims under RC 2919.121/12 and RC 2317.56, Appellants are also furthering Ohio's "profound" and "substantial" interest in protecting pregnant women and the unborn. *Pre-Term v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), 505 U.S. 833, 877, 112 S. Ct. 2791, 120 L.E.2d 674. Further, by bringing their claim under RC 2151.421, Appellants are advancing Ohio's compelling interest in protecting its children from abuse, which this Court has correctly stated is "a problem of epidemic proportions," *Yates v. Mansfield Bd. of Education*, 102

Ohio St.3d 205, at 207, 2004-Ohio-2491, and addressing Ohio's Prosecuting Attorneys' concerns that certain mandatory reporters under RC 2151.421 may be intentionally breaching their reporting duties under the statute.⁹

The Standard Of Review

The general rule in Ohio is that, absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues. See e.g. *State, ex rel. The V Companies v. Marshall* (1998), 81 Ohio St.3d 467, 692 N.E.2d 198. Further, while the standard of review applied in discovery disputes involving privilege has varied among districts, the Appellate Court was required to use the "abuse of discretion" standard in its review of the Discovery Orders because *none* of the information Appellees were ordered to produce is privileged or confidential. (Specifically, the raw, statistical data are just numbers, and the Trial Court ordered that the redaction of all information from which the identities of non-parties could be discerned.) Instead, the Appellate Court incorrectly used the *de novo* standard of review, substituted its own judgment for that of the Trial Court, and reversed the Discovery Orders.

Proposition Of Law No. I (formerly Proposition of No. V)

A minor plaintiff who is the victim of the defendant's systematic and intentional breach of its duty under RC 2151.421 to report suspected abuse is entitled to seek punitive damages against defendant for that breach.

The Appellate Court held that Appellants may not seek an award of punitive damages in connection with Appellees' intentional and systematic breach of their duties under RC 2151.421

⁹ See Brief *Amici 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.

because the statute “does not provide for punitive damages.” (App. 60, at 13) That holding is wrong.

RC 2151.421

Child abuse is a “problem of epidemic proportion,” and the harm it causes is “pervasive and devastating.” *Yates*, supra, at 207. Moreover, of all victims of crime, children who are abused are the most vulnerable, trusting, and innocent. RC 2151.421 is one of the important steps Ohio has taken to protect its children from abuse and eliminate sources of abuse.

Under RC 2151.421 certain individuals and organizations such as Appellees have a duty to report both known and suspected sexual abuse of minors. With respect to the duty to report suspected abuse, mandatory reporters are “required to report *any* reasonable suspicion of child abuse.” *Tracy v. Tinnerman*, 2d Dist. No. 2003-CA-21, 2003-Ohio-6675, WL 22927758. (Emphasis added) RC 2151.421 is silent as to what civil remedies are available to a person who has been harmed by a defendant’s breach of its duties under the statute.

A person who has been harmed by a party’s breach of his duty under RC2151.421 has a civil cause of action against that party. See e.g. *Yates*, supra; *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539; *Brodie v. Summit County Children’s Services Board* (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301. In such cases, the defendant’s liability is not determined by what he claims to have subjectively believed. *Kraynak v. Youngstown City School Dist. Bd. of Edn.* (2007), 172 Ohio App.3d 545, 2007-Ohio-1236, 876 N.E.2d 587. Rather, his liability is determined by whether an objectively reasonable person, with *all* of the knowledge and information that was known by the defendant, would have suspected or known that the child was a victim of sexual abuse. (“The statute’s focus is on the condition, not the reporter.” *Surdel v. Metro Health Med. Ctr.* (1999), 135

Ohio App.3d 141, 733 N.E.2d 281.) However, as discussed below, whether punitive damages should be awarded against a person who breaches his duties under RC 2151.421 is determined by whether he acted with actual malice.

**Punitive Damages Are Available
Under RC 2151.421.**

RC 2919.12/121 and RC 2317.56 are three of the very rare Ohio statutes that explicitly provide that a plaintiff will be entitled to an award of punitive damages if she is able to establish a single statutory violation. However, the absence of such a provision in RC 2151.421 does not mean, as the Appellate Court held, that a defendant who violates that statute is immune from an award of punitive damages.

In *Rice v. Certaineed Corporation* (1999), 84 Ohio St.3d 417, 704 N.E.3d 1217, this Court was faced with the issue of whether a plaintiff who brought a claim under RC 4112.99 was entitled to seek an award of punitive damages when that statute provides that a person may maintain “a civil action for damages, injunctive relief, or any other appropriate relief.” In finding that punitive damages were available under RC 4112.99, this Court stated that “construing the word ‘damages’ as including only those damages that are compensatory would be inconsistent not only with the word but also with the purpose and intent of RC 4112.99.” *Id.*, at 421.

Two years later this Court in *Campbell*, *supra*, made clear that liability in the form of a civil penalty – i.e. punitive damages – may be imposed on mandatory reporters who breach their duties under RC 2151.421, and found the following definition of the word “liability” to be “compelling.”

The quality or state of being legally obligated or accountable; legal responsibility to another or society, enforceable by civil remedy *or criminal punishment*. *Id.*, at 341, quoting Black’s Law Dictionary (7th Ed. 1999) 925. (Emphasis added)

Further, as it had in *Rice*, supra, this Court held that “by its very definition, ‘liability’ refers to either a criminal or civil penalty.” *Id.*, at 341. (Also see *Meyer v. UPS* (2007), 174 Ohio App.3d 339, at 353, 354, in which the Court of Appeals held that, where a statute does not limit the damages available with a restrictive modifier, the statute “embrac[es] the panoply of legally recognized pecuniary relief.”)

No statute is more important in contemporary American law than 42 U.S.C. §1983 (§1983),¹⁰ and, like RC 2151.421, §1983 does not expressly specify any of the remedies available to plaintiffs who bring claims under that statute. (§1983 provides in pertinent part that a defendant “. . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”) Yet the courts have unanimously held that a §1983 plaintiff may in appropriate cases seek both compensatory and punitive damages. See e.g., *Carey v. Piphus* (1978), 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed.2d 252; *Memphis v. Community School Dist. v. Stachura* (1986), 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed.2d 249; *Smith v. Wade* (1983), 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed.2d 632. However, if the Appellate Court’s reasoning were accepted and applied to §1983 claims, plaintiffs who bring lawsuits under §1983 would be precluded from seeking punitive damages in those actions.

The lack of a “punitive damage” provision in RC 2151.421 does not mean that a plaintiff is precluded from seeking an award of punitive damages under the statute. First, Ohio courts have made clear that a person who has breached his duties under RC 2151.421 is civilly liable to the person harmed by the breach. Because the statute does not in any way limit the damages available

¹⁰ “It would be difficult to imagine a statute more clearly designed ‘for the public good’ and ‘to prevent injury and wrong’ than §1983.” *Will v. Michigan Dept. of State Police*, (1989), 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed.2d 45.

to a plaintiff suing under RC 2151.421, she is entitled to seek “the panoply of legally recognized pecuniary relief.” Second, the Appellate Court’s holding conflicts with this Court’s holdings in *Rice* and *Campbell*. And third, excluding punitive damages from the remedies available under RC 2151.421 would be inconsistent with all of the statute’s purposes. As such, the lack of *any* damage provision or limiting language in RC 2151.421 simply means that Appellants are entitled to seek *both* compensatory and punitive damages, and they are able to establish their right to punitive damages under the statute in the usual way—i.e. by obtaining and introducing evidence of Appellees’ actual malice. *Rice*, supra, at 342.

For these reasons, the Appellate Court’s Decision must be reversed.

Proposition Of Law No. II (formerly Proposition of Law No. VI)

A minor plaintiff victimized by the defendant’s breach of its duty under RC 2151.421 to report sexual abuse may use in a civil action redacted reports made pursuant to RC 2151.421 to help establish that the defendant’s breach was intentional and part of a pattern of misconduct.

As discussed above, RC 2151.421 was enacted to address the problem of child abuse, a problem that this Court has found to be a “pervasive and devastating force in our society” and one of “epidemic proportions.” *Yates*, supra, at 207. To encourage persons who are mandatory reporters under the statute to make reports when they suspect or know that child abuse has occurred, the legislature included a provision in that statute that prohibits the report from being “used as evidence in any civil action or proceeding brought *against the person who made the report*.” RC 2151.421(H)(1) (Emphasis added) That provision by its clear language does *not* provide protection to mandatory reporters in civil actions where it is alleged they have breached their duties under RC 2151.421 by *failing* to make a report of suspected abuse and did so pursuant to their practices and

policies. Rather, this language provides “whistleblower” protection to persons who *make* reports. Any other interpretation of the statute is inconsistent with one of the purposes of the statute – to “discourage [] the failure to report.” *Campbell*, supra, at 342. Yet that is precisely how the Appellate Court interpreted the provision.

This Court has long held that statutes enacted by the legislature must be enforced as written. *Maggiore v. Kovach*, 101 Ohio St.3d 184, 2004-Ohio-722, 803 N.E.2d 790; *Hubbard v. Canton* (2002), 97 Ohio St.3d 45, 2002-Ohio-6718, 780 N.E.2d 543; *Weaver v. Edwin Shaw Hospital* (2004), 104 Ohio St.3d 39, 2004-Ohio-6549. Indeed, this Court has repeatedly instructed courts to enforce statutes “as written” and not “recast the language” to “accommodate some unstated meaning or purpose.” *Hubbard*, supra, at 454. Second, this Court has instructed that courts must not circumvent the intent of the Ohio legislature and add a provision to a statute which the court or a party may believe the Ohio legislature left out: “Had the General Assembly intended to include such a provision, it could have done so.” *Weaver*, supra, at 393-394. In other words, “it is improper for a court to add words to those utilized by the General Assembly.” *Montpelier v. Williams* (1991), 61 Ohio St.3d 390, 395 575 N.E.2d 152, 156. Third, this Court has also “long recognized the principle of *expressio unius est exclusio alterius* – ‘the expression of one thing implies the exclusion of another.’” *Maggiore*, supra, at 187. These principles of law provide the framework in which the relevant language of RC 2151.421(H)(1) must be analyzed to determine whether redacted abuse reports made pursuant to the statute may be used as evidence against a defendant who failed to make a report as it was required to do.

The language of RC 2151.421(H)(1) is clear. Reports made pursuant to the statute may not be used in a civil proceeding “*against the person who made the report.*” Contrary to the holding of

the Appellate Court,¹¹ the statute does *not* prohibit the use of the reports in *all* civil proceedings. Indeed, it does not prohibit the use of the reports in civil proceedings against defendants who breached their duties under the statute to make a report and did so as part of a pattern and practice. Moreover, a trial court has the inherent power to order the disclosure of child abuse reports in appropriate circumstances. *Johnson v. Johnson* (1999), 134 Ohio App.3d 579, 731 N.E.3d 1144. In short, the Appellate Court “recast[ed] the language” of RC 2151.421 to reach its conclusion, and in doing so ignored the well-settled law that statutes enacted by the legislature must be enforced as written, not to “accommodate some unstated meaning or purpose.”

The Appellate Court’s interpretation of RC 2151.421(H)(1) not only conflicts with Ohio law and the statute’s clear language; it conflicts with the purposes for the statute’s enactment. RC 2151.421(H)(1) was enacted to encourage individuals to report suspected or known abuse without fear of being named in a lawsuit brought by the person(s) who are the subject of the report, and it is to “be liberally interpreted and construed so as to effectuate [its] purposes . . .” RC 2151.01. As such, the statute was enacted to provide “whistleblower” protection to reporters who make a good faith effort to fulfill their obligations; it was *not* enacted to provide protection to organizations and individuals who systematically and intentionally ignore their reporting duties under the statute. (“ . . . the General Assembly encouraged reporting and specifically discouraged the failure to report . . .” *Campbell, supra*, at 342)

Finally, the issue of whether mandatory reporters under RC 2151.421 understand and meet their duties is one of great concern to all Ohioans, including Prosecuting Attorneys. Indeed, *Amici*

¹¹ “. . . [R]eports made under RC 2151.421, and the information contained therein, are confidential and inadmissible in *any* civil proceeding.” (App. 60, at 10, emphasis added.)

Prosecuting Attorneys are “concerned that certain mandated reporters may be intentionally breaching those duties, and, in essence, helping child abusers to cover-up and continue the abuse they are perpetrating.” Brief *Amici 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. According to those Prosecuting Attorneys, RC 2151.421 is “one of the better means the Ohio legislature has made available to everyone . . . to identify those persons and entities who do not fulfill their duties under RC 2151.421,” and the Appellate Court’s interpretation of Section H(1) of the statute “is in direct conflict with what the Ohio legislature intended when RC 2151.421 was enacted.”

For these reasons, The Appellate Court’s Decision should be reversed.

Proposition Of Law No. III (formerly Proposition of Law No. IV)

In cases involving claims for punitive damages, plaintiffs are entitled to discover information from defendant that establishes that defendant’s conduct is part of a pattern of wrongful/criminal conduct.

Pattern And Practice Evidence Is Highly Relevant Not Only To Appellants’ Punitive Damage Claims; It Is Also Highly Relevant To Their Claims That Appellees Breached Their Duties To Them.

As fully discussed below, Appellants, like all other plaintiffs who seek punitive damages, are entitled to discover pattern and practice information to prove their right to an award of punitive damages, as well as the amount of punitive damages to be awarded. However, Appellants are also entitled to that information to help prove their claims that Appellees breached their duties to them. *Indeed, this is the same argument that Planned Parenthood’s counsel correctly and successfully made just recently in Poneris v. Pa. Life Ins. Co. (S.D. Ohio 2007), 2007 U.S. Dist. LEXIS 80685.* (“Plaintiff seeks this evidence to help prove his bad faith denial claim and his claim for punitive

damages . . . The Court preliminarily finds that the . . . information . . . is relevant to establish whether Defendant had a pattern and practice of bad faith conduct.”) (Emphasis added)

Ohio law is clear that evidence of a “pattern of wrongful conduct” by a defendant is highly relevant to the issue of whether the alleged injury was a natural and probable consequence of the wrongful act. *State v. Smith* (1990), 49 Ohio St.3d 127, 551 N.E.2d 19 (Other acts are admissible to show similar acts under an “identifiable scheme, plan or system.”); *Smithhisler*, supra; *State v. Elersic*, 9th Dist. App. No. 21150, 2003 Ohio 721 (Pattern and practice evidence can establish circumstantially that 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.); *Meyer*, supra; *TXO Production Corp.*, supra, 509 U.S. 443; *Poneris*, supra. Further, Evid. R. 404(B) provides in pertinent part that:

Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Clearly, Appellee’s pattern and practice of wrongful conduct (e.g. repeated violations of statutory duties) is relevant not only to Appellants’ punitive damage claims; it is also highly relevant to establish to Appellants’ claims that Appellees breached their duties to Appellants.

**Appellants’ Claims For Punitive Damages
Under RC 2919.121/12 And RC 2317.56**

The Appellate Court erroneously held that, because RC 2919.12 and RC 2317.56 “provide that punitive damages are available for a single violation,” Appellants are not entitled to the raw, statistical data (the numbers) or the redacted medical records of non-parties even if those records

contain “evidence that Planned Parenthood had violated Ohio law 1,000 times.” This holding not only directly conflicts with long established Ohio precedent; it defies all logic.

An award of punitive damages is required for a single violation of RC 2919.121/12 or RC 2317.56. By this requirement the Ohio legislature imposed *per se* liability for punitive damages for a single violation of the statutes, and, in doing so, simply eliminated the plaintiff’s duty to prove actual malice on the part of the defendant to obtain such an award. However, the statutes do not provide any guidance whatsoever as to what the appropriate *amount* of the punitive damage award should be for a single violation of the statutes or what an appropriate award should be for the defendant’s pattern and practice of wrongful conduct that results in multiple violations. How is a trier of fact to determine the amount of the punitive damage award? The same way it does in most cases – i.e. by determining the reprehensibility of the defendant’s conduct, which Appellants have the right to establish by obtaining the evidence necessary to prove that Appellees have engaged in a pattern and practice of similar misconduct.

The United States Supreme Court and the Ohio courts have made clear that a factor - maybe the most important factor – to consider in determining the amount of punitive damages to be awarded is whether defendant’s conduct is “part of a larger pattern of wrongdoing.” *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed.2d 336; *Smithhisler v. Dutter* (1952), 157 Ohio St. 454, at 469, 195 N.E.2d 868; *Myer v. Preferred Credit, Inc.* (2001), 117 Ohio Misc.2d 8, 34, 2001 Ohio 4190, 766 N.E.2d 612; *Poneris*, supra. In the recent *Phillip Morris* decision, the United States Supreme Court held that a plaintiff may use evidence of the defendant’s misconduct that causes harm to third parties to establish the reprehensibility of the defendant’s conduct that harmed the plaintiff. *Phillip Morris, USA v.*

Williams (2007), 549 U.S. _____, 127 S. Ct. 1057, 166 L. Ed.2d 940. Further, the United States Supreme Court in *TXO Production Corp.* held that, when the jury is determining whether to award punitive damages and the size of the award, “[i]t is appropriate to consider the potential harm that the defendant’s conduct would have caused the intended victim . . ., *as well as the possible harm to other victims that might have resulted if similar future behavior is not deterred.*” *TXO Production Corp.*, supra. (Emphasis added.) Finally, as discussed above, under Evidence Rule 404(B), pattern and practice evidence is admissible to establish “motive . . . intent, plan, knowledge . . . or absence of mistake or accident.”

The Trial Court correctly found, and certainly did not abuse its discretion in finding, that Appellants’ discovery request is a proper attempt to gather evidence of precisely the type of conduct – e.g. Planned Parenthood’s practice of failing to obtain the consent of or provide notice to a minor’s parent (RC 2919.121/RC 2919.12) and failing to provide the information necessary for a woman to make an informed decision (RC 2317.56) – that is relevant to the amount of punitive damages to be awarded and the injunctive relief Appellants seek under RC 2317.56. The Appellate Court not only improperly substituted its judgment for that of the Trial Court’s on this topic; it also incorrectly prevented Appellants from gathering some of the strongest evidence they need to establish the amount of punitive damages they should be awarded and the injunctive relief that should be ordered for Appellees’ breaches of their duties under RC 2919.121/12 and RC 2317.56.

For these reasons, the Appellate Court’s Decision should be reversed.

**Appellants’ Claims For Punitive Damages
Under RC 2151.421 And For Intentional
Infliction Of Emotional Distress.**

Absent a statutory provision that requires an award of punitive damages for the defendant’s single violation of the statute, a plaintiff must establish her right to an award of punitive damages

the usual way – by proving that the defendant acted with actual malice. As such, Appellants seek to discover from Appellees pattern and practice evidence to help establish the actual malice element of their claims for Appellees’ intentional infliction of emotional distress¹² and Appellees’ breach of their duties under RC 2151.421.¹³ What possibly could be more relevant to the issue of whether Appellees’ breached their duties under RC 2151.421 and did so with actual malice than the fact that they have as a matter of practice intentionally and repeatedly failed to report suspected sexual abuse of children? Not much. Yet the Appellate Court found that Appellants had no need for this evidence, and ridiculed Appellants’ claim as an “artiface.”

Actual malice is the “conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, at 473, 575 N.E.2d 416. Since defendants rarely admit to malicious conduct, actual malice is most often inferred from conduct and surrounding circumstances. *Joyce-Couch v. Dr. Silva* (1991), 77 Ohio App.3d 278, at 288, 602 N.E.2d 286; Evid. R. 404(B). Some of the best, if not the best, evidence a plaintiff may introduce to support her claim of actual malice is evidence that the defendant was engaged in a pattern and practice of wrongdoing.

Appellants seek evidence – i.e. raw, statistical data (i.e. numbers) and redacted medical records and abuse reports – that by itself or in conjunction with other evidence will establish their claim that Appellees were engaged in a pattern and practice of intentionally breaching their duty to report suspected abuse, as well as their claim of intentional infliction of emotional distress. The

¹² Plaintiffs are also entitled to seek awards of punitive damages as part of their claims of intentional infliction of emotional distress. See e.g. *Uebalacker v. Cincom Sys., Inc.* (1992), 80 Ohio App.3d 97, 608 N.E.2d 858, motion overruled 65 Ohio St.3d 1496, 605 N.E.2d 950.

¹³ See Proposition of Law No. I, supra.

Trial Court correctly recognized this request to fall well within the bounds of permissible discovery, and, using its inherent power to order the discovery of confidential records in appropriate circumstances, granted the motion to compel. The Appellate Court mocked the use of pattern and practice evidence, stating that Appellants “offered no evidence to support this artifice.” Contrary to the Appellate Court’s pronouncement, pattern and practice evidence is no artifice. In fact, it is rudimentary that evidence of other bad acts can be used to establish motive, intent, plan, and absence of mistake, as well as to establish actual malice and the appropriate level of punitive damages.

The Appellate 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.” (App. 60, at 16) Indeed, the Appellate Court stated that, “[e]ven if the Roes rooted around in these patient’s medical records and found evidence that Planned Parenthood had violated Ohio law 1000 times, it would not assist the Roes in showing that Planned Parenthood had violated Ohio law in Jane’s case.” (App. 60, at 14) This holding is directly contradictory to Ohio law. As discussed above, the evidence is not only highly relevant to Appellants’ claims of actual malice and the amount of punitive damages to which they are entitled; it is also highly relevant to the issue of whether Appellees breached their duties to Appellants.

Maybe even more troubling is that, in order to support its conclusions, the Appellate Court prematurely evaluated the merits of the case, and used that prejudgment to reverse the Trial Court’s resolution of this discovery dispute. In doing so, the Appellate Court stated that Appellants “offered no evidence” that the defendants engaged in a pattern and practice of violating RC 2151.421, and reversed the Discovery Orders because the “facts and evidence nowhere indicate that Planned

Parenthood systematically and intentionally evaded its statutory duties.” (App.60, at 14) Of course, at this early state of the case, Appellants are *collecting* evidence, not proffering evidence, and they are not required to introduce any evidence to prove their claims to be able to discover the very evidence they need to prove those claims.

The Appellate Court’s Decision conflicts with well-settled jurisprudence from the Ohio and federal courts. Moreover, the Appellate Court used questionable logic, combined with the conspicuous lack of citation and controlling law, to substitute its judgment for that of the Trial Court. For these reasons, the Appellate Court’s Decision should be reversed.

Proposition Of Law No. IV (formerly Proposition of Law No. II)

The disclosure of redacted non-party medical records necessary for Plaintiffs to establish their claims outweighs the need for protection provided by the physician-patient privilege.

Introduction

Since this Court’s decision in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, 1999 Ohio 115, 715 N.E.2d 518, Ohio courts have applied that case’s holdings to situations where the plaintiff seeks to obtain through discovery the medical records of non-parties in the possession of the defendant. Several appellate courts have used slightly different balancing tests where the needs of the requesting party are balanced with the confidentiality interest of the non-parties. See e.g., *Richards*, supra; *Alcorn*, supra; *Walker v. Firelands Community Hosp.*, 6th Dist. No. E-03-009, 2004-Ohio-681. In the cases where the courts have found that the balance tips in favor of the requesting party, they have protected the interests of the non-parties by ordering the redaction of information and issuing protective orders.

In *Alcorn*, the defendants appealed the decision of the First District, and this Court accepted

jurisdiction of that appeal. However, the parties in *Alcorn* agreed to settle their claims before this Court could decide the appeal. As such, this appeal is an opportunity for this Court to provide guidance to trial courts faced with the discovery issue of when a plaintiff is entitled to confidential records of non-parties.

The Balancing Test Appellants Urge This Court To Adopt

When a trial court must decide whether a plaintiff is entitled to non-parties' medical records, it must balance the plaintiff's need for the records and the non-parties' interest in protecting the confidential and/or privileged information in those records. Appellants respectfully submit that, in applying this balancing test, the first two questions the trial court should answer are: one, does the plaintiff need the information to establish or help establish his claims, defeat the defendant's defenses, and/or challenge the defendant's credibility?; and two, is the plaintiff unable to obtain the same information from another source? If the answer to both of these questions is "yes," the trial court should then determine if the plaintiff's need for the information will be satisfied by records redacted of all of the information from which the identities of the patients could be discerned. If it can, the trial court should order the production of the redacted records because, by ordering the redactions, the trial court will have fully protected the non-parties' privileged and/or confidential information. That is exactly what the Trial Court did in this case.

Ironically, Planned Parenthood's own legal counsel is in full agreement with the balancing test Appellants suggest. Just last year in *Poneris*, *supra*, the plaintiff, who is represented by Planned Parenthood's counsel in this case, sued the defendant insurance company, and alleged that the defendant's bad faith denial of the plaintiff's claim was part of its practice of denying claims without conducting reasonable investigations. To help establish that claim and the plaintiff's "claim for

punitive damages,” the plaintiff argued that he was entitled information relating to the defendants’ non-party insureds. In other words, the plaintiff in *Poneris* made precisely the same arguments in support of their right to the non-party information that Appellants make here. The defendant refused to produce the information, asserting that information about other insureds was irrelevant and invaded their privacy rights.

The court in *Poneris* ruled that the plaintiff was entitled to the information he sought. Specifically, the trial court found that the information is relevant to the plaintiff’s claim that, when the defendant harmed the plaintiff, it did so as part of a pattern and practice. (“As to the first issue, relevancy, the Court preliminarily finds that the [third-party] claims information . . . is relevant to establish whether Defendant had a pattern and practice of denying claims . . . without conducting reasonable investigations.”) Further, the court protected the rights of the non-party insureds by ordering the defendant to provide “redacted versions of the claims files” and the plaintiff “not to use the information he received to contact other insureds . . .” In short, at the suggestion of the plaintiff’s counsel – Planned Parenthood’s counsel in this case – the court in *Poneris* used precisely the same balancing test that the Trial Court used in this case and Appellants urge this Court to adopt.

**The Appellate Court Had No Jurisdiction
Over The Trial Court’s Order Relating
To The Raw, Statistical Data.**

Through certain of the interrogatories and requests for admission that are subjects of the Discovery Orders, Appellants seek raw, statistical data on the number of abortions Appellees have performed, as well as various subcategories of those numbers, and the number of abuse reports made. No names, no confidential or privileged information. Just numbers! Indeed, this is precisely the type of data Planned Parenthood voluntarily publishes in its annual reports and in its communications

with third parties such as its liability insurance carrier and Planned Parenthood Federation of America, and the Ohio Department of Health publishes in its annual reports. Accordingly, as the Trial Court correctly held, this data is not protected by the physician-patient privilege.

The Appellate Court had no jurisdiction over the part of the Discovery Orders dealing with the raw, statistical data (i.e. numbers). First, as discussed above, Appellees' one assignment of error is limited to that part of the Discovery Orders in which they were ordered to produce "the [redacted] *medical records* of unrepresented non-party minors." (App. 30, at ii) (Emphasis added) As such, Appellees did not appeal the Trial Court's order directing them to produce the numbers. Second, the Appellate Court would have lacked jurisdiction even if Appellees had appealed the parts of the Discovery Orders dealing with the numbers because the raw, statistical data is not privileged information. Accordingly, the part of the Discovery Orders directing Appellees to produce the data is not immediately appealable, and was not properly before the Appellate Court.¹⁴ RC 2505.02; *Dispatch Printing Co. v. Recovery LTD.* (2006), 166 Ohio App.3d 118, 2006-Ohio-1347.

**Planned Parenthood Routinely
Collects And Voluntarily Disseminates The
Raw, Statistical Data To Third Parties
As Part Of Its Normal Business Practice.**

The origin of the discovery dispute relating to the raw, statistical data can be traced to Appellees' inaccurate representation that the production of that data would violate the privacy rights

¹⁴ Appellants moved to dismiss this aspect of Appellees' appeal of the Discovery Orders (App. 19), but the motion was denied. However, the Appellate Court did not explain how it had jurisdiction over a subject that had not been appealed (i.e. the Trial Court's order that Appellees produce the statistical data) or how a discovery order directing a party to produce raw, statistical data and records that had been redacted of all confidential and privileged information involves "discovery of privileged matters" under RC 2505.02(a)(3).

of third-party patients because it “can only be determined by reviewing patient records.” Indeed, this was the sole factual premise for Appellees’ objection to Appellants’ interrogatories and requests for admission relating to the data.

Just as the records cannot be produced, they cannot be reviewed to determine “numbers” of abortions performed, as plaintiffs insist. These “numbers” do not exist in the abstract; they can only be determined by reviewing patient records. It is the review itself that violates privacy rights. (App. 30, pp.9, 10)

The Planned Parenthood representative who verified the interrogatory responses in which this objection was made was Susan Momeyer, who was Planned Parenthood’s CEO at that time. Both Appellants and the Trial Court believed that Planned Parenthood’s and Ms. Momeyer’s representations on this topic were accurate at the time the Discovery Orders were issued. Unfortunately, the representations were incorrect, which has led to what may aptly be described as the discovery version of the Abbott and Costello “Who’s On First” comedy routine.

After the appellate briefs had already been filed, Appellants learned during depositions of Planned Parenthood’s personnel, including Ms. Momeyer, that: (1) Planned Parenthood in the ordinary course of its business routinely reviews its patients’ records for several purposes, including collecting and tallying this data; (2) some of this data is, in fact, maintained in Planned Parenthood’s software and other documents, not just the medical records; and (3) Planned Parenthood routinely disseminates this data to third parties such as its insurance carrier. In fact, Appellants were just recently informed that, for each year since 1997, Planned Parenthood has reviewed its medical records to collect certain information that Appellants seek (i.e. the number of abortions Planned Parenthood has performed on minors), and it has each year voluntarily communicated that

information to Planned Parenthood Federation Of America.¹⁵

When Planned Parenthood's routine review of its medical records to collect, store and disseminate the requested raw data to third parties was exposed, Appellants assumed that Appellees would promptly provide full responses to their interrogatories and requests for admission. Appellants assumed incorrectly. Planned Parenthood simply raised a new objection to these discovery requests, stating that, because its software system had somehow become "corrupted" (Planned Parenthood's word), it is no longer able to retrieve all of the data from the system. According to Planned Parenthood, this means that it cannot respond to the discovery requests without *again* reviewing its medical records which, according to Planned Parenthood, will violate its patients' privacy rights. In short, Planned Parenthood now maintains that, although its patients' alleged privacy rights were not violated when it originally reviewed the records to collect the data to store it in its software system and disseminate to recipients of its choice, these rights will somehow be violated if it *again* reviews the same records to collect the data to respond to Appellants' discovery requests.

Planned Parenthood cannot in good faith continue to maintain that the mere collection of this raw, statistical data from its patients' records will violate its patients' privacy rights. First, Appellees cite absolutely no authority to support their position that their patients have a privacy interest in raw, statistical data that can be, and already has been, collected by Planned Parenthood when it reviews

¹⁵ See Supplement, pp. 86 - 97. Planned Parenthood collected the data, and claims to have stored it in its software system. It claims to have thereafter used the software system to tally the numbers, which it then communicated to Planned Parenthood Federation of America in its Annual Affiliate Survey Census forms. Appellants do not comment here on how it is possible after over two years of hotly contested litigation involving this topic that Planned Parenthood just learned of the existence of forms that it has created and distributed on an annual basis for at least the last 10 years.

their records for the purpose of disseminating it to third parties. There is a good reason for this. None exists.

Second, Planned Parenthood in the ordinary course of its business routinely reviews its medical records to collect the same or the similar types of data to store in its software system, and it includes that data in reports and documents that it voluntarily sends to third parties. As such, Appellees argue that their patients' privacy rights are not violated when Planned Parenthood reviews the medical records for the purpose of collecting and sending the raw data to third parties of its choice, but somehow are violated when the data is collected to provide to Appellants. Appellants respectfully submit that this argument is not only wrong; it is specious.

The correct analysis of whether the patients' alleged privacy rights in this data are violated focuses on the actions of Planned Parenthood (i.e. the review of the records and the collection of the data), not the identity of the recipient of the data. Because Planned Parenthood admits that none of its actions violates its patients' privacy rights when it reviews the records and collects the data to be sent to other third parties, its performance of precisely the same tasks to collect and tally the data necessary to respond to Appellants' discovery requests is not transmuted into a violation of those alleged privacy rights merely because the data will be sent to the Appellants.

Planned Parenthood holds itself out as a business that does everything it possibly can to prevent the sexual abuse of minors and meet its duties under RC 2919.121/12, RC 2317.56 and RC 2151.421. The numbers Appellants seek not only will provide evidence to help Appellants establish their claims in this litigation; it will also provide Planned Parenthood itself with the data needed to do a statistical analysis of whether its policies, practices and training purportedly designed to achieve those goals are working. Yet Planned Parenthood has done everything possible to prevent

Appellants from obtaining this raw data, and it has not done the statistical analysis itself. Why? Planned Parenthood knows that the results of the analysis will support the Appellants' allegation that Planned Parenthood intentionally and as a matter of practice breaches its duties under the above-referenced statutes.

**The Trial Court Did Not
Abuse Its Discretion**

The issues raised in Appellants' motion to compel and Appellees' motion for protective order were extensively briefed, and the Trial Court held a lengthy hearing during which it was clear that it fully understood the issues and correctly identified the interests of the parties. The Trial Court thereafter issued a well-reasoned and thorough 12 page decision in which it found that Appellants' need for the information and records was "tremendous" and "vital" to their ability to prosecute their claims. Specifically, the Trial Court found that certain of the information Appellants seek (e.g., the numbers) is not protected by privilege. The Trial Court also found that for many reasons, including those discussed in connection with Propositions of Law Nos. 1 - 3, Appellants need the raw, statistical data and documents in the possession of Planned Parenthood to establish or help establish that: (1) Appellees breached their duties under RC 2919.121 or RC 2919.12, RC 2317.56 and RC 2151.421 and those breaches were caused, in whole or in part, by Planned Parenthood's policies and practices; (2) Appellees' conduct was intentional and constitutes the intentional infliction of emotional distress; (3) Appellants are entitled to awards of punitive damages for Appellees' breach of RC 2151.421¹⁶ and Appellees' conduct that constitutes their intentional infliction of emotional distress; *Uebalacker*, supra; and (4) injunctive relief that should be ordered under RC 2317.56. Further, the Trial Court found that Appellants need the information and records to establish the

¹⁶ See Appellants' discussion of Proposition Of Law No. I.

amount of punitive damages to which Appellants will be entitled and challenge Appellees' credibility with respect to their assertion that they always met their duties under the above-referenced statutes.

The Trial Court, after acknowledging that Appellees' interest in the records is one of "tremendous importance," determined that Appellants' need for the records "heavily" outweighed Appellees' interest in protecting those records. The Trial Court then fully protected the non-parties' confidentiality and privacy rights by ordering the redaction of all information from which their identities could be discerned and stating that it would if needed provide additional protection through protective orders.

The Trial Court did not abuse its discretion when it issued the Discovery Orders, and the Appellate Court's Decision should be reversed.

CONCLUSION

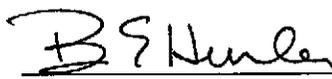
The Appellate Court's Decision is fundamentally wrong, and it is dangerous in its implications for all parties who bring lawsuits in Ohio. In place of a well-established and fair procedure by which all plaintiffs in Ohio courts have the right through discovery to collect evidence to prove their claims, the decision below would establish a procedure that will require certain plaintiffs to introduce evidence in support of their claims before they are entitled to obtain the very evidence they need to establish those claims. In cases where much, if not all, of that evidence is in the possession of the defendant, this procedure will in effect prevent the plaintiff from being able to successfully prosecute her claims. Moreover, the decision below would prevent all plaintiffs seeking punitive damages from obtaining and using some of the best evidence necessary to establish their right to punitive damages, as well as the amount of punitive damages to which they are entitled.

Finally, the decision provides protection to mandatory reporters under RC 2151.421 who breach their duties under the statute.

For these reasons and those set forth in this brief, the Appellate Court's Decision must be reversed.

Respectfully submitted,

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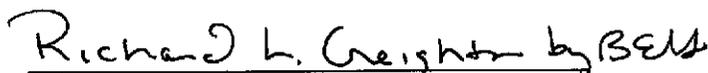
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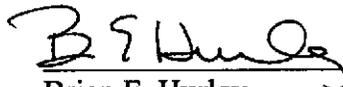
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular mail this 14th day of May, 2008 to the following attorney of record:

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IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, Individually and:
as parents and next friends of JANE ROE,:
a minor,

Plaintiffs/Appellants,

-v-

PLANNED PARENTHOOD
SOUTHWEST OHIO REGION, et al.

Defendants-Appellees.

On Appeal from the Hamilton County
Court of Appeals, First Appellate District

Appeals No: C060557
Trial No.: A-0502691

07 - 1832

NOTICE OF APPEAL OF PLAINTIFFS-APPELLANTS JOHN AND JANE ROE,
INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS
OF JANE ROE, A MINOR

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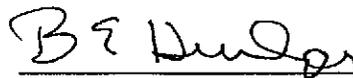
FILED
OCT 05 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Appellants hereby give Notice of Appeal to the Supreme Court of Ohio from the Decision issued by the Court of Appeal for the First Appellate District in Appeal No. C-060557, entered on August 24, 2007. A copy of the Decision is attached hereto.

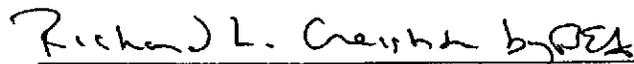
This is an appeal of right because it involves substantial constitutional questions. It is also a discretionary appeal that involves issues of public or great general interest. A Memorandum In Support Of Jurisdiction is filed contemporaneously with this Notice.

Respectfully submitted,

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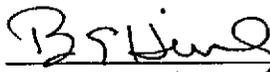
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal of Appellants John and Jane Roe, Individually and as Parents and next Friends of Jane Roe, a Minor* was sent by regular mail to Defendants' Attorneys, Daniel J. Buckley, Vorys Sater Seymour & Pease, 221 E. Fourth St., Suite 2000, P.O. Box 236, Cincinnati, Ohio 45202 this 5th day of October, 2007



Brian E. Hurley

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

**JOHN AND JUNE ROE, Individually
and as parents and next friends of
JANE ROE, a minor,**

Plaintiffs-Appellees,

vs.

**PLANNED PARENTHOOD
SOUTHWEST OHIO REGION,**

ROSLYN KADE, M.D.,

and

JOHN DOES 1-6,

Defendants-Appellants.

**APPEAL NO. C-060557
TRIAL NO. A-0502691**

DECISION.

Civil Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 24, 2007

Brian E. Hurley, Kathleen McGarvey Hidy, Robert J. Gehring, and Crabbe, Brown & James, LLP, for Plaintiffs-Appellees,

Daniel J. Buckley, Barbara Bison Jacobsen, and Vorys, Sater, Seymour & Pease, for Defendants-Appellants.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Presiding Judge.

{¶1} Are abuse reports and medical records of minors under the age of 13 receiving abortions discoverable, in an identity-cloaking format, by private civil plaintiffs when the records are not necessary to develop the plaintiffs' claims? We think not.

{¶2} Plaintiffs-appellees John and June Roe, individually and as parents of Jane Roe (collectively "the Roes"), sued defendants-appellants Planned Parenthood Southwest Ohio Region, Roselyn Kade, M.D., and John Does one through six (collectively "Planned Parenthood") for performing a wrongful abortion on Jane Roe. John Does one through six represent various Planned Parenthood employees. The complaint alleged that Planned Parenthood had performed an unlawful abortion on Jane Roe because it had neither notified the parents nor secured their consent before the abortion;¹ that it had not obtained Jane's informed consent;² and that it had breached its duty to report suspected child abuse.³ The Roes sought compensatory and punitive damages, as well as injunctive relief.

1. The Illicit Relationship and Jane's Fraudulently Procured Abortion

{¶3} In the fall of 2003, Jane engaged in a sexual relationship with her 21-year-old soccer coach, John Haller. At the time, Jane was 13 and in the eighth grade. The sexual relationship continued through 2004, and in March of that year, Jane discovered that she was pregnant.

¹ R.C. 2919.121 and 2919.12.

² See R.C. 2317.56.

³ See R.C. 2151.421.

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{¶4} Jane told Haller. Haller convinced Jane to have an abortion. Later in March, Haller called Planned Parenthood and attempted to schedule an abortion for Jane. Planned Parenthood told Haller that he could not schedule the abortion and that Jane would have to call to make the appointment. After his conversation with Planned Parenthood, Haller called Jane and told her to schedule the abortion. And he also instructed her that if she was asked to provide a parental telephone number, she should give Planned Parenthood his cell-phone number in lieu of her father's phone number.

{¶5} Jane called Planned Parenthood, and during her conversation, she told a worker that she was 14 and that her parents could not accompany her to the abortion. She also asked whether her "step-brother" could come with her. The worker asked whether Jane's parents knew about her pregnancy. Jane lied and told the worker that one or both of her parents knew. They did not. The worker then told Jane that someone would have to stop at Planned Parenthood to pick up an information packet, but that Jane did not have to personally retrieve the packet. At some point during the conversation, Jane gave the worker her father's correct name and address, but she lied twice more, telling the worker that her father did not have a home phone number and then giving Haller's cell-phone number as her father's phone number. Planned Parenthood scheduled the abortion for March 30, 2004.

{¶6} Sometime before the abortion, Haller picked up the information packet for Jane. Several days after Jane's initial conversation with Planned Parenthood, she called again because she could not find her social-security card, but the worker told her that another form of identification could be used.

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{¶7} The parties' assertions of fact diverge as to whether Planned Parenthood called the misleading phone number given by Jane. The Roes second amended complaint alleged that they were without knowledge whether "Planned Parenthood called or attempted to call the cell phone that belonged to Haller or, if it did, whether Planned Parenthood ever spoke to Haller." But at a hearing, Planned Parenthood read into evidence without objection the following transcript of the investigative officer's discussion with Jane Roe:

{¶8} "[JANE ROE]: I told [Planned Parenthood], to call [Haller's] cell phone number. I acted like it was my dad's cell phone. And when they called him, he was acting like my dad and told them that I was allowed to do it or whatever.

{¶9} "[THE DETECTIVE]: So they called. You gave your dad's cell phone number?

{¶10} "[JANE ROE]: No, I gave them [Haller's] cell phone number, but I told them it was my dad's."

{¶11} Planned Parenthood also produced the parental-notification form filled out by Dr. Kade. The form indicated that Kade had telephonically notified parent John Roe that Jane Roe was scheduled for an abortion at Planned Parenthood no sooner than 24 hours from the time the notice was given.

{¶12} On the day of the abortion, Haller drove Jane to the abortion clinic, and on arrival, a worker requested to see both Haller's and Jane's identification. Jane presented her school-identification card, and Haller provided his Ohio driver's license.

{¶13} Haller reviewed the forms Jane had filled out to be sure that they had been completed in a satisfactory manner. The forms were submitted to Planned

OHIO FIRST DISTRICT COURT OF APPEALS

Parenthood, and one worker noted on a form that Jane Roe's "brother John * * * [was] here today." Haller used his credit card to pay for the abortion.

{¶14} Before the abortion, Jane signed a form setting forth the nature and purpose of, and the medical risks associated with, a dilation-and-sharp-curettage abortion. One form she signed also stated that Planned Parenthood had met its statutory obligation to obtain the patient's informed consent.⁴ The Roes alleged that even if Jane had been fully informed, her age and emotional state precluded her from comprehending and understanding the risks associated with the abortion. The Roes also alleged that Jane's consent was not given in a knowing, voluntary, or intelligent manner, and that it was procured under duress and coercion.

{¶15} After the abortion, a Depo-Provera shot was administered to Jane, and she was given condoms. Haller and Jane resumed their sexual relationship. But within three days of the abortion, Haller ended the relationship. After the breakup, Jane and Haller's sister, also a classmate of Jane's, had an argument about Haller and his relationship with Jane. A teacher overheard the argument, including the references to Jane's sexual relationship with Haller, and reported the suspected sexual abuse to the police.

{¶16} After a criminal investigation, Haller was convicted of seven counts of sexual battery. 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.

{¶17} The Roes sued and moved to compel discovery of ten years' worth of minors' abortion records. The abortion records contained information about

⁴ See R.C. 2317.56(B)(4).

patients' sexual and gynecological history, number of sexual partners, contraceptive methods, and general medical history. The trial court compelled discovery of the records in an identity-concealing format, concluding that the Roes' interest in the records was "tremendous," and that the civil rules, the statutes, and the case law weighed in favor of disclosure.

{¶18} The management of the discovery process is reviewed under an abuse-of-discretion standard, but questions of privilege, including the propriety of disclosure, are questions of law and are reviewed de novo.⁵

II. The Statutory Prohibitions and the Roes' Complaint

{¶19} The Roes' complaint alleged violations of former R.C. 2919.12 (parental notice), current R.C. 2919.121 (parental written consent), R.C. 2151.421 (failure to report suspected abuse of a minor), and R.C. 2317.56 (patient's informed consent). We discuss these sections of the Revised Code in turn, first noting that to determine the limitations on the scope of discovery, we must evaluate the Roes' allegations and claims, before analyzing the necessity and probative value of the information sought to be discovered.

III. The Former Notice Statute

{¶20} Former R.C. 2919.12 ("the notice statute") prohibited any person from knowingly performing an abortion on a pregnant minor unless the person had given at least 24 hours' actual notice, in person or by telephone, to one of the minor's parents of the intent to perform the abortion.⁶ Therefore, under the notice statute, at

⁵ See *Alcorn v. Franciscan Hospital*, 1st Dist. No. C-060061, 2006-Ohio-5896.

⁶ See former R.C. 2919.12.

a minimum, Planned Parenthood was required to give 24 hours' telephonic notice of the abortion to a parent before performing the abortion. Even though Jane had misinformed Planned Parenthood about her father's phone number, the Roes alleged that Planned Parenthood had failed to give them telephonic notice as required by the statute.

{¶21} The heart of the Roes' notice claim is that the statute required actual notice. The parties do not dispute that the Roes did not receive notice. Though the statute required actual notice to the parents, it enumerated several affirmative defenses when the pregnant minor had given false, misleading, or incorrect information. And Jane's testimony showed that she had lied to Planned Parenthood when she gave it Haller's, rather than her father's, phone number.

IV. The Consent Statute Was Enjoined

{¶22} The notice statute was amended in 1998 by H.B. No. 421, which enacted the notice statute's successor, R.C. 2919.121 ("the written-consent statute"). The written-consent statute requires that the attending physician secure the informed written consent of the minor and one parent before performing an abortion.⁷ In addition to requiring written consent of a parent, H.B. No. 421 also provided a statutory affirmative defense to any civil, criminal, or professional-disciplinary action under R.C. 2919.121 if enforcement of the written-consent statute has been enjoined: If a person complies with the [notice statute] in the good-faith belief that the application or enforcement of the written-consent statute is subject to a restraining order or injunction,

⁷ See R.C. 2919.121.

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good-faith compliance is a complete defense to any civil, criminal, or professional disciplinary action brought under the written-consent statute.⁸

{¶23} The Roes assert that the same facts that supported their claim under the notice statute support their claim under the parental-written-consent statute. But the constitutionality of H.B. No. 421 was immediately contested, and enforcement of the statute was preemptively enjoined in federal district court before its effective date.⁹ In 2005, the district court upheld the constitutionality of H.B. No. 421 and ruled that it would go into effect in September 2005. To summarize, H.B. No. 421 was enjoined, and the act suspended, in 1998, Jane's abortion was performed on March 30, 2004, and H.B. 421 was ruled constitutional and became effective in September 2005.

{¶24} Because R.C. 2919.121 was enjoined from becoming Ohio law at the time the underlying action accrued, discovery under the Roes' R.C. 2919.121 claim was unwarranted. Notwithstanding this, if Planned Parenthood had complied with R.C. 2919.12 in the good-faith belief that R.C. 2919.121 had been enjoined, then civil, criminal, or professional disciplinary actions under R.C. 2919.121 were precluded. Even if we were to assume that the enforcement of the written-consent statute was not enjoined as to the Roes, the affirmative defense required only a good-faith belief that R.C. 2919.121 had been enjoined, and the record before us does not reflect a lack of good faith in Planned Parenthood's belief that enforcement of the statute had been enjoined. Because it had.

⁸ See R.C. 2919.122.

⁹ See *Cincinnati Women's Services Inc. v. Voinovich* (1998), S.D. Ohio No. C-1-98-289.

V. The Duty to Report Suspected or Known Abuse

{¶25} Under R.C. 2151.421 (“the duty-to-report-abuse statute”), certain officials and agencies have a duty to report suspected abusive or illegal relationships to a law-enforcement agency or a prosecuting attorney. The Roes alleged that Planned Parenthood had failed to report Jane’s relationship with Haller to a law-enforcement agency or a prosecuting attorney.

{¶26} The Roes’ memorandum supporting their motion to compel stated that their discovery requests sought “production of information that relates directly to the claims they have made, the punitive damages and injunctive relief they seek, and the defenses Planned Parenthood and Kade have raised in their answer and counterclaim.” But the closest the Roes came to explaining how the abortion records related to their claims was their allegation that “‘as a matter of policy and/or pattern and practice Planned Parenthood does not meet its reporting duties under R.C. 2151.421 with respect to minors to whom it provides abortion and other medical services, including the provision of birth control.’ (¶40 of the Second Amended Complaint) (This allegation is based on what occurred in this case, information [p]laintiffs have learned from the Hamilton County, Ohio Prosecutor’s Office, and the investigations of Planned Parenthood currently being conducted by the attorney generals of Nebraska and Indiana)[.] The failure to report suspected abuse by entities and persons covered by R.C. 2151.421 is a crime, and defendants may not hide behind the assertion of privilege to prevent [p]laintiffs from discovering the information they need to establish that their breach of this duty in this case was not an isolated incident.”

{¶27} The Roes alleged that Planned Parenthood had breached its duty to report suspected abuse, and claiming a systematic and intentional breach of that duty, the Roes attempted to justify their request for the abortion records.

{¶28} Planned Parenthood did not deny that it had not filed an abuse report. And we note that reports made under R.C. 2151.421, and the information contained therein, are confidential and inadmissible as evidence in any civil proceeding.

VI. The Duty to Secure the Patient's Informed Consent

{¶29} Under R.C. 2317.56 ("the patient's-informed-consent statute"), absent a medical emergency, at least 24 hours before an abortion is performed, a physician must meet with the pregnant woman to (1) allow her an opportunity to ask questions; (2) inform her of the nature and purpose of, and the medical risks associated with, the abortion; (3) tell her the probable gestational age of the fetus; and (4) advise her of the medical risks associated with carrying the pregnancy to term.

{¶30} Under the patient's-informed-consent statute, the meeting need not occur at the facility where the abortion is to be performed or induced, and the physician involved in the meeting need not be affiliated with that facility or with the physician who is scheduled to perform or induce the abortion.¹⁰ Moreover, the Ohio Attorney General has opined, "The provision of information at least twenty-four hours in advance must be made 'verbally or by other nonwritten means of communication,' but need not occur in a face-to-face meeting * * *. '[V]erbally or by

¹⁰ See R.C. 2317.56.

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other nonwritten means of communication' refers to all types of nonwritten communication, including videotaped or audiotaped physician statements.¹¹ The statute also authorizes the court to order injunctive and equitable relief where appropriate. This was the only one of the Roes' statutory claims that specifically provided for injunctive relief.

{¶31} The Roes alleged that Planned Parenthood had failed to meet with Jane and convey the information required under R.C. 2317.56.

VII. The Scope of Discovery Under Civ.R. 26

{¶32} 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, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * * ." In determining the scope of discovery, we focus not on whether the information requested is admissible, but on whether the information sought is reasonably calculated to lead to admissible evidence.¹² In sum, the scope of discovery is limited to relevant nonprivileged matters that are reasonably calculated to lead to admissible evidence. But even privileged matters are subject to discovery where it is necessary to protect or further a countervailing interest that outweighs the privilege.¹³

{¶33} For this discussion, we assume without so holding that the discovery sought by the Roes was relevant and reasonably calculated to lead to admissible evidence. The abuse reports and abortion records were unquestionably confidential

¹¹ 1994 Ohio Atty.Gen.Ops. No. 94-094.

¹² See *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, 835 N.E.2d 768, ¶7; Civ.R. 26(B)(1).

¹³ See *id.*, citing *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518, paragraph two of the syllabus.

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and privileged under the physician-patient privilege.¹⁴ But whether the information sought was relevant or reasonably calculated to lead to admissible evidence is not clear, and because our discussion of the parties' interests is dispositive of the issue, we limit our analysis to whether the discovery sought was necessary to protect or further a countervailing interest that outweighed the minors' privilege.

VIII. Necessity

{¶34} Disclosure of privileged information is only appropriate when necessary. The Ohio Supreme Court held in *Biddle v. Warren General Hospital*,¹⁵ and we later held in *Richards v. Kerlakian*,¹⁶ that only where the privileged information is necessary to further or protect a countervailing interest is disclosure proper.

{¶35} In *Richards*, the plaintiff sued her deceased son's physician and the employer hospital under a negligent-credentialing theory. The plaintiff sought discovery of redacted copies of operative reports of nonparty patients. The medical records belonged to the defendant physician's former patients who had undergone the same gastric-bypass surgery. The issue was whether the hospital knew or should have known that the physician was incompetent to perform the surgery. We upheld the trial court's order compelling discovery, noting that though the records were privileged under R.C. 2317.02, they were nonetheless necessary to develop a primary claim against the hospital on the issue of negligent credentialing and to impeach the deposition testimony of the defendant physician. And in that instance, the plaintiff's interests outweighed the patients' interest in confidentiality.

¹⁴ See R.C. 2151.421(H)(1) and 2317.02; *Richards v. Kerlakian*, supra.

¹⁵ 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518.

¹⁶ 162 Ohio App.3d 823, 2005-Ohio-4414, 835 N.E.2d 768.

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{¶36} In this case, the Roes alleged that the abortion records were necessary to further their core claims. Not so.

{¶37} The Roes first argue that the records were necessary to establish punitive damages. But the duty-to-report-abuse statute does not provide for punitive damages.¹⁷ Because R.C. 2151.421 does not provide for punitive damages, the Roes' punitive-damages justification under R.C. 2151.421 is without merit.

{¶38} On the other hand, the parental-notice statute¹⁸ and the patient's-informed-consent statute¹⁹ provide that punitive damages are available for a single violation;²⁰ and the Roes admit as much. Because punitive damages are available for one violation, the medical records (used to show intentional and systematic violations in the past) were unnecessary to the Roes' claim for punitive damages. The Roes must only show that Planned Parenthood violated its statutory duties to them one time for punitive damages to be calculable. And even if it is assumed that the medical records were necessary for the computation of punitive damages (which in itself is speculative at this stage of the proceedings), we hold that a private plaintiff's interest in attempting to bolster a speculative punitive-damages award alone does not outweigh the patients' interest in maintaining confidentiality.²¹

{¶39} The key in any analysis of a discovery dispute is to first determine what truly is at issue. Once that is done, we can determine what is discoverable.

{¶40} This is not a class action. This is not a criminal case. It is *Roe v. Planned Parenthood*—not *State v. Planned Parenthood*. The issue is not whether

¹⁷ See R.C. 2151.421.

¹⁸ See R.C. 2919.12.

¹⁹ See R.C. 2317.56.

²⁰ See R.C. 2919.12(E) and 2317.56(H)(1).

²¹ See, e.g., *Sirca v. Medina Cty. Dept. of Human Services* (2001), 145 Ohio App.3d 182, 1867-187, 762 N.E.2d 407.

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Planned Parenthood violated its duties to other patients—it is whether Planned Parenthood violated its duties to the Roes. No amount of “issue framing” to the contrary can change that fact. The redacted medical records were not necessary for the Roes to establish whether Planned Parenthood had violated Ohio statutes in its treatment of Jane. 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. 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. The attempt to interject nonparty medical abortion records into a private civil suit by claiming systematic and intentional violation of Planned Parenthood’s statutory duties is clearly at odds with the nature of this case.

{¶41} Further, this case provides no persuasive reason for a judicial endorsement of the Roes acting as private attorneys general. If the state reasonably believed that Planned Parenthood had systematically and intentionally violated its duties under Ohio law, it could have sued or prosecuted. And even then it is not certain that Planned Parenthood would have been required to disclose the confidential information sought here.²² The facts and evidence nowhere indicate that Planned Parenthood systematically and intentionally evaded its statutory duties. And if Planned Parenthood was violating Ohio law, then those same statutes provided a private cause of action for each aggrieved party.

²² See, e.g., *Planned Parenthood of Indiana v. Carter* (Ind.App.2006), 854 N.E.2d 853.

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{¶42} A separation of the wheat from the chaff reveals that this case is about whether Planned Parenthood performed an unlawful abortion on Jane; about whether Planned Parenthood met its duty to report suspected abuse of Jane; and about whether Jane's consent was proper. The Roes' interests are important. And the minor patients' privilege is undeniable. But the information sought was not necessary to this case.

{¶43} Even if the records were even tenuously necessary, the burden of disclosure on Planned Parenthood and its patients would exceed the value of the records to this litigation.

{¶44} The potential invasion of privacy rights trumps the probative value of the records to this case. Even with the records redacted, it is arguable that disclosure would result in a privacy invasion. For instance, in the same vein that a voyeur observing in secret invades the subject's privacy—even if the subject's identity is not known—an abortion patient's privacy rights can be encroached by the nonconsensual review of redacted abortion records. In this case, nondisclosure was compulsory notwithstanding that the patients' identities would have been concealed by redaction, or that it would have been impossible to extrapolate a patient's identity from the redacted records—otherwise a privacy invasion would arguably be visited on the unconsenting, unrepresented, nonparty patients; and under such a meager showing of necessity, we refuse to order disclosure. And we are unsure that a sufficient redaction is even possible—identities might be compromised.

{¶45} Because of the lack of necessity, we need not further address or weigh the parties' interests, except that we acknowledge and recognize that, under the

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proper circumstances, the physician-patient privilege²³ between an abortion patient and her physician may be afforded constitutional protection under the penumbra of privacy rights.²⁴

{¶46} The Roes need only prove that Planned Parenthood violated its duty to the Roes in this case—no more, no less. 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. Likewise, the records are not necessary for either punitive damages or injunctive relief.

{¶47} The order of the trial court compelling discovery is reversed, and the cause is remanded for further proceedings.

Judgment reversed and cause remanded.

HENDON, J. and CUNNINGHAM, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²³ R.C. 2317.02(B).

²⁴ See *State v. Desper*, 151 Ohio App.3d 208, 2002-Ohio-7176, 783 N.E.2d 939, ¶32; *Roe v. Wade* (1973), 410 U.S. 113, 151-157, 93 S.Ct. 705; *Whalen v. Roe* (1977), 429 U.S. 589, 598-601, 97 S.Ct. 869.

The Supreme Court of Ohio

FILED

MAR 26 2008

CLERK OF COURT
SUPREME COURT OF OHIO

John and June Roe, Individually and as
parents and next friends of Jane Roe, a
minor

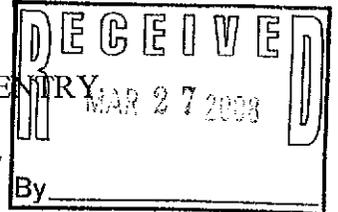
Case No. 2007-1832

v.

Planned Parenthood Southwest Ohio
Region, Roslyn Kade, M.D., and John
Does 1-6

RECONSIDERATION ENTRY

Hamilton County



It is ordered by the Court that the motion for reconsideration in this case is granted and the Court accepts the appeal on Proposition of Law Nos. II, IV, V, and VI. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Hamilton County Court of Appeals; No: C060557)

A large, stylized handwritten signature in black ink, appearing to read "Thomas J. Moyer".

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 26, 2008

[Cite as *03/26/2008 Case Announcements*, 2008-Ohio-1279.]

MERIT DECISIONS WITH OPINIONS

2006-1061 and 2006-1069. Minster Farmers Coop. Exchange Co., Inc. v. Meyer, Slip Opinion No. 2008-Ohio-1259.

Shelby App. Nos. 17-05-32, 2006-Ohio-1886, and 17-05-28, 2006-Ohio-1887. Judgments reversed and causes remanded.

Moyer, C.J., and Pfeifer, O'Connor, O'Donnell, Lanzinger, and Bryant, JJ., concur.

Lundberg Stratton, J., concurs in judgment only.

Peggy L. Bryant, J., of the Tenth Appellate District, sitting for Cupp, J.

2006-2263. State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm., Slip Opinion No. 2008-Ohio-1261.

Fayette App. No. CA2006-01-006, 171 Ohio App.3d 476, 2006-Ohio-5509. Judgment affirmed.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, O'Donnell, Lanzinger, and Cupp, JJ., concur.

2007-0268. State v. Smith, Slip Opinion No. 2008-Ohio-1260.

Hamilton App. No. C-060077, 2006-Ohio-6980. Judgment affirmed.

Moyer, C.J., and Lundberg Stratton, O'Connor, O'Donnell, Lanzinger, and Cupp, JJ., concur.

Pfeifer, J., dissents.

2007-1865. State v. Aleshire, Slip Opinion No. 2008-Ohio-1272.

Licking App. No. 2007-CA-1, 2007-Ohio-4446. Judgment reversed, guilty plea vacated, and cause remanded for new trial.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, and O'Donnell, JJ., concur.

Lanzinger, J., dissents.

Cupp, J., dissents and would dismiss the cause as having been improvidently accepted.

MERIT DECISIONS WITHOUT OPINIONS

2008-0080. State ex rel. Brown v. Rogers.

In Mandamus. On respondents' motion to dismiss and relator's amended motion for stay. Motion to dismiss granted. Motion for stay denied. Cause dismissed.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, O'Donnell, and Lanzinger, JJ., concur.

Cupp, J., not participating.

2008-0112. State ex rel. Madison v. Connors.

In Mandamus. On complaint in mandamus of Oliver Madison. On S.Ct.Prac.R. X(5) determination, cause dismissed.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, Lanzinger, and Cupp, JJ., concur.

O'Donnell, J., dissents and would grant an alternative writ.

2008-0274. Coulter v. Elum.

In Prohibition. On complaint in prohibition of Justin Coulter. On S.Ct.Prac.R. X(5) determination, cause dismissed.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, O'Donnell, Lanzinger, and Cupp, JJ., concur.

MOTION AND PROCEDURAL RULINGS

2006-2056. State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland.

In Mandamus. On relators' bill and documentation in support of attorney fees and respondents' objections to attorney fees. Attorney fees in the amount of \$19,039. are awarded.

2007-0705. McFadden v. Cleveland State Univ.

Franklin App. No. 06AP-638, 2007-Ohio-298, and 170 Ohio App.3d 142, 2007-Ohio-939. On motion for admission pro hac vice of Benjamin C. Mizer by William P. Marshall. Motion granted.

2007-2325. State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.

Cuyahoga App. No. 90575, 2007-Ohio-6480. On relator's motion for stay of court of appeals' judgment. Motion denied.

On respondents' motion for sanctions and attorney fees. Request for attorney fees granted. Appellee's counsel shall submit a bill and documentation in support of the award of attorney fees within ten days of the date of this entry, and appellant may file objections to appellee's bill and documentation within ten days of filing of the bill.

Pfeifer, O'Connor, and O'Donnell, JJ., dissent and would not award attorney fees.

2008-0152. State ex rel. Baker v. Tri-Rivers Educational Computer Assn.

In Mandamus. On motion to dismiss. Sua sponte, an alternative writ is granted and the following briefing schedule is set for presentation of evidence and filing of briefs pursuant to S.Ct.Prac.R. X:

The parties shall file any evidence they intend to present within 20 days of the date of this entry; relator shall file a brief within ten days of the filing of the evidence; respondents shall file a brief within 20 days after the filing of relator's brief; and relator may file a reply brief within ten days after filing of respondents' brief.

Moyer, C.J., and O'Donnell and Lanzinger, JJ., dissent and would dismiss the cause.

2008-0273. State v. Blandin.

Allen App. No. 1-06-107, 2007-Ohio-6418. On motion for leave to file delayed appeal. Motion granted.

O'Connor, O'Donnell, and Lanzinger, JJ., dissent.

2008-0279. State v. Diaz.

Lucas App. No. L-05-1381, 2007-Ohio-4480. On motion for leave to file delayed appeal. Motion denied.

Pfeifer, J., dissents.

2008-0283. Ohio Edison Co. v. Williams.

Summit App. No. 23530, 2007-Ohio-5028. On emergency motion for stay of court of appeals' judgment. Motion denied.

2008-0290. State v. Frazer.

Cuyahoga App. No. 89097, 2007-Ohio-5954. On motion for leave to file delayed appeal. Motion granted.

O'Connor, Lanzinger, and Cupp, JJ., dissent.

2008-0299. State v. Brown.

Darke App. No. 1700, 2007-Ohio-4544. On motion for leave to file delayed appeal. Motion denied.

Pfeifer, J., dissents.

2008-0313. State v. Rosemond.

Hamilton App. No. C-060578, 2007-Ohio-6333. On motion for leave to file delayed appeal. Motion granted.

O'Connor and O'Donnell, JJ., dissent.

2008-0317. State v. Wade.

Lucas App. No. L-07-1198, 2007-Ohio-6891. On motion for leave to file delayed appeal. Motion granted.

O'Connor and Lanzinger, JJ., dissent.

2008-0335. State v. Bevins.

Hamilton App. No. C-050754, 2006-Ohio-6974. On motion for leave to file delayed appeal. Motion denied.

2008-0336. State v. Howald.

Union App. No. 14-07-25, 2007-Ohio-6152. On motion for leave to file delayed appeal. Motion denied.

Pfeifer and Lundberg Stratton, JJ., dissent.

2008-0340. State v. Land.

Auglaize App. No. 2-07-20, 2007-Ohio-6963. On motion for leave to file delayed appeal. Motion granted.

O'Connor, J., dissents.

2008-0341. State v. Berry.

Franklin App. No. 06AP-45, 2006-Ohio-5875. On motion for leave to file delayed appeal. Motion denied.

2008-0353. State v. Kepiro.

Franklin App. No. 06AP-1302, 2007-Ohio-4593. On motion for leave to file delayed appeal. Motion granted.

O'Connor, O'Donnell, and Lanzinger, JJ., dissent.

2008-0425. Dunn v. Smith.

In Habeas Corpus. On petition for writ of habeas corpus of Andrew Dunn.

Sua sponte, the writ is allowed. Allowing the writ means only that a return is ordered. See *Reed v. Kinkela* (1998), 84 Ohio St.3d 1427, 702 N.E.2d 903; *Hernandez v. Kelly*, 107 Ohio St.3d 1430, 2005-Ohio-6400, 838 N.E.2d 670.

Respondent shall file a return of writ within 21 days of service of the petition and petitioner may file a response within ten days after the return is filed. Petitioner's physical presence before the court will not be required.

O'Connor and O'Donnell, JJ., dissent and would dismiss the cause.

APPEALS ACCEPTED FOR REVIEW

2007-2193. State v. Bartrum.

Summit App. No. 23549, 2007-Ohio-5410.

Pfeifer, O'Connor, and O'Donnell, JJ., dissent.

2007-2232. State v. Peterson.

Montgomery App. No. 22008, 173 Ohio App.3d 575, 2007-Ohio-5667.

Pfeifer, Lanzinger, and Cupp, JJ., dissent.

2007-2310. State v. Jones.

Stark App. No. 2007 CA 00139, 2007-Ohio-5818. Discretionary appeal accepted and cause consolidated with 2007-2311, *State v. Skropits*, Stark App. No. 2007 CA 00098, 2007-Ohio-5817.

Pfeifer, O'Donnell, and Lanzinger, JJ., dissent.

APPEALS NOT ACCEPTED FOR REVIEW

2007-1404. Krause v. Bislich.

Lorain App. No. 06CA008937, 2007-Ohio-2983. Discretionary appeal not accepted. Motion for stay denied as moot.

O'Donnell, J., dissents and would accept the appeal.

2007-1487. Parrish v. Coles.

Franklin App. Nos. 06AP-696 and 07AP-720, 2007-Ohio-3229.

2007-2012. State v. Odavar.

Cuyahoga App. No. 89029, 2007-Ohio-5535.

2007-2154. State ex rel. Lopez v. Deters.
Hamilton App. No. C-061057.

2007-2159. State v. Gordon.
Muskingum App. No. CT2007-0011, 2007-Ohio-5545.

2007-2163. State v. Wells.
Warren App. No. CA2006-11-129, 2007-Ohio-5388.

2007-2183. Tingler v. C.J. Mahan Constr. Co.
Stark App. No. 2007CA00086, 2007-Ohio-5463.

2007-2185. State v. Collins.
Clermont App. No. CA2007-01-010, 2007-Ohio-5392.
O'Connor, J., dissents.

2007-2194. State v. Lopez.
Lucas App. No. L-06-1243, 2007-Ohio-5473.

2007-2197. State v. Ballard.
Hamilton App. No. C-061077.

2007-2200. Flatt v. Atwood Manor Nursing Ctr.
Crawford App. No. 3-06-26, 2007-Ohio-5387.

2007-2203. State v. Comsa.
Washington App. No. 06CA21, 2007-Ohio-5561.
O'Donnell, J., dissents.

2007-2209. Martin v. Henderson.
Richland App. No. 07CA28, 2007-Ohio-5467.

2007-2211. State v. Cullins.
Montgomery App. No. 21881, 2007-Ohio-5978.

2007-2214. State v. Lester.
Auglaize App. No. 2-07-23, 2007-Ohio-5627.

2007-2216. State v. Raleigh.

Licking App. No. 2007-CA-31, 2007-Ohio-5515.

2007-2219. Mattingly v. Grant Joint Vocational School.
Clermont App. No. CA2007-04-056.

2007-2221. State v. Watson.
Licking App. No. 07CA107.

2007-2223. State v. Smith.
Summit App. No. 23554, 2007-Ohio-5673.

2007-2226. State v. Paige.
Hamilton App. No. C-980704.

2007-2230. Cincinnati Ins. Co. v. ACE INA Holdings, Inc.
Hamilton App. Nos. C-060384 and C-060385, 2007-Ohio-5576. Discretionary appeal not accepted.

Lundberg Stratton, J., dissents.

Motion for admission pro hac vice of William M. Cohn, Brian C. Coffey, and Erin E. O'Brien by Gregory A. Harrison granted.

2007-2231. State v. Hutton.
Cuyahoga App. No. 80763, 2007-Ohio-5443.

2007-2235. Ridenour v. Wilkinson.
Franklin App. No. 07AP-200, 2007-Ohio-5965.
Moyer, C.J., and O'Donnell, J., dissent.

2007-2238. State v. Dillard.
Montgomery App. No. 21704, 173 Ohio App.3d 373, 2007-Ohio-5651.
O'Donnell, J., dissents.

2007-2246. State v. Rowbotham.
Mahoning App. No. 06 MA 59.

Moyer, C.J., dissents and would accept the appeal on Proposition of Law Nos. I and III and hold the cause for the decision in 2007-0656 and 2007-0657, *State v. Veney*, Franklin App. No. 06AP-523, 2007-Ohio-1295.

O'Connor, J., dissents and would accept the appeal and hold the cause for the decision in *State v. Veney*.

2007-2248. State v. Haught.

Pickaway App. No. 06CA30, 2007-Ohio-5736.

2007-2250. Aultcare Corp. v. Roach.

Stark App. No. 2007CA0009, 2007-Ohio-5686.

2007-2251. Encompass Ins. Co. of Am. v. Reeder.

Summit App. No. 23775, 2007-Ohio-5675.

Moyer, C.J., dissents and would accept the appeal on Proposition of Law No. I.

Cupp, J., dissents.

2007-2253. State v. Bolling.

Montgomery App. No. 21874, 2007-Ohio-5976.

2007-2256. State v. Turner.

Cuyahoga App. No. 88489, 2007-Ohio-3264, and 2007-Ohio-5449.

Moyer, C.J., dissents and would accept the appeal on Proposition of Law No. I.

2007-2258. State v. Kennedy.

Hamilton App. Nos. C-060579 and C-060580.

2007-2259. State v. McClaskey.

Pickaway App. No. 06CA24, 2007-Ohio-5867.

2007-2260. State v. Graves.

Cuyahoga App. No. 88845, 2007-Ohio-5430.

Moyer, C.J., dissents.

2007-2261. State v. Glover.

Washington App. No. 07CA17, 2007-Ohio-5868.

2007-2267. State v. Merrifield.

Hamilton App. No. C-060764.

O'Connor, J., dissents.

2007-2268. Ross v. William E. Platten Contracting Co.

Cuyahoga App. No. 88749, 2007-Ohio-5733.

O'Connor, J., not participating.

2007-2272. Hundemer v. Partin.

Clermont App. No. CA2007-01-006, 2007-Ohio-5631.

Moyer, C.J., and Lanzinger, J., dissent.

2007-2274. State v. Schuler.

Hamilton App. No. C-060864.

2007-2276. Wadley v. Knowlton Mfg. Co.

Hamilton App. No. C-061045, 2007-Ohio-5739.

Pfeifer, J., dissents.

2007-2277. State v. Collins.

Summit App. No. 23662, 2007-Ohio-5674.

2007-2278. State v. Ford.

Cuyahoga App. Nos. 88946 and 88947, 2007-Ohio-5722.

2007-2284. Bowling Green v. Bourne.

Wood App. No. WD-07-007, 2007-Ohio-5748.

Pfeifer and O'Donnell, JJ., dissent.

2007-2290. Lassiter v. Lassiter.

Hamilton App. No. C-070048.

2007-2292. In re Cole.

Cuyahoga App. No. 89089, 2007-Ohio-5730.

2007-2296. CityLink Ctr. v. Cincinnati.

Hamilton App. Nos. C-061037, C-061054, and C-061064, 2007-Ohio-5873.

2007-2297. State v. Stephens.

Franklin App. No. 07AP-682.

2007-2301. State v. Heard.

Hamilton App. Nos. C-060862, C-060900, and C-060928, 2007-Ohio-5872.

2007-2304. State v. Johnson.

Lake App. No. 2006-L-259, 2007-Ohio-5783.

2007-2305. Yoder v. Thorpe.

Franklin App. No. 07AP-225, 2007-Ohio-5866.

O'Donnell, J., dissents.

2007-2306. State v. Hairston.

Franklin App. Nos. 07AP-160 and 07AP-161, 2007-Ohio-5928. Discretionary appeal and cross-appeal not accepted.

Moyer, C.J., dissents and would accept the cross-appeal.

Lanzinger, J., dissents and would accept the appeal on Proposition of Law Nos. I and II and the cross-appeal.

Cupp, J., dissents and would accept the cross-appeal on Proposition of Law Nos. II and III.

2007-2312. State v. Betts.

Cuyahoga App. No. 88607, 2007-Ohio-5533.

2007-2314. In re B.F.

Warren App. Nos. CA2006-10-118 and CA2006-11-137.

2007-2315. State v. Orsborne.

Allen App. No. 1-06-94, 2007-Ohio-5776.

Lanzinger, J., dissents and would accept the appeal on Proposition of Law No. II.

2007-2316. State v. Miller.

Washington App. No. 07CA2, 2007-Ohio-5931.

2007-2327. State v. Martin.

Cuyahoga App. No. 89030, 2007-Ohio-6062.

2007-2328. State v. McGlothlin.

Hamilton App. No. C-060145, 2007-Ohio-4707.

O'Connor, J., dissents.

2007-2330. In re Grubbs.

Guernsey App. No. 07 CA 2, 2007-Ohio-5807.

2007-2332. State v. Tabor.

Franklin App. No. 07AP-267, 2007-Ohio-5796.

Cupp, J., not participating.

2007-2333. State v. Smith.
Hamilton App. No. C-070728.

2007-2340. State v. Garner.
Franklin App. No. 07AP-429, 2007-Ohio-5865.

2007-2346. State v. Ervin.
Cuyahoga App. No. 88618, 2007-Ohio-5942.

2007-2360. State v. Kendrick.
Montgomery App. No. 21790, 2007-Ohio-6136.

2007-2362. Boila v. Nationwide Mut. Ins. Co.
Mahoning App. No. 06 MA 166, 2007-Ohio-6071.
Moyer, C.J., and Pfeifer, J., dissent.

2007-2364. Kemp v. Kemp.
Stark App. No. 2007-CA-0045, 2007-Ohio-6116.

2007-2367. State v. Conte.
Franklin App. No. 07AP-33, 2007-Ohio-5924.

2007-2370. Butler Cty. Joint Vocational School Dist. Bd. of Edn. v. Andrews.
Butler App. No. CA2006-10-245, 2007-Ohio-5896.

2007-2397. State v. Kemp.
Clark App. No. 2006 CA 116, 2007-Ohio-5985.

2007-2404. State v. D.H.
Franklin App. No. 07AP-73, 2007-Ohio-5970.

2007-2406. State v. Cummings.
Butler App. No. CA2007-03-055.

2007-2427. Grady v. Progressive Business Compliance.
Cuyahoga App. No. 89350, 2007-Ohio-6078.
Lundberg Stratton, J., dissents.

2007-2440. State v. Carson.

Franklin App. No. 07AP-492, 2007-Ohio-6382.

2008-0012. State v. King.

Franklin App. No. 07AP-230, 2007-Ohio-5406.

2008-0036. Reznickcheck v. N. Cent. Corr. Inst.

Marion App. No. 9-07-22, 2007-Ohio-6425.

2008-0143. State v. Hairston.

Scioto App. No. 06CA3087, 2007-Ohio-4159.

2008-0153. State v. Thornton.

Summit App. No. 23417, 2007-Ohio-3743.

2008-0243. State v. Liddle.

Summit App. No. 23287, 2007-Ohio-1820.

RECONSIDERATION OF PRIOR DECISIONS

2006-1889. State ex rel. Mosier Indus. Servs. Corp. v. Indus. Comm.

Franklin App. No. 05AP-1096, 2006-Ohio-4620. Reported at 117 Ohio St.3d 1201, 2008-Ohio-260, 881 N.E.2d 267. On motion for reconsideration. Motion denied.

2007-1688. Lee v. Margulies.

Hamilton App. No. C-070478. Reported at 116 Ohio St.3d 1475, 2008-Ohio-153, 879 N.E.2d 783. On motion for reconsideration. Motion denied.

2007-1750. Stuber v. Stuber.

Allen App. No. 1-06-101, 2007-Ohio-3981. Reported at 116 Ohio St.3d 1476, 2008-Ohio-153, 879 N.E.2d 784. On motion for reconsideration. Motion denied.
O'Donnell, J., dissents.

2007-1791. In re D.S.

Cuyahoga App. No. 88709, 2007-Ohio-3911. Reported at 116 Ohio St.3d 1476, 2008-Ohio-153, 879 N.E.2d 784. On motion for reconsideration. Motion denied.
Lundberg Stratton and O'Donnell, JJ., dissent.

2007-1817. Westgate Ford Truck Sales, Inc. v. Ford Motor Co.

Cuyahoga App. No. 86596, 2007-Ohio-4013. Reported at 116 Ohio St.3d 1477, 2008-Ohio-153, 879 N.E.2d 784. On motion for reconsideration and motion to strike motion for reconsideration. Motions denied.

Lundberg Stratton, J., dissents and would grant the motion for reconsideration.

2007-1832. Roe v. Planned Parenthood Southwest Ohio Region.

Hamilton App. No. C-060557, 2007-Ohio-4318. Reported at 116 Ohio St.3d 1477, 2008-Ohio-153, 879 N.E.2d 785. On motion for reconsideration. Motion granted. Discretionary appeal accepted on Proposition of Law Nos. II, IV, V, and VI.

Pfeifer, O'Connor, and Lanzinger, JJ., dissent.

2007-1916. Cuyahoga Metro. Hous. Auth. v. SEIU Local 47.

Cuyahoga App. No. 88893, 2007-Ohio-4292. Reported at 116 Ohio St.3d 1479, 2008-Ohio-153, 879 N.E.2d 786. On motion for reconsideration. Motion denied.

2007-2170. State ex rel. Hytower v. Beightler.

In Habeas Corpus. Reported at 116 Ohio St.3d 1470, 2008-Ohio-153, 879 N.E.2d 780. On motion for reconsideration. Motion denied.

2007-2207. DiStasio v. State.

In Habeas Corpus. Reported at 116 Ohio St.3d 1471, 2008-Ohio-153, 879 N.E.2d 780. On motion for reconsideration. Motion denied.

2007-2291. Gonzales v. Smith.

In Habeas Corpus. Reported at 116 Ohio St.3d 1471, 2008-Ohio-153, 879 N.E.2d 780. On motion for reconsideration. Motion denied.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JOHN AND JUNE ROE, Individually	:	APPEAL NO. C-060557
and as parents and next friends of	:	TRIAL NO. A-0502691
JANE ROE, a minor,	:	
Plaintiffs-Appellees,	:	<i>DECISION.</i>
vs.	:	
PLANNED PARENTHOOD	:	
SOUTHWEST OHIO REGION,	:	
ROSLYN KADE, M.D.,	:	
and	:	
JOHN DOES 1-6,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 24, 2007

Brian E. Hurley, Kathleen McGarvey Hidy, Robert J. Gehring, and Crabbe, Brown & James, LLP, for Plaintiffs-Appellees,

Daniel J. Buckley, Barbara Bison Jacobsen, and Vorys, Sater, Seymour & Pease, for Defendants-Appellants.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Presiding Judge.

{¶1} Are abuse reports and medical records of minors under the age of 13 receiving abortions discoverable, in an identity-cloaking format, by private civil plaintiffs when the records are not necessary to develop the plaintiffs' claims? We think not.

{¶2} Plaintiffs-appellees John and June Roe, individually and as parents of Jane Roe (collectively "the Roes"), sued defendants-appellants Planned Parenthood Southwest Ohio Region, Roselyn Kade, M.D., and John Does one through six (collectively "Planned Parenthood") for performing a wrongful abortion on Jane Roe. John Does one through six represent various Planned Parenthood employees. The complaint alleged that Planned Parenthood had performed an unlawful abortion on Jane Roe because it had neither notified the parents nor secured their consent before the abortion;¹ that it had not obtained Jane's informed consent;² and that it had breached its duty to report suspected child abuse.³ The Roes sought compensatory and punitive damages, as well as injunctive relief.

1. The Illicit Relationship and Jane's Fraudulently Procured Abortion

{¶3} In the fall of 2003, Jane engaged in a sexual relationship with her 21-year-old soccer coach, John Haller. At the time, Jane was 13 and in the eighth grade. The sexual relationship continued through 2004, and in March of that year, Jane discovered that she was pregnant.

¹ R.C. 2919.121 and 2919.12.

² See R.C. 2317.56.

³ See R.C. 2151.421.

{¶4} Jane told Haller. Haller convinced Jane to have an abortion. Later in March, Haller called Planned Parenthood and attempted to schedule an abortion for Jane. Planned Parenthood told Haller that he could not schedule the abortion and that Jane would have to call to make the appointment. After his conversation with Planned Parenthood, Haller called Jane and told her to schedule the abortion. And he also instructed her that if she was asked to provide a parental telephone number, she should give Planned Parenthood his cell-phone number in lieu of her father's phone number.

{¶5} Jane called Planned Parenthood, and during her conversation, she told a worker that she was 14 and that her parents could not accompany her to the abortion. She also asked whether her "step-brother" could come with her. The worker asked whether Jane's parents knew about her pregnancy. Jane lied and told the worker that one or both of her parents knew. They did not. The worker then told Jane that someone would have to stop at Planned Parenthood to pick up an information packet, but that Jane did not have to personally retrieve the packet. At some point during the conversation, Jane gave the worker her father's correct name and address, but she lied twice more, telling the worker that her father did not have a home phone number and then giving Haller's cell-phone number as her father's phone number. Planned Parenthood scheduled the abortion for March 30, 2004.

{¶6} Sometime before the abortion, Haller picked up the information packet for Jane. Several days after Jane's initial conversation with Planned Parenthood, she called again because she could not find her social-security card, but the worker told her that another form of identification could be used.

{¶7} The parties' assertions of fact diverge as to whether Planned Parenthood called the misleading phone number given by Jane. The Roes second amended complaint alleged that they were without knowledge whether "Planned Parenthood called or attempted to call the cell phone that belonged to Haller or, if it did, whether Planned Parenthood ever spoke to Haller." But at a hearing, Planned Parenthood read into evidence without objection the following transcript of the investigative officer's discussion with Jane Roe:

{¶8} "[JANE ROE]: I told [Planned Parenthood], to call [Haller's] cell phone number. I acted like it was my dad's cell phone. And when they called him, he was acting like my dad and told them that I was allowed to do it or whatever.

{¶9} "[THE DETECTIVE]: So they called. You gave your dad's cell phone number?

{¶10} "[JANE ROE]: No, I gave them [Haller's] cell phone number, but I told them it was my dad's."

{¶11} Planned Parenthood also produced the parental-notification form filled out by Dr. Kade. The form indicated that Kade had telephonically notified parent John Roe that Jane Roe was scheduled for an abortion at Planned Parenthood no sooner than 24 hours from the time the notice was given.

{¶12} On the day of the abortion, Haller drove Jane to the abortion clinic, and on arrival, a worker requested to see both Haller's and Jane's identification. Jane presented her school-identification card, and Haller provided his Ohio driver's license.

{¶13} Haller reviewed the forms Jane had filled out to be sure that they had been completed in a satisfactory manner. The forms were submitted to Planned

Parenthood, and one worker noted on a form that Jane Roe's "brother John * * * [was] here today." Haller used his credit card to pay for the abortion.

{¶14} Before the abortion, Jane signed a form setting forth the nature and purpose of, and the medical risks associated with, a dilation-and-sharp-curettage abortion. One form she signed also stated that Planned Parenthood had met its statutory obligation to obtain the patient's informed consent.⁴ The Roes alleged that even if Jane had been fully informed, her age and emotional state precluded her from comprehending and understanding the risks associated with the abortion. The Roes also alleged that Jane's consent was not given in a knowing, voluntary, or intelligent manner, and that it was procured under duress and coercion.

{¶15} After the abortion, a Depo-Provera shot was administered to Jane, and she was given condoms. Haller and Jane resumed their sexual relationship. But within three days of the abortion, Haller ended the relationship. After the breakup, Jane and Haller's sister, also a classmate of Jane's, had an argument about Haller and his relationship with Jane. A teacher overheard the argument, including the references to Jane's sexual relationship with Haller, and reported the suspected sexual abuse to the police.

{¶16} After a criminal investigation, Haller was convicted of seven counts of sexual battery. 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.

{¶17} The Roes sued and moved to compel discovery of ten years' worth of minors' abortion records. The abortion records contained information about

⁴ See R.C. 2317.56(B)(4).

patients' sexual and gynecological history, number of sexual partners, contraceptive methods, and general medical history. The trial court compelled discovery of the records in an identity-concealing format, concluding that the Roes' interest in the records was "tremendous," and that the civil rules, the statutes, and the case law weighed in favor of disclosure.

{¶18} The management of the discovery process is reviewed under an abuse-of-discretion standard, but questions of privilege, including the propriety of disclosure, are questions of law and are reviewed de novo.⁵

II. The Statutory Prohibitions and the Roes' Complaint

{¶19} The Roes' complaint alleged violations of former R.C. 2919.12 (parental notice), current R.C. 2919.121 (parental written consent), R.C. 2151.421 (failure to report suspected abuse of a minor), and R.C. 2317.56 (patient's informed consent). We discuss these sections of the Revised Code in turn, first noting that to determine the limitations on the scope of discovery, we must evaluate the Roes' allegations and claims, before analyzing the necessity and probative value of the information sought to be discovered.

III. The Former Notice Statute

{¶20} Former R.C. 2919.12 ("the notice statute") prohibited any person from knowingly performing an abortion on a pregnant minor unless the person had given at least 24 hours' actual notice, in person or by telephone, to one of the minor's parents of the intent to perform the abortion.⁶ Therefore, under the notice statute, at

⁵ See *Alcorn v. Franciscan Hospital*, 1st Dist. No. C-060061, 2006-Ohio-5896.

⁶ See former R.C. 2919.12.

a minimum, Planned Parenthood was required to give 24 hours' telephonic notice of the abortion to a parent before performing the abortion. Even though Jane had misinformed Planned Parenthood about her father's phone number, the Roes alleged that Planned Parenthood had failed to give them telephonic notice as required by the statute.

{¶21} The heart of the Roes' notice claim is that the statute required actual notice. The parties do not dispute that the Roes did not receive notice. Though the statute required actual notice to the parents, it enumerated several affirmative defenses when the pregnant minor had given false, misleading, or incorrect information. And Jane's testimony showed that she had lied to Planned Parenthood when she gave it Haller's, rather than her father's, phone number.

IV. The Consent Statute Was Enjoined

{¶22} The notice statute was amended in 1998 by H.B. No. 421, which enacted the notice statute's successor, R.C. 2919.121 ("the written-consent statute"). The written-consent statute requires that the attending physician secure the informed written consent of the minor and one parent before performing an abortion.⁷ In addition to requiring written consent of a parent, H.B. No. 421 also provided a statutory affirmative defense to any civil, criminal, or professional-disciplinary action under R.C. 2919.121 if enforcement of the written-consent statute has been enjoined: If a person complies with the [notice statute] in the good-faith belief that the application or enforcement of the written-consent statute is subject to a restraining order or injunction,

⁷ See R.C. 2919.121.

good-faith compliance is a complete defense to any civil, criminal, or professional disciplinary action brought under the written-consent statute.⁸

{¶23} The Roes assert that the same facts that supported their claim under the notice statute support their claim under the parental-written-consent statute. But the constitutionality of H.B. No. 421 was immediately contested, and enforcement of the statute was preemptively enjoined in federal district court before its effective date.⁹ In 2005, the district court upheld the constitutionality of H.B. No. 421 and ruled that it would go into effect in September 2005. To summarize, H.B. No. 421 was enjoined, and the act suspended, in 1998, Jane's abortion was performed on March 30, 2004, and H.B. 421 was ruled constitutional and became effective in September 2005.

{¶24} Because R.C. 2919.121 was enjoined from becoming Ohio law at the time the underlying action accrued, discovery under the Roes' R.C. 2919.121 claim was unwarranted. Notwithstanding this, if Planned Parenthood had complied with R.C. 2919.12 in the good-faith belief that R.C. 2919.121 had been enjoined, then civil, criminal, or professional disciplinary actions under R.C. 2919.121 were precluded. Even if we were to assume that the enforcement of the written-consent statute was not enjoined as to the Roes, the affirmative defense required only a good-faith belief that R.C. 2919.121 had been enjoined, and the record before us does not reflect a lack of good faith in Planned Parenthood's belief that enforcement of the statute had been enjoined. Because it had.

⁸ See R.C. 2919.122.

⁹ See *Cincinnati Women's Services Inc. v. Voinovich* (1998), S.D.Ohio No. C-1-98-289.

V. The Duty to Report Suspected or Known Abuse

{¶25} Under R.C. 2151.421 (“the duty-to-report-abuse statute”), certain officials and agencies have a duty to report suspected abusive or illegal relationships to a law-enforcement agency or a prosecuting attorney. The Roes alleged that Planned Parenthood had failed to report Jane’s relationship with Haller to a law-enforcement agency or a prosecuting attorney.

{¶26} The Roes’ memorandum supporting their motion to compel stated that their discovery requests sought “production of information that relates directly to the claims they have made, the punitive damages and injunctive relief they seek, and the defenses Planned Parenthood and Kade have raised in their answer and counterclaim.” But the closest the Roes came to explaining how the abortion records related to their claims was their allegation that “ ‘as a matter of policy and/or pattern and practice Planned Parenthood does not meet its reporting duties under R.C. 2151.421 with respect to minors to whom it provides abortion and other medical services, including the provision of birth control.’ (¶40 of the Second Amended Complaint) (This allegation is based on what occurred in this case, information [p]laintiffs have learned from the Hamilton County, Ohio Prosecutor’s Office, and the investigations of Planned Parenthood currently being conducted by the attorney generals of Nebraska and Indiana)[.] The failure to report suspected abuse by entities and persons covered by R.C. 2151.421 is a crime, and defendants may not hide behind the assertion of privilege to prevent [p]laintiffs from discovering the information they need to establish that their breach of this duty in this case was not an isolated incident.”

{¶27} The Roes alleged that Planned Parenthood had breached its duty to report suspected abuse, and claiming a systematic and intentional breach of that duty, the Roes attempted to justify their request for the abortion records.

{¶28} Planned Parenthood did not deny that it had not filed an abuse report. And we note that reports made under R.C. 2151.421, and the information contained therein, are confidential and inadmissible as evidence in any civil proceeding.

VI. The Duty to Secure the Patient's Informed Consent

{¶29} Under R.C. 2317.56 (“the patient’s-informed-consent statute”), absent a medical emergency, at least 24 hours before an abortion is performed, a physician must meet with the pregnant woman to (1) allow her an opportunity to ask questions; (2) inform her of the nature and purpose of, and the medical risks associated with, the abortion; (3) tell her the probable gestational age of the fetus; and (4) advise her of the medical risks associated with carrying the pregnancy to term.

{¶30} Under the patient’s-informed-consent statute, the meeting need not occur at the facility where the abortion is to be performed or induced, and the physician involved in the meeting need not be affiliated with that facility or with the physician who is scheduled to perform or induce the abortion.¹⁰ Moreover, the Ohio Attorney General has opined, “The provision of information at least twenty-four hours in advance must be made ‘verbally or by other nonwritten means of communication,’ but need not occur in a face-to-face meeting * * * . ‘[V]erbally or by

¹⁰ See R.C. 2317.56.

other nonwritten means of communication' refers to all types of nonwritten communication, including videotaped or audiotaped physician statements."¹¹ The statute also authorizes the court to order injunctive and equitable relief where appropriate. This was the only one of the Roes' statutory claims that specifically provided for injunctive relief.

{¶31} The Roes alleged that Planned Parenthood had failed to meet with Jane and convey the information required under R.C. 2317.56.

VII. The Scope of Discovery Under Civ.R. 26

{¶32} 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, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * * ." In determining the scope of discovery, we focus not on whether the information requested is admissible, but on whether the information sought is reasonably calculated to lead to admissible evidence.¹² In sum, the scope of discovery is limited to relevant nonprivileged matters that are reasonably calculated to lead to admissible evidence. But even privileged matters are subject to discovery where it is necessary to protect or further a countervailing interest that outweighs the privilege.¹³

{¶33} For this discussion, we assume without so holding that the discovery sought by the Roes was relevant and reasonably calculated to lead to admissible evidence. The abuse reports and abortion records were unquestionably confidential

¹¹ 1994 Ohio Atty.Gen.Ops. No. 94-094.

¹² See *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, 835 N.E.2d 768, ¶7; Civ.R. 26(B)(1).

¹³ See *id.*, citing *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518, paragraph two of the syllabus.

and privileged under the physician-patient privilege.¹⁴ But whether the information sought was relevant or reasonably calculated to lead to admissible evidence is not clear, and because our discussion of the parties' interests is dispositive of the issue, we limit our analysis to whether the discovery sought was necessary to protect or further a countervailing interest that outweighed the minors' privilege.

VIII. Necessity

{¶34} Disclosure of privileged information is only appropriate when necessary. The Ohio Supreme Court held in *Biddle v. Warren General Hospital*,¹⁵ and we later held in *Richards v. Kerlakian*,¹⁶ that only where the privileged information is necessary to further or protect a countervailing interest is disclosure proper.

{¶35} In *Richards*, the plaintiff sued her deceased son's physician and the employer hospital under a negligent-credentialing theory. The plaintiff sought discovery of redacted copies of operative reports of nonparty patients. The medical records belonged to the defendant physician's former patients who had undergone the same gastric-bypass surgery. The issue was whether the hospital knew or should have known that the physician was incompetent to perform the surgery. We upheld the trial court's order compelling discovery, noting that though the records were privileged under R.C. 2317.02, they were nonetheless necessary to develop a primary claim against the hospital on the issue of negligent credentialing and to impeach the deposition testimony of the defendant physician. And in that instance, the plaintiff's interests outweighed the patients' interest in confidentiality.

¹⁴ See R.C. 2151.421(H)(1) and 2317.02; *Richards v. Kerlakian*, supra.

¹⁵ 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518.

¹⁶ 162 Ohio App.3d 823, 2005-Ohio-4414, 835 N.E.2d 768.

{¶36} In this case, the Roes alleged that the abortion records were necessary to further their core claims. Not so.

{¶37} The Roes first argue that the records were necessary to establish punitive damages. But the duty-to-report-abuse statute does not provide for punitive damages.¹⁷ Because R.C. 2151.421 does not provide for punitive damages, the Roes' punitive-damages justification under R.C. 2151.421 is without merit.

{¶38} On the other hand, the parental-notice statute¹⁸ and the patient's-informed-consent statute¹⁹ provide that punitive damages are available for a single violation;²⁰ and the Roes admit as much. Because punitive damages are available for one violation, the medical records (used to show intentional and systematic violations in the past) were unnecessary to the Roes' claim for punitive damages. The Roes must only show that Planned Parenthood violated its statutory duties to them one time for punitive damages to be calculable. And even if it is assumed that the medical records were necessary for the computation of punitive damages (which in itself is speculative at this stage of the proceedings), we hold that a private plaintiff's interest in attempting to bolster a speculative punitive-damages award alone does not outweigh the patients' interest in maintaining confidentiality.²¹

{¶39} The key in any analysis of a discovery dispute is to first determine what truly is at issue. Once that is done, we can determine what is discoverable.

{¶40} This is not a class action. This is not a criminal case. It is *Roe v. Planned Parenthood*—not *State v. Planned Parenthood*. The issue is not whether

¹⁷ See R.C. 2151.421.

¹⁸ See R.C. 2919.12.

¹⁹ See R.C. 2317.56.

²⁰ See R.C. 2919.12(E) and 2317.56(H)(1).

²¹ See, e.g., *Sirca v. Medina Cty. Dept. of Human Services* (2001), 145 Ohio App.3d 182, 1867-187, 762 N.E.2d 407.

Planned Parenthood violated its duties to other patients—it is whether Planned Parenthood violated its duties to the Roes. No amount of “issue framing” to the contrary can change that fact. The redacted medical records were not necessary for the Roes to establish whether Planned Parenthood had violated Ohio statutes in its treatment of Jane. 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. 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. The attempt to interject nonparty medical abortion records into a private civil suit by claiming systematic and intentional violation of Planned Parenthood’s statutory duties is clearly at odds with the nature of this case.

{¶41} Further, this case provides no persuasive reason for a judicial endorsement of the Roes acting as private attorneys general. If the state reasonably believed that Planned Parenthood had systematically and intentionally violated its duties under Ohio law, it could have sued or prosecuted. And even then it is not certain that Planned Parenthood would have been required to disclose the confidential information sought here.²² The facts and evidence nowhere indicate that Planned Parenthood systematically and intentionally evaded its statutory duties. And if Planned Parenthood was violating Ohio law, then those same statutes provided a private cause of action for each aggrieved party.

²² See, e.g., *Planned Parenthood of Indiana v. Carter* (Ind.App.2006), 854 N.E.2d 853.

{¶42} A separation of the wheat from the chaff reveals that this case is about whether Planned Parenthood performed an unlawful abortion on Jane; about whether Planned Parenthood met its duty to report suspected abuse of Jane; and about whether Jane's consent was proper. The Roes' interests are important. And the minor patients' privilege is undeniable. But the information sought was not necessary to this case.

{¶43} Even if the records were even tenuously necessary, the burden of disclosure on Planned Parenthood and its patients would exceed the value of the records to this litigation.

{¶44} The potential invasion of privacy rights trumps the probative value of the records to this case. Even with the records redacted, it is arguable that disclosure would result in a privacy invasion. For instance, in the same vein that a voyeur observing in secret invades the subject's privacy—even if the subject's identity is not known—an abortion patient's privacy rights can be encroached by the nonconsensual review of redacted abortion records. In this case, nondisclosure was compulsory notwithstanding that the patients' identities would have been concealed by redaction, or that it would have been impossible to extrapolate a patient's identity from the redacted records—otherwise a privacy invasion would arguably be visited on the unconsenting, unrepresented, nonparty patients; and under such a meager showing of necessity, we refuse to order disclosure. And we are unsure that a sufficient redaction is even possible—identities might be compromised.

{¶45} Because of the lack of necessity, we need not further address or weigh the parties' interests, except that we acknowledge and recognize that, under the

proper circumstances, the physician-patient privilege²³ between an abortion patient and her physician may be afforded constitutional protection under the penumbra of privacy rights.²⁴

{¶46} The Roes need only prove that Planned Parenthood violated its duty to the Roes in this case—no more, no less. 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. Likewise, the records are not necessary for either punitive damages or injunctive relief.

{¶47} The order of the trial court compelling discovery is reversed, and the cause is remanded for further proceedings.

Judgment reversed and cause remanded.

HENDON, J. and CUNNINGHAM, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²³ R.C. 2317.02(B).

²⁴ See *State v. Desper*, 151 Ohio App.3d 208, 2002-Ohio-7176, 783 N.E.2d 939, ¶32; *Roe v. Wade* (1973), 410 U.S. 113, 151-157, 93 S.Ct. 705; *Whalen v. Roe* (1977), 429 U.S. 589, 598-601, 97 S.Ct. 869.

CO OF ENTRY FILED
JUN 21 2006

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JOHN AND JUNE ROE, : Case No. A0502691
Individually and as parents and next :
friends of Jane Roe, a minor : (Judge Dinkelacker)

Plaintiffs :

vs. :

PLANNED PARENTHOOD : ENTRY OVERRULING
SOUTHWEST OHIO REGION, et al. : DEFENDANT'S MOTION
: FOR PROTECTIVE ORDER

Defendants :

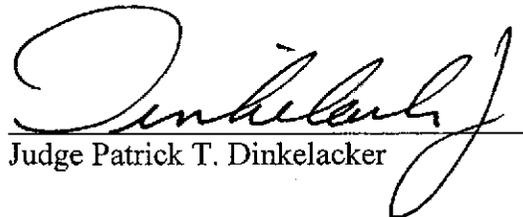
This matter came before the Court pursuant to Defendants' Motion for Protective Order.

The Court has reviewed the Motion and all the pertinent material regarding the Motion.

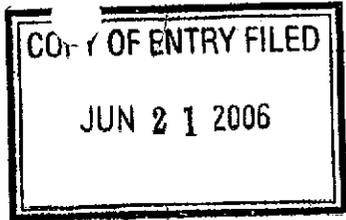
I. CONCLUSION

Upon review, study and in light of the Court's ruling on Plaintiff's October 7, 2005 Motion to Compel, the Court finds the Motion to be not well-taken and is hereby overruled.

IT IS SO ORDERED.


Judge Patrick T. Dinkelacker

6-22-06
Date



COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JOHN AND JUNE ROE, : Case No. A0502691
Individually and as parents and next :
friends of Jane Roe, a minor : (Judge Dinkelacker)

Plaintiffs :

vs. :

PLANNED PARENTHOOD : DECISION/ENTRY
SOUTHWEST OHIO REGION, et al. : GRANTING PLAINTIFF'S
 : OCTOBER 7, 2005
Defendants : MOTION TO COMPEL

This matter came before the Court pursuant to Plaintiff's Motion to Compel.

The Court has reviewed the myriad of documents regarding the Motion and conducted a hearing on the Motion in open Court.

Further, the Court has reviewed and studied the pertinent statutes and case law.

I. LAW Motion to Compel

Ohio Rule of Civil Procedure 37(A)

(A) Motion for order compelling discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery....

Ohio Rule of Civil Procedure 26

General provisions governing discovery

(A) Policy; discovery methods. It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable

aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

II. DISCUSSION

Plaintiffs, John and June Roe, individually and as parents and next friends of Jane Roe, a minor, ("Roe") are requesting the Court pursuant to a motion to compel Defendants Planned Parenthood Southwest Ohio Region ("Planned Parenthood") and Dr. Roslyn Kade ("Dr. Kade") to make full, fair and legal compliance with interrogatories, document requests and requests for admissions.

In any litigation both parties are entitled to appropriate discovery.

Roe argues such presented discovery requests are legal and are not subject to privilege protection. In other words, the documentation requested is in line with the law and in compliance with the dictates, statutorily and in case law, with the well-recognized physician-patient privilege.

Planned Parenthood and Dr. Kade assert they have fully complied with the law regarding Roe's demand for discoverable material and are not required to provide the special discovery further requested by Roe. Planned Parenthood cites objections based on case law and statutory authority.

The issue before the Court is quite plain and unambiguous.

Under the rules and the law, is Roe entitled to the discovery requested?

This Court must answer unequivocally: Yes.

First of all, every party to a lawsuit is entitled to the full benefit of the Ohio Rules of Civil Procedure. In this instance, Roe is entitled to the full benefit of the rules regarding discovery. Planned Parenthood is entitled to all the protection against improper discovery requests as provided by the rules. The Court is obviously cognizant of the scope of discovery as provided in the Ohio Rules of Civil Procedure.¹ Further, the Court must consider the totality of the claims and allegations of a party not limiting discovery to what the opposing party may deem as discoverable material. "...any matter, not privileged, which is relevant..." provides an extremely broad range to be considered regarding discovery.

¹ Ohio R. Civ. P. 26(B)(1).

Allegations and claims proffered by Roe cannot be dismissed as without basis for discovery because Planned Parenthood disputes the validity of the allegations or claims. Roe has alleged several claims in its amended complaint. The claims assert violations of O.R.C. 2919.211 (written consent of parents), O.R.C. 2919.12 (parental notice), O.R.C. 2317.56 (informed consent by parent) and O.R.C. 2151.421 (child abuse reporting) as well as specific statutory reliefs and punitive damages. Absent law denying Roe entitlement to discovery on those claims, this Court must allow Roe to have access to their requested discovery. The rules of discovery in this case are the same and are to be administered the same as any other lawsuit. The parties have asserted many arguments to bolster their respective position. The Court will address the most pertinent arguments in detail and encompass all other arguments and positions in the general entry.

A. Minor Patient Records Protected By Physician-Patient Privilege

It appears to this court that many of the documents requested by Roe are not subject to protection under the physician-patient privilege. Any document, therefore, that is relevant and not afforded the privilege protection is appropriate for discovery.

The Court as mandated by the law must also order the discovery of material which may meet the criteria of being protected by the physician-patient privilege if the discovery is appropriate.

The assertion of a privilege does not mandate automatic compliance with the asserted privilege. The Court will order compliance only if the law so mandates.

The Court is bound to follow the dictates of Richards v. Kerlakian.²

² Richards v. Kerlakian, 162 Ohio App.3d 823 (2005).

Richards requires the Court to conduct a balancing test and to allow a waiver of the physician-patient privilege if there exists “a countervailing interest that outweighs the patient’s confidentiality” and the non-party patient’s identity is appropriately and adequately protected. Finally, the Court must decide if the requested discovery material is necessary for a party to proceed on its claims or to impeach credibility. Richards is the prevailing law and binding on this Court. Richards in the opinion of this Court distinguishes Wozniak v. Kombrink.³ Wozniak is specifically cited in Richards and distinguished by the Court of Appeals.

Is there a countervailing interest that outweighs the patient’s confidentiality?

Roe has asserted very serious claims against Planned Parenthood. If any or all of the assertions are ultimately found to be with sufficient factual and legal basis, the law provides serious consequences for Planned Parenthood.

It is also quite apparent Roe’s allegations could be shown to be without basis by the documents Roe is requesting per the rules of discovery. The Court obviously does not know what evidentiary treasure or lack of treasure lies within the documents requested. It is not within the realm of the Court to know the answer to what may be revealed by an inspection of the document at issue.

The First District Court of Appeals, the appellant court this Court is bound by law to follow, made the following comment in Richards regarding a discovery issue. Though Richards involved a negligent credentialing claim, the Court’s comment is most telling regarding the claims of this case.

³ Wozniak v. Kombrink, No. C-89053, 1991 WL 17213, at *5 (Ohio App. 1 Dist.)

“... it is difficult to imagine how else [these] claims could be investigated without the disputed documents.”

Roe has a tremendous interest in what the documents requested state. Richards provides the legal parameters for allowing an investigation into disputed documents. This Court would have to commit an act of fundamental unfairness and substitute its judgment over the pronounced law by the First Appellate District in order to find the documents are not vital to Roe's claims.

This Court will not act in such a manner.

The Court, then, must go further in its analysis.

Having indicated Roe has a “countervailing interest in the documents, the Court still must find such interest” outweighs the patient's confidentiality. The patient's confidentiality is very important. The patient's right to privacy regarding their medical records is of tremendous importance. Even though the patients at issue chose to conduct medical business with party defendant Planned Parenthood, they are entitled to protection of their medical records to a certain degree. This Court will honor the legal allowable degree of confidentiality. The patients whose records have been requested are entitled to confidentiality as to specific persons and correlated specific medical information. No law allows Roe to have access to specific personal information of a specific person.

Fortunately, the attorneys for Roe have on several occasions in open court and in various filings indicated Roe is not requesting specific personal information and Roe will not be attempting to contact any specific patient as a result of discovery obtained. This Court will also indicate its intention to protect the privacy of all patients who are or may be subject to appropriate discovery measures. In compliance with Richards, the Court will enforce a

complete protection of any and all patient's identity regarding discovery. Any and all personal patient information must be completely redacted.

Resultantly, the Court has protected the confidentiality of the patient(s). The Court will also sign off on any appropriate protective order. The balancing test required by law weighs heavily in favor of Roe. Roe has shown a legitimate, countervailing interest in the requested discovery and the Court has found and will order an appropriate protection for the confidentiality of the patients.

B. Smitherman

Planned Parenthood's attorneys as part of a very extensive and well-thought out opposition to Roe's request for discovery have cited the case of Smitherman v. Buffington.⁴ Smitherman was assigned to and resolved by this Court.

In Smitherman, plaintiff Smitherman requested discovery in the form of patients' records (all non-party patients) who had undergone the same type of medical procedure as did plaintiff Smitherman. The procedure was performed by defendant, Doctor Buffington. The discovery material demanded by plaintiff Smitherman had nothing whatsoever to do with the claim or assertions of the pending lawsuit. Unlike the case sub judice, where the actions or non-actions of a party defendant, to wit, Planned Parenthood, are at issue, plaintiff Smitherman's requests pertained to non-party patients and non-pending lawsuit allegations. Smitherman is of a completely different nature than the lawsuit at issue. Accordingly, so is the nature and status of the discovery documents in dispute. The claims of Roe and the discovery requests related to Planned Parenthood's patients are part of an appropriate nexus to the possible outcome of this litigation. No such nexus existed in Smitherman.

⁴ Hamilton County Court of Common Pleas Case No. A0408965.

Roe's requests are to determine if the sum and substance of their claims are valid via inspection of documentation held by the party defendants. There is a legal nexus between the patient records of party defendant Planned Parenthood and the viability of Roe's claims. Such was not the case in Smitherman. Smitherman does not provide an appropriate basis to render a decision on the pending motion for Planned Parenthood.

C. Alpha Medical Clinic v. Anderson (Kansas 2006)

Planned Parenthood further cites the recent State of Kansas Supreme Court ruling in Alpha Medical Clinic v. Anderson⁵ as persuasive authority to overrule Roe's motion to compel. First and foremost, the decision by the Supreme Court of Kansas is not binding on this Court. Further, the nature of the Anderson proceeding is much different than the case and motion before this Court.

Anderson involves a mandamus action regarding the trial judge's ruling on a motion to quash subpoenas. Anderson is set in what Kansas law refers to as an inquisition proceeding, which is some type of criminal proceeding requiring a showing of reasonable suspicion by the governmental interests. Anderson involves a question of "nonredacted" patient files.

Certainly there are similarities.

The Court notes that the Kansas Supreme Court used a "balancing test" which contains basically the same criteria upon which Ohio law requires this Court to make its decision. This Court's interpretation of the Anderson decision does not indicate a finding by the Kansas Supreme Court that the state cannot obtain at some point the patient files at issue.

⁵ Alpha Medical Clinic v. Anderson, 128 P.3d 364 (Kan. 2006).

Rather, the gist of the Anderson ruling appears to rebut Planned Parenthood's physician-patient privilege argument and the right to absolve patient privacy arguments. Like Richards and other pertinent law binding on this Court, Anderson states discovery in the nature of patient files is appropriate if the criteria of a proper, legal balancing test is met.

The Anderson court specifically addressed the constitutional privacy interests of the patients. Upon discussion, the Anderson Court stated the following:

And an individual's right to informational privacy is not necessarily "absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest."⁶

Anderson is not persuasive.

D. Other Submitted Case Law

Finally, regarding specific cases cited by Planned Parenthood in "Bench Memorandum of Defendants", the Court respectfully finds the cases to be without persuasive authority.

The Courts in Planned Parenthood Federation of America, Inc. v. Ashcroft⁷ and Northwestern Memorial Hospital v. Ashcroft⁸ both appear to have used a balancing test similar to the test this Court must follow and arrived at the conclusion the patients' rights outweighed the United States Government interest in the patient records.

⁶ Planned Parenthood of Southern Arizona v. Lawall, 307 F.3d 783, 790 (9th Cir. 2002) (citing In Re Crawford, 194 F.3d 954, 959 [9th Cir. 1999]).

⁷ Planned Parenthood Federation of America, Inc. v. Ashcroft, 320 F. Supp.2d 920 (N.D. Cal. 2004), aff'd 453 F.3d 1163 (9th Cir. 2006).

⁸ Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923 (7th Cir. 2004).

The gist of the decisions rendered by the courts is related to the confidentiality aspect.

This Court has been assured and this Court reiterates, the confidentiality of the patients will not be compromised. The aforementioned cases appear to give no credence to any means or manner of confidentiality. This Court does not agree with those Courts' stance.

The record before this Court does show the relevance of the patients' records in the lawsuit pending before the Court. The record shows the providing of the requested discovery documentation is not unduly burdensome and the record shows that Planned Parenthood patients' right to privacy does not outweigh Roe's legitimate interests in the requested discovery.

As an aside, Northwestern Memorial Hospital's reasoning appears to this Court to be end-oriented and bypasses any logical, legal assessment. "Skillful googlers" and "nude pictures of women" takes the Court's decision outside the norm.

The Court finds the above mentioned cases to be non-instructive and certainly non-persuasive.

E. Summation

The Court in the final analysis resorts back to the law it is bound to follow: Richards v. Kerlakian,⁹ as well as the appropriate statutory authority. Richards specifically addresses the privilege issue which is very similar to the privilege issue before this Court. According to O.R.C. 2317.02, the physician-patient communication privilege is not absolute. The aforementioned balancing test comes into play. This Court's decision on that issue is well-within the statutory parameters. Richards clearly states "discovery of a confidential information" is allowable if the "patient's identity is sufficiently protected."

⁹ Richards, 162 Ohio App.3d 823.

In summation, Richards states the following:

Here, the plaintiffs sought the records to impeach a party defendant and to develop a primary claim. The trial court crafted adequate protection for the identity of the non-party patients and included language to protect against indiscriminate dissemination of the information sought to be discovered. The Court specifically weighed the risk of disclosure of this information otherwise protected by R.C. 2317.02 against the plaintiffs' compelling need for the information.

This Court has as it is obligated followed the precise language of Richards.

Per Richards, Roe is entitled to all the requested discovery.

III. CONCLUSION

This Court has reviewed and studied to the best of its ability the myriad of arguments, assertions, case law, etc. regarding this Motion to Compel.

This decision/entry is in no way an attempt to specifically address each and every assertion, argument or claim. This decision/entry addresses the generalities of the Motion to Compel and certain specifics necessary to provide the Court's reasoning process. All arguments are encompassed and ruled upon as part of the general entry.

The Motion to Compel merits a clear and unambiguous response. This is a discovery issue and the Court has concerned itself only with the pending discovery issue. Ohio Rules of Civil Procedure 26(A)(1) clearly delineates the scope and parameter of discovery. The statutes of Ohio and pertinent case law enunciate the boundaries of the physician-patient privilege. Richards provides binding law regarding a party's interests in gaining discovery versus a patient's right to privacy and confidentiality.

The rules, the statutes and the majority of case law including the binding case law weigh in favor of Roe. Planned Parenthood's arguments are interesting and thought-provoking but are not persuasive and not grounded in the law. This Court is firmly

convinced plaintiff is legally entitled to the discovery requested. The law and justice demand Planned Parenthood provide the requested discovery.

Therefore, this Court must and will find plaintiffs, John and June Roe's Motion to Compel to be well-taken and is hereby granted.

Defendants Planned Parenthood Southwest Ohio Region and Dr. Roslyn Kade are ordered "... to respond in full to certain interrogatories, document requests and requests for admissions." In other words, all discovery requested as part of the October 7, 2005 Motion to Compel must be provided to Roe.

The Court further orders the patient records to be provided to plaintiffs must be sufficiently and fully redacted so no patient-identifying information is made available.

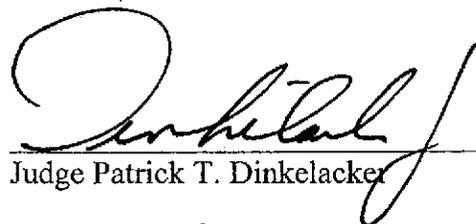
If a protective order is necessary or agreed to by the parties, the Court will certainly effectuate such an order. Such protective order would relate to patient confidentiality and not meant to be a granting of Planned Parenthood's pending Motion for Protective Order.

As soon as practicable the ordered discovery is to be returned to the custody of the defendants and the ordered discovery is not to be shared with anyone other than the parties and their respective attorneys without further order of the Court.

The ordered discovery is to be provided as soon as practicable by the Defendant.

Though the Motion to Compel has been granted against the defendants, the Court will honor plaintiffs' request for no sanctions.

IT IS SO ORDERED.



Judge Patrick T. Dinkelacker

6-20-06

Date

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*** ARCHIVE MATERIAL ***

*** CURRENT THROUGH LEGISLATION APPROVED THROUGH DECEMBER 15, 2004 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2004 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT
DESERTION OF CHILD UNDER 72 HOURS OLD

ORC Ann. **2151.421** (2004)

§ **2151.421**. Duty to report child abuse or neglect; investigation and followup procedures

(A) (1) (a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 [5120.17.3] of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 [5120.17.3] of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; superintendent, board member, or employee of a county board of mental retardation; investigative agent contracted with by a county board of mental retardation; or employee of the department of mental retardation and developmental disabilities.

(2) An attorney or a physician is not required to make a report pursuant to division (A)(1) of this section concerning any communication the attorney or physician receives from a client

or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding, except that the client or patient is deemed to have waived any testimonial privilege under division (A) or (B) of section 2317.02 of the Revised Code with respect to that communication and the attorney or physician shall make a report pursuant to division (A)(1) of this section with respect to that communication, if all of the following apply:

(a) The client or patient, at the time of the communication, is either a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age.

(b) The attorney or physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(c) The attorney-client or physician-patient relationship does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(B) Anyone, who knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child may report or cause reports to be made of that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 [5120.17.3] of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the public children services agency or to a municipal or county peace officer. In the circumstances described in section 5120.173 [5120.17.3] of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the entity specified in that section.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;

(2) The child's age and the nature and extent of the child's known or suspected injuries, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information that might be helpful in establishing the cause of the known or suspected injury, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect.

Any person, who is required by division (A) of this section to report known or suspected child abuse or child neglect, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D) (1) When a municipal or county peace officer receives a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, upon receipt of the report, the municipal or county peace officer who receives the report shall refer the

report to the appropriate public children services agency.

(2) When a public children services agency receives a report pursuant to this division or division (A) or (B) of this section, upon receipt of the report, the public children services agency shall comply with section 2151.422 [2151.42.2] of the Revised Code.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 [2151.42.2] of the Revised Code.

(F) (1) Except as provided in section 2151.422 [2151.42.2] of the Revised Code, the public children services agency shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect and of a known or suspected threat of child abuse or child neglect that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to a central registry which the department of job and family services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G) (1) (a) Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division (B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding.

(b) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's

fees and costs to the party against whom the civil action or proceeding is brought.

(H) (1) Except as provided in divisions (H)(4) and (M) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the report is made, but before the child attains eighteen years of age, the public children services agency or municipal or county peace officer to which the report was made or referred, on the request of the child fatality review board, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the deceased child resided at the time of death. On the request of the review board, the agency or peace officer may, at its discretion, make the report available to the review board.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

(I) Any report that is required by this section, other than a report that is made to the state highway patrol as described in section 5120.173 [5120.17.3] of the Revised Code, shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 [2151.42.2] of the Revised Code.

(J) (1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

(a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;

(b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;

(c) The county peace officer;

(d) All chief municipal peace officers within the county;

(e) Other law enforcement officers handling child abuse and neglect cases in the county;

(f) The prosecuting attorney of the county;

(g) If the public children services agency is not the county department of job and family services, the county department of job and family services;

(h) The county humane society.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(K) (1) Except as provided in division (K)(4) of this section, a person who is required to make a report pursuant to division (A) of this section may make a reasonable number of requests of the public children services agency that receives or is referred the report to be provided with the following information:

(a) Whether the agency has initiated an investigation of the report;

(b) Whether the agency is continuing to investigate the report;

(c) Whether the agency is otherwise involved with the child who is the subject of the report;

(d) The general status of the health and safety of the child who is the subject of the report;

(e) Whether the report has resulted in the filing of a complaint in juvenile court or of criminal charges in another court.

(2) A person may request the information specified in division (K)(1) of this section only if, at the time the report is made, the person's name, address, and telephone number are

provided to the person who receives the report.

When a municipal or county peace officer or employee of a public children services agency receives a report pursuant to division (A) or (B) of this section the recipient of the report shall inform the person of the right to request the information described in division (K)(1) of this section. The recipient of the report shall include in the initial child abuse or child neglect report that the person making the report was so informed and, if provided at the time of the making of the report, shall include the person's name, address, and telephone number in the report.

Each request is subject to verification of the identity of the person making the report. If that person's identity is verified, the agency shall provide the person with the information described in division (K)(1) of this section a reasonable number of times, except that the agency shall not disclose any confidential information regarding the child who is the subject of the report other than the information described in those divisions.

(3) A request made pursuant to division (K)(1) of this section is not a substitute for any report required to be made pursuant to division (A) of this section.

(4) If an agency other than the agency that received or was referred the report is conducting the investigation of the report pursuant to section 2151.422 [2151.42.2] of the Revised Code, the agency conducting the investigation shall comply with the requirements of division (K) of this section.

(L) The director of job and family services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department of job and family services may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(M) (1) As used in this division:

(a) "Out-of-home care" includes a nonchartered nonpublic school if the alleged child abuse or child neglect, or alleged threat of child abuse or child neglect, described in a report received by a public children services agency allegedly occurred in or involved the nonchartered nonpublic school and the alleged perpetrator named in the report holds a certificate, permit, or license issued by the state board of education under section 3301.071 [3301.07.1] or Chapter 3319. of the Revised Code.

(b) "Administrator, director, or other chief administrative officer" means the superintendent of the school district if the out-of-home care entity subject to a report made pursuant to this section is a school operated by the district.

(2) No later than the end of the day following the day on which a public children services agency receives a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall provide written notice of the allegations contained in and the person named as the alleged perpetrator in the report to the administrator, director, or other chief administrative officer of the out-of-home care entity that is the subject of the report unless the administrator, director, or other chief administrative officer is named as an alleged perpetrator in the report. If the administrator, director, or other chief administrative officer of an out-of-home care entity is named as an alleged perpetrator in a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved the out-of-home care entity, the agency shall provide the written notice to the owner or governing board of the out-of-home care entity that is the

subject of the report. The agency shall not provide witness statements or police or other investigative reports.

(3) No later than three days after the day on which a public children services agency that conducted the investigation as determined pursuant to section 2151.422 [2151.42.2] of the Revised Code makes a disposition of an investigation involving a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall send written notice of the disposition of the investigation to the administrator, director, or other chief administrative officer and the owner or governing board of the out-of-home care entity. The agency shall not provide witness statements or police or other investigative reports.

HISTORY: 130 v 625 (Eff 10-10-63); 131 v 632 (Eff 11-11-65); 133 v S 49 (Eff 8-13-69); 133 v H 338 (Eff 11-25-69); 136 v H 85 (Eff 11-28-75); 137 v H 219 (Eff 11-1-77); 140 v S 321 (Eff 4-9-85); 141 v H 349 (Eff 3-6-86); 141 v H 528 (Eff 7-9-86); 141 v H 529 (Eff 3-11-87); 143 v H 257 (Eff 8-3-89); 143 v H 44 (Eff 7-24-90); 143 v S 3 (Eff 4-11-91); 144 v H 154 (Eff 7-31-92); 146 v S 269 (Eff 7-1-96); 146 v H 274 (Eff 8-8-96); 146 v S 223 (Eff 3-18-97); 147 v H 215 (6-30-97); 147 v H 408 (Eff 10-1-97); 147 v S 212 (Eff 9-30-98); 147 v H 606 (Eff 3-9-99); 148 v H 471 (Eff 7-1-2000); 148 v H 448 (Eff 10-5-2000); 149 v H 510 (Eff 3-31-2003); 149 v H 374 (Eff 4-7-2003); 149 v S 221. Eff 4-9-2003; 150 v S 178, § 1, eff. 1-30-04; 150 v H 106, § 1, eff. 9-16-04.

NOTES:

The provisions of § 4 of S.B. 178 (150 v --) read as follows:

Section 4. Section 2151.421 of the Revised Code is presented in this act as a composite of the section as amended by Am. Sub. H.B. 374, Sub. H.B. 510, and Am. Sub. S.B. 221 all of the 124th General Assembly. Section 5126.28 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 538 and Sub. S.B. 171 of the 123rd General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act.

EFFECT OF AMENDMENTS

150 v H 106, effective September 16, 2004, added (M)(1) and redesignated former (M) and (N) as (M)(2) and (3), and corrected internal references.

S.B. 178, Acts 2004, effective January 30, 2004, added "superintendent, board member ... developmental disabilities" to the end of (A)(1)(b), and made related changes.

CROSS-REFERENCES TO RELATED STATUTES

Penalties, RC § 2151.99.

Child abuse and child neglect prevention programs, RC § 3109.13 et seq.

Child fatality review board access to confidential information, RC § 307.62.7.

Community schools, terms of contract between sponsor and governing authority of school, RC § 3314.03.

Confidentiality of residential addresses of public children services agency or private child placing agency personnel, RC § 2151.14.2.

Confidential mental health outpatient services for minors; duty to report, RC § 5122.04.

Court control of child following commitment to department, RC § 2152.22.

Definitions, RC § 2151.01.1.

Abused child, RC § 2151.03.1.

Child without proper parental care, RC § 2151.05.

Dependent child, RC § 2151.04.

Neglected child, RC § 2151.03.

Domestic violence, filing of proceedings report, RC § 3113.31

Duration of dispositional order, RC § 2151.38.

Duties to children in need of public care or protective services, RC § 5153.16.

Guardian ad litem for abused child; civil action against person required to file report of known abuse, RC § 2151.28.1.

Information to be disclosed concerning deceased child, RC § 5153.17.2.

Making or causing false report of child abuse or neglect, RC § 2921.14.

Petition for protection order to protect victim of menacing by stalking, RC § 2903.21.4.

Privileged communications, RC § 2317.02.

Procedure where child is living in domestic violence or homeless shelter, RC § 2151.42.2.

Review of report of abuse, neglect or misappropriation by employee, RC § 5123.51.

Summary removal of abused child by humane society agent, RC § 1717.14.

OHIO RULES

Immediate temporary care and medical treatment, JuvR 13(A)-(D).

Notifying physicians of affidavits alleging abuse under RC § 2919.12, SupR 24.

OHIO ADMINISTRATIVE CODE

Department of job and family services, division of social services--

Alleged child abuse and neglect; those mandated to report. OAC ch. 5101:2-34.

Central registry reports on child abuse and neglect; referral procedures for children's protective services. OAC ch. 5101:2-35.

Children services definition of terms: mandated reporter. OAC 5101:2-1-01.

Documentation of comprehensive health care for children in custody. OAC 5101:2-42-662.

Family and children services information system (FACIS) reporting requirements. OAC 5101:2-33-05.

Supportive services. OAC ch. 5101:2-39.

Incident reporting, complaint resolution, and documentation procedures--

Alcohol and drug addiction programs. OAC 3793:2-1-05.

Child day camps. OAC 5101:2-18-07.

Child day-care centers. OAC 5101:2-12-45.

Childrens residential centers, group homes, etc. OAC 5101:2-9-23.

Community residential centers of department of youth services. OAC 5139-35-11.

Programs and services of department of MR/DD. OAC 5123:2-17-01 et seq.

Residential facilities of department of mental health. OAC 5122-30-16.

Type A family day-care homes. OAC 5101:2-13-43.

Type B family day-care homes. OAC 5101:2-14-62.

Training in child abuse recognition for personnel--

Child day camps. OAC 5101:2-18-11.

Child day-care centers. OAC 5101:2-12-30, 5101:2-12-32.

School child day-care centers. OAC 5101:2-17-262.

Type A family day-care homes. OAC 5101:2-13-29, 5101:2-13-31.

Type B family day-care homes. OAC 5101:2-14-13.

COMPARATIVE LEGISLATION

Child abuse statutes:

CHILD ABUSE STATUTES:

42 USC § 5101 ET SEQ CA--Penal Code §§ 270 et seq, 11164 et seq

FL--Stat Ann §§ 39.001 et seq, 827.01 et seq

IL--Comp Stat Ann ch 325 § 5/1 et seq

IN--Code §§ 31-33-1-1 et seq, 35-46-1-3 et seq

KY--Rev Stat Ann § 508.100 et seq

MI--Comp Laws Ann §§ 722.601 et seq, 750.135 et seq

NY--Fam Ct Act §§ 812 et seq, 1011 et seq; Soc Serv Law § 411 et seq

PA--CSA tit 23 § 6301 et seq, tit 55 § 3490.1 et seq

REPORTING CHILD ABUSE: CA--Penal Code § 11164 et seq
 FL--Stat Ann § 39.201
 IL--Comp Stat Ann ch 325 § 5/4; ch 735 § 5/8-802
 IN--Code § 35-46-1-14
 KY--Rev Stat Ann §§ 620.030-620.050
 MI--Comp Laws Ann §§ 722.623-722.625
 NY--Soc Serv Law § 413 et seq
 PA--CSA tit 23 § 6311 et seq

TEXT DISCUSSION

Age of majority. 1 Anderson Fam. L. § 5.1
 Child abuse prevention and reporting. Ohio Sch. Law § 9.55.1
 Complaint: who may file. 2 Anderson Fam. L. § 13.4
 Contents of report. 1 Anderson Fam. L. § 4.3
 Criminal charges against adults under the Juvenile Code. 2 Anderson Fam. L. § 9.10
 Exceptions to confidentiality. Ohio Prof. Resp. § 9.5
 Immunity from liability. 1 Anderson Fam. L. § 4.5
 Lack of proper care or immediate danger. 2 Anderson Fam. L. § 12.8
 Missing child law. Ohio Sch. Law § 9.55.3
 Procedure and investigation. 1 Anderson Fam. L. § 4.4
 Reporting statute: RC § 2151.42.1. 2 Anderson Fam. L. § 12.1
 Victims of abuse or neglect. 1 Anderson Fam. L. § 4.1
 Who must make a report. 1 Anderson Fam. L. § 4.2

RESEARCH AIDS

Official report of abuse or neglect:
 O-Jur3d: Fam L §§ 1474-1479, 1736
 Physician-patient privilege:
 O-Jur3d: Evid & Witn § 809

ALR

Validity, construction, and application of state statute requiring doctor or other person to report child abuse. 73 ALR4th 782.
 Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 ALR4th 649.

LAW REVIEW

Between a rock and a hard place: Michigan social worker liability for child abuse investigations after *Achterhof v. Selvaggio*. Note. 22 ToledoLRev 455 (1991).
Brodie v. Summit County Children Services Board: A statutory duty exception to the public duty rule for children service agencies. Casenote. 17 Ohio N.U.L. Rev. 711 (1991).
 Caseworker liability for the negligent handling of child abuse reports. Comment. 60 CinLRev 191 (1991).
 Child abuse: civil liability of physicians and hospitals for failure to report -- *Landeros v. Flood* [551 P2d 389 (1976)]. Note. 2 UDayLRev 93 (1977).
 Confidentiality and privilege: the status of social workers in Ohio. Gary W. Paquin. 19 Ohio N.U.L. Rev. 199 (1992).
 Creating therapist-incest offender exception to mandatory child abuse reporting statutes -- when psychiatrist knows best. Phyllis Coleman. 54 CinLRev 1113 (1986).
 Faith-healing and religious treatment exemptions to child-endangerment laws: should parental religious practices excuse the failing to provide necessary medical care to children? Comment. 13 UDayLRev 79 (1987).
 In re Barzak: access to children services board files. David Hagelkorn. 19 Akron L. Rev. 237 (1985).
 Major evidentiary issues in prosecution of family abuse cases. Susan P. Mele. 11 Ohio N.U.L. Rev. 245 (1984).

The medical diagnosis and treatment exception to hearsay -- the use of the child protection team in child sexual abuse prosecutions. Sally A. Moore. 13 NoKyLRev 51 (1986).

Ohio homeowners beware: your homeowner's insurance premium may be subsidizing child sexual abuse. Comment. 20 UDayLRev 341 (1994).

Ohio's mandatory reporting statute for cases of child abuse. Mario C. Ciano. 18 WestResLRev 1405 (1967).

The outer limits of parental autonomy: withholding medical treatment from children. Comment. 42 Ohio St. L.J. 813 (1981).

The parent-child dilemma in the courts. James W. Carpenter. 30 Ohio St. L.J. 292 (1969).

Protecting children from abuse: should it be a legal duty? Douglas J. Besharov. 11 UDayLRev 509 (1986).

Representing the interests of the abused and neglected child: the guardian ad litem and access to confidential information. Dayle D. Deardurff. 11 UDayLRev 649 (1986).

The use of juvenile court jurisdiction and restraining authority to address the problem of maternal drug abuse in Ohio. Deborah A. Wainey. 17 Ohio N.U.L. Rev. 611 (1991).

When the abused child fatally says "No more!": can parricide be self-defense in Ohio? Comment. 18 UDayLRev 447 (1993).

CASE NOTES AND OAGS

ANALYSIS

- ⚡ Adequate state remedy
- ⚡ Children services agencies
- ⚡ Children services board
- ⚡ Conduct of investigation
- ⚡ Confidentiality
- ⚡ Construction
- ⚡ Due process
- ⚡ Duty generally
- ⚡ Duty investigate child abuse
- ⚡ Duty of agencies to investigate child abuse
- ⚡ Duty of state
- ⚡ Duty to investigate child abuse
- ⚡ Duty to report child abuse
- ⚡ Evidence
- ⚡ Failure to investigate reports of child abuse
- ⚡ Immunity
- ⚡ Malicious prosecution

- ⚡Priority of investigation
- ⚡Privilege
- ⚡Reasonable and necessary force
- ⚡Records
- ⚡School officials
- ⚡Self incrimination
- ⚡Support
- ⚡Time limits

⚡ADEQUATE STATE REMEDY.

A father who alleges that he has been denied reasonable visitation rights with his children due to the county welfare department's failure to complete within 30 days an investigation of a report of child abuse by the father cannot maintain a § 1983 action, since his complaint alleges, at the most, a procedural due process violation, and, for that, there is an adequate state remedy available to the plaintiff: Haag v. Cuyahoga County, 619 F. Supp. 262 (N.D. Ohio 1985).

⚡CHILDREN SERVICES AGENCIES.

Public children services agencies are local agencies for purposes of RC Chapter 1347., which governs the maintenance of personal information systems: OAG No. 89-084 (1989).

Public children services agencies are authorized to investigate reports of alleged child abuse or neglect or threats of child abuse or neglect at detention homes established pursuant to RC § 2151.34, at the Ohio Veterans' Children's Home operated pursuant to RC Chapter 5909., and at public schools operating under standards set by the State Board of Education pursuant to RC Chapter 3301.: OAG No. 89-108 (1989).

Public children services agencies are authorized to investigate reports of alleged child abuse or neglect or threats of child abuse or neglect at facilities operated by the Department of Mental Health pursuant to RC Chapter 5122., at facilities operated by the Department of Mental Retardation and Developmental Disabilities pursuant to RC Chapter 5123., and at facilities operated by the Department of Youth Services pursuant to RC Chapter 5139.: OAG No. 89-108 (1989).

Public children services agencies have authority to investigate all reports of known or suspected child abuse or neglect or threats of child abuse or neglect within their respective counties of jurisdiction unless there is some provision of law restricting that authority with respect to particular persons or locations: OAG No. 89-108 (1989).

⚡CHILDREN SERVICES BOARD.

A children services board and its agents have a duty to investigate and report their findings as required by RC § 2151.42.1 when a specific child is identified as abused or neglected, and the public duty doctrine may not be raised as a defense for agency failure to comply with such statutory requirements: Brodie v. Summit Cty. Children Services Bd., 51 Ohio St. 3d 112, 554 N.E.2d 1301 (1990).

⚡CONDUCT OF INVESTIGATION.

A board of education may require by rule, adopted pursuant to RC § 3313.20, that an

investigator from a county children services board obtain parental consent or permit a school official to be present before allowing such investigator to interview a child on school property in the course of an investigation required to be conducted under RC § 2151.42.1. The reasonableness of any such rule is, however, subject to judicial review: OAG No. 82-029 (1982).

☞CONFIDENTIALITY.

A court may conduct an in camera inspection of child abuse records and has inherent power to order disclosure in appropriate circumstances: Johnson v. Johnson, 134 Ohio App. 3d 579, 731 N.E.2d 1144 (1999).

The Cuyahoga county ombudsman office is a "public office" whose records are subject to disclosure. RC § 2151.42.1 does not exempt its child abuse and neglect reports: State ex rel. Strothers v. Wertheim, 80 Ohio St. 3d 155, 684 N.E.2d 1239 (1997).

Records of a county children services board investigation made pursuant to RC §§ 5153.17 and 2151.42.1 are "official records" within the ambit of the sealing provisions of RC § 2953.52. The trial court should weigh the privacy interests of the person seeking to seal the official records against the legitimate needs of the agency in maintaining those records: State v. S.R., 63 Ohio St. 3d 590, 589 N.E.2d 1319 (1992).

Child abuse investigation reports are confidential and not subject to inspection: State ex rel. Renfro v. Cuyahoga Cty. Dept. of Human Serv., 54 Ohio St. 3d 25, 560 N.E.2d 230 (1990).

Each report and investigation of alleged child abuse or neglect made under RC § 2151.42.1 is confidential and, pursuant to OAC 5101:2-34-38, the dissemination of such confidential information to an agency or organization is permitted only if the agency or organization has rules or policies governing the dissemination of confidential information that are consistent with those of rule 5101:2-34-38: OAG No. 92-046 (1992).

A public children services agency may, pursuant to :1991-1992 Monthly Record, vol. 1] OAC 5101:2-34-71, at 280, include the Air Force Office of Special Investigations as a voluntary subscriber to a county plan of cooperation prepared pursuant to RC § 2151.42.1(J), if the Office wishes to be a voluntary subscriber and if the agency determines that the participation of the Office would be appropriate. If the Office has suitable rules or policies governing the use and dissemination of confidential information, the Office may receive investigatory materials as provided in the county plan of cooperation and in OAC 5101:2-34-38(D)(4): OAG No. 92-046 (1992).

A public children services agency may disclose child abuse and neglect investigation materials to the Air Force Office of Special Investigations when such disclosure is in compliance with RC §§ 2151.42.1, 5153.17, and OAC 5101:2-34-38 and is for purposes authorized by those provisions; the agency is not required to obtain assurance that the Office will not use the materials for purposes other than criminal prosecution: OAG No. 92-046 (1992).

Child abuse and neglect investigation records maintained by public children services agencies do not constitute "public records" within the meaning of RC § 149.43 to which the right of public access attaches. Records of child abuse or neglect investigations under RC §§ 2151.42.1(H)(1) and 5153.17 are "records the release of which is prohibited by state law" under RC § 149.43(A)(1): OAG No. 91-003 (1991).

☞CONSTRUCTION.

Revised Code § 2151.42(H)(1) references only the "reports" which are required to be made by certain categories of persons designated in subsections (A) and (B) of that section. Thus, "reports" as used there is very limited in its scope and is not so inclusive as to encompass any report made by anyone regarding the subject child. On the other hand, RC § 5153.17 is very broad: Sharpe v. Sharpe, 85 Ohio App. 3d 638, 620 N.E.2d 916 (1993).

For purposes of RC § 2901.13(F), the corpus delicti of crimes involving child abuse or neglect is discovered when a responsible adult, as listed in RC § 2151.42.1, has knowledge of

both the act and the criminal nature of the act: State v. Hensley, 59 Ohio St. 3d 136, 571 N.E.2d 711 (1991).

The possible infringement upon minor plaintiff's right to anonymity concerning requirement that attorneys and other professionals report incidents of child abuse or neglect discovered during the course of their professional responsibilities has been cured by amendment: Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988).

The powers of the State Highway Patrol or special police officers designated by the Superintendent of the State Highway Patrol to investigate and to enforce laws on state properties and in state institutions do not restrict the authority of public children services agencies to investigate reports of alleged child abuse or neglect or threats of child abuse or neglect pertaining to such locations: OAG No. 89-108 (1989).

Revised Code § 2151.42.1 sets forth a comprehensive scheme for the reporting of allegations of child abuse and neglect and threats of child abuse and neglect and for the investigation of such reports by public children services agencies: OAG No. 89-108 (1989).

The phrase "having reason to believe," as used in RC § 2151.42.1, is equivalent to "known or suspected" as used in 45 CFR 1340.3-3(d). The term "child neglect," as used in RC § 2151.42.1, applies to children without proper parental care or guardianship as defined by RC § 2151.05: OAG No. 78-038 (1978).

⚡DUE PROCESS.

Revised Code § 2151.42.1(G) does not violate the equal protection or due process rights of persons accused of child abuse: Cudlin v. Cudlin, 64 Ohio App. 3d 249, 580 N.E.2d 1170 (1990).

Procedural due process does not require a county agency to provide a family reunification plan after a child has been removed from the family but before a final adjudication of abuse or dependency has been made; thus, RC § 2151.42.1 is not unconstitutional on its face: Leshar v. Lavrich, 632 F. Supp. 77 (N.D. Ohio 1984).

⚡DUTY GENERALLY.

The hospital did not have a statutory duty to report an employee when he quit his employment. At that time the hospital had no reason to know or suspect that any particular child was being abused or in danger of being abused by the employee: Douglass v. Salem Community Hosp., 153 Ohio App. 3d 350 (2003).

⚡DUTY INVESTIGATE CHILD ABUSE.

A claim that a children services board and its employees failed to properly investigate an instance of alleged child abuse pursuant to duties imposed by RC § 2151.42.1 is not subject to the general immunity granted to political subdivisions by RC § 2744.02(A), or to the immunity granted to employees by RC § 2744.03(A)(6): Crago v. Lorain Cty. Commrs., 69 Ohio App. 3d 24, 590 N.E.2d 15 (1990).

⚡DUTY OF AGENCIES TO INVESTIGATE CHILD ABUSE.

The provisions of RC § 2151.42.1 impose the duties of investigation and disposition of reported cases of child abuse and neglect solely on children services boards and county welfare departments which have assumed the functions of a children services board, and, therefore, prohibit delegation of these duties to private entities: OAG No. 79-067 (1979).

⚡DUTY OF STATE.

When a state voluntarily undertakes to protect neglected children from harm, it may also acquire a duty under state tort law to provide the child with adequate protection and may be liable for doing so in a negligent fashion: Rich v. Erie Cty. Dept. of Human Resources, 106

Ohio App. 3d 88, 665 N.E.2d 278 (1995).

¶ DUTY TO INVESTIGATE CHILD ABUSE.

In investigating a report of child abuse pursuant to RC § 2151.42.1, a public children services agency is required to consider the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect; the cause of the injuries, abuse, neglect, or threat; and the person or persons responsible for the injuries, abuse, neglect, or threat. Thus, a public children services agency must consider whether, in accordance with RC § 3319.41(G), a school teacher, principal, administrator, nonlicensed employee, or bus driver has used reasonable and necessary force and restraint to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil, for the purpose of self-defense, or for the protection of persons or property: OAG No. 2002-019 (2002).

A public children services agency is required, pursuant to RC § 2151.42.1(F)(1), to investigate as alleged child abuse a report received by it of an incident in which a sixteen year old female has been assaulted by her husband: OAG No. 92-073 (1992).

¶ DUTY TO REPORT CHILD ABUSE.

Generally, in order to maintain a claim of negligence per se based on violation of a statute, the plaintiff must show that he is among the class of individuals that the statute is designed to protect. RC § 2151.42.1 imposes a duty which is owed solely to the minor child of whom reports have been received concerning abuse or neglect: Curran v. Walsh Jesuit High School, 99 Ohio App. 3d 696, 651 N.E.2d 1028 (1995).

Revised Code § 2151.42.1 is not an exclusive listing of those persons who must report knowledge or suspicion of child abuse. A duty to report abuse can arise from a special relationship at law, irrespective of a statutory duty. Since a parent has a special relationship to the child, the duty of care, protection and support under RC § 2921.22(A) would create a duty to stop the alleged acts of abuse: Hite v. Brown, 100 Ohio App. 3d 606, 654 N.E.2d 452 (1995).

Revised Code § 2151.42.1 imposes a duty to investigate owed to a minor child who has allegedly been abused or neglected. It does not impose a duty to that child's grandparents or to any other member of the public who files a charge with a children services board: Neuenschwander v. Wayne Cty. Children Serv. Bd., 92 Ohio App. 3d 767, 637 N.E.2d 102 (1994).

The corpus delicti of a crime involving sexual abuse of children is discovered when an employee of a children services agency or other "responsible adult" as that term is defined in RC § 2151.42.1 had knowledge of both the act itself and the criminal nature of the act: State v. Ritchie, 95 Ohio App. 3d 569, 642 N.E.2d 1168 (1994).

Revised Code § 2919.24(A) is a strict liability offense. Concealing the child from a parent to prevent alleged abuse does not constitute an affirmative defense: State v. Thompson, 97 Ohio App. 3d 629, 647 N.E.2d 226 (1994).

Because an administrator of a child day-care center has a duty under RC § 2151.42.1(A)(1) to report suspected child abuse and immunity under RC § 2151.42.1(G) for doing so, the administrator cannot be liable for defamation in making such a report: Lall v. Madisonville Child Care Project, Inc., 55 Ohio App. 3d 37, 561 N.E.2d 1063 (1989).

Revised Code § 2151.42.1(A) does not impose upon a professional counselor or social worker licensed under RC Chapter 4757. the duty to report knowledge or suspicion of child abuse of an individual if, when the professional counselor or social worker learns of the child abuse, the individual no longer is a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age. However, if information provided to a professional counselor or social worker who is acting in an official or professional capacity gives that person reason to know or suspect that an individual who currently is a child is at risk of child abuse, RC § 2151.42.1(A) requires that such knowledge or suspicion be reported: OAG No. 2001-035 (2001).

A Big Brother or Big Sister is not subject to the child abuse or neglect reporting requirements of RC § 2151.42.1(A)(1), but a Big Brother or Big Sister who, during the course of his or her activities as a Big Brother or Big Sister, learns of or suspects child abuse or neglect, may, in accordance with RC § 2151.42.1(B), report such knowledge or suspicion to one of the agencies or authorities described therein: OAG No. 97-031 (1997).

Revised Code § 2151.42.1 does not require that a public children services agency routinely share child abuse and neglect investigation materials with the Air Force Office of Special Investigations, an agency of the federal government: OAG No. 92-046 (1992).

☞ EVIDENCE.

Reports of suspected child abuse otherwise admissible under RC § 2151.42.1 may be excluded if they are not adequately authenticated and contain hearsay: State v. Humphries, 79 Ohio App. 3d 589, 607 N.E.2d 921 (1992).

☞ FAILURE TO INVESTIGATE REPORTS OF CHILD ABUSE.

Within the meaning of RC §§ 2744.02(B)(5) and 2744.03(A)(6)(c), RC § 2151.42.1 expressly imposes liability for failure to perform the duty to report known or suspected child abuse. Pursuant to RC § 2744.02(B)(5), a political subdivision may be held liable for failure to perform a duty expressly imposed by RC § 2151.42.1. Pursuant to RC § 2744.03(A)(6)(c), an employee of a political subdivision may be held liable for failure to perform a duty expressly imposed by RC § 2151.42.1: Campbell v. Burton, 92 Ohio St. 3d 336, 750 N.E.2d 539 (2001).

Within the meaning of RC §§ 2744.02(B)(5) and 2744.03(A)(6)(c), RC § 2151.42.1 does not expressly impose liability for failure to investigate reports of child abuse: Marshall v. Montgomery Cty. Children Serv. Bd., 92 Ohio St. 3d 348, 750 N.E.2d 549 (2001).

☞ IMMUNITY.

Revised Code § 2151.42.1 creates a duty only to a specific child. Where a school employee sexually assaulted a student, the school's failure to report a prior alleged incident between the employee and a different student did not qualify as an exception to immunity under RC § 2744.02(B)(5): Yates v. Mansfield Bd. of Edn., 150 Ohio App. 3d 241, 780 N.E.2d 608 (2002).

Where RC § 2151.42.1 provides immunity, summary judgment may be granted as a matter of law: Liedtke v. Carrington, 145 Ohio App. 3d 396, 763 N.E.2d 213 (2001).

Entries denying a subdivision's motion for judgment on the pleadings based on immunity were not final appealable orders. Orders regarding protective orders were not appealable absent compliance with CivR 54(B): Chambers v. Chambers, 137 Ohio App. 3d 355, 738 N.E.2d 834 (2000).

Revised Code § 2151.42.1 provides absolute immunity to medical professionals who are asked to provide assistance to law enforcement agencies and social services providers: Casbohm v. Metrohealth Med. Ctr., 140 Ohio App. 3d 58, 746 N.E.2d 661 (2000).

A report of suspected child abuse by a day-care center administrator or employee is entitled to immunity and is exempt from discovery, regardless of whether it was filed in good faith: Walters v. The Enrichment Ctr. of Wishing Well, Inc., 133 Ohio App. 3d 66, 726 N.E.2d 1058 (1999).

Anyone who participates in a mandatory report under RC § 2151.42.1(A) or who participates in good faith in a permissive report under RC § 2151.42.1(B) is entitled to immunity. Immunity is not limited to the initial reporter: Surdel v. MetroHealth Med. Ctr., 135 Ohio App. 3d 141, 733 N.E.2d 281 (1999).

"School employee" and "school authority" were included in occupations listed in RC § 2151.42.1(A)(1) and a referral made to a "county department of human services exercising the children services function" described by RC § 2151.42.1(A)(1) provided absolute immunity pursuant to RC § 2151.42.1(G)(1): Merk v. Watts, 1994 Ohio App. LEXIS 3999

(9th Dist. 1994).

Former RC § 2151.42.1(G) confers immunity upon those who, as a result of a report of a known or suspected incident of child abuse and/or neglect, participate in a judicial proceeding: Gersper v. Ashtabula Cty. Children Services Bd., 59 Ohio St. 3d 127, 570 N.E.2d 1120 (1991).

Division (G) of RC § 2151.42.1 does not confer immunity upon those who fail to carry out the mandate of the statute: Brodie v. Summit Cty. Children Services Bd., 51 Ohio St. 3d 112, 554 N.E.2d 1301 (1990).

Anyone participating in a judicial proceeding involving a child abuse complaint is absolutely immune from civil liability. This immunity protects the judge, the juvenile court employees, the county department of human services and its employees, and the attorneys representing the person accused of abuse: Scarso v. Cuyahoga County Dept. of Human Services, 747 F. Supp. 381 (N.D. Ohio 1989).

A former wife who files a false report that her former husband has sexually abused the parties' child is absolutely immune from liability in a civil action filed against her. The grant of immunity pursuant to RC § 2151.42.1(G) extends to anyone making reports of child abuse whether in good faith or not: Hartley v. Hartley, 42 Ohio App. 3d 160, 537 N.E.2d 706 (1988).

A hospital and medical center's report to child welfare authorities that a minor child has a sexually transmitted disease is immune from liability under RC § 2151.42.1 even though (1) the diagnosis is mistaken, and (2) the child presents no evidence of a wound, injury, trauma, disability, or condition of a nature that reasonably indicates child abuse: Criswell v. Brentwood Hosp., 49 Ohio App. 3d 163, 551 N.E.2d 1315 (1988).

A licensed psychologist who met with a child and her mother and subsequently made a report to the county welfare department about possible child abuse by the child's father is immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such report: Haag v. Cuyahoga County, 619 F. Supp. 262 (N.D. Ohio 1985).

✦MALICIOUS PROSECUTION.

The father's claim that county employees maliciously pursued a false allegation of child abuse against him was not subject to dismissal under CivR 12(B)(6): Roe v. Franklin Cty., 109 Ohio App. 3d 772, 673 N.E.2d 172 (1996).

✦PRIORITY OF INVESTIGATION.

When a public children services agency receives a report of the spanking of a student by a school administrator, the agency must assign the report a priority rating in accordance with OAC 5101:2-34-08. A report that is rated Priority I, II, or III must be investigated as required by RC § 2151.42.1, in accordance with the procedures prescribed in OAC 5101:2-34-32, 5101:2-34-33, and 5101:2-34-34. A report that is rated Priority IV may be resolved by termination pursuant to OAC 5101:2-34-08 if it is determined that the report alleges only action that is permitted under RC §§ 3319.31 and 2919.22, for then the report does not constitute an allegation of abuse or neglect: OAG No. 92-082 (1992).

✦PRIVILEGE.

Court admitted testimony from the nurse of appellant's physician in child neglect action. The exception of RC § 2151.42.1 does not apply to the challenged testimony because the nurse's statements went beyond whether appellant kept her appointments to appellant's diagnosis, treatment and medication: In re Riddle, 1996 Ohio App. LEXIS 2054 (5th Dist. 1996).

Any privilege under RC § 2317.02 or RC § 4732.19 is automatically waived under RC § 2151.42.1(A)(3) in certain child abuse cases: State v. Stewart, 111 Ohio App. 3d 525, 676 N.E.2d 912 (1996).

Under RC § 2151.42.1, there is no exception for communications by a penitent to a clergy

member as there is for communications from patient to physician or client to attorney: Niemann v. Cooley, 93 Ohio App. 3d 81, 637 N.E.2d 943 (1994).

✦REASONABLE AND NECESSARY FORCE.

If, in investigating a report of child abuse pursuant to RC § 2151.42.1, a public children services agency finds that action consisting of reasonable and necessary force and restraint was used by a school teacher, principal, administrator, nonlicensed employee, or bus driver in accordance with RC § 3319.41(G) to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil, for the purpose of self-defense, or for the protection of persons or property, the public children services agency is precluded from finding that such action constituted child abuse for purposes of RC § 2151.42.1: OAG No. 2002-019 (2002).

✦RECORDS.

CCDCFS records are not absolutely privileged. Where records are necessary and relevant to a proceeding and good cause for disclosure has been shown, access to those records may be warranted: State v. Sahady, 2004 Ohio App. LEXIS 3120 (July 1, 2004).

Child abuse and neglect investigatory records maintained by public children services agencies constitute "investigatory material compiled for law enforcement purposes" within the meaning of RC § 1347.04(A)(1)(e). Personal information systems that are comprised of such records are, pursuant to RC § 1347.04(A)(1)(e), exempt from the provisions of RC Chapter 1347.: OAG No. 89-084 (1989).

✦SCHOOL OFFICIALS.

Pursuant to former RC § 2744.02(B)(5), a board of education may be held liable when its failure to report the sexual abuse of a minor student by a teacher in violation of RC § 2151.421 proximately results in the sexual abuse of another minor by the same teacher: Yates v. Mansfield Bd. of Edn., 102 Ohio St. 3d 205 (2004).

✦SELF INCRIMINATION.

The privilege against compulsory self-incrimination is self-executing and applied in a proceeding for termination of parental rights. Where the parents were given a choice of admitting the father's abuse of the child or of permanently losing custody, they had to be afforded protection against use of the admission in a subsequent prosecution: In re Amanda W., 124 Ohio App. 3d 136, 705 N.E.2d 724 (1997).

✦SUPPORT.

Compliance with a common pleas court order fixing the amount of support payments for a minor child of divorced parents is a bar to prosecution for nonsupport in a juvenile court: State v. Holl, 25 Ohio App. 2d 75, 266 N.E.2d 587 (1971).

✦TIME LIMITS.

A parent's knowledge of child sexual abuse does not trigger the running of the statute of limitations. The limitation period begins to run when a responsible adult, as defined in RC § 2151.42.1, acquires the requisite knowledge while acting in his or her official or professional capacity: State v. Rosenberger, 90 Ohio App. 3d 735, 630 N.E.2d 435 (1993).

Terms: 2151.421 ([Edit Search](#) | [Suggest Terms for My Search](#))

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§ 2317.54 Consent to surgical or medical procedure; requirements.

Practice Manuals and Treatises

Ohio Transaction Guide: Family Law & Forms § 6.33 Consent to Medical Treatment

Anderson's Ohio Elder Law Practice Manual § 8.1 Right to Terminate Treatment

Anderson's Ohio Civil Practice with Forms § 74.06 Consent to Treatment

Anderson's Ohio Civil Practice with Forms § 107.02 Battery and Informed Consent

Anderson's Ohio Civil Practice with Forms § 107.05 Defenses

Practice Forms

Consent to Medical Treatment or Procedure, Ohio Transaction Guide: Family Law & Forms § 6.210

Consent Form, Anderson's Ohio Civil Practice with Forms Form 74.11

Consent Form, Anderson's Ohio Civil Practice with Forms Form 107.12

Consent to surgical or medical procedure—Skeleton form, Couse's Ohio Form Book Form 32.1

Jury Instructions

OJI 331.syn Synopsis to Chapter 331 MEDICAL NEGLIGENCE

OJI 331.07 Statutory defense, lack of informed consent: physician/surgeon R.C. 2317.54 [Rev. 4-17-04]

ALR

Liability of dentist for extraction of teeth — Lack of informed consent. 125 ALR5th 403.

CASE NOTES AND OAG

INDEX

Informed consent
Lack of informed consent

Informed consent

Summary judgment for a doctor was affirmed as to a patient's battery claim, which was based on the doctor performing surgery on the patient without informed consent, since the patient failed to overcome the statutory presumption that the written consent was valid; further, the one-year statute of limitations had expired. *Johnson v. Munther*, — Ohio App. 3d —, — N.E. 2d —, 2005 Ohio App. LEXIS 3364, 2005 Ohio 3641, (July 11, 2005).

Summary judgment for a doctor was affirmed as the patient failed to overcome the statutory presumption in Ohio Rev. Code Ann. § 2317.54 that the patient's written consent to surgery was valid; the patient failed to support her complaint with a medical opinion that the doctor's opinion, if given, as to the life-threatening nature of her condition was a misrepresentation or that harm resulted. *Johnson v. Munther*, — Ohio App. 3d —, — N.E. 2d —, 2005 Ohio App. LEXIS 3364, 2005 Ohio 3641, (July 11, 2005).

Lack of informed consent

Trial court did not commit error in a medical malpractice action with respect to informed consent issues, as reliance by the parents of a deceased minor who received medical treatment on Ohio Rev. Code Ann. § 2317.54 was misplaced where it concerned written consent, but the complaint itself concerned lack of informed consent. There was no evidence

to support the claim of lack of informed consent in the circumstances. *Werden v. Children's Hosp. Med. Ctr.*, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 4547, 2006 Ohio 4600, (Sept. 8, 2006).

As the requirement of informed consent in Ohio Rev. Code Ann. § 2317.54(A) was not met due to the failure of the patient's informed consent form regarding a hernia procedure and the administration of anesthesia to indicate the name of the anesthesiologist who was responsible for that aspect of the medical procedure, as well as the lack of any indication of the name of the student nurse anesthetist who performed the procedure, an erroneous trial court judgment in favor of medical professionals in the patient's medical malpractice action would not have been upheld on the alternative informed consent claim pursuant to a cross-appeal by the professionals pursuant to Ohio R. App. P. 3(C)(2). *Luetke v. St. Vincent Mercy Med. Ctr.*, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 3828, 2006 Ohio 3872, (July 28, 2006).

§ 2317.56 Information to be provided to woman prior to abortion; consent form; medical emergency or necessity; liability of noncomplying physician and employer; publication of informational materials.

Practice Manuals and Treatises

Ohio Transaction Guide: Family Law & Forms § 6.50 Abortion

Practice Forms

Consent to Abortion, Ohio Transaction Guide: Family Law & Forms § 6.211

CASE NOTES AND OAG

Constitutionality

H.B. 421, amending RC § 2317.56, does not violate a woman's right to have an abortion under Ohio Const. art. I, § 1 by requiring informed consent in a face-to-face meeting with a physician at least 24 hours prior to the procedure because the requirement does not impose an undue burden, nor does the bill impose a substantial obstacle to minors who seeking abortions in that H.B. 421 allows a minor to forego parental consent if she establishes that she is mature enough to proceed without consent or that an abortion is in her best interests. *Cincinnati Women's Servs. v. Taft*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 23015 (S.D. Ohio Sept. 8, 2005).

§ 2317.62 Evidence of cost of annuity as to future damages in tort actions.

Jury Instructions

OJI 23.09 Tort actions based on claims for future damages; cost of annuity (PROVISIONAL)

§ 2319.02 Definitions.

CASE NOTES AND OAG

Affidavit

Where an inmate attached a statement indicating that he was indigent and noting which civil actions he had filed within the prior five years, but instead of having the statement notarized as required by Ohio Rev. Code Ann. § 2969.25(A),

Source: [Legal](#) > [States Legal - U.S.](#) > [Ohio](#) > [Statutes & Regulations](#) > OH - Ohio Statutes, Constitution, Court Rules & ALS, Combined 

TOC: [Ohio Statutes, Constitution, Court Rules & ALS, Combined](#) > [/.../](#) > [PATIENT'S INFORMED CONSENT](#)
> § 2317.56. Information to be provided to woman prior to abortion; consent form; medical emergency or necessity; liability of noncomplying physician and employer; publication of informational materials

Terms: 2317.56 ([Edit Search](#))

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ORC Ann. 2317.56

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* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH MAY 17, 2005 *
* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2005 *

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2317. EVIDENCE
PATIENT'S INFORMED CONSENT

◆ [GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION](#)

ORC Ann. 2317.56 (2005)

§ 2317.56. Information to be provided to woman prior to abortion; consent form; medical emergency or necessity; liability of noncomplying physician and employer; publication of informational materials

(A) As used in this section:

(1) "Medical emergency" means a condition of a pregnant woman that, in the reasonable judgment of the physician who is attending the woman, creates an immediate threat of serious risk to the life or physical health of the woman from the continuation of the pregnancy necessitating the immediate performance or inducement of an abortion.

(2) "Medical necessity" means a medical condition of a pregnant woman that, in the reasonable judgment of the physician who is attending the woman, so complicates the pregnancy that it necessitates the immediate performance or inducement of an abortion.

(3) "Probable gestational age of the embryo or fetus" means the gestational age that, in the judgment of a physician, is, with reasonable probability, the gestational age of the embryo or fetus at the time that the physician informs a pregnant woman pursuant to division (B)(1)(b) of this section.

(B) Except when there is a medical emergency or medical necessity, an abortion shall be performed or induced only if all of the following conditions are satisfied:

(1) At least twenty-four hours prior to the performance or inducement of the abortion, a physician meets with the pregnant woman in person in an individual, private setting and gives her an adequate opportunity to ask questions about the abortion that will be performed

or induced. At this meeting, the physician shall inform the pregnant woman, verbally or, if she is hearing impaired, by other means of communication, of all of the following:

(a) The nature and purpose of the particular abortion procedure to be used and the medical risks associated with that procedure;

(b) The probable gestational age of the embryo or fetus;

(c) The medical risks associated with the pregnant woman carrying the pregnancy to term.

The meeting need not occur at the facility where the abortion is to be performed or induced, and the physician involved in the meeting need not be affiliated with that facility or with the physician who is scheduled to perform or induce the abortion.

(2) At least twenty-four hours prior to the performance or inducement of the abortion, one or more physicians or one or more agents of one or more physicians do each of the following in person, by telephone, by certified mail, return receipt requested, or by regular mail evidenced by a certificate of mailing:

(a) Inform the pregnant woman of the name of the physician who is scheduled to perform or induce the abortion;

(b) Give the pregnant woman copies of the published materials described in division (C) of this section;

(c) Inform the pregnant woman that the materials given pursuant to division (B)(2)(b) of this section are provided by the state and that they describe the embryo or fetus and list agencies that offer alternatives to abortion. The pregnant woman may choose to examine or not to examine the materials. A physician or an agent of a physician may choose to be disassociated from the materials and may choose to comment or not comment on the materials.

(3) Prior to the performance or inducement of the abortion, the pregnant woman signs a form consenting to the abortion and certifies both of the following on that form:

(a) She has received the information and materials described in divisions (B)(1) and (2) of this section, and her questions about the abortion that will be performed or induced have been answered in a satisfactory manner.

(b) She consents to the particular abortion voluntarily, knowingly, intelligently, and without coercion by any person, and she is not under the influence of any drug of abuse or alcohol.

(4) Prior to the performance or inducement of the abortion, the physician who is scheduled to perform or induce the abortion or the physician's agent receives a copy of the pregnant woman's signed form on which she consents to the abortion and that includes the certification required by division (B)(3) of this section.

(C) The department of health shall cause to be published in English and in Spanish, in a typeface large enough to be clearly legible, and in an easily comprehensible format, the following materials:

(1) Materials that inform the pregnant woman about family planning information, of publicly funded agencies that are available to assist in family planning, and of public and private agencies and services that are available to assist her through the pregnancy, upon

childbirth, and while the child is dependent, including, but not limited to, adoption agencies. The materials shall be geographically indexed; include a comprehensive list of the available agencies, a description of the services offered by the agencies, and the telephone numbers and addresses of the agencies; and inform the pregnant woman about available medical assistance benefits for prenatal care, childbirth, and neonatal care and about the support obligations of the father of a child who is born alive. The department shall ensure that the materials described in division (C)(1) of this section are comprehensive and do not directly or indirectly promote, exclude, or discourage the use of any agency or service described in this division.

(2) Materials that inform the pregnant woman of the probable anatomical and physiological characteristics of the zygote, blastocyte, embryo, or fetus at two-week gestational increments for the first sixteen weeks of pregnancy and at four-week gestational increments from the seventeenth week of pregnancy to full term, including any relevant information regarding the time at which the fetus possibly would be viable. The department shall cause these materials to be published only after it consults with the Ohio state medical association and the Ohio section of the American college of obstetricians and gynecologists relative to the probable anatomical and physiological characteristics of a zygote, blastocyte, embryo, or fetus at the various gestational increments. The materials shall use language that is understandable by the average person who is not medically trained, shall be objective and nonjudgmental, and shall include only accurate scientific information about the zygote, blastocyte, embryo, or fetus at the various gestational increments. If the materials use a pictorial, photographic, or other depiction to provide information regarding the zygote, blastocyte, embryo, or fetus, the materials shall include, in a conspicuous manner, a scale or other explanation that is understandable by the average person and that can be used to determine the actual size of the zygote, blastocyte, embryo, or fetus at a particular gestational increment as contrasted with the depicted size of the zygote, blastocyte, embryo, or fetus at that gestational increment.

(D) Upon the submission of a request to the department of health by any person, hospital, physician, or medical facility for one or more copies of the materials published in accordance with division (C) of this section, the department shall make the requested number of copies of the materials available to the person, hospital, physician, or medical facility that requested the copies.

(E) If a medical emergency or medical necessity compels the performance or inducement of an abortion, the physician who will perform or induce the abortion, prior to its performance or inducement if possible, shall inform the pregnant woman of the medical indications supporting the physician's judgment that an immediate abortion is necessary. Any physician who performs or induces an abortion without the prior satisfaction of the conditions specified in division (B) of this section because of a medical emergency or medical necessity shall enter the reasons for the conclusion that a medical emergency or medical necessity exists in the medical record of the pregnant woman.

(F) If the conditions specified in division (B) of this section are satisfied, consent to an abortion shall be presumed to be valid and effective.

(G) The performance or inducement of an abortion without the prior satisfaction of the conditions specified in division (B) of this section does not constitute, and shall not be construed as constituting, a violation of division (A) of section 2919.12 of the Revised Code. The failure of a physician to satisfy the conditions of division (B) of this section prior to performing or inducing an abortion upon a pregnant woman may be the basis of both of the following:

(1) A civil action for compensatory and exemplary damages as described in division (H) of this section;

(2) Disciplinary action under section 4731.22 of the Revised Code.

(H) (1) Subject to divisions (H)(2) and (3) of this section, any physician who performs or induces an abortion with actual knowledge that the conditions specified in division (B) of this section have not been satisfied or with a heedless indifference as to whether those conditions have been satisfied is liable in compensatory and exemplary damages in a civil action to any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property as a result of the failure to satisfy those conditions. In the civil action, the court additionally may enter any injunctive or other equitable relief that it considers appropriate.

(2) The following shall be affirmative defenses in a civil action authorized by division (H)(1) of this section:

(a) The physician performed or induced the abortion under the circumstances described in division (E) of this section.

(b) The physician made a good faith effort to satisfy the conditions specified in division (B) of this section.

(c) The physician or an agent of the physician requested copies of the materials published in accordance with division (C) of this section from the department of health, but the physician was not able to give a pregnant woman copies of the materials pursuant to division (B)(2) of this section and to obtain a certification as described in divisions (B)(3) and (4) of this section because the department failed to make the requested number of copies available to the physician or agent in accordance with division (D) of this section.

(3) An employer or other principal is not liable in damages in a civil action authorized by division (H)(1) of this section on the basis of the doctrine of respondeat superior unless either of the following applies:

(a) The employer or other principal had actual knowledge or, by the exercise of reasonable diligence, should have known that an employee or agent performed or induced an abortion with actual knowledge that the conditions specified in division (B) of this section had not been satisfied or with a heedless indifference as to whether those conditions had been satisfied.

(b) The employer or other principal negligently failed to secure the compliance of an employee or agent with division (B) of this section.

(4) Notwithstanding division (E) of section 2919.12 of the Revised Code, the civil action authorized by division (H)(1) of this section shall be the exclusive civil remedy for persons, or the representatives of estates of persons, who allegedly sustain injury, death, or loss to person or property as a result of a failure to satisfy the conditions specified in division (B) of this section.

(I) The department of job and family services shall prepare and conduct a public information program to inform women of all available governmental programs and agencies that provide services or assistance for family planning, prenatal care, child care, or alternatives to abortion.

HISTORY: 144 v H 108 (Eff 5-28-92); 145 v H 715 (Eff 7-22-94); 147 v H 421 (Eff 5-6-98); 148 v H 471. Eff 7-1-2000.

NOTES:

The effective date is set by section 12(A) of HB 471.

CROSS-REFERENCES TO RELATED STATUTES

Grounds for discipline of physician, [RC § 4731.22](#).

Public health council rules on abortion, [RC § 3701.34.1](#).

Time limitations for bringing civil action, [RC § 2305.11](#).

RESEARCH AIDS

Abortion:

[O-Jur3d: Health § 33](#); [O-Jur3d: Phys & S § 162.1](#)

[Am-Jur2d: Abort §§ 101-117](#)

CASE NOTES AND OAGS

ANALYSIS

⚡Constitutionality

⚡Generally

⚡CONSTITUTIONALITY.

The provisions of [RC §§ 2317.56](#) and [4731.22](#) pertaining to abortion do not violate [OConst art I, §§ 1, 2, 7 or 11](#). Legislation is invalid only if it imposes an undue burden on abortion rights: [Preterm Cleveland v. Voinovich, 89 Ohio App. 3d 684, 627 N.E.2d 570 \(1993\)](#).

⚡GENERALLY.

The provision of information to a pregnant woman by a physician "in an individual, private setting" and the opportunity to ask questions under [RC § 2317.56\(B\)\(2\)](#) need not occur at least twenty-four hours prior to the performance or inducement of the abortion: OAG No. 94-094 (1994).

[Revised Code § 2317.56\(B\)\(1\)](#) requires that, at least twenty-four hours prior to the performance or inducement of an abortion, a physician must inform the pregnant woman, verbally or by other nonwritten means of communication, of various listed items. [RC § 2317.56\(B\)\(1\)](#) does not require that an in-person meeting occur between the physician and the pregnant woman at that time: OAG No. 94-094 (1994).

The words "verbally or by other nonwritten means of communication" in [RC § 2317.56\(B\)\(1\)](#) refer to all types of nonwritten communication, including videotaped or audiotaped physician statements: OAG No. 94-094 (1994).

Source: [Legal > States Legal - U.S. > Ohio > Statutes & Regulations > OH - Ohio Statutes, Constitution, Court Rules & ALS, Combined](#) 

TOC: [Ohio Statutes, Constitution, Court Rules & ALS, Combined > \[...\]](#) > [PATIENT'S INFORMED CONSENT > § 2317.56. Information to be provided to woman prior to abortion; consent form; medical emergency or necessity; liability of noncomplying physician and employer; publication of informational materials](#)

Terms: [2317.56 \(Edit Search\)](#)

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2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

2919.12 Unlawful abortion.

(A) No person shall perform or induce an abortion without the informed consent of the pregnant woman.

(B)(1)(a) No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated unless at least one of the following applies:

(i) Subject to division (B)(2) of this section, the person has given at least twenty-four hours actual notice, in person or by telephone, to one of the woman's parents, her guardian, or her custodian as to the intention to perform or induce the abortion, provided that if the woman has requested, in accordance with division (B)(1)(b) of this section, that notice be given to a specified brother or sister of the woman who is twenty-one years of age or older or to a specified stepparent or grandparent of the woman instead of to one of her parents, her guardian, or her custodian, and if the person is notified by a juvenile court that affidavits of the type described in that division have been filed with that court, the twenty-four hours actual notice described in this division as to the intention to perform or induce the abortion shall be given, in person or by telephone, to the specified brother, sister, stepparent, or grandparent instead of to the parent, guardian, or custodian;

(ii) One of the woman's parents, her guardian, or her custodian has consented in writing to the performance or inducement of the abortion;

(iii) A juvenile court pursuant to section 2151.85 of the Revised Code issues an order authorizing the woman to consent to the abortion without notification of one of her parents, her guardian, or her custodian;

(iv) A juvenile court or a court of appeals, by its inaction, constructively has authorized the woman to consent to the abortion without notification of one of her parents, her guardian, or her custodian under division (B)(1) of section 2151.85 or division (A) of section 2505.073 of the Revised Code.

(b) If a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated desires notification as to a person's intention to perform or induce an abortion on the woman to be given to a specified brother or sister of the woman who is twenty-one years of age or older or to a specified stepparent or grandparent of the woman instead of to one of her parents, her guardian, or her custodian, the person who intends to perform or induce the abortion shall notify the specified brother, sister, stepparent, or grandparent instead of the parent, guardian, or custodian for purposes of division (B)(1)(a)(i) of this section if all of the following apply:

(i) The woman has requested the person to provide the notification to the specified brother, sister, stepparent, or grandparent, clearly has identified the specified brother, sister, stepparent, or grandparent and her relation to that person, and, if the specified relative is a brother or sister, has indicated the age of the brother or sister;

(ii) The woman has executed an affidavit stating that she is in fear of physical, sexual, or severe emotional abuse from the parent, guardian, or custodian who otherwise would be notified under division (B)(1)(a)(i) of this section, and that the fear is based on a pattern of physical, sexual, or

severe emotional abuse of her exhibited by that parent, guardian, or custodian, has filed the affidavit with the juvenile court of the county in which the woman has a residence or legal settlement, the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, and has given the court written notice of the name and address of the person who intends to perform or induce the abortion;

(iii) The specified brother, sister, stepparent, or grandparent has executed an affidavit stating that the woman has reason to fear physical, sexual, or severe emotional abuse from the parent, guardian, or custodian who otherwise would be notified under division (B)(1)(a)(i) of this section, based on a pattern of physical, sexual, or severe emotional abuse of her by that parent, guardian, or custodian, and the woman or the specified brother, sister, stepparent, or grandparent has filed the affidavit with the juvenile court in which the affidavit described in division (B)(1)(b)(ii) of this section was filed;

(iv) The juvenile court in which the affidavits described in divisions (B)(1)(b)(ii) and (iii) of this section were filed has notified the person that both of those affidavits have been filed with the court.

(c) If an affidavit of the type described in division (B)(1)(b)(ii) of this section and an affidavit of the type described in division (B)(1)(b)(iii) of this section are filed with a juvenile court and the court has been provided with written notice of the name and address of the person who intends to perform or induce an abortion upon the woman to whom the affidavits pertain, the court promptly shall notify the person who intends to perform or induce the abortion that the affidavits have been filed. If possible, the notice to the person shall be given in person or by telephone.

(2) If division (B)(1)(a)(ii), (iii), or (iv) of this section does not apply, and if no parent, guardian, or custodian can be reached for purposes of division (B)(1)(a)(i) of this section after a reasonable effort, or if notification is to be given to a specified brother, sister, stepparent, or grandparent under that division and the specified brother, sister, stepparent, or grandparent cannot be reached for purposes of that division after a reasonable effort, no person shall perform or induce such an abortion without giving at least forty-eight hours constructive notice to one of the woman's parents, her guardian, or her custodian, by both certified and ordinary mail sent to the last known address of the parent, guardian, or custodian, or if notification for purposes of division (B)(1)(a)(i) of this section is to be given to a specified brother, sister, stepparent, or grandparent, without giving at least forty-eight hours constructive notice to that specified brother, sister, stepparent, or grandparent by both certified and ordinary mail sent to the last known address of that specified brother, sister, stepparent, or grandparent. The forty-eight-hour period under this division begins when the certified mail notice is mailed. If a parent, guardian, or custodian of the woman, or if notification under division (B)(1)(a)(i) of this section is to be given to a specified brother, sister, stepparent, or grandparent, the specified brother, sister, stepparent, or grandparent, is not reached within the forty-eight-hour period, the abortion may proceed even if the certified mail notice is not received.

(3) If a parent, guardian, custodian, or specified brother, sister, stepparent, or grandparent who has been notified in accordance with division (B)(1) or (2) of this section clearly and unequivocally expresses that he or she does not wish to consult with a pregnant woman prior to her abortion, then the abortion may proceed without any further waiting period.

(4) For purposes of prosecutions for a violation of division (B)(1) or (2) of this section, it shall be a

rebuttable presumption that a woman who is unmarried and under eighteen years of age is unemancipated.

(C)(1) It is an affirmative defense to a charge under division (B)(1) or (2) of this section that the pregnant woman provided the person who performed or induced the abortion with false, misleading, or incorrect information about her age, marital status, or emancipation, about the age of a brother or sister to whom she requested notice be given as a specified relative instead of to one of her parents, her guardian, or her custodian, or about the last known address of either of her parents, her guardian, her custodian, or a specified brother, sister, stepparent, or grandparent to whom she requested notice be given and the person who performed or induced the abortion did not otherwise have reasonable cause to believe the pregnant woman was under eighteen years of age, unmarried, or unemancipated, to believe that the age of a brother or sister to whom she requested notice be given as a specified relative instead of to one of her parents, her guardian, or her custodian was not twenty-one years of age, or to believe that the last known address of either of her parents, her guardian, her custodian, or a specified brother, sister, stepparent, or grandparent to whom she requested notice be given was incorrect.

(2) It is an affirmative defense to a charge under this section that compliance with the requirements of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant woman from the continuation of her pregnancy created an emergency necessitating the immediate performance or inducement of an abortion.

(D) Whoever violates this section is guilty of unlawful abortion. A violation of division (A) of this section is a misdemeanor of the first degree on the first offense and a felony of the fourth degree on each subsequent offense. A violation of division (B) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(E) Whoever violates this section is liable to the pregnant woman and her parents, guardian, or custodian for civil compensatory and exemplary damages.

(F) As used in this section "unemancipated" means that a woman who is unmarried and under eighteen years of age has not entered the armed services of the United States, has not become employed and self-sustaining, or has not otherwise become independent from the care and control of her parent, guardian, or custodian.

Effective Date: 07-01-1996

2919.121 Unlawful abortion upon minor.

(A) For the purpose of this section, a minor shall be considered "emancipated" if the minor has married, entered the armed services of the United States, become employed and self-sustaining, or has otherwise become independent from the care and control of her parent, guardian, or custodian.

(B) No person shall knowingly perform or induce an abortion upon a pregnant minor unless one of the following is the case:

(1) The attending physician has secured the informed written consent of the minor and one parent, guardian, or custodian;

(2) The minor is emancipated and the attending physician has received her written informed consent;

(3) The minor has been authorized to consent to the abortion by a court order issued pursuant to division (C) of this section, and the attending physician has received her informed written consent;

(4) The court has given its consent in accordance with division (C) of this section and the minor is having the abortion willingly.

(C) The right of a minor to consent to an abortion under division (B)(3) of this section or judicial consent to obtain an abortion under division (B)(4) of this section may be granted by a court order pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court of the county in which the minor has a residence or legal settlement, the juvenile court of any county that borders the county in which she has a residence or legal settlement, or the juvenile court of the county in which the facility in which the abortion would be performed or induced is located. The juvenile court shall assist the minor or next friend in preparing the petition and notices required by this section. The minor or next friend shall thereafter file a petition setting forth all of the following: the initials of the minor; her age; the names and addresses of each parent, guardian, custodian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that the minor has not previously filed a petition under this section concerning the same pregnancy that was denied on the merits; that, if the court does not authorize the minor to consent to the abortion, the court should find that the abortion is in the best interests of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend.

(2) A hearing on the merits shall be held on the record as soon as possible within five days of filing the petition. If the minor has not retained counsel, the court shall appoint counsel at least twenty-four hours prior to the hearing. The court shall appoint a guardian ad litem to protect the interests of the minor at the hearing. If the guardian ad litem is an attorney admitted to the practice of law in this state, the court may appoint the guardian ad litem to serve as the minor's counsel. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other

evidence that the court may find useful in determining whether the minor should be granted the right to consent to the abortion or whether the abortion is in the best interests of the minor. If the minor or her counsel fail to appear for a scheduled hearing, jurisdiction shall remain with the judge who would have presided at the hearing.

(3) If the court finds that the minor is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall grant the petition and permit the minor to consent to the abortion.

If the court finds that the abortion is in the best interests of the minor, the court shall give judicial consent to the abortion, setting forth the grounds for its finding.

If the court does not make either of the findings specified in division (C)(3) of this section, the court shall deny the petition, setting forth the grounds on which the petition is denied.

The court shall issue its order not later than twenty-four hours after the end of the hearing.

(4) No juvenile court shall have jurisdiction to rehear a petition concerning the same pregnancy once a juvenile court has granted or denied the petition.

(5) If the petition is granted, the informed consent of the minor, pursuant to a court order authorizing the minor to consent to the abortion, or judicial consent to the abortion, shall bar an action by the parents, guardian, or custodian of the minor for battery of the minor against any person performing or inducing the abortion. The immunity granted shall only extend to the performance or inducement of the abortion in accordance with this section and to any accompanying services that are performed in a competent manner.

(6) An appeal from an order issued under this section may be taken to the court of appeals by the minor. The record on appeal shall be completed and the appeal perfected within four days from the filing of the notice of appeal. Because the abortion may need to be performed in a timely manner, the supreme court shall, by rule, provide for expedited appellate review of cases appealed under this section.

(7) All proceedings under this section shall be conducted in a confidential manner and shall be given such precedence over other pending matters as will ensure that the court will reach a decision promptly and without delay.

The petition and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records under section 149.43 of the Revised Code.

(8) No filing fee shall be required of or court costs assessed against a person filing a petition under this section or appealing an order issued under this section.

(D) It is an affirmative defense to any civil, criminal, or professional disciplinary claim brought under this section that compliance with the requirements of this section was not possible because an immediate threat of serious risk to the life or physical health of the minor from the continuation of her pregnancy created an emergency necessitating the immediate performance or inducement of an

abortion.

(E) Whoever violates division (B) of this section is guilty of unlawful abortion, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section, unlawful abortion is a felony of the fourth degree.

(F) Whoever violates division (B) of this section is liable to the pregnant minor and her parents, guardian, or custodian for civil, compensatory, and exemplary damages.

Effective Date: 05-06-1998

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[Laws in effect as of January 3, 2006]
[CITE: 42USC1983]

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 21--CIVIL RIGHTS

SUBCHAPTER I--GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Codification

R.S. Sec. 1979 derived from act Apr. 20, 1871, ch. 22, Sec. 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

Amendments

1996--Pub. L. 104-317 inserted before period at end of first sentence ``', except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable''.

1979--Pub. L. 96-170 inserted ``or the District of Columbia'' after ``Territory'', and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective Date of 1979 Amendment

Amendment by Pub. L. 96-170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96-170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.

RULE 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(A) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, subject to the following exceptions:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) **Character of witness.** Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Effective: July 1, 1980.]

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Citation: 2007 U.S. Dist. LEXIS 80685

2007 U.S. Dist. LEXIS 80685, *

Constantinos Poneris, Plaintiff, v. Pennsylvania Life Insurance Company, Defendant.

Case No. 1:06-cv-254

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2007 U.S. Dist. LEXIS 80685

October 18, 2007, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured filed an action against defendant insurer, claiming that the insurer committed breach of contract and bad faith denial of benefits. The insured sought an order requiring the insurer to provide the name and last known address of other insureds who filed claims against the insurer but were not paid. The insurer opposed the request.

OVERVIEW: The insured asked the company to provide the names and last known addresses of other insureds who submitted claims for benefits under an accident benefits policy, but were denied benefits. The insurer opposed the request, claiming that information about other insureds was irrelevant, invaded their privacy rights, and was not discoverable until the insured established that he was entitled to coverage under his policy. The court found that the information was relevant to the insured's claim that the insurer had a practice of denying claims without conducting reasonable investigations. The court also found that Sixth Circuit precedent did not foreclose recovery on a bad faith tort claim, even though a related breach of contract claim failed, so the insured did not have to establish that his breach of contract claim was valid before he proceeded with discovery on his claim that the insurer acted in bad faith. That said, the court found that the rights of other insureds had to be protected, and it ordered the insurer to provide redacted versions of the claims files and ordered the insured not to use the information he received to contact other insureds, absent further court order.

OUTCOME: The court ordered the insurer to provide redacted versions of files it maintained on other insureds, but ordered the insured not to use the information he received to contact other insureds, absent further order of the court.

CORE TERMS: bad faith, insured, discovery, insurer, coverage, contract claim, tort claim, lawful, redacted, insurance policy, coverage issue, causes of action, breach of contract, bad faith denial, privacy rights, entitled to coverage, burdensome, bifurcated, discovery dispute, last known, claims files, summarizes

LEXISNEXIS® HEADNOTES**Hide**[Civil Procedure > Discovery > Relevance](#)[Contracts Law > Breach > General Overview](#)[Insurance Law > Bad Faith & Extracontractual Liability > Payment Delays & Denials](#)[Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Payments](#)

HN1 The United States District Court for the Southern District of Ohio, Western Division, does not read the United States Court of Appeals for the Sixth Circuit's decision in *Penton Media, Inc. v. Affiliated Insurance Co.* as establishing an absolute rule that discovery regarding a bad faith claim always must be stayed pending resolution of the underlying insurance coverage issue. [More Like This Headnote](#)

[Civil Procedure > Discovery > General Overview](#)[Insurance Law > Bad Faith & Extracontractual Liability > General Overview](#)[Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > General Overview](#)

HN2 If a plaintiff, in theory, can establish a bad faith claim even if there is no underlying insurance coverage, then discovery on the bad faith claim need not be stayed until resolution of the coverage issue. [More Like This Headnote](#)

[Civil Procedure > Discovery > General Overview](#)[Contracts Law > Breach > General Overview](#)[Insurance Law > Bad Faith & Extracontractual Liability > General Overview](#)

Torts > Business Torts > Bad Faith Breach of Contract > General Overview 

HN3 The United States Court of Appeals for the Sixth Circuit has not specifically foreclosed recovery on a bad faith tort claim in circumstances where an underlying breach of contract claim failed. Accordingly, discovery need not be bifurcated in all cases. [More Like This Headnote](#)

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For Pennsylvania Life Insurance Company, Defendant: [Scott R Brown](#) , LEAD ATTORNEY, Frost Brown Todd LLC - 1, Cincinnati, OH; [David W Walulik](#) , Frost Brown Todd LLC, Cincinnati, OH.

JUDGES: [Susan J. Dlott](#) , United States District Judge.

OPINION BY: [Susan J. Dlott](#) 

OPINION

ORDER GRANTING DOCUMENT PRODUCTION

This matter comes before the Court on a discovery dispute. A discovery conference was held on September 25, 2007. Both parties have briefed this issue. (Docs. 19, 20.)

This case arises from an insurance coverage dispute. Plaintiff has sued Defendant, his insurer, alleging six causes of action, including breach of contract and bad faith denial of benefits. As it pertains to this present discovery dispute, Plaintiff originally sought discovery of the following information:

18. [T]he name and last known address of each of the 288 insureds who were among those 832 insureds who made claims for payment on their Penn Life Accident Benefit Policies (Form 1900) from 1994 to the present but were not among the 544 insureds [*2] whose claims were paid, and identify any document that summarizes this information.

19. [T]he name and last known address of each of the 194 insureds whose claims on their Penn Life Accident Benefit Policies (Form 1900) from 1994 to the present were "declined," and identify any document that summarizes this information.

(Doc. 19-3.) The groups of insureds referenced in the requests excerpted immediately above will be referred to hereafter in this Order as the "Form 1900 Insureds." During the discovery conference, the parties and the Court discussed that Plaintiff sought, as an alternative to the name and address lists, redacted copies of the claims files for the Form 1900 Insureds.

Plaintiff seeks this evidence to help prove his bad faith denial of coverage claim and his claim for punitive damages. Defendant argues that evidence regarding the Form 1900 Insureds is irrelevant, invasive of the Insureds' privacy rights, and in any event, not discoverable unless and until Plaintiff establishes that he is entitled to coverage under his insurance policy. As to the first issue, relevancy, the Court preliminarily finds that the claims information concerning the Form 1900 Insureds is relevant [*3] to establish whether Defendant had a pattern or practice of denying claims based on a particular exclusion(s) without conducting reasonable investigations. See e.g., *Paolo v. Amco Ins. Co.*, No. 02-02367, 2003 WL 24027877, *1 (N.D. Cal. Sept. 17, 2003) (permitting discovery of other insureds to prove bad faith); *First Fidelity Bancorporation v. National Union Fire Ins. Co.*, No. 90-1866, 1992 U.S. Dist. LEXIS 341, 1992 WL 6859 (E.D. Pa. Jan. 13, 1992) (permitting discovery of bad faith pattern and practice evidence); but see e.g. *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331, 333 (E.D. Pa. 1999) ("Past claims by other insureds are not relevant to the present bad faith action before the court."); *Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99 (D.N.J. 1989) (finding evidence of how insurer treated other insureds to be relevant but disproportionately burdensome in the particular circumstances). The estimated cost of the discovery here, \$ 8,900, is substantial, but not overly burdensome.

The Court next addresses whether discovery in this action should be bifurcated such that Plaintiff is not entitled to discovery on his bad faith claim until he has established that he was entitled to coverage under the [*4] insurance policy. Defendant cites to *Penton Media, Inc. v. Affiliated Insurance Co.*, No. 06-4315, 245 Fed. Appx. 495, 2007 U.S. App. LEXIS 19669, * 18-21 (6th Cir. Aug. 15, 2007), for the proposition that an insured must establish his right to coverage before he is entitled to discovery as to his bad faith claim or other insureds' claims. The court in *Penton Media* found that the district court had not erred by granting summary judgment to the insurer on the plaintiff insured's breach of contract and bad faith claims without first permitting the plaintiff to obtain discovery regarding the bad faith claim. 2007 U.S. App. LEXIS 19669, at *19-21. The court found that the insurer in *Penton Media* had a reasonable justification based on its interpretation of the policy to deny coverage and that the insurer was not required to conduct any additional investigation. 2007 U.S. App. LEXIS 19669, at *20. **HN1** This Court does not read *Penton Media* as establishing an absolute rule that discovery regarding a bad faith claim always must be stayed pending resolution of the underlying insurance coverage issue. The *Penton Media* court chided the plaintiff therein for not providing citation to Ohio precedent supporting his request for discovery. This Court has found Ohio precedent [*5] which supports Plaintiff Poneris's discovery request here.

The issue is whether a bad faith tort claim can be established independent of the breach of contract claim. ^{HN2} If a plaintiff, in theory, can establish a bad faith claim even if there is no underlying coverage, then discovery on the bad faith claim need not be stayed until resolution of the coverage issue. The Ohio Supreme Court held in 1992 that a bad faith tort claim can be established in two ways:

[W]e hold that a cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim.

Motorists Mut. Ins. Co. v. Said, 63 Ohio St.3d 690, 699-700, 1992 Ohio 94, 590 N.E.2d 1228 (1992). Said was overturned two years later by Zoppo v. Homestead Ins. Co., 71 Ohio St. 3d 552, 554-55, 644 N.E.2d 397, 1994-Ohio-461 (1994), [*6] insofar as the Ohio Supreme Court held that actual intent was not an element of the tort of bad faith by an insurer. Zoppo did not overturn the Said principle that two types of bad faith claims exist under Ohio law. Essad v. Cincinnati Cas. Co., No. 00 CA 199, 2002 Ohio 2002, 2002 WL 924439, P 32 (Ohio App.). Some Ohio courts have held that an insured might be able to prove the second type of bad faith claim-based on failure to determine whether there was a lawful basis to deny coverage-even if he fails to establish the underlying coverage claim. Mid-American Fire & Cas. Co. v. Broughton, 154 Ohio App. 3d 728, 2003 Ohio 5305, 798 N.E.2d 1109, P 24 (2003); Essad, 2002 Ohio 2002, 2002 WL 924439, PP 32, 35; Bullet Trucking, Inc. v. Glen Falls Ins. Co., 84 Ohio App.3d 327, 333, 616 N.E.2d 1123 (Ohio App. 1992); but see Hahn's Elec. Co. v. Cochran, 2002 Ohio 5009, 2002 WL 3111850, *8 (Ohio App. 10 Dist.) (bad faith claim liability is predicated on contract claim).

Turning back to the Sixth Circuit interpretation of Ohio law, the Penton Media court did not distinguish between the two types of bad faith cases. The court's conclusion in Penton Media that the bad faith claim there could not be established apart from the coverage [*7] claim is not dispositive here. In another recent Sixth Circuit case, the court recognized that a bad faith claim against an insurer was "independent of the contract of insurance." Klein v. State Farm Fire & Cas. Co., No. 06-4155, 250 Fed. Appx. 150, 2007 U.S. App. LEXIS 23798, 2007 WL 2913915, *5 n.5 (6th Cir. Oct. 4, 2007) (citation omitted). The court in Klein examined the plaintiff's bad faith claim on the merits despite the fact that the breach of contract claim had been barred by the insurance policy's limitation period. 2007 U.S. App. LEXIS 23798, at *5-6. The Court finds that ^{HN3} the Sixth Circuit has not specifically foreclosed recovery on a bad faith tort claim in circumstances where the underlying breach of contract claim failed. Accordingly, discovery need not be bifurcated in all cases.

In this case, Plaintiff has alleged that Defendant acted in bad faith by failing to investigate his claim, failing to apply provisions of this policy, and failing to interpret the policy in his favor. (Doc. 1 at 14.) This claim might implicate the second type of bad faith claim. ¹ Accordingly, under the precedents cited above, the Court will permit Plaintiff to seek discovery of evidence relevant to the bad faith claim even before the coverage claim has been established.

FOOTNOTES

¹ The [*8] parties will have the opportunity after discovery is completed to establish whether Plaintiff's bad faith claim can be established independently from the breach of contract claim.

For the foregoing reasons, the Court hereby **ORDERS** that Defendant is to produce claims files for the Form 1099 Insureds with the redactions necessary to protect the confidential and private identifying information of the individual Insureds. The information to be redacted includes the Insureds' names, addresses, phone numbers, and social security numbers. The Insureds' dates of birth do not need to be redacted. The Court further **ORDERS** that Plaintiff is prohibited from using the information produced to attempt to contact directly or indirectly any of the individual Form 1099 Insureds absent further order of the Court. The Court believes that the scope of the discovery to be produced should remedy the concerns Defendant raised regarding the privacy rights of the Form 1099 Insureds.

IT IS SO ORDERED.

s/ Susan J. Dlott

Susan J. Dlott

United States District Judge

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