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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF FACTS	2
ARGUMENT	3
I. Proposition of Law No. 1 Public policy demands that a patient’s treatment records not be subject to discovery in civil matters in which that patient is not involved.	3
A. Confidentiality is a fundamental principle of the provision of health care services.....	3
B. Confidentiality is even more essential in mental health professional relationships.	6
C. Production of patient records to an unrelated private plaintiff violates the patient’s trust and jeopardizes the strong medical and public policies protecting confidentiality in mental health relationships.	9
II. Proposition of Law No. 2– Punitive damages for failure to report suspected child abuse is unnecessary and inappropriate.	11
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases

<i>Biddle v. Warren General Hospital</i> (1999), 86 OhioSt.3d 395	6
<i>Campbell v. Burton</i> (2001), 92 Ohio St.3d 336	14
<i>Jaffe v. Redmond</i> . 518 U.S. 1, 10 (1996)	9
<i>Morgan v. Fairfield Family Counseling Ctr</i> (1997) 76 Ohio St. 3d 1493	11
<i>Rice v. Certainteed</i> (1999), 84 Ohio St. 3d 417	15
<i>Yates v. Mansfield Bd. of Education</i> (2004), 102 Ohio St. 3d 205	13

Statutes

R.C. §2151.421	12, 14, 15
R.C. §2151.421(A)(3)	13
R.C. §2151.99	15
R.C. §2151.99(C)(1)	13
R.C. §2305.33	11
R.C. §2317.02(B)	6
R.C. §4731.22(B)	6, 14
R.C. §5101.61(A)	12
R.C. §5122.31(A)(1)	10

Regulations

42 C.F.R.Part B 2.22	10
O.A.C. §3793:2-1-06	10

Other Authorities

American Psychiatric Associations's Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, §4.1 (2006)	8
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Carol A. Ford & Abigail English, <i>Limiting Confidentiality of Adolescent Health Services: What are the Risks?</i> 288:6 JAMA 752-53 (Aug. 14, 2002).....	4
Jessica G. Weiner, <i>And the Wisdom to Know the Difference: Confidentiality vs. Privilege in the Self-Help Setting</i> , 144 U. Pa. L. Rev. 243, 263 (1995-96).....	7
J. Knapp & Leon VandeCreek, <i>Privileged Communications For Psychotherapists in Pennsylvania: A Time for Statutory Reform</i> . 60 Temp. L. Q. 267, 271-272 (1987)	7
Nova Online, Hippocratic Oath – Modern Version, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html	3
Principles of Medical Ethics of the AMA, Council on Ethical and Judicial Affairs (“CEJA”), <i>Current Opinions with Annotations</i> §IV (2006- 2007 Ed).....	4, 5
Ryan D. Jagim, et al., <i>Mental Health Professionals’ Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure</i> , 9 Prof. Psychology 458-59 (Aug. 1978).....	7
Tina L. Cheng, et al, <i>Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students</i> , 269:11 JAMA 1404 (Mar. 17, 1993)	4
U.S. Surgeon General, <i>Mental Health: A Report of the Surgeon General</i> , Chapter 7, Confidentiality of Mental Health Information: Ethical Legal and Policy Issues; Summary http://www.surgeongeneral.gov/library/mentalhealth/chapter7/sec3.html	8

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Psychiatric Physicians Association (formerly the Ohio Psychiatric Association) (“OPPA”) is the professional organization representing the interests of psychiatric-physicians in Ohio. Its more than one thousand members specialize in the diagnosis, treatment and prevention of mental illness, including substance abuse disorders. The Ohio Psychiatric Physicians Association is dedicated to promoting the highest quality of care for people with mental disorders and to serving the professional needs of Ohio psychiatric physicians. The Ohio Psychiatric Physicians Association is a district branch of the American Psychiatric Association, which was founded in 1844, represents more than 38,000 psychiatric physicians. The American Psychiatric Association serves as the voice and conscience of modern psychiatry.

The OPPA urges this Court to affirm the decision of the First District Court of Appeals. In particular, OPPA urges this Court to recognize the fundamental importance of confidentiality in connection with medical and mental health care, and to avoid unnecessarily burdening the healthcare system with the threat of punitive damages.

STATEMENT OF FACTS

OPPA adopts the Statement of Facts set forth in the Brief on the Merits of Defendant-Appellees, Planned Parenthood Southwest Ohio Region and Roslyn Kade, M.D.

ARGUMENT

I. **Proposition of Law No. 1** Public policy demands that a patient's treatment records not be subject to discovery in civil matters in which that patient is not involved.

A. **Confidentiality is a fundamental principle of the provision of health care services.**

The Hippocratic Oath recognized in the fourth century B.C. that confidentiality is a fundamental aspect of the physician-patient relationship. Traditionally, the Hippocratic Oath states, in pertinent part:

Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret."

Hippocratic Oath, 38 Harvard Classics 3 (Charles W. Elliott Ed. P.F. Collier & Son, 1910). In 1964, the traditional oath was modernized by Louis Lasanga, the Academic Dean of the Tufts University School of Medicine to state, in pertinent part: "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Nova Online, Hippocratic Oath – Modern Version, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html. This version of the Oath is still taken by many medical students today.

The reason for the long standing recognition of confidentiality as part of the treatment relationship is that it is necessary to allow patients to freely divulge personal information, however sensitive or embarrassing, so that the physician can most accurately determine the diagnosis and most relevant treatment. Without such a free flow of information, the quality of care a physician is able to provide to a patient is compromised.

Numerous studies have shown that the need to both actual and perceived confidentiality is especially important in providing services to teens. For example, even the perception of a lack of confidentiality can lead adolescents to avoid healthcare services. Tina L. Cheng, et al, *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269:11 JAMA 1404 (Mar. 17, 1993). Teens, in fact, will avoid healthcare services if their confidentiality is not assured. Carol A. Ford & Abigail English, *Limiting Confidentiality of Adolescent Health Services: What are the Risks?* 288:6 JAMA 752-53 (Aug. 14, 2002). In other words, the health care of patients, particularly those in their teens, is compromised if they do not believe the relationship and the services are confidential.

Due to the fundamental importance of assuring the free flow of information from the patient, the confidentiality of patient information is a basic principle of medical ethics. For example, the American Medical Association (“AMA”), has included patient confidentiality in its “Principle of Medical Ethics,” which are standards defining the essentials of physician behavior. Principle IV states:

A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

Principles of Medical Ethics of the AMA, Council on Ethical and Judicial Affairs (“CEJA”), *Current Opinions with Annotations* §IV (2006- 2007 Ed). CEJA further elaborated on the fundamental ethical principle of confidentiality, stating:

The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make

this disclosure with the knowledge that the physician will respect the confidential nature of the communication.

Id., Opinion 5.05. In addition, CEJA has opined on the importance of respecting a patient's privacy:

Physicians must seek to protect patient privacy, in all of its forms, including (1) physical, which focuses on individuals and their personal spaces, (2) informational, which involves specific personal data, (3) decisional, which focuses on personal choices, and (4) associational, which refers to family or others intimate relations. Such respect for patient privacy is a fundamental expression of patient autonomy and is a prerequisite to building the trust that is the core of the patient-physicians relationship.

Id., Opinion 5.059.

The Ohio General Assembly has incorporated the AMA Principles of Medical Ethics into the Ohio Medical Practices Act. Specifically, a physician can be denied licensure or can have his or her license suspended or revoked for violating the AMA's Principles. R. C. 4731.22(B)(18).

Aside from medical ethics, medical confidentiality has also been repeatedly recognized in Ohio. In *Biddle v. Warren General Hospital* (1999), 86 OhioSt.3d 395, this Court recognized a cause of action in tort for disclosure of nonpublic medical information. The testimonial privilege preventing a physician from testifying regarding communications from a patient is embodied in R.C. §2317.02(B). In addition, the Ohio General Assembly found the confidentiality of medical communications so important it also expressly empowered the Medical Board to discipline a physician for failure to preserve the confidentiality of patient information. R.C. §4731.22(B)(4) ("The board . . . shall . . . limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the

holder of a certificate for . . . (4) Willfully betraying a professional confidence.”). Thus, the fundamental importance of confidentiality and privacy of patient information is well-established in medicine and the law regulating medicine in the State of Ohio.

B. Confidentiality is even more essential in mental health professional relationships.

While confidentiality is fundamental in the general physician-patient relationship, it is even more essential when the relationship concerns the patient’s mental health.

Mental health experts have long recognized that confidentiality is absolutely necessary for productive psychotherapy. Ryan D. Jagim, et al., *Mental Health Professionals’ Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 Prof.

Psychology 458-59 (Aug. 1978) (“[t]he concept of confidentiality of client-therapist communications is at the core of the psychotherapeutic relationship.”). “The unauthorized disclosure of patient communications may hamper severely the effectiveness of psychotherapy and its usefulness to society. Studies show that some people, perceiving a lack of confidentiality, are reluctant to initiate contact with a psychotherapist. Other psychotherapy patients might be selective or cautious about what information they revealed. Fearing later disclosure, they might withhold important information and, as a consequence, limit severely the potential benefits of psychotherapy.

Id. (footnotes omitted). See also, Jessica G. Weiner, *And the Wisdom to Know the Difference: Confidentiality Vs. Privilege in the Self-Help Setting*, 144 U. Pa. L. Rev. 243, 263 (1995-96); Samuel J. Knapp & Leon VandeCreek, *Privileged Communications For Psychotherapists in Pennsylvania: A Time for Statutory Reform*. 60 Temp. L. Q. 267, 271-272 (1987). As noted in a report by the U.S. Surgeon General:

In the absence of strong confidentiality protections, some individuals with mental illness may decide that the benefit of treatment is outweighed by the risk of public disclosure. This would be harmful not only to the individual, but to a public that has a stake in the mental health of its members.

U.S. Surgeon General, *Mental Health: A Report of the Surgeon General*, Chapter 7, Confidentiality of Mental Health Information: Ethical Legal and Policy Issues; Summary <http://www.surgeongeneral.gov/library/mentalhealth/chapter7/sec3.html>.

The American Psychiatric Association, the national organization of which OPFA is a district branch, recognizes the particular importance of confidentiality in mental health services. Its ethical principles direct that “[p]sychiatric records, including even the identification of a person as a patient, must be protected with extreme care.

Confidentiality is essential to psychiatric treatment. This is based on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient.” American Psychiatric Association’s Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, §4.1 (2006).

Even the U.S. Supreme Court has recognized the ultimate importance of confidentiality in a mental health treatment relationship. In *Jaffee v. Redmond*, the U.S. Supreme Court recognized the existence of a common law psychotherapist-patient privilege in federal court, observing:

[B]ecause of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, *the mere possibility of disclosure* may impede development of the confidential relationship necessary for successful treatment.

518 U.S. 1, 10 (1996)(emphasis added). In other words, the potential for disclosure of some of the information that could be revealed in the treatment relationship is sufficient to negate the ability to provide effective treatment.

Furthermore, both Ohio and federal law recognize the heightened need for confidentiality in the treatment of mental health and related conditions. In addition to the confidentiality protections noted above that are afforded to general physician-patient relationship, Ohio law places additional restrictions on the ability to release information. For example, O.A.C. §3793:2-1-06 and 42 C.F.R.Part B 2.22 protect the confidentiality of drug and alcohol treatment information. Under these provisions, information regarding a patient, including the mere fact that an individual is a patient, cannot be released without an express written authorization from the patient designating exactly what information is to be released, to whom and for what purpose. Furthermore, the person to whom such information is released is prohibited from further dissemination of that information. With respect to medical records maintained by a mental health facility, R.C. §5122.31(A)(1) prohibits release of information to the patient or patient's legal guardian even with the patient's consent unless it is found to be in the patients best interest.

In light of the foregoing, it cannot be disputed that confidentiality, especially in the areas of mental health and drug and alcohol treatment, is an essential aspect of the treatment relationship and has been recognized in the law as fundamental.

C. Production of patient records to an unrelated private plaintiff violates the patient's trust and jeopardizes the strong medical and public policies protecting confidentiality in mental health relationships.

In the present case, plaintiff-appellants seek to obtain records of defendant-appellees' minor patients. The patients in question are not parties to the underlying lawsuit and have no interest in the suit. Perhaps most importantly, the patients in question have not consented to release of their medical information, and have had no opportunity to either assert or waive their confidentiality and privacy interests.

As demonstrated above, it is not just actual confidentiality of medical records that affects the ability to provide appropriate and effective medical and mental health care. Rather, the perception of confidentiality is equally important. Although the plaintiff is willing to accept the requested records with the specific patient names redacted, such a measure, without the patient's express consent, does not eliminate the violative nature of the request. Realizing their medical information has been released in a court case, patients will feel violated, even if their specific name is not attached. The perception of confidentiality will be severely damaged. As noted above, such damage will result in patients, particularly adolescents, not seeking appropriate and needed medical and mental health care.

OPPA recognizes that there are some circumstances in which other interests outweigh the need for confidentiality in treatment relationships. An examination of those circumstances, however, demonstrates that they are not only very limited, but also directly pertain to the patient who's information is to be released. For example, some exceptions allow a physician to release information to protect others from a specific threat posed by the patient. *See*, R.C. §2305.33 (physician may report information to a

patient's employer if the patient is the driver of a common carrier and the patient's infirmity or drug or alcohol abuse creates a risk of harm to passengers); *Morgan v. Fairfield Family Counseling Ctr* (1997) 76 Ohio St. 3d 1493 (psychotherapist has a duty to reveal information to protect third-parties if the psychotherapist knows that the patient is a substantial risk of harm to others). Other exceptions permit or require reporting to avoid or minimize future harm to that patient. *See*, R.C. §5101.61(A) (duty to report to the county department of human services if the physician has reasonable cause to believe an senior citizen is being abused, neglected or exploited); R.C. §2151.421 (duty to report to children services board if the physician knows or suspects that a child has suffered or faces child abuse).

In the present situation, however, plaintiff-appellants advocate for a vast extension to these exceptions to the fundamental confidentiality in medical and mental health treatment relationship. The suggested extension, to allow the discovery of medical records of unrelated patients, does not fall within any of the current exceptions, nor does it fit within the principles illuminating the present exceptions. Specifically, the patient records are not sought for the purposes of protecting against any specific threat to a third party posed by these particular patients, nor are the records sought for the immediate protection of these specific patients.

Rather, the records in this case are sought for the purpose of advancing a private cause of action of these particular, unrelated plaintiffs. On balance, desire of a private plaintiff to access health information of others to assist in their case for damages is insignificant compared to need to for confidentiality. Accordingly, given the great societal interest in preserving the confidentiality of treatment relationships, OPPA urges

this Court to affirm the Court of Appeals decision, protecting the rights of the public and the specific third-party patients.

II. Proposition of Law No. 2– Punitive damages for failure to report suspected child abuse is unnecessary and inappropriate.

OPPA agrees with this Court in its pronouncement that “child abuse is a . . . devastating force in our society.” *Yates v. Mansfield Bd. of Education* (2004), 102 Ohio St. 3d 205. For this reason, OPPA supports reporting of child abuse. OPPA further agrees that those who violate the child abuse reporting requirements should be held accountable. Nevertheless, OPPA disagrees with plaintiff-appellants’ position that punitive damages are a necessary or effective means of encouraging reporting with respect to physicians.

Under current law, a physician is required to make a report to the children services agency if the physician “knows, or has reasonable cause to suspect, based upon facts that would cause a reasonable person in similar position to suspect, as a result of the communication or any observations made during that communication, that the . . . patient has suffered or faced a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect.” R.C. §2151.421(A)(3). In addition to this duty to report child abuse, the General Assembly created express penalties for violation of this duty. As set forth in R.C. §2151.99(C)(1) “the offender is guilty of a misdemeanor of the fourth degree.” Thus failure to report known or suspected child abuse is punishable by criminal conviction.

In addition to the criminal penalty, physicians face a more serious penalty for failure to comply with the child abuse reporting requirement. The State Medical Board of Ohio, in regulating the practice of medicine in Ohio, is authorized to revoke the license

of a physician who fails to report under R.C. §2151.421. Specifically, the Medical Board's disciplinary statute provides as grounds for discipline:

(11) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;

(12) Commission of an act in the course of practice that constitutes a misdemeanor in this state . . .

R.C. §4731.22(B). The Medical Board is authorized to take this action even if the physician is not criminally prosecuted for the violation. Thus, if a physician fails to report under R.C. §2151.421, the physician is subject to a disciplinary action against his or her license, potentially resulting in the loss of licensure.

Loss of licensure, or even restriction of licensure, is a serious matter than may well result in the inability of the physician to practice medicine anywhere. Any action taken by the State Medical Board of Ohio is reported to the National Practitioners Data Bank, which affects the physician's ability to obtain and maintain clinical privileges at any hospital. Additionally, any state in which the physician holds or seeks a medical license will also be advised of the Ohio disciplinary action, making it difficult or impossible for the physician to simply relocate. In other words, the failure to make a required report under R.C. §2151.421 can result in the end of the physician's career.

In addition to the criminal penalties and loss of licensure, a physician can also be held liable for compensatory damages in the civil suit. *Campbell v. Burton* (2001), 92 Ohio St.3d 336. Punitive damages, on the other hand, are not provided for in the statutory framework enacted by the General Assembly for enforcement of the reporting requirement. In *Rice v. Certainteed* (1999), 84 Ohio St. 3d 417, this Court considered whether punitive damages were authorized in civil employment discrimination actions.

In that case, the relevant statute expressly provided for “a civil action for damages, injunctive relief, or any other appropriate relief.” This Court noted that the word “damages” was not expressly limited to compensatory damages, and therefore found that the statute envisioned punitive damages. In doing so, this Court noted:

In assessing the language employed by the General Assembly, the court must take words at the usual, normal, or customary meaning. Most importantly, it is the court’s duty to “give effect to the words used [and to refrain from] insert[ing] words not used.”

Id. at 419 (citations omitted). Thus, because the statute in that case provided for damages, punitive damages were permitted.

The statutes at issue in the present case do not resemble the one in the *Rice* case. Specifically, neither R.C. §2151.421 nor the penalty provisions of R.C. §2151.99 provide for civil damages. Rather, the statutes are silent as to the availability of damages to private plaintiffs. As such, the argument that the General Assembly envisioned the award of punitive damages for violation of R.C. §2151.421 cannot be reached without adding “words not used” to the statutes.

OPPA submits that faced with civil liability, criminal conviction and destruction of one’s career, no other penalty or sanction is necessary or appropriate to encourage reporting of child abuse. In this context, and faced with a healthcare system that is overburdened both financially and in terms of human resources, the availability of punitive damages is contrary to the public’s interest. Specifically, punitive damages will not create an incentive for physicians to comply with the reporting requirements beyond the penalties already in existence. It will, however, encourage potential plaintiffs to bring questionable claims against their health care providers, seeking to “hit the lottery” with

an award of punitive damages. For these reasons, OPPA urges this court to affirm the Court of Appeals decision that punitive damages are not available.

In light of the foregoing, Amicus Curiae, Ohio Psychiatric Physicians Association urges this Court to affirm the decision of the Court of Appeals. Specifically, this Court is urged to recognize the fundamental public interest in assuring confidentiality in order to promote appropriate and effective healthcare outweighs the plaintiff-appellants' interest in seeking discovery to promote their personal claim for damages. Further, the Court is urged to recognize that permitted claims for punitive damages in this context will not serve any public interest, and will further burden the healthcare system with unnecessary and unmeritorious claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the true and accurate copy of the foregoing *Brief Of Amicus Curiae Ohio Psychiatric Physicians Association* was served via first class U.S.

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