

IN THE SUPREME COURT OF OHIO

JOHN and JUNE ROE, Individually
and as parents and next friend of
JANE ROE, a minor,

Plaintiffs-Appellants,

v.

PLANNED PARENTHOOD
SOUTHWEST OHIO REGION, et al.,

Defendants-Appellees.

Case No. 2007-1832

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District
(No. 060557)

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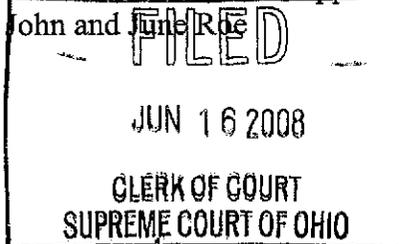


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STATEMENT OF THE CASE

The central issue in this case is whether an allegation of failure to report sexual abuse in their own situation gives the Roes a right to see privileged medical records and sexual abuse reports with respect to all minors who sought an abortion during the past ten years from Planned Parenthood Southwest Ohio Region and Dr. Roslyn Kade. In arguing that they have the authority to examine even redacted versions of these highly confidential documents, the Roes ask this Court to create new law out of whole cloth and to override the plain language of existing statutes. They insist that the Court engraft a provision for award of punitive damages onto R.C. 2151.421 by judicial fiat. They invite the Court to ignore R.C. 2151.421(H), which absolutely prohibits discovery and use of sexual abuse reports by third parties. And they urge the Court to devise a new standard for determining when “necessity” in civil litigation should overcome the medical records privilege of persons who are not parties to the case. The Court should reject these overtures to convert a conventional discovery dispute into a monumental change of the settled expectations and ironclad protections of Ohio law.

As the basis of their invasive attempt to re-engineer the discovery standards of Ohio civil procedure, the Roes have alleged a purported breach of several statutory obligations owed to Jane Roe: the duty to report abuse of a minor (R.C. 2151.421); the duty to notify or obtain consent from a minor’s parents prior to an abortion procedure (R.C. 2919.12) and (R.C. 2919.121); and the duty to obtain the informed consent of a minor prior to an abortion (R.C. 2317.56). The Roes sought discovery of medical records and sexual abuse reports associated with other minors who had become patients of Planned Parenthood during the past ten years. Planned Parenthood and Dr. Kade moved

for a protective order to prohibit discovery of these privileged records and reports. The Roes in turn filed a motion to compel discovery of those materials. They claimed that their interest in seeking punitive damages entitled them to go through the Planned Parenthood files.

The Common Pleas Court granted the motion to compel. Reasoning that the Roes had an unspecified “tremendous” need to review this information, and that their “tremendous” need superseded the privacy interests of the young women who had relied upon the confidential auspices of Planned Parenthood in seeking highly-personal medical treatment over the past decade, the Court ordered Planned Parenthood and Dr. Kade to produce the documents after redaction of unspecified “patient-identifying information.” (Decision/Entry, June 21, 2006, at 12.)

Planned Parenthood and Dr. Kade appealed pursuant to R.C. 2505.02(B), which defines an appealable “provisional remedy” to include “a proceeding ancillary to an action, including, but not limited to, a proceeding for . . . discovery of privileged matter.”

The Court of Appeals reversed. It determined, as a matter of law, that the claimed interest of the Roes in seeking an increased amount of punitive damages does not outweigh the confidentiality of sexual abuse reports or the interests of the non-party minors in the privacy of their medical records, which contain highly personal information as to sexual conduct, pregnancy, sexually-transmitted diseases or abortions. The Court began with the familiar proposition that “the scope of discovery is limited to relevant non-privileged matters that are reasonably calculated to lead to admissible evidence” although “even privileged matters are subject to discovery where it is necessary to protect or further a countervailing interest that outweighs the privilege.” (Decision, at ¶ 32,

citing *Biddle v. Warren General Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518, syl. para. 2). The Court “assume[d] without so holding that the discovery sought by the Roes was relevant” and found that “[t]he abuse reports and abortion records were unquestionably confidential and privileged under the physician-patient privilege.” (Id., at ¶ 33.)

The Court of Appeals then applied the legal standard that this Court adopted in *Biddle*, and concluded that no interests of the Roe family outweighed the privilege. It found that the Roes do not need the personal reports and medical records of minors of other families in order to prove their claims under (1) the former “notice statute,” R.C. 2919.12, because that statute excuses compliance when a pregnant minor provides false or misleading information; (2) the “written-consent” statute, R.C. 2919.121, because that statute had been enjoined and suspended at the time of Jane Roe’s abortion; (3) the “duty to report” statute, R.C. 2151.421, because reports of abuse in other cases are unrelated to whether appellees failed to report abuse in Jane Roe’s case; or (4) the “informed consent” statute, R.C. 2317.56, because the reports as to other patients are unrelated to whether appellees informed Jane Roe of the required information. “The redacted medical records were not necessary for the Roes to establish whether Planned Parenthood had violated Ohio statutes in its treatment of [Ms. Roe].” (Id., at ¶ 40.)

Medical records and sexual abuse reports related to other Planned Parenthood patients also are not a predicate of the Roes’ claim for punitive damages, the Court of Appeals ruled. (Id., at ¶ 38.) The Roes may recover punitive damages for a single violation of R.C. 2919.12 or R.C. 2317.56, said the Court, so evidence of alleged

violations of statutory duties owed to other individuals is wholly unnecessary to prove their own claims. (Id., at ¶ 38.) The Court explained that:

This is not a class action. This is not a criminal case
[T]he issue is whether Planned Parenthood violated its
duties to the Roes.

* * *

Further, this case provides no persuasive reason for a
judicial endorsement of the Roes acting as private attorneys
general [T]he information sought was not necessary
to this case.

(Id., at ¶ 40-42.)

The Court of Appeals concluded that, even if the records were tenuously necessary to prove the Roes' claims, the privacy rights of minors and other families who are not parties to this case would outweigh any probative value of the records to the Roes. (Id., at ¶ 44.) Accordingly, the Court did not reach the issue of whether disclosure of the records would infringe upon the non-party minors' constitutional rights. (Id., at ¶ 45.)

On October 5, 2007, the Roes asked this Court to assume jurisdiction. The Court rejected their request on January 23, 2008. The Roes moved for reconsideration on February 1, 2008. The Court granted their motion and, on March 26, 2008, ordered the Hamilton County Court of Appeals to certify the record for consideration by this Court.

STATEMENT OF FACTS

Some portions of the Statement of Facts that the Roes present in their Merit Brief are accurate, but others are not. It is undisputed that Jane Roe obtained an abortion from appellees on March 30, 2004, when she was fourteen years old. It is also undisputed that, prior to the procedure, appellees provided required medical information to Ms. Roe, she signed a written informed consent form, appellees called the telephone number at which Ms. Roe had said they could reach her father, and appellees notified the adult male who answered the telephone (and identified himself as Ms. Roe's father) about the procedure.

It likewise is undisputed that Ms. Roe did not tell appellees that her pregnancy was the result of sexual abuse by her adult soccer coach, and that appellees did not file a report of sexual abuse under R.C. 2151.421(A). Nor is there any dispute that Ms. Roe lied to appellees about the identity and age of her sexual partner; that she lied to them about whether her parents knew of the pregnancy and whether they consented to the abortion; that she lied to them about her father's telephone number; that she lied to them when she introduced the person accompanying her as her step-brother; and that she conspired with her sexual partner to impersonate her father when appellees called the telephone number she provided to notify her father of the procedure. (See Merit Brief of Appellants, at 2-3.) Planned Parenthood and Dr. Kade did not learn about any of this elaborate hoax until later. The parties disagree as to whether Jane Roe's parents were aware of her sexual activities.

There is no evidence of record to support other portions of the Statement of Facts, and most of these "facts" are untrue. For example, there is no evidentiary basis for the claim that "Planned Parenthood has a 'don't ask don't tell' policy with respect to its

reporting obligations.” (Merit Brief of Appellants, at 4.) On the contrary, Planned Parenthood has produced copies of its policies and operating procedures, which expressly require employees to report suspected sexual abuse. There is no evidence that its policies and procedures were violated in this case.

Appellants also misrepresent that “[w]hen [Ms.] Roe arrived at Planned Parenthood’s Clinic . . . [appellees] did not attempt to learn the age of the father of her child.” (Merit Brief of Appellants, at 4.) In fact, the undisputed evidence of record establishes that Ms. Roe was asked about the age of the father, and that she told appellees that she had been impregnated by a classmate. See Motion of Plaintiffs’/Appellees’ to Dismiss Appeal, Exhibit 3, at 18 (“Jennifer Castillo [an employee of appellee Planned Parenthood] and [appellee] Dr. Kade asked questions to elicit the age of Roe’s partner”, and she “told them her partner went to her school”). Compare Merit Brief of Appellants, Statement of Facts, *supra*, at 4 (appellees “intentionally did not ask minor participants to disclose . . . the age of the minor’s sexual partner . . . [Appellees] did not attempt to learn the age of the father of Roe’s child”).

There similarly is no evidentiary record that supports the fusillade of irrelevant and untrue accusations included in their Statement of Facts -- for example, that appellees “coached minors on what not to say” in order to avoid their statutory obligations; that appellees should be required to report every teen pregnancy as “sexual abuse” unless they can confirm that the father is a minor, on the ground that “70% of all babies born to teenaged girls are fathered by men older than 20”; and that appellees “learned that Roe was suffering from a sexually transmitted infection” (and, thus, were also required to report sexual abuse by an adult on this basis). (Merit Brief of Appellants, at 4.) These

so-called “facts” have no foundation in the record and are irrelevant to any issue raised in this appeal, even if they were true.

The Roes also assert that “[b]etween January 1, 2000 through December 31, 2004, Planned Parenthood did not make even one report of ‘suspected’ abuse.” (Id., at 4.) But the Roes concede just four pages later that “Planned Parenthood. . . made reports” when it was able to elicit statements from minor patients about the ages of their partners that raised suspicions of sexual abuse. (Id., at 8.) There is nothing beyond this bare, unsubstantiated assertion that suggests Planned Parenthood or Dr. Kade engaged in any “pattern” or “practice” of failing to report sexual abuse.

ARGUMENT

Planned Parenthood and Dr. Kade urge the Court to affirm the ruling of the Court of Appeals for the following reasons.

STANDARD OF REVIEW

The Roes complain in vain that the Court of Appeals for the First Appellate District erred because it reviewed the trial court's order under a de novo standard rather than an abuse of discretion standard. (Merit Brief of Appellants, at 10, 14.) They claim that in two earlier cases the Court of Appeals "explicitly held that its review of precisely the same type of discovery order is under the 'abuse of discretion' standard." (Id., at 10, citing *Alcorn v. Franciscan Hospital* 1st Dist. No. C-06061, 2006-Ohio-5896, appeal dismissed, 113 Ohio St.3d 1454, 2007-Ohio-1718, and *Richards v. Kerlakian* 1st Dist. 162 Ohio App.3d 823, appeal denied, 108 Ohio St.3d 1416, 2006-Ohio-179.)

They are mistaken. The standards set by the Court of Appeals in those earlier cases remained inviolate in this case. In *Alcorn*, the Court of Appeals specifically held that "[t]he propriety of disclosure [of privileged medical records] is a question of law, and we review the trial court's decision de novo." (2006-Ohio-5896, at ¶9, citing *Biddle*, supra.) Similarly, the Court did not "explicitly hold" in *Richards* that an abuse of discretion standard applied; it never even considered whether a de novo standard was proper. (2005-Ohio-4414, at ¶8.)

Appellate courts review issues of law -- such as the legal question of privilege -- under a de novo standard even though discovery orders are generally subject to the more deferential abuse-of-discretion standard. See, e.g., *Medical Mutual of Ohio v. Schlotterer*, 8th Dist. No. 89388, 2008-Ohio-49, at ¶21; *Wright v. Perioperative Med. Consultants*, 1st Dist. No. C-060586, 2007-Ohio-3090, at ¶9; *Huntsmen v. Aultman*

Hospital, 160 Ohio App.3d 196, 2005-Ohio-1482, 826 N.E.2d 384; *Rulong v. Rulong* (8th Dist. Dec. 16, 2004), No. 84953, 2004-Ohio-6919, at ¶7. Here, as in *Alcorn*, 2006-Ohio-5896 at ¶ 15, “the initial question of privilege was a matter of law” even though “management of the discovery process was solely within the discretion of the trial court.”

The Roes do not dispute this legal rule or distinguish the case law that has applied it. Instead, they argue that “the Appellate Court was required to use the ‘abuse of discretion’ standard . . . because none of the information Appellees were ordered to produce is privileged or confidential.” (Merit Brief of Appellants, at 14; original emphasis.) They erroneously assume -- and with no supporting legal authority -- that possible future redaction destroys the present privileged status of the reports and records. Their argument further assumes that they have the right to divest the highly personal medical records of these young women of their privileged and confidential status so long as some identifying information has been redacted.

Courts have resoundingly rejected that assumption. See, e.g., *In re Tenet Healthcare, Ltd.* (Tex App. Mar. 31, 2006), No. 12-05-00310, 2006 WL 860076 (medical records are privileged in their entirety and redaction does not defeat the privilege); *In re Columbia Valley Reg. Med. Center* (Tex App. 2001), 41 S.W.3d 797, 799-800 (same); *Ortiz v. Ikeda* (Del. Super. Mar. 26, 2001), No. 99C-10-032, 2001 WL 660107 (same); *Davis v. American Home Products Corp.* (La. App. 1999), 727 So.2d 647, 650 (same); see also *Northwestern Memorial Hosp. v. Ashcroft* (C.A. 7 2004), 362 F.3d 923, 929 (whether patients’ identities would remain confidential by excluding their names and identifying numbers is “questionable at best”; evaluation summaries and patient histories still render the potential for recognition “very high”) (quotations and citations omitted).

In any event, the de novo standard of review applies in this appeal because this case arises from a trial court order that the Roes' unsubstantiated need for the records overcomes the legal privilege afforded the medical records and reports of other young women. The abuse of discretion standard has never applied to legal questions of privilege. Accordingly, the Court of Appeals properly applied the de novo standard of review, as should this Court.

Proposition of Law No. I:

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

Appellees' Response:

Punitive damages are not recoverable under R.C. 2151.421 because that statute, which created a duty and concomitant liability that did not exist in common law, does not expressly authorize punitive damages awards.

For the reasons set forth in the discussions of Proposition of Law Nos. II, III, and IV, the medical records and sexual abuse reports at issue here are simply not subject to disclosure. However, even if no privilege or statute barred their disclosure, the Court of Appeals correctly held that the discovery of non-party minors' confidential medical records and sexual abuse reports is not necessary for the Roes to establish a punitive damages claim under the sexual abuse reporting statute, R.C. 2151.421, because that statute "does not provide for punitive damages." Decision, at ¶ 37. There is no merit to the contention in support of the first proposition of law that "[t]hat holding is wrong." (Merit Brief of Appellant, at 15.)

The Roes assert, without any legal authority, that "the lack of any damage provision" in R.C. 2151.421 "means that appellants are entitled to seek both compensatory and punitive damages." (Id., at 18.) They are wrong. For almost a century, this Court has held that courts cannot award punitive damages for violations of a statutory duty that did not exist at common law unless the General Assembly expressly authorized punitive damages in the statute. That rule of law precludes punitive damage awards under R.C. 2151.421. The Court of Appeals' ruling was correct and should be affirmed.

First, it is beyond dispute that the unique mandatory reporting duty and concomitant liability created by R.C. 2151.421 did not exist at common law. See *David M. v. Erie Cty. Dept. of Human Services* (June 30, 1994), 6th Dist. No. E-93-40, 1994 WL 319053, appeal denied (1994), 71 Ohio St.3d 1423 (rejecting the argument “that a hospital and a physician owe a common law duty to their child patient to . . . inform the proper agencies when the hospital or physician suspects that the patient was abused . . .”). The Court specifically rejected the contention that R.C. 2151.421 “codified” some pre-statutory common law duty to report sexual abuse. (Id.) See also *John Doe I v. Roman Catholic Diocese of Galveston-Houston* (S.D. Tex. 2007), No. H-05-1047, 2007 WL 2817999, at *31 (noting that state courts “have addressed the issue of whether there is a common law duty to report child abuse” but “[n]o court has found such a duty”). (Emphasis added.)

Second, Ohio law has always provided that punitive damages cannot be awarded for violation of a statutory duty that did not exist at common law unless the General Assembly expressly authorizes punitive damage awards in “plain terms.” See *Kleybolte v. Buffon* (1913), 89 Ohio St. 61, 66, 105 N.E. 192:

The statute [Ohio Rev. Stat. 4212-2] . . . is in derogation of the common law The Court cannot read into it anything that does not come within the clear meaning of the language used, and the statute should not be given force beyond its plain terms If it had been intended that the injured party should have the right to recover exemplary or punitive damages, or any damages other than actual damages, the Legislature would have made such a provision.

Ohio appellate courts have uniformly followed that rule. See, e.g., *Brown v. Henderson* (4th Dist. 1996), No. 96-CA-2, 1996 WL 537470, at *2 (“[p]unitive damages may not be awarded pursuant to [a] statutory cause of action” that did not exist at common law

unless the statute specifically authorizes such damages); *Byrley v. Nationwide Life Ins. Co.* (6th Dist. 1994), 94 Ohio App.3d 1, 21, 640 N.E.2d 187 (“[p]unitive damages are not recoverable under a statutory cause of action if the statutory cause of action was created in derogation of the common law” and the statute does not mention punitive damages); and *Hauter v. McIlwaine* (June 11, 1982), 6th Dist. No. L-81-364, 1982 WL 6444, at *4 (“R.C. 311.05 is not a mere statement of the common law Had the legislature intended to [further] broaden the liability . . . to include punitive damages, the legislature easily could have done so by a specific provision within the statute”).

Third, it is indisputable that R.C. 2151.421 does not expressly authorize awards of punitive damages for violation of its requirements. In fact, the Roes concede that R.C. 2151.421 is silent as to what, if any, civil remedies are available to a person who has violated the statute. (Merit Brief of Appellants, at 15.) Nevertheless, they argue that R.C. 2151.421 affirmatively allows for punitive damages because other statutes that explicitly authorize a civil action for “damages . . . and any other appropriate relief” have been construed to mean both compensatory and punitive damages. As noted above, however, R.C. 2151.421 does not provide for, or even mention, “damages” or “other appropriate relief.” Their discussion of *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 704 N.E.2d 1217, is therefore inapposite; the Court in *Rice* simply concluded that a different statute, R.C. 4112.99, which explicitly provides for “a civil action for damages, injunctive relief or any other appropriate relief,” authorizes an award of punitive damages upon a finding of actual malice. 84 Ohio St.3d at 419.

This Court’s holding in *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539, likewise provides no support for the claim for punitive damages under

R.C. 2151.421. The Roes characterize *Campbell* as holding that a civil penalty -- which appellants then define as punitive damages -- is imposed by R.C. 2151.421. However, *Campbell* did not discuss civil penalties and certainly did not equate them with punitive damages. The issue that the Court addressed in *Campbell* was whether R.C. 2151.421 expressly imposed liability on political subdivisions and their employees for purposes of the Political Subdivision Tort Liability Act. This Court held that the criminal sanction imposed by R.C. 2151.99 for a violation of R.C. 2151.421 constitutes an express “liability” within the meaning of the Political Subdivision Tort Liability Act because “liability” includes both civil and criminal liability. The holding in *Campbell* does not remotely support the contention that R.C. 2151.421 authorizes punitive damages.

In short, punitive damages are not recoverable for violations of R.C. 2151.421 because that statute, which creates a duty and liability that did not exist at common law, contains no language authorizing punitive damages. Application of this rule is especially compelling with respect to R.C. 2151.421 -- a statute that, on its face, does not authorize any civil remedies at all. Absent express statutory authorization for punitive damages, this Court should reject the Roes’ request to create such a remedy by fiat. Indeed, such a ruling would open the floodgates to litigants claiming punitive damages under countless Ohio statutes and would unravel years of precedent by this Court, and years of legislative reform by the Ohio General Assembly, that has sought to carefully regulate the award of punitive damages.

Proposition of Law No. II:

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

Appellees' Response:

Reports of suspected sexual abuse are confidential and privileged pursuant to R.C. 2151.421(H) without regard to whether the reporter also has filed other reports of suspected sexual abuse involving different minors in unrelated incidents.

R.C. 2151.421(H) prohibits the discovery and use of sexual abuse reports.

Despite that absolute statutory bar, the Roes contend that a sexual abuse report involving a non-party is usable and admissible against the person who made the report if a different minor alleges that the reporter failed to make a sexual abuse report in her own case. They argue that reports that were made about other minors will somehow show that the failure to make a report in this case was "part of a pattern and practice" of failing to report sexual abuse. (Merit Brief of Appellants, at 20.) The Court should reject this argument as a matter of law and logic.

First, this proposition of law contradicts the express and absolute statutory prohibition against disclosing or using these reports as evidence in any civil action against the person who made the reports. R.C. 2151.421(H)(1) states that:

[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.

The Roes seek to use the sexual abuse reports made by Planned Parenthood and Dr. Kade against Planned Parenthood and Dr. Kade, in direct violation of that statutory prohibition. This statute provides no exceptions, and this Court is not permitted to create one. *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶20 (a court may not create an “an additional statutory exclusion not expressly incorporated into [the] statute by the legislature”).

Second, this proposition ignores the fact that the narrow exception to the physician-patient privilege that is created by the statute applies only to reports that give rise to a civil action, not to other reports about other minors who have never filed suit:

[T]he 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.

R.C. 2151.421(G)(1)(b) (emphasis added). The present case is not a judicial proceeding resulting from reports of sexual abuse that Planned Parenthood and Dr. Kade made about other minors; the claims are based on the fact that Planned Parenthood and Dr. Kade did not make a report of sexual abuse with respect to Jane Roe. Accordingly, sexual abuse reports that Planned Parenthood and Dr. Kade made with respect to other minors are outside the exception to the physician-patient privilege created by R.C. 2151.421(G)(1)(b).

The Roes contend that it would encourage sexual abuse reporting if sexual abuse reports were subject to public disclosure whenever their author fails to report sexual abuse of another minor. (Merit Brief of Appellants, at 20.) But that interpretation of R.C. 2151.421 would defeat the purpose of its confidentiality provisions: to encourage people to report suspected sexual abuse by ensuring that the reports will not be disclosed. Adoption of this unfounded proposition of law would allow disclosure of sexual abuse

reports and thus necessarily discourage reporting. The purpose of the statute will be thwarted if health care professionals are told that the composite of their sexual abuse reports will be a repository of evidence for use against them whenever any individual patient alleges that they should have suspected sexual abuse and filed a report in her own case.

In short, through the absolute statutory bar of R.C. 2151.421(H) against disclosure of sexual abuse reports, the legislature has duly established the policy of this State that such a bar promotes -- not impedes -- reporting of sexual abuse. The Roes' contention that this statutory bar, and the policy it articulates, should be reconsidered, is not properly directed to this Court. They should go to the General Assembly instead.

Adoption of this proposition of law also would invade the rights and interests of innocent minor victims for whom sexual abuse was properly reported under R.C. 2151.421. According to the Roes, reports of other victims' sexual abuse -- which are privileged and inadmissible into evidence even if those victims sue the person who reported the abuse -- lose their privileged status and become admissible into evidence if someone else sues that person for failing to report suspicions of sexual abuse in her own case. There is no conceivable reason or policy justification for finding that the privacy interests of minor victims of sexual abuse should be contingent on whether the person who reported their abuse did or did not report abuse in the case of a different patient.

The Roes concede 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." (Merit Brief of Appellants, at 19.) Yet they ask this Court to create an exception to the confidentiality provisions of R.C. 2151.421 that does not exist.

“Had the General Assembly intended to include such a provision, it could have done so.”
Weaver, 2004-Ohio-6549, at ¶16. The General Assembly did not subject the statutory privilege to an exception that would be operative whenever a person who reports abuse in one case allegedly fails to report abuse in a separate case. This Court should not do so in its place.

Proposition of Law No. III:

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.

Appellees' Response:

The purported relevance of non-party minors' privileged medical records and abuse reports does not establish that discovery is necessary or outweighs the countervailing privacy interests of the non-party minors.

This Court held in *Biddle* that privileged records may be disclosed only if “disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality.” *Biddle*, 86 Ohio St.3d at 402 (emphasis added). The Roes do not dispute that this standard applies to this discovery dispute. Nor do they dispute that the Court of Appeals applied the *Biddle* standard. Instead, in support of their third proposition of law, the Roes contend that medical records and abuse reports of non-party minors might provide evidence of “a pattern of wrongful/criminal conduct” and, thus, could be relevant to their punitive damages claim. (Merit Brief of Appellants, at 21.) Indeed, they argue at length that the records and reports are relevant to their claims.

But whether the records might have some relevance to their claim for punitive damages is immaterial under *Biddle*, immaterial to the rulings below, and thus immaterial to the issues presented by this appeal.¹ The Court of Appeals did not hold that the medical records and abuse reports are irrelevant to the Roes' claims. In fact, the Court of Appeals “assume[d] without so holding that the discovery sought by the Roes was

¹ Further, the Roes attempt to insert an additional proposition of law that was not included in their Memorandum in Support of Jurisdiction: that medical records of non-party minors and sexual abuse reports are “also highly relevant” to their compensatory damages claims -- in addition to their “claims for punitive damages.” The Roes did not include this legal proposition in their Memorandum in Support of Jurisdiction. They thus have not properly presented it for exercise of the Court's jurisdiction in this case.

relevant,” but it went on to hold that this evidence “was not necessary” to their claims. (Id., at 11, 18.) The Court of Appeals addressed the necessity of disclosing the privileged reports and records, rather than their relevance to the Roes’ claims, because that is the standard that *Biddle* established.

As set forth below in response to Proposition of Law No. IV, the Roes have never claimed that they will be unable to prove their claims unless they can avail themselves of the private medical records and abuse reports relating to other young women. The privilege applicable to the reports and records therefore was not overcome, and there was no reason for the Court of Appeals to reach the question of whether they are relevant. As a result, the relevance of the reports and records to the Roes’ claims can make no difference to this appeal, and Proposition of Law No. III is unfounded.

Moreover, the abuse reports made by Planned Parenthood and Dr. Kade, and the medical records of those non-party patients, reveal nothing about the circumstances of cases in which they did not make reports. While the Roes strenuously insist that “pattern and practice” evidence is relevant to their claims, they never explain how those abuse reports and medical records could establish a pattern or practice of statutory non-compliance by Planned Parenthood and Dr. Kade. They certainly cannot establish a pattern and practice of not making abuse reports.

Further, the Roes admit that Planned Parenthood “made reports” if “a patient had disclosed information (e.g., the ages of the patient and her sexual partner or an explicit allegation of abuse).” (Merit Brief of Appellants at 8.) Thus, the records of patients for whom no abuse report was made will not show an unlawful age-disparate relationship or an allegation of abuse (as the Roes admit, a report is made in those situations). Because

those records will not show that the patient was in an unlawful relationship or otherwise a victim of abuse, they simply cannot establish a pattern and practice of failing to report known or suspected abuse.

Indeed, Jane Roe's own records prove this point exactly. Her records do not reveal that she was in an unlawful age-disparate relationship (rather, she told Planned Parenthood that her partner went to her school), and they do affirmatively reflect informed consent and parental notice. It is only on facts existing outside of those documents that the Roes can base their claims. But the Roes repeatedly represented on the record that they would not contact non-party patients. The non-party records thus are the limit of what they would discuss in this foray. (See June 21, 2006 Decision/Entry Granting Plaintiff's [sic] October 7, 2005 Motion to Compel at 6.)

This Court's recent decision in *Kraynak v. Youngstown City School Dist. Bd. of Educ.*, --- Ohio St.3d ---, 2008 Ohio 2618, --- N.E.2d ---, underscores how misguided the Roes' discovery requests are. In that case, this Court held that under former R.C. 2151.421, which applies here, a subjective standard governs the question of whether a person knew or suspected child abuse such that the reporting obligation was triggered. Abuse reports that were filed, and those patients' medical records, cannot possibly reveal the subjective knowledge or suspicions of appellees in other cases where reports were not made. Records that do not memorialize a disclosure by the patient of actual or threatened abuse likewise are incapable of establishing subjective knowledge or suspicion by Planned Parenthood or Dr. Kade.

Even Jane Roe's own medical records fail to do so. As the records will not show a pattern and practice of failing to comply with the law, they are no more relevant -- even

if that were the determinate -- to the Roes' claims for compensatory damages (even if that issue were properly before the Court) than to their punitive damages claims.

Finally, the Roes' reliance on *Philip Morris USA v. Williams* (2007), 127 S.Ct. 1057, is misplaced. First, there was no dispute in that case that the plaintiff was entitled to seek punitive damages as a matter of law for the claim he asserted. He was not using such records to establish his right to be able to seek such damages. Here, by contrast, as discussed above, the Roes are not entitled to seek punitive damages under R.C. 2151.421. Second, based on due process concerns, the Supreme Court held that punitive damages cannot be premised on harm to third parties. *Id.* Thus, the records at issue here cannot be used to establish the amount of punitive damages. *Id.* Moreover, while evidence of conduct toward third parties might be relevant to a different aspect of the punitive damages equation -- namely, the "reprehensibility" of the conduct -- the Supreme Court has made clear that such evidence can be used only if it shows "actual harm to nonparties." *Id.* at 1064 (emphasis added).

The medical records and sexual abuse reports at issue here could not show actual harm, any more than they could show a pattern and practice of failure to comply with the law. Again, to determine whether Planned Parenthood violated the law in regard to any individual patient and whether that patient suffered harm as a result, the Roes would need to go beyond the redacted records, to learn the patient's name in order to contact and depose her, and to otherwise investigate the facts surrounding the patient's pregnancy and treatment. But this they have pledged they will not do. Finally, even to the extent that *Philip Morris* would allow plaintiffs to introduce some evidence of actual harm to nonparties to show reprehensibility, nothing in *Philip Morris* or any other case cited by the

Roes suggests that civil plaintiffs are entitled to obtain privileged records of non-parties in discovery in an attempt to bolster their individual claims for punitive damages.

The other cases cited by Roes lend no support to their position. Thus, *TXO Prod. Corp. v. Alliance Resources Corp.* (1993), 509 U.S. 553, 113 S.Ct. 2711, 125 L.Ed.2d 366, in a plurality opinion that pre-dated *Philip Morris*, allowed that harm to others may be taken into account as part of a jury's punitive damages determination, but the Court in no way addressed when, if ever, plaintiffs might be entitled to discover non-parties' confidential information in the hope that it would show wrongdoing or harm to others. *State v. Smith* (1990), 49 Ohio St.3d 137, 551 N.E.2d 190, held that "evidence of 'other acts' to prove intent to commit a crime and the identity of the perpetrator is admissible where two deaths occur under almost identical circumstances," and likewise says nothing about the discoverability of the privileged records at issue here. *State v. Elersic* 11th Dist. No. C000023, 2003-Ohio-7218, another criminal case, simply followed *Smith* and upheld the admission of evidence of similar crimes committed by the defendant. *Smithhisler v. Dutter* (1952), 157 Ohio St. 454, 105 N.E.2d 868, held that actual malice need not be proved for a plaintiff to recover punitive damages in an action involving intentional alienation of the affections of a spouse, and again did not address the discoverability of privileged information.

In sum, the Court of Appeals properly found that the issue of relevance was immaterial unless the Roes overcame the privileged status of the reports and records by establishing that disclosure is necessary to prove their claims. The Roes did not do so, as set forth below, and thus their relevancy arguments in Proposition of Law No. III are immaterial and should be rejected.

Proposition of Law No. IV:

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.

Appellees' Response:

Discovery of non-party minors' privileged medical records in an attempt to raise the requested amount of punitive damages is not necessary when non-privileged evidence is available as to every element of a claim and, even if there were a right to obtain such privileged information, it would not outweigh the privacy interests of non-party minors in their confidential medical records.

Proposition of Law No. IV challenges the ruling that disclosure of the privileged abuse reports and medical records of non-party minors is not necessary for the Roes to establish their claims for compensatory or punitive damages, and that, under the balancing test established in *Biddle*, the privacy interests of the non-party minors outweigh the Roes' interest in increasing the amount of punitive damages they may potentially recover. (Decision, *supra*, at 42, 44.) Significantly, even the trial court did not find that disclosure was necessary; it merely believed that it "must . . . order the discovery . . . if the discovery is appropriate." (Decision/Entry, at 4; emphasis added.)

The Roes do not contend that the Court of Appeals applied an incorrect legal standard when it reversed the trial court's ruling. On the contrary, they propose a balancing test that would also focus on whether the party seeking discovery of privileged information needs the information to establish a claim. (Merit Brief of Appellants, at 28.) They also do not object to the Court of Appeals' conclusion that there is no reason to "further address or weigh the parties' interests" if there is a "lack of necessity" for disclosure of the privileged sexual abuse reports and medical records. (*Id.*, at ¶ 45.)

The Roes state that they “need” the privileged reports and records in order to prove their claims, but they never attempt to explain why that is true. (Indeed, they acknowledge that pattern and practice evidence is not necessary to establish their entitlement to punitive damages, but simply argue that the abuse reports and medical records of other minors are relevant to the amount of punitive damages they hope to recover at trial. (Merit Brief of Appellants, at 23-4.))

Instead, the Roes devote their entire argument in support of Proposition of Law No. IV to the contention that certain statistical data they sought in discovery is not privileged. (Id., at 29-34.) But that issue is moot; Planned Parenthood and Dr. Kade have located previous compilations of the data and have provided the requested discovery to the Roes. (Merit Brief of Appellants at 31-32 & n.15.)²

Disclosure of the other documents that the Roes seek -- the abuse reports and medical records relating to other minors -- would not be “necessary” in this case, even if they had no other evidence to support their compensatory and punitive damages. Those documents would not establish their claim that Planned Parenthood and Dr. Kade did not comply with statutory requirements with respect to Jane Roe. Discovery of the sexual abuse reports that Planned Parenthood and Dr. Kade filed with respect to some patients

² Even if the issue had not been mooted by Planned Parenthood’s disclosure of the requested statistical data, it is questionable whether the Court of Appeals would have had jurisdiction over the issue. The Roes argue that “[t]he Appellate Court had no jurisdiction over the part of the Discovery Order dealing with the raw, statistical data (i.e., numbers)” on the ground that “Appellees did not appeal the Trial Court’s order directing them to produce the numbers.” (Merit Brief of Appellants at 30.) Importantly, the Court of Appeals’ opinion did not mention, much less rule on, whether Planned Parenthood could be required to disclose this data. Because the Roes concede this issue was not appealed to the Court of Appeals, and because the Court of Appeals did not address it, it is not properly before this Court.

cannot logically establish any pattern or practice with respect to patients for whom they did not file reports. Moreover, the redacted reports and medical records will reveal nothing about the personal circumstances of these patients and therefore cannot establish a pattern or practice of behavior that violates the statutes. Also, as discussed above, this Court's recent decision in *Kraynak*, 2008-Ohio-2618, makes clear that liability for violating R.C. 2151.421's reporting provisions is governed by a subjective standard of what a person knew or suspected. *Kraynak*, 2008-Ohio-2618, at ¶15. Finally, the Roes have claimed throughout this litigation that the statistical data they sought would establish their claims. (Merit Brief of Appellants, at 34-35.) That information has now been provided to them.

In short, the Court of Appeals correctly found that the Roes failed to carry their burden of proving that disclosure of the privileged medical records and reports is necessary to establish their claims for compensatory or punitive damages. "[T]he mere prospect that [a party] could ultimately be compelled to pay a large sum to victorious plaintiffs does not outweigh the interest of a third party in retaining the confidentiality of his treatment history." *Sirca v. Medina Cty. Dept. of Human Services*, 145 Ohio App.3d 182, 187, 762 N.E.2d 407. Indeed, the interest of other young women and Ohio families in preserving the privacy of their extraordinarily personal medical records and sexual abuse reports is clearly more compelling than the interest of the pseudonymous Roes in a larger damages award in this case. The transcendent importance that Ohio law confers upon these privacy interests is evidenced by the multiple confidentiality statutory provisions, cited above, that the General Assembly included in the statutes.

Moreover, the privacy interests of other minors is heightened here because those interests include a constitutional right to information privacy. Indeed, the Supreme Court of the United States, the Supreme Court of Ohio, and courts nationwide all have recognized that due process protections include a constitutional right of information privacy. See, e.g., *Whalen v. Roe* (1977), 429 U.S. 589 (right to privacy encompasses right to security of personal information); *State ex rel. Keller v. Cox* (1999), 85 Ohio St.3d 279, 707 N.E.2d 931 (police officers' files, which included family information and medical records, were protected by constitutional right of information privacy); *Powell v. Schriver* (C.A. 2 1999), 175 F.3d 107 (holding that transsexual inmate had privacy right of confidentiality in his medical records); *Sterling v. Borough of Minersville* (C.A. 3 2000), 232 F.3d 190, 195 (officer's threat to disclose arrestee's suspected homosexuality violated arrestee's constitutional right to privacy); *Taylor v. Best* (C.A. 4 1984), 746 F.2d 220, 225 (recognizing that right to privacy includes avoiding disclosure of personal information).

Nor would redaction somehow render these records non-privileged or less worthy of protection, as the Roes suggest. Section 2317.02(B) of the Ohio Revised Code, which establishes the physician-patient privilege, provides no authority for the Roes' contention that redaction of identifying information takes the records outside the scope of the non-party minors' privilege. (Appx. 1-4.) Indeed, R.C. 2317.02(B) enumerates the circumstances under which the physician-patient privilege can be qualified or waived -- notably, redaction is not among them. *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 20 (a court may not create an "an additional statutory exclusion not expressly incorporated into [the] statute by the legislature.").

Moreover, redacting identifying information does nothing to address the concerns regarding portions of the medical records relating to evaluation, diagnosis, and treatment, all of which are indisputably privileged. As courts have established, the privilege of a medical record is not a function of its redactability. See page 9 above. In short, redacting identifying information does not defeat the medical records privilege or otherwise affect the Roes' burden of proving necessity.

The case upon which the Roes rely, *Poneris v. Pennsylvania Life Ins. Co.* (S.D. Ohio 2007), No. 1:06-CV-254, 2007 WL 3047232, did not involve even remotely similar interests. The plaintiff brought a bad faith claim against his insurer for denying his disability insurance claim without conducting a reasonable investigation. He sought discovery of certain information as to whether the insurer had conducted investigations for similar claims by other insureds with identical policies. Thus, *Poneris* involved the discovery of selected information, not the discovery of entire medical charts, let alone the medical charts of minors or the intensely personal and private sexual abuse and medical information that the Roes want to obtain and use for their own purposes in the present case. Additionally, the insureds in *Poneris* had released the relevant information to their insurance company for purposes of coverage and reimbursement. Moreover, in *Poneris*, the patient sought third party records that were factually similar to his own.

Here, however, the Roes are asking for the records of every minor who sought an abortion, whether similarly situated to the Roes or not. (For instance, Jane Roe's treatment by Planned Parenthood and Dr. Kade involved multiple deceptions she perpetrated against them. Yet she is not seeking just the medical records of other minor patients who may have lied to them.) Finally, the plaintiff in *Poneris*, unlike the Roes,

needed the non-privileged information to establish his bad faith claim. In short, the *Poneris* decision is not applicable here.

Plaintiffs further insist that the Court of Appeals put “the cart before the horse” by noting that the “facts and evidence nowhere indicate that Planned Parenthood systematically and intentionally evaded its statutory duties.” (Decision, *supra*, at ¶41.) But in balancing a civil plaintiff’s interest against the interests of the unrepresented patients whose records she seeks, a court could appropriately take into account that – as here – the plaintiff’s specific factual allegations and admissions she has made about the care she received from the defendant contradict her conclusory allegation of intentional violation of the law. The United States Supreme Court’s recent decision in *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), supports that approach. In holding that Federal Rule of Civil Procedure 8(a) requires plaintiffs to “plausibly” allege facts entitling them to relief in order to withstand a Rule 12(b)(6) motion to dismiss, the Court stated: “Asking for plausible grounds to infer [misconduct] . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].” *Id.*, 127 S.Ct. at 1965. An assertion of “bare” misconduct, such as the “pattern and practice” allegation in the Roes’ complaint, “will not suffice,” said the Court, “lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.” *Id.* at 1966 (citations omitted). The Roes’ bare allegations of pattern and practice of statutory violations, that are contradicted by the specific facts they allege, should not entitle them to rove through ten years of confidential medical records of non-parties.

The Court of Appeals correctly held that the Roes cannot invade the privacy rights of others through involuntary production of information that they hope will serve a much larger goal than compensation for Jane Roe. “This is not a class action. . . . The issue is not whether 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.” (Decision, *supra*, at ¶ 40.) There is “no persuasive reason for a judicial endorsement of the Roes acting as private attorneys general.” (*Id.*, at ¶ 41.)

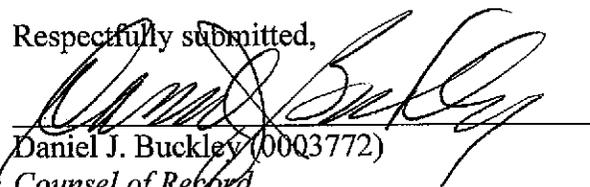
Moreover, the Roes’ unwarranted discovery requests cannot be justified by their implicit contention that compulsory disclosure of such information to private citizens will promote prosecutions for violation of R.C. 2151.421. While the statute is silent as to any civil remedies, R.C.2151.421 explicitly provides for a criminal sanction if it is violated. In this case, the prosecutor investigated the failure to report and decided that no prosecution was warranted.

The Roes accordingly have not carried their burden of showing that their “need” for the non-party minors’ privileged medical records and sexual abuse reports to prove Jane Roe’s claims outweighs the privacy interests that other minors have in these confidential memorializations of extraordinarily personal details of their own lives.

CONCLUSION

Planned Parenthood Southwest Ohio Region and Roslyn Kade, M.D. urge the Court to overrule the propositions of law submitted by the Roes and affirm the judgment of the Court of Appeals.

Respectfully submitted,


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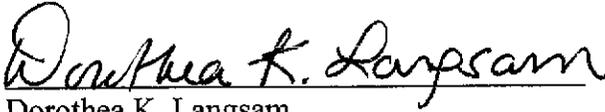
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APPENDIX

R.C. 2317.02 (Privileged communications)Appendix pp.1-9

2317.02 Privileged communications.

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)(i) If the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug

of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician or dentist as provided in division (B)(1)(c) of this section, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient relation.

(5)(a) As used in divisions (B)(1) to (4) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray,

photograph, financial statement, diagnosis, or prognosis.

(b) As used in division (B)(2) of this section, "health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) "Ambulatory care facility" means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. "Ambulatory health care facility" does not include the private office of a physician or dentist, whether the office is for an individual or group practice.

(ii) "Emergency facility" means a hospital emergency department or any other facility that provides emergency medical services.

(iii) "Health care practitioner" has the same meaning as in section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of the Revised Code.

(v) "Long-term care facility" means a nursing home, residential care facility, or home for the aging, as those terms are defined in section 3721.01 of the Revised Code; an adult care facility, as defined in section 3722.01 of the Revised Code; a nursing facility or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20 of the Revised Code; a facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the "Social Security Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(d) As used in divisions (B)(1) and (B)(2) of this section, "drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 307.628 of the Revised Code or the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(C)(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may

testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian science Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(F) A person who, if a party, would be restricted under section 2317.03 of the Revised Code, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G)(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757. of the Revised Code as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies:

(a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.

(b) The client gives express consent to the testimony.

(c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent.

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under section 2151.421 of the Revised Code.

(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 of the Revised Code or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to section 4931.35 of the Revised Code or Title II of the "Communications Act of 1934," 104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

Nothing in this section shall limit any immunity or privilege granted under federal law or regulation.

(J)(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, in any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim

under Chapter 4123. of the Revised Code, under any of the following circumstances:

- (a) If the patient or the guardian or other legal representative of the patient gives express consent.
 - (b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.
 - (c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.
- (2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.
- (3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.
- (4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to, any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.
- (K)(1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.
- (2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:
- (a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.
 - (b) The individual who received crisis response services gives express consent to the testimony.
 - (c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L)(1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about any of the following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply to any of the following:

(a) A criminal action or proceeding involving an offense under sections 2903.01 to 2903.06 of the Revised Code if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

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