

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. 07-1832

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

Appeal No. C-060557  
Trial No. A-0502691

BRIEF OF AMICUS CURIAE OHIO PSYCHOLOGICAL ASSOCIATION,  
IN SUPPORT OF DEFENDANTS-APPELLEES

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## **INTERESTS OF AMICUS CURIAE**

Amicus Curiae, Ohio Psychological Association, urges this Court to uphold the decision of the First District Court of Appeals and protect the confidentiality of medical records and the sanctity of the privilege that exists between healthcare providers and their patients. Plaintiffs-Appellants are asking this Court to change Ohio's statutory and case law, and greatly expand the discovery and damages available to plaintiffs under R.C. 2151.421. This change in law would have a negative impact on healthcare providers and patients outside of the abortion debate. The intent of the Ohio Psychological Association in filing this brief is not to take a position on abortion. Instead, its intent is to emphasize the fundamental belief in the importance of the privilege protecting medical and counseling records of patients.

The Ohio Psychological Association is an organization representing Ohio's mental health professionals. Its members are committed to the diagnosis and treatment of mental health disorders of children and adults through therapy and counseling. Amicus is submitting this brief because the privilege that protects a patient's records, including notes generated in counseling sessions, is critical to providing effective treatment to mental health patients. Amicus is particularly concerned that if Plaintiffs-Appellants are successful in destroying that privilege, potential patients will choose not to seek necessary counseling, for themselves or their children, for fear that their innermost thoughts and feelings will be subject to discovery by unknown third parties. This result would be devastating to children and adults across the state.

## STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the Merit Brief of Defendants-Appellees.

## STATEMENT OF FACTS

Amicus adopts the statement of facts set forth in Merit Brief of Defendants-Appellees.

## LAW AND ARGUMENT

### I. First Proposition of Law

**The privilege protecting communications between non-party patients and their healthcare providers must be upheld, and the redaction of certain identifying information in the patients' records will not protect their confidentiality.**

"Pursuant to R.C. 4732.19, confidential communications between a licensed psychologist and client are 'privileged in the same manner as communications between a physician and a patient.'" *McCoy v. Maxwell* (2000), 139 Ohio App. 3d 356, 358, 743 N.E.2d 974, citing *State v. Stewart* (1996), 111 Ohio App. 3d 525, 530, 676 N.E.2d 912. "R.C. 2317.02 governs the physician-patient privilege and has been interpreted by the Supreme Court of Ohio to mean that the privilege applies to all communications between a physician and patient unless it is waived." *McCoy* at 358, citing *In re Miller* (1992), 63 Ohio St. 3d 99, 109, 585 N.E.2d 396.

It is undisputed that the non-party patients have not waived their statutorily protected privilege. Unlike most cases where the production of a party's medical

records is at issue, this Court does not have the benefit of hearing from the non-party minors whose confidentiality will be violated if Plaintiffs-Appellants are successful in changing Ohio law. Contrary to the assertions of Plaintiffs-Appellants, the interests of children will not be protected by having their privilege destroyed without their waiver or consent.

The members of the Ohio Psychological Association are intimately aware of the devastating effects of child abuse in our society. Psychologists are on the front lines counseling children and adults whose lives have been shattered by abuse. The discovery sought by Plaintiffs-Appellants will not help to ease the pain of child abuse. In fact, it could have exactly the opposite effect.

The decision to seek counseling is often a choice made by an individual, either on behalf of himself/herself or on behalf of a child. If Plaintiffs-Appellants are permitted to invade the privacy of the non-party patients' medical records, it could deter people from entering counseling in the future. Parents who are making the difficult decision about whether to seek psychological counseling for a troubled child may decide against it for fear of having their child's confidential information and private thoughts turned over to strangers and their attorneys. An adult who suffered abuse as a child, and is therefore more likely to continue the cycle of abuse, may avoid necessary counseling, and more children may be abused as a result of his/her untreated mental disorders.

Because courts recognize the importance of the confidentiality of a patient's counseling records, discovery of those records is only permitted in very limited circumstances. For example, in *McCoy, supra*, the court reversed the trial court's granting of defendant's motion to compel records from plaintiff's psychologist. *McCoy*,

139 Ohio App. 3d at 359. The court recognized that “information contained in [plaintiff’s] psychological or psychiatric records may be extremely relevant to [defendant’s] defense of the defamation suit; however, relevancy alone does not waive the physician-patient or psychologist-client privilege.” *Id.* The court held that the records remained privileged. *Id.* In *McCoy*, the counseling records belonged to a party in the case and were actually relevant to the opposing party’s defense. Here, the medical and counseling records at issue belong to unrepresented non-parties, so the need to protect their rights is even more compelling.

This case provides this Court an opportunity to reestablish its holding in *Biddle v. Warren General Hosp.* (1999), 86 Ohio St. 3d 395, 1999-Ohio-115, 715 N.E.2d 518, which has been misconstrued and unjustifiably expanded by lower courts to allow discovery that was not at issue in the *Biddle* decision. In *Biddle*, this Court went out of its way to emphasize the context in which it was making the decision:

It is appropriate at this point to step back for a moment and review the facts of this case. A hospital hands over to a law firm thousands of patient registration forms containing information about the medical condition of each patient, including diagnoses of alcohol and drug abuse, mental illness and sexually transmitted diseases. The law firm reviews these forms for the sole purpose of finding amongst them potential Social Security claimants. The firm then calls these potential claimants and gives them unsolicited advice that they should take legal action in the form of obtaining SSI.... We can find no interest, public or private, that would justify the recognition of a privilege under these circumstances.

*Biddle*, 86 Ohio St. 3d at 405. Within that context, this Court held that “an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship”, and “[a] third party can be held liable for inducing the unauthorized,

unprivileged disclosure of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship." *Id.*, paragraph 1 and 3 of syllabus.

Here, Plaintiffs-Appellants are making a similar argument that the law firm made in *Biddle*. They argue that they need the records of the non-party patients for the benefit of the patients, as well as the alleged benefit of unknown third parties. This Court rejected that argument in *Biddle* and it should here as well:

Properly construed, this argument goes to the question of privilege. As we explained above, there may be special situations where the interests of the patient will justify the creation of a privilege to disclose. However, the only interest that has been recognized in this regard is the patient's interest in obtaining medical care and treatment, and disclosure is limited to those who have a legitimate interest in the patient's health. (citations omitted) Otherwise, it is for the patient—not some medical practitioner, lawyer, or court—to determine what the patient's interests are with regard to personal confidential medical information.

*Id.* at 407-8. As discussed in Section II below, Plaintiffs-Appellant's alleged interest in the non-party patients' records is not legitimate, and their attempted intrusion into the applicable privilege should not be permitted.

Redacting "identifying information" from the records will not adequately protect the non-party patients' substantial rights to confidentiality and privacy. This is particularly true with respect to psychological counseling records, like some of the records at issue here. Counseling records typically contain descriptions of people and events that would allow a person's identity to be discovered, and his/her confidentiality to be destroyed, even if the person's name and social security number is redacted from the records.

The First District Court of Appeals recognized this problem in *Wozniak v. Kombrink* (1991), 1st Dist. No. C-89053, 1991 Ohio App. LEXIS 606. In *Wozniak*, the

court reversed an order allowing the production of privileged non-party medical records, emphasizing that redaction of certain identifying information does not necessarily protect a patient's confidentiality:

[t]he risk of disclosing a patient's identity cannot be entirely eliminated by the masking of a patient's name or identifying personal data such as telephone or social security numbers. A patient's identity can be ascertained from a unique juxtaposition of a variety of circumstances.

*Wozniak*, 1991 Ohio App. LEXIS 606 at \*12.

In this case, like in *Wozniak*, “[t]o the extent rights of privacy and confidentiality are implicated by the information at issue, those rights would irretrievably be lost should the information be erroneously divulged by the trial court’s order.” *Id* at \*8. This Court should uphold the decision of the First District Court of Appeals and protect the privacy and confidentiality of non-party patients.

## **II. Second Proposition of Law**

**The plain and unambiguous language of R.C. 2151.421 does not allow the recovery of punitive damages.**

This Court’s recent decision in *Kraynak v. Youngstown City School Dist. Bd. Of Educ.*, 2008-Ohio-2618, is instructive on the application of R.C. 2151.421 in this context, and in particular on the issue of punitive damages. This Court recognized the following requirements in construing and applying statutory language:

In resolving the standard for determining whether a person as a matter of law suspects child abuse under former R.C. 2151.421, thereby triggering a duty to report, we must first examine the language of the statute. We look to the plain language of the statute to determine the legislative intent. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St. 3d 78, 81, 1997-Ohio-310, 676 N.E.2d 519. We apply a statute as written when its meaning is unambiguous and definite. *Portage Cty. Bd. Of Comm’rs v. Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. Of Edn.* (1996), 74 Ohio St. 3d 543, 545, 1996-Ohio-291, 660 N.E.2d 463. Finally, an

unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language. *Burrows*, 78 Ohio St. 3d at 81.

*Kraynak*, 2008-Ohio-2618, at ¶ 10.

It is undisputed that the plain language of R.C. 2151.421 does not mention punitive damages. In their Brief, Plaintiffs-Appellants recognize that “[t]his Court has long held that statutes enacted by the legislature must be enforced as written.” Merit Brief of Plaintiffs-Appellants, p. 19 (citations omitted). Plaintiffs-Appellants’ own words defeat their claim for punitive damages under R.C. 2151.421:

Indeed, this Court has repeatedly instructed courts to enforce statutes ‘as written’ and not ‘recast the language’ to ‘accommodate some unstated meaning or purpose.’ (citations omitted) Second, this Court has instructed that courts must not circumvent the intent of the Ohio legislature and add a provision to a statute which the court or a party may believe the Ohio legislature left out: ‘Had the General Assembly intended to include such a provision, it could have done so.’ (citations omitted) In other words, ‘it is improper for a court to add words to those utilized by the General Assembly.’ (citations omitted)

Merit Brief of Plaintiffs-Appellants, p. 19.

Had the General Assembly intended to allow recovery of punitive damages under R.C. 2151.421, it could have done so. It did not. This Court should reject Plaintiffs-Appellant’s attempt to add words to those utilized by the General Assembly in order to accommodate an unstated meaning or purpose.

The members of the Ohio Psychological Association take their reporting obligations under R.C. 2151.421 very seriously. The protection of their patients is of their utmost concern. Allowing the recovery of punitive damages to one plaintiff will not serve to protect future unrelated patients, as asserted by Plaintiffs-Appellants. Even if a plaintiff recovers punitive damages in a failure to report case, that judgment will

unfortunately not stop the next abuser. This change in law could, however, impact insurance rates of doctors and psychologists, which would have a negative effect on the healthcare industry as a whole.

Furthermore, there is a real risk that jurors may award punitive damages against a healthcare provider in a failure to report case as a result of their anger about the underlying abuse as opposed to the failure to report the abuse. The Supreme Court of Texas recognized this potential problem in *Perry v. S.N* (Tex. 1998), 973 S.W.2d 301 (declining to recognize a civil cause of action for failure to report under an abuse-reporting statute). In *Perry*, the court analyzed the legislative intent behind the vastly different criminal penalties for abuse of a child versus failure to report abuse under the reporting statute. *Perry*, 973 S.W.2d at 308.

This evidence of legislative intent to penalize nonreporters far less severely than abusers weighs against holding a person who fails to report suspected abuse civilly liable for the enormous damages that the abuser subsequently inflicts. The specter of disproportionate liability is particularly troubling when, as in the case of the reporting statute, it is combined with the likelihood of 'broad and wide-ranging' liability of collateral wrongdoers. . . . (citations omitted)

*Id.*

Even if punitive damages were arguably recoverable under R.C. 2151.421, under the *Kraynak* decision, the medical and counseling records of past non-party patients are not relevant in determining whether the healthcare provider in this case *subjectively* suspected that Jane Roe had been abused. *Kraynak*, 2008-Ohio-2618, at ¶ 15 (holding that the former version of R.C. 2151.421, which is applicable here, contained a subjective standard).<sup>1</sup> Furthermore, Plaintiffs-Appellants will be unable to determine

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<sup>1</sup> The trial judge's conclusion that the former version of the statute contained a subjective standard is correct. The statute asks whether the school employee knows of child abuse or

from the medical and counseling records of past non-party patients whether other healthcare providers at Planned Parenthood subjectively suspected that past patients had been abused, but failed to report the abuse.

As the Court of Appeals correctly found, Plaintiffs-Appellants are not entitled to punitive damages under R.C. 2151.421, and the privileged records at issue are not necessary for Plaintiffs-Appellants to prove their other claims. This Court's decision in *Kraynak* makes the Court of Appeals' decision even more compelling.

### **CONCLUSION**

The privilege protecting medical and counseling records is critical to the ability of healthcare providers to effectively treat and counsel patients and clients. The privilege should only be ignored in extraordinary circumstances that do not exist in this case. This is particularly true because the reason that Plaintiffs-Appellants' allegedly want the records, to support their claim for punitive damages, is not supported by the statutes and case law on which they rely. Plaintiffs-Appellants are not entitled to medical and counseling records of non-party patients, and the Court of Appeals' decision denying them access to the confidential records must be upheld.

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suspects child abuse. The statute does not ask whether the school employee "knew of should have known" or "suspected or should have suspected" or "knew or had reasonable cause to suspect" child abuse. Rather, R.C. 2151.421(A)(1)(a) simply asks whether the school employee "knows or suspects" child abuse. *Id.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L.A. Hinegardner', is written over a horizontal line.

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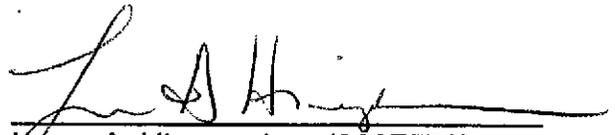
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