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I. Introduction

Planned Parenthood raises three flawed arguments to challenge the Roes' right to complete discovery of information "likely to lead to the discovery of admissible evidence." Planned Parenthood incorrectly argues: 1) the redacted medical records and abuse reports are not "necessary" for the Roes to prove their case, 2) punitive damages are not available under R.C. 2151.421 and 3) that R.C. 2151.421(H) prohibits discovery of abuse reports. Each of Planned Parenthood's arguments is meritless because Planned Parenthood attempts to set the threshold for discovery artificially high, misstates the Roes' intended use of the requested information, and flatly misinterprets Ohio statutes and precedent. As the trial court held, redacting patient identifying information, coupled with a protective order, sufficiently protects the confidentiality interests of a patient.

When reduced to its essence, Planned Parenthood's and its *Amici's* argument is a request that this Court act as a "super-legislature" and amend Ohio statutes by applying well-settled and uncontroversial legal doctrines in a manner by which defendants who are in the abortion industry are treated differently and preferentially than any other defendants in litigation. This different and better treatment by the courts – often referred to as the "abortion distortion" – was identified and criticized by former United States Supreme Court Justice O'Connor:

Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but – except when it comes to abortion – the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from even-handedly applying uncontroversial legal doctrines to cases that come before it.

Thornburgh v. American College of Obstetricians & Gynecologists (1986), 476 U.S. 747, 814, 106 S.Ct. 2169. The balance has shifted since that decision, and many courts, including the United States Supreme Court in its recent decision in *Gonzales v. Carhart* (2007), 550 U.S. _____, have clearly stated that courts may no longer provide this better and preferential treatment to abortion providers. As such, the procedural and substantive law of Ohio must be applied in the same, even-handed manner as it would in any case not involving abortion. The First District opinion and Appellees, unfortunately, attempt to revive the abortion distortion.

For these reasons, the Court should uphold the trial court's decision by reversing the Court of Appeals decision.

II. Standard Of Review

Planned Parenthood misstates the standard of review the First District should have applied. The proper standard of review has been articulated in the American Law Reports, and adopted by Ohio courts: "Whether a discovery privilege applies is a matter of law, but the question of whether specific materials are part of a privileged medical study is a factual question within that legal determination." *Selby v. Fort Hamilton Hospital*, 12th Dist. CA2007-05-126, 2008-Ohio-2413 at ¶ 10, quoting 69 A.L.R.5th 559, § 2(b). In sum, the application of a particular point of law to facts calls for an abuse of discretion review; only when a court considers an interpretation of law or the scope of law should the court employ a *de novo* standard of review.

In this case, the First District was not interpreting whether R.C. 2317.02 should be applied. Indeed, "the abuse reports and medical records were unquestionably confidential and privileged."

Roe v. Planned Parenthood, at ¶33.¹ As such, the trial court's determination that "the disclosure [of the reports and records] was necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality" necessarily involved an examination of Appellants' claims and the facts of this case, not the scope of the law. *Biddle v. Warren General Hospital* (1998), 86 Ohio St.3d 395, 1999-Ohio-165, at ¶ 12.

If the First District had utilized the appropriate abuse of discretion standard, the trial court's decision would have been affirmed because an "unreasonable, arbitrary, or unconscionable" attitude did not pervade the trial court's decision. *See Harmon v. Baldwin*, 107 Ohio St.3d 232, 2005-Ohio-6264, at ¶16. However, by applying a *de novo* review, the First District ignored the appropriate parameters of appellate review of the trial court's decision.

III. Redaction Of Personal Information Preserves The Anonymity Of Confidential Medical Information.

Planned Parenthood has repeatedly argued that no amount of redaction can protect the confidentiality interests of its patients, and, for that reason, the protection of those interests should be absolute. This argument, which the trial court correctly characterized as an "end-oriented" conclusion "that by-pass[es] any logical assessment," is in conflict with the holdings of this Court, the United States Supreme Court, and many other courts.

In *Biddle*, this Court held in Paragraphs 2 of the Syllabus that, "in the absence of prior authorization, a physician or hospital is permitted to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing

¹ However, unlike the medical reports and abuse records, the statistical data (i.e. raw numbers) Appellants seek are not privileged or confidential.

interest that outweighs the patient's interest in confidentiality."² In short, this Court has made clear that the physician-patient privilege is not absolute. As such, implicit in Planned Parenthood's argument is that *Biddle* should be overturned, and in its place Planned Parenthood suggests this Court create an absolute bar even to the discovery of *redacted* medical records, particularly of abortion patients. That suggestion to overturn *Biddle* should be rejected.

First, the creation of a bar to protect politically sensitive classes of patients has been rejected by numerous courts. See Anna C. Schumaker, *Rules Were not Meant to Be Broken: Alleviating the Tension Between Privacy and Discovery in Medical Records Disputes*, 40 Val. U.L. Rev. 845 (collecting cases concerning the disclosure of medical records in the HIV and abortion contexts, and recommending discovery of redacted medical records subject to protective orders). Moreover, creating a specific exception for abortion records, HIV records, or other politically sensitive medical conditions would necessarily mean that this Court is making a public policy determination that those patients are somehow more worthy of protection than any other individual. Other courts have refused to make this public policy leap. See, e.g., *Nat'l. Abortion Federation v. Ashcroft* (E.D. Mich. 2004), No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (ordering disclosure of redacted abortion records to government in case challenging partial birth abortion ban); *Nat'l. Abortion Federation v. Ashcroft* (S.D.N.Y. 2004) No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (same). Cf. *Doe v. Puget Sound* (Wash. 1991), 819 P.2d 370 (refusing to bar discovery of blood donor records in an HIV

² In this case, the Roes contend that the defendants failed to meet their duty to disclose certain information in accordance with several statutory mandates. One of those statutes, R.C. 2317.02, sets forth various privileges, and specifically excludes medical information required to be disclosed under R.C. 2151.421 from protection. R.C. 2317.02(B)(1) ("... [I]f the patient is deemed by section R.C. 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.").

case); *Doe v. Meachum* (D. Conn. 1989), 126 F.R.D. 444 (ordering disclosure of names of inmates with HIV); *Inmates of New York with HIV v. Cuomo* (N.D.N.Y. 1991), No. 90-CV-252, U.S. Dist. LEXIS 1488 (Ordering disclosure of redacted medical records subject to a protective order).

Second, the United States Supreme Court has explicitly recognized that redaction that strips medical records of all vestiges of personally identifying information and thereby divests medical records of any otherwise privileged nature automatically maintains the confidentiality of non-party patients, including the confidentiality of abortion patients. *Reproductive Services, Inc. v. Walker* (1978), 439 U.S. 1307, 1309. (Permitting discovery of non-party abortion patients' records under a protective order shielding against disclosure of the patients' identities.) In the wake of *Reproductive Services, Inc.*, courts across the country have routinely ordered the production of redacted, non-party medical records. *See, e.g. Alpha Medical Clinic v. Anderson* (Kansas 2006), 128 P.3d 364, 379, (holding that redaction, coupled with a protective order, maintains non-party confidentiality to the same extent as the physician-patient privilege envisions); *Varghese v. Royal Maccabees Life Ins. Co.* (S.D. Ohio 1998), 181 F.R.D. 359, 361, n.1, (rejecting that an amorphous " 'unique juxtaposition' of circumstances would allow a patient's identity to be ascertained absent the names, addresses, and other identifying information"); *Ziegler v. Super. Ct. In and For Cty. of Pima* (Ariz. App. Ct. 1982), 134 Ariz. 390, 391-395 (upholding disclosure redacted medical charts so long as the attorneys did not attempt to learn the identity of any patients, and the information was not communicated to anyone not a party to the case); *Tanzi v. St. Joseph Hosp.* (R.I. 1994), 651 A.2d 1244, 1244-45 (permitting discovery of non-party medical records, so long as "all names and information that identify the patients" were redacted); *Terre Haute Regional Hosp. v. Trueblood* (Ind. 1992), 600 N.E.2d 1358, 1361-1362 (ordering production of the nonparties' medical records

“where adequate safeguards exist to protect the identity and confidentiality of the non-party patient”); *Community Hosp. Ass’n. v. Dist. Ct.* (Colo. 1977), 194 Colo. 98, 101 (ordering disclosure of non-party patients’ medical records so long as the non-party patients identities were not disclosed); *Fischer v. Hartford Hosp.* (Conn. Super. 2002), 2002 Conn. Super. Lexis 269, *9 (ordering the defendant hospital to disclose non-party medical records after removing all identifiable patient information and ordered the parties to keep the records confidential.) Indeed, prior to this case, the First District recognized that redaction of non-party medical records, coupled with a protective order, adequately ensures the anonymity of non-party patients. *Richards v. Kerlakian*, 162 Ohio App. 3d 823, 2005-Ohio-4414 at ¶¶ 4, 8.

Third, two weeks prior to the filing of this Reply this Court discussed its holdings in *Biddle*, and it issued a new syllabus law that strengthened the protections afforded to confidential medical records disclosed in litigation, thereby further reducing the risk of possible harm of production. “An attorney may be liable to an opposing party for the unauthorized disclosure of that party’s medical information that was obtained through litigation.” *Hageman v. Southwest Gen. Health Ctr.*, Slip Opinion No. 2008-Ohio-3343, Syllabus. (Although *Hageman* speaks only of “party’s medical information,” nothing in the opinion suggests that the same protection would not be afforded to non-party medical information.) This added safeguard provides another layer of protection to the unidentifiable non-parties whose redacted medical information was ordered to be produced under a protective order in this case.

In the litigation context, the disclosure of redacted non-party medical records successfully balances two important public policies by “shielding the confidentiality” of non-party medical records and promoting the “public interest in justice” achieved through open discovery. *Cedepa v.*

Lutheran Hospital, 2008 Ohio App. LEXIS 1996, 2008-Ohio-2348 at ¶11. ; *c.f.*, *Whalen v. Roe* (1977), 429 U.S. 589, 602 (finding that statutory required disclosure of medical records serve important public policy goals). Planned Parenthood’s attempt to obliterate this delicate balance should be rejected because sufficient redaction measures and protective orders will maintain the anonymity and confidentiality of non-party patients.

IV. In The Discovery Context, Demonstrating “Need” Requires Only Relevancy And Unavailability From More Easily Obtainable Sources.

Planned Parenthood asserts that, in the context of discovery of non-party medical records, a party seeking such information must assert and establish that the records are necessary or critical to proving a claim. (Merit Brief of Appellees, at 20). On this point also, Planned Parenthood requests this Court overturn black letter syllabus law. “A showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable.” *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, Paragraph 2 of the Syllabus. Unfortunately, the First District ignored *Jackson*, and held that the medical records were not absolutely necessary for the Roes because “[t]he Roes need only prove that Planned Parenthood violated its duty to the Roes in this case—no more, no less.” *Roe v. Planned Parenthood*, at ¶ 46.³

Ohio courts have allowed disclosure of redacted non-party medical records where the records would “provide relevant information” beyond the defendants’ untrustworthy and self-serving testimony. *Fair v. St. Elizabeth Medical Center* (2000), 136 Ohio App.3d 522, 737 N.E.2d 106 at

³ By making this statement, the First District also ignored that Appellants have alleged that Appellees breached their duties as a matter of policy and practice and Appellants seek punitive damages for the breach of those duties.

527. Further, just like other materials subject to discovery, information gleaned from redacted medical records need not even be admissible so long as “the information sought is reasonably calculated to lead to admissible evidence.” *Richards*, 162 Ohio App.3d 823, 2005-Ohio-4414 at ¶6. *See Cepeda*, 2008-Ohio-2348 at ¶16 (holding redacted medical information of nonparty patients could lead to admissible evidence). Finally, Ohio courts have suggested that disclosure of properly redacted medical records is appropriate for “establishing the plaintiff’s claims for punitive damages” *Id.*

Planned Parenthood’s assertion that the Roes must establish “that they will be unable to prove their claims unless they can avail themselves of the [requested] medical records and abuse reports” calls for this Court to overturn existing syllabus law and impose a burden on them that no other civil litigants have. However, Planned Parenthood does not contend this case meets the *Galatis*⁴ standard or any other standard for overturning precedent. Accordingly, there is no reason to overturn *Jackson*, and this Court should reverse the decision below.

V. Punitive Damages Are Available Under R.C. 2151.421.

Planned Parenthood and the First District acknowledge that a civil cause of action is available under R.C. 2151.421. However, Planned Parenthood nevertheless attempts to defend the First District’s holding—*without citation*—that “[b]ecause R.C. 2151.421 does not provide for punitive damages, the Roes’ punitive-damages [sic] justification under R.C. 2151.421 is without merit.” *Roe v. Planned Parenthood*, ¶ 37. The First District’s ruling on this matter was premature, incorrect, and irrelevant to discovery issue that was before that court.

⁴ *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849.

First, assuming as Appellees assert that the civil cause of action provided by R.C. 2151.421 is not available at common law, the statutory language of R.C. 2151.421 does not prohibit a person harmed as a result of a breach of the statute from seeking an award of punitive damages against the person who breached his duty under the statute. Indeed, every case cited by Planned Parenthood stands for the limited proposition that punitive damages cannot be awarded under a statute that *expressly* provides for *only* compensatory damages. See *Kleybolte v. Buffon* (1913), 89 Ohio St. 61, 65-66, 105 N.E. 192, (determining that punitive damages were not available under an Ohio law that provided damages only for the full amount of injury and none otherwise); *Byrley v. Nationwide Life Ins. Co.* (6th Dist. 1994), 94 Ohio App.3d 1, 20-21, 640 N.E.2d 187 (holding that punitive damages were not available under a blue-sky law that specifically provided for damages based on only loss). R.C. 2151.421. Unlike the statutes relied on by Planned Parenthood, R.C. 2151.421 does not limit itself to compensatory damages.

Second, Appellees misunderstand the significance of *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539. *Campbell* provides that liability, generally, includes a consideration of *both* civil and criminal liability. (“A definition of ‘liability’ that states, ‘The quality or state of being legally obligated or accountable; legal responsibility to another or to society enforceable by civil or criminal punishment.’” *Id.* at 341, *quoting* Black’s Law Dictionary (7 Ed. 1999) 925.) Thus, *Campbell* holds that R.C. 2151.421 contemplates *both* civil and criminal liability. *Id.* at 342. As *Campbell* notes, R.C. 2151.99 imposes criminal liability for a violation of R.C. 2151.421. *Id.* Under R.C. 2307.60, “[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, . . . and may recover punitive or exemplary damages if authorized by section R.C. 2315.21 or another section of the Revised Code.”

R.C. 2307.60(A). Accordingly, the Roes are entitled to punitive damages if they establish Planned Parenthood violated R.C. 2151.421.

Third, even absent R.C. 2307.60(A), the Roes are entitled to punitive damages under R.C. 2151.421. Far from the strict and particular remedies outlined in the statutes that are the subjects of the cases by Appellees' have cited, R.C. 2151.421 lacks specific civil damages provisions. As discussed in Roe's Merit Brief, this Court rejected the notion that "specificity is the rule for punitives" and found, without restrictions like those cited in the Appellees' cases, damages are not limited to a particular type: "damages, absent a restrictive modifier * * * embrac[es] the panoply of legally recognized pecuniary relief." *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217. Indeed, in *Rice* this Court held that allowing punitive damages, even though not specifically provided for by statute, "is neither beyond the General Assembly's intent nor otherwise unfair" when statutes are remedial and have a goal of deterrence. By dismissing *Rice* solely because it involves a different statute, Appellees ignore this Court's finding that general allocation of damages, without greater specificity or further limitation, includes punitive and compensatory damages. *See Meyer v. United Parcel Service, Inc.*, 174 Ohio App.3d 339, 2007-Ohio-7063, 831 N.E.2d 612, at ¶47 (interpreting a general damage allowance not to be limited to any specific type).

VI. The Availability Of Punitive Damages Under R.C. 2151.421 Does Not Negate The Roes' Entitlement To The Redacted Medical Records And Abuse Reports.

Appellees assert, that, if Appellants are not entitled to punitive damages under R.C. 2151.421, they are not entitled to discover the medical records and abuse reports.⁵ Planned

⁵ Planned Parenthood did not offer any substantive support for this assertion. Rather, it merely dropped a footnote – without citation – in which it claimed the Roes could not assert the obvious point that Appellants are entitled, without raising a fifth proposition of law, to discover the records and reports in connection with any and all of their claims.

Parenthood once again completely ignores that Appellants have never stated that their right to this discovery is premised solely on their right to pursue an award of punitive damages under R.C. 2151.421.

Appellants have made clear, first in their Complaint and thereafter during all aspects of this discovery dispute, that, *in addition to helping prove their claim for punitive damages under R.C. 2151.421*, the medical records and abuse reports are sought to help Appellants prove that Appellees' breached their duties to them under *all* of the statutes (R.C. 2151.421, R.C. 2919.12/121 and R.C. 2317.56) (Appellants' Merit Brief, pp. 21, 22), to help prove that punitive damages should be awarded against Appellants for their breaches of R.C. 2141.421 and intentional infliction of emotional distress (Appellants' Merit Brief, pp. 24-27), and to help establish the amount of punitive damages that should be awarded under all of their claims (Appellants' Merit Brief, pp. 22-27). As such, Appellants posit that their un rebutted contention that the redacted medical records and abuse reports are likely to lead to the discovery of information relevant to all of their claims falls squarely within Propositions of Law II, III and IV, and, even if Appellants are not entitled to seek punitive damages under R.C. 2151.421, they are entitled to discover the redacted medical records and abuse reports to help prove all of their claims and their right to punitive damages, as well as the amount of punitive damages to which they are entitled, under the other claims.

VII. R.C. 2151.421(H) Permits Discovery And Use Of The Abuse Reports.

A. R.C. 2151.421(H) Protects Reporters, Not Non-Reporters.

Just as they have attempted to do with respect to the discovery process, Appellees have tortured the reading of R.C. 2151.421(H) so much that they have turned the section on its head. That

section provides protection for those who meet their duties under R.C. 2151.421, not for those mandatory reporters such as Planned Parenthood who, as a matter of policy and practice, breach their duties under the statute.

Here, if Planned Parenthood had met its duty and reported the suspected abuse of Jane Roe, R.C. 2151.421(H) would prohibit Appellants from using the report as evidence against the Planned Parenthood's employee who made the report in a civil action brought against her for having made the report. *That* is the protection provided by R.C. 2151.421(H). However, Appellants do not intend to use abuse reports against Planned Parenthood or an employee for having made reports. Instead, they intend to use the reports to establish that Planned Parenthood never makes reports of "suspected" abuse as it is required to do under the statute. R.C. 2151.421(H) does not prohibit Appellants from discovering and using the reports for that purpose.

B. Planned Parenthood Itself Confirms Why Appellants Are Entitled To Use The Reports.

As Appellants discuss on page 15 of their Merit Brief, R.C. 2151.421 does not, as Appellees and its *Amici* argue, require that reports of abuse be made only when a mandatory reporter *knows* that abuse has occurred. They are required to report *both* known *and* suspected abuse. (With respect to the duty to report suspected abuse, mandatory reporters are "required to report any reasonable suspicion of child abuse." *Tracy v. Tinnerman*, 2d Dist. No. 2003-CA-21, 2003-Ohio-6675, WL 22927758.) Indeed, as Planned Parenthood's former CEO admits, Planned Parenthood must make a report every time it has "any inkling" of sexual abuse of a minor.

In its Merit Brief, Planned Parenthood has stated that its duty to report under R.C. 2151.421 is triggered only when the information it receives "memorialize[s] a disclosure by the parties of actual

or threatened abuse” In short, Planned Parenthood now admits what Appellants have always alleged – Planned Parenthood has a policy and practice to report only “known” instances of sexual abuse, and it is now, in essence, requesting that this Court eliminate its duty under R.C. 2151.421 to report “suspected” sexual abuse of minors.

Under these circumstances, Appellants have the right to discover and use redacted reports of sexual abuse that prove that for a relevant period of time Planned Parenthood did not make even one report of suspected sexual abuse of a minor.⁶

C. Planned Parenthood Ignores Ohio Law On Point.

In Planned Parenthood’s discussion of Proposition of Law No. II, it cites to only one case, *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079 for generic quotations such as “Had the General Assembly intended to include such a provision, it could have done so.” (See Appellees’ Merit Brief, 15-18.) By treating this issue in such a superficial manner, Planned Parenthood avoided the heavy lifting of interpreting the law that applies R.C. 2151.421. It did so because the precedent is squarely in the Roes’ favor.

D. The Case Law.

Appellees completely ignore *Johnson v. Johnson* (1999), 134 Ohio App.3d 579, 731 N.E.2d 1144, a case cited by Appellants, and every case in which *Johnson* was cited. In *Johnson*, the appellate court held that a trial court possesses “the *inherent power* to order disclosure of such [child abuse] records or records” in appropriate circumstance, *Id.* at 585. (Emphasis added.) The *Johnson* holding has been followed by every court that has cited to it, including five Appellate Districts, the

⁶ Planned Parenthood has already produced its abuse reports for the years 2000 - 2005, and during that period of time it did not make one report of suspected sexual abuse of a minor.

Northern and Southern Districts of Ohio, and an Attorney General's opinion. See, e.g., *State v. Estep* (3rd Dist. App.), 2007-Ohio-6554 (applying the *Johnson* test); *State v. Dixon* (5th Dist. App.), 2004-Ohio-3940 (same); *Rankin v. C.C.D.C.F.S.* (8th Dist. App.), 2006-Ohio-6759 (same); *Wiley v. Summit Cty. Children Servs.* (9th Dist. App.), 2007-Ohio-1476 (same); *Grantz v. Discovery for Youth* (12th Dist. App.), 2005-Ohio-680 (same); *Hupp v. Switz. of Ohio Local Sch. Dist.* (S.D. Ohio 2008), No. 2:07-CV-628, 2008 U.S. Dist. LEXIS 43715 (same); *Thomas v. Cleveland Mun. Sch. Dist.* (N.D. Ohio 2006), 1:05-CV-2216, 2006 U.S. Dist. LEXIS 6484 (same); 2007 Ohio Op. Att'y Gen. No. 25 (same). Further, Appellees ignore both cases in which this Court has made clear that R.C. 2151.421(H) is a limited bar to the discovery and use of abuse reports at trial. *State v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319 (“While [public children services agency] investigatory records are confidential pursuant to R.C. 2151.421(H)(1), it appears the legislature never intended to mandate absolute confidentiality or a total bar on disclosure in some circumstances”); *State ex rel. Beacon Journal Publ'g. Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 37 (R.C. 2151.421 requires, when applicable, the redaction of the name of the *individual* who made the report, but otherwise authorizes the discovery and use of the report.)

E. The Administrative Code.

Appellees also ignore the Administrative Code provision implementing R.C. 2151.421 and which expressly authorizes disclosure of the abuse reports in certain circumstances, including to “a grand jury or court, as ordered” where needed “to protect children from abuse and neglect.” Ohio Adm. Code 5101:2-34-38(E)(1)(m). Moreover, this provision does not limit the children protected by disclosure to the courts to only those children who are the subject of the reports.

Section 34-38(E)(3)(a) authorizes the dissemination of child abuse reports to “any individual . . . when it is believed to be in the best interest of . . . an alleged child victim, the family, or the caretaker.” Notably, the Section provides for dissemination of child abuse records to protect “*an* alleged child victim,” not just “*the* alleged child victim.” (Emphasis added.) Accordingly, the Section permits disclosure of reports of abuse of one child to the family of a second child when it is in the “best interest” of the victims or potential victims of abuse. Here, the trial court correctly determined that dissemination of the requested child abuse reports was in the best interest of the Roes and future Jane Roes, and, for that reason, its order compelling disclosure is consistent with Section 34-38(E)(3)(a).

Section 34-38(E)(2)(g) also authorizes the disclosure of *unredacted* child abuse reports to “researchers” and authorizes them to “disseminat[e]” and “publish” the results of their research so long as it is devoid of individual identifiable information. The consultants and expert witnesses the Roes may employ to evaluate whether Planned Parenthood adequately reported suspected cases of child abuse are, in essence, the same as “researchers” under Section 34-38(E)(2)(g). The work they will perform analyzing the data and creating reports summarizing the findings are of no empirical difference than the work of other researchers authorized to publish their work. Accordingly, Section 34-38(E)(2)(g) supports the discovery and use of the child abuse reports when they are being used to protect children.

This analysis of the cases and regulations interpreting R.C. 2151.421 demonstrates that Planned Parenthood’s unsupported declaration of “an express and absolute statutory prohibition against disclosing or using” child abuse reports is utterly false. The disclosure of child abuse reports

in this case is authorized by R.C. 2151.421, the relevant Ohio case law, and the Ohio Administration Code implementing the statute.

VIII. Planned Parenthood And Its *Amici's* Misdirected Public Policy Arguments And Their Argument That This Court Should Amend R.C. 2151.421.

A. The Public Policy Arguments

Planned Parenthood and its *Amicis* expend much ink expounding their public policy preferences – arguments they have already raised and lost at the Statehouse.⁷ However, a careful reading of the position paper attached to the brief of the Ohio State Medical Association reveals Planned Parenthood's and its *Amici's* objectives in this matter.

The Court should note that the Medical Association's position paper always puts the term 'statutory rape' in quotation marks, and defines statutory rape as "consensual sexual intercourse." The paper then complains that statutes like R.C. 2151.421 "do not allow sufficient opportunity for health care professionals to exercise sound medical judgment," and goes on to state that "[e]nforcement of 'statutory rape' and child abuse reporting laws could potentially affect a very large number of adolescents." (Of course, this is *exactly* what the laws are designed to do – i.e. they are designed to affect the children's lives by stopping sexual abuse.) Not yet finished, the paper reads, "Although a wide discrepancy in age between partners is of concern when caring for the adolescent patient, *partner age by itself is not indicative of exploitation or abuse.*" (emphasis added).⁸

⁷ Two of those are that the discovery of medical records "will seriously undermine the delivery of health care" because patients will not disclose information to their medical providers out of fear of disclosure and the protection of "adolescents and promoting good health entails reinforcing . . . confidentiality."

⁸ Planned Parenthood makes its public policy position clear when it refers to 13 and 14 year old girls, the ages of Ms. Roe when she was sexually abused by her soccer coach, as "young women."

Contrary to these wrong-headed public policy arguments, under Ohio law, the discrepancy in the ages of a minor and the adult engaged in a sexual relationship can be, as a matter of law, sexual abuse, and it certainly, when reviewed in conjunction with other evidence, may lead a reasonable, objective person to suspect abuse. Planned Parenthood and its *Amici* are asking the Court to overturn the public policy determination of the General Assembly.

B. Planned Parenthood's Misunderstanding Of R.C. 2151.421's Paramount Purpose

Planned Parenthood apparently believes that the paramount purpose of R.C. 2151.421 is to protect medical providers. “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.” (Appellees’ Merit Brief at 17.) Planned Parenthood is wrong. The purpose of the statute is *not* to protect medical providers from claims that they should have reported abuse. To the contrary, the legislature created claims under the statute in order to serve “the two preeminent purposes of R.C. 2151.421: to facilitate the protection of abused and neglected children and to determine the person or persons responsible for the abuse or neglect.” *State ex. rel Beacon Journal*, 104 Ohio St.3d 399, at ¶ 53. To the extent a required reporter is protected from liability under R.C. 2151.421(H), it is for making a report, not failing to make one.

C. Planned Parenthood Argues That This Court Should Amend R.C. 2151.421 To Eliminate Its Duty To Report Suspected Abuse And Permit It to Determine Whether It Should Report Known Abuse.

Because Planned Parenthood and its *Amici* do not agree with Ohio’s statutory rape and mandatory reporting laws, they will do everything within their power to minimize their compliance.

This includes making the argument that R.C. 2151.421 should be misconstrued so that they are required to report only those cases of abuse they choose to report. (See Appellees' Merit Brief at pp. 20-21.) Specifically, Planned Parenthood seeks to have this Court amend R.C. 2151.421 to: (1) to completely eliminate its duty to report suspected abuse; and (2) and require it to report sexual abuse only when the abuse is expressly disclosed to it – i.e. when it is “known” by Planned Parenthood – and then only if it subjectively believes a report should be 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.” *Id.* At 20.) Planned Parenthood’s “interpretation” of R.C. 2151.421 is in direct conflict with the unambiguous language of the statute. It is also in direct conflict with Ohio case law that holds that a defendant’s liability for the breach of the statute is *not* determined by what he subjectively believed, but instead by whether an objectively reasonable person, with all of the knowledge and information that was known to the defendant, would have suspected or known that the child was a victim of sexual abuse. *Kraynak v. Youngstown City School Dist. Bd. Of Edn.* (2007), 172 Ohio App.3d 545, 2007-Ohio-1236; *Surdel v. Metro Health Med. Cr.* (1999), 135 Ohio App.3d 141, 733 N.E.2d 281.

Planned Parenthood and its *Amici* had and took the opportunity to make their public policy arguments relating to R.C. 2151.421 before the statute was enacted. They lost those arguments then, and, if they wish to reargue them, they should do so two blocks East of the Ohio Judicial Center in the Capitol Building. Planned Parenthood has apparently forgotten that this Court is not a legislative body and that its roles do not include amending statutes.

IX. Appellees' Criticism Of Appellants' "Statement Of Facts" Is Unfounded.

Planned Parenthood contests many of Appellants' factual allegations, stating that "[t]here is no evidence of record to support other portions of the Statement of Facts . . ." The statement shows that Planned Parenthood misconstrues this discovery dispute as a motion for summary judgment, and indeed, attempts to turn the discovery process on its head. The Roes are not required to prove the facts of their case before they are entitled to discovery. Indeed, they are collecting information at this time, and as such, they are only required to explain why they are entitled to the discovery they seek. Appellants have done so, in part by providing the Court with the factual context in which their discovery requests are made.

X. The Misstatements About And Animosity Directed Toward Appellants

In an apparent attempt to portray Jan Roe's parents in the worst possible light, Planned Parenthood states that the "parties disagree as to whether Jane Roe's parents were aware of her sexual activities." (Appellees' Merit Brief, at p. 15) The clear and false implication of that statement is that Appellees have evidence that would support a good faith assertion that Jane Roe's parents were aware of her sexual relationship with her abuser before the abortion. However, there is absolutely nothing in the record to support that assertion, and there never will be because her parents had no such knowledge.

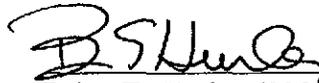
Planned Parenthood repeatedly attempts to divert attention from its conduct and the real issues in this case. However, what Planned Parenthood cannot change is that this case is about a frightened and confused 14 year old girl who had just learned that she had become pregnant by the 21 year old adult who had been sexually abusing her and Appellees' breach of their clear duties they

owed to that girl and her parents under Ohio law. No amount of clever draftsmanship and argument can change those facts.

XI. Conclusion

Appellees wrongheaded attempt to protect themselves from liability for not disclosing known or suspected child abuse by refusing discovery of relevant redacted medical records and child abuse reports that might reveal a pattern and practice of Appellees' non-compliance with statutory reporting responsibilities should be rejected. Redaction and court orders sufficiently protect the legitimate privacy interests of other teenage girls. Ordering the disclosure will comport with R.C. 2151.421. For these reasons and those set forth in Appellants' Merit Brief and its *Amici's* briefs, the First Appellate's decision should be reversed.

Respectfully submitted,



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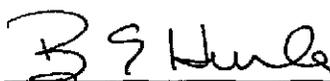
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