

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)

EXPEDITED MOTION OF APPELLEES PLANNED PARENTHOOD SOUTHWEST OHIO
REGION AND DR. ROSLYN KADE TO PROHIBIT USE OF PROPOSED ORAL
ARGUMENT EXHIBIT BY APPELLANTS

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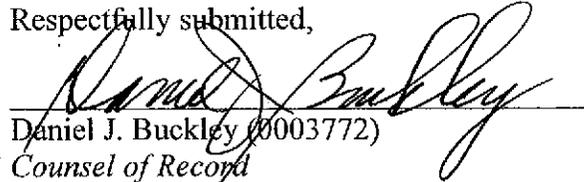
Counsel for Plaintiffs-Appellants

John and June Roe



Appellees Planned Parenthood Southwest Ohio Region and Dr. Roslyn Kade respectfully move this Court pursuant to S.Ct.Prac.R. XIV, Section 4, for an expedited order prohibiting Appellants from using as an exhibit at oral argument an abuse report that is not part of the record of this appeal and that relates to a minor who is not a party to this action. A memorandum in support of this motion is attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

On October 2, 2008, Appellants' counsel informed Planned Parenthood that, at the oral argument scheduled for October 7, 2008, appellants intend to use as an exhibit a redacted abuse report made by Planned Parenthood pursuant to R.C. 2151.421(H) that is not part of the record of this appeal and that relates to a minor patient who is not a party to this action.

Appellants are not permitted to use the abuse report as an exhibit. The report is not part of the record and therefore cannot be considered by this Court. R.C. 2151.421(H) mandates that abuse reports are confidential and cannot be used in a civil action against the party who made the report. Exhibiting the report in a public proceeding—and which is accessible on the internet—violates the privacy rights of the unrepresented minor patient about whom the report was made. Accordingly, this Court should prohibit appellants from using the proposed exhibit at oral argument.

II. FACTUAL BACKGROUND

On October 2, 2008, Appellants informed Planned Parenthood that they intend to use two exhibits at oral argument on October 7, 2008.¹ The first proposed exhibit—which is the subject of this motion—is a redacted abuse report that Planned Parenthood made to Hamilton County Children's Services, pursuant to R.C. 2151.421(H). Pursuant to the trial court's orders of June 21, 2006 and November 28, 2006 in the ongoing action, Planned Parenthood produced the redacted abuse report to Appellants in December 2006, which was five months after Planned Parenthood filed its Notice of Appeal of the discovery issue now before this Court, and after the

¹ See Correspondence of Brian E. Hurley, Esq., attached hereto as Exhibit A. (For confidentiality reasons, Appellants' proposed exhibits are not attached to this motion.)

parties had completed all appellate briefing on the discovery issue in the First District Court of Appeals. Accordingly, the abuse report was not part of the record before the First District and is not part of the record before this Court. The second exhibit Appellants propose using at oral argument is a single redacted page from Jane Roe's medical record.

III. ARGUMENT

A. **The Abuse Report Is Not Part of the Record on Appeal and Therefore Cannot Be Considered by This Court.**

It is well-settled that appellate courts may only consider evidence that is part of the record on appeal. *State v. Golphin* (1998), 81 Ohio St.3d 543, 544, 692 N.E.2d 608 (refusing to consider exhibits that were not part of the record before the Court of Appeals, and noting that “[w]e are precluded by well-established principles of appellate review from considering these documents in resolving the legal issues before us.”). A “reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.” *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500 at syllabus, ¶ 1.

Section 1 of S.Ct.Prac.R. V defines what constitutes the record on appeal:

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers. Where applicable, the record on appeal shall consist of all of the above items from both the court of appeals and the trial court.

The abuse report Appellants propose as an exhibit falls squarely outside that definition. Planned Parenthood produced the report to Appellants in the ongoing trial court action pursuant to the trial court’s orders five months after the instant discovery dispute was appealed to the

Court of Appeals. Accordingly, the abuse report was never part of the record before the Court of Appeals and was not introduced in the trial court until after the appeal was long under way.

Because the proposed exhibit was not part of the record before the Court of Appeals and is not part of the record before this Court, Appellants should not be permitted to use the report as an exhibit at oral argument.

B. Appellants Are Statutorily Prohibited from Using the Abuse Report as an Exhibit in This Case.

Section 2151.421 of the Ohio Revised Code directly addresses whether and when abuse reports can be used in civil litigation, and categorically prohibits Appellants' use of the report in this case. Pursuant to R.C. 2151.421(H), "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." (Emphasis added). It is irrelevant that certain information identifying the minor is redacted in the proposed exhibit. Section 2151.421(H) broadly prohibits the release of "information provided in a report made pursuant to this section" and contains no exception allowing for the release of such information as long as certain identifying information is withheld. Nor should this Court create such an exception. *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St.3d 390, 394 ("a court may not "add[. . . an additional statutory exclusion not expressly incorporated into [the] statute by the legislature.""). In short, because Appellants seek to use the report against the person who made the report, Planned Parenthood, the report's use is strictly prohibited by R.C. 2151.421(H).

Other sections of R.C. 2151.421 underscore the strong protection the General Assembly has afforded to abuse reports. For instance, R.C. 2151.421(H)(1) stresses that "a report made under this section is confidential," and R.C. 2151.421(H)(2) provides that "[n]o person shall

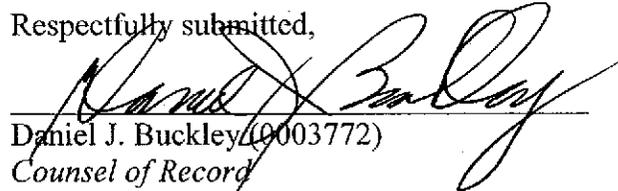
permit or encourage the unauthorized dissemination of the contents of any report made under this section.” Use of the report as an exhibit in open proceedings that are broadcast and then archived on the internet (as this Court’s arguments are) would entirely undercut R.C. 2151.421’s confidentiality provision and impermissibly disseminate the contents of the report. It would violate the privacy rights, recognized by R.C. 2151.421, of the non-party minor about whom the report was made.

In sum, Appellants are statutorily prohibited from using the abuse report as an exhibit in this action.

IV. CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court prohibit Appellants from using as an exhibit at oral argument an abuse report that is not part of the record of this appeal and that relates to a minor who is not a party to this action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Appellees to Supplement the Record has been served by electronic and United States mail on the 6 day of October, 2008, to the following:

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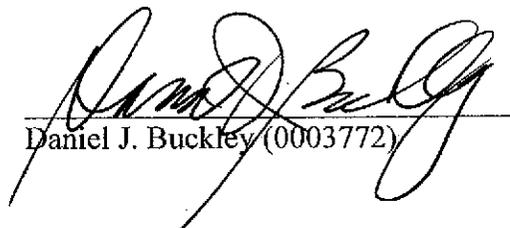
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