

IN THE SUPREME COURT OF OHIO

MEDICAL MUTUAL OF OHIO, : Case No. 2008-0598
: :
: : Appeal from the Cuyahoga County
Appellant, : Court of Appeals,
: Eighth Appellate District,
v. : Case No. 89388
: :
WILLIAM SCHLOTTERER, D.O., :
: :
Appellee. : :

**MERIT BRIEF OF AMICI CURIAE,
OHIO STATE MEDICAL ASSOCIATION
AND AMERICAN MEDICAL ASSOCIATION,
NOT EXPRESSLY SUPPORTING THE POSITION
OF EITHER PARTY**

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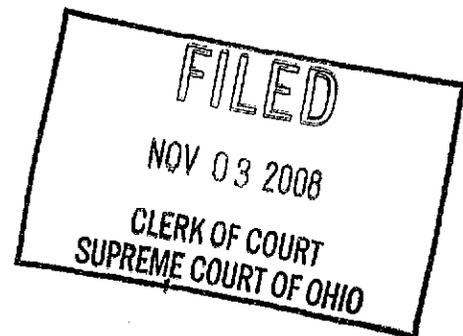
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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae, the Ohio State Medical Association (“OSMA”) and the American Medical Association (“AMA”) (Collectively “Amici”), file this brief because they are concerned about the erosion of confidentiality in the physician-patient relationship and have a strong interest in ensuring that all Ohioans have access to safe and effective health care.

The OSMA is a non-profit professional association founded in 1835 and is comprised of approximately 20,000 physicians, medical residents, and medical students in the State of Ohio. OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA strives to improve public health through education, to encourage interchange of ideas among members, and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics. The OSMA is committed to protecting the confidentiality of physician-patient communications.

The AMA, an Illinois nonprofit corporation, is the largest professional association of physicians, residents, and medical students in the United States. It has approximately 240,000 members who practice in every state and in every medical specialty. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.¹

¹ The AMA and the OSMA are participating in this brief in their own capacity and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies (“Litigation Center”). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

The principle of confidentiality espoused in the Hippocratic Oath in the fourth or fifth century B.C. is still a fundamental tenet in contemporary medical codes. For example, the Principles of Medical Ethics of the American Medical Association mandate that "[a] physician * * * shall safeguard patient confidences and privacy within the constraints of the law."² The American Medical Association's Code of Medical Ethics states that "[t]he information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services."³

There has been an erosion in the confidential relationship between patients and health professionals, resulting from growing outside demands for the information shared in this protected relationship.⁴ An emphasis on society's right to know, at the expense of the individual's right to privacy and confidentiality, has resulted. A better balance is needed. Protecting the confidentiality of medical records is vital to achieving the goal of safe and effective health care. Uncertainty about whether communications with physicians and/or medical records are confidential will lead patients to avoid or delay seeking medical treatment, or to withhold important information when they do seek medical treatment.

Amici are deeply concerned that allowing broad discovery in private civil lawsuits of nonparty medical records will seriously undermine the delivery of health care. People who expect privacy to surround their most personal decisions will be less likely to seek out

² Available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

³ Available at <http://www.ama-assn.org/ama/pub/category/8353.html>.

⁴ Confidentiality, AMA Policy H-320.994 (2008), available at AMA PolicyFinder, <http://www.ama-assn.org/ama/noindex/category/11760.html>.

necessary medical services and treatment if they believe their confidential information will be compromised by those outside the physician-patient relationship.

Amici are troubled by the growing demand for the privileged medical records of strangers in private civil lawsuits and the commensurate hodgepodge of exceptions created by Ohio's lower courts regarding such discovery.⁵ If this trend is not stopped, patient privacy will be a relic from the past. To the extent Ohio is to allow an exception for discovery of the privileged medical records of nonparties, such exception(s) should not be created on an ad hoc basis by Ohio's lower courts, as is currently the case.

Should this Court create a new exception to the physician-patient privilege in this case, the exception should be narrow and applied only where the demonstrated need for such information is compelling, such as where the insurer (1) has made a prima facie showing of fraud that could not have been discovered, with the exercise of due diligence, within the two-year period after payment was made to the provider as set forth in R.C. 3901.388, and (2) has demonstrated that consent of the nonparty patients cannot be obtained. A decision allowing broad or ad hoc discovery of the medical records of bystanders will further erode the confidential physician-patient relationship and negatively impact the delivery of health care in Ohio.

Amici urge the Court to affirm the decision of the Eighth District Court of Appeals.

STATEMENT OF THE CASE

Amici defer to the Statement of the Case that has been set forth in the Merit Briefs of the Appellant and Appellee.

⁵ See fn. 8 herein.

STATEMENT OF FACTS

Amici defer to the Statement of Facts that has been set forth in the Merit Briefs of Appellant and Appellee.

LAW AND ARGUMENT

APPELLANTS' PROPOSITION OF LAW No. 1: The investigation of practitioner insurance fraud is a special situation in which the dual interests of the public and third-party health insurance providers in eradicating the harmful effects of insurance fraud outweigh non-party patients interests in absolute confidentiality and allow for the limited disclosure of physician-patient privileged information under a court order protecting patient confidentiality.

A. Introduction

1. This Court Should Disallow the Routine Civil Discovery of Confidential Medical Records of Nonparties

Nonparty medical records subject to the physician-patient privilege should be treated with the utmost confidentiality, as they are not discoverable under the Ohio Rules of Civil Procedure, nor do they fall within a statutory exception to the physician-patient privilege. See R.C. 2317.02(B). The physician-patient relationship and the confidentiality of medical records of people who are bystanders to the litigation should not be jeopardized, particularly without a compelling need for such information.

Recently, this Court reaffirmed that confidentiality between patients and their physicians is of paramount importance in the provision of health care: “[I]ndividuals should be encouraged to seek treatment for medical or psychological conditions, and privacy is often essential to effective treatment.” *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153, ¶15 (relying on *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518). The “mere possibility of disclosure may impede development of the confidential relationship

necessary for successful treatment.”⁶ *Id.* (discussing the particular importance of confidentiality in the context of psychological treatment) (citing *Jaffee v. Redmond* (1996), 518 U.S. 1, 10, 116 S.Ct. 1923, 135 L.Ed.2d 337). “If the right of confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information.” *Hageman*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.D. 153, ¶13.

Despite the fact that the thrust of *Biddle* (relied on in *Hageman*), was to protect an individual’s right to medical confidentiality, Ohio litigants and lower courts have relied on *Biddle*’s “special situation” exception for *liability* to drastically expand the scope of civil *discovery* – including to obtain the confidential medical records of nonparties. *Biddle* recognized a new tort for the unauthorized disclosure of confidential medical information. It did not address discovery and should not be used as a weapon by private litigants to obtain the confidential medical information of others without their knowledge or consent. The increased demand in judicially-created “special situation” exceptions seeking to discover nonparty medical records has created confusion and uncertainty as to whether privileged medical records can be shared with strangers. Without clear direction from this Court or the General Assembly, the increasingly popular “special situation” exception may swallow the general rule of patient confidentiality.

2. Any Exception to the Physician-Patient Privilege Should be Narrowly Defined and Sparingly Applied to Protect Patient Confidentiality

Amici understand the concerns of Medical Mutual and its amici curiae regarding the costs of health care fraud in the United States. Amici recognize the importance of investigating and detecting health care fraud, of maintaining oversight of the practice of

⁶ In the instant case, many of the patients whose records are at issue have been diagnosed with HIV. (Appellee’s Memorandum in Opposition to Jurisdiction, at 2). The nature of this diagnosis heightens concerns about the unauthorized disclosure of confidential medical information.

medicine in Ohio, and of disciplining doctors who violate professional standards. Amici, however, also recognize the competing and equally important needs (1) to protect patient confidentiality in all cases — especially in private civil cases where the patients are not even aware that their confidential medical records may be disclosed to strangers — including those where an insurer has merely alleged civil fraud, without more, and (2) to ensure that physicians are not routinely asked to produce confidential patient medical records of nonparties in private civil litigation.

Should this Court determine that a judicially-created exception allowing the discovery of confidential medical records of nonparties is warranted in private civil cases alleging provider fraud, Amici ask the Court to strike a balance recognizing the important competing considerations noted above. The scope of any such exception should be narrowly defined to provide only the necessary information required for an insurance company to investigate specific instances of suspected fraud, and applied only where a compelling need for the information has been demonstrated.

B. Ohio Courts Should Vigilantly Protect Nonparties' Confidential Medical Records from Unjustified Intrusion

1. None of the Exceptions in the Physician-Patient Privilege Statute are Applicable

Medical records are “communications” subject to the protection of the physician-patient privilege, R.C. 2317.02(B). . See, e.g., *Biddle* (1999), 86 Ohio St. 3d at 401-402, 1999-Ohio-115, 715 N.E.2d 518 (holding that an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical records developed within a physician-patient relationship). As such, medical records are not discoverable unless the privilege is waived or an exception to the privilege applies. See *State ex rel. Floyd v. Court of Common Pleas* (1978), 55 Ohio St.2d 27, 29, 377 N.E.2d

794. Ohio's physician-patient privilege statute includes exceptions to the physician-patient privilege, allowing disclosure of privileged information in civil cases only under very specific circumstances: (1) where the patient or guardian gives express consent; (2) if the patient is deceased, where the spouse or executor gives express consent; (3) civil actions filed by the patient or concerning court ordered treatment; and (4) in a will contest. See R.C. 2317.02(B); *In re Banks*, 4th Dist. No. 07CA3192, 2008-Ohio-2339, at ¶17 (finding that none of the statutory exceptions applied); *Grove v. Northeast Ohio Nephrology Assocs.*, 164 Ohio App.3d 829, 2005-Ohio-6914, 844 N.E.2d 400, ¶7-8. There is no exception in the physician-patient privilege statute allowing discovery where physician fraud is alleged or a "special situation" is claimed to exist. Thus, none of the statutory exceptions apply in the instant case.

Because no statutory exception for discovery of nonparty medical records exists, litigants seeking such discovery (such as Medical Mutual) have asked Ohio's lower courts to create a judicial exception to the physician-patient privilege so that they may obtain such discovery. Despite this Court's expressed reluctance to allow judicial exceptions to statutory privileges,⁷ many of Ohio's lower courts have not hesitated to create exceptions and allow the discovery of confidential medical records of nonparties.

⁷ See, e.g., *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶13 (recognizing the Ohio Supreme Court's "significant body of law that has consistently rejected the adoption of judicially created waivers, exceptions and, limitations for testimonial privilege statutes.").

2. *Biddle* Does Not Authorize Discovery of the Confidential Medical Information of Bystanders to Private Commercial Litigation

Often, litigants and Ohio's lower courts (such as the trial court herein) have relied on this Court's decision in *Biddle* as authority for doing so.⁸ Reliance on *Biddle* to expand the scope of civil discovery is misplaced.

Biddle made clear that in Ohio, "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." *Id.*, paragraph one of the syllabus. The Court then determined the circumstances under which such liability will be found, holding:

In the absence of prior authorization, a physician or hospital is privileged 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

⁸ See, e.g., *Cepeda v. Lutheran Hosp.*, 8th Dist. No. 90031, 2008-Ohio-2348, at ¶16 (applying *Biddle*, appellate court upheld trial court's grant of a motion to compel billing statements of non-party patients in a negligent credentialing case); *Soehnlén v. Aultman Hosp.* (May 4, 2007), N.D. Ohio No. 5:06 CV 1594, 2007 U.S. Dist. LEXIS 33064 (applying *Biddle*, court granted motion to compel nonparty medical records in a negligence case); *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, 835 N.E.2d 768, ¶16 (applying *Biddle*, appellate court affirmed order compelling production of redacted nonparty medical records, finding a "compelling need" to impeach a party defendant and to develop a primary claim outweighed the nonparty patient's interest in confidentiality); *Harris v. Univ. Hosps. of Cleveland* (Mar. 7, 2002), 8th Dist. Nos. 76724, 76785, 2002-Ohio-983 (applying *Biddle*, appellate court held that properly redacted privileged records could have been admitted to substantiate medical practice's contractual claims against former employee); *Roe v. Planned Parenthood of Southwest Ohio Region*, 173 Ohio App.3d 414, 2007-Ohio-4318, 878 N.E.2d 1061, ¶47 (applying *Biddle*, appellate court reversed the trial court's order compelling redacted abuse reports and medical records of minors who received services at Planned Parenthood); *Walker v. Firelands Cmty. Hosp.*, 6th Dist. No. E-03-009, 2004-Ohio-681, at ¶24 (applying *Biddle*, the appellate court reversed the trial court's order compelling the hospital to disclose the names of potential class members who suffered a miscarriage or stillbirth in a case alleging that hospital improperly disposed of the fetal tissue); *Sirca v. Medina Cty. Dept. of Human Servs.* (2001), 145 Ohio App.3d 182, 186-187, 762 N.E.2d 407 (applying *Biddle* in a wrongful adoption case, appellate court reversed trial court's order compelling adoptee's nonparty medical records).

or further a countervailing interest that outweighs the patient's interest in confidentiality.

Id., paragraph two of the syllabus.

Thus, *Biddle* sets forth the general rule, reiterated in *Hageman*, that liability lies against a physician (or other person) who discloses confidential medical records of patients without the patients' prior authorization. *Biddle* also sets forth the exception to the general rule for recognized "special situations" where disclosure is made in accordance with (1) a statutory mandate; (2) a common-law duty, or (3) where disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality. If a *Biddle* "special situation" exists, then the person who disclosed the medical records without patient authorization is not liable for such disclosure. Although *Biddle* recognizes that the physician-patient privilege is not absolute, it did not hold that privileged confidential medical records of nonparties are discoverable in private civil lawsuits.

This Court has never expanded *Biddle*, nor applied it outside the context of establishing liability for an unauthorized out-of-court disclosure of confidential medical information. But, Ohio's lower courts have not confined the balancing test set forth in *Biddle* to unauthorized out-of-court disclosures of confidential medical information. Rather, this well-meaning principle of *Biddle* has been radically transformed by lawyers and some lower courts and now serves as a basis for expanding discovery in civil lawsuits to compel the production of confidential medical records of nonparties. See, e.g., *Cepeda*, 2008-Ohio-2348, at ¶30 ("This is not one of those 'special situations' envisioned by the Ohio Supreme Court in *Biddle*. . .") (Blackmon, dissenting). Thus, instead of being used to establish liability for unauthorized disclosure of privileged information, some litigants

(such as Medical Mutual) and courts are using *Biddle* to open doors to discovery of privileged information that previously were closed.

Other Ohio courts have refused to create judicial exceptions for disclosure of confidential medical records (albeit not always in the context of civil discovery). See, e.g., *In Re Banks*, 4th Dist. No. 07CA3192, 2008-Ohio-2339 (refusing to create a public policy exception for grand jury proceedings where none of the statutory exceptions to the physician-patient privilege apply); *In re Grand Jury Subpoena Duces Tecum*, 4th Dist. No. 01CA55, 2002-Ohio-5600, at ¶22-23 (refusing to adopt a “law enforcement” exception to the counselor-patient privilege); *Johnston v. Miami Valley Hospital* (1989), 61 Ohio App.3d 81, 85, 572 N.E.2d 169 (refusing to extend exceptions to physician-patient privilege applicable to criminal proceedings to civil lawsuit). This Court similarly has discouraged judicially created exceptions for privileged information. See, e.g., *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio- 4968, 854 N.E.2d 487; *In re Wieland*, 89 Ohio St.3d 535, 538, 2000-Ohio-233, 733 N.E.2d 1127 (relying on *State v. Smorgala* (1990), 50 Ohio St.3d 222, 553 N.E.2d 672 and *In re Miller*, stating “this court has repeatedly and consistently refused to engraft judicial waivers, exceptions, or limitations into the testimonial privilege statutes”); *In re Miller* (1992), 63 Ohio St.3d 99, 109, 585 N.E.2d 396 (relying on *Smorgala* in holding that the physician-patient privilege applies unless it is waived, and refusing to judicially engraft an exception for civil commitment proceedings) .

When the *Biddle* “special situation” exception is applied in the context of civil discovery, there are no meaningful rules or guidelines to follow and, thus, there is no way of knowing whether the discovery requested qualifies for the exception. Lower courts reviewing the same information and arguments may reach different conclusions. Nonparty

confidential medical information should not be protected from discovery in one case, but not in another similar case. Clear guidelines are needed and should apply uniformly to a nonparty patient's right to confidentiality of private medical information.

Amici urge the Court to hold that the *Biddle* balancing test should not be applied as a general exception to allow discovery of the confidential medical records of nonparties. In the alternative, if this Court finds that *Biddle* provides an exception to the well-recognized physician-patient privilege in the context of civil discovery, such exception should be narrowly construed and only applied in limited recognized "special situations where a compelling need for such information has been demonstrated."⁹ To hold otherwise — and to allow every civil litigant who sues a doctor to obtain the medical records of nonparties — would completely undermine the confidentiality that historically has been afforded to physician-patient communications. This Court should make clear its rejection of the routine discovery of confidential nonparty medical records.

Should this Court craft a judicial exception allowing discovery of nonparty medical records in this case, the scope of such an exception should be narrowly defined to provide

⁹ Amici respectfully suggest that rather than adopting the "balancing test" set forth in *Biddle*, the Court adopt a more stringent standard to be used in the context of discovery of nonparty medical records in private civil lawsuits. For instance, the Court could require the requesting party to show a "compelling need" for the information sought, such as is sometimes required by the government when it seeks information that invades an individual's right of privacy. *McMaster v. Iowa Bd. of Psychology Examiners* (Iowa 1993), 509 N.W.2d 754, 759-60; *State v. Pilcher* (Iowa 1976), 242 N.W.2d 348, 359 ("Before the state can encroach into . . . the personal right of privacy, there must exist a subordinating interest which is compelling and necessary, not merely related, to the accomplishment of a permissible state policy."). A "compelling need" test also has been applied in the context of civil lawsuits by private parties. See, e.g., *Arnold v. Am. Natl. Red Cross* (1994), 93 Ohio App.3d 564, 578, 639 N.E.2d 484 (holding that a compelling need for disclosure must be demonstrated by clear and convincing evidence in order for the identity of a blood donor to be released); *Coleman v. Am. Red Cross* (E.D.Mich. 1990), 130 F.R.D. 360, 363 (ruling that plaintiff failed to demonstrate either a compelling need or special circumstance militating in favor of disclosing a blood donor's identity).

only the necessary information required to investigate specific instances of suspected fraud. And, any exception should be applied only where a compelling need for the discovery has been demonstrated, such as where the insurer (1) has made a prima facie showing of fraud that could not have been discovered, with the exercise of due diligence, within the two-year period after payment was made to the provider as set forth in R.C. 3901.388, and (2) has demonstrated that consent of the nonparty patients cannot be obtained.

C. The Prompt Pay Statute Does Not Require the Discovery Sought

Contrary to Medical Mutual's assertions, Ohio's Prompt Pay statute (R.C. 3901.388) does *not* require the creation of an exception for the discovery sought. The Prompt Pay statute provides, "payment made by a third-party payer to a provider . . . shall be considered final two years after payment is made. After that date, the amount of the payment is not subject to adjustment, except in the case of fraud by the provider." R.C. 3901.388(A). Medical Mutual argues based on this statute that the "legislature acknowledged that third party payors, such as Medical Mutual, have a right to challenge payments years after they occur" and must be given the means to do so. (Appellant's Merit Brief, at 15).

Medical Mutual, however, turns the Prompt Pay statute on its head. The Prompt Pay statute was passed in response to multiple reports of chronic late payments by health insurers to physicians and hospitals.¹⁰ The purpose of the bill was to "speed up insurer payments to providers" and to "encourage insurers to process and pay claims in a more

¹⁰ Hearing Before the Ohio House Ins. Comm. Regarding S.B. 4, 124th Gen. Assembly (May 29, 2001) (statements of Sen. Mumper and Tim Maglione, Ohio State Medical Association).

timely manner.”¹¹ Upon passage, then-Governor Taft stated that the bill would allow doctors and hospitals to “make best use of their time practicing medicine, instead of collecting on bills.”¹²

Although there is a fraud exception that allows an adjustment after two years, this exception does not overtake the rule. The fraud exception cannot be interpreted to open the door for discovery in every case where a payor has merely alleged fraud or discovered an overpayment after the statutory time for adjustments has expired. If this were the case, the Prompt Pay statute would have no meaning as any payor could reopen and reassess any payment by alleging fraud against a provider when there has been an overpayment.

D. Alternatives to Creating an Exception to the Physician- Patient Privilege Exist to Detect and Punish Fraud Without Eroding Physician-Patient Confidentiality.

The Eighth District notes that Medical Mutual has made no representations to the Court that it could not obtain current releases from the patients whose records are sought in this case. *Med. Mut. of Ohio v. Schlotterer*, 8th Dist. No. 89388, 2008-Ohio-49, at ¶33. To this charge, Medical Mutual responds that requiring it to obtain nonparty consent would “deprive [it] of its ability to substantiate its claims to the extent [it] cannot locate the non-parties or obtain other consent.” (Appellant’s Merit Brief, at 23).

Without the consent of patients, however, physicians are put in a “catch-22.” They are at risk of being liable for unauthorized disclosure on the one hand or for failure to comply with discovery on the other. To protect the important interest of patient confidentiality, and to avoid this “catch-22”, the Court should require the party requesting

¹¹ Hannah Report, Physician-HMO Negotiating Bill Reappears (July 3, 2001); Hannah Report, Prompt Pay Bill Advances (June 27, 2001).

¹² Hannah Report, Law Addressing Prompt Payment of Health Care Claims Goes Into Effect (July 25, 2005).

the confidential information to exhaust other means of obtaining it, including an attempt to obtain patient consent where possible, before seeking a judicial exception of the physician-patient privilege. In this case, Medical Mutual is already in possession of the names of the patients for whom they seek records. It did not, however, even attempt to notify and obtain the consent of these nonparty patients before seeking discovery of their privileged and confidential records.

Only to the extent nonparties could not be located, or their consent could not be obtained should the court consider a judicial waiver of the patients' right to maintain the confidentiality of his or her records. A judicial exception to confidentiality should be a last resort, sought only when obtaining patient consent is unworkable.

E. Redaction of Personal Patient Information Does Not Effectively Protect the Identity of Unrepresented Nonparty Patients.

Medical Mutual argues that the rationale behind Eighth District's statements regarding the inefficacy of redacting medical records is flawed. (Appellant's Merit Brief, at 25). Medical Mutual distinguishes the facts here from other cases involving redaction because, as the patients' insurer, it already has access to patients' names, social security numbers, diagnoses, and treatment histories.

Generally speaking, redaction does not fully protect the identities of unrepresented nonparty patients, and its effectiveness should be explored on a case by case basis. Even when medical records are redacted, patients' identities may not be protected. For example, in *Wozniak v. Kombrink* (Feb. 13, 1991), 1st Dist. No. C-890531, 1991 Ohio App. LEXIS 606, the court reversed an order allowing the production of privileged nonparty medical records, noting that:

the 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.

Id. at *12. See also *Planned Parenthood Fed. of Am. v. Ashcroft* (Mar. 5, 2004), N.D. Cal. No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383, at *6, overruled on other grounds by *Gonzales v. Carhart* (2007), 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480; *Northwestern Mem. Hosp. v. Ashcroft* (7th Cir. 2004), 362 F.3d 923, 928 (explaining that even after redaction of identifying information, patients' records contain that "can make the possibility of recognition very high.").

Medical database privacy researchers confirm the courts' fears regarding the ineffectiveness of redaction. Although one might assume that patient identities are protected where all explicit personal identifiers are redacted from a medical record (such as name, address, telephone number, and social security number), the remaining data in the record can, in most cases, be used to re-identify individual patients.¹³ Ad hoc de-identification methods do not guarantee the anonymity of medical records.¹⁴ As a general matter, then, redaction is not always effective.

¹³ Sweeney, Weaving Technology and Policy Together to Maintain Confidentiality (1997), 25 J. of Law, Medicine & Ethics 98.

¹⁴ Malin & Sweeney, A Secure Protocol to Distribute Unlinkable Health Data (2005), AMIA Symposium Proceedings 485 (citing Sweeney, Guaranteeing Anonymity When Sharing Medical Data, the Datafly System (1997), AMIA Symposium Proceedings 51-55 and Malin, An Evaluation of the Current State of Genomic Data Privacy In a Distributed Network: Using Trail Re-identification to Evaluate and Design Anonymity Protection Systems (2004), 37 J. Biomed. Info. 179-192).

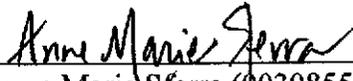
CONCLUSION

Patients “should be encouraged to seek treatment for medical or psychological conditions, and privacy is often essential to effective treatment.” *Hageman*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.D. 153, ¶15. Even the “mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.* Accordingly, nonparty medical records historically have been and should continue to be treated with the utmost confidentiality.

Biddle does not provide a general exception to confidentiality of nonparty medical records whenever a party in private civil litigation seeks discovery asserting the existence of a “special situation,” and no such exception should be created. In limiting “special situations,” this Court made clear: “[I]t 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.” *Biddle* (1999), 86 Ohio St. 3d at 408, 1999-Ohio-115, 715 N.E.2d 518.

To the extent this Court crafts a judicial exception to the physician-patient privilege in this case, the exception should be narrowly defined and applied only after a demonstrated compelling need for the information sought. Any result which allows strangers to routinely obtain the medical records of others — even if redacted — will have the unintended consequence of eroding the physician-patient privilege and, thus, adversely impacting patients and the quality of health care in Ohio.

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