

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT MEDICAL MUTUAL OF OHIO

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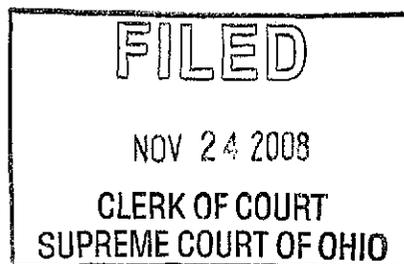
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I. INTRODUCTION AND CLARIFICATION OF SIGNIFICANT FACTS

“Fraud and falsehood only dread examination. Truth invites it.”

Appellee’s arguments for belated, unchecked and unjustified secrecy call to mind these words of Samuel Johnson. In essence, Appellee would have this Court sanction unfettered, fraudulent conduct in the name of the physician-patient privilege rather than allow the examination of truth in a controlled environment that will do no harm to the privilege. In this context of an insurance fraud investigation, the pursuit of truth should prevail through the proper application of this Court’s holding in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, 402, 715 N.E.2d 518.

Appellee’s brief attempts to paint Appellee as a physician who wants nothing more than to protect the medical information of his patients. In fact, Appellee is trying to protect no one other than himself. Appellee had no qualms about providing his patients’ medical records when he wanted to be paid and when he first attempted to justify amounts he had been paid. But when Appellee learned he was being investigated for fraud, suddenly patient privacy became his utmost concern. This self-serving, belated concern is particularly misguided here, where Appellee, in the claims submission process, has already provided to Medical Mutual the patient information (i.e. patient identification, diagnosis and treatment) he now claims must have absolute protection. In refusing to provide the medical records, which would establish or disprove that he actually performed the claimed medical services for the previously identified patients with the previously disclosed diagnoses and treatments, Appellee has sought only to conceal his fraudulent billing practices. That is what this case is about: the ability of an unscrupulous medical provider to shield his fraudulent behavior by assertion of the physician-patient privilege.

A. Medical Mutual reported Schlotterer's fraudulent conduct to the Ohio Department of Insurance.

As made explicitly clear in the State of Ohio's amicus curiae brief, Appellant Medical Mutual of Ohio ("Medical Mutual") did, in fact, report its suspicions of Schlotterer's fraudulent conduct to the Ohio Department of Insurance ("ODI"), as required by R.C. 3999.42. (*See* State of Ohio Amicus Curiae Merit Brief, pg. 3) ("The State stresses that, in 2005, Medical Mutual reported its suspicions about Dr. Schlotterer to ODI").

Because this indisputable fact completely undermines Appellee's argument that Medical Mutual failed to abide by Ohio's statutory scheme in its investigation and handling of Schlotterer's fraudulent conduct, Schlotterer invites the Court to disregard this crucial fact. He claims that Medical Mutual's report to ODI is not in the record and beyond the Court's consideration. (Appellee's Merit Brief, pg. 35). Admittedly, the issue never arose in the trial court. But the Eighth District decided that notification was important and, in the absence of evidence one way or the other, erroneously concluded that Medical Mutual did not notify ODI in its opinion. (App. Ct. Opinion, 10).

However, as noted by amicus curiae the State of Ohio: "The appeals court acknowledged the statutory requirement for insurers to report to ODI, but it mistakenly said that Medical Mutual did not report here . . . when in fact, Medical Mutual did." (State of Ohio Amicus Curiae Merit Brief, pg. 7). Therefore, in light of the State of Ohio's unequivocal affirmation of the fact that Medical Mutual reported its suspicions of Appellee to ODI, Medical Mutual respectfully requests the Court to take judicial notice of this fact. Evid.R. 201(F); *State v. Mays* (1992), 83 Ohio App.3d 610, 614, 615 N.E.2d 641 ("Pursuant to Evid.R. 201(F), judicial notice may be taken at any stage of the proceeding, including on appeal."). Appellee's claims that Medical Mutual first raised this issue in its Merit Brief and that Appellant's counsel made a contrary oral

representation as to this fact at oral argument are simply baseless. (See Medical Mutual's Memorandum in Support of Jurisdiction, pg. 9, footnote 2).

B. Medical Mutual's request for documents is limited and based on existing knowledge of patient information.

Of critical import to this appeal is the fact that Medical Mutual, the non-party patients' insurer, already possesses records containing the patients' names, social security numbers, diagnoses (including AIDS or HIV diagnoses), and treatment history. Schlotterer, himself, repeatedly submitted this information to Medical Mutual throughout the claims handling process for his respective patients. Significantly, he did so without any concern about the physician-patient privilege; that is, until he realized Medical Mutual was about to uncover fraud of immense magnitude.

Appellee and amicus curiae American Civil Liberties Union of Ohio Foundation Inc. ("ACLUO") ignore this fact, and attempt to characterize Medical Mutual's actions as an unwarranted and invasive frolic into patients' records, which would seemingly allow Medical Mutual to learn, for the first time, the patients' conditions, and, consequently, potentially deter patients from confiding in Appellee and receiving appropriate treatment. In actuality, Medical Mutual, as the patients' insurer, already knows the history and diagnoses of Appellee's patients and seeks only Appellee's backup documentation, which will allow Medical Mutual to determine whether Appellee fraudulently sought reimbursement from Medical Mutual for treatment never rendered. Thus, Appellee's and ACLUO's fear that allowing the limited disclosure of this privileged information under a protective order would somehow dissuade patients from seeking treatment is unfounded.

Moreover, the backup documentation Medical Mutual sought was not so broad to include **all of the records of all of Appellee's patients** for a six-year period, as ACLUO contends.

(Brief of Amicus Curiae ACLUO, pg. 2). In fact, Medical Mutual's request for backup documentation was limited to Appellee's use of the 99215 Common Procedural Terminology ("CPT") code created by the American Medical Association.¹ Appellee was required to maintain and make available to Medical Mutual documentation substantiating the use of the 99215 code, which is only to be employed when the medical provider faces significant and complex medical issues.

C. Schlotterer previously disclosed patients' records without regard to the physician-patient privilege.

During Medical Mutual's investigation into Appellee's conduct, Appellee willingly submitted records to Medical Mutual, which unequivocally did not support the CPT code criteria for which Medical Mutual reimbursed Appellee. Both parties admit that Appellee disclosed those initial records to Medical Mutual without any objection based on his purported concern for the physician-patient privilege. (*See* Schlotterer's Brief in Opposition to Plaintiff's Motion for a Protective Order, pgs. 1, 3, 6; Schlotterer's Merit Brief to the Eighth District, pg. 8; Merit Brief of Appellant, pgs. 4-5; Medical Mutual's Merit Brief to the Eighth District, pg. 4). Only when faced with further scrutiny from Medical Mutual and, consequently, increased liability for his fraudulent conduct, did Appellee object to the disclosure of further records.

II. LAW AND ARGUMENT

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.

¹ Medical Mutual's Request for Production No. 10 provided: "Produce any patient records that you believe support your use of CPT code 99215 to describe services rendered to that patient."

A. *Biddle* allows for the disclosure of privileged physician-patient information during discovery.

Schlotterer argues that the only exceptions to the physician-patient privilege are set forth in R.C. 2317.02(B). (Brief of Appellee, pgs.10-12.) However, Schlotterer ignores that this Court addressed, and explicitly rejected, his argument in *Biddle*. In *Biddle*, this Court flatly disavowed the Court of Appeals' conclusion that "a disclosure may be privileged only if mandated by statute." *Biddle*, 86 Ohio St. 3d at 401. Instead, this Court concluded that in addition to the statutory exceptions, "[t]he physician also has certain duties under the common law to disclose otherwise confidential medical information" *Id.* at 402. The Court then went on to state that "the privilege to disclose is not necessarily coextensive with a duty to disclose." *Id.*

It is in this context of a privilege to disclose that the Court held: "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 or further a countervailing interest which outweighs the patient's interest in confidentiality." *Id.* (emphasis added.) Thus, in addition to establishing an independent tort for the improper disclosure of privileged information, this Court recognized that the physician-patient privilege is not absolute and must yield to other, significant interests when appropriate, including those of the public, the patient, physicians or third parties. *Id.*

This holding, which Appellee tries to marginalize as purported dicta, is entirely consistent with Ohio law and, further, refutes Appellee's argument that R.C. 2317.02 provides the "exclusive method by which the physician-patient privilege may be set aside." *See Biddle*, 86 Ohio St.3d at 402; *see also Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, 213-14,744

N.E.2d 154 (attorney-client privileged information may be disclosed outside of R.C. 2317.02 in an action alleging bad faith denial of insurance claim); *State ex rel. Nix v. City of Cleveland* (1998), 83 Ohio St. 3d 379, 383, 700 N.E.2d 12 (“A communication is excepted from the attorney-client privilege if it is undertaken for the purpose of committing or continuing a crime or fraud”); *Moskovitz v. Mt. Sinai Medical Center* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331 (attorney-client privileged information may be disclosed pursuant to a R.C. 1343.03(C) proceeding regarding a party’s failure to make a good faith effort to settle a case); *Ohio State Medical Bd. v. Miller* (1989), 44 Ohio St.3d 136, 140, 541 N.E.2d 602 (finding the interest of the public served through the investigation of a physician’s criminal conduct outweighs the interests to be served by the invocation of the physician-patient privilege, regardless of physician’s argument that R.C. 2317.02 controlled); *State v. McGriff* (1996), 109 Ohio App.3d 668, 670, 672 N.E.2d 1074 (properly censored, non-party medical records containing evidence of physician’s insurance fraud and illegal prescriptions may be used as evidence in criminal prosecution, despite claims of privilege); *Ohio State Dental Bd. v. Rubin* (1995), 104 Ohio App.3d 773, 775, 663 N.E.2d 387 (holding that the public is better served by permitting discovery of non-party medical records during dental board investigation rather than allowing pretext of dentist-patient privilege); *State v. Spencer* (1998), 126 Ohio App.3d 335, 339-340, 710 N.E.2d 352 (allowing the disclosure of privileged records in a case involving the prescription of illegal steroids because, under the circumstances, the doctor did not have the right to assert the physician-patient privilege); R.C. 3904.13 (recognizing that privileged information may be disclosed, absent consent, to combat insurance fraud).

Likewise, as discussed in Appellant’s Merit Brief, this Court’s holding in *Jackson v. Greger* (2006), 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487 does not invalidate

Biddle, nor establish R.C. 2307.17 as the exclusive manner by which physician-patient privileged information can be disclosed. (Merit Brief of Appellant, pgs. 23-24). *Jackson*, a case addressing a client's purported waiver of the attorney-client privilege, does not mention *Biddle*, much less question the validity of it or this Court's holdings in *Boone*, *Nix* or *Moskovitz*, which establish exceptions to the attorney-client privilege not found in R.C. 2317.02.

Appellee claims this Court's decision in *Jackson* precludes non-statutory **exceptions** to the physician-patient privilege. However, *Jackson* dealt with waiver of the privilege, not exceptions to the privilege. Appellee's argument is the same one already rejected by this Court in *Boone*. In *Boone*, the trial court relied on *Moskovitz* to allow an insured access to otherwise attorney-client privileged files to substantiate the insured's bad faith claim against the insurer. The insurer argued that this Court's holding in *Moskovitz* must be limited by this Court's holding in *State v. McDermott* (1995), 72 Ohio St.3d 570, 574 651 N.E.2d 985 (holding that "R.C. 2317.02 provides the exclusive means by which privileged communications directly between an attorney and a client can be waived" in a case alleging waiver of privilege due to client's disclosure of the contents of privileged communications to third parties). *Boone*, 91 Ohio St.3d at 213. However, this Court rejected the insurer's attempt to make R.C. 2317.02 paramount to cases involving exceptions to the privilege, stating: "[t]he flaw in [the insurer's] argument is that *McDermott* addresses client *waiver* of privilege, whereas *Moskovitz* sets forth an *exception* to the privilege and is therefore unaffected by our holding in *McDermott*." *Id.* For the same reason, this Court should reject Appellee's flawed attempt to use *Jackson* to question *Biddle*, as this Court clearly recognizes a distinction between the waiver of privilege and exceptions to privilege. *Boone*, 91 Ohio St.3d at 213.

Notwithstanding this Court's holding in *Biddle*, establishing a balancing test for when physician-patient privileged information can be disclosed, Appellee and amici curiae Ohio State Medical Association ("OSMA") and American Medical Association ("AMA") argue that *Biddle* should not apply to discovery, but should be used solely to determine liability for the tort established in that case. This contention is incorrect.

Such a restrictive application of *Biddle* is unwarranted, as nothing in *Biddle* precludes its application to the discovery context. Indeed, this Court has long recognized that non-statutory exceptions to R.C. 2317.02 apply in discovery. *See Boone*, 91 Ohio St.3d 209, 213-14 ("we hold that in an action alleging bad faith denial of insurance coverage, the insured is entitled to **discover** claims files materials containing attorney-client communications") (emphasis added); *Moskovitz*, 69 Ohio St.3d 661 ("statements ... generated in an attorney-client relationship tending to establish the failure of ... an insurer to make a good faith effort to settle a case contrary to the purposes of R.C. 1343.03(C) **are not protected from discovery ...**") (emphasis added). In this same vein, Ohio courts have repeatedly applied the *Biddle* balancing analysis to discovery. *See Soehnlén v. Aultman Hospital*, (N.D. Ohio May 4, 2007), No. 5:06 CV 1594, 2007 U.S. Dist. LEXIS 33064, at *14-15; *Cepeda v. Lutheran Hospital*, Eighth Dist. No. 90031, 2008-Ohio-2348, at ¶ 16; *Alcorn v. Franciscan Hosp. Mt. Airy Campus*, First District No. C-060061, 2006-Ohio-5896, at ¶ 8; *Richards v. Kerlakian* (2005), 162 Ohio App.3d 823, 825, 2005-Ohio-4414, 835 N.E.2d 768; *Fair v. St. Elizabeth Medical Center* (2000), 136 Ohio App.3d 522, 527, 737 N.E.2d 106.

By articulating its balancing test in *Biddle*, this Court reinforced that Ohio courts have the authority to evaluate the competing considerations and circumstances that can outweigh the physician-patient privilege in the different contexts in which physician-patient privileged

information might have to be disclosed, including during discovery. This is precisely what the Trial Court and other Ohio courts have properly done both pre- and post-*Biddle*. See *Soehrlen*, 2007 U.S. Dist. LEXIS 33064, at *14-15; *Miller*, 44 Ohio St.3d at 140; *Cepeda* at ¶ 16; *Alcorn* at ¶¶ 8-12; *Richards* at ¶ 6; *Fair*, 136 Ohio App.3d at 527; *McGriff*, 109 Ohio App.3d at 670; *Rubin*, 104 Ohio App.3d at 775.

Further, Schlotterer should not be allowed to hide behind the physician-patient privilege in evading an investigation into his fraudulent conduct. Cf. *McNiel v. Cooper*, 241 S.W.3d 886, 896-97 (Tenn. App. Ct. 2007) (“Accordingly, most of the jurisdictions that have addressed the question have concluded that healthcare providers should not be permitted to frustrate a legitimate investigation into their professional conduct by asserting the physician-patient privilege.”) (citing to *Biddle*). As in *Fair*, this Court should consider Schlotterer’s motive in asserting the physician-patient privilege, especially when Schlotterer did not raise the privilege when he willingly submitted records in response to Medical Mutual’s initial investigation prior to Medical Mutual filing this lawsuit. *Fair*, 136 Ohio App.3d at 527 (raising the issue that the hospital may have asserted the privilege for “the self-serving purpose of precluding any further investigation and thus protecting the hospital from potential liability.”).

B. *Biddle* allows for the disclosure of privileged information during investigations into insurance fraud, as the interests served by such investigations far outweigh the patients’ interest in absolute confidentiality.

Ultimately, this appeal involves the proper application of this Court’s holding in *Biddle* that: “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 necessary to protect or further a countervailing interest which outweighs the patient’s interest in confidentiality.” *Biddle*, 86 Ohio St.3d at 402.

Applying *Biddle*, the investigation of insurance fraud constitutes a special situation in which the interests of the State of Ohio, the public, third-party insurers, and Medical Mutual in eradicating the harmful effects of insurance fraud outweigh the non-party patients' interests in absolute confidentiality. (See Merit Brief of Appellant, pgs. 11-27). Despite recognizing that "the elimination of insurance fraud is certainly an important public policy interest," Appellee argues that: (1) this case does not involve sufficient interests to justify disclosure under *Biddle* and (2) "Medical Mutual cannot establish the necessity element of the *Biddle* test." (See Brief of Appellee, pgs. 21-30). Further, amici curiae OSMA and AMA argue that disclosure under *Biddle*, if permissible, should only be applicable if the non-party patient's consent cannot be obtained. (Merit Brief of Amici Curiae OSMA and AMA, pgs. 13-14). Appellee's and OSMA and AMA's arguments are untenable for the reasons articulated in Section II, D of Medical Mutual's Merit Brief and for the following reasons.

1. The State of Ohio and the public have critical and *unmistakable* interests in insurers' ability to properly investigate insurance fraud without practitioners wielding the physician-patient privilege as an instrument to conceal fraud.

As highlighted by Medical Mutual and the amici curiae that have filed briefs in support of Medical Mutual, insurance fraud is a staggering financial drain on the nation and Ohio's health care system, which ultimately affects the public's ability to obtain quality, affordable health care. Despite this reality, Appellee argues that Medical Mutual's investigation into his fraudulent conduct is not a matter of public interest. (See Brief of Appellee, pg. 24). Similarly, the Eighth District concluded that Ohio's statutory scheme "indicated a preference for such matters [referring to insurance fraud investigations] to be handled by the state, rather than a private party." (App. Ct. Opinion, 10). Both of these contentions fail to consider the reality of the collaborative nature of the State of Ohio's insurance regulatory scheme in practice, and that

the public is negatively impacted by the misuse of the physician-patient privilege – points amicus curiae the State of Ohio unequivocally emphasizes.

The State of Ohio’s statements below demonstrate the critical interests the state and public it serves have in effective insurance fraud investigation by insurers, like Medical Mutual, and the need to prevent physicians from using the physician-patient privilege to insulate fraudulent conduct:

- “[ODI] has a duty to investigate insurance fraud, and it relies on private insurance companies – who have a statutory duty to report fraud – to work as partners in rooting out fraud. If the insurers cannot do their job, then ODI cannot do its job as effectively. If that happens, fraud continues undiscovered, to the detriment of all Ohio citizens. (State of Ohio Amicus Curiae Merit Brief, pg. 1);
- “The Assembly has also provided for a public-private partnership between ODI and private insurers to combat fraud.” (*Id.* at 2);
- “ODI’s fraud unit investigates over 180 suspected case of insurance fraud per year, and about 80-85% of those investigations are triggered by insurers’ reports to ODI.” (*Id.* at 2);
- “ODI’s antifraud mission is, in turn, part of its broader mission to protect consumers through strong, fair, and vigilant regulation, while promoting a stable and competitive environment for insurers. Insurance fraud threatens that broader mission because it adds costs to providing insurance to consumers, and higher costs threaten access to insurance.” (*Id.* at 2);
- “Insurance fraud is a scourge on the insurance market and on the health care system, and ODI cannot effectively fight fraud without the help of private insurers’ efforts.” (*Id.* at 5);
- “The General Assembly did not expect ODI to act alone in combating fraud; to the contrary, it provided for a public-private partnership between ODI and private insurers to detect and expose fraud.” (*Id.* at 6);
- “[P]ublic policy, as expressed in statutes, favors disclosure of the information that Medical Mutual seeks from Dr. Schlotterer, so that Medical Mutual can seek to prove its fraud case against him. The appeals court’s contrary view, if adopted here, would eviscerate ODI’s ability to fight fraud and protect the public.” (*Id.* at 7-8);

- “The [State] Medical Board [of Ohio] has an interest, too, as it is statutorily charged with overseeing the practice of medicine in Ohio, and it disciplines doctors who violate professional standards.” (*Id.* at 2);
- “[T]he Medical Board, which supports a strong doctor-patient privilege as a means of strengthening the doctor-patient relationship, agrees that the privilege should yield in fraud cases. The privilege helps to ensure proper treatment, but that purpose is not met if a doctor uses a patient as a pawn in a fraud scheme.” (*Id.* at 1);
- “[A] doctor’s fraudulent submission of insurance claims does not enhance patient care, so allowing the privilege to shield such fraud would be an abuse of the privilege and of the doctor-patient relationship. What is more, fraud schemes may involve more than just proper care followed by improper billing; fraudulent doctors may perform unneeded tests and procedures to pad the bills.” (*Id.* at 9);
- “[T]he Auditor of State audits Medicaid payments to doctors to ensure that taxpayer dollars are not misspent, and that interest is also at issue here. While this formally involves fraud against a private insurer rather than against Medicaid, the two often coincide.” (*Id.* at 2).

Thus, the State of Ohio and the public’s interests in the disclosure of physician-patient privileged information during the course of an insurer’s insurance fraud investigation are substantial, and support the disclosure of the backup documentation under *Biddle*.

2. Medical Mutual’s need for the limited disclosure of the non-party patient’s backup documentation to substantiate its claims, which favors disclosure under *Biddle*, is not diminished by Appellee’s purported two-year window to question the legitimacy of claims.

As argued in its Merit Brief, Medical Mutual will not be able to effectively substantiate its claims against Appellee without the backup documentation, which Appellee refuses to disclose based on his pretextual assertion of the physician-patient privilege. Ohio courts, relying on this Court’s holding in *Biddle*, have allowed the disclosure of privileged information in similar cases when such information was necessary for litigants to substantiate their claims, finding that the litigants’ need for the information outweighed the non-party patients’ interest in absolute confidentiality in those circumstances. *Soehnen*, 2007 U.S. Dist. LEXIS 33064, at *14-15; *Cepeda* at ¶ 16; *Alcorn* at ¶ 12 ; *Richards*, 162 Ohio App.3d at 825-26; *Fair*, 136 Ohio

App.3d at 527; *see also Varghese v. Royal Maccabees Life Ins. Co.* (S.D. Ohio Jan. 27, 1998), No. C-1-95-699, 1998 U.S. Dist. LEXIS 12886, at **8.²

Rather than dispute the fact that Medical Mutual cannot effectively substantiate its claim without comparing the treatment actually provided versus the treatment for which Appellee sought reimbursement, Appellee argues that “Medical Mutual cannot show the necessity of their right to the privileged medical records in this case” because of the “lengthy period of time Medical Mutual had to view the medical records, and the rights afforded to it under ODI statutes and regulations.” (Brief of Appellee, pgs. 29-30). This argument against allowing disclosure of the backup documentation under *Biddle* is completely unpersuasive.

R.C. 3901.388, Ohio’s “Prompt Pay” statute, provides: “[a] 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 payment is not subject to adjustment, **except in the case of fraud by the provider.**” (emphasis added). Notwithstanding this distinct exception, Appellee has maintained that Medical Mutual only has a two-year window or “look back” in which to challenge Appellee’s fraudulent up-coding. (*Id.* at 6, 29). As a result, Appellee argues that “length of time Medical Mutual had to view the medical records” prevents it from “needing” the information under *Biddle*. (*See id.* at 29-30). Appellee’s argument as to a limited “look back” period essentially ignores the unambiguous fraud exception to R.C. 3901.388 in favor of a system in which an insurer’s failure to discover fraudulent conduct within two years forever insulates that

² Interestingly, and incredibly, amici curiae OSMA and AMA not only ignore this reality, but advocate a procedure which virtually guarantees that discovery can never be had. They ask the Court to craft a doctrine that compels the insurer to make a “prima facie showing of fraud” before being entitled to the records in discovery. (Merit Brief of Amici Curiae OSMA and AMA, pg. 12). Exactly how an insurer is supposed to satisfy this showing without the records is not explained. Perhaps more importantly, this Court has previously concluded that attorney-client privileged information is subject to discovery based on allegations of bad faith against an insurer with no reference to a “prima facie” showing. *Boone*, 91 Ohio St.3d at 213-14.

conduct from scrutiny and, more importantly, liability. In other words, according to Appellee, if an unscrupulous provider can successfully conceal his fraudulent conduct for two years, he is home free.

Medical Mutual's reliance on the plain language of R.C. 3901.388 does not "turn the Prompt Pay statute on its head" or threaten to overtake the rule, as amici curiae OSMA and AMA contend. (Merit Brief of Amici Curiae OSMA and AMA, pgs. 12-13). Rather, the statute's fraud exception demonstrates that, even though the legislature wanted to expedite payment to practitioners by insurers, it did not intend that practitioners should be able to use the statute's two-year time constraint as a shield for fraudulent conduct. The statute specifically provides that insurers still have the right to redress practitioners' fraudulent billing practices, once uncovered.

Further, Appellee's argument in favor of a strict two year "look back" period, which irrevocably precludes subsequent investigation in fraud situations, ignores Ohio's adherence to the discovery rule for fraud claims. *Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 (citing to R.C. 2305.09). Thus, contrary to Appellee's argument, fraudulent billing practices are not immune from scrutiny after two years; instead, Medical Mutual is entitled to assert a fraud claim up to four years after it discovers the offending conduct, despite the fact that the up-coding may have occurred back in 2000. *See Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 495, 2006-Ohio-2625, 849 N.E.2d 268 ("Ordinarily, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed. Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action.")

3. The non-party patients' consent is not required for the disclosure of privileged information in an insurance fraud investigation under *Biddle*.

Appellee's five-page harangue regarding the lack of patient consent for the disclosure of the backup documentation ignores two critical aspects of the *Biddle* holding: (1) patient consent is not a prerequisite for disclosure and (2) the patient's interest in confidentiality may be outweighed by the countervailing interests of the public or other third parties depending on the circumstances. *Biddle*, 86 Ohio St.3d at 402 ("[S]pecial situations may exist where the interest of the **public, the patient, the physician, or a third person** are of sufficient importance to justify the creation of a conditional or qualified privilege to disclose [physician-patient privileged information] in the absence of any statutory mandate or common-law duty. We hold that **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 necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality.") (emphasis added). Requiring patient consent for the backup documentation not only contravenes the express language of *Biddle*, which clearly permits disclosure absent consent, but essentially eliminates the interests of the three other recognized classes of individuals: the public, physicians, and third-parties, whose interests may outweigh the patients' interest in confidentiality, depending on the circumstances. *See id.*

It is also worth stressing that Appellee and his amici curiae inappropriately overstate the case for patients' consent in the context of this case. As discussed above, Medical Mutual, the non-party patients' insurer, already has the patients' basic information regarding diagnoses and treatment and patients understand this reality. Indeed, as the United States Supreme Court recognized, "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern practice

...” *Whalen v. Roe* (1977), 429 U.S. 589, 602, 97 S.Ct. 869. In fact, both federal and Ohio law contemplate that insurers will routinely have access to a patients’ medical information for purposes of evaluating insurance transactions, and both regulate an insurer’s ability to disclose that information. *See* 45 C.F.R. §164.502 *et seq.*; R.C. 3904.13(C).

Further, from a policy perspective, Appellee and his amici curiae advance a proposition of overkill that could lead to the virtual abrogation of the privilege. Appellee and amici contend that only a properly tailored consent would allow for the disclosure. As such, they require insurers to develop consent forms to be executed by insureds, at the outset of obtaining coverage, that would exhaustively and specifically identify every possible scenario for the disclosure of records. If this was the procedure, insurers could create such consent forms that would allow disclosure on a much broader, and more public, scale than allowing for disclosure in limited circumstances under a protective order and a judge’s scrutiny, as advocated by Medical Mutual.

C. R.C. 3701.243 should not preclude the limited disclosure of the backup documentation under *Biddle*.

As a final barrier to prevent the limited disclosure of the backup documentation and any further inquiry into his billing practices, Appellee, much in the same way he has wielded R.C. 2307.17 for his own self-serving purposes, brazenly asserts, without any support in the record, that his practice consists of a “large number of patients with AIDS or HIV” and, therefore, R.C. 3701.243 precludes any disclosure of these records. (Brief of Appellee, pgs. 8, 14-15).³

³ Because the applicability of R.C. 3701.243 was not raised by Appellee in the proceedings below, neither party verified in the record the exact number of Appellee’s patients, who have been diagnosed with AIDS or HIV, whose records are at issue in this dispute concerning Appellee’s use of the 99215 CPT code. In actuality, according to Medical Mutual’s records, its request for documentation regarding Appellee’s use of the 99215 CPT code only affects **nine** of Dr. Schlotterer’s patients who have been diagnosed with AIDS or HIV. As such, Appellee’s attempt to characterize the vast majority of the records at issue in this case as falling under the protection of R.C. 3701.243 is unfounded.

R.C. 3701.243 is not even applicable to the disclosure of the backup documentation regarding the patients' records as contemplated in this case. R.C. 3701.243 prohibits the disclosure of "the identity of any individual diagnosed as having AIDS or an AIDS-related condition." R.C. 3701.243(A)(3). However, in this case, Medical Mutual, as the patients' insurer, already possesses information disclosing that these patients have AIDS or an AIDS-related condition, as Schlotterer had already disclosed this information to Medical Mutual throughout the claims submission process. In essence, applying R.C. 3701.243 in this case would serve no purpose, as it would only "prohibit" Medical Mutual's access to information (i.e., the diagnosis of AIDS or an AIDS-related condition) it already knows, at the cost of concealing fraudulent conduct. This would harm not only Medical Mutual, but the State of Ohio and the public it serves, as well. Therefore, R.C. 3701.243 should not preclude the disclosure of the backup documentation in this context under *Biddle*.

D. The limited disclosure of the non-party patients' backup documentation will not violate the non-party patients' privacy interests.

Appellee's amici attempt to concoct a constitutional issue out of this appeal by contending that Medical Mutual's position threatens a patient's "expectation of privacy."⁴ This contention ignores the reality of the context in which this appeal is brought. It ignores the fact that this case does not involve the potential exposure of private health information to someone who has no prior access to that patient's information. It ignores the reality of modern health insurance reimbursement practices, which necessarily involve health insurers that are granted, and need, access to private health information on a routine, systematic basis, in order to make coverage determinations.

⁴Notably, Appellee has never raised such a constitutional issue.

“The right of privacy involves the interest of avoiding disclosure of personal matters and independence in making certain kinds of important decisions.” *State ex rel. The Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 34, 661 N.E.2d 187 (citing *Whalen*, 429 U.S. 589). However, it “first must be determined whether a legitimate expectation of privacy exists in the information sought to be disclosed.” *State ex rel. Fisher v. City of Cleveland* (2006), 109 Ohio St.3d 33, 38, 2006-Ohio-1827, 845 N.E.2d 500 (citing *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 608, 640 N.E.2d 164).

Thus, if the Court feels compelled to consider this issue, it must address, in the first instance, the preliminary query: what is the patient’s “expectation of privacy” as it relates to a health insurer evaluating the propriety of a claim for reimbursement made by a physician and pursuing that physician for fraudulent conduct? Indeed, perhaps the more succinct inquiry is this: Does such an “expectation of privacy” exist at all in this context? Given the United States Supreme Court’s recognition that disclosure to insurance companies is “an essential part of modern practice,” *Whalen, supra*, the answer to this question should be a resounding “No.”

If there is an “expectation of privacy” concern, it relates not to whether the insurer should have access to the information in the first instance, but rather, whether the insurer can disclose that information further. That issue is addressed by the Protective Order, Ohio and federal law, the trial court’s inherent power to control discovery, Ohio tort law and the ethical obligations of an insurer’s attorneys.

First, the documentation would be subject to the Protective Order, and the Trial Court could discipline any party who violated it. *Arnold v. American National Red Cross* (1994), 93 Ohio App.3d 564, 580, 639 N.E.2d 484 (finding that protective order could adequately protect the privacy interests of a non-party blood donor, diagnosed with AIDS, whose records were

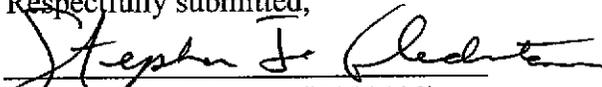
sought in negligence suit against a hospital and the American Red Cross). Second, any unauthorized disclosure of the backup documentation would subject the disclosing part to liability for the tort created in *Biddle* and affirmed in *Hageman*. *Hageman v. Southwest Gen. Health Ctr.* (2008), 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153, at ¶ 17 (“we hold that when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case. An attorney can certainly use medical records obtained lawfully through the discovery process for the purposes of the case at hand However, an attorney may be liable to [the patient] for the unauthorized disclosure of [the patient’s] medical information that was obtained through litigation.”). Third, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) provides the Department of Health and Human Services with the authority to levy civil or criminal penalties for the improper disclosure of medical information. *Henry v. Ohio Victims of Crime Compensation Program* (S.D. Ohio Feb. 27, 2007), No. 2:07-cv-0052, 2007 U.S. Dist. LEXIS 14508, at *4-5. Likewise, Ohio law provides for a private right of action, as well as administrative penalties by the Superintendent of Insurance for improper disclosure. R.C. 3904.19; 3904.21(B). Fourth, counsel for Medical Mutual would be bound by Rule 4.4 of the Ohio Rules of Professional Conduct, which prohibits attorneys from disregarding the rights of third parties in their privileged information. Thus, to the extent the “expectation of privacy” is presented as a concern, it is clearly adequately protected.

III. CONCLUSION

This appeal is about a doctor’s attempt to use, first, the physician-patient privilege and, now, the diagnoses of his patients to perfect his fraudulent conduct. Allowing the physician-patient privilege to be manipulated in such an egregious and self-serving manner will not only

prevent Medical Mutual from effectively substantiating its claims in this case, but will detrimentally affect the State of Ohio, the public, and third-party insurers going forward as future practitioners will be emboldened to commit fraud under the convenient and seemingly impenetrable protection of the physician-patient privilege. Contrary to Appellee and his amici curiae's hollow assertions, permitting the disclosure of the backup documentation under a protective order in this context will not eviscerate the physician-patient privilege, nor deter patients from seeking necessary treatment. Rather, the limited disclosure of the privileged information under the numerous layers of protection available will only eviscerate Appellee's pretextual assertion of the privilege and deter future, similar fraudulent schemes. Therefore, in light of the distinct, compelling interests at stake in insurance fraud investigations, this case presents the ideal context for the application of this Court's holding in *Biddle*. As such, the Eighth District's decision vacating the Trial Court's order should be overturned.

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