

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN and JUNE ROE, Individually :
and as parents and next friend of : Case No. 2007-1832
JANE ROE, a minor :
:
:
Plaintiffs-Appellants, :
:
v. :
: On Appeal from the Hamilton County
PLANNED PARENTHOOD : Court of Appeals,
SOUTHWEST OHIO REGION, et al., : First Appellate District (No. 060557)
:
Defendants-Appellees. :

APPELLEES' BRIEF ON APPLICABILITY AND EFFECT
OF 127 AM. SUB. HB 280

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I. PRELIMINARY STATEMENT

The answer to the question on the application and effect of 127 Am.Sub. HB 280 is clear and unequivocal: The new provisions of the statute do not apply to this case or have any effect on its outcome.

The Ohio General Assembly cannot affect the determination of cases under review by this Court by simply amending the statute on which a court of appeals' decision was based. Well-settled Ohio law provides that this Court's review of appellate decisions must be governed by reference to the law in existence at the time the appellate court considered a case. This is true even if the amendments are intended to be explanatory in nature. To allow otherwise violates the doctrine of separation of powers established by the Ohio Constitution.

Further, even if the revised statute did not offend the separation of powers doctrine, it nevertheless runs afoul of the Ohio Constitution's prohibition against retroactive laws as a violation of due process. R.C. 2151.421 as amended now provides for punitive damages; it did not before. R.C. 2151.421 as amended now provides for the use of abuse reports in civil proceedings against the person who made the reports; it did not before. The affidavit of a single member of the Ohio House notwithstanding, H.B. 280 has *changed* R.C. 2151.421, not simply "clarified" it.

Finally, H.B. 280 amends R.C. 2151.421 — the statute concerning abuse reports — not R.C. 2317.02, which established the confidentiality of *medical records*. H.B. 280 does not refer to, and thus has no effect upon, the discoverability of third-party medical records. Appellants' argument to the contrary overreaches, has no support, and should be rejected by the Court.

II. 127 AM. SUB. H.B. 280's SUBSTANTIVE AMENDMENTS TO R.C. 2151.421

For the last thirty-three years, R.C. 2151.421 has mandated that certain enumerated professionals (“mandatory reporters”) — including physicians and nurses — must report to a public children services agency or municipal or county peace officer suspected or known cases of abuse. See R.C. 2151.421(A)(1)(a) (version effective January 30, 2004). For the last twenty-three years, the statute required that a report of abuse “be made forthwith either by telephone or in person,” and “be followed by a written report, if requested by the receiving agency or officer.” *Id.* (A)(2)(c).¹ It did not otherwise require mandatory reporters to maintain a written record of verbal reports made. Moreover, in the thirty-three years since its enactment, R.C. 2151.421 has contained no provision for the recovery of punitive damages in the event of a violation. Indeed, appellants have not cited — and appellees cannot locate — *any* case in which punitive damages were assessed for a mandatory reporter’s failure to report known or suspected abuse.

Beginning in 1975, R.C. 2151.421 included strict confidentiality provisions.² It provided at that time that “a report made under this section is confidential.” Additional provisions added since 1975 further stated that “[n]o person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.” *Id.* (H)(1, (2). The statute also flatly stated:

¹ R.C. 2151.421 was originally enacted in 1963 and affirmatively required mandated reporters to make *written* reports of abuse. In 1975, the General Assembly amended R.C. 2151.421 to provide that written reports were only required “if requested by the receiving officer or agency.”

² In 1975, the General Assembly amended R.C. 2151.421 to include language providing that, “any report made under this section is confidential.”

The 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*.

Id. (H)(1) (emphases added). Thus, for the last twenty-three years, R.C. 2151.421 has mandated the confidentiality of abuse reports.

As originally drafted, 127 Am. Sub. H.B. 280 (“H.B. 280”) was not addressed to R.C. 2151.421 at all. Rather, in its original form, H.B. 280 had two objectives: to require a poster to be displayed at facilities providing abortions stating, “no one can force you to have an abortion;” and to increase the penalty for domestic violence against a pregnant victim. It was not until *after* this Court heard oral argument in this case that H.B. 280 was revised to include amendments to R.C. 2151.421.

The revised version of H.B. 280 ultimately enacted by the General Assembly codified two significant changes to R.C. 2151.421. First, it added a provision allowing for the recovery of punitive damages: “Whoever violates division (A) of this section is liable for . . . exemplary damages to the child who would have been the subject of the report that was made.” R.C. 2151.421(M) (current version). Second, while R.C. 2151.421 continues to provide that abuse reports are generally “confidential,” not to be disseminated,” and not to be “released for use,” it now contains this exception:

Nothing in this division shall preclude the use of reports of other incidents of known or suspected abuse or neglect in a civil action or proceeding brought pursuant to division (M) of this section against a person who is alleged to have violated division (A)(1) of this section, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker of the report is not the defendant or an agent or employee of the defendant, has been redacted.

Id. (H)(1). It similarly provides:

A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceedings reports of other incidents of known or suspected abuse or neglect, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker is not the defendant or an agent or employee of the defendant, has been redacted.

Id. (M).

As revised by H.B. 280, R.C. 2151.421 provides no guidance as to what information the General Assembly believes must be redacted to protect the identity of the child or other reporter. Moreover, as set forth in Sec. III.C. below, R.C. 2151.421 as revised appears to permit abuse reports to be used only “*against*” the maker of the report by “a person who brings a civil action”; there appears to be no corresponding right for the mandatory reporter to use abuse reports to defend against alleged violations.

There is little or no legislative history reflecting discussion on the floor of the House or Senate of the R.C. 2151.421 amendments enacted by H.B. 280.³ H.B. 280 had an effective date of April 7, 2009, and contained uncodified law providing that it “applies to civil actions filed on or after the effective date of this act” as well as to “civil actions that are pending on the effective date of this act.” It is this uncodified provision directing retroactive application of the amendments that invokes constitutional analysis. That

³ On December 16, 2008, one member stated on the Senate floor only that “we also have in the bill a provision that requires or that penalizes those who would withhold information about abuse. For example — the example that came to mind was my grandson, if he was in a daycare center and was abused and we found out that that daycare center had hidden previous abuse issues they would be held accountable for failing to disclose that information if we want to pursue something because of an abuse to our grandson.” Video available at: http://www.ohiochannel.org/multimedia/media.cfm?file_id=117520&start_time=3990&. In the same hearing, another provision added to H.B. 280 to address human trafficking was discussed at length.

analysis leads to the inevitable conclusion that R.C. 2151.421, as amended, cannot be applied to affect the outcome in this case.

III. ARGUMENT

A. **Retroactive Application Of 127 Am. Sub. H.B. 280 To This Case Violates The Doctrine Of Separation Of Powers Established By The Ohio Constitution.**

The constitutional separation of powers prevents retroactive application of the amendments to R.C. 2151.421 because, under this Court's long-standing precedent, the General Assembly may not interfere with judicial interpretation of a statutory provision in a pending case. "The separation-of-powers doctrine implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of government have their own unique powers and duties that are separate and apart from the others." *State v. Thompson* (2001), 92 Ohio St. 3d 584, 586, 752 N.E.2d 276. To that end, "[i]t is incumbent on each officer of the different departments of the government to perform the duties and exercise the authority of his office without in any wise interfering with the power, discretion, or authority of the officers in either of the other departments." *State, ex rel. Schorr v. Kennedy* (1937), 132 Ohio St. 510, 517, 9 N.E.2d 278. The situation presented by H.B. 280 is precisely the type of encroachment that the separation of powers doctrine is intended to prevent, and, as set forth below, this Court's well-settled decisions in *Cowen v. State* and *Schooner Aurora Borealis v. Dobbie* speak directly to this issue.

On its face, H.B. 280 directs that the amendments to R.C. 2151.421 are to be applied retroactively:

Section 2151.421 of the Revised Code, as amended by this act, applies to civil actions filed on or after the effective date of this act and to civil actions that are pending on the effective date of this act.

H.B. 280 at § 4, p. 100. As this Court has acknowledged, however:

It is well settled that the Legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court [of] competent jurisdiction.

Cowen v. State (1920), 101 Ohio St. 387, 394, 129 N.E. 719; *see also Schooner Aurora*

Borealis v. Dobbie (1848), 17 Ohio 125. In *Cowen*, the Court held:

[T]he Legislature cannot change a rule of law binding upon the Court of Appeals at the time a final judgment is rendered by it and compel this court in determining whether error has intervened therein to consider or apply that change in a consideration of the record of the case in which such final judgment was rendered. *Whether the record discloses error depends upon what the law was at the time the final judgment was rendered.*

Id. at 395 (emphasis added). This is true even if the legislature has expressed its intent that a law apply retroactively, *and even if the legislative enactment is, as appellants repeatedly suggest here, intended to do no more than explain or clarify existing law:*

It is the right of the Legislature to enact laws, and the province of the court to construe them. The Legislature has no power to enact a law, declaring what construction or decision the court shall make upon acts under which rights and liabilities have already been acquired or incurred *The explanatory act operates prospectively, and has, from the time of its passage, the force and effect of a law. But as far as it assumes to encroach upon the province of the court, and assumes to give construction to existing acts, to govern the decisions of the court, as to cases pending, it is judicial; and as the Constitution confers judicial power upon the courts, and withholds it from the Legislature, to that extent such act will be inoperative.*

See id. at 396 (emphasis added), quoting *Schooner Aurora Borealis v. Dobbie*, 17 Ohio at 127-28.

After the appeal in *Schooner Aurora Borealis v. Dobbie*, but before the Supreme Court of Ohio had issued its decision in the matter — the same procedural posture presented here — the General Assembly passed “explanatory” legislation intended to direct the Court’s construction of a statute relating to claims for work done on a ship. *Id.* at 125. In that explanatory legislation, the legislature declared that the earlier statute had been misconstrued by courts as having no extraterritorial operation, which was contrary to the legislature’s intent in enacting the statute. *See id.* at 127. Thus, the explanatory legislation further declared that the statute was to be construed to apply extraterritorially to “cases already pending” as well as those that “may hereafter be commenced.” *Id.* But this Court refused to apply the purported explanatory statute to the pending case, holding that the legislature’s attempt to require such application was a usurpation of judicial power.

Similarly, in *Cowen v. Ohio* this Court again refused to apply legislation retroactively to determine the outcome in a case pending before it — again the same procedural posture as here — when “curative” legislation took effect. In that case, the appellants petitioned the Court to accept jurisdiction over their appeal on the basis of the case’s public or great general interest. *See Cowen*, 101 Ohio St. at 394. The Court declined to grant jurisdiction. Thereafter, the appellants moved for reconsideration of that decision. After the Court granted the motion for reconsideration, but before it entered its judgment, “curative” legislation went into effect that, according to the appellees, was specifically directed at the case before the Court. *See id.* In refusing to apply the statute, the Court stated:

Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted

authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.

Id. at 397, quoting Cooley's Constitutional Limitations (7th Ed.) 136.

1. The First District Court of Appeals rendered a final judgment on the availability of punitive damages and the discoverability of abuse reports.

Regardless of whether H.B. 280 affirmatively *changed* R.C. 2151.421 or simply “clarified” that the statute is to be construed to allow for punitive damages and the discovery of third-party abuse reports, the amendments to R.C. 2151.421 cannot be applied retroactively; they cannot be used to determine whether the third-party abuse reports appellants seek are discoverable, or whether punitive damages are available to them, in a manner that satisfies the Ohio Constitution.

The decision of the First District Court of Appeals is, for purposes of the separation of powers analysis, a final judgment. *Cowen* makes clear that the term “final judgment” includes a court of appeals’ judgment subsequently accepted for review by this Court on the basis of the Supreme Court of Ohio’s discretionary jurisdiction in Art. IV, Sec. 2(B)(2), of the Ohio Constitution. *See Cowen*, 101 Ohio St. at 394-95. In *Cowen*, as here, the Court accepted the Court of Appeals’ decision for review pursuant to its discretionary jurisdiction on the basis of a public or great general interest. *Id.* at 394. The Court of Appeals’ decision was a final judgment for purposes of its separation of powers analysis because the determination of whether a court of appeals committed error must be determined by reference to the law as it was written at the time the court rendered its judgment. *Id.* at 395. That reasoning applies with full force to this case. Indeed, to hold otherwise would allow the General Assembly to enact legislation

dictating to this Court in *any* and *every* case the Court accepts for review, without concern for the constitutional separation of powers.

2. The purpose of H.B. 280 is to reverse the decision of the Court of Appeals.

There can be no dispute that the purpose of H.B. 280 is to reverse the First District Court of Appeals' determination that punitive damages may not be had for a violation of R.C. 2151.421 and that appellants are not entitled to discover third party abuse reports. The bill itself indicates a legislative intent to affect the outcome of this case, by reversing the Court of Appeals' determinations on those very issues, and by directing that this legislation apply retroactively "to civil actions that are pending on the effective date of this act." Indeed, appellants ask the Court to consider the affidavit of Representative Robert Mecklenborg, which unabashedly asserts that H.B. 280 was "enacted to address an interpretation of R.C. § 2151.421 by the Court of Appeals, First Appellate Division, in *Roe, et al. v. Planned Parenthood Southwest Ohio Region, et al.*, App. No. 060557."

As this Court instructed in *Cowen*, the judgment of whether an error occurred in the Court of Appeals' analysis must be determined by reference to the law as it existed at the time the Court of Appeals considered this case. The amendments to R.C. 2151.421 cannot be applied retroactively. Were it otherwise, the legislature could act to modify the outcome in every case with which it disagreed, improperly elevating itself to the position of a superior court of review. *See Cowen*, 101 Ohio St. at 397.

B. Retroactive Application Violates Article II, Section 28 Of The Ohio Constitution Which Prohibits Retroactive Laws As A Violation Of Due Process And The United States Constitution's Prohibition Against Retroactive Laws.

Both the state and federal constitutions prohibit the retroactive application of H.B. 280 to R.C. 2151.421. Section 28, Article II of the Ohio Constitution, provides in pertinent part: "The general assembly shall have no power to pass retroactive laws." This constitutional rule has been interpreted by Ohio courts to prohibit retroactive application of laws that affect *substantive* rights, but not those affecting only *remedial* ones. A "statute purely remedial in its effect * * * on pre-existing rights, obligations, duties and interests" is not "within the mischiefs against which [Section 28, Article II] of our constitution was intended to guard." *Rairden v. Holden* (1864), 15 Ohio St. 207, 211. A statute that affects substantive rights is one which, *inter alia*, impairs or takes away vested rights,⁴ or imposes new or additional burdens, duties, obligations or liabilities as to a past transaction.⁵ In such cases, the legislation cannot be retroactively applied consistent with Art. II, Section 28 of the Ohio Constitution or with the United States Constitution.

Because there is no question that the General Assembly intended for the amendments to R.C. 2151.421 to apply retroactively, the question for the Court is whether the amendments to R.C. 2151.421 in H.B. 280 affect substantive or remedial rights. As this Court has stated, "[i]t is the exclusive function of the judiciary, ultimately this tribunal, to make the determination of whether legislation is procedural or remedial."

⁴ See, e.g., *State, ex rel. South Euclid v. Zangerle* (1945), 145 Ohio St. 433, 62 N.E.2d 160.

⁵ See, e.g., *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749, 752; *State v. Cincinnati Tin & Japan Co.* (1902), 66 Ohio St. 182, 212, 64 N.E. 68, 71; *State, ex rel. Szalay v. Zangerle* (1940), 137 Ohio St. 195, 198, 28 N.E.2d 592, 593.

French v. Dwiggins (1984), 9 Ohio St.3d 32, 36 n.4, 458 N.E.2d 827; *see also Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 225, 2008-Ohio-546, 883 N.E.2d 337, ¶187. As set forth below, the R.C. 2151.421 amendments change, rather than clarify, the law in existence at the time the court of appeals entered its judgment, and do so in a way that affects the substantive rights of appellees and third parties.

1. The amendments to § 2151.421 do not merely clarify, but change, the law in existence at the time the Court of Appeals entered its judgment.

H.B. 280 enacts two significant changes to R.C. 2151.421: (1) it makes punitive damages available for a violation of the statute; and (2) it makes third-party abuse reports discoverable in civil proceedings, under specific, if not obscure, circumstances. While appellants argue that the amendments merely “*clarified and confirmed*” existing law, *see pp. 2-4 of Appellants’ Post-Argument Brief* (emphasis in original), the plain language of the previous version of R.C. 2151.421 and this Court’s analysis in *Kraynak v. Youngstown City School District Board of Education*, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, expose the fatal weaknesses in that argument.

The version of R.C. 2151.421 in effect prior to April 7, 2009, contained *no* provision for the recovery of punitive damages. As set forth in appellees’ merit brief, Ohio law has long provided that punitive damages cannot be awarded for violation of a statutory duty that did not exist at common law unless the General Assembly expressly authorizes punitive damage awards in “plain terms.” *Kleybolte v. Buffon* (1913), 89 Ohio St. 61, 105 N.E. 192; *see generally* Appellees’ Merit Brief at pp. 17-20 and cases cited therein. It is beyond dispute that the mandatory reporting duty and concomitant liability created by R.C. 2151.421 did not exist at common law, and thus, because they

were not expressly authorized, punitive damages could not have been available for violation of the version of R.C. 2151.421 in effect prior to April 7, 2009. *See David M. v. Erie Cty. Dept. of Human Services* (June 30, 1994), 6th Dist. No. E-93-40, 1994 WL 319053, appeal denied (1994), 71 Ohio St.3d 1423 (rejecting the argument “that a hospital and a physician owe a common law duty to their child patient to . . . inform the proper agencies when the hospital or physician suspects that the patient was abused”).

Further, the version of R.C. 2151.421 in effect prior to April 7, 2009 stated, in clear and unambiguous language, that abuse reports made pursuant to R.C. 2151.421 are “confidential” and that “information provided in a report made pursuant to this section . . . 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.” As amended by H.B. 280, R.C. 2151.421(H) *now* provides: “Nothing in this division shall preclude the use of reports . . . against a person who is alleged to have violated division (A)(1) of this section.” The language has changed from *prohibiting* the use of reports as evidence, to specifically *allowing* the use of reports against a defendant in certain circumstances — a metamorphosis that flatly refutes any suggestion that H.B. 280 did *not* change R.C. 2151.421(H).

Moreover, the principles of statutory construction that this Court employed in *Kraynak* compel the conclusion that H.B. 280 changes existing law. In *Kraynak*, the Court found that “the current version of R.C. § 2151.421 is instructive in determining what standard the former version required as well as what the General Assembly intended in amending the statute.” *Kraynak*, 118 Ohio St.3d at 403, 2008-Ohio-2618, 889 N.E.2d at 531, ¶16. The Court reasoned that the General Assembly’s replacement of the statute’s

subjective language with objective language supported the conclusion that *a change was necessary* for an objective standard to apply. *Id.* Likewise, here, the General Assembly's amendments to R.C. 2151.421 to provide for punitive damages and disclosure of abuse reports should be taken as a change in the law. The amendments reflect the General Assembly's understanding that the law as previously written did not provide for punitive damages or the discovery of abuse reports.

Nevertheless, ignoring the stark contrast between the language of R.C. 2151.421 before and after H.B. 280's amendments, appellants rely solely on the affidavit of a single member of the General Assembly to argue that H.B. 280 did nothing more than clarify the law. That affidavit cannot bear the weight appellants would give it. In *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 337, the Court refused to accept the General Assembly's characterization of a statutory provision as remedial because "whether the statute is remedial depends upon its operation and not upon a label placed upon it by the General Assembly." *Id.* at 225, ¶187. Where, as in *Groch*, the General Assembly's view expressed in the statute itself does not control, the statement of a single representative presented to the Court in a post-enactment affidavit certainly does not.

Likewise, in *Glick v. Sokol*, 149 Ohio App.3d 344, 2002-Ohio-4731, 777 N.E.2d 315, the Court of Appeals held that Am. Sub. H.B. 551 changed rather than clarified the law despite testimony by the sponsor of the bill that "the language amending section 1707.01 of the Ohio Securities act clarifies that an interest in a 'life settlement' constitutes a 'security' under Ohio law." *Id.* at 346, ¶10. The Court of Appeals explained that because "Ohio has no official legislative history," "sponsor testimony is of

limited value to our analysis.” *Id.* (citing *State v. Dickenson* (1971), 28 Ohio St.2d 65, 67, 275 N.E.2d 599).

In comparison to *Glick*, the affidavit presented here does not even reflect testimony given on the floor of the General Assembly. Instead, it is the statement of one representative crafted *after* the enactment of H.B. 280, at the request of counsel for appellants for the specific purpose of influencing this appeal.⁶ The memorandum attached to the affidavit is directed on its face to one party only and is labeled “confidential.” A statement of a single representative written with the intent of influencing a judicial decision, as well as a memorandum apparently withheld from some portion of the legislature, cannot be properly characterized as *legislative history*. See *Glick*, 149 Ohio App.3d at 346, ¶10; see also, e.g., *DirectTV, Inc. v. Levin* (Feb. 12, 2009), 10th Dist. No. 08AP-32, 2009-Ohio-636, 2009 WL 352560, *10, ¶¶31-34 (holding trial court erred in relying on written evidence of arguments presented by lobbyists in support of provision as well as “statements reflecting the reasoning of members of the legislature for enacting” the provision). The affidavit and memorandum cannot be taken to express the view of the General Assembly.⁷

Finally, even if the affidavit could somehow be categorized as “legislative history,” Ohio law prohibits the consideration of legislative history unless a statute contains an ambiguity. See *State, ex rel. Brinda v. Lorain County Board of Elections*,

⁶ The Affidavit was signed on April 7, 2009. See also Memo. in Supp. of Appellants’ Mot. for Permission to File the Aff. (noting that, in response to Court’s direction that the parties brief the effect of H.B. 280 on this case, “[a]ppellants contacted Representative Mecklenborg” and obtained the affidavit from him).

⁷ Indeed, the description given on the floor of the Senate that H.B. 280 “penalizes those who would withhold information about abuse” suggests an understanding that the bill provided for the first time for punitive damages for failure to report. See note 3, *supra*.

115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, ¶25; *State, ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶ 28; *see also BedRoc Ltd., L.L.C. v. United States* (2004), 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (“our inquiry begins with the statutory text, and ends there as well if the text is unambiguous”). There is no ambiguous language within the amendments to R.C. 2151.421.

2. The punitive damages provision is a substantive change and thus cannot be retroactively applied.

The punitive damages provision of H.B. 280 may not constitutionally apply retroactively because it is substantive in nature. This Court has squarely held that the amendment of a statute to allow, or even limit, recovery of punitive damages affects substantive rights, and may not be applied retroactively. *See Osai v. A & D Furniture Co.* (1981), 68 Ohio St.2d 99 (“[T]he treble-damages provision affects a substantive right. Therefore, its application to the facts of this case would violate due process.”); *see also French v. Dwigins* (1984), 9 Ohio St.3d 32, 458 N.E.2d 827; *Central States Stamping Co. v. Lake County National Bank* (N.D. Ohio, 1974), 587 F. Supp. 372. Though amendments that affect *compensatory* damages generally can be retroactively applied, the same is not true of punitive damages, which, by definition, are intended to punish. As this Court stated in *French, supra*, “[a] statute which imposes treble damages as a penalty for misconduct is obviously intended to prevent or discourage such activities,” and for that reason affects substantive rights. *French*, 9 Ohio St. 2d at 36.

By its operation, and pursuant to this Court’s precedent, H.B. 280’s punitive damages provision is substantive. It therefore cannot control the outcome of this appeal.

3. **The provision permitting discovery and use of third-party abuse reports is a substantive change and cannot be retroactively applied.**

The amendment to R.C. 2151.421 allowing the use of third-party abuse reports against defendants in civil proceedings impairs the vested privacy rights of third parties, and imposes “new and additional burdens, obligations, and liabilities” on mandatory reporters.⁸ It therefore may not be applied retroactively.

H.B. 280 makes a substantive change in the law by altering the privacy rights of third party minors about whom a report of known or suspected abuse has been made. The privacy rights inhering in those reports are substantive under Ohio law. *See, e.g., Housh v. Peth* (1956), 165 Ohio St. 35. Where the General Assembly previously mandated that the reports be “confidential,” it has now provided for their disclosure in unrelated civil litigation, apparently without providing courts any opportunity to consider whether the reports are necessary to a plaintiff’s case or probative of any issue, and without providing judges any discretion to bar discovery of those reports in a particular case.⁹ Nor did the General Assembly specifically define what information in a report could “identify the child who is the subject of the report.”¹⁰ A minor victim of abuse is

⁸ *See, e.g., Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749, 752; *State v. Cincinnati Tin & Japan Co.* (1902), 66 Ohio St. 182, 212, 64 N.E. 68, 71; *State, ex rel. Szalay v. Zangerle* (1940), 137 Ohio St. 195, 198, 28 N.E.2d 592, 593

⁹ Alternatively, the Court could conclude that the amendment was *not* intended to permit discovery of abuse reports absent a showing of necessity or probity. As discussed, other constitutional barriers would still prevent retroactive application of the amendment to this case, but if the Court determined to apply the amendment in this fashion, it will still then need to determine that the abuse reports are necessary or probative to any issue in this case before it could reverse this aspect of the Court of Appeals’ decision.

¹⁰ As is the case with medical records generally, any unique juxtaposition of facts in a report could lead to the identity of a particular minor. *See Amicus Brief of Ohio State Medical Association et al.*, pp. 14-17.

entitled to the privacy that the version of R.C. 2151.421 in effect prior to April 7, 2009 afforded.

Further, it is well-settled under Ohio law that a statute affects a substantive right when it “imposes new or additional burdens, duties, obligations or liabilities as to a past transaction.”¹¹ By providing for the use of third-party abuse reports against a defendant in a civil action, the General Assembly has by implication affirmatively changed the obligations of a mandatory reporter under Ohio law. Whereas the version of R.C. 2151.421 in effect prior to April 7, 2009 did not require a reporter to keep a *written record* of abuse reports,¹² the new version of that statute may well impose such a burden. That may be good practice prospectively; it is a quagmire retrospectively.

Indeed, appellants have stated in no uncertain terms that they seek the records Planned Parenthood maintained of abuse reports it made precisely because appellants believe the records — records that R.C. 2151.421 did *not* require appellees either to make or maintain — will provide “statistical data” establishing that appellants did not report every instance of known or suspected abuse. *See* page 8 of appellants’ post argument brief. Thus, in order to prove that it complied with its reporting obligations under R.C.

¹¹ *See, e.g., Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749, 752; *State v. Cincinnati Tin & Japan Co.* (1902), 66 Ohio St. 182, 212, 64 N.E. 68, 71; *State, ex rel. Szalay v. Zangerle* (1940), 137 Ohio St. 195, 198, 28 N.E.2d 592, 593.

¹² The version of § 2151.421 in effect from 1975 to April 6, 2009 provided:

Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, *if requested by the receiving agency or officer.*

In fact, R.C. 2151.421(C) remains unchanged in the current version of R.C. 2151.421 — H.B. 280 appears not to have affected the language of that particular provision. Nevertheless, because of the amendments to R.C. 2151.421(H), there is now an implied obligation to make and maintain written reports of *every* report of known or suspected abuse, despite the language of R.C. 2151.421(C).

2151.421, Planned Parenthood, or any other defendant facing a R.C. 2151.421 claim, must produce *written* records from a period of time when *telephone* reports were permissible. While the General Assembly can impose this duty prospectively, to base liability on a failure to have done so before the enactment of H.B. 280 would impose a new burden and potential liability on a past transaction. *See French*, 9 Ohio St.3d at 35 (noting that an amendment is substantive when a party would “be expected to conduct his affairs differently depending on which version of [the statute] was in effect”). In that regard as well, H.B. 280 has affected substantive, versus remedial, rights and cannot be retroactively applied.

Finally, by providing both that plaintiffs in civil actions alleging a failure to report may obtain punitive damages and may use non-party abuse reports in such actions, without apparent discretion for courts to evaluate the propriety of the admission of such reports into evidence, the General Assembly has effected a substantive change that interferes with the due process protections articulated in *Philip Morris USA v. Williams* (2007), 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940. In *Philip Morris*, the United States Supreme Court held that a jury may not award punitive damages against a defendant “for having caused injury to others.” *Id.* at 357, 127 S.Ct. at 1065. The Court specifically instructed that states “cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.” *Id.*

If Ohio courts have no discretion to evaluate whether non-party abuse reports should be admitted in a particular civil action, they cannot avoid what may in a particular case create an unreasonable and unnecessary risk that the jury will punish a defendant for injury to others. This substantive change may not, therefore, be applied retroactively, and

unless the Court interprets the amendment to allow courts discretion to comply with the requirements of due process, may also not be applied prospectively.

C. The Provision Allowing Abuse Reports To Be Used Against, But Not By, Mandatory Reporters Violates Their Right To Due Process.

If, as its plain language suggests, H.B. 280 allows third-party abuse reports to be used “*against*” the maker of the report, without providing any reciprocal right to the maker of the report to use reports *in defense of* alleged violations of R.C. 2151.421, it cannot constitutionally be applied in any case. Such a one-sided provision would be entirely arbitrary and a violation of due process.¹³

An illustration demonstrates why this is the case. Under the amended version of R.C. 2151.421, it appears that a plaintiff could selectively introduce third-party abuse reports in support of an allegation that the defendant failed to report abuse whenever the abuser was a member of the victim’s family, but the defendant could not introduce other reports into evidence which flatly contradict that allegation. Or, as applied to this case, appellants could introduce some, but not all, of the reports made by Planned Parenthood to support their “statistical” contention that Planned Parenthood reports “known” but not “suspected” abuse, and Planned Parenthood would have no opportunity to rebut that contention with other abuse reports that show that it reported suspected abuse. This

¹³ As amended, R.C. 2151.421(H)(1) provides that non-party abuse reports may be used “against” mandatory reporters who allegedly failed to make a report of known or suspected abuse, without providing that such reports may be used “by” the reporters. R.C. 2151.421(M) provides:

A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceedings reports of other incidents of known or suspected abuse or neglect.

result, whether intended by the General Assembly or not, unfairly handicaps civil defendants and violates their right to due process under the Constitution.

Indeed, in *Philip Morris USA v. Williams*, the United States Supreme Court held that a punitive damages award may not be based upon harm to non-parties precisely because a defendant must have “an opportunity to present every available defense.” 549 U.S. 346, 353, 127 S.Ct. 1047, 1063, 166 L.Ed.2d 940.¹⁴ To allow abuse reports to be used only *against* mandatory reporters would carry even greater “risks of arbitrariness” that the Court condemned in *Philip Morris*. *Id.* at 354, 127 S.Ct. at 1063. Such a provision would violate the right to due process, whether applied retrospectively or prospectively.

D. Even If 127 Am. Sub. H.B. 280 Could Be Applied Retroactively In A Manner Consistent With The Constitution, The Amendments Apply Only To Abuse Reports And Thus Have No Effect On Discoverability Of Third Party Medical Records.

Even if H.B. 280 could be applied retroactively to this case without running afoul of the Ohio Constitution, it does not apply to third party medical records — only third-party abuse reports. This distinction is of utmost importance to this case, in which the Court has been asked to determine whether a private plaintiff may discover both confidential medical records of third parties *and* confidential written reports of known or

¹⁴ “Yet,” the Court explained, “a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.” *Id.* at 353-54. Further, any award would be arbitrary and speculative, because the trial would not likely answer the questions as to non-parties “How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?” *Id.* at 354.

suspected abuse made to authorities. On its face, H.B. 280 purports to provide an answer to the latter, but says nothing about the former:

Nothing in this division shall preclude the use of *reports of other incidents of known or suspected abuse or neglect* in a civil action or proceeding brought pursuant to division (M) of this section against a person who is alleged to have violated division (A)(1) of this section, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker of the report is not the defendant or an agent or employee of the defendant, has been redacted.

R.C. 2151.421(H)(1) (current version) (emphasis added); *see also id.* (M). The amended language says nothing about medical records of third parties.

Rather, H.B. 280 is plainly directed only to R.C. 2151.421, a statute that deals solely with the reporting of known or suspected child abuse — not to R.C. 2317.02, which provides for the confidentiality of medical records generally. If the legislature had intended to abrogate the privacy guaranteed to medical records generally, it would have amended R.C. 2317.02. It did not. “There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.” *Voight Indus., Inc. v. Tracy*, 72 Ohio St.3d 261, 265, 1995-Ohio-18, 648 N.E.2d 1364, (quoting *State, ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 56 N.E.2d 265, syllabus para. 8).

Indeed, the General Assembly’s enactment of H.B. 280 in response to the Court of Appeals’ decision in this case may suggest its *approval* of that court’s interpretation of R.C. 2317.02. If the legislature disagreed with the court’s central holding that medical records are not discoverable, it surely would have attempted to reverse that determination as well:

Where a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains

unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as part of the law, unless express provision is made for a different construction.

Johnson v. Microsoft Corp., 106 Ohio St.3d 278, 283, 2005-Ohio-4985, 834 N.E.2d 791, ¶12 (quoting *Spitzer v. Stillings* (1924), 109 Ohio St. 297, 142 N.E. 365, syllabus para. 4). Where, as here, the General Assembly specifically directed its bill at the Court of Appeals' decision, and attempted to reverse some but not all parts of that decision, the presumption usually given to the decision of a court of last resort applies with great force. Appellants thus overreach in their attempt to expand H.B. 280 to apply to medical records generally, without any support. Even if H.B. 280's amendments to R.C. 2151.421 could somehow pass constitutional muster, those amendments do nothing to affect the discoverability of confidential third-party medical records in this case.

Appellants likewise overreach when they assert in support of this position that “[t]he United States Supreme Court has explicitly recognized that redaction divests medical records of any claim of privilege.” Page 9 of appellants' post-argument brief (citing *Reproductive Services, Inc. v. Walker* (1978), 439 U.S. 1307, 1309). The case relied upon was *not* a decision of the United States Supreme Court, but of one Justice on an application for stay pending a decision on a petition for certiorari. Further, the Justice refused to allow the production of medical records, although redacted of patient names, because the parties could not agree “to a protective order ensuring the privacy of patients.” *Id.* at 1354. The single-Justice decision in *Reproductive Services v. Walker* provides no support for appellants' contention that in amending R.C. 2151.421, the

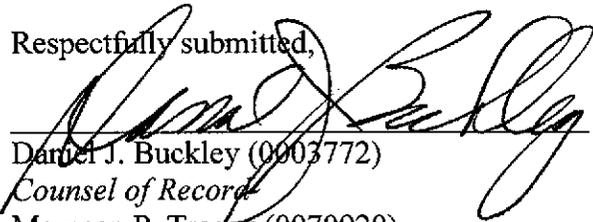
General Assembly also tacitly amended R.C. 2317.02 to permit the production of non-party medical records.

For all of the reasons set forth in appellees' merit brief, the Court of Appeals correctly determined that those medical records cannot be discovered by appellants. That decision should be affirmed.

IV. CONCLUSION

For the reasons set forth above, appellees submit that 127 Am. Sub. H.B. 280 cannot be retroactively applied to this case without violating the Ohio Constitution.

Respectfully submitted,


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I hereby certify that a copy of the foregoing Appellees' Brief on Applicability and Effect of 127 Am. Sub. HB 280 has been served by electronic and United States mail on this 20th day of April, 2009, to the following:

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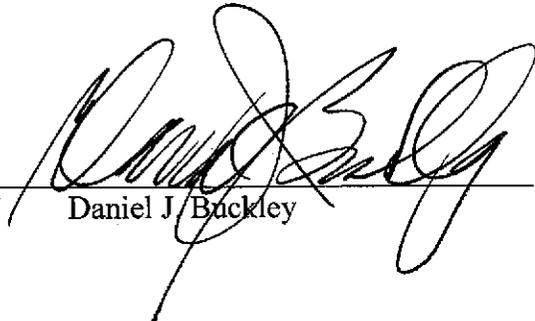
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