

ORIGINAL

IN THE SUPREME COURT OF OHIO

|   |   |                                 |
|---|---|---------------------------------|
| JOHN AND JUNE ROE, individually and as        | : | Case No. 07-1832                |
| parents and next friends of JANE ROE, a minor | : |                                 |
|   | : | Appeal from the Hamilton County |
| Appellants,                                   | : | Court of Appeals,               |
|   | : | First Appellate District,       |
| v.  | : | Case No. C060557                |
|   | : |                                 |
| PLANNED PARENTHOOD SOUTHWEST                  | : |                                 |
| OHIO REGION, et al.,                          | : |                                 |
|   | : |                                 |
| Appellees.                                    | : |                                 |

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**BRIEF OF AMICI CURIAE  
OHIO STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION,  
AND AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS,  
ON APPLICABILITY AND EFFECT OF 127 AM. SUB. H.B. 280  
IN SUPPORT OF APPELLEES**

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

Amici Curiae, the Ohio State Medical Association (“OSMA”), the American Medical Association (“AMA”), and the American College of Obstetricians and Gynecologists (“ACOG”) (collectively “Amici”) file this supplemental Brief in response to the Court’s order of April 3, 2009 requesting additional briefing on the application and effect of 127 Am. Sub. House Bill 280 (“H.B. 280”) on this case.<sup>1</sup> Previously, Amici filed a Merit Brief in Support of Appellees in this case setting forth their position why this Court should protect confidential third-party medical records from disclosure in civil litigation — even when such records are redacted.

Appellants now assert that the amendment to R.C. § 2151.421, made by H.B. 280, allows them to discover not only abuse reports, but also the medical records of strangers to this litigation. Amici disagree, and submit this Brief to urge the Court to reject Appellants’ blatant overreaching and misapplication of the abuse reporting statute. Simply put, the amendments to the abuse reporting statute do not address and were not intended to permit disclosure of confidential third-party medical records.

## **LAW AND ARGUMENT**

H.B. 280, which became effective April 9, 2009, amends Ohio’s statute regarding the reporting of suspected child abuse or neglect – R.C. § 2151.421. In adopting H.B. 280, the General Assembly stated that the amendments to this statute shall apply to pending cases. H.B. 280, 127th Gen. Assem., § 4 (2009). While Amici doubt that the

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<sup>1</sup> The OSMA and AMA participate herein 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.

statute as amended can constitutionally apply to alter the judgment already rendered in this case, they do not address that issue herein. Instead, Amici address only the issue of whether R.C. § 2151.421, as amended, provides a basis for the disclosure of sensitive third-party medical records to complete strangers.

Appellants assert in their Post Argument Brief that the provisions of H.B. 280 confirm that Appellants are entitled to discover not only abuse reports, but also the confidential *medical records* of other minor patients who received services at Appellees' Planned Parenthood facility. Appellants' Post Argument Brief, at 1. Appellants are wrong.

H.B. 280 amends R.C. § 2151.421—the statute concerning *abuse reports*. The bill does not amend R.C. § 2317.02, which addresses the confidentiality of *medical records*. H.B. 280 does not even reference or mention in any way the discoverability of third-party medical records. Given the highly sensitive nature of the medical records requested in this case, and the fact that H.B. 280 does not speak in any way to the discovery of *medical records*, Appellant's contention that H.B. 280 permits such confidential medical records to be provided to strangers – even if redacted – has no support, and should be rejected.

**A. H.B. 280's Substantive Amendments Address Only the Discoverability of Abuse Reports –And Not Medical Records**

The Court has been asked to determine whether confidential medical records of third-parties *or* confidential written abuse reports are discoverable by private parties in civil lawsuits. Medical records and abuse reports are distinct documents, serving different purposes. Medical records generally are intended to assist in patient care and treatment; the confidentiality of these records is closely guarded by R.C. § 2317.02. On

the other hand, the primary purpose of abuse reports, governed by R.C. § 2151.421, is to assist in the reporting of known or suspected child abuse.

The plain language of H.B. 280 addresses abuse reports directly, but the bill is entirely silent as to third-party medical records:

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.

H.B. 280 at pp. 8-9, ¶ 1 (emphasis added). The language amending the statute makes no reference, either express or implied, to medical records of third-parties, or to R.C. § 2317.02, the statute governing the confidentiality of medical records. In fact, medical records are not mentioned at all in R.C. § 2151.421, or in the uncodified law of H.B. 280 which addresses the amendment.

As such, H.B. 280 is directed only to the reporting of known or suspected child abuse, and not with disclosure of medical records generally. Had the legislature intended to extinguish the privacy guaranteed to medical records, it would have amended R.C. § 2317.02. But, 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* (1995), 72 Ohio St.3d 261, 265, 648 N.E.2d 1364, 1995-Ohio-18 (quoting *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 56 N.E.2d 265, syllabus para. 8). The Court’s obligation, then, is to apply the statute as written. *Id.*

Simply put, Appellants have overreached in their attempt to expand H.B. 280 to apply to medical records generally. Even if this Court finds that H.B. 280 validly amends § 2151.421 as to the discoverability of confidential abuse reports, the amendments do nothing to affect the discoverability of confidential third-party medical records in this (or any other) case.

**B. The General Assembly’s Approval of Redacted Abuse Reports In This Narrow Context Does Not Constitute a General Imprimatur for Discoverability of Redacted Medical Records In All Civil Cases**

Appellants assert that by adding language expressly making redacted abuse reports available in discovery and for use at trial, “the General Assembly has added its imprimatur to the premise that the redaction of all information from which the identity of a person may be discerned fully protects the person,” including specifically redacted medical records. Appellants’ Post Argument Brief, at 9. Appellants’ logic is flawed.

The General Assembly’s decision to allow the discovery of redacted abuse records in the narrow context of R.C. § 2151.421 says nothing about its approval of redaction as a general matter to protect patient confidentiality. If the General Assembly disagreed with the Court of Appeal’s holding that redaction is insufficient to protect the identity of patients, it could have attempted to reverse that determination by directly addressing the discoverability of third-party medical records in all or some civil matters.

Given the importance of ensuring the confidentiality of the particularly sensitive medical records at issue in this case, the General Assembly’s approval of redaction should be limited to the specific, narrow context in which H.B. 280 amended R.C. § 2151.421. The Court should not, based on this narrow amendment, disregard the long-standing policy of medical confidentiality underlying R.C. § 2317.02 by permitting the discovery of redacted privileged and confidential medical records.

The fundamental tenet of confidentiality of communications between medical professionals dates back to the Hippocratic Oath, and remains paramount to patient treatment today. When patients are reluctant to seek health care services or to provide complete and accurate information to their medical providers for fear that their very private information will be shared with others who have no legitimate interest in their health care, public policy goals of protecting patients, including minors, and promoting their well-being are undermined. Confidentiality is particularly essential in providing health care services to adolescents.<sup>2</sup> Thus, protecting adolescents and promoting their good health entails reinforcing, rather than weakening, the confidentiality of the physician-patient relationship. Therefore, permitting the discovery of medical records in this case -- even if redacted -- undermines confidentiality in communications between physicians and their adolescent patients and, thus, may harm adolescents under the guise of protecting them.

The redaction of personal patient information from medical records does not effectively protect the identity of the unrepresented nonparty patients.<sup>3</sup> The redaction of privileged medical records neither divests them of their privileged status, nor fully protects the identities of the unrepresented nonparty patients. Hence, redaction of “identifying information” from medical records is ineffective to protect patient confidentiality.

The General Assembly’s decision to enact H.B. 280 to provide disclosure rules for abuse reports does nothing to alter the general rule that confidential medical records

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<sup>2</sup> See Merit Brief of Amici Curiae, at 6-11.

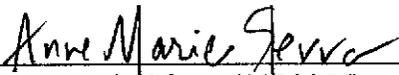
<sup>3</sup> For a full discussion of the confidentiality issues associated with the redaction of medical records, see Merit Brief by Amici Curiae, at 17-21.

are not to be disclosed absent express authorization permitting such disclosure. See *Hageman v. Southwestern Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343.

**CONCLUSION**

For the reasons set forth above, Amici submit that 127 Am. Sub. H.B. 280 applies, if at all, only to the reporting of known or suspected abuse of minors, and has no bearing on the discoverability of third-party medical records.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

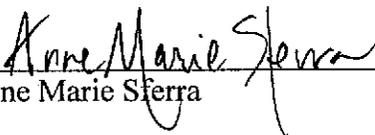
I hereby certify that a true copy of the foregoing Brief of Amici Curiae Ohio State Medical Association, American Medical Association, and American College of Obstetricians and Gynecologists on Applicability and Effect of 127 Am. Sub. H.B. 280, in Support of Appellees was sent via regular U.S. mail, postage prepaid this 20<sup>th</sup> day of April 2009, to the following:

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