ORIGINAL

IN THE SUPREME COURT OF OHIO

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

POST ARGUMENT REPLY BRIEF

CRABBE BROWN & JAMES LLP
Brian E. Hurley (0007827) (*Counsel of Record*)
Robert J. Gehring (0019329)
30 Garfield Place, Suite 740
Cincinnati, OH 45202
Tel: (513) 784-1525
Fax: (513) 784-1250

KEATING MUETHING & KLEKAMP PLL
Richard J. Creighton, Jr. (0021806)
William A. Posey (0021821)
Charles M. Miller (0073844)
One Each Fourth Street, Suite 1400
Cincinnati, OH 45202
Tel: (513) 579-6513
Fax: (513) 579-6457

WHITE, GETGEY & MEYER CO., LPA
Nicholas E. Bunch (0015008)
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
Tel: (513) 241-3685
Fax: (513) 241-2399

Counsel for Plaintiffs-Appellants

VORYS, SATER, SEYMOUR AND PEASE LLP
Daniel J. Buckley (0003772) (*Counsel of Record*)
Maureen P. Haney (0070920)
Dorothea K. Langsam (0082973)
Suite 2000, Atrium Two
221 East Fourth Street
P.O. Box 0236
Cincinnati, OH 45201-0236
Tel: (513) 723-4000
Fax: (513) 723-4056

Suzanne K. Richards (0012034)
John J. Kulewicz (0008376)
Alexandria T. Schimmer (0075732)
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6400
Fax: (614) 464-6350

Counsel for Defendants-Appellees

FILED
APR 27 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

Page

I. INTRODUCTION 1

II. ARGUMENT 3

A. There Has Been No Final Judgment in this Case 3

B. The Current Version of R.C. 2151.421 is Remedial 5

1. R.C. 2151.421's express authorization of the discovery of redacted abuse reports does not alter the remedial nature of R.C. 2151.421 6

2. Permitting Discovery of Redacted Abuse Reports Does Not Violate Planned Parenthood's Due Process Rights 9

3. R.C. 2151.421's express authorization of exemplary damages does not alter the remedial nature of R.C. 2151.421 10

C. The Abuse Reports and Medical Records Are Discoverable 12

D. Redacted Medical Records Are Discoverable 13

III. CONCLUSION 15

Table Of Authorities

Page

CASES

Ackison v. Anchor Packing Co., 120 Ohio St.3d 228, 2008-Ohio-5243, 987 N.E.2d 1118 . . . . . 6, 7, 10

Alpha Medical Clinic v. Anderson (Kansas 2006), 128 P.3d 364, 379 8

Community Hosp. Ass'n. v. Dist. Ct. (Colo. 1977), 194 Colo. 98, 101 8

Cowen v. State (1920), 101 Ohio St. 387, 388, 129 N.E. 719 . . . . . 4, 5

Doe v. Meachum (D. Conn. 1989), 126 F.R.D. 444 8

Doe v. Puget Sound (Wash. 1991), 819 P.2d 370 8

Fischer v. Hartford Hosp. (Conn. Super. 2002), 2002 Conn. Super. Lexis 269, *9 8

French v. Dwiggins (1984), 9 Ohio St.3d, 32, 36, 458 N.E.2d 827 10

Inmates of New York with HIV v. Cuomo (N.D.N.Y. 1991), No. 90-CV-252, U.S Dist. LEXIS 4491 8

Kraynak, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 529 . . . . . 5, 6, 12

Reproductive Services, Inc. v. Walker (1978), 439 U.S. 1307, 1309 8

Nat'l. Abortion Federation v. Ashcroft (E.D. Mich. 2004), No. 04-70658, U.S. Dist. LEXIS 4491 8

Nat'l. Abortion Federation v. Ashcroft (S.D.N.Y. 2004) No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 8

Osai v. A & D Furniture Co. (1981), 68 Ohio St.2d 99, 428 N.E.2d 857 10

Shay v. Shay, 113 Ohio St.3d 172, 2007 Oio 1384, 863 N.E.2d 591 11

State v. Cook (1998), 83 Ohio St.3d 404, 411, 700 N.E.2d 570 11

State v. Ferguson, 120 Ohio St.3d, 2008-Ohio-4824, 896 N.E.2d 110 . . . . . 3, 6, 7, 9, 11

State v. Wall, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829 9

State ex rel. White v. Goldsberry (1999), 85 Ohio St.3d 153,
1999 Ohio 447, 707 N.E.2d 496 7

Tanzi v. St. Joseph Hosp. (R.I. 1994), 651 A.2d 1244, 1244-45 8

Terri Haute Regional Hosp. v. Trueblood (Ind. 1992), 600 N.E.2d 1358,
1361-1362 8

The Schooner Aurora Borealis v. Dobbie (1848), 17 Ohio 125 4

Varghese v. Royal Maccabees Life Ins. Co. (S.D. Ohio 1998), 181 F.R.D. 359
361, n.1 8

Ziegler v. Super. Ct. In and For Cty. of Pima, (Ariz. App. Ct. 1982),
124 Ariz. 390, 391-395 8

CONSTITUTIONAL PROVISIONS

Ohio Constitution, Section 15(D), Article II 14

STATUTES

R.C. 2151.01 11
R.C. 2151.421 . . . . . 1-3, 5, 6, 9-12, 14, 15
R.C. 2950.02 11

OTHER AUTHORITIES

Evid. R. 406 . . . . . 12, 13

I. INTRODUCTION

The concise issue the Court requested the parties brief deserves a direct, simple answer, and Appellants' 9-page Post Argument Brief provided that answer. The H.B. 280 version of R.C. 2151.421 applies to this case for two reasons. First, H.B. 280 expressly provides that it is to be applied retroactively. Second, R.C. 2151.421 and R.C. Chapter 2151 are remedial in nature. Specifically, the first revision to R.C. 2151.421 merely provides that redacted abuse reports are not shielded from discovery in cases such as this. (Even if this change was analyzed in isolation from the rest of R.C. 2151.421 and R.C. Ch. 2151 (which it should not be), the procedural nature of this revision renders retroactive application appropriate and the second revision merely states explicitly that damages that were already available under R.C. 2151.421 remain available.) Thus, it does change the statute. Moreover, because damages were already available under R.C. 2151.421, what is at most a mere expansion of the collectable damages by the second revision does alter the remedial nature of the statute. R.C. 2151.421 remains remedial. In short, the revision of H.B. 280 made to 2151.421 do not change the remedial nature of the statute.

As a direct result of Appellee Planned Parenthood's interlocutory appeal of the trial court's discovery order to produce redacted documents this case remains mired in the discovery phase. More important for the purposes of the issue before this Court, this case is a "currently pending case" susceptible to retrospective application of the law, and, because R.C. 2151.421 is remedial, the H.B. 280 version governs this case.

Despite being over twice as long as Appellants' brief, Appellees do not refute the remedial nature of R.C. 2151.421 or R.C. Chapter 2151. Rather, Appellees resort to battling strawmen, making clearly incorrect constitutional arguments and driveling about century old cases that are inapposite to

the simple issue the Court *sua sponte* requested be briefed. The frivolity of Appellees' Due Process and Separation of Powers challenges to H.B. 280 is demonstrated by the refusal of the Ohio State Medical Association ("OSMA"), Appellees' *amicus*, to assert similar arguments in its brief. Rather, OSMA concedes that the H.B. 280 version of R.C. 2151.421 applies to this case, and OSMA merely asserts that R.C. 2151.421 applies *only* to abuse reports, and not to medical records. OSMA's refusal to parrot Appellees' absurd arguments speaks volumes.

Moreover, the procedural posture of this case should render Appellees' arguments regarding exemplary damages unripe. The same is true of the arguments in their original merit brief on the substance of the law governing Appellants' claims, which were rejected when the trial court overruled in its entirety Appellees' motion to dismiss. This case is an interlocutory appeal of a discovery order by which the trial court compelled Appellees to produce redacted abuse reports and redacted medical records. The court of appeals improperly reviewed the nature of Appellants claims, essentially converting the appeal into an interlocutory review of the trial court's denial of Appellees' motion to dismiss. The court of appeals treatment is plain error.

The court of appeals was required to review the discovery order in the context of the case as it was *then* postured, not in the posture the court of appeals thought it should have been. Indeed, the court of appeals made a *sua sponte* decision to address issues never raised at the trial level and revisit issues raised in the motion to dismiss and second-guess whether certain portions of the complaint should have been dismissed, thus creating a procedural morass. If the court of appeals had reservations regarding an aspect of the case that was not before it, the most it should have done was to note that it was not deciding those issues at that time. However, because the court of appeals ruled that punitive damages

are unavailable under R.C. 2151.421 — an issue raised *sua sponte* in its opinion[1] and resolved without briefing by either party—this Court must resolve the issue by either vacating the decision or by reversing it because punitive damages have *always* been permitted under R.C. 2151.421.

II. ARGUMENT

Because they admit that H.B. 280 contains the necessary language to retroactively amend R.C. 2151.421, Appellees are reduced to the unenviable position of arguing that H.B. 280 is unconstitutional. However, Appellees, who have the burden to establish the unconstitutionality of R.C. 2151.421 beyond a reasonable doubt, do not come close to meeting that burden. *Ferguson*, 120 Ohio St. 3d, 2008-Ohio-4824, at ¶ 12.

A. There Has Been No Final Judgment in this Case.

Appellees primarily argue that H.B. 280 is unconstitutional because, according to them, it is designed to set aside a "final judgment." Appellees unearthed cases from 1848 and 1920 to make this argument. The most obvious flaw in this argument is its inaccurate premise – i.e. that there has been a final judgment entered in this case.

In the 1848 case the Court ruled that the General Assembly could not retroactively amend a statute to expand the jurisdiction of Ohio courts to claims arising outside the state. *The Schooner Aurora Borealis v. Dobbie* (1848), 17 Ohio 125. The operative fact in *Aurora Borealis* was that the case had already been completely decided and final judgment entered in the case prior to the amendment of the jurisdictional statute. *Id.* at 127. ("We might say this case was not *pending* at the date of the

---

[1] At the trial level, Appellees never raised, and the trial court never addressed, the issue of whether punitive damages are available under R.C. 2151.421. Indeed, this subject arose for the first time in the decision rendered by the Court of Appeals.

passage of this act, but had been finally disposed of, although the writ of error has since been sued out. We do not suppose the legislature meant to authorize all judgments to be reversed, which had been rendered previous to the passage of the act.") The case *sub judice* is still pending. There has been no final order, and, no matter the result of this appeal, the case will be remanded to the trial court for completion of discovery and resolution on the merits. Moreover, because *Aurora Borealis* predates Ohio's current constitution, adopted in 1851, and even predates the Ohio State Reports, it is of little precedential value in interpreting our present day constitution.

Although the 1920 case is somewhat more modern, it is no more helpful to Appellees than *Aurora Borealis*. In that case, the trial court voided a highway construction contract because it was entered without into competitive bidding. *Cowen v. State* (1920), 101 Ohio St. 387, 388, 129 N.E. 719. The court of appeals affirmed, and this Court declined to exercise jurisdiction. *Id.* at 394. Later, the legislature passed a law to ratify the void contract, and the State attempted to revive the case. *Id.* This Court held that, because it declined to exercise jurisdiction prior to the enactment of the new law, the judgment of the appellate court was final. *Id.* The *Cowen* case is as inapposite as *Aurora Borealis* because it also involved a case that had been laid to rest via final judgment, which is not true here. Moreover, *Cowen* indicates that, had this Court accepted jurisdiction and the case remained pending, the final judgment rule would not apply. Here, H.B. 280 was enacted after oral arguments, but before the issuance of opinion and judgment. Accordingly, *Cowen* in no way supports Appellants' argument that there was a final judgment that bars the application of constitutionally retroactive legislation.[2]

---

[2] Appellees could not have sincerely placed much weight upon their primary argument, as their later discussions of whether the H.B. 280 version of R.C. 2151.421 is remedial demonstrates.

B. The Current Version of R.C. 2151.421 is Remedial.

Having disposed of Appellees' lead argument, we return to the modern era. Buried ten pages into Appellees' Post Argument Brief is Appellees' admission that "there is no question that the General Assembly intended for the amendments to R.C. 2151.421 to apply retroactively." Appellees acknowledge on that same page that remedial statutes can be retroactively applied. As such, in this part of their brief Appellees finally focus on a real issue: Is R.C. 2151.421 remedial?

Appellees first argue that *Kraynak* requires a finding that R.C. 2151.421 must have meant something different before H.B. 280 than after it took effect. This circular reasoning begs the question. First, *Kraynak* did not involve a retroactive change to the law. Second, this Court found that the *Kraynak* amendment ***replaced*** subjective language with objective language. 118 Ohio St. 3d 400, 2008-Ohio-2618, 889 N.E.2d 529, at ¶ 16. That did not occur here.

Unlike what occurred in *Kraynak*, H.B. 280 *added* language to R.C. 2151.421; no language was replaced or stricken. As such, here there is no requirement for the Court to find that R.C. 2151.421 meant anything different prior to H.B. 280 than it means now. Indeed, if this Court accepts the propositions of law in Appellants' Merit Brief, as the trial court did, the H.B. 280 revisions had no material impact upon R.C. 2151.421. Thus, while *Kraynak* concluded that the *replacement* of certain language with other words with a different meaning changed the statute, the Court should conclude here that H.B. 280, which did not replace any existing language, was in conformity with R.C. 2151.421 as it previously existed. Moreover, as discussed in Appellants' Post Argument Brief, R.C. 2151.421 is retroactive even if R.C. 2151.421 means something different now.

1. R.C. 2151.421's express authorization of the discovery of redacted abuse reports does not alter the remedial nature of R.C. 2151.421.

Eventually, Appellees get around to arguing that the aspect of H.B. 280 which clarifies that redacted abuse reports are not shielded from discovery or admission into evidence is not procedural. To make this argument, Appellees speculate that the current version of R.C. 2151.421 "***may well*** impose" a duty "to keep a written record of abuse reports." (Appellees Post Argument Brief, 17 (emphasis added)).[3] ***If*** true, the argument continues, then this "burden" is a substantive change, not a remedial one. This argument twists R.C. 2151.421 in an effort to manufacture an unconstitutional reading. When a statute is reasonably susceptible to a constitutional construction, it will be so interpreted. *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243, 987 N.E.2d 1118, ¶48. Further, speculative burdens will not prevent a statute from applying retroactively. *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, 896 N.E2d 110, at ¶34.

Appellees make an unwarranted leap of logic. They presume that the duty to produce records that already exist imposes a corresponding duty in the future to create records. No such duty exists. *State ex rel. White v. Goldsberry* (1999), 85 Ohio St.3d 153, 1999 Ohio 447, 707 N.E.2d 496. (Of course, if Appellees voluntarily *continue* their practice and policy of creating written records, that is their choice.) Moreover, Appellees utterly fail to establish how any "vested, substantial right" will be impacted if they were required to produce redacted reports.

Ohio law is clear: laws governing the discovery and admissibility of evidence are procedural.

---

[3] Appellees ignore that they already have a duty under R.C. 2151.421 to make reports of suspected or known abuse and, in connection with that duty, have for years been memorializing reports of known abuse in a written record.

Ackison., 120 Ohio St. 3d, at ¶ 29. Laws that relate to procedures are remedial in nature. *Id.* at ¶15. In *Ackison*, this Court ruled that the creation of a statute defining the term "competent medical authority" in asbestos cases is retroactive because the procedural, evidentiary change did not "alter the quantum of proof" for a plaintiff to establish a claim. *Id.* at 29. The same is true here. Evidentiary rules regarding the discovery and admissibility of redacted abuse reports do not alter the quantum of proof necessary for a plaintiff to establish a claim. Accordingly, the change is remedial, and applies retroactively.

Appellees also contend that, despite its procedural nature, the production of redacted abuse reports impairs the privacy rights of the subjects of the reports. Appellees regurgitate their wrongheaded argument that redaction does not protect privacy rights because there might exist some minuscule, undefined, speculative possibility that the documents might not be redacted sufficiently to remove every "unique juxtaposition of facts in a report" that could somehow lead to the identity of the victim.[4] This incorrect and result-oriented theory, which the Appellees use to urge an absolute ban on

---

[4] Apparently following one of Joseph Stalin's infamous maxims ("If you tell a lie often enough, it becomes the truth"), Appellees and their amicis repeatedly and falsely assert that redaction cannot protect the identities and, thus, privacy of Appellee Planned Parenthood's patients. Yet, despite having been invited on numerous occasions to *prove* this conclusory assertion, Appellees have not once done so because it cannot be done.

discovery, has been categorically rejected by many courts.[5]

Quite simply, Appellees miss the point. The current version of R.C. 2151.421 establishes that the General Assembly has expressly rejected the premise that the minuscule chance that a particular report could not be sufficiently redacted to protect the identity of the victim (a dubious contention at best) is sufficient grounds to completely bar the discovery of redacted reports in all cases. This determination does not alter any underlying privacy right. Instead, it "affect[s] merely the methods and

---

[5] *Reproductive Services, Inc. v. Walker* (1978), 439 U.S. 1307, 1309, (Brennan, J)(Permitting discovery of non-party abortion patients' records under a protective order shielding against disclosure of the patients' identities.); *Alpha Medical Clinic v. Anderson* (Kansas 2006), 128 P.3d 364, 379, (holding that redaction, coupled with a protective order, maintains non-party confidentiality to the same extent as the physician-patient privilege envisions); *Varghese v. Royal Maccabees Life Ins. Co.* (S.D. Ohio 1998), 181 F.R.D. 359, 361, n.1, (rejecting that an amorphous " 'unique juxtaposition' of circumstances would allow a patient's identity to be ascertained absent the names, addresses, and other identifying information"); *Ziegler v. Super. Ct. In and For Cty. of Pima* (Ariz. App. Ct. 1982), 134 Ariz. 390, 391-395 (upholding disclosure redacted medical charts so long as the attorneys did not attempt to learn the identity of any patients, and the information was not communicated to anyone not a party to the case); *Tanzi v. St. Joseph Hosp.* (R.I. 1994), 651 A.2d 1244, 1244-45 (permitting discovery of non-party medical records, so long as "all names and information that identify the patients" were redacted); *Terre Haute Regional Hosp. v. Trueblood* (Ind. 1992), 600 N.E.2d 1358, 1361-1362 (ordering production of the nonparties' medical records "where adequate safeguards exist to protect the identity and confidentiality of the non-party patient"); *Community Hosp. Ass'n. v. Dist. Ct.* (Colo. 1977), 194 Colo. 98, 101 (ordering disclosure of non-party patients' medical records so long as the non-party patients identities were not disclosed); *Fischer v. Hartford Hosp.* (Conn. Super. 2002), 2002 Conn. Super. Lexis 269, *9 (ordering the defendant hospital to disclose non-party medical records after removing all identifiable patient information and ordered the parties to keep the records confidential.); *Doe v. Puget Sound* (Wash. 1991), 819 P.2d 370 (refusing to bar discovery of blood donor records in an HIV case); *Doe v. Meachum* (D. Conn. 1989), 126 F.R.D. 444 (ordering disclosure of names of inmates with HIV); *Inmates of New York with HIV v. Cuomo* (N.D.N.Y. 1991), No. 90-CV-252, U.S. Dist. LEXIS 1488 (Ordering disclosure of redacted medical records subject to a protective order). *Nat'l. Abortion Federation v. Ashcroft* (E.D. Mich. 2004), No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (ordering disclosure of redacted abortion records to government in case challenging partial birth abortion ban); *Nat'l. Abortion Federation v. Ashcroft* (S.D.N.Y. 2004) No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (same).

procedures by which rights are recognized, protected and enforced, not the rights themselves." *State v. Wall*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 15.[6] Appellees' arguments of speculative injury do not change this. *Ferguson*, 120 Ohio St. 3d, at ¶34.

Finally, Appellees should not be permitted to assert supposed rights of third parties. It is anything but certain that minor victims of sexual abuse would object to redacted abuse reports being used to ferret out instances of intentional non-reporters such as Appellees.

2. Permitting Discovery of Redacted Abuse Reports Does Not Violate Appellee Planned Parenthood's Due Process Rights.

As part of their throw-everything-at-the-wall litigation strategy, Appellees contend—without citation to any legal authority—that R.C. 2151.421 violates their due process rights because it authorizes only plaintiffs to use the records. This argument is academic and unripe. There has been no effort to prevent Appellees from introducing abuse reports; it merely allows plaintiffs to use them.[7] Second, R.C. 2151.421 does not prohibit mandatory reporters from using redacted reports. Accordingly, because R.C. 2151.421 is susceptible to a constitutional interpretation, Appellees' due process argument must be rejected. *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243, 987 N.E.2d 1118, ¶48.

3. R.C. 2151.421's express authorization of exemplary damages does not alter the remedial nature of R.C. 2151.421.

Appellees acknowledge that, if punitive damages were permitted before H.B. 280, then the current version of R.C. 2151.421 is not unconstitutionally retroactive because the law has not changed.

---

[6] As such, the proper manner to protect these rights is at the trial level by the trial court. That is precisely what happened in this case.

[7] The use would have to comply with other rules of evidence.

They also acknowledge that, ordinarily, changes to the amount or type of collectable damages can be applied retroactively. Despite these admissions, Appellees rely on *Osai v. A & D Furniture Co.* (1981), 68 Ohio St. 2d 99, 428 N.E.2d 857, and contend that, because H.B. 280 expressly authorizes exemplary damages, it cannot be applied retroactively. Appellees' contention is wrong, and their reliance on *Osai* is misplaced. *Osai* was a five paragraph per curium opinion that held a law that does not contain express language of retroactively cannot be applied retroactively. H.B. 280 does contain that express language, and any additional discussion was dicta.

Appellees also rely on *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 36, 458 N.E.2d 827. However, in *French* this Court held that expansion of damages can be, and ordinarily are, retroactive and that a remedial revision "merely substitute[s] a new or more appropriate remedy for the enforcement of an existing right." *State v. Cook* (1998), 83 Ohio St. 3d 404, 411, 700 N.E.2d 570. Indeed, *French* is not only of no help to Appellees; it confirms Appellants' position.

More importantly, Appellees misstate the focus of the remedial verses substantive test. The test does *not* focus on the new language of the statute. It instead focuses on the Revised Code provision as a whole. See *Ferguson*, 120 Ohio St. 3d at ¶¶ 31-33; *Shay v. Shay,* 113 Ohio St. 3d 172, 2007 Ohio 1384, 863 N.E.2d 591. In *Ferguson*, the Court refused to confine its analysis to the Senate bill that amended R.C. 2950.02. Instead, the Court analyzed R.C. Ch. 2950 as a whole, and recognized the "harsh consequences for [sex] offenders." Nevertheless, this Court found that the statute, which retroactively prevented Ferguson's sexual predator designation from being removed, was remedial. *Id.* at ¶ 32. (Because the purpose of the statute was "to protect the public from sex offenders" the Court concluded that the revisions were not driven by a retributive intent. *Id.* at ¶ 36.) As was the case in *Ferguson*, the purpose of R.C. 2151.421 is to protect children from abuse, and it is part of R.C. Ch.

2151, which has the broader purpose of "provid[ing] for the care, protection and mental and physical development of children..." R.C. 2151.01. The inclusion of exemplary damages in R.C. 2151.421 does not change this. Indeed, it is designed to *further* those goals by ensuring that child abuse is reported to the State.

Appellees have failed to establish beyond a reasonable doubt that R.C. 2151.421 is unconstitutional. *Ferguson*, 120 Ohio St. 3d, 2008-Ohio-4824, at ¶ 12. R.C. 2151.421 is remedial, and it should be applied retroactively.

C. <u>The Abuse Reports (and Medical Records) Are Discoverable</u>

Appellees also contend that production of abuse reports violates due process because discovery implicitly authorizes the use of abuse reports to permit a victim of an intentional failure to report the abuse of a minor to obtain exemplary damages based upon injury to others. In addition to being wrong, Appellees contention is really an argument to ***limit*** the use of the abuse reports or justify a limiting instruction to the jury, not one that would prohibit their use, and, even if accepted, would not prohibit their discovery. It is premature in this case to rule upon the particular uses to which the reports may be used. Moreover, in making this argument Appellees, misstate why Appellants need the reports.[8]

---

[8] It is accurate that Appellants intend to use the reports to help them establish their right to an award of punitive damages and the amount of punitive damages to which they are entitled because reports will show that Appellees breaches of R.C. 2151.421 were intentional and done pursuant to Appellees' "don't ask/don't tell" policies. In short, *one* of Appellants' intended uses – i.e. to establish the egregious nature of the breaches – is permissible. ("The routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." *Evid. R. 406.*) Appellants also intend to use the reports to help attack the credibility of Appellees' denials of Appellants' claim that they suspected abuse. The reports and medical records now have an even greater importance since this Court's decision in *Kraynak* that Appellees' denials are to be assessed with a subjective standard. Indeed, as Judge Donovan noted at oral argument, subjective belief can be established through knowledge of objective facts.

Here, Appellants contend that, as a routine practice, Appellees failed to report suspected cases of child abuse. (Appellees' own documents establish that more than 50% of minors who present with an STD and more than 50% who present as pregnant are the victims of abuse. Yet, with the statistical data Appellants will obtain from the abuse reports and medical records, Appellants believe that they will be able to show that Appellees made abuse reports in less than 5% of those circumstances.) For that reason, Appellants and their medical and statistical experts are permitted to discover Appellees' routine reporting practice to attack the credibility of Appellees' assertions that they did not suspect that Jane Roe was a victim of sexual abuse and ascertain whether it can establish, as Appellants contend, that Appellees vastly under-report suspected abuse. Appellants are confident that the evidence of under-reporting will be overwhelmingly statistically significant, and certainly admissible under Evid. R. 406. Thus, the trial court did not abuse its discretion when it determined that Appellants established a need for the requested redacted documents.

D. <u>Redacted Medical Records Are Discoverable.</u>

Appellants requested, and the trial court ordered, that redacted medical records be produced only for minors who presented for treatment either pregnant or with a sexually transmitted disease. Appellants also requested, and the trial court ordered, that those medical records be redacted to include only the age of the patient the information regarding the pregnancy and/or STD – i.e. information from which the identity of the patient could *not* be discerned. This is very limited and targeted information. Further, Appellants did *not* request any information regarding the identity of any patients other medical condition or the specific treatments (including abortions) that the patient received.

Appellants intend to use the abuse reports to show that Appellees *never* reported suspected abuse as a matter of practice and policy. (As discussed above, this evidence is directly relevant to

Appellants' claim that they are entitled to an award of punitive damages and what that award should be.) Through the medical records, Appellants will determine the overall number of likely abuse victims who were patients of Appellees based upon information Appellees themselves have supplied regarding the percentage of similarly situated minors who are abused. Appellants will then compare the number of reports to the number of Appellees' patients who, by Appellees' information, were likely victims of abuse to establish or help establish one or more elements of the claims.[9] Moreover, the fact that the statistical data that will be derived from medical records may not *conclusively* establish those elements does render the medical records undiscoverable. Indeed, they are discoverable because that statistical data may, and probably will, help Appellants establish one or more of those elements.

Appellees assert that, because H.B. 280 did not explicitly address medical records, the General Assembly intends that redacted medical records never to be discoverable. They are wrong. H.B. 280 was *not* enacted to correct *every* error in Judge Painter's opinion. H.B. 280 is titled the Protecting Pregnant Women from Coercion & Violence Act. In addition to revising R.C. 2151.421, H.B. 280 requires abortion facilities to post a "No One Can Force You to Have an Abortion" poster; requires mandatory minimum prison sentences for assault and increases penalties for domestic violence if the offender knew the victim was pregnant; and provides mandatory prison sentences and payment of restitution to victims of human trafficking. These provisions constitute a Single Subject. Further, had H.B. 280 included provisions regarding the general discoverability of medical records, Appellees would

---

[9] For example, Appellants believe that this statistical data will prove or help their claim that Appellees have a policy and routine practice of not reporting suspected abuse and their claim that Appellees' assertion that they did not suspect that Jane Roe was a victim of sexual abuse is not credible.

claim it violated Section 15(D), Article II of the Ohio Constitution. Thus, it is insignificant that such language was not in H.B. 280.

What is significant is that, as discussed in Appellants' Post Argument Brief, the General Assembly rejected Appellees "unique juxtaposition" argument in the context of abuse reports. The General Assembly's position should inform this Court's decision on whether to follow well establish Ohio law or to venture out on its own to completely alter the nature of discovery.

The trial court was well within its discretion to conclude that Appellants should be permitted to explore whether redacted medical records could be analyzed in conjunction with redacted abuse reports to reach a statistically significant conclusion that Appellees' assertions that they did not suspect abuse are not credible and that Appellees were systematically under-reporting suspected abuse. The trial court has not yet ruled upon the admissibility of such evidence. That will come later. For the time being, all that was required was for Appellants to show that the requested documents might lead to the discovery of admissible evidence. The trial court was within its discretion when it concluded that Appellants made this showing.

III. CONCLUSION

This Court should apply the current version of R.C. 2151.421, and reinstate the order of the trial court compelling Appellees to produce redacted abuse reports and medical records.

Respectfully submitted,

CRABBE, BROWN & JAMES LLP

By: Brian E. Hurley (0000782[illegible])
Robert J. Gehring (0019329)
30 Garfield Place, Suite 740
Cincinnati, OH 45202
Tel: (513) 784-1525
Fax: (513) 784-1250
bhurley@cbjlawyers.com
rgehring@cbjlawyers.com
Counsel for Plaintiffs-Appellants

Richard J. Creighton, Jr. (0021806)
William A. Posey (0021821)
Charles M. Miller (0073844)
KEATING MUETHING & KLEKAMP PLL
One Each Fourth Street, Suite 1400
Cincinnati, OH 45202
rcreighton@kmklaw.com
wposey@kmklaw.com
cmiller@kmklaw.com
Tel: (513) 579-6400
Fax: (513) 579-6457

Nicholas E. Bunch (0015008)
WHITE, GETGEY & MEYER CO., LPA
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 4520
nbunch@wgmlpa.com
Tel: (513) 241-3685
Fax: (513) 241-2399

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed, via regular U.S. Mail, postage prepaid on this 27th day of April 2009, to the following:

Daniel J. Buckley
Vorys, Sater, Seymour and Pease
Suite 2000, Atrium Two
221 East Fourth Street
P.O. Box 0236
Cincinnati, OH 45202
Counsel for Defendants-Appellees

Honorable Joseph T. Deters
Hamilton County Prosecutor's Office
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202

Honorable Rachel A. Hutzel
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, OH 45036

Honorable Donald W. White
Clermont County Prosecutor's Office
123 N. Third Street
Batavia, OH 45103
Ohio Prosecuting Attorneys, Amici Curiae

Joel J. Kirkpatrick
Kirkpatrick Law Offices
31800 Northwestern Highway, Suite 350
Farmington Hills, MI 48334

Mailee R. Smith
Americans United for Life
310 S. Peoria Street, Suite 500
Chicago, IL 60607
Counsel for Members of the U.S. Congress, Amici Curiae

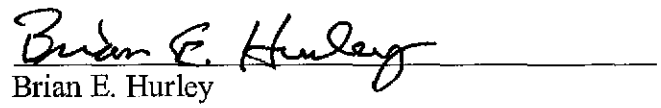
Jeffrey A. Shafer
Alliance Defense Fund
801 G Street, N.W., Suite 509
Washington, D.C. 20001

David R. Langdon
Langdon Law
11175 Reading Road, Suite 104
Cincinnati, OH 45241
Counsel for Dr. and Mrs. Jack Willke, et al., Amici Curiae

Terri-Lynne B. Smiles
Collis, Smiles & Collis, LLC
1650 Lake Shore Drive, Suite 225
Columbus, OH 43204
Counsel for Ohio Psychiatric Physicians Assoc., et al., Amici Curiae

Anne Marie Sferra
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
Counsel for Ohio State Medical Assoc., et al, Amici Curiae

Jeffrey M. Gamso
American Civil Liberties Union of Ohio Foundation, Inc.
Max Wohl Civil Liberties Center
4506 Chester Avenue
Cleveland, OH 44103
Counsel for Ohio Chapter of the American Academy of Pediatrics, et al., Amici Curiae



Brian E. Hurley