

ORIGINAL

No. 09-1998

In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE No. 24567**

DONALD WARD, et al.,

Plaintiffs-Appellees,

v.

SUMMA HEALTH SYSTEM, et al.,

Defendants-Appellants.

**MEMORANDUM IN SUPPORT OF JURISDICTION OF NON-PARTY-APPELLANT
ROBERT DEBSKI, M.D.**

Michael J. Elliott (0070072) (Counsel of
Record)

Lawrence J. Scanlon (0016763)
Scanlon & Elliott
400 Key Building
159 South Main Street
Akron, OH 44308
330-376-1440 / 330-376-0257 fax
Attorneys for Appellees

S. Peter Voudouris (0059957)
Nicole Braden Lewis (0073817)
Tucker, Ellis & West LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115
216-592-5000 / 216-592-5009 fax
Attorneys for Appellant Summa Health System

Douglas G. Leak (0045554) (Counsel of
Record)

Roetzel & Andress, LPA
1375 East Ninth Street, Suite 900
Cleveland, OH 44114
216-623-0150 / 216-623-0134 fax
dleak@ralaw.com

David M. Best (0014349)
4900 West Bath Road
Akron, OH 44333
330-665-5755 / 330-666-5755 fax
dmbest@dmbestlaw.com

*Attorneys for Non-Party Appellant
Robert Debski, M.D.*

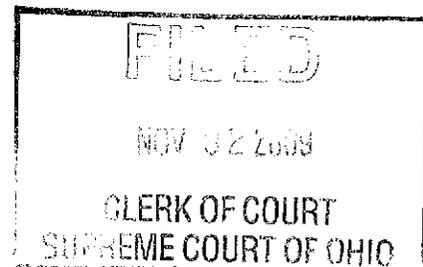


TABLE OF CONTENTS

Table Of Authorities	ii
I. Explanation O Why This Case Is Of Public And Great General Interest.....	1
II. Statement Of The Case And Facts	4
III. Argument In Support Of Propositions Of Law.....	9
PROPOSITION OF LAW NO. 1: The Ninth District’s Decision Is In Direct Conflict With This Court’s Recent Decision In <i>Roe v. Planned Parenthood Southwest Ohio Region</i> , 122 Ohio St. 3d 399, 2009-Ohio-2973 In That It Allows For The Production Of Personal Medical Information Of Non-Party Patients In Violation Of The Physician-Patient Privilege	9
PROPOSITION OF LAW NO. 2: The Ninth District’s Decision Is In Direct Conflict With This Court’s Decision in <i>Medical Mutual v. Schlotterer</i> , 122 Ohio St. 3d 181, 2009-Ohio-2496 And The First District’s Decision In <i>Calihan v. Fullen</i> (1992), 78 Ohio App. 3d 266, 604 N.E.2d 761 In Erroneously Holding That A Patient Is Not A Protected Source When Asserting The Physician-Patient Privilege.....	11
IV. Conclusion	14
Certificate of Service	16
Appendix	
Decision and Journal Entry of the Summit County Court of Appeals, Ninth Appellate District.....	Appx. 1-17

TABLE OF AUTHORITIES

Page

CASES

Biddle vs. Warren General Hosp., 86 Ohio St. 3d 395, 1999-Ohio-115 3, 13, 14

Calihan v. Fullen (1992), 78 Ohio App. 3d 266, 604 N.E. 2d 761..... 1, 11, 12, 13

Cepeda v. Lutheran Hospital, Slip Opinion, 2009-Ohio-4901 1, 10

Grove v. Northeast Ohio Nephrology Associates, Inc., 164 Ohio App. 3d 829,
2005-Ohio-6914..... 9

Hageman vs. Southwest Gen. Health Ctr., 2008-Ohio-3343 13

Hill vs. Natl. Collegiate Athletic Assn. (1994), 7 Cal. 4th 1, 25 13

Medical Mutual vs. Schlotterer, 122 Ohio St. 3d 181,
2009-Ohio-2496 1, 3, 11

Roe vs. Planned Parenthood Southwest Ohio Region, 122 Ohio St. 3d 399,
2009-Ohio-2973 1, 2, 3, 7, 8, 9, 10

State vs. Spencer (1998), 126 Ohio App. 3d 335..... 13

STATUTES AND RULES

45 C.F.R. § 164.502 14

R.C. 2305.24 6

R.C. 2317.02 9, 10

R.C. 2317.02(B)..... 6, 9, 12, 13

Civ. R. 10..... 7

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case is of great public and general interest because the Ninth District has completely eliminated a patient's status as the holder of the physician-patient privilege. The Ninth District has now put all medical patients in Summit County and throughout Ohio at risk of having their personal and privileged medical information subjected to unrestricted disclosure during any civil lawsuit. The Ninth District's holding that a patient is not a protected individual under the physician-patient privilege creates a real danger that patients will be required to disclose their personal medical information in any pending lawsuit under any circumstances.

In Ohio, the statutory physician-patient privilege is paramount, but the Ninth District's decision is nothing more than a judicial elimination of the patient's privilege that is in direct conflict with this Court's authorities in *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, *Cepeda v. Lutheran Hospital*, Slip Opinion, 2009-Ohio-4901, and *Medical Mutual v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496 and is also inconsistent with the First District's decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, 604 N.E. 2d 761. This case is of such enormous public and general interest because the Ninth District's total disregard for the statutory physician-patient privilege provides legal authority whereby the entire public at large faces the real risk of having their privileged and confidential medical matters disclosed in **any** civil action with no ability to protect their own privacy rights.

In order to conclude that this case is of public and great general interest, this Court need not go any further than accepting the Ninth District's acknowledgement that its decision warrants a review by this Court. For example, in holding that the patient is an "unprotected source" in asserting the physician-patient privilege, the Ninth District stated:

Nonetheless, **we are not oblivious to the conflict presented by the above conclusion:** on the one hand the statute prevents the physician from testifying about physician-patient communications absent a waiver, but yet at the same time, it does not by its very terms specifically prevent the patient from being compelled to disclose the same information.

(Ward at ¶ 26) (emphasis added).

Similarly, the concurring opinion stated:

I understand that **the outcome in this case may be shocking to the legal and medical communities** and will likely lead to unanticipated and, possibly, unfortunate consequences.

(*Id.* at ¶ 26) (emphasis added).

The Ninth District undoubtedly recognized that its decision was such an anomaly with respect to the physician-patient privilege that it was deserving of this Court's review.

The Ninth District failed to follow the doctrine of *stare decisis* when it erroneously ordered a non-party patient to disclose personal and medical information. In rendering its decision, the Ninth District's majority opinion completely failed to address this Court's dispositive case of *Roe v. Planned Parenthood*. Non-party Robert Debski, M.D. heavily relied upon the *Roe* case because it is undoubtedly controlling to the legal issues and facts of this case. This Court specifically held in the *Roe* case that pursuant to the physician-patient privilege, a non-party patient's personal medical information is absolutely protected in the civil lawsuits of others. The Ninth District's decision is in direct conflict with the *Roe* holding in that it ordered the disclosure of non-party Dr. Debski's personal medical information.

The majority opinion's failure to address and apply the *Roe* case has now provided attorneys in civil cases with unlimited access to the personal medical information of non-party patients under any circumstances. Under the Ninth District's erroneous decision, non-party patients' confidential medical information can now be disclosed in direct violation of their

privacy rights guaranteed by the statutory physician-patient privilege. The current situation created by the Ninth District has essentially rendered the statutory physician-patient privilege moot throughout Ohio.

The Ninth District also failed to follow this Court's precedent in *Medical Mutual v. Schlotterer*, where this Court held that personal medical information of a patient can only be disclosed pursuant to the **patient's** consent. While this Court in *Medical Mutual* recognized that a patient is, indeed, a "protected source" under the physician-patient privilege, the Ninth District's majority held completely to the contrary. The Ninth District has effectively ignored Ohio's longstanding law that a patient is the holder of the physician-patient privilege.

Additionally, the Ninth District's majority opinion completely ignored this Court's admonition in its decision in *Biddle v. Warren General Hospital*, 86 Ohio St. 3d 395, 1999-Ohio-115 that **patients** are to decide what their interests are with respect to personal medical matters, not lawyers. The Ninth District's decision has abrogated the statutory physician-patient privilege by now permitting an attorney to unilaterally justify the disclosure of patients' confidential medical information under any circumstances. According to the Ninth District's decision, party and non-party patients' confidential medical information is at risk of disclosure in any civil action.

The errors in the Ninth District's majority opinion violate the fundamental principles of the statutory physician-patient privilege and, consequently, the privacy rights of patients in Summit County and throughout Ohio are no longer protected. There can be no question that the Ninth District's decision constitutes a legal divergence from this Court's decisions in *Roe*, *Medical Mutual* and *Biddle*. Now, with the real danger that their personal medical information

will be disseminated, patients will be discouraged from freely and frankly communicating with their physicians in order to obtain the proper diagnosis and appropriate treatment.

It is clear that the legal conflicts and confusion created in the Ninth District jurisprudence requires guidance and clarification from this Court. This Court now has the opportunity to reinstate the statutory physician-patient privilege and to provide all Ohio Appellate and Trial Courts with clarification on how to guarantee that the privacy rights of patients are protected.

II. STATEMENT OF THE CASE AND FACTS

On October 10, 2007, Plaintiffs-Appellees (“Plaintiffs”), David and Susan Ward, refiled this medical malpractice action against Defendant-Appellant Summa Health System (“Summa”). Appellant Robert F. Debski, M.D. (“Dr. Debski”) was not named as a defendant in this case even though Plaintiffs were aware that he was the surgeon who performed the surgery at issue in their Complaint. There are **no** allegations that Dr. Debski negligently performed Mr. Ward’s heart valve replacement surgery on May 26, 2006. (*See* Plaintiffs’ Complaint.) The surgery was performed at Summa. (*Id.*)

Plaintiffs alleged in their Complaint that Mr. Ward was negligently exposed to the Hepatitis B virus during his heart valve replacement surgery. (Plaintiffs’ Complaint.) During the course of discovery between Plaintiffs and Summa, Plaintiffs sought information from Summa that was both privileged and protected. Specifically, Plaintiffs requested from Summa unredacted versions of Unusual Occurrence Reports which contain confidential communications and also sought from Summa the identity of the person who was allegedly responsible for Mr. Ward contracting Hepatitis B. (Plaintiffs’ Motion to Compel and Motion for Protective Order.)

When the parties reached an impasse for the requested discovery directed to Summa, Plaintiffs filed a Motion to Compel and Motion for Protective Order on December 4, 2007.¹ On December 13, 2007, Summa filed its Memorandum in Opposition demonstrating that the Unusual Occurrence Reports were protected from disclosure by the hospital incident reports confidentiality provisions in Ohio statutory and case law. Additionally, Summa established that it was bound by both state law and federal law to protect the private health information of the health care worker at issue in this case. (*See* Summa's Memorandum in Opposition.)

On December 28, 2007, Plaintiffs filed a Reply Brief and then on February 7, 2008, Summa filed its Sur-Reply Brief. While the parties' discovery issues were pending before the Trial Court, on January 2, 2008, Plaintiffs served upon non-party Dr. Debski a subpoena noticing him for a deposition. In discussions regarding the scope of Dr. Debski's deposition, on January 23, 2008, counsel for Dr. Debski informed Plaintiffs' counsel that Dr. Debski's deposition would be limited to factual testimony regarding Mr. Ward's surgery. (Exhibit A, attached to Dr. Debski's Motion for Protective Order.) Dr. Debski would not be permitted to answer any questions pertaining to his personal medical information on the bases that said information was privileged and also irrelevant to the issues at hand. (*Id.*) Plaintiffs' counsel responded on January 25, 2008 to Dr. Debski's stance on the scope of his deposition stating that Dr. Debski's position was unacceptable. (*Id.*, Exhibit "B".)

On March 27, 2008, Dr. Debski filed a Motion for Protective Order that would limit Dr. Debski's deposition to the surgery itself and preclude Plaintiffs from inquiring about Dr. Debski's personal confidential and privileged medical information. Dr. Debski set forth several

¹ In the caption, Plaintiffs mistakenly used the case number from the original filing. Plaintiffs filed a Motion to Correct the Docket on April 25, 2008. Of importance, the Trial Court's ruling with respect to Plaintiffs' Motion to Compel/Motion for Protective Order was properly issued in this refiled case.

well-founded arguments in support of his Motion for Protective Order. Basically, Dr. Debski established that since he was not a party to the instant case and never put his personal medical history at issue, any and all information regarding his personal medical history was both irrelevant and protected under the physician-patient privilege provided in R.C. 2317.02(B).

On April 8, 2008, Plaintiffs filed their Brief in Opposition to Dr. Debski's Motion for Protective Order. On April 21, 2008, Dr. Debski filed a Reply Brief reiterating his position that he was entitled to the protection afforded him under Ohio's statutory physician-patient privilege.

On June 5, 2008, the Trial Court issued its Order whereby it denied Plaintiffs' Motion to Compel and for Protective Order directed toward Summa and granted Dr. Debski's Motion for Protective Order. With respect to the discovery issues involving Summa, the Trial Court found that the Unusual Occurrence Reports were privileged and protected records of a quality assurance/utilization committee pursuant to R.C. 2305.24. As to Dr. Debski, the Trial Court held that his personal medical information was protected under the physician-patient privilege as set forth in R.C. 2317.02(B)(1):

As such, the Court finds that Dr. Debski's Motion for Protective Order is granted as it relates to any testimony or production of information regarding his own medical health history. He may testify, however, as a fact witness to the events that transpired during Plaintiff's care for which Dr. Debski has first hand knowledge.

(June 5, 2008 Order).

On June 27, 2008, Plaintiffs appealed to the Ninth District Court of Appeals from the Trial Court's June 5, 2008 Order. (CA No. 24289). On September 23, 2008, the Ninth District dismissed Plaintiffs' appeal for lack of a final appealable order. (September 23, 2008 Appellate Order).

Upon remand, the Trial Court on October 3, 2008 ordered Plaintiffs to file an Affidavit of Merit pursuant to Civ. R. 10. When Plaintiffs failed to produce an Affidavit of Merit, Summa filed a Motion to Dismiss on December 2, 2008. On December 15, 2008, Plaintiffs filed a Brief in Opposition to Summa's Motion to Dismiss.

On December 22, 2008, the Trial Court granted Summa's Motion to Dismiss. (December 22, 2008 Order, App. 8-10). The bases for the Trial Court's dismissal were that Plaintiffs failed to produce an Affidavit of Merit and, also, Plaintiffs failed to comply with the Trial Court's Order to produce an Affidavit of Merit.

Plaintiffs timely appealed to the Ninth District from the Trial Court's Order of December 22, 2008.² During the pendency of the appeal, this Court issued its decision in *Roe v. Planned Parenthood*. Consequently, on July 9, 2009, Dr. Debski submitted this Court's *Roe* decision to the Ninth District as Supplemental Authority. Dr. Debski submitted the *Roe* decision for the proposition that a non-party patient's personal medical information is absolutely protected from discovery in the lawsuits of others. This Court's decision in *Roe* confirmed that the Trial Court properly precluded the discovery of non-party Dr. Debski's personal medical information in Plaintiffs' lawsuit against Summa.

On September 26, 2009, the Ninth District released its Decision and Journal Entry reversing the Trial Court's Order granting Dr. Debski a protective order.³ In its decision, the Ninth District erroneously held that in asserting the protections of the physician-patient privilege, the patient is not a protected source and, thus, a patient can be compelled to disclose personal medical information without any limitations. Ward at ¶ 5. By its own admission, the majority

² On June 19, 2009, the Ninth District issued an order designating non-party Dr. Debski as an appellee for the purposes of the appeal.

³ The Ninth District also reversed the Trial Court's Orders with respect to Summa.

opinion recognized that its holding created an obvious conflict. *Id.* at ¶ 26. On the one hand, the patient is the holder of the physician-patient privilege; on the other hand, a patient is not permitted to assert the protections afforded him/her pursuant to the physician-patient privilege. *Id.* at ¶¶ 25, 26, and 27. Not only did the majority recognize its holding creates a conflict with Ohio law, the concurring opinion admitted that “the outcome in this case may be shocking to the legal and medical communities and will likely lead to unanticipated and possibly, unfortunate consequences.” *Id.* at ¶ 36.

Of importance, the Ninth District wholly ignored this Court’s decision in *Roe v. Planned Parenthood* that was submitted by Dr. Debski. This Court’s *Roe* decision concerning the privacy rights of non-party patients was both factually and legally binding upon the issues concerning non-party Dr. Debski in this case. By ignoring the *Roe* precedent, the Ninth District set forth an unfounded statement of law and created a conflict with respect to the protections that are guaranteed to non-party patients pursuant to the physician-patient privilege.⁴

It is clear that the legal conflict and confusion in the Ninth District’s jurisprudence requires guidance and clarification from this Court. This Court now has the opportunity to provide all Ohio Appellate Courts and Trial Courts with clarification on determining the appropriateness of discovery into the privileged medical information of patients while maintaining their privacy rights under the statutory physician-patient privilege. This Court should accept jurisdiction over this matter in order to address the Ninth District’s abrogation of Ohio’s statutory physician-patient privilege.

⁴ Dr. Debski and Summa filed a Joint Motion to Certify a Conflict on September 25, 2009. The Ninth District denied the Joint Motion to Certify a Conflict on October 27, 2009.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: The Ninth District's Decision Is In Direct Conflict With This Court's Recent Decision In *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973 In That It Allows For The Production Of Personal Medical Information Of Non-Party Patients In Violation Of The Physician-Patient Privilege.

Ohio law recognizes the statutory physician-patient privilege that explicitly protects the privacy rights of patients throughout all of Ohio. R.C. 2317.02. Ohio law has long recognized that the **patient** is the exclusive holder of the physician-patient privilege. *Grove v. Northeast Ohio Nephrology Associates, Inc.*, 164 Ohio App. 3d 829, 2005-Ohio-6914. The purpose of the physician-patient statute is to encourage persons needing medical aid to seek it without fear of betrayal and to encourage free and frank disclosure between patients and physicians in order to assist physicians in the proper diagnosis and appropriate treatment. Unfortunately, the Ninth District's decision herein runs afoul of the physician-patient privilege statute and defeats the very purpose of the physician-patient privilege.

Just recently, this Court in *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973 explicitly held that personal medical information of non-party patients is absolutely privileged and protected from discovery pursuant to the physician-patient privilege in R.C. 2317.02(B). *Roe* at ¶ 50. This Court recognized the sanctity of the physician-patient privilege and concluded that even the redaction of personal, identifying information does not remove the privileged status of personal medical information. *Id.* at ¶ 53. The Ninth District completely failed to address this Court's *Roe* decision and, instead, rendered an opinion wholly inconsistent with the *Roe* case.

In this case, the privacy rights of non-party Dr. Debski and the confidentiality of his personal medical information under the physician-patient privilege has been completely stripped away by the Ninth District. The Ninth District's decision ordering disclosure of non-party Dr.

Debski's personal medical information imperils the specific purpose of both the *Roe* decision and the physician-patient privilege as set forth in R.C. 2317.02. The Ninth District now erroneously requires non-party Dr. Debski to give up his absolute right to assert the physician-patient privilege. Dr. Debski and other non-party patients have an **absolute** right to privacy which protects against the disclosure of their medical information. The Ninth District's complete failure to even address this Court's decision on this identical issue in *Roe* is proof, itself, that the Ninth District has created a legal divergence and conflict with respect to a non-party patient's rights under the physician-patient privilege.

The Ninth District's decision is also in conflict with this Court's decision in *Cepeda v. Lutheran Hospital*, Slip Opinion, 2009-Ohio-4901 which reinforced the *Roe* decision. In *Cepeda*, this Court applied the *Roe* decision and reversed the Trial Court's order compelling the disclosure of non-party patients' personal medical information. The Ninth District's elimination of non-party patients' absolute protections afforded them under the physician-patient privilege is similarly in direct conflict with this Court's decision in *Cepeda*.

By completely ignoring this Court's legal authority as set forth in *Roe*, the Ninth District has now provided legal authority that denies non-party patients the protection from disclosure of confidential medical information afforded them by Ohio's statutory physician-patient privilege. The Ninth District's decision will have grave consequences in Summit County and throughout all of Ohio with respect to the physician-patient privilege. The whole point of the physician-patient privilege and confidentiality is to allow patients to safely share their most private personal and medical concerns with healthcare providers. Under the Ninth District's decision, the safe and confidential environment for non-party patients is shattered as every statement and diagnosis can be disclosed in any pending lawsuit. Non-party patients will now reluctantly

withhold pertinent medical information of an embarrassing or otherwise confidential nature because the Ninth District has effectively created a real fear and danger of public disclosure of their privileged medical records.

The Ninth District's disregard of this Court's legal authority and this Court's precedent neither serves a public interest nor protects the private interests of non-party patients. This Court should accept jurisdiction herein in order to correct the conflict that the Ninth District has created with this Court.

PROPOSITION OF LAW NO. 2: The Ninth District's Decision Is In Direct Conflict With This Court's Decision In *Medical Mutual v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496 And The First District's Decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, 604 N.E. 2d 761 In Erroneously Holding That A Patient Is Not A Protected Source When Asserting The Physician-Patient Privilege.

The Ninth District's holding that a patient is an "unprotected source" in asserting the physician-patient privilege is also in direct conflict with this Court's decision in *Medical Mutual v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496. This Court held in *Medical Mutual* that personal medical information can be the subject of discovery **only** when the **patient** waives the physician-patient privilege. *Id.*, Paragraph 5 of the Syllabus. There can be no doubt that this Court confirmed Ohio's longstanding and well-established law that the **patient** is the holder of the physician-patient privilege and that the patient is, undoubtedly, a "protected source."

The Ninth District, by its own admission, has created unfounded legal authority that constitutes both a misstatement and misapplication of Ohio law with respect to the sanctity of Ohio's statutory physician-patient privilege. By holding that a patient is an "unprotected source," the Ninth District's decision now permits the unwarranted disclosure of a patient's personal medical information without the patient's consent, as required pursuant to *Medical Mutual*. The Ninth District's erroneous decision is a derogation of the statutory physician-

patient privilege in Ohio and the very spirit of the physician-patient privilege is no longer preserved. Patients in Ohio can no longer seek medical aid without the fear of being publicly disclosed.

The Ninth District also ignored the First District's decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266. In *Calihan*, the First District held that a plaintiff was not entitled to discover his doctor's own personal medical information/records because the medical information of his doctor was protected by the physician-patient privilege existing between a patient and his own physician. *Calihan* at Paragraph One of the Syllabus.

The First District in *Calihan* explicitly held that any personal medical matters conveyed between a patient and a doctor of medicine fall within the definition of protected communications under R.C. 2317.02(B)(3). The *Calihan* court actually faced a more compelling situation than this case where the physician was in fact a named defendant in a medical malpractice case, not the situation in the case at bar where Dr. Debski is a non-party. The First District held that personal medical records of a defendant-surgeon under treatment for a debilitating disease are protected by the physician-patient privilege. The First District found that these records were not discoverable in the malpractice action against the doctor even though relevant to the case. The patient is the holder of the physician-patient privilege and the privilege may be invoked by the patient to preclude discovery or to bar testimony of personal medical information acquired by virtue of the physician-patient relationship. *Id.* at 270.

Applying the *Calihan* case to the present action, the patient here was Dr. Debski and Dr. Debski clearly refused to disclose his private medical information. Dr. Debski was not a named party to the instant action and there were no claims against him; therefore his medical history was not at issue. Plaintiffs' subpoena clearly indicated a demand for the disclosure of

information regarding Dr. Debski's medical history which fell under R.C. 2317.02(B).⁵ In *Calihan*, the defendant surgeon's medical history was deemed relevant and yet the court held it was still protected from discovery by the patient-physician privilege absent defendant's waiver. Likewise, the Ninth District should have held that Dr. Debski's personal medical information was privileged and protected under the physician-patient privilege. Instead, the Ninth District failed to address the *Calihan* and, consequently, rendered an opinion in direct conflict with the First District.

The basic policy of a patient's confidentiality was explicitly recognized and applied by this Court in *Biddle vs. Warren Gen. Hosp.* “[I]t is for the patient – not some medical practitioner, lawyer, or court – to determine what the patient's interests are with regard to confidential medical information.” *Id.* at 408. An individual's right to medical confidentiality “is not so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask.” *Hageman vs. Southwest Gen. Health Ctr.*, 2008-Ohio-3343 ¶ 13, quoting *Hill vs. Natl. Collegiate Athletic Assn.* (1994), 7 Cal. 4th 1, 25. In order for the confidentiality of medical information to mean anything, an individual must be able to direct the disclosure of his or her own private information. *Id.*

The whole point of the physician-patient privilege and confidentiality is to allow patients to safely share their utmost private personal and medical concerns with healthcare providers. *Biddle, supra.* The effect of the physician-patient privilege allows a patient to make a full disclosure of their symptoms and conditions to their physicians without fear that such matters will later become public. *See State vs. Spencer* (1998), 126 Ohio App. 3d 335. Under the

⁵ In this case, the Ninth District properly determined that the requested discovery of Dr. Debski constituted a “communication” as defined within the physician-patient privilege statute in R.C. 2317.02(B)(3); *Ward* at ¶ 25.

erroneous holding of the Ninth District that patients are not a protected source in asserting the physician-patient privilege, a patient no longer has a right to medical confidentiality, which this Court explicitly recognized in *Biddle*.

Finally, the Ninth District's decision compelling Dr. Debski to disclose personal medical information is clearly in violation of the protections afforded patients under the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA prohibits health care providers from disclosing protected health information, including information surrounding patients' surgeries, which is exactly the type of information that the Plaintiffs in this case are seeking to discover. 45 C.F.R. § 164.502. Therefore, it is imperative that this Court accept jurisdiction in order to prohibit an unwarranted intrusion into Dr. Debski's privacy that is clearly protected under HIPAA.

This Court should accept jurisdiction of this matter in order to address the conflict and confusion created by the Ninth District and its improper deprivation of the privacy rights of patients that are guaranteed under Ohio's statutory physician-patient privilege. This Court has the opportunity to provide Ohio Court's with clarification and guidance with respect to the protection of party and non-party patients' private medical information against unwarranted and unnecessary public disclosure.

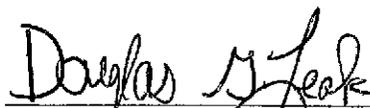
IV. CONCLUSION

The Ninth District's decision was not only erroneous and in conflict with this Court's precedents and the First District, it goes far beyond common sense with respect to the physician-patient privilege. It is illogical to conclude that a patient as the "holder" of the physician-patient privilege is an "unprotected source." It violates principals of substantial justice and improperly creates a judicial elimination of a patient's status as the "holder" of the physician-patient

privilege. Consequently, both party and non-party patients' rights to privacy and confidentiality are no longer paramount in Ohio. Under the Ninth District's decision, there now exists legal authority creating a real danger that patients' privileged medical information will be disclosed in any pending lawsuit throughout all of Ohio.

This Court should accept jurisdiction, resolve the conflict created by the Ninth District and provide Ohio Court's with the proper guidance needed with respect to protecting privileged medical information under Ohio's statutory physician-patient privilege.

Respectfully submitted,



Douglas G. Leak (0045554)
Roetzel & Andress, LPA
Suite 900, One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114
216-623-0150
216-623-0134 fax
dleak@ralaw.com

David M. Best (0014349)
4900 West Bath Road
Akron, OH 44333
330-665-5755
330-666-5755 fax
dmbest@dmbestlaw.com

*Attorneys for Appellee,
Robert F. Debski, M.D.*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail this 30th

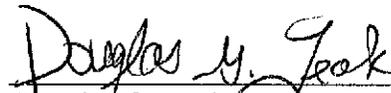
day of October, 2009 to the following:

Michael J. Elliott
Lawrence J. Scanlon
Scanlon & Elliott
400 Key Building
159 South Main Street
Akron, OH 44308

Attorneys for Appellants

S. Peter Voudouris
Nicole Braden Lewis
Tucker, Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115

Attorneys for Appellee Summa Health System



Douglas G. Leak
*One of the Attorneys for Appellee,
Robert Debski, M.D.*

STATE OF OHIO

COUNTY OF SUMMIT

DONALD WARD, et al.

Appellants

v.

SUMMA HEALTH SYSTEM, et al.

Appellees

COURT OF APPEALS
) DANIEL M. HERRIGAN
) ss: IN THE COURT OF APPEALS
) SEP 15 AM 8:10 NINTH JUDICIAL DISTRICT

SUMMIT COUNTY C. A. No. 24567
CLERK OF COURTS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007-10-7075

DECISION AND JOURNAL ENTRY

Dated: September 16, 2009

BELFANCE, Judge.

{¶1} Plaintiffs-Appellants Donald and Susan Ward appeal various rulings of the Summit County Court of Common Pleas. For reasons set forth below, we vacate and remand.

I.

{¶2} In May of 2006, Donald Ward underwent heart valve replacement surgery at Akron City Hospital, a Summa Health System hospital. Approximately a month later, Summa became aware that one of its non-employee health care workers at Akron City Hospital was exhibiting jaundice. The non-employee health care worker subsequently tested positive for the Hepatitis B virus, prompting Summa to engage in a Look Back Program in order to identify all patients that might have been exposed to the virus. Donald Ward was one of the patients identified by the Look Back Program; Ward tested positive for Hepatitis B. Ward's wife Susan had been previously vaccinated against the virus.

{¶3} Donald and Susan Ward filed suit against Summa and a John Doe defendant for personal injury related to his heart surgery. Donald and Susan Ward later dismissed their complaint and re-filed it in October 2007 against Summa and John Doe defendants one through six. Through discovery, the Wards sought information detailing the identity of the non-employee health care worker who exposed Donald Ward to Hepatitis B, as well as details concerning how the exposure occurred. Summa refused to comply with much of the requested discovery and asserted that four of the requested documents were privileged. Summa provided the Wards with a privilege log which essentially listed the documents and a redacted version of one of the documents. The Wards also sought to depose Dr. Robert Debski, the non-employee health care worker who performed Donald Ward's surgery. Dr. Debski refused to answer questions related to his personal medical history and indicated his deposition testimony would be limited to factual testimony related to Donald Ward's surgery.

{¶4} The Wards filed a motion to compel and a motion for a protective order concerning Summa's refusal to provide requested discovery, and Dr. Debski filed a motion for a protective order to limit his deposition testimony to the surgery itself. The trial court denied the Wards' motions and granted Dr. Debski's motion for a protective order. The Wards appealed to this Court and we dismissed for lack of a final appealable order.

{¶5} The trial court then ordered the Wards to file an affidavit of merit pursuant to Civ.R. 10(D)(2). The Wards did not file an affidavit of merit and Summa moved to dismiss. The trial court granted Summa's motion and dismissed the case without prejudice pursuant to Civ.R. 10(D)(2)(d) and Civ.R. 41(B)(1).

{¶6} The Wards have appealed, asserting three assignments of error.

II.

{¶7} As an initial matter, this Court must determine if the order from which the Wards appeal is a final appealable order. The Ohio Constitution limits this Court's appellate jurisdiction to the review of final judgments or orders of lower courts. Section 3(B)(2), Article IV, Ohio Constitution. "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" R.C. 2505.02(B)(1). Generally "[a] dismissal without prejudice is not a final, appealable order." *State ex rel. Automation Tool & Die, Inc. v. Kimbler* (Apr. 4, 2001), 9th Dist. No. 3124-M, at *2, citing *Denham v. City of New Carlisle* (1999), 86 Ohio St.3d 594, 597. Nonetheless, there are situations where a dismissal without prejudice can constitute a final and appealable order. See *National City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, at ¶¶1, 11; *Lippus v. Lippus*, 6th Dist. No. E-07-003, 2007-Ohio-6886, at ¶¶11-12; *MBNA Am. Bank, N.A. v. Harper*, 1st Dist. No. C-060937, 2007-Ohio-5130, at ¶¶1-3, 13; *MBNA Am. Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, at ¶6; *White v. Lima Memorial Hosp.* (Dec. 7, 1987), 3rd Dist. No. 1-86-62, at *1-*2.

{¶8} The Wards have persuaded this Court that the facts of this case warrant the conclusion that the trial court's dismissal without prejudice affects a substantial right and in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). Civ.R. 10(D)(2)(a) requires that complaints containing medical claims include at least one affidavit of merit "relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability." The affidavit of merit must be provided by an expert and, *inter alia*, must include a statement by the expert that one of the defendants breached the standard of care

causing injury to the plaintiff. *Id.* In this case, the trial court dismissed the Wards' case for failure to submit an affidavit of merit as required by the rule. The Wards claim that they have failed to file the affidavit because the trial court's previous denial of their motion to compel their requested discovery leaves their experts unable to complete the necessary affidavit. In support of the Ward's claim, they attached an affidavit of their counsel to their brief in opposition to Summa's motion to dismiss. The affidavit states that experts reviewed the matter but could not determine whether the standard of care was breached due to the experts' inability to review the documents subject to the motion to compel. The Wards argue that while they technically could refile their case, ultimately it will end in the same manner, as they will be unable to provide an affidavit of merit. We conclude that because the Wards arguably cannot produce an affidavit of merit without our review of their denied discovery requests, the trial court's dismissal effectively prevented a judgment in favor of the Wards, and the order from which the Wards appeal is therefore final and appealable.

{¶9} The Wards have presented this Court with three assignments of error which will be analyzed out of order to aid our review.

III.

{¶10} The Wards' third assignment of error alleges that "[t]he Trial Court abused its discretion in denying Appellants' Motion to Compel and Motion for Protective Order."

{¶11} Although generally discovery orders are reviewed under an abuse of discretion standard, the Supreme Court of Ohio has concluded that the issue of whether the information sought is confidential and privileged from disclosure is a question of law that should be reviewed *de novo*. *Med. Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13; see, also, *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973,

at ¶29. As the Wards' second and third assignments of error raise the issue of whether the information sought is confidential and privileged from disclosure, we will conduct a *de novo* review. *Id.* The Wards' motion to compel requested that the trial court compel answers to interrogatories, as well as the documents listed in Summa's privilege log. The documents listed on the privilege log are two Unusual Occurrence Reports, the Minutes from the Meeting of the Summit County Health District, and the Epidemiological Linked Hepatitis B Case Investigation Final Report (which was produced in a redacted form). The trial court did not conduct an *in camera* review of the documents, but nevertheless concluded that based on the evidence presented by Summa, the documents were privileged under R.C. 2305.24.

{¶12} Initially we note that privileges are to be strictly construed and that "[t]he party claiming the privilege has the burden of proving that the privilege applies to the requested information." *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, at ¶17. R.C. 2305.24 provides in pertinent part that:

"Any information, data, reports, or records *made available to a quality assurance committee or utilization committee* of a hospital * * * are confidential and shall be used by the committee and the committee members only in the exercise of the proper functions of the committee." (Emphasis added.)

{¶13} In support of Summa's assertion of privilege concerning the Unusual Occurrence Reports, Summa attached the affidavit of its Director of Infection Control and Clinical Safety. The Director stated that the Unusual Occurrence Reports were "prepared through a process and format specifically designed to follow the hospital incident report confidentiality provisions in Ohio law, namely Sections 2305.24, 2305.251, 2305.253, 2305.28, and 2317.02(A) of the Revised Code * * *." The affidavit contains the further contention that the Unusual Occurrence Reports were prepared with an expectation that they would be confidential and also asserts that the reports contain attorney-client communications.

{¶14} Based on the evidence before the trial court, and the fact that the trial court declined to conduct an *in camera* review of the documents, we are unable to conclude that Summa sufficiently established that the Unusual Occurrence Reports were actually privileged by R.C. 2305.24. While the trial court indicated in its order that the Wards did not challenge the affidavit, it was Summa's burden to demonstrate the privilege applied, not the Wards'. See *Giusti* at ¶17. Nowhere in the Director's affidavit does it state that the reports at issue were made available to any committee, that such a committee existed within the hospital, that any committee actually met to discuss the incident or the reports, or that the reports were prepared by or for the use of a peer review committee. While we note that the Director was also deposed, that transcript was not provided to this Court. Nonetheless, Summa does not rely on the transcript in support of its assertion of privilege and in fact states in its brief in opposition to the Wards' motion to compel that the Director was not questioned about the documents by the Wards during the deposition.

{¶15} The Supreme Court of Ohio has stated that "a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92. Thus, we must examine the other privileges Summa claims apply to the Unusual Occurrence Reports and determine whether they have presented sufficient evidence in support. Specifically, Summa argues in its brief that R.C. 2305.251, R.C. 2305.252, R.C. 2305.253, R.C. 2305.28, and R.C. 2317.02(a), all protect the documents from discovery. However, again, we determine Summa has not provided the trial court with sufficient evidence to conclude that the documents are privileged under any of the statutes, absent an *in camera* review.

{¶16} Initially we note, that R.C. 2305.28 and R.C. 2305.251 both are statutes which grant immunity from liability and are not statutes conferring a privilege and so we cannot see how such a statute would apply to these documents. Both R.C. 2305.252 and R.C. 2305.253 directly, or indirectly relate to peer-review. R.C. 2305.252 provides for the confidentiality of peer review proceedings and R.C. 2305.253 provides for the confidentiality of incident or risk management reports. An incident or risk management report is “a report of an incident involving injury or potential injury to a patient as a result of patient care provided by health care providers, including both individuals who provide health care and entities that provide health care, *that is prepared by or for the use of a peer review committee* of a health care entity and is within the scope of the functions of that committee.” (Emphasis added.) R.C. 2305.25(D).

{¶17} We have stated when examining R.C. 2305.252 that “[a] party claiming the peer-review privilege, at ‘a bare minimum,’ must show that a peer-review committee existed and that it actually investigated the incident.” *Giusti* at ¶17, quoting *Smith v. Manor Care of Canton Inc.*, 5th Dist. Nos. 2005-CA-00100, 2005-CA-00160, 2005-CA-00162, and 2005-CA-00174, 2006-Ohio-1182, at ¶61. Thus, we determine that based on the evidence before it and given the lack of an *in camera* inspection of the documents, the trial court could not conclude as a matter of law that the two Unusual Incident Reports were privileged, under either R.C. 2305.252 or R.C. 2305.253.

{¶18} Likewise, we are not convinced that Summa has produced evidence demonstrating that the documents are privileged under the attorney-client privilege. R.C. 2317.02(A)(1) provides that the testimony of an attorney is privileged “concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client * * *.” The Supreme

Court of Ohio has held that “the burden of showing that testimony [or documents] sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude [them] * * *.” *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166, quoting *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 178. The only reference to attorney-client privilege in the Director’s affidavit states that “Unusual occurrence reports such as those listed on Defendant Summa Health System’s Privilege Log dated January 21, 2008, contain confidential attorney-client communications directed by Summa personnel to Summa’s attorneys.” We determine such a blanket assertion to be insufficient to substantiate the existence of the attorney-client privilege as it relates to the two reports.

{¶19} Thus, the Wards’ argument has merit and the trial court erred in concluding that the Unusual Occurrence Reports were privileged based upon the evidence provided by Summa and the subsequent lack of an *in camera* review of the documents.

{¶20} The Wards also argue that the trial court erred in failing to consider applicable “Privacy Rules” in conjunction with the trial court’s determination that the documents were privileged under R.C. 2305.24.¹ However, as we have determined that Summa did not present sufficient evidence to the trial court to conclude that the documents were even privileged under R.C. 2305.24, we need not address this issue.

¹ We note that in *Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 9th Dist. Nos. 22594, 22585, 2005-Ohio-6914, at ¶23, we determined that the Health Insurance Portability and Accountability Act (“HIPAA”) did not preempt the physician-patient privilege under R.C. 2317.02. However, we did not address in that case whether HIPPA preempted R.C. 2305.24, and as that issue is not yet squarely before us, we leave that determination for another day.

{¶21} With respect to the remaining items of discovery the Wards sought to compel, *i.e.* the answers to interrogatories as well as the other items in the privilege log, we note that it does not appear that the trial court specifically determined whether these items were in fact privileged, and therefore, not subject to discovery. We have stated that “if a trial court fails to rule on a pending motion prior to entering judgment, it will be presumed on appeal that the motion in question was implicitly denied.” *George Ford Constr., Inc. v. Hissong*, 9th Dist. No. 22756, 2006-Ohio-919, at ¶12. Thus, we conclude that the trial court implicitly denied the Wards’ motion to compel concerning the discovery the trial court did not address. However, as the trial court offered no law or analysis pertaining to this discovery, we are unable to determine on what basis the trial court found the discovery to be privileged. Moreover, with respect to the remaining two documents identified in the privilege log, it would appear from the record before us that Summa has completely failed to provide the court with any evidence supporting a determination that those two documents are privileged; Summa’s sole item of evidence is the affidavit of the Director which does not even mention these two documents. It is also unclear to this Court why the trial court did not analyze the propriety of compelling answers to the interrogatories when it appears that many of them are not objectionable.² The analysis the trial

² For example, Interrogatory No. 13 asked: “Does Defendant, Summa Health System, have a protocol for individuals who work as an agent and/or employee of the hospital or an individual who works within the hospital but is not otherwise an employee of the hospital (e.g., doctor) and who is knowingly exposed to Hepatitis B, if so, describe in detail the protocol and if a written protocol attach as part of your response a copy of the protocol procedure in effect in May 2006.” Likewise, Interrogatory No. 14 states: “Please describe screening procedures, for employees of and doctors practicing at Summa Health Systems facilities, for viral infections such as Hepatitis B, including the timing and frequency of any periodic testing in effect for May 2006.”

court did provide related only to the two Unusual Occurrence Reports and Dr. Debski's protective order, which we analyze below, and offers no insight into the basis for finding the other items of discovery privileged. Therefore, upon remand the trial court should revisit this issue in order to evaluate whether in fact any of the documents or interrogatories are privileged.

IV.

{¶22} The Wards argue in their second assignment of error that the trial court erred in granting Dr. Debski, a non-party, a protective order. More specifically, the basic argument the Wards make in their brief is that the trial court erred in finding that the physician-patient privilege applied to bar Dr. Debski's testimony as it relates to his personal medical health history. The Wards subpoenaed Dr. Debski, Donald Ward's surgeon, to testify at a deposition. Dr. Debski indicated prior to the deposition that he would not testify about any matters pertaining to his personal medical history and would seek a protective order if the Wards insisted on asking such questions. Subsequently, Dr. Debski moved for a protective order. In the Wards' brief in opposition to Dr. Debski's motion, the Wards stated that they sought to ask Dr. Debski the following questions: "(1) has he ever had Hepatitis B, (2) if so, when did he contract the disease, and (3) the nature and circumstances of when he first became aware that he had the disease." Dr. Debski has argued that such information is privileged pursuant to R.C. 2317.02(B)(1), the physician-patient privilege.

{¶23} Initially we note that the physician-patient privilege did not exist at common law. *State Med. Bd. of Ohio v. Miller* (1989), 44 Ohio St.3d 136, 140. Thus, "because the privilege is in derogation of the common law, it must be strictly construed against the party seeking to assert it." *Id.*

{¶24} R.C. 2317.02(B)(1) provides in relevant part:

“The following persons shall not testify in certain respects:

“ * **

“A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.” (Emphasis added.)

Under the statute, a communication is defined as “acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A ‘communication’ may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.” R.C. 2317.02(B)(5)(a).

{¶25} While Dr. Debski is a physician, the testimony being sought concerns his role as a patient: the Wards do not wish to ask Dr. Debski about his patients or their records, the Wards want to ask Dr. Debski about himself. Nothing in the plain language of the statute prohibits this. The statute does not prevent patients from testifying. Also, while the Wards seek what clearly could be classified as a “communication” under the statute, they do not seek it from the protected person, the physician; they seek it from an unprotected source, the patient.

{¶26} Nonetheless, we are not oblivious to the conflict presented by the above conclusion: on the one hand the statute prevents the physician from testifying about physician-patient communications absent a waiver, but yet at the same time, it does not by its very terms specifically prevent the patient from being compelled to disclose the same information. At first glance, it might seem that such a pronouncement would obliterate the privilege entirely.

However, we do not believe that is the case. Compelling the patient to testify concerning the patient's medical condition or communications made to or by the patient's physician could only possibly require the patient to disclose information within the patient's knowledge. Information unknown by the patient and only known by the patient's doctor or only contained in the patient's medical record could not, and would not, be disclosed and clearly would fall within the privilege. As medicine is a highly technical field involving a complicated and often confusing vocabulary, the information unknown by the patient could be voluminous.

{¶27} Further, while the patient holds the privilege, see *Grove* at ¶12, the patient can only exercise the privilege to the extent authorized by law. With respect to the physician-patient privilege, the statute grants the patient the right to prevent the physician from testifying concerning his or her communications with the patient, absent an exception, but does not give the patient the right to refuse to testify.

{¶28} Nor do we find persuasive the reasoning in *Ingram v. Adena Health Sys.*, 149 Ohio App.3d 447, 2002-Ohio-4878, applying attorney-client case law to the physician-patient privilege. The *Ingram* court concludes that attorney-client case law is applicable to the physician-patient privilege due to the presence of the privileges in the same section of the Ohio Revised Code. *Id.* at ¶14. However, the two privileges have entirely different histories, as the attorney-client privilege existed both at common law and under statute, see *Gallimore v. Children's Hop. Med. Ctr.* (Feb. 26, 1992), 1st Dist. Nos. C-890808, C-890824, at *6, but the physician-patient privilege never existed at common law. See *Miller*, 44 Ohio St.3d at 140. And while it is clear that under the attorney-client privilege the client cannot be compelled to testify as to attorney-client communications, the client's protection from testifying arose from the common law, not from the statute. See *Ex parte Martin* (1943), 141 Ohio St. 87, paragraph six

of the syllabus; R.C. 2317.02(A)(1). Thus, as the physician-patient privilege has no common law roots to protect the patient's testimony, *Miller*, 44 Ohio St.3d at 140, and the statute does not extend the privilege to prevent the patient's testimony from being compelled, it is not reasonable to conclude that the physician-patient privilege is as broad as the attorney-client privilege.

{¶29} In light of the above, and our duty to strictly construe the statute against Dr. Debski, *id.*, we conclude that the testimony sought by the Wards is not privileged under R.C. 2317.02(B)(1), as the statute does not prevent a patient from being compelled to testify about doctor-patient communications.

{¶30} However, this does not prevent the trial court from issuing a protective order where appropriate. The Supreme Court of Ohio has stated that "Civ.R. 26(C) still applies to discovery that is excepted from privilege protection. Trial courts may use protective orders to prevent confidential information * * * from being unnecessarily revealed. Whether a protective order is necessary remains a determination within the sound discretion of the trial court." *Schlotterer* at ¶23. However, in this case the trial court issued a protective order barring nearly all testimony by Dr. Debski because it found the physician-patient privilege applied. As we have determined the privilege does not prevent the Wards from compelling Dr. Debski's testimony, the protective order granted by the trial court is clearly too broad. However, given the confidential nature of the information the Wards seek, it would be within reason for the trial court to issue a protective order to prevent the unnecessary disclosure of medical information; for example, the trial court could seal Dr. Debski's deposition testimony. Accordingly, we conclude that the Wards' second assignment of error has merit.

V.

{¶31} Finally, we examine the Wards' first assignment of error which alleges that the

trial court erred in dismissing their complaint pursuant to Civ.R. 10(D)(2)(d) and Civ.R. 41(B)(1). We agree.

{¶32} Essentially the trial court dismissed the Wards' case because the Wards failed to file an affidavit of merit as required under Civ.R. 10(D)(2)(d). However, the Wards have argued that they were prevented from filing the affidavit because Summa and Dr. Debski improperly withheld necessary discovery from them. Thus, the resolution of the discovery issues is intertwined with the trial court's ultimate dismissal of the Wards' case. As we have sustained the Wards' assignments of error concerning the discovery issues, we thus determine that the trial court erred in dismissing the Wards' case.

{¶33} Additionally we note that the Supreme Court of Ohio has held that "the proper response to the failure to file the affidavit required by Civ.R. 10(D)(2) is a motion to dismiss filed under Civ.R. 12(B)(6)." *Fletcher v. Univ. Hospitals of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, at ¶3. If the motion is granted, the dismissal should be without prejudice. *Id.* Summa filed its motion to dismiss pursuant to Civ.R. 41(B)(1), and not Civ.R. 12(B)(6). The trial court granted Summa's motion and stated that the Wards "fail[ed] to state a claim under Civ.R. 10(D)(2)(d), and * * * fail[ed to] comply with this Court's order under Civ.R. 41(B)(1)." While Summa's motion was not filed according to the appropriate procedural rule, in light of the trial court's reference to dismissal for failure to state a claim, it is unclear whether the trial court treated the motion as one for a dismissal under Civ.R. 12(B)(6) for failure to state a claim or whether it dismissed the matter solely pursuant to Civ. R. 41(B)(1).

VI.

{¶34} In light of the foregoing, we sustain the Wards' assignments of error and remand this matter to the Summit County Court of Common Pleas for proceedings consistent with this opinion.

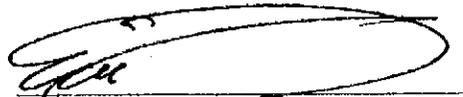
Judgment vacated
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.



EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶35} I agree with the majority because the physician-patient privilege is in derogation of the common law and “must be strictly construed against the party seeking to assert it.” *State Med. Bd. of Ohio v. Miller*, 44 Ohio St. 3d 136, 140 (1989). Unlike with the attorney-client privilege, the common law cannot be relied upon to supplement the statutory language chosen by the General Assembly. The privilege, as provided in Section 2317.02(B), is limited to prohibiting physicians from testifying about communications they receive from their patients and their advice back to those patients. As difficult as it is to believe, it does not protect the patient from being required to testify about those very same communications and that same advice.

{¶36} I understand the outcome in this case may be shocking to the legal and medical communities and will likely lead to unanticipated and, possibly, unfortunate consequences. When a statute is clear on its face, however, it is not the role of this Court to look beyond that face. “In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in . . . a particular statute—we rely only on what the General Assembly has actually said.” *State ex rel. Jones v. Conrad*, 92 Ohio St. 3d 389, 392 (2001) (quoting *Muenchenbach v. Preble County*, 91 Ohio St. 3d 141, 149 (2001) (Moyer, C.J., dissenting)). If, as I suspect, the General Assembly intends the physician-patient privilege to apply as broadly as the attorney-client privilege, it may wish to adopt language like that found in Rule 503(b) of the Uniform Rules of Evidence, which provides: “A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his [physical,] mental or emotional condition, including alcohol or drug addiction, among himself, [physician or]

psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.”

APPEARANCES:

LAWRENCE J. SCANLON, and MICHAEL J. ELLIOTT, Attorneys at Law, for Appellants.

S. PETER VOUDOURIS, NICOLE BRADEN LEWIS, and KAREN E. ROSS, Attorneys at Law, for Appellees.

DAVID M. BEST, Attorney at Law, for Appellee.

DOUGLAS G. LEAK, Attorney at Law, for Appellee.