

ORIGINAL

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.

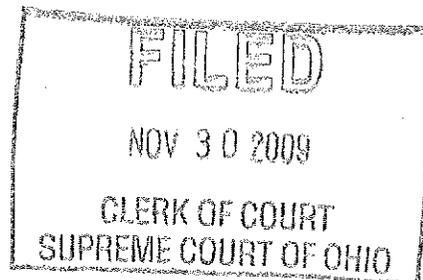
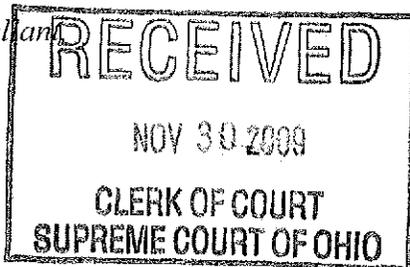
SUMMA HEALTH SYSTEM, et al.,
Defendants-Appellants

**MEMORANDUM OF APPELLEES
DONALD WARD, ET AL.,
IN OPPOSITION TO JURISDICTION**

S. Peter Voudouris (0059957)
(Counsel of Record)
Nicole Braden Lewis (0073817)
Karen E. Ross (074173)
Tucker, Ellis, & West, LLP
1150 Huntington Building
926 Euclid Avenue
Cleveland, OH 44115
216.592.5000
Facsimile: 216.592.5009
*Attorneys for Defendants/
Appellants, Summa Health System*

Michael J. Elliott (0070072)
(Counsel of Record)
Lawrence J. Scanlon (0016763)
SCANLON & ELLIOTT
400 Key Building
159 South Main St.
Akron, OH 44308
330.376.1440
Facsimile: 330.376.0257
MElliott@scanlonco.com
*Attorneys for Plaintiffs/Appellees
Donald and Susan Ward*

Douglas G. Leak (0045554)
(Counsel of Record)
One Cleveland Center, 9th Fl.
1375 E. 9th Street
Cleveland, OH 44114
216.623.0150
Facsimile: 216.623.0134
*Attorney for non-party Appellant
Robert F. Debski, M.D.*



David M. Best (0014349)
4900 West Bath Road
Akron, OH 44333
330.665.5755
Facsimile: 330.666.5755
Attorney for non-party Appellant
Robert F. Debski, M.D.

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I. Explanation of why this case is not of public or great general interest.

This is not a case of great public or general interest and therefore should not be accepted for further review by this Court. The absence in Appellant's own memorandum of any demonstrable basis of such import demonstrates that the matter should not be reviewed. Throughout Appellant's memorandum it is repeatedly alleged that the lower court's decision has put an end to the physician-patient privilege within its purview. Nothing could be further from the truth. The Appellant's memorandum misstates the lower court holding by claiming that a patient is no longer protected by the physician-patient privilege. Not only is this an inaccurate reflection of the lower court's holding but is contrary to the express dictates contained within the statutory physician-patient privilege which the lower court relied upon as the basis of its decision.

The Appellant was correct to point out the concern the Ninth District had when deciding that under certain circumstances an individual may be obligated to reveal matters concerning his or her own medical condition. What it failed to mention was that the Ninth District proceeded to clarify and reconcile the concerns raised:

[I]t 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.

Ward at ¶ 26.

In this case the issue is not whether a patient is protected from the disclosure of medical information. The lower court and the statutory privilege make it clear that absent a waiver documents, records, information and physician-patient communications are not discoverable

from a protected source. *Id.* at 26. The Ninth District correctly decided that in certain limited circumstances information being sought from an individual's own personal knowledge does not fall within the privilege. *Id.* at 25.

II. Statement of the case and facts.

On May 26, 2006, Donald Ward was admitted into Appellant, Summa Health System, ("Summa") to undergo heart valve replacement surgery. When admitted, Mr. Ward was an otherwise healthy individual, free of any known disease or virus, other than his heart condition. During Mr. Ward's admission into Summa he was exposed to Hepatitis B. On or about October 10, 2006, as a result of this exposure, Summa notified Mr. Ward of the need for testing pursuant to the hospital's Hepatitis Look Back Program. Thereafter, Mr. Ward was tested and diagnosed as having Hepatitis B.

Only the Appellants know exactly how, when, and why Mr. Ward was exposed to Hepatitis B during the operative procedure. What has been determined, however, is that one of Mr. Ward's medical providers exposed him to Hepatitis B during the valve replacement surgery. Appellees have been unsuccessful in determining which individual exposed Mr. Ward to Hepatitis B due to the lack of cooperation on the part of Summa and the inability to compel information from the non-party Appellant, Dr. Debski, which should have been discoverable in the proceeding.

As a result of the exposure and testing positive for Hepatitis B a Complaint was filed on behalf of Appellees, Donald and Susan Ward. Summa was named as a Defendant. In order to pursue the matter, Appellee requested information known to Summa pertaining to who caused the exposure to Hepatitis B, when the exposure occurred, and how the exposure happened. During discovery, Summa refused to provide information that would identify the individual or

individuals responsible for Mr. Ward's exposure to Hepatitis B. Documentation prepared by a conglomeration of local health departments entitled the Hepatitis B Study produced by Summa that would further indicate who, how, and why Mr. Ward was infected with Hepatitis B, was produced in a redacted form. (See Defendant Summa Health System's Privilege Log ("Privilege Log") dated November 14, 2007 attached as *Exhibit 2* to Plaintiffs' Motion to Compel and Motion for Protective Order.) Any information identifying the individual responsible for exposing Mr. Ward to Hepatitis B was completely removed from the record along with other information that may or may not identify the individual responsible for the exposure.

Dr. Debski was a health care worker involved in the subject surgery. In fact, he was the surgeon who performed the open heart procedure. At the time of the procedure he was not an employee of Summa. According to the redacted version of the Hepatitis B Study, the individual responsible for the exposure was a healthcare worker. (Abell Depo. at p. 33 ll. 9-16.) During her deposition, the Director of Infection Control for Summa conceded that the exposure occurred sometime during Mr. Ward's surgery (Abell Depo. at p. 35 ll. 1-4) and the person responsible was not an employee of Summa. (Abell Depo. at p. 33 ll. 17-19.) Dr. Debski fits all known criteria as the source of Mr. Ward's Hepatitis B exposure and infection.

Appellants served a subpoena duly issued on Dr. Debski that required his attendance to testify on matters such as did he have Hepatitis B at the time of Donald Ward's surgery, when did first become aware that he had contracted Hepatitis B, what precautions and other procedures did he take to limit or avoid exposure toward other individuals, did Summa ever become aware of his infection, and did he ever notify Summa or other institutions where he had patient privileges of the infection. Rather than attend his deposition, counsel for Dr. Debski responded and stated that he would not add any information that was not stated in the medical records. (See

Letter of Counsel David Best dated January 23, 2008 attached as *Exhibit 2* to Plaintiffs' Brief in Opposition to Protective Order filed by Robert F. Debski.) His attorney also provided that under no circumstances would Dr. Debski talk about his own personal medical situation. (*Id.*)

On December 4, 2007, Appellants filed a motion to compel to receive the documentation and interrogatory answers that Summa was unwilling to provide in their entirety, see *supra*. Summa filed a Motion for Protective Order to protect whatever interest it had in turning over the evidence and non-party Appellant, Dr. Debski, filed a motion for protective order from testifying on matters relevant to Mr. Ward's exposure to Hepatitis B, see *supra*.

On June 5, 2008, the trial court denied Appellees Motion to Compel and Motion for Protective Order, and granted non-party Appellant's Motion for Protective Order. (Trial Court Order dated June 5, 2008.) That decision was appealed to and subsequently remanded from the Ninth District in CA No. 24289. By entry dated September 23, 2008, the Appeals Court found the matter not to be a "final, appealable order." Upon remand, the trial court ordered Appellees to file an affidavit of merit within forty-five days. Appellants were unable to do so because they were unable to discover the source of Donald Ward's exposure to Hepatitis B which was due to the trial court's order denying the motion to compel and granting non-party Debski's motion for protective order. Thereafter, the trial court dismissed Appellees' claim by Order dated December 22, 2008. (Trial Court Order dated December 22, 2008.) Thus, the subject appeal ensued which was determined to be a final appealable order. Ward at ¶ 7.

In its Decision and Journal Entry dated September 16, 2009, the Ninth District reviewed three assignments of error presented by the Wards. As an initial matter, the Ninth District reviewed whether the information sought from Summa was confidential and privileged from disclosure as held by the trial court. The Ninth District correctly decided that the trial court

failed to conduct an *in camera* review of the documents in question and was therefore insufficient evidence to conclude that the documents were privileged under the statutory privileges raised by the Appellants below. Because the Ninth District correctly ruled on error in the trial court that part of the lower court's decision has not been appealed.

The second assignment of error¹ presented by the Wards was that the trial court erred in granting Dr. Debski a protective order by determining that the physician-patient privilege applied to bar the Appellees from questioning the doctor on his own personal health and whether he was the source of Donald Ward's exposure to Hepatitis B while undergoing surgery. In deciding that the physician-patient privilege did not apply the Court simply looked to the language of the statute and applied the statutory language to the facts and circumstances at hand.

Because the Ninth District was simply interpreting statutory language this is not a case of great public or general interest.

¹ The third assignment of error addressed the trial court's decision to dismiss the Wards' claim pursuant to the inability to file the affidavit of merit. The inability to file the affidavit of merit, however, was a direct result of the inability to discover the source of Donald Ward's exposure to Hepatitis B. As such, the Ninth District held that the trial court erred in dismissing the case when it also erred on the discovery issues.

III. Law and Argument

PROPOSITION OF LAW NO. 1: The Ninth District's decision is in direct conflict with this Court's decision in *Roe v. Planned Parenthood Southwest Ohio Region*, (2009) 122 Ohio St. 3d 399 in that it allows for the production of personal medical information of non-party patients in violation of the physician-patient privilege.

The Ninth District's decision does not conflict with the Court's decision in *Roe* as it did not deal with or address any of the facts or circumstances addressed by the Ninth District in its decision below.²

The basis or reason why the Appellant believes this case to be of great public or general interest is due to purported conflicts between the Ninth District decision and decisions by this Court as well as other court of appeals decisions. This same argument has already been attempted and lost by the Appellant in the Ninth District. Dr. Debski and Summa previously moved the Ninth District to certify a conflict between its decision and the Supreme Court judgments in *Roe* and *Medical Mutual of Ohio v. Schlotterer*, (2009) 122 Ohio St. 3d 181, as well as the First District Court of Appeals decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, see *infra*. While the Ninth District held that alleged conflict between a district court and the Supreme Court is not a proper ground for certification it did evaluate Appellant's argument that its decision conflicted with the *Calihan* decision. See Journey Entry entered October 27, 2009, C.A. No. 24567, p 2 of 3.

One thing that is entirely missing from the Appellant's argument is the simple fact that none of the cases cited to by it are in any way factually analogous to the fact at hand. The *Roe*, *Schlotterer* and *Calihan* decisions all involved cases where a party was attempting to compel the

² As the Appellant Summa Health System has filed a confused and confusing "me too" memorandum in support of jurisdiction its Proposition of Law will be addressed following the two propositions raised by Appellant Debski in his memorandum in support of jurisdiction.

discovery of confidential medical records from a protected source. See e.g., *Roe*. The Ninth District held that no such conflict of law existed as its own decision did not deal with confidential medical information from a protected source but rather was limited to the issue of whether Ohio R.C. 2317.02(B) prevented testimony by a person that may concern his medical condition. For that reason and that reason alone none of the decisions cited to by the Appellant do not conflict with the Ninth District's decision.

The Appellant wishes to analogize the case at hand to the *Roe* decision. In reality the *Roe* decision is of no relevance to this case. In the *Roe* decision, there was no issue of whether information being sought by the Roes was confidential information subject to statutory protection. The Roes sought discovery of the **medical records** of non-party minors. *Roe*, 122 Ohio St. 3d at 402. Based upon the Court's decision in *Biddle v. Warren General Hospital*, (1999), 86 Ohio St. 3d 395, the trial court determined that that such confidential information may be discoverable "[where] their need for the information outweighed the nonparty patients' interest in maintaining the confidentiality of their records. *Roe*, 122 Ohio St. 3d at 402. The court of appeals reversed the trial court's decision but on the grounds that the records were unnecessary to the *Roe*'s case and even if necessary the countervailing interests of the nonparty patients outweighed the probative value of the records to the case. *Id.*, citing to *Roe v. Planned Parenthood Southwest Ohio Region*, 173 Ohio App. 3d 414 at ¶42-44. This Court accepted jurisdiction on the issue of whether the Roes were able to discover confidential records of third parties pursuant to the authority expressed in *Biddle*. In *denying* the Roes proposition this Court held that "[a]ny such exception to the physician-patient privilege is a matter for the General Assembly to address." *Id.* at 408, citing to *Jackson v. Greger*, 110 Ohio St. 3d 488, at ¶13. (Quotation omitted.)

This case does not deal with nor does it address the release of confidential medical records by a protected source such as a physician, medical practice, clinic, or hospital. This case is not asking the court to create a judicially created waiver or exception to the physician-patient privilege. This case involves an individual who just happens to be a physician who is being asked about his own medical condition. While the information sought may be of a personal nature and therefore other protections may apply, see *infra*, it is not information protected by the physician-patient privilege. The Wards are not requesting that any of Dr. Debski's own medical records be produced or that any of his own medical providers provide them with information. And while Dr. Debski is not a party inasmuch as he has not named as such in the Complaint he is a likely source of Donald Ward's exposure. Because of this there can be no doubt that the information sought is of relevance to the case at hand.

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, and the first district's decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266 in erroneously holding that a patient is not a protected source when asserting the physician-patient privilege.

Appellant's second proposition of law does little more than advance the same argument that was set forth in its first proposition and law and because of this it too is wrong.

Like the decision in *Roe* the decisions in *Medical Mutual of Ohio v. Schlotterer*, (2009) 122 Ohio St. 3d 181, and *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, addressed the discoverability of medical records from a protected source. Nothing in either of those two decisions is in conflict with the Ninth District's decision. In fact in denying the Appellant's motion to certify a conflict expressly analyzed the *Calihan* decision to its own.

We conclude that no conflict of law exists. As noted above, in the instant case, we determined that the physician-patient privilege pursuant to R.C. 2317.02(B) did not protect the patient, in this case Dr. Debski, from being required to testify at a

deposition about his medical information. Thus, our holding was limited to the issue of whether R.C. 2317.02(B) prevented the testimony of the patient. *Calihan*, by contrast held that “the R.C. 2317.02(B) physician-patient privilege **protected [the patient’s] medical records from compelled disclosure** under the Rules of Civil Procedure governing discovery. (Emphasis added.) *Calihan*, 78 Ohio App. 3d at 271. *Calihan* did not involve attempts by a party to obtain the patient’s testimony. Therefore, *Calihan* does not conflict with our holding in the instant case. Because no conflict exists, the motion to certify is denied.

Journey Entry entered October 27, 2009, C.A. No. 24567, p 2 of 3. (Emphasis added.)

PROPOSITION OF LAW: A health care entity with knowledge or possession of a non-patient’s private health information cannot disclose or produce that information without an express waiver from said non-patient.

The Ninth District decision does not compel or require Summa to disclose or produce private health information from a non-patient and therefore Summa’s “proposition of law” is not even an issue properly before this Court.

As stated, Summa’s argument suggests that the Ninth District’s decision somehow required it or compelled it to turn over private health information. As outlined above, the Ninth District simply held that absent an *in camera* inspection there was insufficient evidence before the trial court to determine documents that had been requested by the Appellees was privileged and therefore not discoverable. Obviously, all of the same privileges and protections raised by the Appellant would apply to the documents *once the trial court had the opportunity to conduct an in camera inspection*.

In support of its position, Summa states that the “Ninth District decision is contrary to HIPAA, 42 U.S.C. 1301 *et seq.*, which further protects an individual’s private health information from unwanted disclosure.” Summa Memo. in Support of Jurisdiction at p. 7. Without saying exactly how Summa argues that the Ninth District’s decision somehow violates the Health Insurance Portability and Accountability Act of 1986 (“HIPAA”). This position is not only contrary to the decision itself but is also contrary to the express dictates of HIPAA. As

acknowledged by Summa in its Brief below, under certain circumstances HIPAA allows for opportunities when protected health information may be disclosed. (See e.g., Brief of Defendant-Appellee Summa Health System at p. 12 (“[i]f Summa receives satisfactory assurance from the Wards that reasonable efforts have been made by them to ensure that the individual has been given notice of the request, private information may be disclosed. 45 CFR § 164.512 (e)(1)(II)(A). ...Disclosure is also permitted in response to a valid Court Order. 45 CFR § 164.512 (e)(1)(i). ...[] [D]isclosure would be permitted, as the Wards note in their Brief, if Summa had received satisfactory assurance that reasonable efforts had been made to secure a qualified protective order. 45 CFR § 164.512 (e)(1)(ii)(B).))

Of course, all of this ignores the simple fact that Summa has not been ordered to produce even a single document by the Ninth District. Therefore, its argument, no matter how incorrect and inaccurate it is, is without a justifiable basis and should not be entertained by this Court.

As indicated above, throughout Dr. Debski’s memorandum the untenable position that the Ninth district decision “denies non-party patients the protection from disclosure of confidential medical information afforded [to] them by Ohio’s statutory physician-patient privilege” (Debski’s Brief in Support of Jurisdiction at p. 10.) and that in so holding “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” (*Id.* at p. 10.) has been stated and restated. How ridiculous. Aside from the fact that the Ninth District decision upholds the physician-patient privilege and does not even affect privileged or confidential medical matters, *passim*, the Ninth District recognized a number of other protections a Court has to guard against unwarranted disclosure of personal information which may or may not be privileged. The Appellant completely ignores the holding of the Ninth District which stated:

[T]his 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.” 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...**

Appellate Opinion at ¶ 30, emphasis added.

Whether it meant to or not the Appellant completely ignores the above language in the Ninth District’s decision in an effort to create controversy where none exists.

In reality, what the Appellants are asking this Court to do is modify the express language of a statute by judicial fiat. This Court held in *Roe* that any exception to the physician-patient privilege is a matter for the General Assembly to address. *Roe* at 408, citing *Jackson v. Greger*, 110 Ohio St. 3d 488, P 13 (“this court... has consistently rejected the adoption of judicially created waivers, exceptions, and limitations for testimonial privilege statutes.”) Just as any exception to the privilege is a matter for the General Assembly to decide any modification to the privilege must only be addressed by the General Assembly.

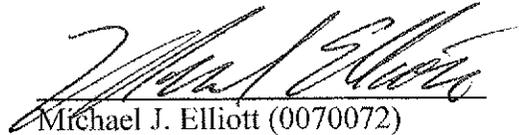
IV. Conclusion

Key to the Appellants’ argument is an ability to demonstrate that the information sought to be withheld from discovery is confidential information protected by the physician-patient privilege. At no point throughout the entire length of Appellants’ memoranda did they explain or provide a reasoned basis of how such information qualifies as protected information under the statute.

As the information the Appellants seek to protect is not information protected by the statute their arguments must fail. And as such there is no issue presently before this Court which constitutes a matter of great public or general interest.

The Supreme Court should not take jurisdiction of this appeal.

Respectfully Submitted,
SCANLON & ELLIOTT



Michael J. Elliott (0070072)

Lawrence J. Scanlon (0016763)

400 Key Building

159 S. Main St.

Akron, OH 44308

330.376.1440

Facsimile: 330.376.0257

Melliott@scanlonco.com

Attorneys for Plaintiffs/Appellees

Donald and Susan Ward

CERTIFICATE OF SERVICE

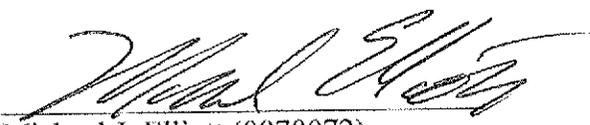
I hereby certify that a true and accurate copy of the foregoing was sent on this 24th day

of November 2009 via regular U.S. Mail to:

S. Peter Voudouris (0059957)
Nicole Braden Lewis (0073817)
Karen R. Ross (0074173)
Tucker, Ellis, & West, LLP
1150 Huntington Building
926 Euclid Avenue
Cleveland, OH 44115
216.592.5000
Facsimile: 216.592.5009
Attorneys for Defendants/Appellants, Summa Health System

David M. Best (0014349)
4900 West Bath Road
Akron, OH 44333
330.665.5755
Facsimile: 330.666.5755
Attorney for Robert F. Debski, M.D.

Douglas G. Leak (0045554)
Roetzel & Andress
One Cleveland Center, 9th Fl.
1375 E. 9th Street
Cleveland, OH 44114
216.623.0150
Facsimile: 216.623.0134
Attorney for Robert F. Debski, M.D.


Michael J. Elliott (0070072)
*Attorney for Plaintiffs/Appellants
Donald and Susan Ward*