
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

**MERIT BRIEF OF APPELLEES
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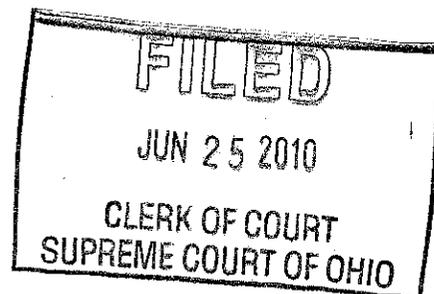
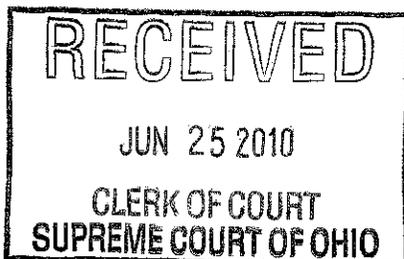


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I. STATEMENT OF THE CASE AND FACTS.

On May 26, 2006, Plaintiff-Appellee, Donald Ward, was admitted into Akron City Hospital, a Summa Health System ("Summa"), facility to undergo heart valve replacement surgery. (See Plaintiffs' Complaint.) The surgeon who performed the procedure was Appellant, Robert Debski, M.D. ("Appellant"). At the time of his admission, Mr. Ward was a healthy individual, other than his heart condition, free of any known disease or virus. Following his discharge Summa notified Mr. Ward he had been possibly exposed to the Hepatitis B virus during his admission into the hospital. The notification letter was authored by Virginia Abell, RN, CIC, Director of Infection Control and Clinical Safety for Summa and recommended he undergo a blood test to determine if in fact he had been exposed to Hepatitis B while in the hospital. Based upon the notification letter, Mr. Ward was tested and the result of the blood test was positive for acute Hepatitis B infection. (See Plaintiffs' Complaint.)

A lawsuit was filed against Summa after it refused to provide information as to the identity of the individual who exposed Donald Ward to Hepatitis B, as well as details concerning how the exposure occurred. The lawsuit alleges, among other things, that the Defendants, including SUMMA, failed to prevent Donald Ward's exposure to the Hepatitis B virus and this failure was a deviation from the standard of care. Through discovery, the Wards requested information known to Summa pertaining to who caused the exposure and how the exposure occurred. (See Plaintiffs' Motion to Compel and Motion for Protective Order.) Summa again refused to provide the identity of the individual responsible for

Mr. Ward's exposure to the Hepatitis B virus. (*See Id.*) In so doing, Summa refused to provide an unredacted copy of a document prepared by it along with one other local hospital and area health departments entitled Epidemiological Linked Hepatitis B Case Investigation ("Case Investigation"). (*See Id.*) The Case Investigation provides information on the identity of the individual who exposed Donald Ward *and others* to the Hepatitis B virus, as well as details concerning how the exposure occurred. (*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.)

As part of its discovery responses, the Case Investigation had been produced by Summa in redacted form. According to the Case Investigation, there was an epidemiological link between a "health care worker" who is identified as the "Index Case" and two other cases of acute Hepatitis B infection who are identified as "Case One" and "Case Two". (*See* the Epidemiological Linked Hepatitis B Case Investigation, redacted version, attached as Exhibit 7 to the Deposition of Virginia Abell RN, CIC, ("Abell depo.") taken on November 15, 2007.) The Case Investigation reveals involvement by the Index Case in both surgeries. (*See Id.*) Case One was a patient who underwent coronary bypass surgery on May 19, 2006, and Case Two was a patient who had surgery on May 26, 2006, which was the same date as Donald Ward's surgery. (*See Id.*) As such, Case Two is believed to represent Donald Ward, and the details in the Case Investigation are believed to involve his surgery and exposure to the Hepatitis B virus.

As part of the proceedings, Summa's Director of Infection Control and Clinical Safety, Virginia Abell, RN, CIC, was deposed. Nurse Abell's testimony confirmed Donald Ward's exposure occurred during surgery and the individual responsible was not an employee of Summa. (Abell Depo. at p. 33 ll. 17-19; p. 35 ll. 1-4.) Appellant, the surgeon who not an employee of Summa, fits all known criteria as the source of Donald Ward's exposure and infection.

The Wards served a subpoena duly issued on Appellant requiring his attendance to testify on matters such as: did he have Hepatitis B at the time of Donald Ward's surgery, and, if so, when did he 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; was Summa ever aware of his infection; and did he ever notify Summa or other institutions where he had patient privileges of the infection. Counsel responded by stating that under no circumstances would Appellant testify about anything having to do with his own personal medical history or any other matter not otherwise contained in the Plaintiff's own operative record. (See Letter of Counsel dated January 23, 2008 attached as *Exhibit 2* to Plaintiffs' Brief in Opposition to Protective Order filed by Robert F. Debski.)

As detailed in the Appellant's Merit Brief a discovery dispute arose over Appellant's position as it related to his planned deposition testimony. On June 5, 2008, the trial court granted non-party Appellant's Motion for Protective Order. In doing so, the Trial Court stated the issue as follows:

Plaintiff [] seeks the identity of the individual via the deposition of non-party Dr. Robert Debski. Plaintiff has subpoenaed Dr. Debski for

oral deposition with respect to the occurrences and allegations set forth in Plaintiff's Complaint. Although Dr. Debski agreed to undergo the deposition, although [sic] through advice of counsel, he refuses to provide any testimony or produce information regarding his own medical health history.

Court Order at p. 4.

In deciding the issue, the Trial Court held:

[] [T]his Court finds the case of *Grove v. Northeast Nephrology Assoc., Inc.*, 2005 Ohio 6914, to be dispositive on the issues herein. In *Grove*, Plaintiff brought a medical malpractice action against Northeast Nephrology and Summit Renal Care for his injuries sustained in an automobile accident. Specifically, the complaint alleged that the above entities had the duty to assess the negligent nonparty driver's condition subsequent to receiving dialysis and to prevent her from driving in an impaired state. Plaintiff subsequently sought production of documents related to this nonparty patient's treatment on the date of the accident. Similar to the case herein, Plaintiff filed a motion to compel discovery [] and issued a notice for the deposition of the attending physician.¹ ***

In the case at hand, Plaintiffs are not the patient, thus no consent made [sic] be expressly waived, and Dr. Debski certainly has standing to assert privilege in testifying as to his own medical information. * * * As such, the Court finds 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. * * *

Id. at pp. 4-5.

Because the Wards were unable to obtain information pertaining to the exact source of infection and how the exposure occurred they were unable to file an affidavit of merit. Accordingly, on December 22, 2008, the Trial Court granted Summa's motion and dismissed the case pursuant to Civ. R. 10(D)(2)(d) and

¹On this point the Trial Court confused the issue. Appellant was being called to testify pertaining to his own matters and as an individual who may have been the possible source of the Plaintiff's Hepatitis B infection, not as an attending physician involved a patient's care or treatment.

Civ. R. 41(B)(1). The Trial Court dismissal and the above holding was, in part, the basis for an appeal to the Ninth District Court of Appeals (C.A. No. 24567).

In its Decision and Journal Entry dated September 16, 2009, the Ninth District reviewed three assignments of error presented by the Wards including the above grant of a protective order. In deciding that the physician-patient privilege did not apply to bar testimony by the Appellant the court held as follows:

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 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.

Ward at ¶ 25.

The theoretical anomaly Appellant says was created by the above holding was easily reconciled by the court when it correctly reasoned:

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.

Id. at ¶ 26.

Appellant argues it is only asking the Court to apply a common sense interpretation to the statute. If the Court accepts this argument and overturns the lower court's ruling it will be extending and applying a privilege into an area unsupported by the plain meaning of the statute. Furthermore, and perhaps more importantly, the Court will have set a precedent with unforeseen consequences more properly within the purview of the legislature. If the Court were to adopt the Appellant's position it would mean a person could refuse to divulge any information in any way relating to their own health condition. Such an absolute bar to such information will have grave consequences on public health. Surely, such an interpretation of the statute should only be given effect if and when the legislature so decides. Accordingly, the Court should affirm the decision by the Ninth District.

II. 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*, 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 entire basis of the appeal is a claimed conflict between this Court's decisions in *Roe* and *Schlotterer*, see *infra*, and the Ninth District's decision in *Ward*. However, none of the cases relied on by the Appellant are in any way analogous to the case at hand. *Roe*, *Schlotterer* and *Calihan*, see *infra*, all involve cases where a party was attempting to compel the discovery of confidential medical records from a protected source such a health care provider. See e.g., *Roe*. In one way or another each of the three cases relied

upon by Appellant dealt with whether there had been effective waiver of the physician-patient privilege. The Wards are not asking for a waiver of the privilege. The Wards subpoenaed Appellant, Donald Ward's surgeon, to answer questions, not in his role as a physician, but about himself.

In the cases cited to by Appellant the physician-patient privilege undoubtedly applied. In *Roe*, medical records of third parties were being sought from the medical provider. *Roe* at ¶ 26. As stated in *Roe*, “[t]he Roes [did] not dispute that they are seeking confidential, privileged information of third parties[.]” *Id.* The litigants and this Court agreed: the only way the medical records could be obtained was by demonstrating “an exception to the privilege.” *Id.* at ¶ 28. In *Roe*, the trial court had taken this Court's holding in *Biddle v. Warren Gen. Hosp.*, 86 Ohio St. 3d 395, as authority of a right to allow for the discovery of non-party medical records where the need for such records outweighed the interest a non-party had in protecting the confidential nature of the records. *Id.* In rejecting such a balancing test, this Court noted, “*Biddle* did not create a litigant's right to discover the confidential medical records of nonparties in a private lawsuit. Any such exception to the physician-patient privilege is a matter for the General Assembly to address.” *Id.* at ¶ 48 citing *Jackson v. Greger*, 110 Ohio St.3d 488 (quotation omitted). In this case, the Wards have not requested anyone's medical records or the disclosure of medically privileged communications from a medical provider as was the case in *Roe*.

The Ninth District expressly recognized under circumstances such as in *Roe*, *Schlotterer*, and *Calihan* the medical records being sought are absolutely privileged against disclosure. *Ward* at ¶ 26. (“Information * * * only contained in the patient’s medical record could not, and would not, be disclosed and clearly would fall within the privilege.”). For that reason and that reason alone none of the decisions cited to by the Appellant conflict with the Ninth District’s decision.

The Wards have not and are not asking this Court for a judicially created waiver or exception to the physician-patient privilege, but to give the subject statute its plain meaning. This case involves an individual who happens to be a physician being asked about his own self. While the information sought may be of a personal nature and other protections may and most likely would apply, see *infra*, it is not information protected by the physician-patient privilege. And while Appellant is not a party insomuch as he has not been named as such in the Complaint he is a likely source of Donald Ward’s exposure to the Hepatitis B virus. Because of this there can be no doubt that the information sought is of great 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 argument set forth in its first proposition.

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, addresses the discoverability of medical records from a protected source. Nothing in the two decisions conflict with the Ninth District decision. In *Schlotterer* an insurer made a discovery request for patient records from the Defendant. *Schlotterer* ¶ 5. *Schlotterer* did not even address the issue before this Court, but whether a release given by patients was a valid waiver of the physician-patient privilege. *Id.* ¶ 1. As such, this Court's holding in *Schlotterer* can in no way conflict with the Ninth District.

As for the *Calihan* decision, in denying the Appellant's motion to certify a conflict the Ninth District analyzed the same contention as advanced by Appellant herein.

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.)

As was noted by the Ninth District there is no physician-patient privilege under Ohio common law. *Wargo v. Buck* (1997), 123 Ohio App. 3d 110, 120. "Because the privilege is entirely statutory and in derogation of the common

law, it must be strictly construed against the party seeking to assert it.” *Id.*, citing *Ohio State Med. Bd. v. Miller* (1989), 44 Ohio St. 3d 136, 140. Privileges are to be strictly construed and the party claiming the privilege has the burden of proving it applies to the requested information. *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App. 3d 53, 60.

R.C. 2317.02(B)(1), in relevant part, provides:

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.)

The above language makes clear; the privilege extends to physicians [and dentists] only.

Striped of its diatribe the appeal is little more than a question of the correct interpretation of the subject statute. In other words, should this Court extend the physician-patient privilege to a scenario not covered by the statute. Appellant’s position is that he may raise the testimonial privilege set forth in R.C. 2317.02 when asked questions so long as it somehow relates to his own health: whether such information was related to a physician, by a physician, or from his own understanding and experience. Conceivably, all of these “communications” would fall within the privilege as is being defined by the Appellant.

By giving plain meaning to the statute the Ninth District properly interpreted the statute to mean what it says. When the language of a statute is plain, unambiguous and conveys a clear and definite meaning, there is no need for a court to apply the rules of statutory interpretation. *Meeks v. Papadopulos* (1980), 62 Ohio St. 2d 187, 190, citing *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. "Where a statute is found to be subject to various interpretations, however, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at the legislative intent." *Meeks, supra*, 62 Ohio St. 2d at 190. R.C. 2317.02 identifies acts and communications which are privileged. R.C. 2317.02(B)(1) states that communications by a patient to a physician made in the patient-physician relationship and advice which the physician gives to the patient in this relationship are privileged. The statute goes on to state **that a physician [or dentist] may not testify as to the privileged communications** unless the patient waives the privilege. A patient waives his privilege either expressly or by one of several other ways set forth in subsection (B)(1)(a) through (e) of the statute. As recognized by the Ninth District, the above language grants the patient the right to prevent a physician [or dentist] from testifying but does not prevent a patient the right to refuse to testify. *Ward* at ¶ 27.

Appellant argues the only way to afford any protection from the disclosure of personal medical information is through the application of the statutory privilege afforded by R.C. 2317.02. Appellant goes to great lengths to generate unfounded fear by suggesting that all Ohioans could be made to

divulge their own personal medical information. The Ninth District dealt with this issue when it described protections already in place:

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. * * * [G]iven 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.

Ward at ¶ 30.

Protective orders, the use of filing depositions under seal, and other means available to the trial court are among the many ways it may effectively prevent personal information from becoming public knowledge.

While, as stated by the Appellant, the patient may be the holder of the privilege, he may only exercise the right to the extent allowed for by law. Where, as here, the law does not provide for the privilege none may be asserted. As noted by the Ninth District, nothing in the plain language of the statute prohibits the testimony by an individual about one’s own self. Appellant is simply wrong when its states that the above statutory language provides for the privilege under these circumstances.

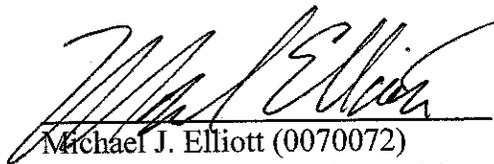
III. CONCLUSION

The Appellant has asked this Court to create an added class or category of protected sources within the physician-patient statutory privilege. As this Court rightfully noted in *Roe, supra*, “[a]ny [such] exception to the physician-patient privilege is a matter for the General Assembly to address.” *Roe* at ¶ 48 (citation

omitted). As such, the Court should deny the Appellant's request by upholding and affirming the decision by the Ninth Appellate District.

Respectfully Submitted,

SCANLON & ELLIOTT

A handwritten signature in black ink, appearing to read "M. J. Elliott", is written over a horizontal line.

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