

ORIGINAL

No. 2009-1998

In the Supreme Court of Ohio

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

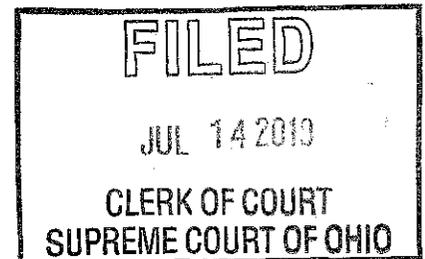
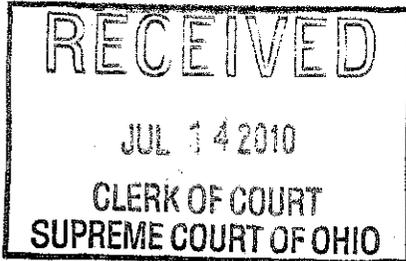
DONALD WARD, et al.,

Plaintiffs-Appellees,

v.

SUMMA HEALTH SYSTEM, et al.,

Defendants-Appellants.



**REPLY BRIEF 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.*

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I. INTRODUCTION

Plaintiffs-Appellees David and Susan Ward essentially raise one meritless argument in an attempt to convince this Court that the Ninth District's legally flawed decision should not be disturbed. Appellees improperly argue that this Court's decisions in *Roe vs. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009-Ohio-2973 and *Medical Mutual vs. Schlotterer*, 122 Ohio St. 3d 181, 909 N.E. 2d 1237, 2009-Ohio-2496 and the First District's decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, 604 N.E. 2d 761 are not analogous to the facts and circumstances of this case. This argument is without merit because Appellees flatly misinterpret these decisions with respect to the application of the physician-patient privilege to non-parties.

II. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: Appellees Are Misdirected In Their Position That *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 912 N.E. 2d 61, 2009-Ohio-2973 Is Not Analogous To The Instant Case

Appellees incorrectly argue that this Court's decision in *Roe* is not "in any way analogous to the case at hand." (Appellees' Merit Brief, p. 6). Appellees claim that the *Roe* case is inapplicable herein because the personal medical information protected by the physician-patient privilege in *Roe* was requested from a health care provider as opposed to being requested from the patient, who is the exclusive holder of the physician-patient privilege. What Appellees conveniently fail to acknowledge is that the crux of the *Roe* decision is that protected medical information is absolutely protected by the physician-patient privilege pursuant to R.C. 2317.02(B) regardless of from whom it is being sought.

Interestingly, Appellees **admit** that the information that they seek from Dr. Debski “may be of a personal nature and other protections may and most likely would apply.” (Appellees’ Merit Brief, p. 8). Yet, Appellees fail to recognize that the purpose of the physician-patient privilege is to prohibit the disclosure of privileged medical communications between a physician and a patient because they contain information of a very **personal nature**. It is disingenuous for Appellees to acknowledge that they are seeking personal medical information but that such information is not afforded the protections of the physician-patient privilege.

Additionally, with respect to the *Roe* decision, Appellees completely fail to address this Court’s explicit holding that the personal medical information of **non-party patients** is absolutely privileged and protected from discovery by the physician-patient privilege in R.C. 2317.02(B). *Roe, supra.*, at ¶ 50. There is no getting around the undisputed fact that Dr. Debski is a **non-party** to Appellees’ cause of action against Summa Health Systems and, therefore, the *Roe* decision is controlling in this case, *i.e.*, personal medical information of a non-party patient is absolutely protected from discovery. Clearly, both Appellees and the Ninth District conveniently ignore this Court’s holding in *Roe* pertaining to non-party patients, because to address the *Roe* decision would justifiably result in the issuance of a protective order that the Trial Court properly ordered in favor of non-party Dr. Debski.

PROPOSITION OF LAW NO. 2: Appellees Are Misdirected In Their Position That *Medical Mutual v. Schlotterer*, 122 Ohio St. 3d 181, 909 N.E. 2d 1237, 2009-Ohio-2496 And *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, 604 N.E.2d 761 Are Not Analogous To The Instant Case.

Similarly, Appellees improperly assert that neither this Court’s decision in *Medical Mutual* nor the First District’s decision in *Calihan* is analogous to this case. Once again, nothing can be further from the truth.

With respect to the *Medical Mutual* decision, the instant case is directly affected by this Court's decision because both cases address the absolute protections afforded **patients** with respect to the discovery of personal medical information. In *Medical Mutual*, this Court undoubtedly reaffirmed Ohio's longstanding law that the **patient** is the exclusive holder of the physician-patient privilege and, thus, the **patient** is a "protected source." Appellees cannot logically argue that this Court's decision in *Medical Mutual* is not in conflict with the Ninth District's decision. This Court correctly recognized that the patient is a "protected source" whereas the Ninth District completely **ignored** the *Medical Mutual* decision and held, to the contrary, that the patient is not a "protected source."

The same goes for the First District's *Calihan* decision. Appellees cannot reasonably claim that the *Calihan* decision is not applicable to this case especially where the *Calihan* court actually faced a more compelling situation than this case. In *Calihan*, the physician was a named defendant and was protected from producing personal medical information. In this case, Dr. Debski is a non-party to the underlying case but the Ninth District held he should be compelled to produce personal medical information. Once again, the Ninth District failed to address the *Calihan* decision despite the fact that it is factually and legally applicable herein.

Finally, Appellees failed to comment on the concerns actually raised by the Ninth District, itself, about the consequences of its decision. For instance, Appellees failed to address the Ninth District's own admission that its decision creates an obvious conflict, *i.e.*, on the one hand, the patient is the holder of the physician-patient privilege; on the other hand, a patient is not a protected source. *Ward v. Summa Health Systems*, 184 Ohio App. 3d 254, 920 N.E. 2d 421, 2009-Ohio-4859 at ¶¶ 5, 26. Additionally, Appellees failed to address the concurring opinion that admitted that "the outcome in this case may be shocking to the legal and medical

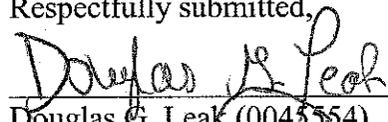
communities and will likely lead to unanticipated and possibly unfortunate consequences.” *Id.* at ¶ 36. Unfortunately, the Ninth District acknowledged, itself, that it issued a decision that not only conflicts with Ohio’s longstanding law with respect to the physician-patient privilege; it issued a decision that will likely have grave consequences.

III. CONCLUSION

Appellees failed to adequately refute the fact that the Ninth District’s decision is not only erroneous and in direct conflict with this Court’s precedents and the First District, its decision goes far beyond common sense with respect to Ohio’s statutory physician-patient privilege. It is illogical to conclude that a patient as the exclusive “holder” of the physician-patient privilege is an “unprotected source.”

By reversing the Ninth District’s decision, this Court will 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. This Court should hold that all patients are a protected source under the physician-patient privilege and, therefore, a patient cannot be compelled to disclose personal medical information. Accordingly, the Ninth District’s decision should be reversed and the Trial Court’s protective order in favor of non-party Dr. Debski should be reinstated.

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 Non-Party Appellant
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 13th

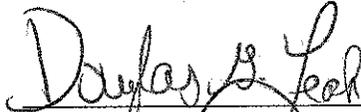
day of July, 2010 to the following:

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

Attorneys for Appellees

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

*Attorneys for Appellant
Summa Health System*



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