ORIGINAL

IN THE SUPREME COURT OF OHIO

Todd Leopold, et al.	)	Case No. 2012-0438
Plaintiffs/Appellees,	)	
v.	)	On Appeal From The Cuyahoga County Court of Appeals, Eighth Appellate District
Ace Doran Hauling & Rigging Co., et al.,	)	
Defendants/Appellant, (Danielle Laurence)	)	

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MERIT BRIEF OF APPELLANT, DANIELLE LAURENCE

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STATEMENT OF FACTS

This case arises out of a multi-vehicle accident that occurred March 6, 2008, on I-90, in Cleveland, Ohio. The depositions in the case have demonstrated that, on that date, Plaintiff's vehicle was hit from behind by a semi-tractor trailer driven by Defendant, Stephen Stillwagon, acting in the course and scope of his employment with Ace Doran Hauling & Rigging Co.

After the Plaintiff's vehicle was hit, it traveled across the middle and far left lanes of I-90 eastbound, striking the concrete center barrier and bouncing back into the middle lane of I-90. At that time Plaintiff's vehicle was hit by a vehicle driven by Michael Murray, which was owned by American Metal Coatings. Following this sequence of events, the Ace Doran vehicle, operated by Defendant Stillwagon, moved forward and struck the rear of Defendant/Appellant Laurence's vehicle. Defendants Stillwagon and Ace Doran have alleged that, prior to striking Defendant Laurence's vehicle, Defendant/Appellant Laurence had hit the car ahead of her, which was being driven by Gertrude Wilson.

With respect to the sole issue in this appeal, namely whether Defendant/Appellant Laurence's medical records should have been subject to a protective order, Appellant would direct the Court's attention to certain portions of the depositions taken in this case. First, Plaintiff, Todd Leopold has testified as follows:

9 Q. I'm Attorney Bruce Goldstein.
10 We just met today for the first time.
11 I represent Danielle Laurence. Do you
12 remember Danielle from being here
13 earlier today?
14 A. Yes, sir.
15 Q. Okay. Was today the first
16 time that you ever recall seeing
17 Danielle Laurence?
18 A. The first time, sir.
19 Q. Okay. You heard testimony
20 that she was driving a white Honda

21 Accord at the time of the accident that
22 brings us all here. Do you recall that
23 from today?
24 A. Yes, sir.
25 Q. Okay. Are you able to offer
1 any testimony whatsoever in this lawsuit
2 about what Danielle Laurence was doing
3 at or before the time of the accident?
4 A. I have no idea.
5 Q. Okay. You don't know if she
6 did anything to cause this accident; is
7 that correct?
8 A. I don't know, sir.
9 Q. Okay. And similarly you
10 don't know if she did nothing and was
11 innocent like you, correct?
12 A. I don't know her. I never
13 met her. Don't remember anything about
14 that part of the accident or any part
15 of the accident.
16 Q. Okay.
(Todd Leopold Depo. pp. 72-73.)

While there have been differing accounts of the specifics of the accident on March 6, 2008, the basis for this appeal is the trial court's failure to issue a protective order regarding Ms. Laurence's medical records from the date of the accident, when Ms. Laurence does not have a pending personal injury claim for which she waives her medical privilege. Counsel for various parties have inquired repeatedly about Defendant/Appellant Laurence's medical records, including in the deposition of Stephen Stillwagon:

25 Q. Have you read the deposition
1 of Danielle Laurence that was taken in
2 another case out in Ashtabula County?
3 A. No.
4 Q. Have you read any of her
5 medical records?
6 A. No.
(Stephen Stillwagon Depo. pp. 76-77.)

Similarly, the deposition of Majore Clark, a witness to the accident itself was taken, and contains the following exchange:

8 Q. Now, there has been some
9 testimony that there was a blue car that
10 was in front of the white car?
11 A. Okay.
12 Q. That white Honda?
13 A. Okay.
14 Q. And as you sit here today is
15 it fair to say you don't recall whether
16 the blue car was there or not?
17 A. I don't recall the car in
18 front of the white car.
19 Q. Okay.
20 A. I do not.
21 Q. And you didn't see the front
22 of the white car before this accident
23 happened, is that fair?
24 A. I don't recall that, no.
25 Q. Before you looked over to

1 the right you can't say one way or the
2 other whether that white car had been in
3 this accident with anything up in front
4 of it, is that fair?
5 A. Not fair.
6 Q. You don't know what was
7 going on in the right lane before you
8 looked over into the right line, is that
9 correct?
10 A. No, not correct.
11 Q. You weren't focused on the
12 right lane until after you passed East
13 22nd Street, is that correct?
14 A. No, I had looked over, yeah.
15 Q. There has been a suggestion
16 that there could have been an accident
17 in the right lane between the white
18 Honda and a blue car, okay, prior to
19 everything else happening in rapid
20 succession. Okay. I want you to just
21 stay with me on that. Okay. Ms.
22 Laurence who was driving that white car
23 told medical personnel --

24 MR. GOLDSTEIN: Objection.
25 Q. Ms. Laurence who was driving

1 that white car told medical personnel
2 that she hit a car in front of her and
3 then was hit from behind?
4 MR. GOLDSTEIN: Objection.
5 Q. Okay. If Ms. Laurence made
6 that statement to medical personnel that
7 she hit someone in front of her and
8 then was hit from behind would you be
9 in a position to dispute that if that's
10 what she told medical personnel shortly
11 after the accident?
12 MR. GOLDSTEIN: Objection.
13 MR. DRINKO: Objection.
14 A. All I saw was I saw the
15 white car moving and I saw the truck
16 behind that. And then I saw the truck
17 behind that and I saw a steady flow of
18 traffic in all lanes. Then I saw the
19 white truck got slammed in the back and
20 the white truck was forced into the car
21 in front of it.
22 Q. And that's what you saw once
23 you -- when you are positioned in the
24 area identified on Exhibit C, correct?
25 Where you put your MC, correct?

1 A. Right.
2 Q. And prior --
3 A. It's not -- it's not all I
4 saw. I mean, I saw --
5 Q. Up ahead.
6 A. Steady flow, yeah. I didn't
7 see the distinct definite feature of
8 each car in front of those cars but I
9 saw that there was a flow of traffic.
10 And I saw the van get hit from behind
11 and then I saw the van hit the car in
12 front of it.
13 Q. Before seeing the van get
14 hit from behind I want to talk about
15 that. Okay. When you met with
16 Attorney Goldstein did he describe any
17 facts to you about the accident?

18 A. (Nodding.)
19 Q. No?
20 A. No.
21 Q. You nodded.
22 A. He just went over this with
23 me.
24 Q. The affidavit?
25 A. That I -- that I had

1 initially wrote. What I reiterated into
2 an affidavit so no, not -- no.
3 Q. Was it explained to you that
4 -- by Mr. Goldstein that his client had
5 told medical personnel that she had
6 been --
7 MR. GOLDSTEIN: Objection.
8 Q. She had --
9 MR. GOLDSTEIN: Objection.
10 MR. ABBARNO: Can you let me
11 finish the question.
12 MR. GOLDSTEIN: Yeah, let me --
13 MR. ABBARNO: Then stop.
14 MR. GOLDSTEIN: No, no, I'm not
15 going to stop.
16 MR. ABBARNO: No speaking
17 objections.
18 MR. GOLDSTEIN: I'm going to make
19 an objection --
20 MR. ABBARNO: Hold on for a
21 second. Then I would please ask the
22 witness to leave and then put it on the
23 record as to not influence the witness.
24 Thank you.
25 **MR. GOLDSTEIN: Mr. Abbarno is**

1 attempting to ask the witness about
2 confidential medical records from which
3 there's been no waiver of privilege.
4 And it remains the position of Defendant
5 Laurence that those -- that the
6 privileges in place that Mr. Abbarno has
7 violated that privilege improperly and
8 in violation of state law and case law.
9 And that by suggesting to this witness
10 that Ms. Laurence has made statements
11 he's attempting to do an end run around

12 **the privilege that applies to those**
13 **medical records and I object to it.**
14 **And I move that all the questions**
15 **pertaining to that issue be stricken.**
16 **Thank you.**
17 MR. ABBARNO: Okay.
18 MR. GOLDSTEIN: That's it.
19 MR. ABBARNO: Good.
20 MR. GOLDSTEIN: Appreciate you
21 letting me put that on the record.
22 (Recess taken.)
23 MR. GOLDSTEIN: The record can
24 reflect that having made my objection
25 Mr. Abbarno is going to proceed with

1 this questioning subject to my
2 objection, agreed?
3 MR. ABBARNO: Agreed.

(Deposition of Majore Clark, pp. 42-48, emphasis added)

Likewise, counsel for Defendants Stillwagon and Ace Doran questioned Danielle Laurence, at length, in her deposition, about information contained in her medical records and most specifically the emergency room record where she was being treated immediately after the accident. See, Deposition of Daniel Laurence, taken 8/20/2010, pp. 16-17, 21-24, 27-29, 31-36) Much of the questioning in this exchange was directed at Ms. Laurence's deposition and testimony given in her previously filed, and dismissed, personal injury action. (Id.)

In addition to the depositions of various parties and fact witnesses, the deposition of Officer Gregory Green was taken in this case. Officer Green has testified:

2 Q. Did you speak with Danielle Laurence at
3 the hospital?
4 A. Yes. I spoke -- let's see. Yes. I
5 interviewed her at MetroHealth Medical Center.
6 Q. And what did you learn from your
7 interview with Miss Laurence?
8 A. She stated that she was slowing in
9 traffic when she -- when she was struck from
10 behind and that the impact caused her to strike
11 the vehicle immediately ahead of her.

12 Q. Do you know whether you spoke to her
13 before or after she was treated by personnel at
14 the emergency room?
15 A. I don't recall whether she had been
16 treated or not.
17 Q. But this is the information you obtained
18 from personally speaking with Danielle Laurence?
19 A. Yes.
20 Q. And this would have been the same day of
21 the accident, correct?
22 A. Yes.
(Deposition of Gregory Green, p. 24)

The following exchange is also found in Officer Green's testimony.

21 Q. Now, in terms of the accident itself,
22 you were asked questions relative to your thought
23 process --
24 A. Right.
25 Q. -- as to what the sequence of events was
1 with respect to the accident, correct?
2 A. Yes.
3 Q. Did you gather any medical records of
4 Danielle Laurence in order to try and determine
5 what additional statements she provided relative
6 to the facts of this case?
7 MR. GOLDSTEIN: Objection.
8 THE WITNESS: Did I --
9 BY MR. ABBARNO:
10 Q. Did you gather any -- did you ask to see
11 any medical records for Miss Laurence relative to
12 how she advised the staff at MetroHealth Medical
13 Center as to how the accident happened?
***
15 Q. When you arrived at the hospital, did
16 you ask if Miss Laurence had provided any
17 statements to the medical staff as to how the
18 accident occurred?
19 A. No, I didn't. No.
20 Q. The statements that you made today
21 relative to how you believe the accident occurred
22 do not take into consideration any potential
23 statements that Miss Laurence made to the
24 emergency department staff relative to how the
25 accident occurred, would you agree?
(Deposition of Gregory Green, pp. 43-46)

This personal injury case was filed by Plaintiff, Todd Leopold, on October 30, 2009. A First Amended Complaint was filed on February 18, 2010, and the parties engaged in written discovery as well as the taking of several depositions, as outlined above. Thereafter, the Plaintiffs' Second Amended Complaint was filed on January 31, 2011, and following additional discovery, a Third Amended Complaint was filed on March 1, 2011.

Defendant/Appellant, Danielle Laurence, filed her Answer to the Third Amended Complaint on March 16, 2011, denying liability and asserting various affirmative defenses. The Co-Defendants, Ace Doran Hauling and Rigging Co., Ace Doran Brokerage Co., and Stephen H. Stillwagon (hereinafter "Doran Defendants"), filed their Answer to Plaintiffs' Complaint on March 10, 2011, also denying liability for the Plaintiffs' claims. On April 6, 2011, the Doran Defendants filed an Amended Answer to the Third Amended Complaint, and also filed a Cross-Claim against Defendant/Appellant Laurence. Defendant/Appellant Laurence timely answered the Cross-Claim, again denying liability for the incident described in Plaintiffs' Third Amended Complaint.

On April 18, 2011, the Doran Defendants filed a Revised Amended Answer to the Plaintiffs' Third Amended Complaint, which again included a Cross-Claim against Defendant/Appellant Laurence. Ms. Laurence again timely answered this Cross-Claim, denying liability for the incident.

On April 29, 2011, counsel for Defendant/Appellant Laurence filed a Motion for Protective Order, asking the trial court to preclude counsel for any party from utilizing the medical records of Danielle Laurence for any purpose, including at any deposition of any party or witness, in any motions for judgment on the pleadings, at trial or in any other proceeding. The

motion was based on the fact that Defendant/Appellant Laurence's medical records are subject to medical privilege which had not been waived for purposes of the instant action.

This motion was ultimately denied without comment on August 15, 2011 by the trial court, in a Journal Entry which simply states "Defendant Laurence's Motion for Protective Order, Filed 04/29/2011, is Denied." It is from this Order that Defendant Laurence filed her interlocutory appeal in the Eighth District Court of Appeals, asking the Court to find that the trial court erred in refusing to honor her medical privilege as clearly set forth by State and Federal law, through both common law and statutory enactments.

The Eighth District Court of Appeals issued its Journal Entry and Opinion on February 9, 2012, affirming the trial court, relying on the case of Menda v. Springfield Radiologists, 136 Ohio App.3d 656, 737 N.E.2d 590 (2d Dist.2000) and specifically stating that:

> Laurence's decision to file a claim of personal injury against Ace, which was based upon the same accident that underlies the basis for the claims and defenses posed by the parties herein, served to waive her physician-patient privilege **with respect to that accident** pursuant to R.C. 2317.02(B). (emphasis added)

As such, the Appellate Court found no error in the denial of Appellant's Motion for a Protective Order regarding her medical records.

Judge Gallagher's dissenting opinion points out that the Second District has commented that their holding in Menda had "most probably been overruled by the decision of the Ohio Supreme Court in Hageman v. S.W. Gen. Health Ctr., 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153." State v. Branch, 2d Dist. No. 22030, 2009-Ohio-3946, 2009 WL 2436878, ¶77. As such, Judge Gallagher discussed:

> Laurence did not file the present action, and her medical condition is not at issue herein. Rather, appellees are seeking to impose liability upon Laurence for the accident that occurred. Contrary to appellees' argument, the statements Laurence made to medical personnel as to how the accident happened were made for the purposes of medical diagnosis or treatment. Appellees wish to use Laurence's

privileged communications to impeach her testimony, claiming the evidence constitutes prior inconsistent statements. However, appellees fail to cite any authority establishing that a party may reference inadmissible, privileged communications in an attempt to impeach the credibility of a witness.

Pursuant to *Hageman*, the fact that Laurence waived the physician-patient privilege in a separate civil action does not effect a waiver of the privilege in this action. *See id.* Therefore, Laurence's medical records are not subject to disclosure, and the trial court erred in denying her motion for a protective order.

Appellant Laurence filed her Notice of Appeal to the Supreme Court of Ohio on March 15, 2012. (Appx. 1) On June 6, 2012, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

ARGUMENT

Proposition of Law No. 1

A party to a lawsuit does not waive the medical privilege with respect to the discovery or use of privileged medical records even when those records were previously produced in discovery in a separate lawsuit.

A. Medical Records Are Generally Privileged From Disclosure

The issue of whether information is confidential and privileged from disclosure is a question of law and any ruling on same is reviewed by the appellate court de novo. See, Ward v. Summa Health Syst., 128 Ohio St.3d 212, 2010-Ohio-6275; Bogart v. Blakely, 2010-Ohio-4526.

This Court has rendered many opinions regarding the extent of the medical privilege in Ohio, and has stated that "Medical records are generally privileged from disclosure under R.C. 2317.02(B)." (Citation omitted). Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 909 N.E.2d 1237, 2009-Ohio-2496, ¶ 13-14; see also Hageman v. Southwest Gen. Health Ctr., 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153; Biddle v. Warren Gen. Hosp., (1999), 86 Ohio St.3d 395, 715 N.E.2d 518; Bogart v. Blakely, 2010-Ohio-4526, 2010 WL 3722772 (2d

Dist.2010), Wallace v. Mantych Metalworking, 2010-Ohio-3765, 189 Ohio App. 3d 25, 937 N.E.2d 177.

Where a patient files a civil action, the testimonial privilege is lifted to a certain extent. See, Ohio Revised Code, §2317.02(B)(1)(a)(iii). The extent of the privilege is then restricted as the physician can be compelled to testify or submit to discovery only as to communications that are related causally or historically to physical or mental injuries that are relevant to issues in the civil action. See, Ohio Revised Code, §2317.02(B)(3)(a).

In order to ensure that the privilege is zealously guarded, this Court and other Ohio courts have acknowledged that a party may pursue a tort claim for one who violates the medical privilege and confidences of the medical records generated through the physician/patient relationship. Hageman, supra; see also Harman v. Kratche, 2006-Ohio-5938, 2006 WL 3240680 (8th Dist. Nov. 9, 2006), "The tortious conduct of unprivileged disclosure occurs the moment the nonpublic medical information is disclosed to an *unauthorized* third-party."

This Court has also examined whether medical records which are produced in one case can be used in a subsequent lawsuit, without the express consent of the party who provided records in the initial case, as was permitted by the trial and appellate court in this case. Hageman v. Southwest Gen. Health Center, (2008), 119 Ohio St.3d 185, 2008-Ohio-3343. In finding that the records may not be disclosed in a subsequent action without the express consent of the patient, this Court first discussed the nature of the medical privilege and its importance as follows:

> {¶ 9} In general, a person's medical records are confidential. Numerous state and federal laws recognize and protect an individual's interest in ensuring that his or her medical information remains so. For example, the Ohio Public Records Act prohibits medical records maintained by public institutions from being released pursuant to a public-records request: " 'Public record' means ***188** records kept by any public ****156** office * * * [but] does not mean any of the following: (a)

> Medical records."[2] R.C. 149.43(A)(1)(a). Likewise, the federal Health Information Portability and Accountability Act of 1996 ("HIPAA") prevents health-care providers from disclosing health information except in certain specific circumstances. See generally 45 C.F.R. 164.502. Physician-patient and psychologist-patient privileges have been codified in Ohio to deny the use of such information in litigation except in certain limited circumstances. See R.C. 2317.02(B)(1) and 4732.19. Physical and mental-health examinations of a litigating party may be ordered only when relevant and "for good cause shown." See Civ.R. 35(A).
>
> {¶ 10} We explicitly recognized and applied this basic policy of confidentiality in *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 715 N.E.2d 518. In that case, we confronted issues arising from the disclosure of health-care information obtained through a physician-patient relationship. After surveying cases in Ohio and beyond, we recognized that the breach of patient confidentiality is a palpable wrong. Id. at 400, 715 N.E.2d 518. However, we also determined that such an injury is difficult to remedy appropriately. Id.

Hageman v. Sw. Gen. Health Ctr., 2008-Ohio-3343, 119 Ohio St. 3d 185, 187-88, 893 N.E.2d 153, 155-56.

This Court went on to find that the patient who releases information in the context of one action is not deemed to have provided an expansive waiver of the privilege for purposes of subsequent litigation. In fact, the Hageman Court went so far as to find that an independent tort exists for one who uses confidential medical information which was properly disclosed in one action in a subsequent action without the express consent of the patient, stating:

> {¶ 13} Notwithstanding that the specific causes of action recognized in *Biddle* apply imperfectly to the facts in this case, we conclude that the rationale for our decision there applies here. *Biddle* stressed the importance of upholding an individual's right to medical confidentiality beyond just the facts of that case. **"[I]t is for the patient-not some medical practitioner, lawyer, or court-to *189 determine what the patient's interests are with regard to personal confidential medical information."** *Biddle,* 86 Ohio St.3d at 408, 715 N.E.2d 518. As the Supreme Court of California has observed in discussing the related concept of a right to privacy, such a right " '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.' " (Emphasis sic.) *Hill v. Natl. Collegiate Athletic Assn.* (1994), 7 Cal.4th 1, 25, 26 Cal.Rptr.2d 834, 865 P.2d 633, quoting ****157** *Briscoe v. Reader's Digest Assn., Inc.* (1971), 4 Cal.3d 529, 534, 93 Cal.Rptr. 866, 483 P.2d 34. **If the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information.**

{¶ 14} Hageman admits that he made his health an issue in the divorce action by seeking custody of his and his ex-wife's minor child. Pursuant to the law of the Eighth Appellate District, Hageman was required to demonstrate that he was capable of caring for his child in order to be granted custody. See *Gill,* 2003-Ohio-180, 2003 WL 132447, ¶ 18-19. For that reason, he waived his medical privilege for the purposes of that case. See id. Whatever discomfort arose from this disclosure of private and confidential information was tempered by the possibility of success on his custody claim. However, **there is neither a legal justification for nor a practical benefit to the proposition that a waiver for a specific, limited purpose is a waiver for another purpose.**

{¶ 15} **Creating an expansive waiver would be inconsistent with the generally recognized confidentiality provisions in Ohio and federal law.** Moreover, the expansive waiver urged by Belovich would not be desirable public policy for a number of reasons. First, individuals should be encouraged to seek treatment for medical or psychological conditions, and privacy is often essential to effective treatment. ***

{¶ 16} **Likewise, if an expansive waiver existed for medical records obtained through litigation, the potential for abuse of this waiver would be high**. The party receiving the records will generally be the only person with anything to gain from the disclosure of the information beyond the underlying litigation. **The *190 facts in this case convince us that an attorney with medical records of a party in one case could use those records for purposes not intended by the party granting the waiver**. Belovich represented Hageman's ex-wife in the divorce and civil-protection-order cases and obtained Hageman's psychological records as part of the divorce action. By sharing that information with the prosecutor in the criminal case against Hageman when it had not yet been made available in that case, she intensified the legal pressure against Hageman. It is not difficult to imagine that someone facing such actions might be encouraged to settle more quickly than he or she would had the medical records not been shared.

23 {¶ 17} **With these considerations in mind, we hold that when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case**. An attorney can certainly use medical records obtained lawfully through the discovery process for the purposes of the case at hand-e.g., submitting them to expert witnesses for analysis or introducing them at trial. However, an attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation. ****158** Thus, as in our decision in *Biddle,* we conclude that an independent tort exists to provide an injured individual with a remedy for such an action.

Hageman v. Sw. Gen. Health Ctr., 2008-Ohio-3343, 119 Ohio St. 3d 185, 188-90, 893 N.E.2d 153, 156-58 (emphasis added). See also, Kapp v. Jewish Hospital, Inc., 112 Fair Empl.Prac.Cas. (BNA) 1436, 24 A.D. Cases 1567 (S.D.Ohio 2011).

Continuing to recognize the importance of the medical privilege, this Court, in Schlotterer, supra, addressed the need for specificity in a release of medical records, and found that:

> The requirement of specificity allows the patients to know exactly who will have access to their medical records in order for them to make a properly informed decision regarding waiver of the physician-patient privilege. It is important to note that **this requirement also prohibits a party receiving the records from sharing the information with others who are not within the scope of the patient's release**. *Id.* at 407, 715 N.E.2d 518. The limited nature of the consent would otherwise be defeated. ***
>
> **If medical information is released for a purpose other than what is agreed to, it is effectively a violation of the express nature of the consent.**

Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 909 N.E.2d 1237, 2009-Ohio-2496, ¶17-18 (emphasis added).

In this case, the medical records at issue were released by Appellant Laurence to counsel for the Ace Doran parties, in a prior lawsuit which she filed for her personal injury. At that time there could have been no expectation that her privileged medical information might become subject to later disclosure by that attorney to third-persons, including independent witnesses, who were not parties to that action. Very clearly, the attempts by Appellees to utilize confidential information in Appellant's medical records is prohibited by the privilege she enjoys.

Clearly, in this case, the medical records which have been bandied about by counsel were obtained in an entirely separate lawsuit, not in the case filed by Todd Leopold. Counsel for the Doran Appellees would ask this Court to believe that, despite the very clear and unambiguous holding of this Court, he should now be permitted to use medical records which he obtained in the course of discovery in that other action, simply because the same automobile accident is the

basis for both claims. Counsel has not provided any case law indicating that this is an acceptable expansion of the medical privilege, and this Court has clearly stated that this is not permissible.

As such, the lower courts erred in finding that Danielle Laurence was not entitled to a protective order regarding the use of her medical records in this case. This is true regardless of whether the underlying accident is the same incident in both cases.

Appellees have suggested in the lower courts that it would be unfair to the parties to allow Appellant to file her own injury claim, produce her records in that action, but following dismissal of the case, seek to assert her medical privilege in the instant action. However, this Court has been clear in cases like Hageman and Schlotterer, the scope of any release of privileged medical information is defined by the release and the specific uses for which the information is released, regardless of whether subsequent litigation arises. In this case, this point is all the more relevant as any civil claim filed by Appellant was dismissed and could not be re-filed as it would now be time-barred.

As the Twelfth District Court of Appeals noted in Asbrock, et al. v. Brown, CA97-01-002 (August. 18, 1997), 1997 WL 473618:

> The present language of the statute recognizes a compulsory waiver of the physician-patient privilege upon the filing of a civil action. *Hollis v. Finger* (1990), 69 Ohio App.3d 286, 293, 590 N.E.2d 784. In the case at bar, appellee, as the executrix of her husband's estate, is the personal representative of the estate of her husband for purposes of R.C. 2317.02(B)(1)(a)(iii). As such, the May 1995 counterclaim filed against appellant operated as a waiver of the physician-patient privilege. However, the counterclaim was subsequently voluntarily dismissed. **After a voluntary dismissal, an action is treated as if it had never been commenced.** *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 95, 464 N.E.2d 142. As a result, the parties are in the same position as if the action had never been commenced. *Conley v. Jenkins* (1991), 77 Ohio App.3d 511, 517, 602 N.E.2d 1187. **Consequently, while appellee's counterclaim waived the physician-patient privilege, her subsequent voluntary dismissal of the counterclaim resulted in a retraction of the waiver.**

Asbrock v. Brown, CA97-01-002, 1997 WL 473618 (Ohio Ct. App. Aug. 18, 1997) on reconsideration, CA97-01-002, 1997 WL 665881 (Ohio Ct. App. Oct. 27, 1997) (emphasis added).

Clearly, when a party files a civil action for their own injuries but dismisses that claim, it is as if the matter was never commenced, and any waiver of privilege provided in that action must be deemed as retracted. In this case, the court failed to acknowledge that principle, choosing rather to avoid Hageman's holding and craft a judicial waiver of privilege in a subsequent lawsuit despite the dismissal of the prior suit. The language of the appellate court's opinion makes it clear that this is what was occurring, as the court stated that Ms. Laurence waived "her physician-patient privilege with respect **to that accident**", rather than stating that she waived her privilege with respect **to the particular litigation** at issue.

In Kapp, supra, the court noted that "Maintaining confidentiality with respect to medical treatment is a significant interest and '[I]f the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information.' *Id.* The Judge adopted the *Biddle* Court's ruling that it is generally for the patient to decide what his interests are – not a physician, lawyer or the court." 715 N.E.2d at 528.

Despite this, the lower courts erred in denying the motion for a protective order, instead finding that Ma. Laurence's medical information was not privileged, contrary to Ohio law. This Court should reverse the lower courts, finding that Ms. Laurence was entitled to a protective order regarding her medical records in this case.

B. Ohio Courts Should Not Be Permitted To Create A Waiver Of Medical Privilege Based On The Filing Of A Subsequent Lawsuit

Ohio residents have a right to know that the judicial system will not take steps to create judicial waivers of these rights. Yet, the trial court and court of appeals in this matter did exactly that, creating a judicial waiver of Appellant Laurence's right to have her medical records and any

communications contained therein remain privileged from disclosure to individuals not of her choosing. Specifically, the court of appeals extended any purported waiver with respect to one lawsuit, into a waiver for any other lawsuit simply because the two lawsuits involve the same vehicular accident. This is not sanctioned by this Court's decision in Hageman, supra.

This Court has been clear in its guidance under Hageman, supra, a party does not waive their medical privilege in one lawsuit, simply by filing a separate action in which medical records are properly produced. This Court did not create an exception to that holding or the waiver of medical privilege simply because there is a factual relationship between two separate lawsuits or judicial matters.

This Court has an interest in insuring that the thousands of Ohioans who seek medical attention every day are not affected by any decision or opinion of the Courts which abrogates or derogates their right to privacy and the privilege of their medical records and communications, and should reverse the lower court to maintain that privilege.

The United States District Court for the Northern District of Ohio also acknowledged this interest in Turk v. Oiler, 732 F.Supp.2d 758 (2010) when it noted:

> The Ohio Supreme Court has "repeatedly and consistently refused to engraft judicial waivers, exceptions, or limitations into the testimonial privilege statutes where the circumstances of the communication fall squarely within the reach of the statute." *In re Wieland,* 89 Ohio St.3d 535, 733 N.E.2d 1127, 1130 (2000). It is well-established that only the legislature, not the courts, has the authority to create additional exceptions to the privilege statute. *Id.* at 1130–31 (finding that "in the absence of a specific statutory waiver or exception, the testimonial privileges established under R.C. 2317.02(B)(1)" are applicable); *State v. Gonzalez,* 154 Ohio App.3d 9, 796 N.E.2d 12, 29 (2003).
>
> Ohio courts have recognized that "[w]hen the legislature wishes to create an exception to the statutory doctor-patient privilege, it can and will do so." *Gonzalez,* 796 N.E.2d at 29 (citing *State v. Smorgala,* 50 Ohio St.3d 222, 553 N.E.2d 672 (1990)). For example, in *Smorgala,* the court declined to judicially create a public policy exception to the privilege statute "which would allow otherwise clearly inadmissible evidence to be received in 'drunk driving' cases."

> 553 N.E.2d at 673–74 ("Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.").

Turk v. Oiler, 732 F. Supp. 2d 758, 772 (N.D. Ohio 2010); see also Jackson v. Greger, 110 Ohio St.3d 488, 854 N.E.2d 487 (refusing to extend a judicial waiver of the attorney-client privilege which is expressly addressed by statute).

In this case, the physician-patient privilege is addressed by statute, and the facts of this case do not fit into any of the statutory exceptions to the privilege, yet the lower courts created a waiver of Appellant's privilege with no justification. This Court should reverse their decision to correct this error.

C. A Party Who Files A Cross-Claim For Contribution Has Not Filed A "Civil Action" And Should Not Be Deemed To Have Waived Their Medical Privilege

It has also been suggested in the lower courts that the information contained in Appellant's medical records is relevant to the case, as Appellant had filed a cross-claim for contribution or indemnity as against the Ace Doran parties. However, the Fifth Appellate District addressed this particular issue in Thompson v. Chapman, 176 Ohio App.3d 334, 891 N.E.2d 1247, 2008-Ohio-2282 (2008). In that case, a minor was injured and filed suit against defendant, through her mother and next friend. The defendant filed a counterclaim against the plaintiff mother, asserting she was responsible for the injuries of the minor plaintiff, and the court issued an order compelling disclosure of defendant's psychological records to the plaintiff. The plaintiff argued that the defendant had waived her medical privilege by filing a counterclaim, or that the court should create a judicial waiver of the privilege to justify their release. The Fifth District Court reversed, finding error in disclosure of the records without in camera inspection, stating that "Appellant did in fact file a counterclaim, but it does not appear

that her counterclaim places her mental condition at issue." Thompson, at ¶17. Thus, they found the information to be privileged and confidential.

In this case, any cross-claim filed against the Ace Doran parties by Appellant is one for contribution or indemnity, and does not place her medical condition at issue. Nor does it constitute a "civil claim" for which an exception to the statutory privilege should apply. See, Ohio Revised Code, §2317.02(B)(1)(a)(iii).

Even before this Court decided Hageman, the Twelfth District Court of Appeals acknowledged this principle in Asbrock v. Brown, CA97-01-002, 1997 WL 473618 (Ohio Ct. App. Aug. 18, 1997). That case involved denial of a motion seeking release of medical records for a party who had previously filed a separate action for damages, who later filed an affirmative defense of comparative negligence when sued in the second action. The court discussed:

> Appellant additionally argues that appellee waived the physician-patient privilege when she filed an action for wrongful death with the court of claims naming the Ohio Highway Patrol and the Ohio Safety Department as defendants. Appellant was not named as a defendant in the action. The action in the court of claims is **completely separate** from the civil suit filed by appellant. **Appellee's suit in the court of claims resulted in a waiver of physician-patient privilege for the benefit of the Ohio Highway Patrol and the Ohio Safety Department only, not for the benefit of appellant for use in a separate action in common pleas court.**
>
> ***3** Appellant also argues that appellee waived the physician-patient privilege by asserting an affirmative defense in her answer to appellant's complaint. However, R.C. 2317.02(B) provides only three instances where the physician-patient privilege is waived and an **automatic waiver based on the pleadings is not one of them**. *Woyczynski v. Wolf* (1983), 11 Ohio App.3d 226, 229, 464 N.E.2d 612 (overruled on other grounds in *Trussell v. Gen. Motors Corp.* [1990], 53 Ohio St.3d 142, 146, 559 N.E.2d 732). Appellee did not waive the patient-physician privilege by either denying the allegations of appellant's complaint or by raising the affirmative defense of comparative negligence.
>
> The trial court's finding that the patient-physician privilege was not waived and the subsequent denial of appellant's discovery motion with regard to Alden Brown's medical records was proper. Appellant's first assignment of error is not well-taken and is overruled.

Asbrock v. Brown, CA97-01-002, 1997 WL 473618 (Ohio Ct. App. Aug. 18, 1997) on reconsideration, CA97-01-002, 1997 WL 665881 (Ohio Ct. App. Oct. 27, 1997) (emphasis added).

This Court's holding in Hageman and the logic of the Asbrock court make clear that a party to a lawsuit does not waive the medical privilege with respect to the discovery or use of privileged medical records even when those records were previously produced in discovery in a separate lawsuit, regardless of the fact that the two lawsuits may involve the same factual circumstances. When the trial court denied Appellant's motion for a protective order and the appellate court affirmed that ruling, they failed to acknowledge the privilege which Ms. Laurence enjoys with respect to her medical records, rather they avoided this Court's holding in Hageman to create an improper judicial waiver of Ms. Laurence's medical privilege. This should not be sanctioned by this Court, and Appellant respectfully requests that this Court reverse the lower courts' rulings.

D. Redaction Of Medical Records Is Not A Proper Remedy

At oral argument of this case, the appellate court questioned whether it might be a proper remedy in a case such as this to simply redact certain information from the medical records at issue, allowing for use of other information contained therein. While not specifically addressed in the lower court's Journal Entry and Opinion, it is clear that this sort of suggestion for a remedy to the judicially created waiver of Ms. Laurence's medical privilege is not permissible.

This Court in Roe v. Planned Parenthood SW Ohio Region, 912 N.E.2d 61, 72, 122 Ohio St.3d 399, 409 (2009) stated "Redaction of personal, identifying information does not remove the privileged status of the records." This Court also noted that the records are categorically "confidential" and redaction does not "divest" the records of their confidential status. See also,

Freudeman, et al. v. The Landing of Canton, et al., United States District Court, Northern District of Ohio, Case No. 5:09-CV-00175, May 31, 2010, 2010 WL 2196460.

While Appellees may argue that the portion of the medical record document they seek to utilize does not constitute a "communication" for purposes of the medical privilege, and somehow redaction of other information can transform the record into one not considered confidential, clearly this is an unacceptable practice. As noted by the court in State v. Russ, CA99-07-074 (12th Dist., June 26, 2000), 2000 WL 864989:

> The trial court quashed appellant's subpoena because it concluded that Christina's hospital records were inadmissible privileged communications protected under R.C. 2317.02. R.C. 2317.02(B)(1) provides that a physician may not testify concerning a communication made to him by his patient in that relation, unless the patient waives the testimonial privilege.
>
> R.C. 2317.02(B)(4)(a) broadly defines "communication" to include acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician * * * 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.
>
> Information placed in hospital records by a physician is privileged. *Weis v. Weis* (1947), 147 Ohio St. 416, 72 N.E.2d 245, paragraph five of the syllabus; *Humphry v. Riverside Methodist Hosp.* (1986), 22 Ohio St.3d 94, 96, 488 N.E.2d 877, overruled on other grounds by *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 438, 639 N.E.2d 83; *Johnston v. Miami Valley Hosp.* (1989), 61 Ohio App.3d 81, 84, 572 N.E.2d 169. Notations made by nurses in the "nurses' notes" portions of a hospital record are also privileged because they are necessary to enable a physician to diagnose, treat or prescribe for a patient. *Johnston,* 61 Ohio App.3d at 84, 572 N.E.2d 169. Thus, the term "communication" as defined by R.C. 2317.02(B)(4)(a) specifically includes hospital records and is sufficiently broad to cover any confidential information gathered or recorded within them during the treatment of a patient at the hospital. See *Dellenbach v. Robinson* (1993), 95 Ohio App.3d 358, 370, 642 N.E.2d 638; *State v. Brown* (1993), 90 Ohio App.3d 674, 689, 630 N.E.2d 397; *State v. Bourdess* (Oct. 7, 1999), Franklin App. No. 74842, unreported.
>
> Since hospital records are privileged, they may not be released unless the person who is the subject of the records actually or implicitly waives the privilege. *Id.*

> R.C. 2317.02(B)(1) states that a patient waives his testimonial privilege when he gives express consent, files a medical claim under R.C. Chapter 4123, or is deceased. In addition, the physician-patient privilege does not extend to tests performed to determine the concentration of alcohol or drugs of abuse in a person's blood, breath or urine. R.C. 2317.02(B)(2); *Johnston,* 61 Ohio App.3d at 85, 572 N.E.2d 169. A person does not waive his physician-patient privilege merely by testifying. *Brown,* 90 Ohio App.3d at 689, 630 N.E.2d 397.

State v. Russ, CA99-07-074, 2000 WL 864989 (Ohio Ct. App. June 26, 2000); see also, Grove v. Northeast Ohio Nephrology Assocs., Inc., 164 Ohio App.3d 829, 844 N.E.2d 400, (2005).

Thus, any information contained in the medical records at issue here fall squarely within the statutory definition of a "communication" for purposes of the medical privilege. Any suggestion in this case that the lower court could somehow waive Ms. Laurence's medical privilege from one case to another, yet provide a remedy for privilege concerns through redaction is simply misplaced.

Proposition of Law No. II

Ohio residents have a Constitutional and statutory right to have their medical privilege maintained by Courts in Ohio.

With respect to the information contained in a person's medical records, there is both a Constitutional right to privacy, and also a statutory privilege to maintain the confidentiality of those records. In this case, the trial court and appellate court failed to recognize Appellant's rights to privacy and privilege, and this Court should accept jurisdiction to correct this error.

> A constitutional right to privacy in the context of disclosure of personal information was first explicitly recognized in *Whalen v. Roe* (1977), 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64. In *Whalen,* the United States Supreme Court acknowledged that harm to a person's reputation may result from disclosing the person's name or address when the context of the release associates the person with certain characteristics or activities. Although the challenged release of information was not found to be ****424** unconstitutional in that case, the Supreme Court recognized that the right to privacy may involve "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." (Footnotes omitted.) *Whalen, supra,* at 599-600, 97 S.Ct. at 876-877. The first of those interests is at issue here.

> Neither the United States nor the Ohio Constitution specifically mentions an inherent right to privacy. However, even absent an explicit textual foundation for privacy interests, Ohio courts, like the United States Supreme Court, have established that an inherent right exists. See, *e.g., Housh v. Peth* (1956), 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340; *General Motors Corp. v. Director of Natl. Institute for Occupational Safety & Health* (C.A. 6, 1980), 636 F.2d 163; *Gutierrez v. Lynch* (C.A.6, 1987), 826 F.2d 1534, 1539.

Doe v. Univ. of Cincinnati, 42 Ohio App. 3d 227, 231, 538 N.E.2d 419, 423-24 (1988)

Clearly, as noted by the court in Doe, there is an inherent right to privacy with respect to disclosure of personal matters. The court in Mullins v. Griffin, 78 Ohio App. 3d 84, 603 N.E.2d 1133 (1991) acknowledged this by stating:

> The constitutional right to privacy is now well established in American jurisprudence. Included in this right is an individual's interest in avoiding disclosure of personal matters. *Whalen v. Roe* (1977), 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64, 73. The interests protected by this right, however, are limited to those which are " 'fundamental' or 'implicit in the concept of ordered liberty.' " *Paul v. Davis* (1976), 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 421, citing *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Palko v. Connecticut* (1937), 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288. These interests include "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul, supra,* 424 U.S. at 713, 96 S.Ct. at 1166, 47 L.Ed.2d at 421.
>
> There is some question whether the unauthorized disclosure of confidential medical records could ever constitute a violation of the constitutionally protected right to privacy. Construing *Whalen* and *Paul,* the United States Courts of Appeals for the First and Sixth Circuits have concluded that there is no general constitutional right to have the disclosure of private information ****1136** measured against the need for disclosure. In these cases, it was held that personal psychiatric records and social histories were not protected under the confidentiality branch of the right to privacy. *Borucki v. Ryan* (C.A.1, 1987), 827 F.2d 836; *J.P. v. DeSanti* (C.A.6, 1981), 653 F.2d 1080; see, also, *Dean v. Rocne Gen. Hosp.* (S.D.W.Va.1984), 578 F.Supp. 408 (hospital's unauthorized release of an inmate's medical records to county sheriff did not constitute invasion of constitutionally protected right to privacy). Nevertheless, a number of courts have recognized a constitutionally protected right to privacy in personal medical records. *United States v. Westinghouse Elec. Corp.* (C.A.3, 1980), 638 F.2d 570; ***88** *Carter v. Broadlawns Med. Ctr.* (S.D.Iowa 1987), 667 F.Supp. 1269. Where such a right is recognized, the courts have weighed the government's interest in disclosure against the individual's privacy interest to determine whether a

violation of the right has occurred. *Fraternal Order of Police, Lodge 5 v. Philadelphia* (C.A.3, 1987), 812 F.2d 105; *Fadjo v. Coon* (C.A.5, 1981), 633 F.2d 1172.

Mullins v. Griffin, 78 Ohio App. 3d 84, 87-88, 603 N.E.2d 1133, 1135-36 (1991).

While many Ohio courts have determined that there is no Constitutional right to privacy with respect to medical records and information, the importance of such a right has clearly been acknowledged by the Ohio legislature. It is undisputed that Ohio law provides an explicit statutory privilege with respect to medical communications, pursuant to Ohio Revised Code, §2317.02.

Ohio's codification of the medical privilege is found in Ohio Revised Code, 2317.02 which provides, in relevant part:

> The following persons shall not testify in certain respects:
> ***
> (B)(1) **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.
> The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:
> (a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:
> ***
> (5)(a) As used in divisions (B)(1) to (4) of this section, **"communication" means 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.
> ***

(emphasis added)

The application of this privilege with respect to Appellant is discussed at length above, specifically with respect to whether a waiver of the privilege in one lawsuit may be considered a waiver of the privilege in a subsequent lawsuit involving different parties. It is clear by this Court's pronouncement in cases such as Hageman, supra, that the waiver of the statutory privilege must be specific and the use of records under any waiver or consent must be consistent with the patient's consent.

There has been no legislative pronouncement which would extend the waiver to cover the facts of this case, nor has there been any finding by the court which would provide a legal basis for expanding the limited waiver applicable to the first case. As such, the medical records of Danielle Laurence should remain confidential and privileged, and should not be permitted to be used in the case at bar.

Allowing a party who obtains an individual's medical records in one lawsuit to be permitted to utilize those records in a subsequent lawsuit involving different parties, even going so far as to attempt to ask questions of independent witnesses about communications contained in those records, very clearly implicates the statutory privilege set forth in Ohio Revised Code, §2317.02. This privilege was waived by the trial court and appellate court in clear violation of Appellant Laurence's rights, and this Court should redress this wrong by reversing the lower courts' decisions.

Proposition of Law No. III

Appellate Districts should not treat a litigant's medical privilege differently, in the face of this Court's pronouncement in *Hageman v. S.W. Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153.

The Journal Entry and Opinion of the Eighth Appellate District in this case clearly relies upon the holding in the case of Menda v. Springfield Radiologists, 136 Ohio App.3d 656, 737 N.E.2d 590 (2d Dist.2000) for the proposition that "the legislature could not have intended for a waiver of physician-patient privilege in one case to operate, *at least in some situations*, as waiver in another case." See, February 9, 2012 Journal Entry and Opinion, p. 6.

From this, the majority concludes that Appellant Laurence waived her medical privilege in the personal injury action filed by Todd Leopold, because she had previously filed a lawsuit for her injuries sustained in the same accident. It is important to note that at the time this issue arose, Ms. Laurence's personal injury suit had been dismissed and could not have been re-filed due to a statute of limitations bar.

However, as was noted by Judge Gallagher in his dissent:

"the Second District recognized in a later case, 'our holding in *Menda* has most probably been overruled by the decision of the Supreme Court of Ohio in *Hageman v. S.W. Gen. Health Ctr.*, [119 Ohio st.3d 185, 2008-Ohio-3343, 893 N.E.2d 153].'" See, February 9, 2012 Journal Entry and Opinion, Dissent at pp. 8-9, citing State v. Branch, 2d Dist. No. 22030, 2009-Ohio-3946, 2009 WL 2436867. See also, Bogart v. Blakely, No. 2010 CA 13 (2d Dist. Sept. 24, 2010), 2010 WL 372272.

Insofar as the Second Appellate District in Ohio has not recognized that Menda may be overruled by Hageman on the issue of disclosure of medical records in a subsequent matter, this

creates a conflict between at least the Eighth and Second Districts concerning the application of medical privilege.

This Court's pronouncement in Hageman, supra, was very clear:

> **we hold that when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case.**

Hageman v. Sw. Gen. Health Ctr., 2008-Ohio-3343, 119 Ohio St. 3d 185, 188-90, 893 N.E.2d 153, 158 (emphasis added).

This Court was unequivocal in its statement, and did not make exception for use of medical records between cases, simply because they may involve the same factual circumstances. Yet, that is what the trial court and appellate court did here. Interestingly, the appellate court chose to rely on a Second Appellate District case to do so, despite the fact that the Second District has appeared to concede that case has been "most probably been overruled by the decision of the Supreme Court of Ohio in *Hageman v. S.W. Gen. Health Ctr.*, [119 Ohio st.3d 185, 2008-Ohio-3343, 893 N.E.2d 153]." See, State v. Branch, 2d Dist. No. 22030, 2009-Ohio-3946, 2009 WL 2436867, citing Menda v. Springfield Radiologists, 136 Ohio App.3d 656, 737 N.E.2d 590 (2d Dist.2000).

Clearly confusion remains between appellate districts on this issue but Ohio litigants have the right to be treated the same with respect to their rights regardless of jurisdiction. Appellant respectfully requests that this Court clarify the holding of Hageman, supra, to indicate that the waiver of medical privilege in one case does not serve as a waiver of the privilege in a subsequent case involving different parties, even if the factual circumstances underlying the cases are related. This will afford the appellate courts and trial courts clear direction with respect to the important issue of medical privilege.

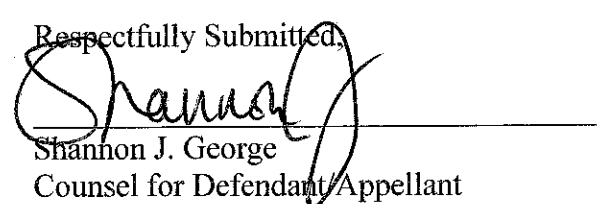
CONCLUSION

The trial court erred in denying Defendant/Appellant, Danielle Laurence's motion for a protective order, which sought to protect her confidential and privileged medical information from introduction into this case. The appellate court likewise erred by affirming this decision, finding that Ms. Laurence had waived her medical privilege with respect to the "accident" underlying this case, rather than looking to whether she had waived her medical privilege with respect to this "lawsuit".

Regardless of whether Ms. Laurence had previously consented to a limited waiver of that privilege to pursue a personal injury claim, this Court has very clearly indicated that such a waiver of the privilege found in Ohio Revised Code, §2317.02 is limited to the case in which the waiver was given. See, Hageman, supra. Medical records properly produced in one case do not lose their privilege in a subsequent action involving different parties. The trial court and appellate courts erred in not recognizing this, and in denying Defendant/Appellant Laurence's motion for a protective order to establish her medical privilege.

WHEREFORE, the Defendant/Appellant, Danielle Laurence, respectfully requests that this Court reverse the Journal Entry and Opinion of the Eighth District Court of Appeals for Cuyahoga county, dated February 9, 2012, and that this Court issue an order reversing that Entry, remanding the matter for further order precluding counsel for any party from utilizing the medical records of Danielle Laurence for any purpose, including at any deposition of any party or witness, in any motions for judgment on the pleadings, at trial or in any other proceeding.

Respectfully Submitted,



Shannon J. George
Counsel for Defendant/Appellant
Danielle Laurence

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was sent to the following parties or their counsel of record this 20th day of July, 2012, by regular U.S. Mail, with proper postage affixed:

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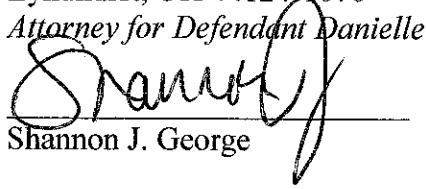

Shannon J. George

12-0438

IN THE SUPREME COURT OF OHIO

Todd L. Leopold, et al. Appellees, v. Ace Doran Rigging & Hauling Co., et al. Appellants.	: : : : : : : : :	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 97277 Trial Court Case No. CV-708330

NOTICE OF APPEAL OF APPELLANT, DANIELLE LAURENCE

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FILED
MAR 15 2012
CLERK OF COURT

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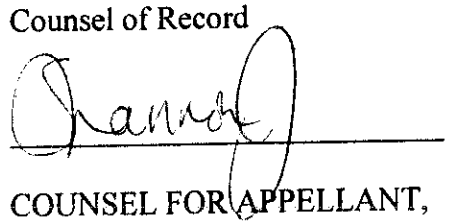
Notice of Appeal of Appellant, Danielle Laurence

Appellant, Danielle Laurence hereby gives notice of her appeal to the Supreme Court of Ohio from the judgment and accompanying Journal Entry and Opinion of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in the case of Todd A. Leopold, et al. v. Ace Doran Hauling & Rigging Co., et al., Court of Appeals Case Number 97277, resulting in the attached Journal Entry and Opinion dated February 9, 2012.

This case raises a conflict between appellate districts, involves a substantial constitutional question and is one of great general interest.

Respectfully Submitted,
Shannon J. George
Counsel of Record



COUNSEL FOR APPELLANT,
DANIELLE LAURENCE

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Notice of appeal was sent to the following parties or their counsel of record this 14th day of March, 2012, by regular U.S. Mail, with proper postage affixed:

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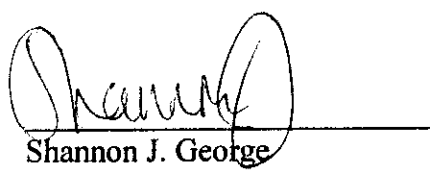

Shannon J. George

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97277

TODD L. LEOPOLD, ET AL.

PLAINTIFFS-APPELLEES

vs.

ACE DORAN HAULING & RIGGING CO., ET AL.

DEFENDANTS-APPELLEES

[APPEAL BY DANIELLE LAURENCE]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-708330

BEFORE: Rocco, J., S. Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 9, 2012

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FILED AND JOURNALIZED
PER APP.R. 22(C)

FEB 09 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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KENNETH A. ROCCO, J.:

Defendant-appellant Danielle Laurence appeals the trial court's order that denied her motion for a protective order. This matter is before this court on an interlocutory appeal filed pursuant to R.C. 2505.02(B)(4), with "the sole issue [being] whether the trial court's order involves the disclosure of privileged information contrary to the law." *Medina v. Medina Gen. Hosp.*, 8th Dist. No. 96171, 2011-Ohio-3990, ¶ 1, 7; *see also Hartzell v. Breneman*, 7th Dist. No. 10 MA 67, 2011-Ohio-2472; *compare Viafora v. Suhail*, 11th Dist. No. 2010-G-2987, 2010-Ohio-5796.

The underlying matter is a personal injury action originally filed in October 2009, by plaintiffs-appellees Todd Leopold and his wife. The suit results from a multi-vehicle accident that occurred on March 6, 2008. The Leopolds named numerous defendants, including Laurence, who was driving one of the cars involved. Laurence and some of the other defendants subsequently filed cross-claims against each other, seeking contribution or indemnification should the plaintiffs prevail.

In April 2011, after the Leopolds had filed their third amended complaint, Laurence filed her motion seeking a protective order pursuant to Civ.R. 26(C). She sought to preclude "counsel for any party to this litigation from utilizing [her] medical records [resulting from the accident] * * * for any purpose,

including at any deposition of any party or witness, in any motions for judgment on the pleadings, at trial or in any other proceeding * * * ." In her brief in support of her motion, Laurence acknowledged the following facts.

After the accident, Laurence had made statements to emergency room medical personnel that suggested she may have caused the accident. In November 2008, Laurence had commenced a personal injury action, viz., Case No. CV-676218, which was based upon the accident, against Stephen Stillwater and Ace Doran Hauling and Rigging Co. (hereinafter, referred to in the singular as "Ace"), two defendants whom the Leopolds also had named in the instant action. In responding to Ace's requests for discovery in her case, Laurence had turned over her statements. Laurence subsequently dismissed her case. By the time she filed her motion seeking a protective order in this case, the statute of limitations barred her from refiling CV-676218.

In this case, Leopold argued with respect to her request for a protective order that her waiver of her "physician-patient privilege" in her previous action did not extend to the current case. She further argued that some of the information she provided to the medical personnel might be used by the other parties in this case for improper purposes.

Ace filed a brief in opposition to Laurence's motion. Therein, Ace argued that Laurence's request should be denied because she had not complied with

Civ.R. 26(C)'s prerequisites and that her request was overbroad. Ace also argued that Laurence's statements concerning the cause of the accident did not fit within the protection of the physician-patient privilege. The Leopolds later joined in Ace's opposition to Laurence's Civ.R. 26(C) motion.

Laurence filed a reply brief, to which Ace filed a responsive brief. In this brief, Ace essentially argued that Laurence had waived her privilege with respect to the statements when she made them in sworn testimony "in the context of her personal injury action."

On August 15, 2011, the trial court denied Laurence's motion for a protective order without opinion.

Laurence's appeal of the trial court's order presents one assignment of error,[1] in which she challenges the trial court's order as denying her the protection of physician-patient privilege in violation of R.C. 2317.02(B). Ace, on the other hand, argues that the information Laurence seeks to protect does not fall under the statute's proscription, because Laurence waived her privilege when she filed her action in Case No. CV-676218.

The burden of showing that testimony and documents are either confidential or privileged rests upon the party seeking to exclude it. *Lemley v.*

---

[1]Laurence's assignment of error states: "The trial court erred in denying Appellant's motion for a protective order, as Danielle Laurence did not waive any medical privilege which would permit the use of her medical records in this case."

Kaiser, 6 Ohio St.3d 258, 263-264, 452 N.E.2d 1304 (1983). Moreover, a trial court's decision whether to grant or deny a protective order is one within the trial court's discretion, and will not be reversed absent an abuse of that discretion. *Ruwe v. Bd. of Springfield Twp. Trustees*, 29 Ohio St.3d 59, 61, 505 N.E.2d 957 (1987). However, this court reviews matters involving the discovery of alleged confidential and privileged information de novo. *Roe v. Planned Parenthood S.W. Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶ 29.

"The purpose of [the physician-patient] privilege is to encourage patients to make a full disclosure of their *symptoms and conditions* to their physicians without fear that such matters will later become public * * *." (Emphasis added.) *State v. Antill*, 176 Ohio St. 61, 64-65, 197 N.E.2d 548 (1964). Therefore, R.C. 2317.02(B)(1) protects communications between a health care provider and the patient. *Medina v. Medina Gen. Hosp.*, 8th Dist. No. 96171, 2011-Ohio-3990, ¶ 13.

R.C. 2317.02 provides in relevant part:

"The following persons shall not testify in certain respects:

" * * *

"(B)(1) 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, * * *.

"The testimonial privilege established under this division *does not apply*, and a physician or dentist may testify or may be compelled to testify, in *any* of the following circumstances:

"(a) In *any civil action*, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under *any* of the following circumstances:

" * * *

"(iii) *If* a medical claim, dental claim, chiropractic claim, or optometric claim, * * * *any* other *type of civil action*, or a claim under Chapter 4123. of the Revised Code *is filed by the patient* * *

"* * *

"(3)(a) * * * [A] physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist *by the patient in question* in that relation, or the physician's or dentist's

advice to the patient in question, that *related causally or historically to physical or mental injuries* that are *relevant to issues in the medical claim* * * *." (Emphasis added.)

There "existed no physician-privilege at common law. * * * Since the privilege is in derogation of the common law, it must be strictly construed against the party seeking to assert it. * * * [O]ur decisions have long reflected the belief that discovery should be liberally allowed." *Bogart v. Blakely*, 2d Dist. No. 2010 CA 13, 2010-Ohio-4526, ¶ 23, citing *Arroyo v. Wagon Wheel Auto Sales Inc.*, 2d Dist. No. 18235, 2000 WL 1133167 (Aug. 11, 2000).

According to R.C. 2317.02(B)(1)(a)(iii), the privilege is waived if the patient filed a civil action. Laurence asserts that, since this action is not the one she herself filed, if the trial court order stands, she will be required to waive her privilege beyond the extent to which she intended. *Bogart*, ¶ 29. In addressing that same assertion, the court in *Menda v. Springfield Radiologists*, 136 Ohio App.3d 656, 737 N.E.2d 590 (2d Dist.2000) made the following pertinent observations:

> "We disagree with [defendant's] conclusion that the legislature could not have intended for a waiver of physician-patient privilege in one case to operate, *at least in some situations*, as a waiver in another case. The plain language of R.C.

2317.02(B) sets forth that the physician-patient privilege does not apply if the patient files a medical claim or 'any other type of civil action' which *puts the mental or physical condition about which he saw the physician at issue.* This is precisely what [defendant] did when he filed suit previously. The language of the statute does not limit the waiver to use of the information only in the patient's case. Moreover, the privacy concern which seems to have been central to the legislature's creation of the privilege is not compelling in a situation such as this one where [defendant] *has already revealed* his * * * health problems by filing a claim for [personal injury]." (Emphasis added.)

This court agrees with the foregoing analysis as it applies in this case. Laurence's decision to file a claim of personal injury against Ace, which was based upon the same accident that underlies the basis for the claims and defenses posed by the parties herein, served to waive her physician-patient privilege with respect to that accident pursuant to R.C. 2317.02(B). *Id.*

Accordingly, the trial court did not err in denying Laurence's motion for a protective order, and her assignment of error is overruled.

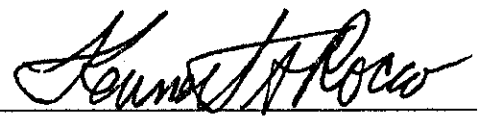
Affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
SEAN C. GALLAGHER, P.J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

SEAN C. GALLAGHER, P.J., DISSENTING:

I respectfully dissent from the majority opinion. I would reverse the ruling of the trial court because the medical records are protected under the physician-patient privilege, R.C. 2317.02.

The majority relies upon the Second District Court of Appeals decision in *Menda v. Springfield Radiologists*,136 Ohio App.3d 656, 737 N.E.2d 590 (2d Dist.2000), which held that the waiver of the physician-patient privilege by filing a civil suit that puts the plaintiff's mental or physical health at issue also extends to separate lawsuits. However, as the Second District recognized in a later case, "our holding in *Menda* has most probably been overruled by the decision of the Supreme Court of Ohio in *Hageman v. S.W. Gen. Health Ctr.*[, 119

Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153]." *State v. Branch*, 2d Dist. No. 22030, 2009-Ohio-3946, 2009 WL 2436867, ¶ 77. In *Hageman*, the Ohio Supreme Court specifically held that "when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case" and that "waiver of medical confidentiality for litigation purposes is limited to the specific case for which the records are sought * * *." *Id.* at ¶ 17, 20.

Laurence did not file the present action, and her medical condition is not at issue herein. Rather, appellees are seeking to impose liability upon Laurence for the accident that occurred. Contrary to appellees' argument, the statements Laurence made to medical personnel as to how the accident happened were made for the purposes of medical diagnosis or treatment. Appellees wish to use Laurence's privileged communications to impeach her testimony, claiming the evidence constitutes prior inconsistent statements. However, appellees fail to cite any authority establishing that a party may reference inadmissible, privileged communications in an attempt to impeach the credibility of a witness.

Pursuant to *Hageman*, the fact that Laurence waived the physician-patient privilege in a separate civil action does not effect a waiver of the privilege in this action. *See id.* Therefore, Laurence's medical records are not subject to disclosure, and the trial court erred in denying her motion for a

protective order.

69842555

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

TODD L. LEOPOLD, ET AL
Plaintiff

ACE DORAN HAULING & RIGGING CO., ET AL
Defendant

Case No: CV-09-708330

Judge: DEENA R CALABRESE

JOURNAL ENTRY

DEFENDANT LAURENCE'S MOTION FOR PROTECTIVE ORDER, FILED 04/29/2011, IS DENIED.

Deena Calabrese
Judge Signature 08/15/2011

08/12/2011

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08/15/2011 09:57:59
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GERALD E. FUERST, CLERK

Baldwin's Ohio Revised Code Annotated
Title XXIII. Courts--Common Pleas
Chapter 2317. Evidence (Refs & Annos)
Competency of Witnesses and Evidence; Privileged Communications

R.C. § 2317.02

2317.02 Privileged communications and acts

Effective: July 1, 2011
Currentness

The following persons shall not testify in certain respects:

(A)(1) An attorney, 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 or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

(B)(1) 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.

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

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(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)(i) If the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of

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the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician or dentist as provided in division (B)(1)(c) of this section, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient relation.

(5)(a) As used in divisions (B)(1) to (4) of this section, "communication" means 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.

(b) As used in division (B)(2) of this section, "health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) "Ambulatory care facility" means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. "Ambulatory health care facility" does not include the private office of a physician or dentist, whether the office is for an individual or group practice.

(ii) "Emergency facility" means a hospital emergency department or any other facility that provides emergency medical services.

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(iii) "Health care practitioner" has the same meaning as in section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of the Revised Code.

(v) "Long-term care facility" means a nursing home, residential care facility, or home for the aging, as those terms are defined in section 3721.01 of the Revised Code; an adult care facility, as defined in section 5119.70 of the Revised Code; a nursing facility or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20 of the Revised Code; a facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the "Social Security Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(d) As used in divisions (B)(1) and (2) of this section, "drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 307.628 of the Revised Code or the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(C)(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

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(F) A person who, if a party, would be restricted under section 2317.03 of the Revised Code, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G)(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757. of the Revised Code as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies:

(a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.

(b) The client gives express consent to the testimony.

(c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent.

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under section 2151.421 of the Revised Code.

(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 of the Revised Code or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to section 4931.06 of the Revised Code or Title II of the "Communications Act of 1934," 104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

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Nothing in this section shall limit any immunity or privilege granted under federal law or regulation.

(J)(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, in any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(a) If the patient or the guardian or other legal representative of the patient gives express consent.

(b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.

(4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to, any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(K)(1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.

(2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:

(a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.

(b) The individual who received crisis response services gives express consent to the testimony.

(c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

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(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L)(1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about any of the following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply to any of the following:

(a) A criminal action or proceeding involving an offense under sections 2903.01 to 2903.06 of the Revised Code if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

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(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

Credits
(2011 H 153, eff. 7-1-11; 2010 S 162, eff. 9-13-10; 2006 S 117, eff. 10-31-07 (*State ex rel. Ohio Gen. Assembly v. Brunner*); 2006 S 8, eff. 8-17-06; 2006 S 17, eff. 8-3-06; 2006 H 144, eff. 6-15-06; 2005 S 19, eff. 1-27-06; 2002 S 281, eff. 4-11-03; 2002 H 533, eff. 3-31-03; 2002 H 374, eff. 4-7-03; 2001 H 94, eff. 9-5-01; 2000 S 180, eff. 3-22-01; 2000 H 506, eff. 4-10-01; 2000 S 172, eff. 2-12-01; 2000 H 448, eff. 10-5-00; 1998 H 606, eff. 3-9-99; 1996 S 223, eff. 3-18-97; 1996 S 230, eff. 10-29-96; 1994 H 335, eff. 12-9-94; 1993 S 121, eff. 10-29-93; 1992 S 343; 1990 S 3, H 615; 1989 S 2; 1987 H 1; 1986 H 529, H 528; 1984 H 205; 1980 H 284; 1976 H 1426; 1975 H 682; 125 v 313; 1953 H 1; GC 11494)

Notes of Decisions (793)

R.C. § 2317.02, OH ST § 2317.02
Current through all 2011 laws and statewide issues and 2012 Files 70 through 126, 130, 132 to 137 and 139 to 142 of the 129th GA (2011-2012).

End of Document

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