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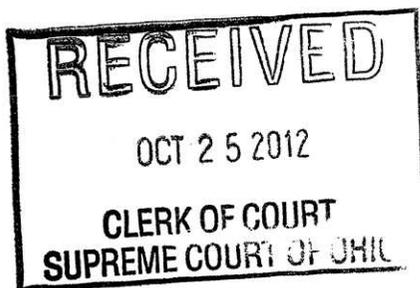
IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF APPELLEES TODD AND LINDA LEOPOLD
OPPOSING MOTION TO STRIKE THEIR MERIT BRIEF

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MEMORANDUM OF APPELLEES TODD AND LINDA LEOPOLD
OPPOSING MOTION TO STRIKE THEIR MERIT BRIEF

Appellees Todd and Linda Leopold (collectively “Leopold”) oppose the Motion to Strike their Merit Brief filed by Co-Appellees, Stephen H. Stillwagon, Ace Doran Brokerage Company, and Ace Doran Hauling & Rigging Co. (collectively “Stillwagon”) for the following seven (7) reasons:

- 1) Stillwagon is wrong in saying Leopold is not an appellee because the Court’s docket designates him as an appellee.
- 2) Stillwagon is wrong in saying Leopold should have filed a brief as *amicus curiae* because Leopold is a party to the case and *amicus curiae* are not parties to cases. *Wellington v. Mahoning County Board of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, 882 N.E.2d 420, ¶53; *City of Lakewood v. State Employment Relations Board*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist. 1990); *Board of County Commissioners v. Unknown Heirs of Cooper*, 50 Ohio L. Abs. 20, 75 N.E.2d 84 (2nd Dist. 1947).
- 3) Stillwagon is wrong in saying Leopold is asserting Laurence’s privilege because Leopold simply agrees that Laurence can assert it here.
- 4) Stillwagon is wrong to suggest that Leopold, who chose not to brief the issues until this Court accepted the appeal, cannot brief them now because Leopold is an appellee who has the right to file a merit brief with this Court.
- 5) Stillwagon is wrong in saying Leopold is not an interested party who has no standing because admitting Laurence’s privileged medical records into evidence is a threat to Leopold being fully compensated. As explained in Leopold’s Merit Brief (pp. 1-2),

Stillwagon is attempting to shift liability to Laurence, which could severely impact Leopold because Laurence's available insurance coverage is significantly less than Stillwagon's. If a percentage liability shift to Laurence occurs and is great enough, Leopold could go uncompensated for a good portion of his economic and non-economic loss under Ohio's joint and several liability rules. See *R.C.*

2307.22(A)(1),(2), and (C). Thus, if Laurence is found liable because she said something to her doctors, Leopold is an aggrieved party if the percentages of fault assessed by the jury cause all or some of Leopold's damages to go uncompensated due to limited liability insurance coverage. Leopold is severely prejudiced in that circumstance and has the right to stand before this Court.

- 6) Stillwagon is wrong in saying Leopold shares oral argument time with Stillwagon because Leopold's Merit Brief obviously favors Laurence's position. Thus, Leopold is on Laurence's "side," not Stillwagon's. Therefore, Laurence and Leopold may share Laurence's allotted time. See S.Ct. Prac. R. 9.5(A)(2).
- 7) Finally, Stillwagon is wrong in saying an appellee's merit brief must support the lower court's decision because Leopold as an appellee, rather than an appellant, is not prohibited from briefing the merits. Differing opinions can exist among appellees. Under S.Ct. Prac. R. 6.3(B), which governs the contents of an appellee's brief, two provisions are mandatory and one other is permissive. Significantly, each provision is followed by a comma, which makes the three provisions separate, distinct alternatives. Use or omission of commas is important in understanding a sentence's meaning. See *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶¶ 13 (*majority opinion*), 27 (*dissenting opinion*); *Families Against Reily/Morgan*

Sites v. Butler County Board of Zoning Appeals, 56 Ohio App.3d 90, 92-93, 564 N.E.2d 1113 (12th Dist. 1989); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 171, 125 N.E.2d 896 (8th Dist. 1955). A comma is defined as “a punctuation mark, used especially as a mark of separation within the sentence.” See Merriam-Webster Dictionary @ m-w.com. In legal writing, “... the final comma in a list of more than two is important to avoid ambiguities.” Garner, *A Dictionary of Modern Legal Usage* (2d Ed. 1995) 714. Thus, the three provisions separated by commas in Rule 6.3(B) are interpreted as separate, distinct alternatives in an appellee’s brief. The first alternative requires that: “The appellee’s brief shall comply with the provisions of S.Ct. Prac. R. 6.2(B),” Rule 6.2(B) requires “... an argument....” An argument is “... discourse intended to persuade” See Merriam-Webster Dictionary @ m-w.com. By definition, Leopold’s Merit Brief presented an argument. The second alternative requires that: “The appellee’s brief shall ... ,answer the appellant’s contentions,” To answer is “... to reply to a legal charge” *Id.* By definition, Leopold’s Merit Brief answered Laurence’s contentions. Leopold’s answer or reply was to agree with Laurence. The third alternative says: “The appellee’s brief shall ... ,make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken.” Leopold’s Merit Brief chose not to make “any other appropriate contentions as reasons for affirmance” because there were none. Thus, S.Ct. Prac. R. 6.3(B) consists of three separate parts as evidenced by the use of commas between each provision. Thus, the phrase “as reasons for affirmance” only modifies “other appropriate contentions,” not “argument” or “answer.” Leopold is not required to speak to all three Rule 6.3(B) alternatives. Accordingly, a merit

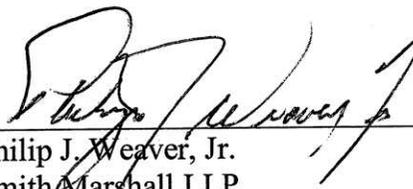
brief can agree with an opposing position while it is presenting an argument and an answer and nothing more.

Therefore, the Motion to Strike has no merit.

Moreover, Stillwagon's attempt to prohibit Leopold from siding in writing with Laurence is merely another effort to enhance his expansive privilege-waiver position, one that creates a high risk for abuse. The privilege is owned by the patient, not Stillwagon or his attorneys. *Hageman v. Southwest General Health Center*, 119 Ohio St.3d 185, 2008-Ohio-3343,893 N.E.2d 153, ¶¶ 13 – 17. The *Hageman* holding was: "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.*" *Id.* @ ¶ 17. (Emphasis added.) This holding is consistent with a medical authorization's need for specificity, which "*prohibits a party receiving the records from sharing the information with others who are not within the scope of the patient's release.*" *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 17. (Emphasis added.) Thus, narrowly interpreting a privilege waiver necessarily follows because the statutory waiver was created to avoid personal injury plaintiffs from asserting the privilege. Here, Laurence is not making a personal injury claim so she did not place her medical condition at issue. Thus, her medical records are privileged.

For the aforementioned reasons, Stillwagon's Motion to Strike Leopolds' Merit Brief should be overruled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of this Memorandum of Appellees Todd and Linda Leopold Opposing Motion To Strike Their Merit Brief was served by ordinary U.S. mail on October 23, 2012 upon:

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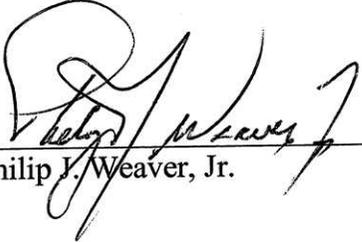
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