ORIGINAL

Case No. 2014-1055

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2013CA00142

GENE' A GRIFFITH, EXECUTRIX
FOR THE ESTATE OF HOWARD E. GRIFFITH, DECEASED
Plaintiff-Appellant,
v.
AULTMAN HOSPITAL
Defendant-Appellee

BRIEF OF AMICI CURIAE STARK COUNTY ASSOCIATION FOR JUSTICE AND SOUTHWEST OHIO TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT, GENE' A. GRIFFITH, EXECUTRIX FOR THE ESTATE OF HOWARD E. GRIFFITH, DECEASED

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I. INTRODUCTION

This appeal involves the right of a patient to access all of his medical record maintained by a health care provider.

When Howard Griffith died at Aultman Hospital in Canton, Ohio on May 8, 2012, his daughter, as executrix of his estate, sought a complete copy of his medical record. Of particular interest were records regarding electronic cardiac monitoring, as it was learned during the course of his recovery from successful surgery, that cardiac monitoring equipment attached to his body was not connected for approximately forty minutes.

After several unsuccessful attempts to obtain her father's complete medical record, his daughter filed a lawsuit pursuant to R.C. 3701.74(C) (authorizing civil action to enforce patient's right of access to medical records). During discovery, it was learned that certain of his medical records - his printed electronic cardiac monitoring data - were not provided to her because they were not in the Medical Records Department. Instead, they were in Aultman's Risk Management Department.

Aultman filed a motion for summary judgment explaining that it had provided Mr. Griffith's medical record under its theory of medical record - if a record is not maintained in the medical records department, it is not part of a patient' s medical record under R. C. 3701.74(A)(8).

The trial court agreed and granted summary judgment finding that Aultman had produced Mr. Griffith's medical records under R. C. 3701.74(A)(8).

On appeal, the Fifth District Court of Appeals affirmed the granting of summary judgment to Aultman Hospital. *Griffith v. Aultman Hospital,* Fifth Dist. No. 2013CA00142,

2014-Ohio-1218. In a divided 2 to 1 opinion, the appeals court found that the "medical record consists of what was maintained by the medical records department and information that the provider decides not to maintain is not part of the medical record." *Id*, at ¶22. In other words, if the medical provider chooses to place a portion of a patient's medical record in a department other than medical records, such as risk management, that record is not considered a medical record under R. C. 3701.74.

A medical record is defined as "data in any form that pertains to a patient's medical history, diagnosis, prognosis or medical condition and that is generated and maintained by a health care provider in the process of the patient's health care treatment, R. C. 3701.74(A)(8).

The issue in this case is whether a health care provider - in this case a hospital - can define a medical record by the place it is stored and deny a patient or his representative access by maintaining it in a department that is not labeled medical records. While the facts of this case are troubling, the resolution of this issue does not depend on these particular facts. Rather, the impact is far reaching and extends to the rights of Ohio citizens who seek their medical record for a variety of reasons. Consider, for example, a patient who seeks a second opinion, or wishes to transfer to another medical provider. Can a medical provider undermine the intent of the legislature in enacting R. C. 3701.74 by ignoring this definition and self define the statute to include only those medical records it chooses to maintain in a medical records department and deny a patient access to his complete medical record.

The decision of the Fifth District Court of Appeals, if left in place, would thwart the General Assembly's intent to guarantee the citizens of Ohio access to their complete medical

record.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Stark County Association for Justice (SCAJ) is an association of attorneys dedicated to the advancement of causes of those who are damaged in person and property and who seek redress through the laws of this State. Its members encourage cooperation among lawyers to promote justice, human welfare, access to the courts of this state and advance fair trials. The Southwest Ohio Trial Lawyers Association is an association of attorneys advancing similar interests.

The Associations' members practice in the areas of negligence, worker's compensation, professional malpractice, products liability, employment, and civil rights law, on behalf of injured persons, consumers and families.

The amici are interested in this case because it affects their ability to provide fair and effective advocacy for their clients. Of particular importance to its members is the ability to obtain accurate and complete medical records for their clients when necessary, particularly in the area of medical malpractice. Ohio Civil Rules require clients pursuing medical negligence claims to file expert affidavits of merit contemporaneous to the filing of complaint. It is incumbent upon the Associations' members representing patients to receive complete medical records to represent their clients effectively, conduct a thorough and complete investigation and avoid frivolous filings. If the decision of the Fifth District Court of Appeals is allowed to stand, the Associations' members may be unable to review the complete medical records prior to a lawsuit being filed which undermines their responsibility to the clients and their community. Amici's interest in this case is to reinforce the intent of the Ohio Legislature in enacting R. C.

3701.74 to allow complete access to a patient's medical record and disallow the position taken by Aultman that medical providers can withhold medical records by simply storing and maintaining them in a department other than a medical records department.

III. STATEMENT OF THE FACTS

Amici adopts the Statement of Facts set forth in plaintiff-appellant's Merit Brief.

IV. ARGUMENT

<u>Proposition of Law:</u> A health care provider cannot withhold portions of a patient's medical record by unilaterally selecting and storing those medical records in a department other than its medical records department.

A. The language of R. C. 3701.74 is plain.

Pursuant to R. C. 3701.74, a citizen in Ohio who has sought treatment from a health care provider, including a hospital, has a right to access his medical records and obtain a copy of them, R. C. 3701.74.

R. C. 3701.74(A)(8) defines a medical record as "data in any form that pertains to a patient's medical history, diagnosis, prognosis, or medical condition and that is generated and maintained by a health care provider in the process of the patient's health care treatment."

The definition is sweeping and expansive to include anything relating to the patient's care and treatment. Many items are kept with the medical record: digital images of the patient, flowsheets from operations/intensive care units, informed consent forms, EKG tracings, outputs

from medical devices and numerous other important pieces of information depending on the patient and his or her set of illnesses or treatments. See, e.g., *Lykins v. Miami Valley Hospital,* Mont. Common Pleas No. 00-CV-2404, 2001 WL35673996, unreported (Nov. 20, 2001) (holding that urgent care form and telephone form used when doctor called hospital prior to patient's arrival are medical records). In short, a medical record is anything that pertains to the patient's medical history, diagnosis, prognosis or medical condition that was generated in the process of the patient's treatment. *Id*, at *2.

It is undisputed here that Aultman saved, maintained and stored the electronic cardiac monitoring strips after Mr. Griffith was found unresponsive by the x-ray technicians. And it is undisputed that they were marked a medical record. It is also undisputed that Mr. Griffith's daughter, as executrix of the estate, requested his medical records not once but several times under R. C. 3701.74. Yet, Aultman did not provide the records to the executrix because they were not in the medical records department. Instead, they were in the risk management department. It was only after suit that Aultman produced the electronic cardiac (EKG) monitoring information stating that such records "are not part of the medical records but responsive to [t]he discovery request." (Answer to Request No. 1, Production of Documents).

The majority of the Fifth District Court of Appeals agreed, finding that the EKG information was not part of the medical record because it was not maintained in the medical records department. *Griffith*, *supra*, at ¶22.

Nowhere in the statute, R. C. 3701.74, however, is there any language that suggests this conclusion of the court. Indeed, the appeals court majority cited no authority for such a holding.

In short, there is simply no room in the statute for a construction so narrow that it voids or otherwise exempts a patient's right to complete medical records from a health care provider.

The appeals court relied on the statute's placement in the Department of Health, "Health-Safety-Morals" section of the revised code and concluded that the purpose of the statute was to enable a patient to obtain a second opinion or transfer to another medical provider. *Griffith*, supra, at ¶23. There is nothing in the statute or its legislative history of amendments, however, that suggests such a narrow purpose. Even so, how would such a limited purpose be served by allowing a health care provider to restrict access to the patient's complete medical record by maintaining them in a department other than medical records. Would not a doctor consulted for a second opinion want full access to all medical records not just a portion of them.

This Court has warned against enacting "common law pronouncements" when the legislature has or could have spoken on the subject, saying "[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." *State v. Smorgala,* 50 Ohio St. 3d 222, 223, 503 N.E.2d 672 (1990), superseded by statute on other grounds.

The language of R. C. 3701.74 is plain - a patient has a right of access to all of his medical records as defined by R. C. 3701.74(A)(8). This conclusion finds additional support in R. C. 3701.74(C) providing a civil remedy for those patients who are denied access to their medical records by a health care provider prior to the initiation of any malpractice litigation.

As discussed more fully in appellant's merit brief, the legislative history and circumstances surrounding the enactment of R. C. 3701.74 manifest the legislature's intentions

that data in any form pertaining to a patient is part of a patient's medical record and that patients are given the right to examine and obtain copies of their health care records.

The Eighth District Court of Appeals has said as much in *S. S. v. Ruddock,* Eighth Dist. No. 100281, 2014-Ohio-2270. Plaintiff-patient brought an action against a doctor alleging various claims including violation of R. C. 3701.74 for failing to provide medical records despite repeated written requests and the passage of reasonable time. The doctor provided the records after the lawsuit was filed and argued, therefore, that the claim was baseless. The patient countered that she should not have been obligated to file a lawsuit to obtain her medical records and did not have the opportunity to review them in contemplation of a lawsuit. The trial court granted the doctor's motion for summary judgment and the patient appealed.

The Eighth District found the claim for failure to provide medical records was improperly dismissed by the trial court and reversed the judgment finding there was a genuine issue of material fact as to whether the doctor violated the law [R. C. 3701.74] regarding the patient's right of access to her medical records. *Id*, at ¶22.

In sum, the intent of the legislature in enacting R. C. 3701.74 was to allow a patient or his representative complete access to his medical records whether it be for a second opinion, for transfer to another medical provider, or for a daughter seeking answers to her father's death.

The opinion of the Fifth District Court of Appeals should be reversed.

B. A medical record is not defined by the place it is stored by a health care provider.

There has been no invocation by Aultman of the peer-review privilege or a showing of its application in this case. Indeed, there is none. Rather, Aultman simply argues that the EKG

monitoring information sought by Mr. Griffith's daughter was beyond her reach when her father's medical record was sought because it was kept in the risk management department not the medical records department. It had no duty, then, to produce them in response to her request for her father's medical records.

The Fifth District Court of Appeals' majority agreed. *Griffith,* supra, at ¶22. The danger of such a finding was noted by the dissent - the majority opinion allows a medical provider to "self-define" a medical record to "only include those records it determines to send to its medical records department." *Id*, at ¶37.

The majority cited no cases in support of its holding; nor did Aultman; and Amici here has found none.

Still, Ohio cases analyzing R. C. 2305.253 [peer review privilege] are instructive. In *Flynn v. University Hospital,* 172 Ohio App. 3d 775, 876 N.E. 2d 1300, 2007-Ohio-4468, plaintiff filed a malpractice action against defendant-hospital claiming he was severely burned during shoulder surgery due to defendant's negligence. Plaintiff discovered that an incident report had been prepared but not disclosed. The hospital claimed it was privileged under R. C. 2305.253. The trial court granted the plaintiff's motion to compel the report and the hospital appealed, claiming, inter alia, the report was protected by the peer review privilege. The First District Court of Appeals rejected the argument finding that labeling a document an "incident report" does not mean it meets the statutory definition of an incident report for purposes of R. C. 2305.253. *Id* at ¶6. Accord *Selby v. Fort Hamilton Hospital,* 12th Dist. No. 2007-05-126, 2007-Ohio-2413 (holding that EKG discrepancy reports cannot be protected from discovery simply by

labeling the documents peer review, confidential or privileged.); *Rinaldi v. City View Nursing & Rehab.*, 8th Dist. No. 85867, 2005-Ohio-6360 (labeling documents as "investigation reports" or "incident statements" is insufficient to demonstrate that the reports were incident reports actually prepared for use by a peer review committee.).

The lesson of these cases is this: A health care provider cannot withhold a record from a patient by self-defining it as an incident report privileged under statute

The same principal holds true here. Storing EKG monitoring information of a patient in the risk management department instead of the medical records department does not mean that it loses the statutory definition of a medical record accessible to a patient who requests his medical records. A medical record is not beyond the reach of a patient under R. C. 3701.74 simply because the hospital self-defines it and stores it in the risk management department instead of the medical records department and nothing more. This is the very result envisioned by Judge Delaney in her *Griffith* dissent.

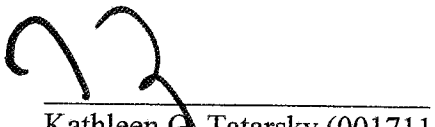
Finally, Aultman argued below that a sweeping definition of a medical record is burdensome and cumbersome. But the bottom line is that hospitals are in business to serve their patients. The rights of a patient to ready access to their complete medical record outweigh the relatively minor burden it places on the medical provider. Here, Mr. Griffith's daughter sought records which could reveal if or when her father's cardiac condition was monitored. To deny access to information which may be dispositive of the primary issue simply by claiming it is burdensome would be to deny the right of the appellant to access relevant facts.

The decision of the Fifth District Court of Appeals should be reversed.

V. CONCLUSION.

For the foregoing reasons, Amici Curiae respectfully request that this Court reverse the decision of the Fifth District Court of Appeals.

Respectfully submitted,



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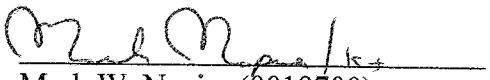

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A copy of the foregoing Brief of Amici Curiae Stark County Association for Justice and Southwest Ohio Trial Lawyers Association in Support of Plaintiff-Appellant, Gene A. Griffith, Executrix for the Estate of Howard E. Griffith, Deceased has been sent by regular U.S. Mail, on this 29th day of December, 2014 to the following counsel of record:

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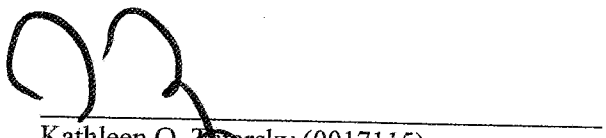

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