Supreme Court of Ohio Clerk of Court - Filed March 09, 2015 - Case No. 2014-1055

IN THE SUPREME COURT OF OHIO

GENE'A GRIFFITH, EXECUTRIX FOR THE ESTATE OF HOWARD E. GRIFFITH, DECEASED

Plaintiff-Appellant,

vs.

AULTMAN HOSPITAL

Defendant-Appellee.

Case No. 14-1055

On Appeal from the Stark County Court of Appeals, Fifth Appellate District, Case No. 2013 CA 00142

REPLY BRIEF OF APPELLANT GENE'A GRIFFITH

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I. Introduction

The Ohio Legislature decided to enact legislation that provided a statutory right to every patient in Ohio to receive a complete copy of her medical record. In doing so, the legislature chose not to limit that right, as other states have, only to records contained in a records department. Instead, an Ohio patient has a right to receive a copy of all medical records generated and maintained by her provider. A "provider" includes everything from individual nurses and doctors to the hospital or emergency facility itself. With the introduction and expanded use of electronic medical records, the legislature again expanded the definition to ensure that patients also had a right to all electronic medical records that the provider generated and maintained. The legislature further protected this right by defining a medical record itself, rather than allowing a hospital to define "medical record" however it wishes. Unfortunately, despite the clear language of the statute, Aultman Hospital, urges this Court to allow it to exclude medical records which it both generated and maintained – simply because it printed them, and stored them in a hospital department where the sign read "Risk Management" instead of "Records Department."

Appellee Aultman Hospital and its Amici ignore important facts in their Briefs which directly rebut many of their arguments:

1) One of Mr. Griffith's physicians made the conscious decision to save the cardiac monitoring information at issue. (Supp., p. 107; Depo. Jennifer Reagan-Nichols, Vol. 2, p. 112 (May 24, 2013)).
2) One of Mr. Griffith's physicians reviewed the cardiac monitoring information at issue in treating and diagnosing Mr. Griffith. (Supp., p. 114).
3) Aultman's employees, including nurses, printed some of the cardiac monitoring information reviewed by and saved at the direction of Mr. Griffith's physician(s) and stored such printed information in Aultman's Risk Management Department. (Supp., p. 101; Depo. Reagan-Nichols, Vol. 2, p. 86)).

As such, this is not a customary situation where, as represented by Aultman and its Amici, it is normal to not save patients' electronic monitoring information. This is a case in which a physician reviewed Mr. Griffith's electronic monitoring information and a physician made the conscious decision to save such electronic monitoring information. Aultman's employees, including nurses, printed some of that information and stored it in Aultman's Risk Management Department. Once any of these independent steps were taken, the information became "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."

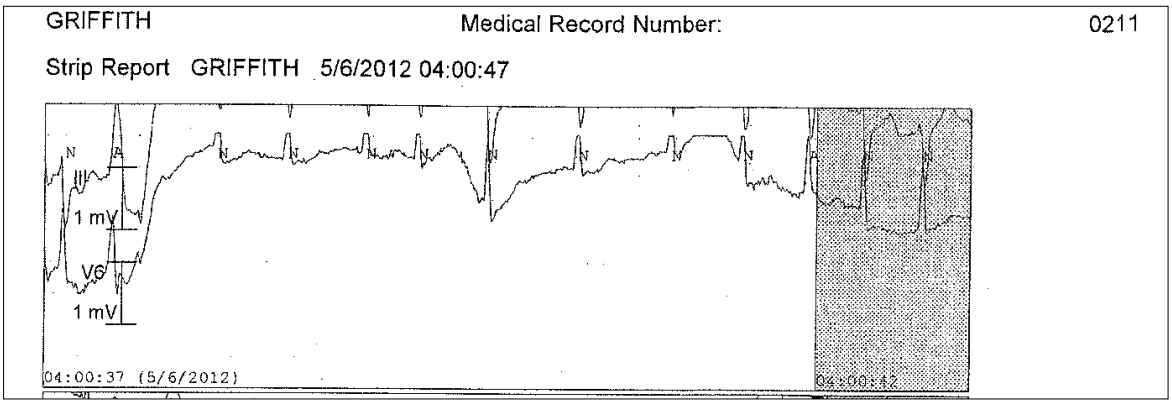
II. <u>Aultman and Its Amici Have Distorted Appellant's Proposition of Law.</u>

Appellee Aultman Hospital's (hereinafter "Aultman") Merit Brief is premised on knocking down a straw man argument. The position that Aultman **wishes** Appellant had taken is that a health care provider must eternally store and print all electronic data ever created for a patient and must provide that infinite data when it responds to a patient's request for their medical record. That is not Appellant's proposition of law. Appellant's proposition of law is that once a medical provider **reviews** and **decides** to save and/or print an EKG monitoring strip showing a patient's cardiac activity in the moments leading to his death, and further decides to store and maintain that paper monitoring strip within its control, it is a medical record that a patient has a right to without filing a negligence lawsuit.

Appellant's Proposition of Law is very narrow:

> A hospital should not be permitted to 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.

The underlying facts leading to this legal issue are clear and undisputed. After her father passed away at Aultman Hospital, Appellant Gene'a Griffith (hereinafter "Ms. Griffith") requested a copy of her father's medical record on four separate occasions, which Aultman admits it did not provide, even under its own definition of what a Medical Record consists of. (Supp., p. 116-117) (Supp., p. 15; Depo. Reagan-Nichols, Vol 1., p. 56).[1] Unconvinced that a complete medical record had been produced, Ms. Griffith filed a lawsuit to compel production of her father's medical record. After Ms. Griffith filed this lawsuit, Aultman produced additional pages of medical records, which included Mr. Griffith's cardiac monitoring strips that Aultman claimed were not "medical records" because they were stored in Aultman's Risk Management Department. An example of one of those records produced is below, which depicts Mr. Griffith's cardiac activity within an hour being found unresponsive. This is but one example of what Aultman argues is not a medical record, and therefore data that a patient is not entitled to without first filing a negligence action.



It was discovered that one of Mr. Griffith's physicians made the conscious decision to save Mr. Griffith's cardiac monitoring information, including the example above, soon after Mr.

[1] Aultman claims that Appellant's wordage implying that it intentionally "refused" to provide Mr. Griffith's complete medical record is not accurate because it hired a third party service to respond to medical records requests. However, Ms. Griffith's last attempt to obtain such records pre-suit included letters sent directly to Aultman's General Counsel, Risk Management Department, and Medical Records Department specific as to what records Ms. Griffith had not been provided.

Griffith was found nonresponsive. (Supp., p. 107). Further, one of Mr. Griffith's physicians, Dr. Sanofsky, reviewed such cardiac monitoring information in treating and diagnosing Mr. Griffith. (Supp., p. 114). Aultman's employees, including nurses, printed some of the cardiac monitoring information saved at the direction of Mr. Griffith's physician. (Supp., p. 101). That printed cardiac monitoring information was then taken to and stored in Aultman's Risk Management Department.

Aultman's Director of Medical Records testified that although she signed a certification for the medical records produced, she did not know whether or not Risk Management, or any other department, possessed any other medical records regarding Mr. Griffith. (Supp., 106; Depo. Reagan-Nichols, Vol. 2, p. 108-109). She continued that all of Mr. Griffith's cardiac monitoring information was saved, and therefore additional records other than those produced in discovery should exist. (Supp., p. 107, Depo. Reagan-Nichols, Vol. 2, p. 113). Accordingly, an issue of fact remained as to whether Risk Management or any other department at Aultman was still in possession of additional medical records regarding Mr. Griffith. The predicate legal issue which this Court must therefore determine is whether a medical record, such as the one shown above, that medical providers reviewed, and decided to save, print, and maintain, is a medical record as defined by R.C. §3701.74(C), even if that provider elects to physically store that record in the Risk Management Department.

Aultman and its Amici have instead decided to argue against a proposition of law that Ms. Griffith has not made. They propose that Ms. Griffith's proposition of law will require hospitals to "provide multiple boxes of redundant and irrelevant data" because "Hospitals and Physicians will have no choice but to make all data, no matter how redundant, available lest they face allegations of sanitizing." Amicus Brief for the Academy of Medicine of Cleveland and

Northern Ohio at 4, 6. In an attempt to strike fear, they argue that this will price patients out of being able to request their own medical records. Id. at 4.

To be clear, Ms. Griffith's proposition of law is significantly narrower. So much so that the great majority of the analysis of both Aultman and its Amici is not actually relevant to the legal inquiry. Ms. Griffith does not propose that R.C. 3701.74 requires Aultman and all other hospitals to eternally store thousands of pages of electronic data every day for every single patient. Ms. Griffith's proposition of law is that once a medical provider has reviewed and made the decision to save and/or print medical data, and further decides to store and maintain that medial data, a patient has a right to such medical information under R.C. 3701.74, regardless of where it is stored in the hospital.

III. <u>Aultman Mischaracterizes the Holding of the Fifth District Court of Appeals.</u>

Aultman attempts to write a revisionist history in stating that "[t]he appellate court did not hold that the question of what constitutes a medical record depends on where that record is physically located within the hospital." Merit Brief of Aultman Hospital at 8. Aultman casts this as a "mechanical and senseless test that considers only the physical location of the record. That is not the court's holding." Ms. Griffith agrees that defining a patient's right to her own medical record by the sign above the door in which it is stored is a mechanical and senseless test. Unfortunately, that analysis is undeniably engrained in the holding from which Ms. Griffith appeals. The Opinion of the Fifth District Court of Appeals speaks for itself, and states in relevant part that:

> Thus, 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**. Appellee certified that it had produced the medical records at issue in this case. On such basis, we find that the trial court did not err in granting summary judgment in favor of appellee. Opinion at ¶22 (emphasis added).

***

> While appellant also alleged that she was entitled to additional discovery to determine whether any department other than the medical records department, including Risk Management, had medical records regarding her father that were not produced, as is stated above, **such documents do not meet the definition of a medical record because they were not "maintained' by the medical records department**.

(Emphasis added.) Opinion at ¶ 30.

A. The Ohio Legislature did not give medical providers the unilateral right to self-determine what is and what is not a medical record.

Aultman fails to address Ms. Griffith's argument that the Opinion of the Fifth District cuts against the Ohio Legislature's choice to use broad and expansive language that did not limit where medical records must be stored to fall within the definition of a medical record in R.C. 3701.74. R.C. 3701.74(B) identifies that a patient has a right to a medical record "that is generated and maintained by a health care provider in the process of the patient's health care treatment." A "health care provider" can be an individual nurse or can be a hospital. R.C. 3701.74(A)(5); R.C. 3701.74(A)(4). Unlike the Arkansas Legislature that expressly limits the patient's right to records contained in the "medical records department," the Ohio Legislature provides absolutely no qualification or limitation. Ark. Code Ann. 16-46-402(1)(A). Aultman does not account for this dissonance and this Court should accordingly not restrict the meaning of R.C. 3701.74, when the Ohio Legislature gave no indication that it intends for the statute to be restricted accordingly.

Similarly, Aultman fails to address the legislative history in this case, which shows the Ohio Legislature's decision to modify the definition of a medical record so that it was defined by statute, rather than by each hospital's own individual bylaws. Compare HB 433 (App. p. 41) with HB 508 (App. p. 49-54). Aultman's Amici seem to argue a contrary interpretation of the

statute's legislative history – but in doing so, only bolster Ms. Griffith's argument. They argue that HB 508 expanded the definition of a medical record further to include electronic medical records and data. Brief of Amici Ohio Hospital Association, p. 4. We agree. There is no doubt that the Ohio Legislature expanded the definition of a medical record to include and in anticipation of the use of electronic medical records. There is also no dispute that hospitals, including Aultman, cannot eternally store all of that electronic data amounting to thousands of pages per day. Ms. Griffith does not argue, and never has argued, that patients are entitled to the endless supply of electronic data. Ms. Griffith argues instead that where Aultman employees, including physicians and other medical providers, review medical information and **make** the conscious choice to save and/or print such information, and such records are kept by the hospital, then a patient has a right to those records **regardless of where they are stored without filing a negligence lawsuit.**

B. In practice, Aultman does not distinguish between medical records requested pursuant to the broader statute 45 CFR 164.501 versus medical records requested pursuant to R.C. 3701.74.

Aultman agrees with Appellant that that "medical record" as defined by R.C. 3701.74(A)(8) is different than "designated record set" as defined by 45 CFR 164.501. In fact, designated record set is broader and includes additional information. However, Aultman's **Director of Medical Records**, testified that Aultman, in its practices, makes no distinction whether "medical record" as defined by R.C. 3701.74(A)(8) is requested or "designated record set" as defined by 45 CFR 164.501 is requested. In Aultman's discussion as to designated record set implying that the deposition questions were unfair, Aultman fails to tell the Court of the following testimony from its Director of Medical Records:

> Q. Does Aultman make any distinguish (sic) between a patient's medical record and a designated record set?

A. **Not that I'm aware of.**

Q. If a patient requests a certified copy of all of their medical records, is there any distinction or any records that are withheld as not being part of the designated record set?

A. **No.**

(Emphasis added). (Supp., p. 105; Depo. Reagan-Nichols, Vol. 2, p. 104)).

As such, in practice, Aultman makes no distinction between "medical record" as defined by R.C. 3701.74(A)(8) and "designated record set" as defined by 45 CFR 164.501. Thus, they should be viewed as one in the same, and, in theory, Aultman's record-keeping practices should meet both definitions.

C. If Appellant's Proposition of Law is sustained, such has no direct relevance to spoliation, fraud, or punitive damages claims. Instead, if the Fifth District's decision stands, it will have far reaching negative impact including patients' rights to be accurately and fully informed and necessitating the filing of unnecessary lawsuits.

Aultman and its Amici discuss concerns over spoliation, fraud, and punitive damage claims if Appellant's Proposition of Law is sustained. However, such claims are irrelevant to the issue before the Court. The only issue before the Court is whether a patient has a right to their medical record, regardless of where it is stored. A claim for spoliation has no relevance to such issue – but instead to whether a provider intentionally interferes with or destroys relevant information knowing that litigation exists or is probable. [2] *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037 (1993). Appellant is not claiming in the present case that additional medical records should exist – that but additional medical records exist that she has not been provided that she is entitled to. Likewise, Appellant is at a loss for how the compulsion of medical records is directly related to claims of fraud and punitive damages.

[2] Appellant included a claim for spoliation in her negligence / wrongful death action against Aultman because Aultman claimed that some relevant information was destroyed when Aultman knew or should have known that litigation was probable. Such claim has nothing to do with a patient's right to their medical records as they are **maintained** by the medical provider.

Instead, the issue is that once a medical provider has reviewed and made the decision to save and/or print medical data, and further decides to store and maintain that medical data, a patient has a right to such medical information under R.C. 3701.74, regardless of where it is stored in the hospital.

Aultman and its Amici fail to address Appellant's concerns of the ramifications of the Fifth District's holding. The Fifth District's holding violates the fundamental right of patients to be fully informed regarding the patients' medical treatment and medical history, an inherent right that not only promotes important societal interests, but that is further recognized by federal and state statutes. Further, the Fifth District's holding encourages the filing of unnecessary lawsuits for patients to receive complete and accurate information regarding their medical treatment and medical history. Such precedent, if it stands, has far-reaching consequences that damage society's interests in promoting patients' rights to be accurately and fully informed of their medical condition and medical treatment history.

IV. Aultman's Second Proposition of Law is Merely a Reply in Support of its Motion to Dismiss and Should be Disregarded as it Does Not Relate in Any Way to the Holding by the Fifth District Court of Appeals.

Aultman spends only eight (8) pages of its Argument section on the actual legal issue at hand. The remainder of Aultman's Argument contained in its Second Proposition of Law is simply a backdoor attempt at a Reply Brief in support of its Motion to Dismiss. Furthermore, Aultman's Amici only bolster and highlight Appellant's position that Aultman's Motion to Dismiss should be denied because this issue is a matter of public or great general interest. Despite disagreeing as to the substantive issues, both Appellant's Amici, including the non-partisan AARP, and Appellee's Amici all agree that this issue is one that was important enough for the broad spectrum of twelve (12) Amici to provide their perspective to this Court.

A. The Issues Raised in This Appeal Are Justiciable Because Appellant Has Not Received A Complete Copy of the Medical Record.

As outlined in her Opposition to Appellee's Motion to Dismiss, referenced and incorporated herein, Appellees' claims before this court are still justiciable because Appellee has yet to receive a complete copy of her father's medical record as is her right pursuant to R.C. 3701.74. Aultman incorrectly assumes that there are no other reasons that would "concern any controversy that would support this litigation" other than an underlying medical malpractice action. (Merit Brief at 12). However, R.C. 3701.74 does not require any reason for a patient to receive their records, let alone require that a medical malpractice action also be pending. Instead, the statute broadly allows any patient or patient's representative who merely "wishes to examine or obtain a copy of part or all of a medical record," the right to do so. R.C. 3701.74(B). Appellant, acting as representative for her deceased father, wished to obtain the medical record when she filed this action in the first instance, and as this appeal is still pending today, she still wishes to obtain that complete medical record. Her desire to receive her father's complete medical record and her right to receive her father's complete medical record under R.C. 3701.74 remains unchanged regardless of the settlement of the medical negligence case. As even Aultman states, the purpose of an Appeal is to "correct errors injuriously affecting the appellant." (Merit Brief at 12). In this case, Appellant has asserted a statutory right to examine and obtain medical records and has not received those medical records. Therefore, Appellant is entitled to relief.

B. A Court Has Jurisdiction To Review Appeals That are Otherwise Moot Where The Issues Raised in the Appeal Involves a Matter of Public or Great General Interest.

Aultman argues that "[t]he Court has no authority to decide questions in the absence of a real controversy affecting the parties." (Merit Brief at 13). It is well settled in Ohio that "if a

case involves a matter of public or great general interest, the court is vested with the jurisdiction to hear the appeal, even though the case is moot." *In re Suspension of Huffer from Circleville High School*, 47 Ohio St.3d 12, 14, 546 N.E.2d 1308 (1989). While Appellant does not concede that these issues are moot, the issue remains a matter of public or great general interest, which is why this Court accepted jurisdiction, and why twelve (12) organizations have filed amicus briefs on this important issue. Even aside from the argument that this issue is not moot to Appellant, and is still not moot because it is a matter of public or great general interest, Appellant provided other valid reasons as to why this Court should not dismiss this appeal. *See also Drydock Coal Co., Inc. v. Ohio Div. of Reclamation*, 115 Ohio App.3d 563, 566, 685 N.E.2d 863 (4th Dist. 1996) ("[I]f an issue is capable of repetition yet evades review or **involves a matter of great public or great general interest, the court is vested with jurisdiction to hear the appeal even though the issue raised in the appeal is moot**") (Emphasis added); *Village of West Unity ex rel. Beltz v. Merillat*, 6th Dist. No. WM-03-016, 2004-Ohio-2682, ¶ 15 ("[C]ourts do have the jurisdiction to address issues in those cases where the issue or issues is 'capable of repetition, yet evading review' or if it involves a matter of public or great general interest"); *Deluca v. Aurora*, 144 Ohio App.3d 501, 508, 760 N.E.2d 880 (11th Dist. 2001) ("**A court is also vested with jurisdiction to address moot issues when those issues concern an important public right or a matter of great public or general interest**") (Emphasis added). Furthermore, "where others who are similarly situated would benefit from the resolution of an appeal, it would not be dismissed as moot." *Coshocton Metropolitan Housing Authority v. Dockery*, 5th Dist. No. 99CA24, 2000 WL 968691, *1 (July 5, 2000).

Aultman attempts to distinguish *Danis*, by arguing the court found the issues were not moot because there was a real, justiciable controversy in existence between the parties. (Merit

Brief at 13). What Aultman omits from its argument, however, is that the court's finding of a controversy was only one of many reasons the court concluded the issues were not moot. *Danis Clarkco Landfill Co. v. Clark Cty. Sold Waste Mgt. Dist.*, 73 Ohio St.3d 590, 598, 1995-Ohio-301, 653 N.E.2d 646, 653 (1995). Another reason the appeal was not moot was because "even where appeals to this court might be deemed technically moot, this court may nevertheless hear them where, as here, the appeal contains issues of great public or general interest." *Id*.

Appellee also attempts to distinguish *Franchise Developers* from the case at hand by stating that *Franchise Developers* involved a constitutional question. (Merit Brief p. 13). While true, Appellee again conveniently omits the relevant part of the court's analysis on the topic of mootness. The court held that while it is true that the case is moot, the court nonetheless "may hear the appeal where there remains a debatable constitutional question to resolve, **or where the matter appealed is one of great public or general interest.**" (Emphasis added). *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 29, 505 N.E.2d (1987). The court ultimately held that it "believe[s] that the cause *sub judice* involves matters of great public interest, thereby vesting this court with jurisdiction to entertain this appeal, even though the controversy is moot with respect to the plaintiffs." *Id*. at 31. This Court already retained jurisdiction of this case because it was one of great public or general interest, and retains jurisdiction to hear it because of the existing controversy between the parties, and also because it continues to be one of great public or general interest for others

C. This Appeal Involves Matters of Public or Great General Interest.

Appellant, in her Memorandum in Support of Jurisdiction and also in her Opposition to Appellee's Motion to Dismiss, has explained in detail how the issues in this appeal are of public and great general interest and discussed at length how this appeal will affect similarly situated

individuals – namely, any other patient or patient's representative who asserts their statutory right to retrieve their medical records. The public and great general interest could not be more apparent from the number of amici curiae that have filed briefs with this Court in support of both Appellant and Aultman. The support for the arguments coming from both sides of this issue show how important it is for this Court to review this Appeal as there are a number of patients, patients representatives, hospitals, doctors, and the future of hospital operation and protocol that will be affected. Therefore, not only does Appellant have a personal stake in this Appeal in the form of her right to obtain the requested medical records, but any decision on the issues in this case have the potential to affect numerous other Ohioans in a number of ways.

D. Res judicata does not apply as there are two different issues involved in the two different lawsuits.

Aultman also argues that because the wrongful death case was dismissed, this appeal is now barred by res judicata. While Aultman does identify that res judicata only applies where a subsequent lawsuit is filed that arises from the same transaction or occurrence as a previous lawsuit, it incorrectly identifies the common nucleus of operative facts for each lawsuit here. The facts giving rise to this case involved Aultman's decision to save electronic medical records, print those records, store them in Risk Management, and then not provide them in response to any of four (4) public records requests. The operative facts that gave rise to the wrongful death case involved the fact that Mr. Griffith passed away after Aultman employees failed to attend to Mr. Griffith for over forty (40) minutes while his alarms were sounding and he struggled to get the attention of nurses at the station just a few steps outside of his room. Furthermore, if Aultman found the cases to be so closely related, then it would have made this argument in the Wrongful Death Case after the trial court granted summary judgment in the case at issue here.

Appellee failed to make that argument at that time, thus showing how even it did not view the converse situation to be barred by res judicata.

V. Conclusion

Patients should have a right to access all medical information that satisfies R.C. 3701.74(A)(8) and 45 C.F.R 164.501 - not merely medical information that the health care provider unilaterally and self-servingly decides to send to the medical records department - all the while maintaining the records in another department. The Fifth District's decision ignores the plain language of the statute, cuts directly against its legislative history and intent, and authorizes medical providers to fillet the statute that was designed to provide an important right to patients. With an incomplete medical record, patients have even more difficult, if not impossible, hurdles to overcome in order to determine the truth regarding their medical diagnosis, prognosis, care and treatment. As such, Appellant Gene'a Griffith requests this Honorable Court reverse the Fifth District Court of Appeals.

DATED: March 9, 2015

Respectfully submitted,

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