

IN THE SUPREME COURT OF OHIO

Beverly Clayton, C.N.P., R.N.,	:	Case No. 2014-1092
	:	
Appellant,	:	On Appeal from the Franklin County
	:	Court of Appeals,
v.	:	Tenth Appellate District
	:	
Ohio Board of Nursing	:	Court of Appeals
	:	Case No. 13-AP-726
Appellee.	:	

REPLY BRIEF OF APPELLANT

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I. This appeal does not present a global challenge to the existence of the statutory pre-hearing discovery preclusion in administrative hearings.

Our Proposition of Law accepted for merits review by this Supreme Court makes it clear that the subpoena quashed by the Hearing Examiner was a “hearing subpoena”, not a “pre-hearing discovery” subpoena. (Respondent’s Request for Issuance of Subpoena, Appx. at 88, Exh. G and at Appx. at 94-95, request No. 13, Appx. at 96, *duces tecum* for medical records of “patients in the ICU of Mercy Health who were in-patients in the ICU at any time during the shift of Beverly Clayton, RN, CNP on August 27 and August 28, 2009”; Also see Respondent’s Opposition to OBN’s Motion to Limit [Respondent’s] Subpoena Request, Exh. H, Appx. at 100 and at 106-109, specifically opposing the OBN’s Motion to Quash the Subpoena Duces Tecum for production *at the hearing* pursuant to §§119.09 and explicitly stating therein that the issue involving the subpoena “does not involve pre-hearing ‘discovery’” but rather for production of records “at the adjudication hearing itself” (Appx. at 106); See also the pre-hearing reports of Appellant’s expert, ICU Nurse Terry Gallagher, RN, BSN, who explains the obvious relevance and need for the requested ICU patient records for Appellant’s shift in question (Gallagher Report of October 21, 2011, Exh. A, Appx. at 119-122, #10, at Appx. at 121; and Gallagher Report, Exhibit J, Appx. at 143-146; T. 559-562))

Substantial parts of Appellees’ Brief regarding pre-hearing discovery are completely irrelevant to the issue in this appeal. ¹ We are not requesting in this appeal that this Supreme Court overturn the entire pre-hearing discovery preclusion in the statutory scheme for all

¹ This is not to concede that the preclusion of all pre-hearing discovery is constitutional on its face. It is simply not the issue presented in this appeal. Moreover, we urge that some applications in specific instances of the pre-hearing discovery preclusion may well violate Due Process of Law. The circumstances of this case at bar do raise those concerns.

administrative evidentiary/adjudication hearings in the State of Ohio. Appellee has, in this respect, mischaracterized and overstated the issue raised in this appeal.

II. The statutory duty of the Board pursuant to O.R.C. §119.09 to issue hearing subpoenas requested by Appellant is expressed in mandatory terms.

The language in O.R.C. §119.09 that upon request of a party the agency “**SHALL** issue a subpoena” is clear and unambiguous on its face.

This mandatory language can be made to look ridiculous by hypothesizing some kind of *ultra vires* subpoena *duces tecum* which requests production of patently inappropriate documents. Our subpoena *duces tecum* in this case requests production of records highly relevant to the issues in the evidentiary hearing involving a clear and accurate understanding of the actual circumstances in the ICU during Appellant’s night shift. The subpoena *duces tecum* specifically requested the records for one single night shift for perhaps 8-9 patients. That is not overreaching, vague, overly broad or excessively burdensome or voluminous. As will be discussed hereafter, the quashing of that subpoena *duces tecum* by the Hearing Examiner was also highly prejudicial to Appellant’s defense --- both on issues of exoneration and certainly with respect to mitigation.

However, at this point in our Reply Brief, we will concentrate on the obfuscating argument advanced by Appellee that quashing a proper and legitimate *hearing* subpoena *duces tecum* is not a tool for exercising discretion on the admission or exclusion of *proffered documentary evidence already in the possession of the parties*. Our point is that the issue of the chaotic circumstances in the ICU during the shift in question was an issue considered by the Hearing Examiner as *relevant* to the issue of mitigation by the Hearing Examiner (to which he gave little or no weight). The Hearing Examiner concluded, *without the relevant subpoenaed patient records*, that:

I find that the nature of providing registered nursing care in an ICU setting may at times be chaotic; *however, none of these factors alleged by Respondent was necessarily unusual for an ICU setting.* (Emphasis added)(H.E. Rpt. & Rec., Appx. at 45, par. 18, Findings of Fact)

Given the Hearing Examiner's expressed view that the "chaotic" circumstances in the ICU was *relevant*, why aren't a handful of a few patient records recorded during the shift indispensable to understanding that *relevant* issue? This *a priori* exclusion of documents is patently prejudicial. This evidence is not cumulative of any other evidence on this subject. It is the only and unquestionably most reliable evidence on this subject. The *admissibility* in evidence during the hearing of the documents previously produced by subpoena *duces tecum* is a completely separate issue from the *permissibility* of a subpoena *duces tecum* to produce those documents in the first instance. Given that the issuance of Appellant's subpoena *duces tecum* is statutorily expressed as mandatory (O.R.C. §119.09), it is very dangerous to quash such a subpoena *duces tecum* on relevancy or admissibility grounds when such quashing prevents the review of those documents for determination of relevance or admissibility in the hearing.

Finally, even if we assume, *arguendo*, that the Hearing Examiner had discretion to decide whether or not to quash Appellant's subpoena *duces tecum* at issue, despite the mandatory language of O.R.C. §119.09, we submit that the granting of such a Motion to Quash this particular subpoena *duces tecum* was an abuse of discretion fatally prejudicial to Appellant's defense.

III. Neither the physician-patient privilege nor privacy considerations preclude the production of the medical records, pursuant to subpoena *duces tecum* of the several patients in the ICU during the shift in question where the identities of the patients are redacted and the medical records are sealed.

In *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, this Court affirmed the refusal of the trial court in a private lawsuit brought by the parents

of their 14-year old daughter against Planned Parenthood for performing an abortion on their daughter without prior notification to and consent from the parents, as well as for breach of the duty to report suspected child abuse. In discovery, the parents sought abuse reports and medical records of other nonparty minors who were patients of Planned Parenthood. There were several separate concurring and dissenting opinions, in whole and in part. The essence of the holding appears to be that in the absence of a statutory or other exception to the physician-patient privilege, *in a private civil lawsuit for damages*, abuse reports and medical reports of nonparty minors are not discoverable because they are protected by the physician-patient privilege. The majority in *Roe, supra*, appeared to distinguish between privileged documents and redactions and sealing to protect confidentiality and privacy, asserting that the privileged status of a document is not maintained by redactions and sealing. While recognizing the validity of legislated exceptions to the statutory privileges, the majority seems to reject the weighing of competing policies between privileged non-disclosure and compelling policies favoring disclosure, as earlier enunciated by this Court in *Biddle v. Warren General Hospital*, 86 Ohio St. 3d 395, 1999-Ohio-115. (But see the disagreement regarding *Biddle* of Justice Pfeifer and the dissenting opinions of Justice O'Donnell and Judge Donovan, (sitting for Justice O'Conner)).

Moreover, the majority seems to base its holding in *Roe*, at least in part, on the apparent irrelevancy of the abuse reports and medical records of other nonparty minors, in light of the Court's holding that punitive damages were not available for the cause of action asserted by the Plaintiffs-parents.

We submit that *Roe, supra*, has no application to the issues in this instant appeal brought by Appellant. First, this is not a private lawsuit for damages. It is a statutory administrative hearing. The parties are the Ohio Board of Nursing and the Respondent Nurse, Appellant herein.

The issue is not damages as compensation for an injury or loss, but rather a nursing license proceeding to determine violations of the Nursing Practice Act and, in the event of a violation(s), the disciplinary sanctions to be imposed. A license proceeding is akin to a quasi-criminal proceeding. *The very essence of a proceeding involving a nursing or physician license contemplates disclosure of otherwise privileged and confidential medical records.* Pursuant to O.R.C. §4723.29, the Board has pre-hearing investigative powers to subpoena witnesses for testimony under oath as well as to require the production of documents. Regarding otherwise privileged and confidential medical records, the statute provides:

A subpoena for patient record information shall be issued only upon approval of the executive director of the board and the president or another member of the board designated by the president in consultation with the office of the attorney general. Before issuance of any such subpoena, the executive director and the office of the attorney general shall determine whether there is probable cause to believe that the complaint filed alleges a violation of this chapter or any rule of the board, that the records sought are relevant to the alleged violation and material to the investigation, and that the records cover a reasonable period of time surrounding the alleged violation.

These medical records, to the extent they are to be utilized by the Board in an evidentiary hearing, must be provided according to the statute in advance of the hearing to the Respondent or her counsel. O.R.C. §119.09 authorizes (indeed mandates) the Board *to exercise the Board's subpoena authority* to issue attendance and *duces tecum* subpoenas upon the request of the Respondent Nurse. In effect, the Legislature has accorded to the Respondent (and to the Board as well) the use of the Board's statutory authority to compel persons to attend and testify and to require production of "ANY books, records or papers" *at the time of the hearing.* (emphasis added)

It would be absurd to interpret the statutory scheme permitting the Board to compel production of otherwise privileged or confidential relevant medical records of patients, but to

prohibit such production on the part of the Respondent. In this case, the Legislature has carved out a specific exception to the physician-patient privilege and to confidentiality which clearly applies to hearing subpoenas requested by the Board or the Respondent nurse.

In fact, Court decisions have made this clear. In *State Medical Board of Ohio v. Miller*, 44 Ohio St. 3d 136, 1989 Ohio LEXIS 173, this Court held:

This case presents the question of how a statute, designed to permit investigation of the suspected wrongdoing of physicians, is impacted by the physician-patient privilege. Because the statute in question contains safeguards designed to protect patient confidentiality, which is the same purpose served by the physician-patient privilege, we find that the physician-patient privilege does not preclude turning patient records over to the State Medical Board pursuant to R.C. 4731.22(C)(1). (at 138)

The operation of the statutory process is plainly identified in *Froug v. The Ohio Board of Nursing*, 2001 WL 82926, 2001 Ohio App. LEXIS 305 (10th Dist., Feb. 1, 2001). The Board produced in advance of the evidentiary hearing portions of the medical records for 5 patients. The Board issued hearing subpoenas pursuant to O.R.C. §119.09 for production of the *complete* medical records of these same 5 patients and proffered them into the record during the hearing. Is the Appellee Board in our case at bar in this within appeal arguing that even with hearing (i.e. *non-investigatory*) subpoenas only the Board can subpoena production of otherwise relevant privileged medical records of nonparties pursuant to O.R.C §119.09, but the Respondent cannot?

As Appellee concedes in its Brief, a number of courts have interpreted O.R.C. §119.09 to be a mandatory, *non-discretionary* obligation of the Board to issue subpoenas *upon request* of any party to the proceeding: *Walters v. Ohio State Dept. of Adm. Servs.*, 2006-Ohio-6739, 2006 Ohio App. LEXIS 6642 (10th Dist., Dec. 19, 2006); *Carratola v. Ohio State Dental Bd.*, 1998

WL 225033, 1998 Ohio App. LEXIS 2020 (9th Dist., May 6, 1998); *Ohio State Bd. of Pharmacy v. Poppe*, 48 Ohio App. 3d 222 (12th Dist., 1998). (See Appellee's Brief at p. 26)

Even the authorities cited by Appellant in support of discretion to quash hearing subpoenas are distinguishable on their facts from the obvious relevance of the subpoena at issue in this appeal. See for example *Zak v. Ohio State Dental Bd.*, 2004 Ohio 2981, 20014 Ohio App. LEXIS 2611 (8th Dist., June 10, 2004) (subpoenas disallowed which were served upon 3 Board Members).

In summary, it is apparent that the physician-patient privilege is not a bar at an evidentiary hearing in an administrative proceeding to subpoenaed productions by a party of medical information of nonparties such as patients (under proper confidentiality protections). As a matter of common practice, this is routinely done, particularly when medical issues are involved in licensing cases involving the licenses of physicians, nurses and other medical professionals.

IV. The exclusion of the medical records of the several patients in the ICU during Appellant's night shift on August 27-28, 2009 was prejudicial to Appellant's defenses of exoneration and mitigation.

There was some evidence produced of understaffing, inexperienced and incompetent nurse assignments, excess patient overflow and the complete absence of a separate Unit Secretary and a separate Charge Nurse in the ICU during Appellant's shift in question. These circumstances would partially explain the unreasonable expectations imposed upon Appellant. Appellant's highly qualified ICU expert testified to these factors in explaining why he believed Appellant was set up for error and asked to do the impossible. But as an expert witness for Appellant, Nurse Terry Gallagher repeatedly stated in testimony (and in his pre-hearing report) that to present a full and accurate picture of the chaotic conditions impinging upon Appellant

during that shift, it was indispensable for him to review the medical records of the several other patients contemporaneously recording their medical needs, acuities and care requirements during the shift. Without this critical knowledge recorded contemporaneously in the medical records, it was impossible for him to render more than a surface opinion on the issues of exoneration or mitigation. The Hearing Examiner and our expert (*as well as Appellee's two experts*) could not be asked highly relevant questions related to a central and critical part of Appellant's defenses. It is simply not enough to focus narrowly on whether or not Appellant made avoidable errors with respect to her direct care responsibilities for Patient 1 and then call it a day, imposing sanctions based only upon surface, superficial observations of the circumstances in the ICU that night. *Appellant was required to serve in a triple role: Direct Care Nurse for two patients, Charge Nurse for all patients and other inexperienced staff nurses and as a Unit Secretary*, plus overcrowding and inadequate nurse-patient ratios. The few patient records which we requested would provide the full picture, in technicolor, of specifically what Appellant had to do in the ICU that night, in addition to the direct care of Patient 1. *None of the three experts who testified had any clear or concrete idea about this indispensable issue which was central to our defense.* (Appellant's Expert Gallagher, Pre-Hearing Preliminary Report, Appx. at 119-122, specifically #10, Appx. at 121, T. 559-562, 571-572 and 584; Appellee's Expert Keegan, (who testified that she had *no knowledge or idea of how overwhelming it was for Appellant*, T. 360)).

In *Natoli v. The Ohio State Dental Bd.*, 177 Ohio App. 3d 645 (10th Dist., 2008), the Board's sanction of suspension was reversed: "In excluding Dr. Kramer's testimony, the hearing examiner divested Dr. Natoli of the opportunity to be heard in a meaningful manner." (at P 25) The words of the *Natoli* decision apply literally to this case: *In excluding the subpoenaed patient records, Appellant Beverly Clayton was prejudicially deprived "of the opportunity to be*

heard in a meaningful manner". The *Natoli* Court required at least a reconsideration of the sanctions imposed after inclusion and consideration of the improperly excluded evidence.

Appellant is just now finishing up her Board-mandated "Refresher Course", a pre-condition for her Application for Reinstatement of her license. Her license was suspended per the Board's Adjudication Order on September 21, 2012. (Adjudication Order, Exh. E, Appx. at 79; see date of issuance, Appx. at 84).

No Adjudication Order in which the wrongful exclusion of material, noncumulative, reliable, relevant evidence in the hearing, properly subpoenaed pursuant to statutory mandate, should be allowed to stand. At stake for Appellant is her license to continue practicing nursing, her lifetime career, her source of income, her self-respect, and her future employability, reputation and economic survival.

CONCLUSION

For all the reasons set forth herein and in Appellant's Brief, earlier filed, the Judgment of the Court of Appeals should be reversed and the Administrative Adjudication Order should be vacated.

RESPECTFULLY SUBMITTED,



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The undersigned counsel hereby certifies that a true and accurate copy of the foregoing Reply Brief of Appellant was served upon the following by Priority Mail with Tracking on March 27, 2015:

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**APPENDIX
TO
REPLY BRIEF OF
APPELLANT**

§ 119.09. Adjudication hearing

As used in this section "stenographic record" means a record provided by stenographic means or by the use of audio electronic recording devices, as the agency determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The sheriff shall be paid the same fees for services as are allowed in the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which the witness may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oaths or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct the hearing. The referee or examiner shall have the same powers and authority in conducting the hearing as is granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth the referee's or examiner's findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or the party's attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

History:

GC § 154-70; 120 v 358; 121 v 578; Bureau of Code Revision, 10-1-53; 138 v H 102 (Eff 5-29-79); 144 v H 298. Eff 7-26-91; 152 v H 525, § 1, eff. 7-1-09.

ORC Ann. 4723.29 (2014)

§ 4723.29. Subpoena of witnesses or records

In addition to the powers conferred upon the board of nursing by Chapter 119. of the Revised Code, the board may subpoena witnesses and require their attendance, require the testimony of witnesses and require the production by witnesses of books, papers, public records, and other documentary evidence, and examine them as it may require in relation to any matter which it has authority to investigate, inquire into, or hear.

A subpoena for patient record information shall be issued only upon approval of the executive director of the board, and the president or another member of the board designated by the president, in consultation with the office of the attorney general. Before issuance of any such subpoena, the executive director and the office of the attorney general shall determine whether there is probable cause to believe that the complaint filed alleges a violation of this chapter or any rule of the board, that the records sought are relevant to the alleged violation and material to the investigation, and that the records cover a reasonable period of time surrounding the alleged violation.

Upon failure to comply with any subpoena issued by the board and after reasonable notice to the person being subpoenaed, the board may move for an order compelling the production of persons or records pursuant to Ohio rules of civil procedure.

Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board, shall receive the fees and mileage provided for under section 119.094 of the Revised Code.

History:

126 v 122 (Eff 1-1-56); 130 v PtII, 233 (Eff 12-16-64); 141 v H 201 (Eff 7-1-85); 142 v H 529. Eff 6-14-88; 152 v H 525, § 1, eff. 7-1-09.