

[Cite as *Hawes v. Golden*, 2004-Ohio-4957.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

JUDY HAWES, EXECUTRIX

C.A. No.     03CA008398

Appellant

v.

JAMES R. GOLDEN, et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.    02CV133202

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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CARR, Presiding Judge.

{¶1} Appellant, Judy Hawes, appeals from the decision of the Lorain County Common Pleas Court which ordered her to disclose privileged medical information of her husband, the decedent, to appellees arising out of a fatal traffic accident in which the decedent struck the rear-end of appellee James R. Golden's tractor-trailer. This Court affirms.

I.

{¶2} This action arises out of a fatal automobile accident occurring on November 7, 2001. The decedent was driving on State Route 10 and struck the rear end of appellee's tractor-trailer which was apparently stopped in the right-

hand lane of travel. Appellant, as representative of her husband's estate, filed a wrongful death action against the appellees in Lorain County Common Pleas Court.

{¶3} During the course of discovery, appellees filed interrogatories which requested information regarding all chronic health conditions of which the decedent suffered. Appellant objected to this interrogatory on the grounds that the information sought was not relevant or reasonably calculated to lead to the discovery of relevant information. Appellant then admitted that the decedent suffered from an eye condition known as macular degeneration and was examined and/or treated for this condition by three different physicians. Appellees then attempted to obtain medical releases from appellant for the records of these medical providers. Appellant refused to execute any medical authorizations.<sup>1</sup> Appellees then subpoenaed these records directly from the providers. Two of the providers complied with the subpoena and one objected to providing the records on the grounds of federal privacy protections under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).

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<sup>1</sup> Apparently, appellees attempted to obtain releases from appellant twice – once with a general medical authorization form and once with a HIPAA-compliant medical authorization. Appellant refused to execute either.

{¶4} On July 17, 2003, appellees filed a motion to compel discovery of the medical records and a notice of filing records under protective seal and appellant filed a motion for a protective order. The trial court conducted a hearing on October 20, 2003, and held that the medical records of the decedent are relevant, but not directly discoverable from the health care providers under HIPAA regulations<sup>2</sup>. The court found that appellant waived her patient/physician privilege under R.C. 2317.02(B)(1) and could be compelled to produce these records. It then ordered her to produce all medical records or execute a HIPAA authorization/release in order for appellees to obtain these records.

{¶5} Appellant continued to refuse to execute such medical authorizations and filed a motion to reconsider and vacate order. The trial court denied the motion and appellant filed this appeal.

## II.

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED IN HOLDING THAT, PURSUANT TO R.C. SECTION 2317.02(B)(1), APPELLANT WAIVED THE PRIVILEGE ACCORDED HER DECEDENT’S MEDICAL FILES UNDER THE FEDERAL HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (‘HIPAA’), SINCE (1) HIPAA PREEMPTS STATE LAW, (2) R.C. SECTION 2317.02(B)(1) DOES NOT PURPORT TO EFFECTUATE A WAIVER OF FEDERALLY CREATED PRIVILEGES AND (3) IF IT DID,

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<sup>2</sup> The trial court also ordered that appellee return all medical information obtained pursuant to the subpoenas to the court.

SECTION 2317.(B)(1) WOULD VIOLATE THE SUPREMACY  
CLAUSE OF THE UNITED STATES CONSTITUTION.”

{¶6} Appellant claims that R.C. Section 2317.02(B)(a)(iii) which waives the physician-patient privilege upon filing a wrongful death action is preempted by HIPAA and its newly-enacted privacy rules which grant nationwide protection of certain medical information. HIPAA provides guidelines under which a medical provider, referred to as a ‘covered entity,’ may disclose an individual’s medical information

{¶7} Interpretations of state or federal law are questions of law which are reviewed by this Court de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108. In this case, the Court finds that HIPAA does not preempt state law regarding discovery of medical evidence in legal proceedings deemed relevant under state law.

{¶8} Under HIPAA, a medical provider/covered entity is permitted to disclose medical evidence required by law under 45 C.F.R. 164.512. 45 C.F.R. 164.512 (a)(1) and (2) state:

“(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

“(2) A covered entity must meet the requirements described in paragraph \*\*\* (e) \*\*\* of this section for uses or disclosures required by law.”

{¶9} Under 45 C.F.R.164.512(e) a covered entity may disclose medical evidence for judicial and administrative proceedings in two circumstances:

“(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

“(i) In response to an *order of the court* or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

“(ii) In response to a *subpoena, discovery request*, or other lawful process, that is not accompanied by an order of a court or administrative tribunal[.]” (Emphasis added.).

{¶10} Either of these provisions apply to permit the medical providers/covered entities to disclose the decedent’s medical evidence in this case.

{¶11} It is true that HIPAA does preempt state law in certain areas. See 42 U.S.C. 1320d-7: “[A] provision or requirement under this part, or a standard or implementation specification adopted or established under sections [42 U.S.C. 1320d-1 through 1320-d3] of this title, shall supersede any contrary provision of State law[.]”

{¶12} Whether R.C. Section 2317.02(B)(a)(iii) is preempted by HIPAA depends on whether it is ‘contrary’ to federal law. ‘Contrary’ is defined in 45 C.F.R. 160.202(1) as the impossibility of complying with both state and federal requirements. In this case, it is not impossible for the medical provider/covered entity to comply with both federal and state law. Under state law, the patient/physician privilege is waived upon filing a wrongful death action such that

medical evidence is discoverable from a medical provider/covered entity. R.C. Section 2317.02(B)(a)(iii). And, as discussed above, HIPAA likewise permits disclosure of medical evidence either pursuant to a court order, discovery request or subpoena. Consequently, there is no conflict

{¶13} Appellant claims that HIPAA does not contain any provisions comparable to Section 2317.02(B)(1)(a)(iii) regarding waiver of her decedent’s privacy rights. She claims that disclosure of the decedent’s medical records is governed solely by 45 C.F.R. 164.512(g) and (h). She does not, however, cite 45 C.F.R.164.512(e), regarding judicial and administrative proceedings, discussed above, which clearly apply to this case. These provisions specifically authorize release of medical records pursuant to a court order, subpoena, or discovery request. This Court finds that these provisions permit discovery of medical evidence relevant to wrongful death cases. They are not superseded or preempted by HIPAA.

{¶14} Appellant’s first assignment of error is overruled.

#### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING DISCLOSURE OF REV. HAWES MEDICAL FILE WITHOUT CONDUCTING AN IN CAMERA REVIEW.”

{¶15} Appellant argues in her second assignment of error that the trial court abused its discretion in ordering ‘wholesale disclosure’ of Rev. Hawke’s medical files without conducting an in camera review. Appellees argue that at the

hearing the parties stipulated that only medical records of the decedent which related to his vision were relevant and that only these records are sought by appellees.

{¶16} Discovery matters are reviewed by this Court under an abuse of discretion standard. Abuse of discretion means more than an error of law or judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, (1983), 5 Ohio St.3d 217, 219.

{¶17} In this case, this Court finds that the trial court did not abuse its discretion in resolving the discovery dispute. The trial court properly found that appellant had waived the patient/physician privilege by bringing a wrongful death action and appropriately narrowed the scope of discovery to issues involving the decedent's vision.

{¶18} Furthermore, the trial court acted appropriately in ordering all improperly obtained medical information be deemed not usable. Last, this Court finds that the trial court was not obligated to conduct an in camera review of the medical records, particularly in view of its finding that appellant had waived the decedent's patient/physician privilege by filing suit and the parties' stipulation that the only medical records discoverable were related to decedent's vision.

{¶19} Accordingly, this Court finds that the trial court did not abuse its discretion in its resolution of the discovery matter. Appellant’s second assignment of error is without merit.

### **ASSIGNMENT OF ERROR III**

“THE TRIAL COURT ERRED IN COMPELLING DISCLOSURE OF APPELLANT’S DECEDENT’S MEDICAL RECORDS WHERE (1) R.C. SECTION 2317.02(A)(1)’S WAIVER IS LIMITED TO INFORMATION THAT IS ‘RELEVANT TO [THE] ISSUES,’ (2) THE AVOWED NEED FOR REV. HAWES’ MEDICAL FILES IS TO ENABLE APPELLEES TO EXPLORE A CONTRIBUTORY NEGLIGENCE DEFENSE, AND (3) CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE IN THIS CASE.”

{¶20} Appellant argues that the medical information at issue here is not relevant because it relates to a possible defense of contributory or comparative negligence which cannot be asserted when the appellee is guilty of willful, wanton or reckless misconduct. This Court reviews discovery issues under an abuse of discretion standard, *Blakemore*, 5 Ohio St. 3d at 219.

{¶21} This Court finds that the issues of the relevance and validity of these defenses are not matters appropriately determined during the discovery stage. Discovery under Ohio law is deliberately broad in order to determine all facts and issues before trial. Civ. R. 26(A). It is not a good use of scarce judicial resources to bifurcate a trial. If a determination on the merits of such defense must be made, a more proper forum is at trial where the court will have before it all evidence



relevant to the case. The trial court did not abuse its discretion in compelling disclosure of the decedent's medical records.

{¶22} Appellant's third assignment of error is overruled.

### III.

{¶23} Appellant's three assignments of error are overruled. The judgment of the Lorain County Common Pleas Court is affirmed. This Court remands this case for further proceedings before the trial court.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Exceptions.

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DONNA J. CARR  
FOR THE COURT

SLABY, J.  
BATCHELDER, J.  
CONCUR

APPEARANCES:

ORVILLE E. STIFEL, II, Attorney at Law, 5725 Franklin Blvd, P.O. Box 602780, Cleveland, OH 44102, for appellant.

JAMES P. SAMMON, Attorney at Law, 237 West Washington Row, 2<sup>nd</sup> Floor, Sandusky, OH 44870, for appellees James R. Golden, Baker Hi-Way Express, Inc., T.A.B. Leasing, Inc., and Parkway Leasing, Inc.