No. 2009-1998

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 24567

DONALD WARD, et al.,

Plaintiffs-Appellees,

v.

SUMMA HEALTH SYSTEM, et al.,

Defendants-Appellants.

MERIT BRIEF OF NON-PARTY-APPELLANT ROBERT DEBSKI, M.D.

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I. STATEMENT OF THE CASE AND FACTS

On October 10, 2007, Plaintiffs-Appellees ("Plaintiffs"), David and Susan Ward, refiled this medical malpractice action against Summa Health System ("Summa").[1] Non-party Appellant Robert F. Debski, M.D. ("Dr. Debski") was not named as a defendant in this case even though Plaintiffs were aware that he was the surgeon who performed the surgery at issue in their Complaint. There are **no** allegations that Dr. Debski negligently performed Mr. Ward's heart valve replacement surgery on May 26, 2006 which was performed at Summa. (*See* Plaintiffs' Complaint.)

Plaintiffs alleged in their Complaint that Mr. Ward was negligently exposed to the Hepatitis B virus during his heart valve replacement surgery. (Plaintiffs' Complaint.) During the course of discovery between Plaintiffs and Summa, Plaintiffs sought information from Summa that was both privileged and protected. Specifically, Plaintiffs requested from Summa unredacted versions of Unusual Occurrence Reports which contained confidential communications and also sought from Summa the identity of the person who was allegedly responsible for Mr. Ward contracting Hepatitis B. (Plaintiffs' Motion to Compel and Motion for Protective Order.)

When the parties reached an impasse for the requested discovery directed to Summa, Plaintiffs filed a Motion to Compel and Motion for Protective Order on December 4, 2007.[2] On December 13, 2007, Summa filed its Memorandum in Opposition arguing that the Unusual Occurrence Reports were protected from disclosure by the hospital incident reports

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[1]This Court denied jurisdiction over Summa's appeal to this Court and, thus, Summa is not a party to the instant appeal.

[2]In the caption, Plaintiffs mistakenly used the case number from the original filing. Plaintiffs filed a Motion to Correct the Docket on April 25, 2008. Of importance, the Trial Court's ruling with respect to Plaintiffs' Motion to Compel/Motion for Protective Order was properly issued in this refiled case.

confidentiality provisions in Ohio statutory and case law. Additionally, Summa claimed that it was bound by both state law and federal law to protect the private health information of the health care worker at issue in this case. (*See* Summa's Memorandum in Opposition.)

While the parties' discovery issues were pending before the Trial Court, on January 2, 2008, Plaintiffs served upon non-party Dr. Debski a subpoena noticing him for a deposition. In discussions regarding the scope of Dr. Debski's deposition, on January 23, 2008, counsel for Dr. Debski informed Plaintiffs' counsel that Dr. Debski's deposition would be limited to factual testimony regarding Mr. Ward's surgery. (Exhibit A, attached to Dr. Debski's Motion for Protective Order.) Dr. Debski would not be permitted to answer any questions pertaining to his personal medical information on the bases that said information was privileged and also irrelevant to the issues at hand. (*Id.*) Plaintiffs' counsel responded on January 25, 2008 to Dr. Debski's stance on the scope of his deposition stating that Dr. Debski's position was unacceptable. (*Id.*, Exhibit "B".)

On March 27, 2008, Dr. Debski filed a Motion for Protective Order that would limit Dr. Debski's deposition to the surgery itself and preclude Plaintiffs from inquiring about Dr. Debski's confidential and privileged medical information. Dr. Debski set forth several well-founded arguments in support of his Motion for Protective Order. Basically, Dr. Debski established that since he was not a party to the instant case and never put his personal medical history at issue, any and all information regarding his personal medical history was both irrelevant and protected under the physician-patient privilege provided in R.C. 2317.02(B).

On April 8, 2008, Plaintiffs filed their Brief in Opposition to Dr. Debski's Motion for Protective Order. On April 21, 2008, Dr. Debski filed a Reply Brief reiterating his position that

he was entitled to the protections afforded him under Ohio's statutory physician-patient privilege.

On June 5, 2008, the Trial Court issued its Order whereby it denied Plaintiffs' Motion to Compel and for Protective Order directed toward Summa and granted Dr. Debski's Motion for Protective Order. As to Dr. Debski, the Trial Court held that his personal medical information was protected under the physician-patient privilege as set forth in R.C. 2317.02(B)(1):

> As such, the Court finds that Dr. Debski's Motion for Protective Order is granted as it relates to any testimony or production of information regarding his own medical health history. He may testify, however, as a fact witness to the events that transpired during Plaintiff's care for which Dr. Debski has first hand knowledge.

(June 5, 2008 Order).

On June 27, 2008, Plaintiffs appealed to the Ninth District Court of Appeals from the Trial Court's June 5, 2008 Order. (CA No. 24289). On September 23, 2008, the Ninth District dismissed Plaintiffs' appeal for lack of a final appealable order. (September 23, 2008 Appellate Order).

Upon remand, the Trial Court, on October 3, 2008, ordered Plaintiffs to file an Affidavit of Merit pursuant to Civ. R. 10(D). When Plaintiffs failed to produce an Affidavit of Merit, Summa filed a Motion to Dismiss on December 2, 2008. On December 15, 2008, Plaintiffs filed a Brief in Opposition to Summa's Motion to Dismiss.

On December 22, 2008, the Trial Court granted Summa's Motion to Dismiss. (December 22, 2008 Order, App. 8-10). The bases for the Trial Court's dismissal were that Plaintiffs failed to produce an Affidavit of Merit and, also, Plaintiffs failed to comply with the Trial Court's Order to produce an Affidavit of Merit.

Plaintiffs timely appealed to the Ninth District from the Trial Court's Order of December 22, 2008.[3] During the pendency of the appeal, this Court issued its decision in *Roe v. Planned Parenthood*, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009-Ohio-2973. Consequently, on July 9, 2009, Dr. Debski submitted this Court's *Roe* decision to the Ninth District as Supplemental Authority. Dr. Debski submitted the *Roe* decision for the proposition of law that a non-party patient's personal medical information is absolutely protected from discovery in the lawsuits of others pursuant to Ohio's statutory physician-patient privilege. This Court's decision in *Roe* confirmed that the Trial Court properly precluded the discovery of non-party Dr. Debski's personal medical information in Plaintiffs' underlying lawsuit against Summa.

On September 26, 2009, the Ninth District released its Decision and Journal Entry reversing the Trial Court's Order granting Dr. Debski a protective order.[4] In its decision, the Ninth District erroneously held that in asserting the protections of the physician-patient privilege, the patient is not a protected source and, thus, a patient can be compelled to disclose personal medical information without any limitations. *Ward* at ¶ 5. By its own admission, the majority opinion recognized that its holding created an obvious conflict. *Id.* at ¶ 26. On the one hand, the patient is the holder of the physician-patient privilege; on the other hand, a patient is not permitted to assert the protections afforded him/her pursuant to the physician-patient privilege. *Id.* at ¶¶ 25, 26, and 27. Not only did the majority recognize its holding creates a conflict with Ohio law, the concurring opinion admitted that "the outcome in this case may be shocking to the legal and medical communities and will likely lead to unanticipated and possibly, unfortunate consequences." *Id.* at ¶ 36.

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[3]On June 19, 2009, the Ninth District issued an order designating non-party Dr. Debski as an appellee for the purposes of the appeal.

[4]The Ninth District also reversed the Trial Court's Orders with respect to Summa but, once again, Summa's appellate issues are not before this Court.

Of importance, the Ninth District wholly ignored this Court's decision in *Roe v. Planned Parenthood* that was submitted by Dr. Debski as supplemental authority as it applied to the privacy rights of non-party patients afforded them under Ohio's statutory physician-patient privilege.[5] This Court's *Roe* decision concerning the privacy rights of non-party patients is both factually and legally binding upon the issues concerning non-party Dr. Debski in this case. By ignoring the *Roe* precedent, the Ninth District set forth an unfounded statement of law and created a conflict by eliminating the protections that are guaranteed to non-party patients pursuant to the physician-patient privilege.[6]

Similarly, the Ninth District completely ignored this Court's decision in *Medical Mutual v. Schlotterer,* 122 Ohio St. 3d 181, 909 N.E. 2d 1237, 2009-Ohio-2496, which confirmed that as the "exclusive holder" of the physician-patient privilege, a patient has the absolute right to privacy concerning personal medical information.[7] In *Medical Mutual*, this Court explicitly held that a patient's personal medical information can be disclosed **only** upon the patient expressly waiving the physician-patient privilege. By also ignoring the *Medical Mutual* decision, the Ninth District has essentially stripped a patient of his/her status as the exclusive holder of the physician-patient privilege and now, a patient is an unprotected source with respect to the discovery of personal and confidential medical information.

It is clear that the legal conflict and confusion in the Ninth District's jurisprudence requires guidance and clarification from this Court. This Court now has the opportunity to correct the Ninth District's erroneous decision and provide all Ohio Appellate Courts and Trial

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[5]The Ninth District merely cited the *Roe* decision in confirming that a determination of what constitutes confidential and privileged information is a *de novo* review. *Id.* at ¶ 11.
[6]Dr. Debski and Summa filed a Joint Motion to Certify a Conflict on September 25, 2009. The Ninth District denied the Joint Motion to Certify a Conflict on October 27, 2009.
[7]The Ninth District merely cited *Medical Mutual* confirming a *de novo* review of privileged matters and an abuse of discretion review of protective orders. *Ward* at ¶¶ 11 and 17.

Courts with clarification on determining the appropriateness of discovery into the privileged medical information of patients while maintaining their privacy rights under the statutory physician-patient privilege. This Court should reverse the Ninth District's decision by simply applying the very recent precedents of *Roe* and *Medical Mutual* and by holding that a non-party patient is, indeed, a protected source in asserting the physician-patient privilege.

II. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: The Ninth District's Decision Is In Direct Conflict With This Court's Recent Decision In *Roe v. Planned Parenthood Southwest Ohio Region,* 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009-Ohio-2973 In That It Allows For The Production Of Personal Medical Information Of Non-Party Patients In Violation Of The Physician-Patient Privilege.

Ohio law recognizes the statutory physician-patient privilege that explicitly protects the privacy rights of patients throughout all of Ohio. R.C. 2317.02. In *Biddle v. Warren General Hosp.* (1999), 86 Ohio St. 3d 395, 715 N.E.2d 518, this Court stressed the utmost importance of a **patient's** right to confidentiality of medical communications. *Biddle* at paragraph 1 of the Syllabus.[8] In Ohio, the **patient** is the exclusive holder of the physician-patient privilege. *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, 604 N.E. 2d 761 at ¶ 5; *Grove v. Northeast Ohio Nephrology Associates, Inc.*, 164 Ohio App. 3d 829, 2005-Ohio-6914. As the exclusive holder of the physician-patient privilege under R.C. 2317.02, it is the **patient** who may invoke the privilege to preclude access to personal medical information under the Rules of Civil Procedure governing discovery. *Calihan* at ¶ 5.

The purpose of the physician-patient statute is to encourage persons needing medical aid to seek it without fear of betrayal and to encourage free and frank disclosure between patients and physicians in order to assist physicians in the proper diagnosis and appropriate treatment.

[8] *Biddle* addressed the defenses to the tort of unauthorized disclosure of confidential medical information; it did not create a litigant's right to discover the confidential medical records of non-parties in a private lawsuit. *Roe* at ¶ 48.

State Med. Bd. of Ohio v. Miller (1989), 44 Ohio St. 3d 136, 140, 541 N.E. 2d 602. Unfortunately, the Ninth District's decision herein runs afoul of the physician-patient privilege statute and defeats the very purpose of the physician-patient privilege, especially how it relates to non-party patients. If the Ninth District's decision is allowed to stand, **patients** will be discouraged from freely disclosing private and personal medical information to their physicians because the Ninth District's decision strips patients of the protections afforded them under the physician-patient privilege in R.C. 2317.02(B).

Just recently, this Court in *Roe v. Planned Parenthood* explicitly held that personal medical information of non-party patients is absolutely privileged and protected from discovery pursuant to the physician-patient privilege in R.C. 2317.02(B). *Roe, supra.,* at ¶ 50. This Court recognized that there exists no exceptions to the protections afforded to a non-party patient's personal medical information by the physician-patient privilege. *Roe* at ¶¶ 47-48. This Court emphasized the sanctity of the physician-patient privilege and concluded that even the redaction of personal, identifying information does not remove the privileged status of personal medical information. *Id.* at ¶ 53.

Despite the undisputed fact that the instant case involves issues concerning the production of personal medical information of a non-party patient, the Ninth District completely failed to address this Court's *Roe* decision and, instead, rendered an opinion wholly inconsistent with the *Roe* case. During the pendency of this appeal before the Ninth District, Dr. Debski submitted this Court's decision in *Roe* as supplemental authority because the *Roe* decision is directly on point with this case and is clearly dispositive of the appellate issues that were addressed by the Ninth District. Had the Ninth District applied the *Roe* holding to its analysis, the Ninth District would have been compelled to hold that as a non-party to the lawsuit between

Plaintiffs and Summa, Dr. Debski could not be compelled to disclose his personal medical information during the course of discovery.

Instead, the privacy rights of non-party Dr. Debski and the confidentiality of his personal medical information under the physician-patient privilege has been completely stripped away by the Ninth District. The Ninth District's decision ordering the disclosure of non-party Dr. Debski's personal medical information imperils the specific purpose of both the *Roe* decision and the physician-patient privilege as set forth in R.C. 2317.02. In direct contradiction to the *Roe* decision, the Ninth District's holding erroneously requires non-party Dr. Debski to give up his absolute right to assert the physician-patient privilege. Pursuant to this Court's clear dictate in *Roe*, Dr. Debski and other non-party patients have an **absolute** right to privacy which protects them against the disclosure of their personal medical information. The Ninth District's failure to even address this Court's *Roe* decision concerning the identical issue is proof, itself, that the Ninth District has created a legal divergence and conflict with respect to a non-party patient's absolute right to privacy under the physician-patient privilege.

The Ninth District's decision is also in direct conflict with this Court's decision in *Cepeda v. Lutheran Hospital*, 123 Ohio St. 3d 161, 914 N.E. 2d 1051, 2009-Ohio-4901 which reaffirmed the *Roe* decision. In *Cepeda*, this Court applied the *Roe* decision and summarily reversed the Trial Court's order compelling the disclosure of non-party patients' personal medical information. The Ninth District's elimination of non-party patients' absolute protections afforded them under the physician-patient privilege is, likewise, in direct conflict with this Court's decision in *Cepeda*.

In *Bednarik v. St. Elizabeth Health Ctr.*, Mahoning App. No. 09MA34, 2009-Ohio-6404, the Seventh District Court of Appeals recently followed the *Roe* and *Cepeda* decisions in

precluding a litigant to the discovery of confidential medical records of non-party patients. The Seventh District properly followed this Court's authorities in *Roe* and *Cepeda* and held that a non-party patient cannot be forced to produce privileged medical information. *Id.* at ¶ 21. Unlike the Ninth District herein, the Seventh District correctly acknowledged the importance of this Court's decisions in *Roe* and *Cepeda* and the protections afforded non-party patients pursuant to Ohio's statutory physician-patient privilege in R.C. 2317.02.

By completely ignoring this Court's legal authorities as set forth in *Roe* and reaffirmed in *Cepeda*, the Ninth District has now provided legal authority that denies non-party patients the protections from disclosure of confidential medical information afforded them by Ohio's statutory physician-patient privilege. Therefore, the Ninth District's decision will have grave consequences in Summit County and throughout **all** of Ohio with respect to the physician-patient privilege. The whole point of the physician-patient privilege and confidentiality is to allow patients to safely share their most private personal and medical concerns with healthcare providers. Under the Ninth District's decision, the safe and confidential environment for non-party patients is shattered as all personal medical information can be disclosed in any pending lawsuit without any limitations, whatsoever. Non-party patients will now reluctantly withhold pertinent medical information of an embarrassing or otherwise confidential nature because the Ninth District has effectively created a real fear and danger of public disclosure of their privileged medical information and communications.

The Ninth District's total disregard of this Court's legal authorities and precedents neither serves a public interest nor protects the private interests of non-party patients. This Court should reverse the Ninth District's decision based upon the authorities of *Roe* and *Cepeda*. Upon remand, Plaintiffs should be precluded from forcing discovery (*i.e.*, deposition, production of

documents, interrogatories, etc.) of non-party Dr. Debski's privileged medical information/communications.

PROPOSITION OF LAW NO. 2: The Ninth District's Decision Is In Direct Conflict With This Court's Recent Decision In *Medical Mutual v. Schlotterer*, 122 Ohio St. 3d 181, 909 N.E. 2d 1237, 2009-Ohio-2496 And The First District's Decision in *Calihan v. Fullen* (1992), 78 Ohio App. 3d 266, 604 N.E. 2d 761 In That It Erroneously Holds That A Patient Is Not A Protected Source When Asserting The Physician-Patient Privilege.

The Ninth District's holding that a patient is an "unprotected source" in asserting the physician-patient privilege is also in direct conflict with this Court's recent decision in *Medical Mutual, supra.* Just like it did in ignoring the substantive legal issues in *Roe,* the Ninth District completely ignored this Court's *Medical Mutual* decision as it relates to the absolute privacy rights of patients afforded them under the physician-patient privilege in R.C. 2317.02(B)(1).

This Court held in *Medical Mutual* that personal medical information can be the subject of discovery **only** when the **patient waives** the physician-patient privilege. *Id.*, Paragraph 5 of the Syllabus. As previously mentioned, Ohio law has long recognized that the **patient** is the exclusive holder of the physician-patient privilege. *Calihan, supra.,* at ¶ 5; *Grove, supra.* As such, there can be no doubt that in *Medical Mutual,* this Court reaffirmed Ohio's longstanding and well-established law that it is the **patient** who is the exclusive holder of the physician-patient privilege and that the **patient** is, undoubtedly, a "protected source." The Ninth District's determination that the patient is an unprotected source in asserting the physician-patient privilege is unquestionably in direct conflict with this Court's decision in *Medical Mutual.*

In *Medical Mutual,* this Court held that "the physician-patient privilege statute [R.C. 2317.02(B)(1)(a)(i)] specifically requires a patient's express consent" before personal medical information can be released. *Medical Mutual, supra.,* at ¶ 16. It is undoubtedly the **patient** who **must** waive the physician-patient privilege before there is any discovery into personal medical

information. *Id.* However, the Ninth District's decision is completely inconsistent with the *Medical Mutual* holding because it ignores the requirement that the **patient** must waive the physician-patient privilege **and** expressly consent to the release of personal medical information. As the Ninth District's decision stands now, a patient can be forced to involuntarily disclose personal medical information because the Ninth District has now deemed patients an "unprotected source" under Ohio's statutory physician-patient privilege. Consequently, the Ninth District's decision is glaringly inconsistent and in direct conflict with this Court's *Medical Mutual* decision.

The Ninth District, by its own admission, has created unfounded legal authority that constitutes both a misstatement and misapplication of Ohio law with respect to the sanctity of Ohio's statutory physician-patient privilege. The majority in the Ninth District decision stated:

> Nonetheless, **we are not oblivious to the conflict presented by the above-conclusion: on the one hand, the statute prevents the physician from testifying about physician-patient communications absent a waiver, but yet at the same time, it does not by its very terms specifically prevent the patient from being compelled to disclose the same information.**

(Emphasis added.) (*Ward* at ¶ 26.)

Then, the concurring opinion stated:

> As difficult as it is to believe, it [physician-patient privilege] does not protect the patient from being required to testify about those very same communications and that same advice. . . . **I understand that the outcome in this case may be shocking to the legal and medical communities and will likely lead to unanticipated and, possibly, unfortunate consequences.**

(Emphasis added). (*Id.* at ¶¶ 35 and 36).

By holding that a patient is an "unprotected source," the Ninth District's decision now permits the unwarranted disclosure of a patient's personal medical information without the

patient's waiver and/or consent, which is explicitly required pursuant to this Court's legal authority in *Medical Mutual.* The Ninth District's erroneous decision is a derogation of the statutory physician-patient privilege in Ohio and, thus, the very spirit of the physician-patient privilege is no longer preserved. Patients in Ohio can no longer seek medical aid without the fear of being publicly disclosed.

The Ninth District also ignored the First District's decision in *Calihan, supra.* In *Calihan*, the First District held that a plaintiff was not entitled to discover his doctor's own personal medical information/records because the medical information of his doctor was protected by the physician-patient privilege existing between a patient and his own physician. *Calihan* at Paragraph One of the Syllabus.

The First District in *Calihan* explicitly held that any personal medical matters conveyed between a patient and a doctor of medicine fall within the definition of protected communications under R.C. 2317.02(B)(3). The *Calihan* court actually faced a more compelling situation than this case where the physician was in fact a named defendant in a medical malpractice case, not the situation in the case at bar where Dr. Debski is a non-party. The First District held that personal medical records of a defendant-surgeon under treatment for a debilitating disease are protected by the physician-patient privilege. The First District found that these records were not discoverable in the malpractice action against the doctor even though relevant to the case. The patient is the holder of the physician-patient privilege and the privilege may be invoked by the patient to preclude discovery or to bar testimony of personal medical information acquired by virtue of the physician-patient relationship. *Id.* at 270.

Applying the *Calihan* case to the present action, the patient here was Dr. Debski and Dr. Debski clearly refused to disclose his private medical information. Dr. Debski was not a named

party to the instant action and there were no claims against him; therefore, his medical history was not at issue. Plaintiffs' subpoena clearly indicated a demand for the disclosure of information regarding Dr. Debski's medical history which fell under R.C. 2317.02(B).[9] In *Calihan*, the defendant surgeon's medical history was deemed relevant and yet the court held it was still protected from discovery by the patient-physician privilege absent defendant's waiver. Likewise, the Ninth District should have held that Dr. Debski's personal medical information was privileged and protected under the physician-patient privilege. Instead, the Ninth District failed to address the *Calihan* and, consequently, rendered an opinion in direct conflict with the First District, in addition to this Court's authorities.

The basic policy of a patient's confidentiality was explicitly recognized and applied by this Court in the *Biddle* decision. "[I]t is for the patient – not some medical practitioner, lawyer, or court – to determine what the patient's interests are with regard to confidential medical information." *Id.* at 408. An individual's right to medical confidentiality "is not so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask." *Hageman vs. Southwest Gen. Health Ctr.*, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008-Ohio-3343 ¶ 13, quoting *Hill vs. Natl. Collegiate Athletic Assn.* (1994), 7 Cal. 4th 1, 25. In order for the confidentiality of medical information to mean anything, an individual must be able to direct the disclosure of his or her own private information. *Id.*

Once again, the whole point of the physician-patient privilege and confidentiality is to allow patients to safely share their utmost private personal and medical concerns with healthcare providers. *Biddle, supra*. The effect of the physician-patient privilege allows a patient to make a

[9]In this case, the Ninth District properly determined that the requested discovery of Dr. Debski constituted a "communication" as defined within the physician-patient privilege statute in R.C. 2317.02(B)(3); *Ward* at ¶ 25.

full disclosure of their symptoms and conditions to their physicians without fear that such matters will later become public. *See State vs. Spencer* (1998), 126 Ohio App. 3d 335. Under the erroneous holding of the Ninth District that all patients are not a "protected source" in asserting the physician-patient privilege, a patient no longer has a right to medical confidentiality, which this Court explicitly recognized in *Biddle*.

The **only** basis upon which the Ninth District held that non-party Dr. Debski should be compelled to testify about his own personal medical information is that the testimonial privilege as set forth in R.C. 2317.02(B)(1) does not apply to a **patient**, because the Ninth District deemed the patient an "unprotected source." Despite Ohio's longstanding law that the patient is the "exclusive holder" of the physician-patient privilege, the Ninth District believes that since the language of R.C. 2317.02(B) does not specifically denote the "patient" as a protected source that patients are not afforded the protections under the physician-patient privilege. However, this approach is wholly inconsistent with the overriding principle in statutory construction. *i.e.,* look to the object to be accomplished and give the statute a meaning that will effectuate, rather than defeat, that object. *Carter v. Youngstown* (1946), 146 Ohio St. 203, 65 N.E.2d 63; *State v. S.R.* (1992), 63 Ohio St. 3d 590, 589 N.E.2d 1319. In interpreting and applying statutes, the ultimate goal is to ascertain and give effect to the intention of the legislature. *Carter, supra.,* Where a statute is found to be the subject of various interpretations, this Court may invoke rules of statutory construction in order to arrive at legislative intent. *Cline v. Ohio Bureau of Motor Vehicles* (1991), 61 Ohio St. 3d 93.

By choosing to adopt the physician-patient privilege, the legislature clearly made the policy judgment that complete and honest communications between a physician and patient would be enhanced by making these communications confidential. The Ninth District's

interpretation of the testimonial privilege seriously thwarts the legislature's goal of enhancing candid physician-patient communications. If a patient knows that any litigant in any legal proceeding would have the power to compel the patient to testify about his own personal medical information, a patient will be less likely to share personal medical information with his physician. To allow unfettered discovery and access to a patient's own confidential personal medical information would defeat the purposes underlying the physician-patient privilege and would strip a patient's absolute right to privacy.

This Court's interpretations of the physician-patient privilege in *Roe, Cepeda* and *Medical Mutual* comport with the legislative intent to protect patients from unwarranted invasions into their personal medical information. The clear intent of the drafters of the physician-patient privilege statute of R.C. 2317.02(B) was to make the patient the "exclusive holder" of the privilege and, also, a "protected source" in asserting the privilege. The Ninth District's decision is completely inconsistent with the legislature's intent and, thus, the Ninth District undoubtedly erred in its "statutory construction" of the physician-patient privilege.

Plaintiffs may argue that if non-party Dr. Debski is not compelled to testify about his own personal medical information that they may be precluded from the discovery and admission of relevant evidence. This assertion, however, is no reason to ignore the physician-patient privilege since the legislature clearly intended that certain relationships and situations are deserving of protection, even if crucial information is thereby withheld. *See Calihan, supra.*

Were this Court to agree with the Ninth District and compel a patient to testify about his own personal medical information in all circumstances, such a ruling would effectively eviscerate Ohio's physician-patient privilege. Ohio's longstanding law that the patient is the exclusive holder of the physician-patient privilege would be completely abolished. This Court

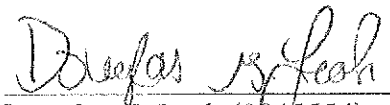
should reverse the Ninth District's decision by applying the *Medical Mutual* decision herein and halt the Ninth District's impermissible encroachment on the privacy rights of patients regarding their personal medical information.

III. CONCLUSION

The Ninth District's decision is not only erroneous and in direct conflict with this Court's precedents and the First District, it goes far beyond common sense with respect to Ohio's statutory physician-patient privilege. It is illogical to conclude that a patient as the exclusive "holder" of the physician-patient privilege is an "unprotected source." It violates principles of substantial justice and improperly creates a judicial elimination of a patient's status as the "exclusive holder" of the physician-patient privilege. Consequently, both party and non-party patients' rights to privacy and confidentiality are no longer paramount in Ohio. Under the Ninth District's decision, there now exists legal authority creating a real danger that patients' privileged medical information will be disclosed in any pending lawsuit throughout all of Ohio without any limitations whatsoever.

By reversing the Ninth District's decision, this Court will resolve the conflict created by the Ninth District and provide Ohio Court's with the proper guidance needed with respect to protecting privileged medical information under Ohio's statutory physician-patient privilege. This Court should hold that **all patients** are a protected source under the physician-patient privilege and, therefore, a patient cannot be compelled to disclose personal medical information. Accordingly, the Ninth District's decision should be reversed and the Trial Court's protective order in favor of non-party Dr. Debski should be reinstated.

Respectfully submitted,



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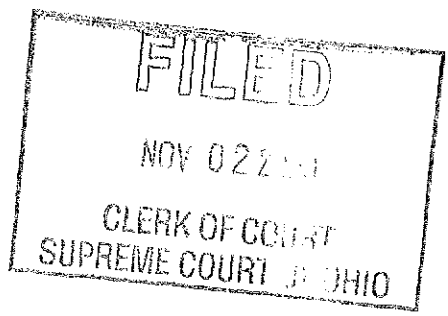
SUMMA HEALTH SYSTEM, et al.,

Defendants-Appellants.



NOTICE OF APPEAL OF NON-PARTY-APPELLANT ROBERT DEBSKI, M.D.

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Notice of Appeal of Non-Party Appellant
Robert Debski, M.D.

Non-Party Appellant Robert Debski, M.D. hereby gives notice of appeal to the Supreme Court of Ohio from the decision rendered by the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 24567 on September 16, 2009.[1]

This case is one of public and great general interest that warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,

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[1] On June 19, 2009, the Ninth District issued an order designating non-party Dr. Debski as an appellee for the purposes of the appeal.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail this 30th day of October, 2009 to the following:

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STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DONALD WARD, et al.

Appellants

v.

SUMMA HEALTH SYSTEM, et al.

Appellees

C. A. No. 24567

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007-10-7075

DECISION AND JOURNAL ENTRY

Dated: September 16, 2009

BELFANCE, Judge.

{¶1} Plaintiffs-Appellants Donald and Susan Ward appeal various rulings of the Summit County Court of Common Pleas. For reasons set forth below, we vacate and remand.

I.

{¶2} In May of 2006, Donald Ward underwent heart valve replacement surgery at Akron City Hospital, a Summa Health System hospital. Approximately a month later, Summa became aware that one of its non-employee health care workers at Akron City Hospital was exhibiting jaundice. The non-employee health care worker subsequently tested positive for the Hepatitis B virus, prompting Summa to engage in a Look Back Program in order to identify all patients that might have been exposed to the virus. Donald Ward was one of the patients identified by the Look Back Program; Ward tested positive for Hepatitis B. Ward's wife Susan had been previously vaccinated against the virus.

{¶3} Donald and Susan Ward filed suit against Summa and a John Doe defendant for personal injury related to his heart surgery. Donald and Susan Ward later dismissed their complaint and re-filed it in October 2007 against Summa and John Doe defendants one through six. Through discovery, the Wards sought information detailing the identity of the non-employee health care worker who exposed Donald Ward to Hepatitis B, as well as details concerning how the exposure occurred. Summa refused to comply with much of the requested discovery and asserted that four of the requested documents were privileged. Summa provided the Wards with a privilege log which essentially listed the documents and a redacted version of one of the documents. The Wards also sought to depose Dr. Robert Debski, the non-employee health care worker who performed Donald Ward's surgery. Dr. Debski refused to answer questions related to his personal medical history and indicated his deposition testimony would be limited to factual testimony related to Donald Ward's surgery.

{¶4} The Wards filed a motion to compel and a motion for a protective order concerning Summa's refusal to provide requested discovery, and Dr. Debski filed a motion for a protective order to limit his deposition testimony to the surgery itself. The trial court denied the Wards' motions and granted Dr. Debski's motion for a protective order. The Wards appealed to this Court and we dismissed for lack of a final appealable order.

{¶5} The trial court then ordered the Wards to file an affidavit of merit pursuant to Civ.R. 10(D)(2). The Wards did not file an affidavit of merit and Summa moved to dismiss. The trial court granted Summa's motion and dismissed the case without prejudice pursuant to Civ.R. 10(D)(2)(d) and Civ.R. 41(B)(1).

{¶6} The Wards have appealed, asserting three assignments of error.

II.

{¶7} As an initial matter, this Court must determine if the order from which the Wards appeal is a final appealable order. The Ohio Constitution limits this Court's appellate jurisdiction to the review of final judgments or orders of lower courts. Section 3(B)(2), Article IV, Ohio Constitution. "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" R.C. 2505.02(B)(1). Generally "[a] dismissal without prejudice is not a final, appealable order." *State ex rel. Automation Tool & Die, Inc. v. Kimbler* (Apr. 4, 2001), 9th Dist. No. 3124-M, at *2, citing *Denham v. City of New Carlisle* (1999), 86 Ohio St.3d 594, 597. Nonetheless, there are situations where a dismissal without prejudice can constitute a final and appealable order. See *National City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, at ¶¶1, 11; *Lippus v. Lippus*, 6th Dist. No. E-07-003, 2007-Ohio-6886, at ¶¶11-12; *MBNA Am. Bank, N.A. v. Harper*, 1st Dist. No. C-060937, 2007-Ohio-5130, at ¶¶1-3, 13; *MBNA Am. Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, at ¶6; *White v. Lima Memorial Hosp.* (Dec. 7, 1987), 3rd Dist. No. 1-86-62, at *1-*2.

{¶8} The Wards have persuaded this Court that the facts of this case warrant the conclusion that the trial court's dismissal without prejudice affects a substantial right and in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). Civ.R. 10(D)(2)(a) requires that complaints containing medical claims include at least one affidavit of merit "relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability." The affidavit of merit must be provided by an expert and, *inter alia*, must include a statement by the expert that one of the defendants breached the standard of care

causing injury to the plaintiff. Id. In this case, the trial court dismissed the Wards' case for failure to submit an affidavit of merit as required by the rule. The Wards claim that they have failed to file the affidavit because the trial court's previous denial of their motion to compel their requested discovery leaves their experts unable to complete the necessary affidavit. In support of the Ward's claim, they attached an affidavit of their counsel to their brief in opposition to Summa's motion to dismiss. The affidavit states that experts reviewed the matter but could not determine whether the standard of care was breached due to the experts' inability to review the documents subject to the motion to compel. The Wards argue that while they technically could refile their case, ultimately it will end in the same manner, as they will be unable to provide an affidavit of merit. We conclude that because the Wards arguably cannot produce an affidavit of merit without our review of their denied discovery requests, the trial court's dismissal effectively prevented a judgment in favor of the Wards, and the order from which the Wards appeal is therefore final and appealable.

{¶9} The Wards have presented this Court with three assignments of error which will be analyzed out of order to aid our review.

III.

{¶10} The Wards' third assignment of error alleges that "[t]he Trial Court abused its discretion in denying Appellants' Motion to Compel and Motion for Protective Order."

{¶11} Although generally discovery orders are reviewed under an abuse of discretion standard, the Supreme Court of Ohio has concluded that the issue of whether the information sought is confidential and privileged from disclosure is a question of law that should be reviewed *de novo*. *Med. Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13; see, also, *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973,

at ¶29. As the Wards' second and third assignments of error raise the issue of whether the information sought is confidential and privileged from disclosure, we will conduct a *de novo* review. Id. The Wards' motion to compel requested that the trial court compel answers to interrogatories, as well as the documents listed in Summa's privilege log. The documents listed on the privilege log are two Unusual Occurrence Reports, the Minutes from the Meeting of the Summit County Health District, and the Epidemiological Linked Hepatitis B Case Investigation Final Report (which was produced in a redacted form). The trial court did not conduct an *in camera* review of the documents, but nevertheless concluded that based on the evidence presented by Summa, the documents were privileged under R.C. 2305.24.

{¶12} Initially we note that privileges are to be strictly construed and that "[t]he party claiming the privilege has the burden of proving that the privilege applies to the requested information." *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, at ¶17. R.C. 2305.24 provides in pertinent part that:

> "Any information, data, reports, or records *made available to* a *quality assurance committee or utilization committee* of a hospital * * * are confidential and shall be used by the committee and the committee members only in the exercise of the proper functions of the committee." (Emphasis added.)

{¶13} In support of Summa's assertion of privilege concerning the Unusual Occurrence Reports, Summa attached the affidavit of its Director of Infection Control and Clinical Safety. The Director stated that the Unusual Occurrence Reports were "prepared through a process and format specifically designed to follow the hospital incident report confidentiality provisions in Ohio law, namely Sections 2305.24, 2305.251, 2305.253, 2305.28, and 2317.02(A) of the Revised Code * * *." The affidavit contains the further contention that the Unusual Occurrence Reports were prepared with an expectation that they would be confidential and also asserts that the reports contain attorney-client communications.

{¶14} Based on the evidence before the trial court, and the fact that the trial court declined to conduct an *in camera* review of the documents, we are unable to conclude that Summa sufficiently established that the Unusual Occurrence Reports were actually privileged by R.C. 2305.24. While the trial court indicated in its order that the Wards did not challenge the affidavit, it was Summa's burden to demonstrate the privilege applied, not the Wards'. See *Giusti* at ¶17. Nowhere in the Director's affidavit does it state that the reports at issue were made available to any committee, that such a committee existed within the hospital, that any committee actually met to discuss the incident or the reports, or that the reports were prepared by or for the use of a peer review committee. While we note that the Director was also deposed, that transcript was not provided to this Court. Nonetheless, Summa does not rely on the transcript in support of its assertion of privilege and in fact states in its brief in opposition to the Wards' motion to compel that the Director was not questioned about the documents by the Wards during the deposition.

{¶15} The Supreme Court of Ohio has stated that "a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92. Thus, we must examine the other privileges Summa claims apply to the Unusual Occurrence Reports and determine whether they have presented sufficient evidence in support. Specifically, Summa argues in its brief that R.C. 2305.251, R.C. 2305.252, R.C. 2305.253, R.C. 2305.28, and R.C. 2317.02(a), all protect the documents from discovery. However, again, we determine Summa has not provided the trial court with sufficient evidence to conclude that the documents are privileged under any of the statutes, absent an *in camera* review.

{¶16} Initially we note, that R.C. 2305.28 and R.C. 2305.251 both are statutes which grant immunity from liability and are not statutes conferring a privilege and so we cannot see how such a statute would apply to these documents. Both R.C. 2305.252 and R.C. 2305.253 directly, or indirectly relate to peer-review. R.C. 2305.252 provides for the confidentiality of peer review proceedings and R.C. 2305.253 provides for the confidentiality of incident or risk management reports. An incident or risk management report is "a report of an incident involving injury or potential injury to a patient as a result of patient care provided by health care providers, including both individuals who provide health care and entities that provide health care, *that is prepared by or for the use of a peer review committee* of a health care entity and is within the scope of the functions of that committee." (Emphasis added.) R.C. 2305.25(D).

{¶17} We have stated when examining R.C. 2305.252 that "[a] party claiming the peer-review privilege, at 'a bare minimum,' must show that a peer-review committee existed and that it actually investigated the incident." *Giusti* at ¶17, quoting *Smith v. Manor Care of Canton Inc.*, 5th Dist. Nos. 2005-CA-00100, 2005-CA-00160, 2005-CA-00162, and 2005-CA-00174, 2006-Ohio-1182, at ¶61. Thus, we determine that based on the evidence before it and given the lack of an *in camera* inspection of the documents, the trial court could not conclude as a matter of law that the two Unusual Incident Reports were privileged, under either R.C. 2305.252 or R.C. 2305.253.

{¶18} Likewise, we are not convinced that Summa has produced evidence demonstrating that the documents are privileged under the attorney-client privilege. R.C. 2317.02(A)(1) provides that the testimony of an attorney is privileged "concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client * * *." The Supreme

Court of Ohio has held that "'the burden of showing that testimony [or documents] sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude [them] * * *.'" *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166, quoting *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 178. The only reference to attorney-client privilege in the Director's affidavit states that "Unusual occurrence reports such as those listed on Defendant Summa Health System's Privilege Log dated January 21, 2008, contain confidential attorney-client communications directed by Summa personnel to Summa's attorneys." We determine such a blanket assertion to be insufficient to substantiate the existence of the attorney-client privilege as it relates to the two reports.

{¶19} Thus, the Wards' argument has merit and the trial court erred in concluding that the Unusual Occurrence Reports were privileged based upon the evidence provided by Summa and the subsequent lack of an *in camera* review of the documents.

{¶20} The Wards also argue that the trial court erred in failing to consider applicable "Privacy Rules" in conjunction with the trial court's determination that the documents were privileged under R.C. 2305.24.[1] However, as we have determined that Summa did not present sufficient evidence to the trial court to conclude that the documents were even privileged under R.C. 2305.24, we need not address this issue.

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[1] We note that in *Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 9th Dist. Nos. 22594, 22585, 2005-Ohio-6914, at ¶23, we determined that the Health Insurance Portability and Accountability Act ("HIPAA") did not preempt the physician-patient privilege under R.C. 2317.02. However, we did not address in that case whether HIPPA preempted R.C. 2305.24, and as that issue is not yet squarely before us, we leave that determination for another day.

{¶21} With respect to the remaining items of discovery the Wards sought to compel, *i.e.* the answers to interrogatories as well as the other items in the privilege log, we note that it does not appear that the trial court specifically determined whether these items were in fact privileged, and therefore, not subject to discovery. We have stated that "if a trial court fails to rule on a pending motion prior to entering judgment, it will be presumed on appeal that the motion in question was implicitly denied." *George Ford Constr., Inc. v. Hissong*, 9th Dist. No. 22756, 2006-Ohio-919, at ¶12. Thus, we conclude that the trial court implicitly denied the Wards' motion to compel concerning the discovery the trial court did not address. However, as the trial court offered no law or analysis pertaining to this discovery, we are unable to determine on what basis the trial court found the discovery to be privileged. Moreover, with respect to the remaining two documents identified in the privilege log, it would appear from the record before us that Summa has completely failed to provide the court with any evidence supporting a determination that those two documents are privileged; Summa's sole item of evidence is the affidavit of the Director which does not even mention these two documents. It is also unclear to this Court why the trial court did not analyze the propriety of compelling answers to the interrogatories when it appears that many of them are not objectionable.[2] The analysis the trial

[2] For example, Interrogatory No. 13 asked: "Does Defendant, Summa Health System, have a protocol for individuals who work as an agent and/or employee of the hospital or an individual who works within the hospital but is not otherwise an employee of the hospital (e.g., doctor) and who is knowingly exposed to Hepatitis B, if so, describe in detail the protocol and if a written protocol attach as part of your response a copy of the protocol procedure in effect in May 2006." Likewise, Interrogatory No. 14 states: "Please describe screening procedures, for employees of and doctors practicing at Summa Health Systems facilities, for viral infections such as Hepatitis B, including the timing and frequency of any periodic testing in effect for May 2006."

court did provide related only to the two Unusual Occurrence Reports and Dr. Debski's protective order, which we analyze below, and offers no insight into the basis for finding the other items of discovery privileged. Therefore, upon remand the trial court should revisit this issue in order to evaluate whether in fact any of the documents or interrogatories are privileged.

IV.

{¶22} The Wards argue in their second assignment of error that the trial court erred in granting Dr. Debski, a non-party, a protective order. More specifically, the basic argument the Wards make in their brief is that the trial court erred in finding that the physician-patient privilege applied to bar Dr. Debski's testimony as it relates to his personal medical health history. The Wards subpoenaed Dr. Debski, Donald Ward's surgeon, to testify at a deposition. Dr. Debski indicated prior to the deposition that he would not testify about any matters pertaining to his personal medical history and would seek a protective order if the Wards insisted on asking such questions. Subsequently, Dr. Debski moved for a protective order. In the Wards' brief in opposition to Dr. Debski's motion, the Wards stated that they sought to ask Dr. Debski the following questions: "(1) has he ever had Hepatitis B, (2) if so, when did he contract the disease, and (3) the nature and circumstances of when he first became aware that he had the disease." Dr. Debski has argued that such information is privileged pursuant to R.C. 2317.02(B)(1), the physician-patient privilege.

{¶23} Initially we note that the physician-patient privilege did not exist at common law. *State Med. Bd. of Ohio v. Miller* (1989), 44 Ohio St.3d 136, 140. Thus, "because the privilege is in derogation of the common law, it must be strictly construed against the party seeking to assert it." Id.

{¶24} R.C. 2317.02(B)(1) provides in relevant part:

"*The following persons shall not testify* in certain respects:

"* * *

"*A physician or a dentist* concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject." (Emphasis added.)

Under the statute, a communication is defined as "acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A 'communication' may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis." R.C. 2317.02(B)(5)(a).

{¶25} While Dr. Debski is a physician, the testimony being sought concerns his role as a patient: the Wards do not wish to ask Dr. Debski about his patients or their records, the Wards want to ask Dr. Debski about himself. Nothing in the plain language of the statute prohibits this. The statute does not prevent patients from testifying. Also, while the Wards seek what clearly could be classified as a "communication" under the statute, they do not seek it from the protected person, the physician; they seek it from an unprotected source, the patient.

{¶26} Nonetheless, we are not oblivious to the conflict presented by the above conclusion: on the one hand the statute prevents the physician from testifying about physician-patient communications absent a waiver, but yet at the same time, it does not by its very terms specifically prevent the patient from being compelled to disclose the same information. At first glance, it might seem that such a pronouncement would obliterate the privilege entirely.

However, we do not believe that is the case. Compelling the patient to testify concerning the patient's medical condition or communications made to or by the patient's physician could only possibly require the patient to disclose information within the patient's knowledge. Information unknown by the patient and only known by the patient's doctor or only contained in the patient's medical record could not, and would not, be disclosed and clearly would fall within the privilege. As medicine is a highly technical field involving a complicated and often confusing vocabulary, the information unknown by the patient could be voluminous.

{¶27} Further, while the patient holds the privilege, see *Grove* at ¶12, the patient can only exercise the privilege to the extent authorized by law. With respect to the physician-patient privilege, the statute grants the patient the right to prevent the physician from testifying concerning his or her communications with the patient, absent an exception, but does not give the patient the right to refuse to testify.

{¶28} Nor do we find persuasive the reasoning in *Ingram v. Adena Health Sys.*, 149 Ohio App.3d 447, 2002-Ohio-4878, applying attorney-client case law to the physician-patient privilege. The *Ingram* court concludes that attorney-client case law is applicable to the physician-patient privilege due to the presence of the privileges in the same section of the Ohio Revised Code. Id. at ¶14. However, the two privileges have entirely different histories, as the attorney-client privilege existed both at common law and under statute, see *Gallimore v. Children's Hop. Med. Ctr.* (Feb. 26, 1992), 1st Dist. Nos. C-890808, C-890824, at *6, but the physician-patient privilege never existed at common law. See *Miller*, 44 Ohio St.3d at 140. And while it is clear that under the attorney-client privilege the client cannot be compelled to testify as to attorney-client communications, the client's protection from testifying arose from the common law, not from the statute. See *Ex parte Martin* (1943), 141 Ohio St. 87, paragraph six

of the syllabus; R.C. 2317.02(A)(1). Thus, as the physician-patient privilege has no common law roots to protect the patient's testimony, *Miller*, 44 Ohio St.3d at 140, and the statute does not extend the privilege to prevent the patient's testimony from being compelled, it is not reasonable to conclude that the physician-patient privilege is as broad as the attorney-client privilege.

{¶29} In light of the above, and our duty to strictly construe the statute against Dr. Debski, id., we conclude that the testimony sought by the Wards is not privileged under R.C. 2317.02(B)(1), as the statute does not prevent a patient from being compelled to testify about doctor-patient communications.

{¶30} However, this does not prevent the trial court from issuing a protective order where appropriate. The Supreme Court of Ohio has stated that "Civ.R. 26(C) still applies to discovery that is excepted from privilege protection. Trial courts may use protective orders to prevent confidential information * * * from being unnecessarily revealed. Whether a protective order is necessary remains a determination within the sound discretion of the trial court." *Schlotterer* at ¶23. However, in this case the trial court issued a protective order barring nearly all testimony by Dr. Debski because it found the physician-patient privilege applied. As we have determined the privilege does not prevent the Wards from compelling Dr. Debski's testimony, the protective order granted by the trial court is clearly too broad. However, given the confidential nature of the information the Wards seek, it would be within reason for the trial court to issue a protective order to prevent the unnecessary disclosure of medical information; for example, the trial court could seal Dr. Debski's deposition testimony. Accordingly, we conclude that the Wards' second assignment of error has merit.

V.

{¶31} Finally, we examine the Wards' first assignment of error which alleges that the

trial court erred in dismissing their complaint pursuant to Civ.R. 10(D)(2)(d) and Civ.R. 41(B)(1). We agree.

{¶32} Essentially the trial court dismissed the Wards' case because the Wards failed to file an affidavit of merit as required under Civ.R. 10(D)(2)(d). However, the Wards have argued that they were prevented from filing the affidavit because Summa and Dr. Debski improperly withheld necessary discovery from them. Thus, the resolution of the discovery issues is intertwined with the trial court's ultimate dismissal of the Wards' case. As we have sustained the Wards' assignments of error concerning the discovery issues, we thus determine that the trial court erred in dismissing the Wards' case.

{¶33} Additionally we note that the Supreme Court of Ohio has held that "the proper response to the failure to file the affidavit required by Civ.R. 10(D)(2) is a motion to dismiss filed under Civ.R. 12(B)(6)." *Fletcher v. Univ. Hospitals of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, at ¶3. If the motion is granted, the dismissal should be without prejudice. Id. Summa filed its motion to dismiss pursuant to Civ.R. 41(B)(1), and not Civ.R. 12(B)(6). The trial court granted Summa's motion and stated that the Wards "fail[ed] to state a claim under Civ.R. 10(D)(2)(d), and * * * fail[ed to] comply with this Court's order under Civ.R. 41(B)(1)." While Summa's motion was not filed according to the appropriate procedural rule, in light of the trial court's reference to dismissal for failure to state a claim, it is unclear whether the trial court treated the motion as one for a dismissal under Civ.R. 12(B)(6) for failure to state a claim or whether it dismissed the matter solely pursuant to Civ. R. 41(B)(1).

VI.

{¶34} In light of the foregoing, we sustain the Wards' assignments of error and remand this matter to the Summit County Court of Common Pleas for proceedings consistent with this opinion.

Judgment vacated
and cause remanded.

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 Summit, 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 Appellees.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶35} I agree with the majority because the physician-patient privilege is in derogation of the common law and "must be strictly construed against the party seeking to assert it." *State Med. Bd. of Ohio v. Miller*, 44 Ohio St. 3d 136, 140 (1989). Unlike with the attorney-client privilege, the common law cannot be relied upon to supplement the statutory language chosen by the General Assembly. The privilege, as provided in Section 2317.02(B), is limited to prohibiting physicians from testifying about communications they receive from their patients and their advice back to those patients. As difficult as it is to believe, it does not protect the patient from being required to testify about those very same communications and that same advice.

{¶36} I understand the outcome in this case may be shocking to the legal and medical communities and will likely lead to unanticipated and, possibly, unfortunate consequences. When a statute is clear on its face, however, it is not the role of this Court to look beyond that face. "In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in . . . a particular statute-we rely only on what the General Assembly has actually said." *State ex rel. Jones v. Conrad*, 92 Ohio St. 3d 389, 392 (2001) (quoting *Muenchenbach v. Preble County*, 91 Ohio St. 3d 141, 149 (2001) (Moyer, C.J., dissenting)). If, as I suspect, the General Assembly intends the physician-patient privilege to apply as broadly as the attorney-client privilege, it may wish to adopt language like that found in Rule 503(b) of the Uniform Rules of Evidence, which provides: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his [physical,] mental or emotional condition, including alcohol or drug addiction, among himself, [physician or]

psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the {physician or} psychotherapist, including members of the patient's family."

APPEARANCES:

LAWRENCE J. SCANLON, and MICHAEL J. ELLIOTT, Attorneys at Law, for Appellants.

S. PETER VOUDOURIS, NICOLE BRADEN LEWIS, and KAREN E. ROSS, Attorneys at Law, for Appellees.

DAVID M. BEST, Attorney at Law, for Appellee.

DOUGLAS G. LEAK, Attorney at Law, for Appellee.

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2317. Evidence (Refs & Annos)
Competency of Witnesses and Evidence; Privileged Communications
→ 2317.02 Privileged communications and acts

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or

may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)(i) If the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the

deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician or dentist as provided in division (B)(1)(c) of this section, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 of the Revised Code does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient relation.

(5)(a) As used in divisions (B)(1) to (4) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(b) As used in division (B)(2) of this section, "health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) "Ambulatory care facility" means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. "Ambulatory health care facility" does not include the private office of a physician or dentist, whether the office is for an individual or group practice.

(ii) "Emergency facility" means a hospital emergency department or any other facility that provides emergency

medical services.

(iii) "Health care practitioner" has the same meaning as in section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of the Revised Code.

(v) "Long-term care facility" means a nursing home, residential care facility, or home for the aging, as those terms are defined in section 3721.01 of the Revised Code; an adult care facility, as defined in section 3722.01 of the Revised Code; a nursing facility or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20 of the Revised Code; a facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the "Social Security Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(d) As used in divisions (B)(1) and (2) of this section, "drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 307.628 of the Revised Code or the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(C)(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.