

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CAROL BEDNARIK,)	
)	CASE NO. 09 MA 34
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
ST. ELIZABETH HEALTH CENTER,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 06CV3168.

JUDGMENT: Reversed.

APPEARANCES:
For Plaintiff-Appellee: Attorney William Ramage
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Youngstown, Ohio 44502

For Defendants-Appellants: Attorney Thomas Wilson
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 4, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant St. Elizabeth Health Center appeals the decision of the Mahoning County Common Pleas Court which ordered the production in discovery of a portion of a non-party patient's medical record. The issue on appeal is whether this record is protected by physician-patient privilege or whether a non-statutory exception exists in a case where plaintiff-appellee Carol Bednarik requires the non-party patient's record to prove that the hospital improperly placed her in a room with an infectious patient which caused her surgical wound to become infected with the same disease believed to have been suffered by the roommate. Due to a recent Supreme Court case, the judgment of the trial court releasing the non-party patient's redacted laboratory results is reversed.

STATEMENT OF THE CASE

¶{2} Appellee filed a medical negligence suit against the hospital. Her complaint explained that on February 28, 2005, she was hospitalized after her back surgery. Prior to her release, she overheard one nurse tell another that her roommate had been diagnosed with methicillin resistant staph aureus (MRSA), which she describes as a highly infectious disease especially for those in a weakened and susceptible post-surgical state. Soon after her release, appellee was rehospitalized for MSRA at the incision site and had to undergo various therapies and surgical procedures as a result.

¶{3} In conducting discovery, appellee requested from the hospital the complete chart of the non-party patient with whom she shared a room after her surgery. She asked that it be redacted to exclude the non-party patient's name and any other identifying information. The hospital filed a motion for a protective order on the basis that the record was privileged and that there was no way to protect the non-party patient's anonymity because the patient is already identified to appellee since they shared a room for four days.

¶{4} Appellee responded that the record was crucial to establishing how she contracted MSRA and how the hospital was negligent in failing to segregate the patients or otherwise protect appellee from transmission. Appellee also stated that she was not aware of the non-party patient's identity.

¶{5} On September 25, 2008, the magistrate ordered production of a redacted record for an in camera inspection. After considering objections, the trial court's October 24, 2008 entry upheld the magistrate's decision. The magistrate then reviewed what was described as a voluminous medical record.

¶{6} On December 4, 2008, the magistrate ordered that six pages be provided to appellee after redaction of the non-party patient's name and date of birth. This portion of the record showed the laboratory results of blood and culture samples collected from the non-party patient on February 19, 2005 and February 26, 2005.

¶{7} The magistrate applied various appellate cases and reasoned that the information was crucial to appellee's cause of action, noting that the hospital did not show that the spread of such infection is impossible or that the allegations are not actionable. The magistrate concluded that appellee's interest in proving her case outweighed the non-party patient's interest in confidentiality. The hospital filed timely objections.

¶{8} On January 22, 2009, the trial court overruled the hospital's objections and adopted the magistrate's decision. The court then ordered the hospital to provide the six pages (three of which are blank) of laboratory results with redactions to the patient's name and date of birth.

¶{9} The hospital filed a timely appeal from this final order. See R.C. 2505.02(A)(3) (discovery of privileged matter is a provisional remedy), (B)(4) (order that grants or denies a provisional remedy is appealable if it in effect determines the action and prevents judgment, both with respect to the provisional remedy, and if appellant would not be afforded meaningful or effective remedy by appeal after final judgment as to all issues).

ASSIGNMENT OF ERROR

¶{10} The hospital assigns the following as error:

¶{11} "THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING ST. ELIZABETH TO PRODUCE PRIVILEGED MEDICAL RECORDS OF A NONCONSENTING, NONPARTY PATIENT."

¶{12} The pertinent discovery rule only allows a party to receive relevant material that is not privileged. Civ.R. 26(B)(1). In general, medical records are protected by the physician-patient privilege and are not subject to disclosure. R.C. 2317.02(B)(1), (B)(5)(a). See, also, *Hageman v. Southwest Gen. Health Ctr.*, 119

Ohio St.3d 185, 2008-Ohio-3343, ¶9. It is conceded that the statutory exceptions to such privilege are not applicable here. See R.C. 2317.02(B)(1)(a)-(e) (patient gives express consent or files a claim, court-ordered treatment in civil action, blood alcohol testing in criminal action, criminal action against physician, or will contest).

¶{13} In order to explain the parties' original positions, we must point out that there is an independent tort available to a patient against a hospital or physician for the unauthorized, unprivileged disclosure to a third-party of records protected by the physician-patient privilege. *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 401. In *Biddle*, the Court stated that the physician-patient privilege is not absolute as there are conditional or qualified privileges which permit the disclosure of medical information. *Id.* at 402. The Court noted that a statute or common law duty may require the disclosure of medical information. *Id.*

¶{14} The Court then stated that there are also "special situations that may exist where the interest of the public, the patient, the physician, or a third person are of sufficient importance to justify the creation of a conditional or qualified privilege * * *." *Id.* Specifically, the court created a defense for those disclosing medical records "where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." *Id.*

¶{15} Based upon these statements, many courts, including the trial court here, apply the *Biddle* exception so that a person seeking discovery of a non-party patient's medical records (that are otherwise confidential) can receive redacted records where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality. See, e.g., *Alcorn v. Franciscan*, 1st Dist. No. C-060061, 2006-Ohio-5896, ¶11 (where the First District found that a plaintiff is entitled to a fellow patient's medical records where that non-party patient attacked the plaintiff because absent these records, the plaintiff could not prove that the hospital was aware of the non-party patient's dangerous proclivities; also holding that merely because the plaintiff may be aware of the non-party patient's identity does not mean that discovery should not be permitted); *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, ¶6-8 (where the First District permitted discovery of the medical records of multiple patients of a certain physician from a defendant hospital in order to develop a primary claim on the issue of negligent credentialing and to impeach a party-defendant's deposition testimony); *Fair v. St. Elizabeth Med. Ctr.* (2000), 136 Ohio

App.3d 533, 527 (where the Second District held that the plaintiff's right of recourse for the hospital's breach of its statutory duty to protect her from assault by others is a special situation outweighing the attacker's right to confidentiality).

¶{16} Although we were inclined to rely on much of this appellate law and affirm the trial court's application of *Biddle*, a Supreme Court case was recently released that abrogated this appellate case law and limited *Biddle*'s application to situations not at issue herein. See *Roe v. Planned Parenthood of Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973. Appellant filed a notice of supplemental authority pointing to this case.

¶{17} In *Roe*, parents were claiming in part that their fourteen-year-old daughter received an illegal abortion as they never received notice prior to the procedure. In discovery, they sought redacted medical records of non-party minors from the past ten years. *Id.* at ¶14. The trial court applied the *Biddle* exception and the First District's *Richards* holding and found that the Roes had a tremendous interest in the requested documents and that their need for the information outweighed the non-party patient's interest in confidentiality. *Id.* at ¶15-16. The appellate court also applied *Biddle* and *Richards* but reversed on the grounds that the privileged information was not necessary to protect the Roes' interest. *Id.* at ¶17.

¶{18} The Supreme Court recognized that various appellate courts have been applying *Biddle* to discovery situations. *Id.* at ¶47, citing *Alcorn*, 1st Dist. No. C-060061; *Richards*, 162 Ohio App.3d 823; *Fair*, 136 Ohio App.3d 533. The Court announced, however, that *Biddle* merely provided a defense to liability for unauthorized disclosure of confidential medical information. *Id.* at ¶47-48. The *Roe* Court emphasized that *Biddle* did not involve discovery of documents and that *it did not create a litigant's right to discovery of confidential medical records of non-parties.* *Id.*

¶{19} *The Court concluded that any such exception to physician-patient privilege would need to be created by the legislature.* *Id.* at ¶48, 51-52. The Court also noted that redaction does not remove the confidential or privileged nature of the documents. *Id.* at ¶49. Thus, the Roes were not permitted to discover the privileged medical records of the non-party patient regardless of their reason for desiring discovery or their need for the information. See *id.* at ¶46-55.

¶{20} Even more recently, the Supreme Court reversed an Eighth District case on this topic. The Eighth District had allowed discovery of non-party patients' billing statements that the defendant had sent to Medicare and Medicaid by applying *Biddle* to hold that although the records were confidential, they were discoverable to prove motive and to support punitive damages. *Cepeda v. Lutheran Hosp.*, 8th Dist. No. 90031, 2008-Ohio-2348, ¶15-16 (non-party patient's privilege was outweighed by plaintiff's countervailing interest in proving her case against defendant for unnecessarily removing her ovaries and uterus). The Supreme Court summarily reversed the Eighth District on the authority of *Roe*. *Cepeda*, __ Ohio St.3d __, 2009-Ohio-4901.

¶{21} The case before us indisputably revolves around the application of the *Biddle* exception to discovery. Since *Roe* has now held that *Biddle* does not create the right to discover confidential medical records and that such records cannot be disclosed in the absence of legislative enactment, the Supreme Court has precluded appellee from forcing discovery of a non-party patient's privileged medical records (redacted or not). As such, we are forced to reverse the trial court's decision on the basis of *Roe*.

¶{22} For the foregoing reasons, the judgment of the trial court releasing the non-party patient's redacted laboratory results is hereby reversed.

Donofrio, J., concurs.

DeGenaro, J., concurs.