

IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, Individually and:  
as parents and next friends of JANE ROE,:  
a minor, :

Plaintiffs/Appellants, :

-v- :

PLANNED PARENTHOOD  
SOUTHWEST OHIO REGION, et al. :

Defendants-Appellees.

On Appeal from the Hamilton County  
Court of Appeals, First Appellate District

Appeals No: C060557

Trial No.: A-0502691

07 - 1832

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF PLAINTIFFS-APPELLANTS JOHN AND JANE ROE,  
INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS  
OF JANE ROE, A MINOR

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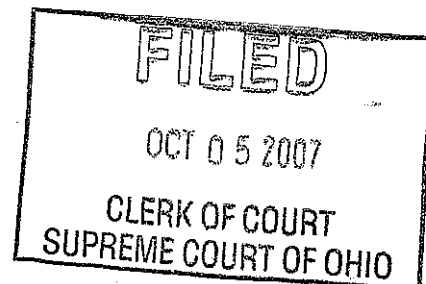
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**TABLE OF CONTENTS**

**EXPLANATION OF WHY THIS COURT SHOULD EXERCISE JURISDICTION OVER THIS APPEAL** ..... 1-4

**STATEMENT OF CASE AND FACTS** ..... 5-6

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1:** The Decision violates Appellants’ constitutional right to due process ..... 6-8

**Proposition of Law No. 2:** The disclosure of redacted non-party medical records necessary for plaintiffs to establish their claims outweighs the need for protection provided by the physician-patient privilege ..... 8-9

**Proposition of Law No. 3:** Medical records do not have constitutional protection ..... 9-10

**Proposition of Law No. 4:** In cases involving claims for punitive damages, plaintiffs are entitled to discover information from defendant that establishes that defendant’s conduct is part of a pattern of wrongful/criminal conduct ..... 10-13

**Proposition of Law No. 5:** A minor plaintiff who is a victim of the defendant’s systematic and intentional breach of his duty under RC 2151.421 to report suspected abuse is entitled to seek punitive damages against defendant for that breach ..... 13-14

**Proposition of Law No. 6:** A minor plaintiff victimized by defendant’s breach of its duty to report sexual abuse pursuant to RC 2151.421 may use redacted reports made pursuant to RC 2151.421 to help establish that the defendant’s breach was intentional and part of a pattern of misconduct ..... 14-15

**CONCLUSION** ..... 15

**PROOF OF SERVICE** ..... 17

**APPENDIX - First Appellate District Court Decision of August 24, 2007** ..... A1

**EXPLANATION OF WHY THIS COURT SHOULD EXERCISE JURISDICTION OVER THIS APPEAL**

This case is about a frightened and confused 14 year old girl who learned she had become pregnant as a result of the sexual abuse of her 21 year old soccer coach. The coach convinced her to have an abortion, and made arrangements at Planned Parenthood for the procedure. In violation of its duties under Ohio law, Planned Parenthood performed the abortion without providing any notice to the young girl's parents or securing her informed consent. Moreover, Planned Parenthood failed to report this sexual abuse to appropriate authorities despite having information that triggered its duty to report that abuse. As a result, the coach was able to continue his sexual abuse of the young girl.

When the young girl's parents learned what had happened to their daughter, they filed suit against Planned Parenthood and the doctor who had performed the abortion. Appellants allege that these defendants had, as a matter of policy and practice, intentionally breached their statutory duties to provide actual notice of the abortion, obtain informed consent, and report suspected cases of abuse. Appellants sought discovery to help establish those claims, as well as their claims for punitive damages and injunctive relief. The Trial Court found that this discovery, which includes medical records from which the Trial Court ordered the redaction of all "personal patient information," is "vital" to Appellants' ability to prove those claims.

**1. The Decision Violates Appellants' Constitutional Right To Due Process.**

Appellants allege that Planned Parenthood's failure to report the sexual abuse of Plaintiff Jane Roe was a part of a pattern or wrongful/criminal conduct, and, to help establish that claim, sought through discovery Planned Parenthood's redacted non-party records of all abortions performed over a period of time. The Trial Court found that Appellants met their burden under Civil

Rule 26 by showing that the information they sought relates directly to (a), their claims that they were harmed by Planned Parenthood's policies and practices and Planned Parenthood's intentional and systematic misconduct and (b), their claims for punitive damages and injunctive relief.

The Appellate Court, in reversing the Discovery Order, held that Appellants are not entitled to discover the evidence necessary to prove their claims because they failed to offer evidence to support their claims! This novel concept, that Appellants must offer evidence of Planned Parenthood's wrongful conduct in order to be able to discover the information that would prove the wrongful conduct, surfaced for the first time in the Appellate opinion authored by Judge Painter. However, it is an incontestable fact that Appellants were never at any stage of this nascent litigation informed of this novel burden or given the opportunity to produce "evidence" of Planned Parenthood's wrongful conduct. The failure to give Appellants notice of or an opportunity to meet this burden constitutes a clear violation of Appellants' constitutional right to due process.<sup>1</sup>

**2. This Case Involves The Interpretation Of Cases Decided By Both The Ohio And United States Supreme Courts, All Of Which Present Matters Of Public Or Great General Interest.**

**a. When Is A Plaintiff Is Entitled To Discover Redacted Non-Party Medical Records?**

The Trial Court, in part relying on *Biddle v. Warren General Hospital*,<sup>2</sup> found that Appellants were entitled to obtain from Appellees redacted, non-party medical records. This is precisely the same ruling that the trial court issued in *Alcorn v. Franciscan Hospital*, a ruling that was upheld by the First District Court of Appeals.<sup>3</sup> The defendants in *Alcorn* appealed that decision, and this Court accepted jurisdiction of that appeal.<sup>4</sup> However, the parties in *Alcorn* agreed to settle their claims

<sup>1</sup>*Matthews v. Eldridge*, 424 U.S. 319 (1976); *Hannah v. Larche*, 363 U.S. 420 (1960); *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985), citing *Management Investors v. United Mine Workers*, 610 F.2d 384 (6<sup>th</sup> Cir. 1979); Milani & Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts* (2002), 69 Tenn. L. Rev. 245, 315. <sup>2</sup>86 Ohio St.3d 395, 1999 Ohio 115, 715 N.E.2d 518.

<sup>3</sup> (2006), Case No. C060061, 2006 Ohio 5896.

<sup>4</sup> (2006), Case No. 06-2357, 3-28-06 Entry.

before this Court could decide the appeal, and, as such, this matter of public and great general interest was not resolved.

**b. Do Abortion Medical Records Have Constitutional Protection?**

This Court and the United States Supreme Court have held that the physician-patient privilege is not a constitutional privacy right.<sup>5</sup> Ignoring this clear precedent, the Court of Appeals recognized that Planned Parenthood's medical records are entitled to constitutional protection merely because its patients had abortions.

**c. In Cases Involving Claims For Punitive Damages, Is A Plaintiff Entitled To Discover Information From The Defendant That Establishes That The Defendant's Conduct Is Part Of A Pattern Of Wrongful/Criminal Misconduct?**

This Court and the United States Supreme Court have held that evidence that establishes that the defendant's conduct that caused harm to the plaintiff is part of a pattern of wrongful conduct is directly relevant to whether it is appropriate to award punitive damages *and*, if it is, to help in the determination of the amount of punitive damages to be awarded.<sup>6</sup> Ignoring this clear precedent, Judge Painter wrote that, even if evidence in Planned Parenthood's files established that it "had violated Ohio law 1000 times," that evidence was not discoverable because "it would not assist [Appellants] in showing that Planned Parenthood had violated Ohio law in [this] case." Appellants respectfully submit that it is hard to imagine evidence that would be more helpful to establish their right to an award of punitive damages and the amount of punitive damages they should receive.

**3. This Case Presents Matters Of Public And Great General Interest.**

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<sup>5</sup> *State v. Webb* (1994), 70 Ohio St. 3d 325, 334-334, 1994 Ohio 425, 638 N.E. 2d 1023, cert. denied, (1995) 514 U.S. 1023; *Gonzales v. Carhart, et al.*, 550 U.S. \_\_\_\_ (2007).

<sup>6</sup> *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St. 3d 470, 575 N.E. 2d 416; *Villella v. Waikum Motors, Inc.* (1989), 45 Ohio St. 3d 36, 543 N.E. 2d 464; *Detling v. Chockley* (1982), 170 Ohio St. 2d 134, 24 O.O. 3d 239; *Davis v. Tunison* (1959), 168 Ohio St. 471, 475, 155 N.E. 2d 904, 7 O.O. 2d 296; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 1993 U.S. LEXIS 4403; *Phillip Morris, USA v. Williams*, 549 U.S. \_\_\_\_ (2007).

a. **Is A Victim Of The Defendant's Breach Of It's Duty To Report Suspected Or Known Sexual Abuse Of A Minor Entitled To Seek Punitive Damages Against The Defendant?**

Under RC 2151.421 certain, specified persons are required to report suspected or known abuse of a minor. The breach of this duty is a crime, and the foreseeable consequence of this breach is the continued abuse of the minor. Yet the Appellate Court held that, even if Planned Parenthood's records establish that Appellees systematically and intentionally breached this duty, Appellants are not entitled to seek punitive damages against them solely because RC 2151.421 does not explicitly provide that right. Appellants submit that victims of unreported sexual abuse are entitled to seek punitive damages under RC 2151.421 and the common law claim of intentional infliction of emotional distress based on the same conduct.

b. **May Redacted Abuse Report Records Be Used In Civil Actions Against A Defendant Who *Did Not* Make The Report To Help The Plaintiff Establish That The Defendant's Breach Of Its Duty Under RC 2151.421 Is Intentional And Part Of A Pattern Of Misconduct?**

Ohio has a compelling interest to identify and punish sexual predators of minors, as well as to prevent the sexual abuse of minors. That is the reason the Ohio legislature enacted RC 2151.421. Section H' of the statute protects persons who attempt to meet their duty under the statute by providing that "report(s) shall not be used as evidence against the person making the report." Appellants submit that, contrary to holding of Appellate Court, this protection is *not* afforded to defendants in a civil action who did *not* make a report and are alleged to, as a matter of policy and practice, ignore their duty to make reports. To hold otherwise means that defendants such as Appellees will use RC 2151.421(H)(1) as a shield to protect and encourage those persons who systematically and intentionally breach their duties under the statute.

## STATEMENT OF CASE AND FACTS

### **1. Appellants' Claims, The Denial Of Appellees' Motion To Dismiss, And Appellants' Motion To Compel**

Appellants claim that Appellees intentionally and systematically breached their duties under four Ohio statutes in connection with the abortion they performed on Appellant Jane Roe, who had just turned 14. The Ohio legislature enacted three of those statutes specifically to regulate Appellees' business<sup>7</sup> because Ohio has a profound and substantial interest in protecting fetal life and the health and safety of women seeking an abortion.<sup>8</sup> The fourth, RC 2151.421, was enacted to protect minors from abuse. Appellants allege that these breaches occurred as a result of Appellees' policies and practices, and seek compensatory and punitive damages, as well as injunctive relief.<sup>9</sup>

Appellees moved to dismiss five of Appellants' claims, and the Trial Court overruled the motion in its entirety.<sup>10</sup> It was within this procedural context that Appellants sought the discovery necessary to establish those claims, including Appellees' redacted non-party medical records and abuse report forms. When Appellees refused to produce the requested documents and information, Appellants filed a motion to compel.

### **2. The Discovery Order**

After extensive briefing by the parties, a long hearing, and the Trial Court's month-long deliberation, the Trial Court granted Appellants' motion to compel, and made the following findings. First, the requested discovery is necessary for Appellants to proceed on their claims, attack Appellees' defenses and impeach Appellees' credibility. Second, Appellants' need was "tremendous." Third, Appellees' interest to protect the confidentiality rights of non-parties is "of

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<sup>7</sup>RC 2919.121 (parental consent), RC 2919.12 (parental notification) and RC 2317.15 (informed consent).

<sup>8</sup>*Pre-Term Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570.

<sup>9</sup>The Ohio legislature has expressly provided that proof of violation of these statutes (RC 2919.121, RC 2919.12 and RC 2317.56) entitles Appellees to an award of punitive damages, and proof of the violation of RC 2317.56(H) entitles Appellees to seek injunctive relief.

<sup>10</sup>T.d. 62.

tremendous importance.” Fourth, Appellants’ need for the information “weigh[ed] heavily” in their favor.” Further, the Trial Court fully protected the identities of the non-party patients’ by ordering the redaction of “personal patient information” and stating that it “would issue a protective order to ensure that the patient records were not disclosed to any party outside of the litigation.”<sup>11</sup>

**3. The Appellate Court Substituted Its Judgment For The Trial Court’s.**

Ignoring that it had twice in the last two years explicitly held that its review of precisely the same type of discovery order is under the “abuse of discretion” standard,<sup>12</sup> the Appellate Court reviewed the Discovery Order *de novo*. Without finding any abuse of discretion by the Trial Court, the Appellate Court simply substituted its judgment regarding the Appellants’ need for information for that of the Trial Court. This usurpation of the Trial Court’s discretion is contrary to Ohio law.

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1: The Decision violates Appellants’ constitutional right to due process.**

**1. Introduction**

Appellants do not maintain that they have a constitutional right to obtain the discovery that is the subject of the Discovery Order. They do, however, maintain that, before being denied that discovery, they had the right to be: (1) notified of the novel and greater burden the Appellate Court created, which requires them to first introduce evidence establishing their claims before they have a right to obtain through discovery the very evidence they need to establish those claims; and (2) provided with the opportunity to meet that burden. The Appellate Court failed to give Appellants either notice of their burden or the opportunity to meet the burden - two of the constitutional

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<sup>11</sup>T.d. 103, at 5, 6, 7, 9, 10, 12.

<sup>12</sup>*Richards v. Kerlakian* (2005), 162 Ohio App.3d 823, 2005 Ohio 4414, 835 N.E.2d 678; *Alcorn v. Franciscan Hospital* (Nov. 9, 2006), 1<sup>st</sup> Dist. No. C-060061, 2006 Ohio 5896.

protections recognized by the Courts as most elementary and important.<sup>13</sup> In so failing, Appellants were deprived of their constitutional right to due process.

**2. Appellants Met Their Burden Under Civil Rule 26.**

Appellants were not required to introduce *any* evidence to meet their burden establishing their right to obtain the information they seek from Appellees. Indeed, under Civ.R. 26, *Biddle* and *Richards*, their *only* burden was to show that the discovery they sought is relevant and necessary to establish one or more of the issues raised in this lawsuit. (The term “relevant” encompasses any matter “that bears on or that reasonably could lead to another matter that could bear on any issue in the case.”<sup>14</sup>) The Trial Court followed exactly the roadmap provided by Rule 26 and the Appellate Court in *Richards*, and found that the information Appellants are seeking is discoverable because Appellants have a “vital” and “tremendous” need for that information.

**3. The Appellate Court Put The Cart Before The Horse.**

The Appellate Court used the incorrect standard of review (*de novo*), and merely substituted its judgment on this issue for that of the Trial Court. Further, the Appellate Court changed the rules of the game in the middle of the game! Specifically, it ruled that, in order to establish their right to obtain the information they seek from Appellees, Appellants were required first to offer evidence to support their claims. The Appellate Court then held that, because the record is devoid of any evidence to support the allegations that Appellees have engaged in a pattern and practice of violating their clear statutory duties, Appellants are not permitted to obtain the very evidence that will establish beyond peradventure that their allegations are true. In short, the Appellate Court put the

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<sup>13</sup>*Selva & Sons, Inc. v. Nine Footwear, Inc.*, 705 F.2d 1316, 217 U.S.P.Q. (BNA) 641 (Fed. Cir. 1983), citing *Davis v. Howard*, 561 F.2d 565, 571-72 (5<sup>th</sup> Cir. 1977).

<sup>14</sup>*Rossmann v. Rossmann*, (1975) 47 Ohio App.2d 103; *Dejaiffe v. KeyBank USA N.A.*, 2006 Ohio 2919, 2006 Ohio App. LEXIS 2808 (6<sup>th</sup> Dis.); *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8<sup>th</sup> Cir. 2000); *Oppenheimer Fund, Inc. v. Sanders* 437 U.S. 340 at 351, 98 S. CT. 2380 at 351 (1978); *Oil Chemical & Atomic Workers Local Union, supra*, 711 F.2d at 360 (D.C. Cir. 1983). (The Ohio rules relevant to this issue are, in essence, identical to their federal counterparts.)

cart before the horse. Appellants were neither given notice of this novel and unique evidentiary burden nor provided the opportunity to present evidence to meet that burden.

#### **4. The Due Process Violation**

Appellants have found no cases where an appellate court converted a review of a trial court's order granting a motion to compel into a review of the opposing party's never-filed motion for partial summary judgment. (It is likely that this has never before happened.) However, cases involving a trial court's conversion of a motion to dismiss into a motion for summary judgment provide guidance on what must be done to protect the constitutional rights of the non-moving party when such a conversion takes place. At the very least, the court must first notify all parties of the conversion, and second, the non-moving party must be provided a reasonable opportunity to respond and present evidence to meet the burden.<sup>15</sup> Appellants received neither notice nor opportunity. This constitutes a constitutional violation because the "failure to do so is inconsistent with the fundamental principles of due process that a party should have notice of, and the opportunity to be heard on, the determinative issues in the case."<sup>16</sup> This constitutes a violation of Appellants' due process rights.

**Proposition of Law No. 2: The disclosure of redacted non-party medical records that are necessary for a plaintiff to establish his claims outweighs the need for protection provided by the physician-patient privilege.**

Since this Court's decision in *Biddle*, Ohio courts have attempted to apply that case's holding to situations where a party seeks through discovery the medical records of non-parties. At least three appellate courts have used slightly different balancing tests where the needs of the requesting party

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<sup>15</sup>*Patrey v. Simon* (1983), 4 Ohio St.3d 154, 147 N.E.2d 1285; *Furness v. Pois* (1995), 107 Ohio App.3d 719, 669 N.E.2d 481.

<sup>16</sup>*Milani & Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts* (2002), 69 Tenn. L. Rev. 245, 315; *Thoen v. United States*, 765 F.2d 1110, 1114 (Fed. Cir. 1985); *Management Investors v. United Mine Workers*, 610 F.2d 384, 390 (6<sup>th</sup> Cir. 1979); *Winbourne v. Eastern Airlines, Inc.*, 632 F.2d 219, 224 (2d Cir. 1980); *State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 563 N.E.2d 713.

are balanced with the confidentiality interests of the non-parties.<sup>17</sup> In the cases where the court has found that the balance tips in favor of the requesting party, the courts have fully protected the interests of the non-parties by ordering the redaction of all information that could reveal the identity of any non-party.<sup>18</sup> That is exactly what the Trial Court did in this case.

Prior to issuing its Decision in this case, the Appellate Court had reviewed precisely the same types of discovery orders under the “abuse of discretion” standard.<sup>19</sup> Ignoring its own precedent, the Appellate Court incorrectly applied the “*de novo*” standard, and then substituted its judgment for that of the Trial Court’s. This alone constitutes reversible error.

This Court recognized the need to provide guidance to trial courts on how to handle the balancing of a party’s need for non-party medical records and the non-parties’ confidentiality interests when it accepted jurisdiction of the appeal in *Alcorn*. However, this Court was not able to provide that guidance because *Alcorn* was dismissed before a ruling was issued. As such, the need for guidance on this issue still remains.

**Proposition of Law No. 3: Medical records do not have constitutional protection.**

This Court in *Webb* ruled that a violation of the physician-patient privilege codified in RC 2317.02 does *not* constitute a constitutional deprivation. Following *Webb*, Ohio appellate courts have uniformly and explicitly held that no constitutional right to privacy attaches to information protected by Ohio’s physician-patient privilege.<sup>20</sup> For example, in *Desper* the appellate court, citing *Webb*, ruled that a patient’s constitutional right to privacy is not implicated when her physician

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<sup>17</sup>These are the First Appellate District in *Richards* and *Alcorn*, the Twelfth Appellate District in *Vaughn v. Fallang*, Case No. CA 2004-10-239, Judgment Entry, May 31, 2005, and the Sixth Appellate District in *Walker v. Firelands Community Hosp.*, 2004 Ohio 681, 2004 Ohio App. LEXIS 656.

<sup>18</sup>*Id.*

<sup>19</sup>*Richards, supra; Alcorn, supra.*

<sup>20</sup>*State v. Desper* (2002), 151 Ohio App.3d 208, 2002-Ohio-7176, 783 N.E.2d 939, *appeal denied* (2003), 98 Ohio St.3d 1540, 2003-Ohio-1946, 786 N.E.2d 902; *State v. Mabrey* (May 17, 1995), 1<sup>st</sup> Dist. C-940218, 1995 Ohio App. LEXIS 2014 at \*4; *State v. Tomkaliski* (Oct. 22, 2004), 11<sup>th</sup> Dist. No. 2003-L-097, 2004-Ohio-5624 at ¶27. *Desper* at ¶36.

testified regarding matters protected by the physician-patient privilege without a waiver. (“The physician-patient privilege is not a constitutional privacy right.”<sup>21</sup>)

The federal courts are in accord with the Ohio courts on this subject. For example, in *Mann v. University of Cincinnati*,<sup>22</sup> the Sixth Circuit Court of Appeals categorically rejected the defendant’s argument that the production of privileged medical records was a violation of a patient’s constitutional right to privacy. Further, just this year the United States Supreme Court in *Gonzales v. Carhart*<sup>23</sup> made clear that the rules that apply to medical doctors and medical records generally are to be applied in the same even-handed manner to abortion doctors and abortion records. (“The law . . . [does not] elevate [an abortion doctor’s] status above other physicians in the medical community.”<sup>24</sup>)

Ignoring the clear precedent of this Court and the United States Supreme Court, Judge Painter recognized that Planned Parenthood’s medical records are entitled to constitutional protection merely because its patients had abortions. In doing so, the Appellate Court improperly provided different and preferential treatment to only one group of medical providers - those who perform abortions.

**Proposition of Law No. 4: In cases involving claims for punitive damages, plaintiffs are entitled to discover information from the defendant that establishes that the defendant’s conduct is part of a pattern of wrongful/criminal conduct.**

The Appellate Court erroneously held that, because RC 2919.12 and RC 2317.56 “provide that punitive damages are available for a single violation,” Appellants are not entitled to review redacted medical records of third parties even if those records contained “evidence that Planned Parenthood had violated Ohio law 1,000 times.” This holding directly conflicts with long established Ohio precedent dealing with the fundamental purpose of punitive damages.

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<sup>21</sup>*Desper* at ¶36.

<sup>22</sup>(1997), 1997 U.S. App. LEXIS 12482 at \*10 (6<sup>th</sup> Cir. Nos. 95-3195, 95-3283).

<sup>23</sup>*Gonzales v. Carhart, et al.*, 550 U.S. \_\_\_\_\_ (2007).

<sup>24</sup>*Id.*, quoting *Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833, at 884, 112 S.Ct. 2791, 120 L.Ed.2d 674.

Neither RC 2919.12 nor RC 2317.56 provide any guidance whatsoever as to what the appropriate amount of the punitive damage award should be for a single violation of either or both. Nor do these statutes provide guidance on what an appropriate award would be for the defendant's pattern and practice of wrongful conduct that results in multiple violations. How is a trier of fact to determine the amount of the punitive damage award? The same way it does in every case - i.e. by determining the reprehensibility of the defendant's conduct, in part by assessing the evidence of a pattern and practice of similar misconduct.

The United States Supreme Court and the Ohio courts have made clear that a factor - maybe the most important factor - to consider in determining the amount of punitive damages to be awarded is whether defendant's conduct is "part of a larger pattern of wrongdoing."<sup>25</sup> In the recent *Phillip Morris*<sup>26</sup> decision the United States Supreme Court held that a plaintiff may use evidence of the defendant's misconduct that causes harm to third parties to establish the reprehensibility of the defendant's conduct that harmed the plaintiff. Further, the United States Supreme Court held that, when the jury is determining whether to award punitive damages and how much the award should be, "[i]t is appropriate to consider the potential harm that the defendant's conduct would have caused the intended victim . . . , as well as the possible harm to other victims that might have resulted if similar future behavior is not deterred."<sup>27</sup> Appellants' discovery request is a proper attempt to gather evidence of precisely the type of conduct - i.e Planned Parenthood's practice of failing to report sexual abuse of minors - that is relevant to the amount of punitive damages to be awarded.

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<sup>25</sup>*TXO Production Corp.*, (1993), 590 U.S. 443; *Myer v. Preferred Credit, Inc.* (2001), 117 Ohio Misc.2d 8, 34, 2001 Ohio 4190; *Smithhisler v. Dutter* (1952), 157 Ohio St. 454, 460, 105 N.E.2d 868.

<sup>26</sup>*Phillip Morris, USA v. Williams*, 549 U.S. \_\_\_\_\_ (2007).

<sup>27</sup>*TXO Production Corp., supra.*

By requiring an award of punitive damages for a single violation of RC 2919.12 or RC 2317.56, the Ohio legislature eliminated the plaintiff's duty to prove "actual malice" on the part of the defendant to obtain such an award under those statutes. However, absent such a provision, a plaintiff must establish his right to an award of punitive damages the old fashioned way - by proving that the defendant acted with "actual malice." As such, Appellants are entitled to discover pattern and practice evidence to help establish the actual malice element of their other claims for which they seek punitive damages.

Actual malice is the "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."<sup>28</sup> Since defendants rarely admit to malicious conduct, actual malice is most often inferred from conduct and surrounding circumstances.<sup>29</sup> Thus, evidence of a "pattern of wrongful conduct" or a "pattern of wrongdoing" by a defendant is highly relevant to the issue of whether the alleged injury was a "natural and probable" consequence of the wrongful act.<sup>30</sup>

Evid. R. 404(B) defines relevant evidence as "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 404(B) also provides in pertinent part that:

Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

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<sup>28</sup>*Calmes* (1991), 61 Ohio St.3d 470, 473 575 N.E.2d 416.

<sup>29</sup>*Joyce-Couch v. Dr. Silva* (1991), 77 Ohio App.3d 278, 288, 602 N.E.2d 286.

<sup>30</sup>*TXO Production Corp.* (1993), 590 U.S. 443; *Myer v. Preferred Credit, Inc.* (2001), 117 Ohio Misc.2d 8, 34, 2001 Ohio 4190; *Smithhisler v. Dutter* (1952), 157 Ohio St. 454, 460, 105 N.E.2d 868.

In the context of this case, what possibly could be more relevant to the issue of Planned Parenthood's actual malice than the fact that it has, over an extended period of time, repeatedly ignored and failed to report known or suspected sexual abuse of children? Not much. Clearly, a pattern and practice of wrongful conduct (i.e. violation of statutory duties) is highly relevant to establishing the actual malice that must underpin a punitive damage award. (Also see e.g. *Falkner v. Para-Chem*,<sup>31</sup> where the Ninth Appellate District, construing Evid. R. 404(B), concluded that "other acts" evidence was admissible to prove a "common scheme, plan, or system" and *Atkinson v. International Technegroup, Inc.*,<sup>32</sup> where the First Appellate District (with Judge Painter concurring) upheld a punitive damages award in a wrongful discharge/age discrimination case wherein the plaintiff was permitted to introduce evidence of defendant's prior, similar misconduct.)

The decision of the First Appellate District in this case, which effectively bars discovery of Planned Parenthood's pattern and practice of failing to report known or suspected child abuse in clear dereliction of its statutory obligations, is in direct conflict with well established Ohio law. In Ohio, a plaintiff has an absolute right to discover and adduce evidence that tends to show a pattern of wrongful conduct by a defendant to prove actual malice and thus demonstrate an entitlement to punitive damages and the amount of punitive damages to be awarded. There is nothing in the statutory provisions of RC 2919.12, RC 2317.56 or RC 2151.421 which even remotely suggests that the Ohio legislature intended to alter the normal rules which apply to punitive damage awards.

**Proposition of Law No. 5: A minor plaintiff who is a victim of the defendant's systematic and intentional breach of his duty under RC 2151.421 to report suspected abuse is entitled to seek punitive damages against the defendant for that breach.**

The Appellate Court held that Appellants may not seek an award of punitive damages in connection with Appellees' intentional and systematic breach of their duties under RC 2151.421

<sup>31</sup>2003 Ohio 3155, 2003 Ohio App. LEXIS 2819.

<sup>32</sup>(1995) 106 Ohio App. 3d 349, 666. N.E. 2d 257, 1995 Ohio LEXIS 3933.

because the statute “does not provide for punitive damages.” That interpretation of RC 2151.421 is wrong.

RC 2919.12/.121 and RC 2317.56 are three of the very rare Ohio statutes that explicitly provide that a plaintiff will be entitled to an award of punitive damages if he is able to establish a single statutory violation. However, the absence of such a provision in RC 2151.421 does not mean, as the Appellate Court held, that a defendant who violates that statute is immune from an award of punitive damages.

Under Ohio law there are many types of conduct that give rise to punitive damages in the absence of an express provision for an award of punitive damages in the relevant criminal statute. For example, this is true for crimes involving death and physical injury (e.g. aggravated murder (RC 2903.01), murder (RC 2903.02), aggravated vehicular homicide (RC 2903.06), felonious assault (RC 2903.11) and all sex offenses (RC 2907 *et seq.*)). None these statutes address the possibility of punitive damages, yet it is inarguable that a victim of violation of any of these criminal statutes is entitled, in a civil action for injuries, to an award of punitive damages against the perpetrator. Indeed, in expressly providing for punitive damages, RC 2919.12/.121 and RC 2317.56 are exceptions to the norm.

The lack of a “punitive damage” provision in RC 2151.421 simply means that Appellants must establish their right to punitive damages for violation of that statute as they would in any other case - i.e. by obtaining and introducing evidence of Appellees’ actual malice and the reprehensibility of Appellees’ conduct. That is precisely the evidence Appellees were directed to produce by the Discovery Order issued by the trial court.

**Proposition of Law No. 6: A minor plaintiff who is a victim of the defendant’s breach of its duty under RC 2151.421 to report sexual abuse may use in a civil action redacted reports**

**made pursuant to RC 2151.421 to help establish that the defendant's breach was intentional and part of a pattern of misconduct.**

The Appellate Court's holding that Appellants are prohibited under RC 2151.421(H)(1) from using abuse reports in this action is wrong. RC 2151.421(H)(1) explicitly provides that abuse reports made under the statute shall not be used as evidence in any civil action or proceeding *against the person who made the report*. That prohibition has no relevance to this case. The defendants in this action are Planned Parenthood and Dr. Rosylin Kade, neither of whom are persons who made the abuse reports that Appellants seek and intend to use in this action.

Moreover, the clear purpose of section RC 2151.421(H)(1) is to protect and encourage individuals to report suspected or known abuse without fear of being named in a lawsuit brought by the person(s) who are the subject of the report. The purpose is *not* to provide protection to organizations and individuals who systematically and intentionally ignore their reporting duties under the statute. Indeed, to read the statute in such a manner would have the effect of encouraging persons who have a duty under the statute *not* to make reports.

#### CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully request that this Court accept jurisdiction in this case.

Respectfully submitted,

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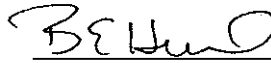
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Memorandum In Support Of Jurisdiction Of Plaintiffs-Appellants John and Jane Roe, Individually and as Parents and next Friends of Jane Roe, a Minor* was sent by regular mail to Defendants' Attorneys, Daniel J. Buckley, Vorys Sater Seymour & Pease, 221 E. Fourth St., Suite 2000, P.O. Box 236, Cincinnati, Ohio 45202 this 5<sup>th</sup> day of October, 2007



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