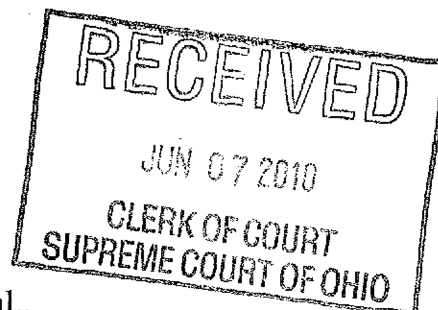
ORIGINAL

No. 2010-0814

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 08-92564



AMY NASH,
Administrator of the Estate of Shane Collins, et al.,

Appellant,

v.

THE CLEVELAND CLINIC FOUNDATION, et al.,

Appellees.

MEMORANDUM OPPOSING JURISDICTION OF APPELLEES THE CLEVELAND CLINIC FOUNDATION, JOHANNA GOLDFARB, M.D., AND RITA STEFFEN, M.D.

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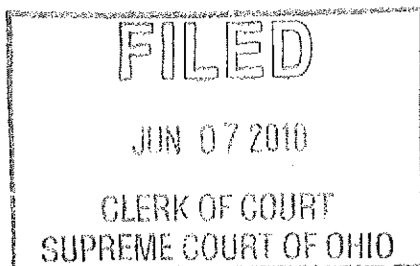

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I. This case does not involve any substantial constitutional issue or any issue of public and great general interest that warrants review.

At issue before the Eighth District, like the trial court before it, was whether certain physicians and social workers of Appellee The Cleveland Clinic Foundation could be deposed without limitation and give testimony regarding their assessment, opinions, and communications as to whether two-year old Shane Collins was a victim of Munchausen-By-Proxy Syndrome (MBPS)—a well-recognized and undisputed form of child abuse. In particular, Appellants—Administrator Amy Nash and Mary Jo Bajc (collectively "Nash")—sought the identities and opinions of Clinic physicians and social workers who assessed Shane for child abuse, and the identity of the reporting individual, to support her uncognizable claim of negligent child-abuse reporting.

The Eighth District—far from the untrue and unprofessional picture of corruption Nash paints here—properly applied R.C. 2151.421 and, in an unanimous decision, reversed the judgment of the Cuyahoga County Common Pleas Court that had effectively granted unrestricted access to confidential and privileged child-abuse-reporting information. Although the appellate court found that the depositions could go forward as to nonconfidential information—i.e., communications or information contained in medical records "that do not relate to a report of child abuse"—confidential information, including records and communications disclosing the identity of those involved in assessing and reporting the suspected abuse, was protected by the statute from disclosure. *Nash v. The Cleveland Clinic Found.*, 8th Dist. No. 92564, 2010-Ohio-10, at ¶2, Appx. 4-5. This is a correct statement of the law and is consistent with the strong, well-

established public policy favoring the protection of children through the reporting of suspected child abuse—even if those suspicions are later found to be unsubstantiated.

But Nash, transforming the appeal into something it is not, wants more. She wants not only unrestricted access to the subpoenaed physicians and social workers, but documents the trial court ordered viewed in camera—at Nash's insistence—before it ruled on the Clinic's motion to quash. Despite her claims that the in camera documents are "secret evidence" and that her inability to view these documents infringes her due process rights, in camera documents viewed by a trial court are not now and have never been accessible to an opposing party absent an order requiring their disclosure. The trial court here issued no such order and the documents themselves—confidential medical records detailing the assessment for and suspicions of child abuse—are not accessible to Nash merely because an appeal had been filed. Nash's argument that she has a constitutional right to these documents simply because they were viewed by the trial court is contrary to the very purpose of in camera inspection and, for good reason, has no support in the law. Due process, under these facts, has not been offended.

Nor is any public or great general interest at stake in Nash's remaining propositions of law. As to Nash's third proposition, appellate courts by rule and inherent authority are empowered to reverse a trial court's order on a privilege issue and remand for proceedings consistent with the reviewing court's opinion, including directing the trial court to enter a protective order to protect the privilege addressed in the appellate court's opinion. There is nothing new about this authority to reverse and remand, nor does it

otherwise negatively impact a state-wide interest.

The same is true of Nash's fourth proposition of law. There, Nash—still seeking the in camera documents—seeks to exclude from the statute's scope of confidentiality any statutorily protected confidential information merely because it is contained in a medical record. Not only is the disclosure of in camera documents not at issue here, but this Court has already noted with approval that any *information* contained in a report is just as protected by the statute's confidentiality as is the actual report itself. See *State ex rel Beacon Journal Pub. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, at ¶14. This well-accepted, commonsense principle does not require this Court's discretionary review.

In sum, the Eighth Appellate District applied well-settled law governing child-abuse reporting and properly restricted the scope of depositions for the subpoenaed individuals on remand. No substantial constitutional question is presented, nor is any public or great general interest at stake that requires further review.

II. Counterstatement of the case and facts.

A. Shane Collins is placed in the foster home of Mary Jo Bajc.

This case has a rather tortuous procedural history. It arises from the unfortunate death of two-year old Shane Collins, who, along with his twin brother Austin Collins, was born prematurely to a drug-addicted mother in September 2002. Immediately after the births, Shane and his twin were placed in the temporary legal custody of defendant Cuyahoga County Department of Children & Family Services (CCDCFS), ultimately adjudicated as neglected and abused children, and eventually placed in the permanent custody of CCDCFS. CCDCFS placed Shane and his brother in the foster home of

Appellant Mary Jo Bajc and her husband Daniel Bajc shortly after the twins' birth.

B. Clinic physicians and social workers evaluate for Munchausen-By-Proxy Syndrome—a well-recognized form of child abuse—and suspected MBPS is eventually reported to CCDCFS.

CCDCFS, as Shane's legal custodian, regularly communicated with physicians and social workers who provided Shane care and treatment, including physicians and social workers affiliated with the Clinic who had been providing Shane care since 2003. Sometime in 2004, however, the frequency of Shane's medical visits and the invasiveness of the intervention requested or obtained—despite Shane's premature birth and medically fragile status—caused some Clinic health-care providers and CCDCFS personnel to be concerned about Munchausen-By-Proxy Syndrome (MBPS). It is undisputed that MBPS is a form of child abuse. The syndrome can be fatal and is characterized by a parent or caretaker reporting or inducing a "false" illness in a child.

Several Clinic physicians and social workers who were involved in providing Shane routine medical care also participated in the MBPS evaluation process. Although each reached their own conclusions as to the existence of MBPS, suspected MBPS was eventually communicated to CCDCFS, not only as part of the Clinic's ongoing relationship with CCDCFS as legal custodian, but as mandated under the child-abuse-reporting statute, R.C. 2151.421.

In July 2004, shortly after MBPS was first suspected, CCDCFS removed Shane and his twin brother from the Bajc home. They were both eventually placed in the home of defendants Joanne and Bryce Smith. At this point forward, the twins received medical care from defendant MetroGeneral Hospital. Shane ultimately died on October 11, 2004

while in the foster care of the Smiths. MBPS was later found to be unsubstantiated and Shane's twin brother, Austin, was eventually returned to the Bajcs and adopted by them.

C. Administrator Amy Nash sues the Cleveland Clinic, among others, and subpoenas the depositions of Clinic physicians and social workers; the Clinic moves to quash.

Three later-consolidated lawsuits followed. In the first action, Nash, along with Mary Jo Bajc, sued the Cleveland Clinic and two of its physicians—Johanna Goldfarb, M.D., and Rita Steffen, M.D.—and MetroHealth Medical Center and one of its physicians—Irene Dietz, M.D. As to the Clinic defendants, Nash claimed that the Clinic defendants were subject to civil liability because the Clinic misdiagnosed child abuse and acted negligently in reporting the suspected abuse to CCDCFS.

But because the child-abuse-reporting statute's overarching concern is for the protection of children, the statute confers immunity from civil liability upon certain health-care providers—like the Clinic defendants here—for reporting suspected abuse, even if the abuse is later found to be unsubstantiated. And on that basis, the Clinic defendants moved for and were granted summary judgment. Claims against the MetroHealth defendants, however, remained, as did claims against the County, CCDCFS, several county employees, and the Smiths. See *Nash*, 2010-Ohio-10, at ¶3-6, Appx. 5-7.

Despite having the claims against the Clinic defendants effectively dismissed, Nash, in two separately filed motions to quash, requested the depositions of several Clinic physicians and social workers while she was pursing her claims against the County defendants. The Clinic moved to quash the deposition subpoenas, however, because the subpoenaed practitioners—physicians Rita Steffen, Conrad Foley, Elumalai Appachi, and

Kadakkal Radhakrishnan, and social workers Hilary Rossen and Sally Siggins—all have mandatory obligations under the child-abuse-reporting statute and are thus prohibited by law from disclosing communications related to those obligations.

Nash contemporaneously moved the trial court for an order requiring the Clinic defendants to produce certain documents for an in camera inspection, including medical records demonstrating that its physicians or social workers "made, or participated in the making, of a report of suspected child abuse" against Bajc. Although Nash acknowledged the confidentiality of the *contents* of these documents in her motion, she argued that an in camera inspection was necessary to determine the identities of the individuals who made or participated in the report of suspected child abuse.

Over the Clinic's opposition, the trial court agreed with Nash and granted the motion; it ordered the Clinic to produce the records for an in camera inspection or risk contempt sanctions. The Clinic thereafter complied with the trial court's order and submitted the confidential documents under seal for inspection in camera, along with supporting affidavits to comply with their authenticity obligations under *Rinaldi v. City View Nursing & Rehab. Ctr., Inc.*, 8th Dist. No 85867, 2005-Ohio-6360, at ¶20. Nash did not seek disclosure of the documents at that time and no such order was ever entered.

D. The trial court denies the motions to quash.

After reviewing the documents in camera, the trial court made several surprising rulings. It vacated the previous grant of summary judgment it had awarded to the Clinic defendants more than two years earlier and denied the motions to quash. The court concluded that it needed a "more complete record," including knowing the identity of the

individuals involved, before it could determine whether the Clinic defendants were entitled to immunity. *Nash*, 2010-Ohio-10, at ¶8, Appx. 7-8.

E. The Eighth Appellate District reverses and remands.

On interlocutory appeal, the Clinic defendants argued that such unrestricted access to the subpoenaed individuals was an affront to the grant of confidentiality provided by R.C. 2151.421(H) and, furthermore, was unnecessary before making any immunity determination because the subpoenas on their face requested privileged information from practitioners with mandatory obligations under the statute.

Instead of responding to the issue on appeal, Nash filed a motion asking the appellate court, among other things, for an order permitting her to inspect and copy documents that the trial court viewed in camera. Like the argument she presents here, Nash argued that these documents are "secret evidence" to which she is entitled. The appellate court denied the motion without opinion. See 5/8/09 J. Entry, Appx. 13.

The appellate court thereafter addressed the merits of the appeal and found that the trial court erred when it denied the motions in their entirety. Declining to address the trial court's "more complete record" reason for the denial, the appellate court nonetheless reversed the judgment of the trial court and remanded with instructions "to permit the depositions to go forward" after the entry of an appropriate protective order limiting the scope of the depositions to records or communications "that do not relate to a report of child abuse." *Nash*, 2010-Ohio-10, at ¶2, Appx. 4-5. There could be no inquiry as to the identity of persons making the reports or the information contained in the reports. Id.

The appellate court reached the same conclusion as to the documents referenced in

each deposition subpoena. Records or notes of communications between the subpoenaed practitioners and CCDCFS were protected from disclosure to the extent that the records were "reports of abuse, or discussed information contained in a report of abuse, or identified the person who made the report[.]" Id. at ¶14, Appx. 11. Records of medical care unrelated to these topics were discoverable. Id. at ¶15, Appx. 11-12.

Nash thereafter filed an application for reconsideration and a motion for en banc hearing, both of which the appellate court denied. This appeal followed.

III. Argument

A. Counterproposition of Law No. I

> Ohio law has long advocated that a trial court conduct an in camera review of documents alleged to be protected from disclosure in determining whether the information contained in the documents is privileged; serving the purportedly privileged documents to an opposing party under Civ.R. 5 would defeat the purpose of the in camera review.

Nash asks this Court to accept jurisdiction of this case and find that documents provided to a trial court under seal for an in camera inspection—on the trial court's order to do so—are documents that should have been served upon her according to Civ.R. 5. She claims that Ohio law does not permit in camera document submissions. Nash Br. at 10. She provides no legal support for this argument and, indeed, cannot. Ohio courts readily rely upon in camera review to determine whether documents purported by one party to be confidential and privileged deserve protection from disclosure. See, e.g., *State v. Hoop* (1999), 134 Ohio App.3d 627, 639.

Undeterred by the well-established policy and practice of in camera inspection,

Nash claims that the in camera tool employed by the trial court here prohibited her access to the submitted documents, not only in the trial court but on appeal as well, and denied her due process rights because she "was not allowed to see and to respond * * * [to] evidence upon which the trial court relied in reaching its judgment." Nash Br. at 10.

Nash misunderstands the issue before the Eighth District, in particular, and the role of an in camera inspection, in general. The disclosure of the documents submitted in camera was not before the appellate court. Although the trial court contemporaneously ordered the documents to be submitted in camera, their disclosure was neither at issue nor necessary to resolve the pending motions. Instead, at issue was whether the trial court erred in denying, in their entirety, the Clinic's motions to quash the deposition subpoenas of its physicians and social workers. To be sure, each deposition subpoena directed the deponent to provide certain documents—records and notes of communications—at the time of the deposition, and the appellate court addressed the discoverability of the requested documents in the course of its decision reversing and remanding. *Nash*, 2010-Ohio-10, at ¶14-15, Appx. 11-12. But the discoverability of the documents submitted in camera was not before the appellate court.

More importantly, Nash misunderstands the purpose of an in camera inspection. An in camera inspection is a tool used by the trial court to determine whether some legal doctrine protects the submitted documents from disclosure. To disclose that information at the appellate level merely because an appeal is pending—an appeal that does not involved the discoverability of those documents—would place the submitting party in an

untenable and essentially indefensible position because it would have no recourse to challenge the disclosure. Cf. *Ingram v. Adena Health Sys.* (2001), 144 Ohio App.3d 603, 606 (noting recourse is after order of disclosure). Although Nash has other procedural mechanisms available to challenge the continued in camera status of the submitted documents, seeking their disclosure by motion during the appeal is not one of them.

B. Counterproposition of Law No. II

> Nonpublic records submitted under seal for an in camera inspection do not become public records accessible to the opposing party, and the public in general, merely because an appeal was filed.

Nash argues next that she should have had access to the sealed, in camera medical records in the trial court and during the intermediate appeal because they are "court records" that fall under the Ohio Public Records Act. She maintains that restricting public access to court records is a judicial determination made only after a written motion to that effect. Nash Br. at 11-12.

Nash is wrong for two reasons. First, the medical records Nash seeks here are expressly exempt from disclosure under the Ohio Public Records Act under the R.C. 149.43(A)(1)(v), which excepts from the definition of "public record" any record whose release is prohibited by state law. The state law at issue here—R.C. 2151.421(H)(1)—prohibits disclosure of information relating to reports of child abuse. The sealed medical records viewed in camera therefore are not public records under R.C. 149.43(A)(1)(v). The essential character of the sealed, in camera documents remains exempt records unless and until a court determines that the records are subject to disclosure.

Second, the trial court *ordered*—at Nash's request—that the purportedly confidential and privileged medical records be submitted for an in camera inspection or risk sanctions for failure to do so. Once ordered to submit, the Clinic complied and submitted the documents under seal. So Nash's representations that the Clinic acted unilaterally to restrict the "public's access to its evidentiary filings" without "judicial determination" is unjustified and wholly incorrect.

C. Counterproposition of Law No. III

> An appellate court is authorized to reverse the trial court's judgment and remand for proceedings consistent with its opinion, including directing the trial court to enter a protective order that would be consistent with that opinion.

Nash next complains that the appellate court was without authority to order the trial court to enter a protective order limiting the scope of the depositions consistent with the appellate court's opinion. Nash Br. at 12. She argues that any protective order would "substantially interfere" with her ability to cross-examine Clinic physicians and that the appellate court otherwise erred when it directed the trial court to enter such an order on remand. She claims there was no showing of "good cause" for a protective order and that an existing protective order—an order that does not include the Clinic defendants but instead is solely between the County defendants and Nash—is sufficient.

Besides arguing, if anything, nothing more than mere error, Nash is wrong. Rule 12 of the Ohio Rules of Appellate Procedure specifically empowers an appellate court to reverse a trial court's order and remand to that court for further proceedings. See App.R. 12(D). Often referred to in practice as a remand for "further proceedings consistent with

this opinion," the rule contemplates that the trial court, on remand, will act consistent with the appellate court's judgment and will undertake whatever actions are necessary to do so. Although the appellate court cannot tell the trial court on remand how to rule on those actions necessary to carry out its mandate, there is no prohibition in giving the trial court direction in implementing the mandate. See, e.g., *State ex rel. The Cincinnati Enquirer v. Winkler*, 149 Ohio App.3d 350, 2002-Ohio-4803, at ¶32 (directing the trial court on remand to analyze for and make certain findings).

Plain and simple, Nash on remand is prohibited from inquiring into areas of child-abuse reporting that the statute expressly makes confidential, including inquiring as to the identities of the reporting professionals or assessment opinions related to the report of abuse. A protective order to that effect ensures that the depositions proceed on remand consistent with the court's opinion. There is nothing unusual about this directive, nor does it exceed the appellate court's authority. This Court's guidance is unnecessary here.

D. Counterproposition of Law No. IV

> The confidentiality afforded by R.C. 2151.421(H)(1) extends to the same confidential information that may be contained in a medical record.

Lastly, Nash complains that the confidentiality afforded by the child-abuse-reporting statute does not extend to medical records that contain the same confidential information. In that regard, Nash argues that the following sentence from the appellate court's opinion unjustly broadens the scope of the statute's confidentiality:

> The confidentiality afforded to reports of child abuse does not preclude discovery of either [Shane Collins's] medical records or the communications among the deponents and the

> Cuyahoga County Department of Children and Family Services ("CCDCFS") *that do not relate to a report of child abuse*. (Emphasis added.)

Nash, 2010-Ohio-10, at ¶2, Appx. 4. Nash claims that the emphasized "do-not-relate-to" part of the sentence "invites subjective determination and obvious error," and is contrary to this Court's decision in *State ex rel. Beacon Journal Pub. Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557.

Nash is wrong on both counts. First, this Court's decision in *Beacon Journal*, although instructive, is not dispositive of the issue in this case. *Beacon Journal* involved the disclosure of *police* investigation reports under the Public Records Act—not the discoverability of information related to the evaluation for and reporting of child abuse. The newspaper-relator in that case sought mandamus relief when the Akron Police Department denied the newspaper's request for police investigatory reports involving alleged abuse offenses against certain minors on the basis that the reports were confidential under R.C. 2151.421. In granting mandamus relief, this Court noted that R.C. 2151.421 expressly accords confidentiality to reports made by certain statutorily identified individuals and entities—like the subpoenaed individuals in this case—but nowhere in the statute is that same confidentiality conferred upon the reports generated by law enforcement agencies. *Beacon Journal*, 2004-Ohio-6557, at ¶37. The Court thereafter held that "police investigatory reports are generally not confidential child-abuse investigatory reports" so that they would be exempt from disclosure under the Public Records Act. Id. at ¶38, 42.

The rule of law created by *Beacon Journal* is that *police* investigatory reports

investigating child abuse are not reports of abuse because the confidentiality afforded by the child-abuse-reporting statute does not extend to reports made by law enforcement agencies. But even this Court found that, to the extent that the police investigatory reports contained or referred to *information* protected from disclosure (i.e., the initial reports made to the County or other specifically protected reports), that information was not subject to disclosure. Id. at ¶44. As this Court recognized, the focus is on the confidential information, not the mode of delivery.

This commonsense principle is consistent with the protective policy behind the child-abuse-reporting statute and the case law applying it. In *Walters v. Enrichment Ctr. of Wishing Well, Inc.* (1999), 133 Ohio App.3d 66, for example, the Eighth Appellate District recognized that the grant of confidentiality under R.C. 2151.421(H) "create[s] a testimonial privilege," which extends not only to reports made of the suspected abuse, but the information gathered in the reporting process. "It would be absurd to hold that the information contained in a report made pursuant to R.C. 2151.421 cannot be used in civil litigation, but that the persons making such reports could nonetheless be deposed as to the attendant circumstances concerning the report." Id. at 73.

This Court agreed and cited *Walters* with approval in *Beacon Journal* when it was providing the legal background for the issue before it. See *Beacon Journal*, 2004-Ohio-6557, at ¶43 ("The clear language of R.C. 2151.421 mandates that not only are the reports of known or suspected abuse protected against use in civil litigation, but so also is the information contained within the reports"); accord *Swartzentruber v. Orrville Grace*

Brethren Church, 163 Ohio App.3d 96, 2005-Ohio-4264, at ¶8 (recognizing the absurdity of allowing deposition inquiry about actions taken under child-abuse-reporting statute when that testimony could not be used in civil litigation). Thus, the "relate to" phrase excerpted from the appellate court's opinion above is consistent with Ohio law because a report's contents and its attendant circumstances "relate to" the report. Nash's fourth proposition of law is simply wrong.

IV. Conclusion

No basis for Supreme Court jurisdiction exists here. No substantial constitutional issue is before the Court, nor is there any public or great general interest at stake that requires this Court's discretionary review. Jurisdiction should be declined.

Respectfully submitted,

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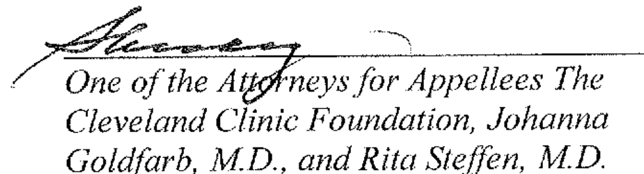

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