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## The Strict Ohio Supreme Court Decision in Biddle: Third Party Law Firm Held Liable for Inducing Disclosure of Medical Information

Kimberly Rathbone

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THE STRICT OHIO SUPREME COURT DECISION IN *BIDDLE*:  
THIRD PARTY LAW FIRM HELD LIABLE FOR INDUCING  
DISCLOSURE OF MEDICAL INFORMATION

KIMBERLY RATHBONE<sup>1</sup>

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I. INTRODUCTION

Cheryl Biddle had not paid her medical bills.<sup>2</sup> Nor had she consented to have her patient registration form released to anyone outside the hospital.<sup>3</sup> What she did not know was that the hospital agreed to send all patient registration forms to a law firm.<sup>4</sup> In turn, the firm attempted to collect any unpaid bills from the Social Security

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<sup>2</sup>*Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 520 (Ohio 1999).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

Administration if they determined that the patient was eligible.<sup>5</sup> The result: an unauthorized disclosure by the hospital of confidential medical information, induced by the law firm.<sup>6</sup>

Victims of unauthorized disclosures of medical information have enjoyed strict protection by state and federal courts. This is because secrecy is considered a sacred requirement in order to foster honesty and cooperation between a physician and patient.<sup>7</sup> Confidentiality is considered such a vital ingredient to the physician-patient relationship by the medical profession that it is addressed in the oath, which is a prerequisite to admittance into the field of medicine: "All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."<sup>8</sup> The assurance of secrecy is, thus, ingrained in public policy and medical ethics and not in the "archaic whims of the common law."<sup>9</sup> The importance of this public policy and the confidentiality between physician and patient has increased the growing concern in Ohio and throughout the nation regarding the unauthorized release of medical information to third parties for approximately the last thirty years.<sup>10</sup>

Recently, the state of Ohio has, once again, established itself as a leader in the development of the law concerning unauthorized disclosures of medical information.<sup>11</sup> Ohio was first instrumental in developing this area of law when the

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<sup>5</sup>*Id.* At first, the hospital employees spent time determining which patients were eligible, which was authorized by the patient because the employees were agents of the hospital. *Biddle*, 715 N.E.2d at 396. However, eventually it was the law firm's employees that determined which patients were eligible. *Id.* This practice was unauthorized. *Id.*

<sup>6</sup>*Id.* at 397. "To establish liability the plaintiff must prove that (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship, (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information, and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient." *Id.* at 519.

<sup>7</sup>Alan B. Vickery, *Breach of Confidentiality: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1438-39 (1982).

<sup>8</sup>Oath of Hippocrates, in DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 609 (26th ed. 1981), cited in Vickery, *supra* note 7, at 1427 n.5. See also *A.M.A. Principles of Med. Ethics* § 9 (1957), reprinted in 4 ENCYCLOPEDIA OF BIOETHICS 1750-51 (W. Reich ed., 1978); MODEL CODE OF PROF'L RESPONSIBILITY Canon 4, EC 4-1, 4-4, 4-6, DR 4-401 (1980). See also CODE OF MEDICAL ETHICS; *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 803 (N.D. Ohio 1965) ("The confidences should be held as a trust and should never be revealed except when imperatively required by the laws of the state" in determining the disclosure was actionable.).

<sup>9</sup>*Hammonds*, 243 F. Supp. at 793; Robert A. Wade, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L. J. 1147 (1989) (explaining that the privilege was not recognized initially by common law, and that state legislatures had to authorize the privilege via statutes).

<sup>10</sup>Vickery, *supra* note 7, at 1428-29.

<sup>11</sup>*Biddle*, 715 N.E.2d 518.

physician-patient privilege was initially recognized.<sup>12</sup> Although courts have been cognizant of the breach of confidentiality tort, few courts throughout the United States have addressed the inducement aspect of the breach of patient confidentiality by a third party.<sup>13</sup> But now, in the boldest move since *Hammonds v. Aetna Casualty & Surety Co.*,<sup>14</sup> the inducement of an unauthorized disclosure of medical information has taken a new twist. Ohio is the first state to hold that a law firm can be considered a third party and held liable for inducing a disclosure.<sup>15</sup> In *Biddle v. Warren General Hospital*, the Ohio Supreme Court held that a law firm who is employed by the hospital is not considered an agent of the hospital and does not have the same duty of confidentiality to the patient because the law firm's duty is to the hospital.<sup>16</sup> Therefore, a law firm is a third party and can be held liable for inducing a physician or hospital to make an unauthorized disclosure of medical information.<sup>17</sup>

Although some may argue that *Biddle* is the beginning of the end for the physician-patient privilege and attorney-client privilege, this is not the case. This Article will explore various ways to avoid the situation encountered in *Biddle* while keeping the privilege intact. The development of the breach of confidentiality tort, both throughout the nation and in Ohio, is examined in Part II. In Part III, the closely related inducing a breach of confidentiality by a third party tort is analyzed nationally and in Ohio. Part IV will provide an in-depth look at *Biddle's*<sup>18</sup> facts, reasoning, and failed arguments, as well as possible solutions for hospitals, physicians, and law firms who may encounter this situation today and in the future.

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<sup>12</sup>See Wade, *supra* note 9, at 1148. The first statute authorizing the privilege was created in 1828. See N.Y. REV. STAT. 406 § 73 (1828). Ohio's statute is OHIO REV. CODE ANN. § 2317.02(B) (West 1999), and the first Ohio Supreme Court case treating an unauthorized disclosure was in 1928. See *Jones v. Stanko*, 160 N.E. 456 (Ohio 1928).

<sup>13</sup>*Panko v. Consolidated Mut. Ins. Co.*, 423 F.2d 41 (3d Cir. 1970); *Alberts v. Devine*, 479 N.E.2d 113 (Mass. 1985); *Anker v. Brodnitz*, 98 Misc. 2d 148 (N.Y. Sup. Ct. 1979); *Moses v. McWilliams*, 549 A.2d 950 (Pa. Super. Ct. 1988); *Alexander v. Knight*, 177 A.2d 142 (Pa. Super. Ct. 1962); *Morris v. Consolidated Coal*, 446 S.E.2d 648 (W. Va. 1994); see also text accompanying footnotes 134-63 *infra*.

<sup>14</sup>*Hammonds*, 243 F. Supp. at 793 (holding a third party liable for the inducement of unauthorized disclosure of medical information).

<sup>15</sup>*Biddle*, 715 N.E.2d at 522-23.

<sup>16</sup>*Id.* at 525-26.

<sup>17</sup>*Id.* Because the issue was not addressed, it is still questionable as to whether the third party is also liable to the hospital for the breach as well as the patient, or if the hospital should be required to indemnify or contribute to the hospital's portion of the liability. *Id.*

<sup>18</sup>*Id.* at 518.

## II. BREACH OF CONFIDENTIALITY TORT

A. *National Development*

## 1. Theories of Liability

Although the physician-patient privilege has existed since 1828,<sup>19</sup> courts did not thoroughly examine the unauthorized disclosure of medical information until the latter half of the twentieth century. State courts have altered the treatment of unauthorized disclosures, through an evolution of various theories of liability, and sometimes used multiple theories of recovery in their analyses.<sup>20</sup> Although the other theories of liability are still utilized, most states eventually recognized the breach of confidentiality as its own tort.<sup>21</sup>

One of the first theories of liability for unauthorized disclosures to be widely used is invasion of privacy.<sup>22</sup> Plaintiffs often brought actions for invasion of privacy when the focus of their case was more on the nature of the injury instead of the fiduciary relationship.<sup>23</sup> Many courts moved further away from the invasion of privacy tort because the unauthorized disclosures were difficult to place into one specific legal category of privacy law.<sup>24</sup> Also, determining who should be legally responsible for protecting a patient's interests was also highly debated, because there is no limit as to who can be held liable for a disclosure.<sup>25</sup> Unlike the tort of the

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<sup>19</sup>N.Y. REV. STAT. 406 § 73 (1828). *See also* Wade, *supra* note 9, at 1148.

<sup>20</sup>*See, e.g.,* *Dubin v. Wakuzawa*, 970 P.2d 496 (Haw. 1998) (containing allegations that the disclosure of plaintiff's medical condition to a third party was based on breach of contract, breach of fiduciary duty, breach of patient-physician relationship, defamation, unfair and deceptive trade practices, and negligent/intentional infliction of emotional distress).

<sup>21</sup>Some states still continue to deny patients the right to an action for breach of confidentiality. However, they are in the minority. *See* Logan v. District of Columbia, 447 F. Supp. 1328, 1335 (D.D.C. 1978) (applying D.C. law); Collins v. Howard, 156 F. Supp. 322, 324 (S.D. Ga. 1957) (applying Georgia law); Quarles v. Sutherland, 389 S.W.2d 249 (Tenn. 1965).

<sup>22</sup>Privacy law is generally divided into four different areas. According to Prosser, these are "intrusion upon seclusion," "appropriation of name or likeness," "publicity given to private life," and "publicity placing a person in false light." RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977). In the past, courts have typically used the third category to honor cases of the unauthorized release of medical information. Vickery, *supra* note 7, at 1426.

<sup>23</sup>*See* Horne v. Patton, 287 So. 2d 824 (Ala. 1974) (disclosing medical information to patient's employer); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284 (Idaho 1961) (giving banking information about depositor to employer); Doe v. Roe, 93 Misc. 2d 201 (N.Y. App. Div. 1977) (granting preliminary injunction against psychiatrist's publication of patient confidences), *cited collectively in* Vickery, *supra* note 7, at 1438-39.

<sup>24</sup>*Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527, 530 (Or. 1985). *See also* Berger v. Sonneland 1 P.3d 1187 (Wash. Ct. App. 2000) (holding, under Washington statute, a tort action exists; however, the court also concluded that the action was similar to an invasion of privacy, allowing the plaintiff to recover damages, including emotional damages, for the harm caused by defendant physician's unauthorized disclosure).

<sup>25</sup>*Humphers*, 696 P.2d at 530; Vickery, *supra* note 7, at 1439.

unauthorized disclosure of confidential information, no higher duty is needed in order to find liability for invasion of privacy.<sup>26</sup> This difference is explained in *Humphers v. First Interstate Bank of Oregon*, where a physician revealed the identity of the birth mother to a daughter who had been given up for adoption.<sup>27</sup> The court held that the physician was liable for failing to keep a confidence under the breach of confidentiality.<sup>28</sup> Despite the fact that the issue was a privacy interest, the physician was not liable because of an obligation under a general duty of people at large not to invade one another's privacy by prying into personal facts.<sup>29</sup> Other requirements limit a finding of invasion of privacy but do not limit the tort of unauthorized disclosures;<sup>30</sup> specifically, the information that is disclosed must be released to the public at large and be "highly offensive," whereas the tort of unauthorized disclosures can arise regardless of the degree of offensiveness.<sup>31</sup> Thus, the invasion of privacy theory is less inclusive than the breach of confidentiality theory.<sup>32</sup>

A second theory on which courts base liability for disclosures is breach of implied contract. Courts who use the breach of implied contract theory focus more on the conduct of the parties involved instead of their relationship to each other.<sup>33</sup> *MacDonald v. Clinger* considered this focus in a case regarding a psychiatrist who disclosed "intimate details" about his patient to the patient's wife.<sup>34</sup> The New York court held that a breach of implied contract would be inadequate because only certain economic wrongs could be remedied using contract law.<sup>35</sup> The court stated, "[i]f plaintiff's recovery were limited to an action for breach of contract ... he would generally be limited to economic loss flowing directly from the breach and would

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<sup>26</sup>*Humphers*, 696 P.2d at 530. See also Vickery, *supra* note 7, at 1439 ("The interests present in confidentiality cases are (1) the expectation of confidentiality arising from the assurance of secrecy and the reliance thereon; and (2) freedom from circulation of damaging information. The first of the confidentiality interests is not protected at all by the privacy action, and the second interest is protected only partially because of the doctrinal limitations of the privacy action.").

<sup>27</sup>696 P.2d at 527.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 531.

<sup>30</sup>"Not every secret concerns personal or private information...[s]ecrecy involves intentional concealment...and secrecy hides far more than what is private." *Id.* at 529 (criticizing the invasion of privacy right of action for a breach of confidence case).

<sup>31</sup>RESTATEMENT (SECOND) OF TORTS § 652D (1977), cited in Vickery, *supra* note 7, at 1438-41.

<sup>32</sup>Various doctrines and requirements limit recovery under the invasion of privacy theory. *Id.* at 1442. The Publicity requirement prevents liability unless the offensive disclosure is to the public at large. *Id.* The Legitimate Public Interest doctrine prevents recovery if the information disclosed has a legitimate public interest. *Id.* The Public Figure doctrine prevents recovery if aspects of the person's life is open to publicity because they are a public figure. *Id.*

<sup>33</sup>*Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912); *Munzer v. Blaisdell*, 49 N.Y.S.2d 915 (N.Y. Sup. Ct. 1944), cited collectively in Vickery, *supra* note 7, at 1438.

<sup>34</sup>84 A.D.2d 482, 482 (N.Y. App. Div. 4 1982).

<sup>35</sup>*Id.* at 486.

thus be precluded from recovering for mental distress, loss of his employment and the deterioration of his marriage.”<sup>36</sup> The court was concerned with honoring physical and mental loss that cannot be recovered from a breach of contract.<sup>37</sup> However, the court upheld an action for breach of confidentiality because a duty grew out of the patient’s trust and confidence in his psychiatrist and the tort was “easily separable from the mere breach of contract.”<sup>38</sup> Therefore, the breach of implied contract theory is inadequate because it does not provide for emotional and physical damages that are common when unauthorized disclosures of medical information occur.<sup>39</sup>

Although not frequently alleged, a court can base liability on intentional infliction of emotional distress.<sup>40</sup> In order to sustain an action for intentional infliction of emotional distress, the conduct is required to be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency,

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<sup>36</sup>*Id.* The court called the action a “breach of fiduciary duty of confidentiality.” *Id.* at 482. However, this is the equivalent to a breach of confidentiality because one of the requirements of a breach of confidentiality is that a relationship must exist that gives rise to a physician-patient privilege. *Id.*

<sup>37</sup>*MacDonald*, 84 A.D.2d at 482.

<sup>38</sup>*Id.* The court also explored an exception where public interest requires disclosure to protect the threatened interest. Although the exception did not exist in this case, the court did address that disclosure is permitted when there is danger to a patient, a spouse or another person. *Id.* at 488; *see also* text accompanying footnote 60, *infra*, for further discussion of the public interest exception.

<sup>39</sup>*MacDonald*, 84 A.D.2d at 486.

<sup>40</sup>*Andrews v. Bruk*, 220 A.D.2d 376 (N.Y. App. Div. 1995). Attorneys have also alleged claims for disclosure based on negligent infliction of emotional distress; however, this theory of liability is inapplicable because this arises when the plaintiff is a spectator of a traumatic event caused by the defendant when a special relationship exists between the victim and the plaintiff. *Kniskern v. Somerford Twp.*, 678 N.E.2d 273 (Ohio Ct. App. 1996); *Lanza-Costlow v. State Farm Fire & Cas. Co.*, 640 N.E.2d 583 (Ohio Ct. App. 1996); *Blackstone v. Lyden Co.*, No. 94CA005886, 1995 WL 324112 (Ohio Ct. App. May 31, 1995); *Midwestern Indemn. Co. v. Craig*, 665 N.E.2d 712 (Ohio Ct. App. 1995); *Fosnight v. Esquivel*, 666 N.E.2d 273 (Ohio Ct. App. 1995); *Boso v. Erie Ins. Co./Erie Ins. Exchange*, 669 N.E.2d 47 (Ohio Ct. App. 1995); *Baker v. Aetna Cas. & Sur. Co.*, 669 N.E.2d 553 (Ohio Ct. App. 1995); *Erie Ins. Group v. Wolff*, 640 N.E.2d 583 (Ohio Ct. App. 1994); *Burris v. Grange Mut. Cos.*, 545 N.E.2d 83 (Ohio 1989), *overruled on other grounds as recognized by Dickerson v. Thompson*, 624 N.E.2d 784 (Ohio Ct. App. 1993). Courts are also reluctant to recognize negligent infliction of emotional distress when only emotional distress damages existed. *See Gracey v. Eaker*, 747 So. 2d 475 (Fl. Dist. Ct. App. 1999) (failing to recognize a cause of action for negligent infliction of emotional distress without an accompanying physical injury). *But see Berger*, 1 P.3d 1187 (holding that a plaintiff seeking compensation for emotional damages resulting from such an action need not meet the heightened standards designed to limit liability in cases alleging bystander negligent infliction of emotional distress). In addition, claims have been brought in the past for negligence solely; however, the courts usually treat negligence claims using more specific bases of liability such as negligent training and supervision. *See Doe v. Community Health Plan-Kaiser Corp.*, Nos. 7342-97, 01-97-052157, 1999 WL 624551 (N.Y. Sup. Ct. Apr. 12, 1999) (stating that a weakness of the negligence theory is that claims based on an intentional act of disclosure are not covered under a negligence theory of liability).

and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>41</sup> The conduct of the disclosing party is often not considered ‘outrageous’ enough for the plaintiff to recover under this theory.<sup>42</sup> This was the case in *Andrews v. Bruk* when a physician released medical records in his divorce proceedings detailing that his patient had undergone a vasectomy in order to show that the patient and the physician’s wife were having an affair.<sup>43</sup> The court held that while the physician’s actions were not condoned, they were not at a level that constituted extreme and outrageous conduct.<sup>44</sup> In contrast to the outrageous conduct required by intentional infliction of emotional distress, the breach of confidentiality tort only requires a disclosure, and outrageous or extreme conduct is not necessary.<sup>45</sup>

An additional theory of liability recognized by some courts is defamation. Courts have limited liability for defamation cases regarding unauthorized disclosures of medical information by requiring a specific injury in order to recover. For example, in *Bullion v. Gadaletto*, a patient sued his psychologist for breach of confidence when he revealed his patient’s sexual indiscretions and other confidences to the patient’s wife.<sup>46</sup> The court stated, “[d]efamation is chiefly concerned with injury to a person’s reputation, and that specific injury must occur before a cause of action arises.”<sup>47</sup> The court ultimately held that the duty of confidentiality was more suitable because it protects every injury that results from a disclosure, instead of only specific injuries that are actionable under defamation.<sup>48</sup>

Courts have also addressed whether an unauthorized disclosure can fall under the theory of medical malpractice.<sup>49</sup> This reasoning is based on the argument that a disclosure by a medical professional can constitute medical malpractice. In a case from an Arkansas court, a patient brought an action for medical malpractice after the patient’s nurse revealed to a third party that the patient either had AIDS or was being tested for it.<sup>50</sup> The court denied liability because the disclosure did not fall under the

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<sup>41</sup>*Andrews*, 220 A.D.2d at 376 (quoting *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983); RESTATEMENT (SECOND) OF TORTS § 46, comment d.).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* No action was brought for breach of confidentiality. If brought, the plaintiff most likely would have won because the physician knew of the existence of the physician patient relationship and disclosed the information to the court despite the fact that the patient had not authorized the disclosure. *Id.*

<sup>45</sup>*Biddle*, 715 N.E.2d at 523.

<sup>46</sup>872 F. Supp. 303 (W.D. Va. 1995).

<sup>47</sup>*Id.* at 307. The plaintiff was suing under the theory of defamation because the statute of limitations had passed for the breach of confidentiality tort. *Id.* at 304. If the statute of limitations had not passed, recovery most likely would have been permitted because the court recognized that emotional distress satisfies the damage element to a cause of action for breach of confidentiality. *Id.* at 307.

<sup>48</sup>*Id.* at 306.

<sup>49</sup>*See, e.g., Wyatt v. St. Paul Fire & Marine Ins. Co.*, 868 S.W.2d 505 (Ark. 1994).

<sup>50</sup>*Id.* at 505.

definition of a medical injury that was the result of a doctor's treatment or order.<sup>51</sup> In addition, the court did not find it necessary to award liability under medical malpractice, but instead found that disclosures should fall under the theory of negligence because an unauthorized disclosure can be analyzed using everyday experience and common knowledge of a lay person.<sup>52</sup> The court held that only "[w]here the matter requires the consideration of the professional skill and knowledge of the practitioner of the medical facility, the more specialized theory of medical malpractice applies."<sup>53</sup> Thus, the definitions of medical injury and medical malpractice prevented an action under the theory of medical malpractice, and the tort of breach of confidentiality would better apply to the disclosures by a nurse.

In addition, statutes in many states provide that a physician or hospital should not disclose confidential patient information.<sup>54</sup> However, these statutes do not always clearly state that a patient has a resulting cause of action due to the disclosure.<sup>55</sup> Plaintiffs have often turned to other theories of liability because a plaintiff cannot receive compensation when no cause of action is stated in the statute. Another concern is that many statutes only offer administrative disciplinary action as a reprimand to those who have disclosed information without authorization instead of a monetary form of compensation.<sup>56</sup> The statutes that do provide compensation often require that the specific relationship stated in the statute must exist and the defendant must fall under the class specifically protected by the statute in order to receive compensation.<sup>57</sup> Due to the restrictions specified in each statute, the statutory cause of action has often proved inadequate when compared to the breach of confidentiality tort which is more easily applied.

The weaknesses present in the other theories of liability have increased the trend toward recognizing unauthorized disclosure of medical information as an independent tort in the past three decades.<sup>58</sup> The elements of the breach of

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<sup>51</sup>*Id.* at 509. Here, the plaintiff was suing the hospital's medical malpractice insurer, presumably because the insurer was another deep pocket. *Id.* at 505.

<sup>52</sup>*Id.* at 509.

<sup>53</sup>*Wyatt*, 868 S.W.2d at 505 (citing *Borrillo v. Beekman Downtown Hosp.*, 146 A.D.2d 734 (N.Y. App. Div. 1989)).

<sup>54</sup>*Vickery*, *supra* note 7, at 1447.

<sup>55</sup>*Id.* *But see Berger*, 1 P.3d 1187 (holding that a tort action existed under WASH. REV. CODE § 7.70.030(1) for damages resulting from the unauthorized disclosure of confidential information related to health care and obtained within the physician-patient relationship).

<sup>56</sup>ALASKA STAT. § 06.05.175(a), (c) (*Michie* 1981) (stating that failure of bank to maintain confidentiality of bank records subjects it to disciplinary action); N.Y. EDUC. LAW § 6509(9) (*McKinney Supp.* 1981-82) and Rules of the Board of Regents, N.Y. COMP. CODES R. & REGS. tit. VIII, § 29.1(b)(8) (1979) (providing together that a physician's professional misconduct includes breach of patient confidence), *cited collectively in Vickery*, *supra* note 7, at 1447.

<sup>57</sup>*Hammonds*, 243 F. Supp. at 802-03; *Peterson*, 367 P.2d at 286-87 (holding no implied cause of action because no statute existed prohibiting bank disclosures); *Doe*, 93 Misc. 2d at 215-16, *cited collectively in Vickery*, *supra* note 7, at 1447.

<sup>58</sup>An additional theory of liability may be referred to as a breach of trust. However, the courts that have treated this theory have done so in the same breath of their treatment with the

confidentiality are (1) the existence of a doctor-patient relationship, and (2) a disclosure of confidential information to a third party by a physician or medical entity that was gained from the patient during the privileged relationship.<sup>59</sup> There is no prerequisite of a disclosure to the public at large or of specific types of damages in order to sustain a cause of action for the unauthorized disclosure of medical information to a third party. The breach of confidentiality tort offers a concrete analysis applicable to a broad class of plaintiffs that courts have applied to various factual scenarios with ease.

## 2. Defenses

However, defenses exist which restrict application of the breach of confidentiality and protect defendants from a barrage of claims. A number of public policy exceptions limit liability for disclosures, despite being unauthorized by the patient.<sup>60</sup> The common thread between all these limitations is that they are

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breach of confidence or unauthorized disclosure and have not distinguished the two as being different theories. *Hammonds*, 243 F. Supp. at 793.

<sup>59</sup>Vickery, *supra* note 7, at 1442, 1455.

<sup>60</sup>Various limitations include when danger to a patient, a patient's spouse, or other person exists: *MacDonald*, 84 A.D.2d at 482 (holding disclosure was not permitted because no danger to a proximate individual was present); *Berry v. Moench*, 331 P.2d 814 (Utah 1958) (permitting disclosure to patient's fiancé's parents because a higher duty to give out information existed); when the physical condition of the patient is an element to the claim: *Mull v. String*, 448 So. 2d 952 (Ala. 1984) (permitting disclosure when patient's health is at issue); *Hague v. Williams*, 181 A.2d 345 (N.J. 1962) (holding disclosure revealing a heart condition was permitted because the physical condition was an element of the claim); if the patient has a highly contagious or infectious disease: *Simonsen v. Swenson*, 177 N.W. 831 (Neb. 1920) (holding disclosure to those at risk of a contagious or infectious disease is not a breach); in a general duty to warn case: *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (stating therapist's duty was to "take whatever other steps are reasonably necessary under the circumstances" to warn the potential victim and holding therapist liable for his failure to warn a female student or her family when his patient had revealed to the therapist that he was going to buy a gun and shoot the student); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311 (Ohio 1997) (ruling outpatient setting still constituted relationship that created a duty of the psychotherapist to protect against the patient's violent tendencies); if the physician is testifying during a judicial proceeding: *Smith v. Driscoll*, 162 P. 572 (Wash. 1917) (ruling that when taking the stand in a court proceeding, a doctor will not be liable if the comments were relevant and the privilege is not abused); if the duty is not recognized within the jurisdiction: *Evans v. Rite Aid Corp.*, 478 S.E.2d 846 (S.C. 1996) (holding a pharmacist cannot be held liable to breach of confidentiality in South Carolina because the duty of confidentiality of a pharmacist is not recognized); in First Amendment and Public Right to Know situations: *Vickery*, *supra* note 7, at 1466 (noting example of whether a candidate is physically fit for office); *see also Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1291-99 (1976) (discussing confidentiality and the First Amendment); if the disclosure is required for a medical peer review process: *Alar v. Mercy Mem'l Hosp.*, 529 N.W.2d 318 (Mich. App. 1995) (permitting disclosure during peer medical record review because the duty of confidentiality is owed to the patient by every doctor who is present at the review); when a medical malpractice claim is brought by the patient against the physician: *Rea v. Pardo*, 132 A.D.2d 442 (N.Y. App. Div. 1987) (permitting disclosure if in reasonable anticipation of a malpractice claim being brought by the patient); *Moses*, 549 A.2d at 950 (holding that patient waived confidentiality by filing a malpractice claim); if a crime or fraud is disclosed: *People v. Johnson*, 125 Cal. Rptr. 725

developed from various public policies that courts feel supercede the importance of the confidentiality between a physician and patient. Therefore, an exception exists if a court determines that a public policy concern, which permits or requires disclosure, is more important than the patient's right to keep medical information confidential.<sup>61</sup>

In addition to the various exceptions, other defenses are available for one who is accused of an unauthorized disclosure of confidential medical information. One defense that can be asserted is the statute of limitations has run and the claim is time-barred.<sup>62</sup> The few courts that have treated this issue have reached varying results.<sup>63</sup> For example, in *Bullion v. Gadaletto*, a psychologist raised the statute of limitations defense after he revealed confidential information to his patient's wife in an effort to destroy their marriage and initiate his own sexual relationship with the wife.<sup>64</sup> The psychologist prevailed when he argued that the cause of action for breach of confidentiality accrued when the disclosure occurred and not when the patient himself was aware of the breach.<sup>65</sup> Because the plaintiff had brought the claim under the personal injury case of action, the defense argued that the personal injury two-year statute of limitations applied.<sup>66</sup> The court determined that "[a]n action accrues when the essential elements of a cause of action are present."<sup>67</sup> As a result, a cause

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(Cal. Ct. App. 1975) (stating that right of confidentiality is lost where depositor attempted to defraud bank); *Hague v. Williams*, 181 A.2d at 345 (N.J. 1962); *State v. McCray*, 551 P.2d 1376 (Wash. Ct. App. 1976) (discussing bank's privilege to disclose depositor's bad checks to police on informal inquiry); *see also* Vickery, *supra* note 7, at 1464-65 (stating that special caution must be used when acting only on reasonable suspicion); if authorized by a court order: *Hague*, 181 A.2d at 345; *Johnson*, 125 Cal. Rptr. at 725 (loss of right of confidentiality where depositor attempted to defraud bank); *McCray*, 551 P.2d at 1376 (discussing bank's privilege to disclose depositor's bad checks to police on informal inquiry); *see also* Vickery, *supra* note 7, at 1464-65 (special caution must be used when acting only on reasonable suspicion); *but see* *Brandt v. Med. Defense Assoc.*, 856 S.W.2d 667 (Mo. 1993) (holding that *ex parte* communications are actionable only if they exceed the bounds of the waiver of the privilege, but are otherwise permitted); *Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985) (holding that *ex parte* interviews are permitted if proper channels are utilized and bad faith is not used); *but see* *Wade*, *supra* note 9, at 1147 (stating a controversy exists as to whether the disclosure is permitted *ex parte*).

<sup>61</sup>Vickery, *supra* note 7, at 1466-68.

<sup>62</sup>Ohio's discovery rule arises when the plaintiff should have discovered the responsible source of the disclosure or other action. 66 OH. JUR. 3D *Limitations & Laches* § 65 (1986). Other states may determine the accrual date in a different manner. *Id.*

<sup>63</sup>*Bullion*, 872 F. Supp. at 303; *Tighe v. Ginsberg*, 146 A.D.2d 268 (N.Y. App. Div. 1989).

<sup>64</sup>872 F. Supp. at 304-05.

<sup>65</sup>*Id.* at 306.

<sup>66</sup>*Id.* Virginia's personal injury statute of limitations period was two years. VA. CODE ANN. § 8.01-243(A) (Michie 1992). Even though the court assumed that the breach of confidentiality was a valid tort, because the cause of action accrued more than two years before the suit was brought, the action was time-barred. *Bullion*, 872 F. Supp. at 306.

<sup>67</sup>*Id.* at 305. This is true even if the injury is very slight and becomes more substantial at a later date. *Id.* at 306. The court also notes that the more intimate or embarrassing the information is that is disclosed, the more damaging the disclosure and injury may be. *Id.* The intent is to "discourage[s] any injury that might result from a physician's unauthorized disclosure of information." *Id.* (emphasis added).

of action for breach of confidentiality accrues when the first unauthorized disclosure outside of the physician-patient privilege occurs, subject to the applicable statute of limitations, and in *Bullion*, a two-year statute.<sup>68</sup>

Another case that explored the statute of limitations defense took a slightly different approach.<sup>69</sup> In *Tighe v. Ginsberg*, the patient was being examined for hearing loss that he suspected was caused by conditions at work and the examining physician sent a written report to the patient's employer detailing his findings without authorization.<sup>70</sup> The court determined the three-year statute of limitations, which pertained to general tort actions, was more appropriate than that of medical malpractice.<sup>71</sup> Here, the court found that since (1) the breach of duty did not occur while "examining, diagnosing, treating, or caring" for the patient; and (2) no medical expert was required to evaluate the evidence in the breach of duty cases as required for medical malpractice, the action was a tort and should have a statute of limitations that was analogous to a general tort instead of medical malpractice.<sup>72</sup> The three-year statute of limitations in *Tighe* is distinguishable from the two-year statute of limitations in *Bullion* because the former is based on an action for negligence, while the latter is based on an action for personal injury.<sup>73</sup> Courts considering statute of limitations issues in the future will most likely determine what time period to apply by examining both the particular jurisdiction and the statutes of limitations from analogous causes of action.

Another defense exists when the defendant receives explicit consent from the plaintiff. However, the evidence must be absolutely clear that consent was obtained in order to protect a physician from liability.<sup>74</sup> In *Vassiliades v. Garfinckel's Brooks Brothers*, the plaintiff brought suit against her plastic surgeon when he used 'before' and 'after' photographs of her cosmetic surgery at a presentation at a department store, as well as a television program that promoted his practice.<sup>75</sup> The physician argued that he had obtained verbal consent to use her photographs in any lectures he might give or in any other way that might help the patients.<sup>76</sup> The court held that only clear evidence of consent by the patient insulates a physician from liability.<sup>77</sup> Therefore, the safest way for a physician to avoid liability for confidentiality is to obtain written consent for disclosure for purposes that are absolutely clear. In

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<sup>68</sup>*Bullion*, 872 F. Supp. at 307.

<sup>69</sup>*Tighe*, 146 A.D.2d at 268.

<sup>70</sup>*Id.* at 269-70.

<sup>71</sup>*Id.* at 272. Similar to *Bullion*, the action in *Tighe* was also brought under an action for personal injury, but no specific statute of limitations existed for New York and they proceeded under the general tort statute of limitations instead. *Id.*

<sup>72</sup>*Id.* at 271-72.

<sup>73</sup>*Tighe*, 146 A.D.2d at 270, 272; *Bullion*, 872 F. Supp. at 305.

<sup>74</sup>*Vassiliades v. Garfinckel's Brooks Bros.*, 492 A.2d 580 (D.C. 1985).

<sup>75</sup>*Id.* at 584.

<sup>76</sup>*Id.* at 586. The department store, Garfinckel's, was not held liable because it was justified in its reliance on the physician's assurances that the patient consented. *Id.* at 590.

<sup>77</sup>*Id.*

*Biddle*, the hospital's authorization form did not include any language referring to a law firm and, consequently, the defense was not recognized.<sup>78</sup>

*B. Development of Ohio Cases*

An understanding of the history of Ohio's law concerning breach of confidentiality regarding medical information emphasizes the significance of the decision in *Biddle v. Warren General Hospital*.<sup>79</sup> Ohio courts have assumed a leading role in strengthening patients' rights regarding disclosures ever since breach of confidentiality was first considered actionable in Ohio.<sup>80</sup> However, it was not until 1988 that the Ohio Supreme Court acknowledged that a physician could be held liable for unauthorized disclosures of medical information.<sup>81</sup> Still, it is the oft-cited 1965 decision of the Northern District of Ohio, interpreting Ohio law in *Hammonds v. Aetna Casualty & Surety Co.*,<sup>82</sup> that first fully examined the policy behind the breach of confidentiality tort.<sup>83</sup>

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<sup>78</sup>*Biddle*, 715 N.E.2d at 527. Specifically, the authorization form in *Biddle* stated "[a]uthorization is hereby granted to release to my insurance company and/or third party payor such information including medical records as may be necessary for the completion of my hospitalization claims. . . ." *Id.* (emphasis added). The Ohio Supreme Court did not consider the law firm to be included in the language "third party payor." *Id.*

<sup>79</sup>*Id.* at 518.

<sup>80</sup>*Jones*, 160 N.E. at 456.

<sup>81</sup>*Littleton v. Good Samaritan Hosp. & Health Ctr.*, 529 N.E.2d 449 n.19 (Ohio 1988).

<sup>82</sup>*Hammonds*, 243 F. Supp. at 793. Although not the first decision to recognize the breach of confidentiality tort, *Hammonds* has been cited by numerous other courts because of its exploration of the public policy behind the physician-patient relationship and its reasoning for holding the physician liable for breaches of confidentiality. See *United States v. Willis*, 737 F. Supp. 269 (S.D.N.Y. 1990); *Nedd v. United Mine Workers*, 556 F.2d 190 (3d Cir. 1977); *Dickinson v. Magargal*, No. 91-CV-4533, 1993 U.S. Dist. LEXIS 13789 (D.N.J. Sept. 23, 1993); *Manion v. N.P.W. Med. Ctr., Inc.*, 676 F. Supp. 585 (M.D. Pa. 1987); *Howes v. United States*, 887 F.2d 729 (6th Cir. 1989); *Kozar v. Chesapeake & Ohio R. Co.*, 320 F. Supp. 335 (W.D. Mich. 1970); *Mikel v. Abrams*, 541 F. Supp. 591 (W.D. Mo. 1982); *Hoesl v. United States*, 451 F. Supp. 1170 (N.D. Cal. 1978); *Logan*, 447 F. Supp. at 1328; *McNerney v. Sec. of HHS*, No. 90-1689V, 1992 U.S. Cl. Ct. LEXIS 228 (Cl. Ct. May 5, 1992); *Romine v. Medicenters of America, Inc.*, 476 So. 2d 51 (Ala. 1985); *Mull*, 448 So. 2d at 952; *Horne v. Patton*, 287 So. 2d 824 (Ala. 1973); *Allred v. State*, 554 P.2d 411 (Alaska 1976); *Duquette v. Superior Court*, 778 P.2d 634 (Ariz. Ct. App. 1989); *Valencia v. Duval Corp.*, 645 P.2d 1262 (Ariz. Ct. App. 1982); *Heller v. Norcal Mut. Ins. Co.*, 876 P.2d 999 (Cal. 1994); *Murphy v. Godwin*, 303 A.2d 668 (Del. Super. Ct. 1973); *Vassiliades*, 492 A.2d at 580; *Humana Med. Plan v. Jacobson*, 614 So. 2d 520 (Fla. Dist. Ct. App. 1992); *Coralluzzo v. Fass*, 435 So. 2d 262 (Fla. Dist. Ct. App. 1983); *Lee v. Corregedore*, 925 P.2d 324 (Haw. 1996); *Pearce v. Ollie*, 826 P.2d 888 (Idaho 1992); *Baylaender v. Method*, 594 N.E.2d 1317 (Ill. Ct. App. 1992); *Petrillo v. Syntex Lab., Inc.*, 499 N.E.2d 952 (Ill. App. Ct. 1986); *Kirk v. Financial Sec. Life Ins. Co.*, 369 N.E.2d 340 (Ill. App. Ct. 1977); *Ahnert v. Wildman*, 376 N.E.2d 1182 (Ind. Ct. App. 1978); *Geary v. Schroering*, 979 S.W.2d 134 (Ky. Ct. App. 1998); *Leger v. Spurlock*, 589 So. 2d 40 (La. Ct. App. 1991); *Green v. Otenasek*, 296 A.2d 597 (Md. 1972); *Stevens v. Barnhart*, 412 A.2d 1292 (Md. Ct. Spec. App. 1980); *Sard v. Hardy*, 367 A.2d 525 (Md. Ct. Spec. App. 1976), *rev'd*, 379 A.2d 1014 (Md. 1977); *Hellman v. Board of Registration in Med.*, 537 N.E.2d 150 (Mass. 1989); *Schwartz v. Goldstein*, 508 N.E.2d 97 (Mass. 1987); *Tower v. Hirschhorn*, 492 N.E.2d 728 (Mass. 1986); *Alberts*, 479 N.E.2d at 113; *Hannaway v.*

In *Hammonds*, the court explained the intricacies of the physician-patient relationship in order to justify holding an insurance company liable for inducing a doctor's intentional, unauthorized divulgence of confidences:<sup>84</sup>

Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor—even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy referred to above. The candor which this promise elicits is necessary to the effective pursuit of health; there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors. But the disclosure is certainly intended to be private. If a doctor should reveal any of these confidences, he surely effects an invasion of the privacy of his patient. We are of the opinion that the preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well.<sup>85</sup>

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Cole, 311 N.E.2d 924 (Mass. App. Ct. 1974); Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991); Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891 (Mich. Ct. App. 1988); Wenninger v. Muesing, 240 N.W.2d 333 (Minn. 1976); Stubbs v. North Mem'l Med. Ctr., 448 N.W.2d 78 (Minn. Ct. App. 1989); Brandt v. Med. Defense Assocs., 856 S.W.2d 667 (Mo. 1993); State ex rel. Stufflebam v. Appelquist, 694 S.W.2d 882 (Mo. Ct. App. 1985); Callahan v. Burton, 487 P.2d 515 (Mont. 1971); Stempler v. Speidell, 495 A.2d 857 (N.J. 1985); Runyon v. Smith, 730 A.2d 881 (N.J. Sup. Ct. App. Div. 1999); Spaulding v. Hussain, 551 A.2d 1022 (N.J. Super. Ct. 1988); Aufrechtig v. Lowell, 650 N.E.2d 401 (N.Y. 1995); Madden v. Creative Servs., 646 N.E.2d 780 (N.Y. 1995); Tighe, 146 A.D.2d at 268; Rea, 132 A.D.2d at 442; MacDonald, 84 A.D.2d at 482; Anker, 413 N.Y.S.2d at 582; Doe, 400 N.Y.S.2d at 668; Biddle, 715 N.E.2d at 518; Littleton, 529 N.E.2d at 449; Orvets, 722 N.E.2d at 114; Biddle v. Warren Gen. Hosp., No. 96-T-5582, 1998 Ohio App. LEXIS 1273 (Ohio Ct. App. Mar. 27, 1998); Wargo v. Buck, 703 N.E.2d 811 (Ohio Ct. App. 1997); Allinder v. Mount Carmel Health, No. 93 AP-156, 1994 Ohio App. LEXIS 633 (Ohio Ct. App. Feb. 17, 1994); Honegger v. Saunders, No. 86 AP-118 Ohio App. LEXIS 3736 (Ohio Ct. App. Sep. 13, 1988); Investors Reit One v. Jacobs, Nos. 86 AP 118, 86 AP 119, 1988 Ohio App. LEXIS 1252 (Ohio Ct. App. Apr. 7, 1988); Fletcher v. Bolz, 520 N.E.2d 22 (Ohio Ct. App. 1987); Levias v. United Airlines, 500 N.E.2d 370 (Ohio Ct. App. 1985); Moore v. Grandview Hosp., No. CA 8808, 1985 Ohio App. LEXIS 8571 (Ohio Ct. App. 1985); Conti v. Lynn, 75 AP-591, 1976 Ohio App. LEXIS 6329 (Ohio Ct. App. May 20, 1976); Nationwide Mut. Ins. Co. v. Jackson, 226 N.E.2d 760 (Ohio Ct. App. 1967); Lambdin v. Leopard, 251 N.E.2d 165 (Ohio Com. Pleas 1968); Bryson v. Tillinghast, 749 P.2d 110 (Okla. 1988); Humphers, 696 P.2d at 527; Humphers v. First Interstate Bank, 684 P.2d 581 (Or. App. 1984); Moses, 549 A.2d at 950; McCormick v. England, 494 S.E.2d 431 (S.C. Ct. App. 1997); Schaffer v. Spicer, 215 N.W.2d 134 (S.D. 1974); Morris, 446 S.E.2d at 648; Finn v. Schammel, 412 N.W.2d 147 (Wis. Ct. App. 1987); Chase v. People's Drug Store, 24 V.I. 183 (1989).

<sup>83</sup>The facts of *Hammonds* only included a claim for inducing disclosure instead of the breach itself. 243 F. Supp. at 793. However, the court discusses the disclosure action at great length and it often cited for its exploration of the physician's breach of the patient's confidentiality and the liability that arises from that action. *Id.* at 795-802.

<sup>84</sup>*Id.* at 801.

<sup>85</sup>*Id.*

The court further explained that it was the complimentary efforts of both “men of medicine,” who encouraged complete honesty from their patients, and “men of law,” who reinforced this encouragement by reassuring patients, that helped to create an atmosphere of complete disclosure.<sup>86</sup> These professionals fostered patient autonomy by impressing on the patients that they themselves are the *only* individuals who can waive their privilege.<sup>87</sup>

In *Hammonds*, the patient had brought an action against an insurance company for inducing disclosure from a physician by informing him that his patient was contemplating a malpractice suit against him.<sup>88</sup> The court recognized the breach of confidentiality tort and found that modern public policy and medical ethics requires courts to enforce a physician’s implied assurance of secrecy.<sup>89</sup> Despite the fact that the court recognized that some exceptions permitting disclosure exist, the court felt compelled to hold that any unauthorized disclosure of confidential information is tortious conduct and effectively gives rise to an action for damages.<sup>90</sup>

An appellate court further expanded the claim for unauthorized disclosures of medical information by holding a medical examiner liable for a disclosure under the invasion of privacy theory, even when the traditional physician-patient relationship did not exist.<sup>91</sup> In *Levias v. United Airlines*, recovery was permitted from a doctor who disclosed a flight attendant’s medical information to her supervisor as well as her husband.<sup>92</sup> Because the physician was a medical examiner for her employer and not the patient’s personal physician, the typical physician-patient relationship was not present.<sup>93</sup> The court predicated recovery on whether the party receiving the disclosure had a “real need to know, not mere curiosity” and whether the party had authority to act on the disclosed information.<sup>94</sup> The court suggested several factors to consider in determining an invasion of privacy claim, including whether the party

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<sup>86</sup>*Id.* at 797.

<sup>87</sup>*Hammonds*, 243 F. Supp. at 797.

<sup>88</sup>*Id.* at 795.

<sup>89</sup>*Id.* at 796-97. The court dismissed the defendants’ second argument that because no malicious motive existed, liability could not be enforced. *Id.* at 798. The court ignored persuasive authority (*McPheeters v. Board of Med. Exam’rs*, 284 P. 938 (Cal. 1930)), which held that a malicious purpose was required to state a cause of action, and instead held that only a purposeful divulgence of confidential information was needed to state a cause of action for the unauthorized disclosure of confidential information. *Hammonds*, 243 F. Supp. at 798.

<sup>90</sup>*Id.* at 802.

<sup>91</sup>*Levias*, 500 N.E.2d at 370, 373. The court rejected an action for negligent infliction of emotional distress because it would require proving a serious and debilitating injury existed, whereas proving invasion of privacy did not. *Id.* at 370, 374. Most actions for disclosure were based on these bases of liability at this time. *Id.*

<sup>92</sup>*Id.* at 370. The physician-patient relationship was favored over the marital relationship because the husband also required a valid need to know the information in order to be the recipient of privileged, unauthorized medical information. *Id.* at 370, 374.

<sup>93</sup>*Levias*, 500 N.E.2d at 373. The patient was seeking a waiver of weight limits that were imposed for appearance regulation that was applicable to being a flight attendant. *Id.*

<sup>94</sup>*Id.* at 374.

had any authority to act upon the data, whether the person's own well being was at issue, or whether emergency care was required and whether the physician has a compelling reason to avoid seeking the patient's permission before disclosing information.<sup>95</sup> Because the physician was held liable even though he was not the patient's regular doctor, Ohio law now recognizes liability that does not fall under the category of the traditional physician-patient relationship.<sup>96</sup>

Another appellate court broadened the right to privacy action by honoring an action for an unauthorized disclosure that was the result of a negligent act instead of an intentional act.<sup>97</sup> In *Prince v. St. Francis-St. George Hospital*, doctors sent a bill with the patient's diagnosis of Alcoholism to a stranger at her husband's place of employment.<sup>98</sup> The court held, "[i]t seems to us that a negligent invasion of the right of privacy... can just as effectively invade one's right of privacy as an intention to do so."<sup>99</sup> This ruling further strengthened patients' rights to recover for unauthorized disclosures by allowing recovery for an action under any mental state.<sup>100</sup>

Liability for unauthorized disclosures was, once again, extended when a court permitted recovery to a minor patient for a disclosure by a physician's agent.<sup>101</sup> In *Hobbs v. Lopez*, a nurse disclosed the minor's pregnancy to her parents after she had sought advice for an abortion.<sup>102</sup> The court enforced liability of the doctors and the corporation under the theory that the nurse was an agent; because the privilege has the same purpose for an agent of a physician, the agent is bound by the same obligation as the physician to keep the medical information in confidence.<sup>103</sup> Also, the court refused to distinguish the fact that it was the parents of the minor who received the disclosure, implying that even parents are not privileged to receive medical information if it is unauthorized and that the parents are not able to authorize consent for their own child.<sup>104</sup>

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<sup>95</sup>*Id.* at 375.

<sup>96</sup>*Id.* at 374 (stating the examination of the patient was involuntary because she did not go to the physician attempting to seek medical care, but instead attended the examination in order to obtain a waiver for her employment).

<sup>97</sup>*Prince v. St. Francis-St. George Hosp.*, 484 N.E.2d 265 (Ohio Ct. App. 1985).

<sup>98</sup>*Id.* at 266.

<sup>99</sup>*Id.* at 268. Although the physicians were held liable, the hospital was not because the physicians were not employees of the hospital. *Id.* at 267.

<sup>100</sup>*Id.*

<sup>101</sup>*Hobbs v. Lopez*, 645 N.E.2d 1261 (Ohio Ct. App. 1994). The court based liability on both breach of confidentiality and intentional infliction of emotional distress theories. *Id.* However, the court would not enforce actions for invasion of privacy because the information was not disseminated to the public at large. *Id.* Also, the court held the violation amounted to conduct which held the defendants liable for intentional infliction of emotional distress and, therefore, did not predicate liability on negligent infliction of emotional distress. *Id.*

<sup>102</sup>*Id.* at 1262.

<sup>103</sup>*Hobbs*, 645 N.E.2d at 1263.

<sup>104</sup>*Id.*

Another protection offered for patients is the preclusion of obtaining only oral authorization from the patient or other doctors instead of written permission by the patient alone to release medical information.<sup>105</sup> In *Nationwide v. Mutual Insurance Co. v. Jackson*, an insured party gave authorization to an insurance company to obtain copies of all medical records, but had refused to authorize interviews of medical professionals and employers.<sup>106</sup> The court held that, although a patient may waive the privilege of confidentiality, the consent must be in express terms.<sup>107</sup> Therefore, in order to properly guard patients' privacy interests, each waiver obtained must be explicit and unambiguous in its terms.

The Ohio Supreme Court also broadened patients' rights by holding that the judiciary is not permitted to create any public policy exceptions to allow disclosures, but that the exceptions must be determined by the legislature instead.<sup>108</sup> In *State v. Smorgala*, a patient was charged with driving under the influence when the results of her blood-alcohol test were released to a police officer after a car accident.<sup>109</sup> The court upheld a reversal of her conviction because the physician-patient privilege was not subject to limitation by a judicially created public policy preference.<sup>110</sup> The court held, "[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy."<sup>111</sup> Consequently, only the legislature can determine which unauthorized disclosures are not actionable because a statutory exception precludes liability.<sup>112</sup>

In addition, the Ohio Supreme Court expanded liability by not only requiring a medical professional to refrain from disclosing information, but by requiring an actual affirmative duty to disclose when there is a potential of harm by the patient.<sup>113</sup> *Estates of Morgan v. Fairfield Family Counseling Center*, the Ohio companion case

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<sup>105</sup>*Nationwide Mut. Ins. Co.*, 226 N.E.2d at 760.

<sup>106</sup>*Id.* at 761. This is similar to *Vassiliades*, 492 A.2d at 580, where a physician was held liable for only obtaining oral consent to use before and after photographs of his patient's cosmetic surgery at a presentation in a department store. See text accompanying footnotes 74-77 *supra*.

<sup>107</sup>*Id.* at 762. The court stated, "[f]urthermore, even if there is some ambiguity due to the fact that the contract says only 'reports' rather than 'written reports,' in general legal usage it is accepted that medical reports means *written* medical reports." *Id.* at 763.

<sup>108</sup>*State v. Smorgala*, 553 N.E.2d 672 (Ohio 1990).

<sup>109</sup>*Id.* at syllabus.

<sup>110</sup>*Id.* at 674.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>*Estates of Morgan*, 673 N.E.2d at 1311. The development of the exceptions to disclosure liability in Ohio originated in the first case treating the duty of confidentiality by the Ohio Supreme Court. *Jones*, 160 N.E. at 456. In *Jones*, a widow brought a negligence suit against a doctor who failed to notify the health authorities and others in dangerous proximity to the patient as required by statute, that he was treating his patient with the extremely contagious disease, black smallpox. *Id.* at 457. The court concluded that if a statute requires disclosure, the duty of confidentiality is waived and the physician has an affirmative duty to disclose the medical information. *Id.* at 456.

to the *Tarasoff*<sup>114</sup> case, involved a vocational counselor who was held liable for his failure to prevent harm from occurring when a patient with a medical history of schizophrenia fatally shot each member of his family.<sup>115</sup> The court discussed the statute providing that “no person shall be liable for any harm that results to any other person as a result of failing to disclose any confidential information about the mental health client or patient.”<sup>116</sup> The court stated that despite the existence of the statute, a special relationship exists between a psychotherapist and a patient that creates a duty of the therapist to take affirmative steps to prevent any harm by the patient from occurring.<sup>117</sup> The affirmative duty may make physician liability appear to have no boundaries in Ohio law, but many courts have found circumstances that limit legal responsibility.

Although patients’ rights to recover for unauthorized disclosures have grown stronger, some restrictions are still valid and may be used as defenses by the disclosing party. One appellate court held that the dangerous risk of a contagious disease may permit unauthorized disclosures of confidential medical information.<sup>118</sup> In *Knecht v. Vandalia Medical Center Inc.*, a secretary of a medical center disclosed to her son that one of the patients had been treated for a venereal disease when she suspected her son had engaged in sexual relations with the patient.<sup>119</sup> The court took into consideration that the employee did not “chat at will,” but only revealed the information out of fear of her son being exposed to a contagious disease.<sup>120</sup> The court held that this was a qualified or conditional privilege because “a commonality of interest exists between the publisher and the recipient and the communication is of a kind reasonably calculated to protect that interest.”<sup>121</sup> If the defense can prove against a high scrutiny that a common interest existed and that the disclosure did not stretch beyond the interest, then the defendant might not be held liable.

Additionally, a physician’s ability to reveal confidential medical information pursuant to a court order or statute has long been enforced.<sup>122</sup> In *State v. Antill*, the physician was required by statute to report an assault to law-enforcement officers and to testify in court about the resulting wounds.<sup>123</sup> The physician was not held liable because the husband had used a deadly weapon and the statute required the

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<sup>114</sup>*Tarasoff*, 551 P.2d at 334.

<sup>115</sup>*Estates of Morgan*, 673 N.E.2d at 1311.

<sup>116</sup>OHIO REV. CODE ANN. § 5122.34 (West 1999).

<sup>117</sup>*Estates of Morgan*, 673 N.E.2d at 1327.

<sup>118</sup>*Knecht v. Vandalia Med. Ctr., Inc.*, 470 N.E.2d 230 (Ohio Ct. App. 1984). *See also* OHIO REV. CODE ANN. § 3701.243 (West 1999).

<sup>119</sup>*Knecht*, 470 N.E.2d at 231 (holding a patient may only be able to sue under the theory of invasion of privacy because an employee of a physician has no legal duty to refrain from divulging confidential medical information concerning the patient of that physician).

<sup>120</sup>*Id.* at 232.

<sup>121</sup>*Id.* The court reasoned that the commonality of interest between a mother and a son is obvious and her disclosure to her son was not actionable. *Id.*

<sup>122</sup>*State v. Antill*, 197 N.E.2d 548 (Ohio 1964).

<sup>123</sup>*Id.* at 552.

physician to disclose the perpetrator of an assault when a deadly weapon is used.<sup>124</sup> The Ohio Supreme Court reasoned, “[t]he publicity against which the privilege is supposed to protect has already taken place.... The only purpose that sustaining the privilege can now serve is to obstruct the course of justice.”<sup>125</sup> If a statute or court order not only permits, but also requires disclosure, the defendant will not be held liable for the release of unauthorized confidential medical information.<sup>126</sup>

Ohio statutory law may also limit a defendant’s liability by permitting a physician to reveal the results of a positive drug test, especially if the disclosure is to another physician.<sup>127</sup> In *Neal v. Corning Glass Works Corp.*, an employee had injured himself on the job and was taken to the emergency room for treatment where blood and urine samples were taken and subsequently yielded a positive drug test, which was then revealed to the physician hired by the employer.<sup>128</sup> The court held that the disclosure to another physician was not actionable because the second physician owed the same fiduciary duty to the patient.<sup>129</sup> Consequently, disclosures between physicians are permitted and encouraged when they concern a public policy and a common interest.<sup>130</sup>

The law regarding unauthorized disclosures has become more strict for medical professionals since its inception. The holding in *Biddle v. Warren General Hospital* that a hospital is liable for the release of patient registration forms to a law firm in an attempt to collect medical bills is representative of the courts’ unwillingness to permit an unauthorized disclosure to occur without legal responsibility.<sup>131</sup> However,

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<sup>124</sup>*Id.*

<sup>125</sup>*Id.* In addition, OHIO REV. CODE ANN. § 2317.02 requires disclosure when the circumstances in the statute are satisfied. *Antill*, 197 N.E.2d at 551. In fact, the physician would incur liability if s/he did not disclose the medical information. OHIO REV. CODE ANN. § 2921.22 (West 1999); *Antill*, 197 N.E.2d at 551.

<sup>126</sup>Other statutes authorizing disclosure include OHIO REV. CODE ANN. § 2317.02 (West 1999) (determining when a physician may testify about privileged matters in court); § 3701.243 (regarding disclosure of information about HIV tests); § 5122.31 (determining rights of patients who are hospitalized due to mental illness); § 2151.421 (statute requiring practitioners of medicine to report knowledge or suspicion of child abuse or neglect).

<sup>127</sup>*Neal v. Corning Glass Works Corp.*, 745 F. Supp. 1294 (S.D. Ohio 1989).

<sup>128</sup>*Id.* at 1295.

<sup>129</sup>*Id.* at 1297. In addition, the disclosure to the company doctor and the disclosure by the employer’s doctor to the employer were also permitted under *Knecht’s* qualified privilege because a positive drug test affects both of the physicians’ mutual interests. *Id.*; see *Knecht*, 470 N.E.2d at 230 (holding that a qualified or conditional privilege exists when a commonality of interest exists between the publisher and recipient, and the communication reasonably protects that interest); see also text accompanying footnotes 117-28 *supra*. The court stated in dicta that the drug usage by the patient could constitute a disclosure necessary to protect the welfare of the employees in the work environment. *Neal*, 745 F. Supp. at 1297. Therefore, a sufficient public policy probably would have permitted the disclosure. *Id.*

<sup>130</sup>*Id.* Additionally, the court did not address the fact that the employer’s physician may have had a conflicting duty toward the employer which may not give him the same fiduciary duty toward the patient as the treating physician had. *Id.*

<sup>131</sup>*Biddle*, 715 N.E.2d at 518.

in *Biddle*, it was not only the hospital, but also the law firm that was liable.<sup>132</sup> The law firm was held responsible for the inducement of the hospital's breach of confidentiality because the firm constituted a third party and was not considered an agent of the hospital.<sup>133</sup> *Biddle* is the most extreme example to date of liability for an unauthorized disclosure and the inducement of the disclosure.

### III. THIRD PARTY INDUCEMENT OF THE BREACH OF CONFIDENTIALITY

The inducement of an unauthorized disclosure is a subset of the breach of confidentiality tort. Although inducing a physician to breach the duty of confidentiality is not an area that has been thoroughly explored, it is recognized that "a person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused."<sup>134</sup> It is well settled that the elements which must be satisfied in order to establish liability for the inducement of an unauthorized disclosure are (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.<sup>135</sup> Since its birth in 1965, only a handful of cases have addressed the tort of the inducement of unauthorized disclosures.<sup>136</sup>

#### A. Development of Ohio Law

It was an Ohio court that first held a third party liable for inducing a breach of confidentiality.<sup>137</sup> In *Hammonds v. Aetna Casualty & Surety Co.*, an insurance company induced a physician to reveal confidential medical information when a

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<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>RESTATEMENT (SECOND) OF TORTS § 874 (1977) (Violation of a Fiduciary Duty). See also RESTATEMENT (SECOND) OF TORTS § 876 (1979) (Persons Acting in Concert). Other types of fiduciary relationships that have been examined and treated similarly include attorney/client, accountant/client, banker/customer, trustee/beneficiary, principal/agent, director/corporation, law officer/informant, journalist/confidential source, parent/child, broker/client, clergy/penitent, employer/employee, telecommunications assistant/hearing impaired person, mediator/mediation participant, social worker/client, school guidance counselor/student, and husband/wife. RESTATEMENT (SECOND) OF TORTS §§ 874, 876 (1977).

<sup>135</sup>*Morris*, 446 S.E.2d at 648. Damages resulting from the breach itself and the inducing of the breach may be measured differently because the fiduciary would also be liable for the harm caused or profits made by the fiduciary. RESTATEMENT (SECOND) OF TORTS § 874 (1977) (Violation of a Fiduciary Duty).

<sup>136</sup>*Hammonds*, 243 F. Supp. at 793. See also *Panko*, 423 F.2d at 41; *Neal*, 745 F. Supp. at 1294; *Alberts*, 479 N.E.2d at 113; *Anker*, 98 Misc. 2d at 148; *Moses*, 549 A.2d at 950; *Alexander*, 177 A.2d at 142; *Curtis v. Fairfax Hosp.*, No. 129754, 129755, 1994 WL 1031299 (Va. Cir. Ct. May 15, 1994); *Morris*, 446 S.E.2d at 648.

<sup>137</sup>*Hammonds*, 243 F. Supp. at 793.

patient merely threatened to file a malpractice claim.<sup>138</sup> When holding the insurance company liable, the court analogized the policy behind other laws regarding third party participation in breaches of trust to also apply to those who participate in or induce the breach of a fiduciary duty.<sup>139</sup> Specifically, the court held that parties who are directly liable to a plaintiff are “third part[ies] who induce[] a breach of a trustee’s duty of loyalty, or participate[] in such a breach, or knowingly accept[] any benefit from such a breach....”<sup>140</sup> The injustice invoked by inducing a breach of trust explained in *Hammonds* became the basis underlying future court decisions when holding parties liable for inducing an unauthorized disclosure.

Another Ohio district court further expanded the tort of the inducement of a breach of confidentiality by holding an employer liable for inducing the disclosure of medical information regarding its employee.<sup>141</sup> In *Neal v. Corning Glass Works Corp.*, a patient brought an action against his employer for inducing his physician to release the positive results of a drug test in breach of the physician’s duty of confidentiality.<sup>142</sup> The court held that an action for inducing the disclosure of confidential medical information exists, but recognized that a question of fact remained as to the employer’s role in ordering the drug test.<sup>143</sup> The court distinguished a disclosure between two doctors, wherein the fiduciary duty of confidentiality is still owed to the patient by both physicians, from a disclosure between an employer and doctor, wherein the fiduciary duty of the employer owed to the employee is nonexistent.<sup>144</sup> The Ohio courts’ bold step, by first holding a third party liable for inducing an unauthorized disclosure, provided a stringent application of patients’ highly protected rights of privacy.

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<sup>138</sup>*Id.* at 800.

<sup>139</sup>*Id.* at 803. See also *In re Van Sweringen Co.*, 119 F.2d 231 (6th Cir. 1941) (stating that one who knowingly joins a fiduciary in purchasing for profit the property of the trust estate in unlawful circumstances becomes jointly and severally liable with him for resultant profits); *Shuster v. North American Mortg. Loan Co.*, 40 N.E.2d 130 (Ohio 1942) (holding that a third person, who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein, is liable for any loss caused by the breach of trust); RESTATEMENT (SECOND) OF TRUSTS § 326 (2d ed. 1959); Scott, *Participation in Breach of Trust*, 38 TRUST BULL. 41 (1958).

<sup>140</sup>*Hammonds*, 243 F. Supp. at 803.

<sup>141</sup>*Neal*, 745 F. Supp. at 1298.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 1298-99. The action for inducing a breach was not dismissed along with the original breach of confidentiality action. *Id.* at 1299. Instead, the action for inducing the breach remained at bar because the court reasoned that the claim for inducing a breach of confidentiality was legally permitted. *Id.*

<sup>144</sup>*Neal*, 745 F. Supp. at 1299. This reasoning seems illogical that one can be held liable for inducing a disclosure that wasn’t a violation of any relationship or duty. However, the court held that the employer’s actions of inducing the disclosure of confidential medical information might have violated the patient’s right to privacy. *Id.* Consequently, the employer’s Motion for Summary Judgment was denied. *Id.*

*B. Development of National Cases*

Other state courts have eventually followed Ohio's example by recognizing the inducement of an unauthorized disclosure as an independent tort and contributing to the development of the law. In *Alberts v. Devine*, a minister's superiors induced a psychiatrist to disclose confidences during the minister's evaluation for re-appointment.<sup>145</sup> The Massachusetts court broadened the application of inducement liability by analogizing its holding with the general rule that a party is liable for intentionally inducing another to commit any tortious acts.<sup>146</sup> To avoid liability, the court held that the superiors must prove they reasonably believed the psychiatrist could disclose information without violating his duty of confidentiality.<sup>147</sup> In order for an inducement to be actionable, "[t]he inducement need not be a threat, nor a promise of reward, but 'may be a simple request or persuasion exerting only moral pressure.'"<sup>148</sup> With the exception of the Ohio courts' interpretations, *Alberts* is one of the few detailed expansions of the inducement tort.

Some state courts recognized that the tort of inducement of unauthorized medical disclosures exists and should be punished, but could not hold a third party liable because of another issue. In *Alexander v. Knight*, the defense's doctor paid the personal injury plaintiff's doctor fifty dollars to provide a report of the plaintiff's condition without authorization.<sup>149</sup> Although they did not consider the inducing of the breach to be significant, the court held both the plaintiff's doctor and the defense's doctor owed a duty to "refuse affirmative assistance to the patient's antagonist in litigation" and should be condemned.<sup>150</sup> In addition, an insurance investigator interviewed a physician without the express consent of the patient or a court order in *Anker v. Brodnitz*.<sup>151</sup> In an effort to reduce the improper pressures on physicians to disclose unauthorized information, the court held liable any participants in the private interviews of a physician during the investigation of an insurance claim, for the disclosure or the inducement of the disclosure.<sup>152</sup> In order to

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<sup>145</sup>479 N.E.2d at 116.

<sup>146</sup>*Cobb v. Indian Springs, Inc.*, 522 S.W.2d 383, 387 (Ark. 1975) (negligence); *Halberstam v. Welch*, 705 F.2d 472, 481-89 (D.C. Cir. 1983) (burglary and murder); *Smith v. Thompson*, 655 P.2d 116 (Idaho Ct. App. 1982) (arson); *Nelson v. Nason*, 177 N.E.2d 887 (Mass. 1961) (negligence); *Duke v. Feldman*, 226 A.2d 345 (Md. 1966) (assault and battery); *Rael v. Cadena*, 604 P.2d 822 (N.M. Ct. App. 1979) (battery); *Russell v. Marlboro Books*, 183 N.Y.S.2d 8 (N.Y. Sup. Ct. 1959) (libel), cited collectively in *Alberts*, 479 N.E.2d at 121.

<sup>147</sup>*Alberts*, 479 N.E.2d at 122.

<sup>148</sup>*Id.* at 121 (quoting RESTATEMENT (SECOND) OF TORTS § 766, cmt. k (1979)). The court reiterated the elements stated above that are required in order to hold a party liable for inducing a breach of confidentiality by a psychiatrist. *Id.*

<sup>149</sup>177 A.2d at 146.

<sup>150</sup>*Id.*

<sup>151</sup>98 Misc. 2d 148.

<sup>152</sup>*Id.* at 153. In order to deter such private interviews, both the physician and the insurance company would be held liable for disclosures that occurred during the private meeting. *Id.* The court's reasoning was that "the adequacy of formal discovery procedures, the difficulty of determining what medical information is relevant, and the possibility of

protect the patient's right to keep his or her medical information confidential, some New York courts require a ban on any private interviews of a physician while investigating a claim.<sup>153</sup> Also, in *Morris v. Consolidated Coal Co.*, a patient on worker's compensation brought an action against his employer for inducing his physician to disclose that the patient was lying about the extent of his injury.<sup>154</sup> The court held that "the concept of holding someone who induces a fiduciary to breach his fiduciary relationship is not a foreign concept."<sup>155</sup> Each court's recognition of the tort of inducement of breach of confidentiality is yet another example of the high standard placed on enforcement of patients' rights.

However, various courts provided limitations to the independent tort of inducing a breach of confidentiality. In *Panko v. Consolidated Mutual Insurance Co.*, a store's liability insurance investigators induced a physician to disclose a patient's medical history and injuries without her consent when she brought a slip and fall action against a store.<sup>156</sup> Despite the fact that the pre-trial disclosures were actionable, the customer ultimately failed because she could not prove the disclosures resulted in the loss of the personal injury action.<sup>157</sup> The court held that the "[p]laintiff must show a causal connection between the allegedly tortious conduct and the injury complained of, even if the plaintiff succeeds in establishing an intentional unprivileged interference."<sup>158</sup> The causal connection requirement provided a limitation to disclosures that would otherwise be actionable.

Another limitation for the inducement tort is that the action for the original breach of confidentiality must be successful in order for a third party to incur liability for the inducement of the breach. In *Moses v. McWilliams*, a patient's doctor had disclosed confidential medical information about his patient to his defense attorneys after the patient brought a medical malpractice action against him for negligent care.<sup>159</sup> The court ruled that because the patient had voluntarily instituted a malpractice action against the doctor, the filing constituted a waiver of

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doctors or insurers becoming the object of lawsuits for unauthorized disclosure require that there be no private interviews without a patient's express consent." *Id.* at 154.

<sup>153</sup>*Id.* at 153. The court hoped that the rule would reduce unnecessary lawsuits for wrongful disclosure. *Anker*, 98 Misc. 2d at 153.

<sup>154</sup>446 S.E.2d 648, 650 (W. Va. 1944). Case was brought by certified questions and the facts were not properly developed in the lower courts. *Id.* at 657-58.

<sup>155</sup>*Id.* at 657. In addition to recognizing the elements for inducing a breach of confidentiality stated above, the court added a fourth element that "the physician wrongfully divulge[d] confidential information to the third party," explicitly stating the holding in *Moses*, 549 A.2d at 950. *Morris*, 446 S.E.2d at 657.

<sup>156</sup>423 F.2d at 42-43. The way that the insurers induced the physician to disclose the information was by writing the physician and requesting that he fill out a medical report. *Id.* at 42. The physician completed the form without obtaining authorization from the patient. *Id.* The doctor was ultimately paid to testify as an expert witness against her. *Id.* at 42-43.

<sup>157</sup>*Id.* at 44.

<sup>158</sup>*Panko*, 423 F.2d at 44 n.4 (stating this is also true if the plaintiff's cause of action is viewed as one for inducing breach of a contract with an implied term of secrecy).

<sup>159</sup>549 A.2d at 952. This claim was also brought against the medical center, but the analysis is the same for both parties. *Id.*

the patient's privilege.<sup>160</sup> The court then determined that because the original breach of confidentiality was not actionable, all claims for inducing the physician to disclose must also fail.<sup>161</sup> These limitations help to provide some defendant protection against unreasonable claims.<sup>162</sup> But courts, on the whole, continue to remain overly cautious of patients' rights when third parties induce unauthorized disclosures of confidential medical information.

Courts throughout Ohio have upheld the right of a patient to sue a third party for inducing the unauthorized disclosure of confidential medical information by a physician. However, it was the Ohio Supreme Court's holding in *Biddle v. Warren General Hospital* authorizing an action for inducement of confidential medical information by a third party that further advanced this claim.<sup>163</sup>

#### IV. *BIDDLE v. WARREN GENERAL HOSPITAL*<sup>164</sup>

The willingness of courts to protect patients' rights to confidentiality is best exemplified by the Ohio Supreme Court's authorization of an independent tort for the inducement of an unauthorized disclosure of medical information.<sup>165</sup>

##### A. *Facts*

The law firm of Elliott, Heller, Maas, Moro & Magill Co., L.P.A. [hereinafter "Elliott Heller"] approached Warren General Hospital [hereinafter "Warren Hospital"] with the proposition that Elliott Heller could attempt to collect unpaid medical bills through the assistance of the Social Security Administration.<sup>166</sup> The parties subsequently entered into an unwritten agreement whereby Warren Hospital sent Elliott Heller patient registration forms to determine if the patients were eligible for Supplemental Security Income.<sup>167</sup> Elliott Heller then called the eligible patients and if they consented, Elliott Heller assisted the patient by filing the claim with the

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<sup>160</sup>*Id.* at 953. The court stated an additional public policy to that stated in *Anker*, 98 Misc. 2d 148. *Moses*, 549 A.2d at 955. The court held, "[i]t is in the best interest that malpractice claims be investigated at the earliest possible stage to determine their validity." *Id.* (quoting *Forster v. Manchester*, 410 Pa. 192, 197 (1963)). The court also based its ruling on the Pennsylvania physician-patient privilege which permits disclosure in civil matters brought by the patient for personal injury. *Id.*

<sup>161</sup>*Id.* at 960.

<sup>162</sup>Another example of a limitation concerns a case for tortious interference with contract. *Curtis*, 1994 WL 1031299, at \*1. In *Curtis*, an employee of the defendant Fairfax Hospital brought an action for wrongful death of her infant. *Id.* However, the court found that there was no valid contractual relationship and a breach could not occur if no relationship existed that provided a fiduciary duty. *Id.*, at \*2. Therefore, a breach could not be induced when the relationship was not a valid one. *Id.*

<sup>163</sup>*Biddle*, 715 N.E.2d at 518.

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* at 520.

<sup>167</sup>*Id.*

Social Security Administration.<sup>168</sup> Under this agreement, Warren Hospital received payments for medical services that otherwise would be written off, and Elliott Heller was paid on a contingent basis for their efforts.<sup>169</sup> The understanding between Elliott Heller and Warren Hospital was that the hospital was the initial client of the law firm, but the firm may “at some point in time” represent the patients individually concerning Social Security benefits.<sup>170</sup> The registration forms released by the hospital included names, telephone numbers, ages, and medical conditions of each patient.<sup>171</sup>

Initially, Warren Hospital had its own pre-screening process before sending files to Elliott Heller.<sup>172</sup> Shortly after the process began, Warren Hospital abandoned its pre-screening process and released all its registration forms without obtaining authorization.<sup>173</sup> The registration forms<sup>174</sup> traveled weekly via courier, and were reviewed by attorney Robert Heller and his legal assistant, Sharyn Jacisin.<sup>175</sup> If patients were eligible for Supplemental Security Income, they received a phone call from Jacisin or Heller’s secretary, Melanie Sutton.<sup>176</sup> Jacisin and Sutton stated that they were calling on behalf of the hospital, and informed the patients that they may be eligible for help paying their medical bills.<sup>177</sup> If patients expressed interest, they were referred to Heller to receive further assistance.<sup>178</sup> Heller claimed that he did not tell the patients that Elliott Heller would be representing them.<sup>179</sup> However, one

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<sup>168</sup>*Biddle*, 715 N.E.2d at 520.

<sup>169</sup>*Id.* Heller got the idea for this plan at a legal seminar. *Id.* The agreement was an unwritten agreement. *Id.* The process was in effect for a total of two and one-half years. *Id.*

<sup>170</sup>*Biddle*, 715 N.E.2d at 520.

<sup>171</sup>*Id.*

<sup>172</sup>Appellants’ Warren Gen. Hosp.; Kevin Andrews; Elliott, Heller, Maas, Moro & Magill, Co., L.P.A.; and Robert L. Heller Merit Briefs; and Merit Brief of Appellees/Cross-Appellants Cheryl A. Biddle, Individually and as Executrix; and Gary Ball, at 2, *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518 (Ohio 1999) (No. 96-5582). Initially the hospital staff would separate the self-pay accounts so the law firm could come in and review them. *Id.* However, this would also not be enough to protect the parties from liability because the sorting did not provide consent from the patient. *Id.* Liability would only be avoided if the hospital staff was the initial caller to the patients and if the hospital obtained consent to send the registration forms to the law firm. *Id.*

<sup>173</sup>*Biddle*, 715 N.E.2d at 520.

<sup>174</sup>This was disputed by patient affidavits. *Id.* at 520-21.

<sup>175</sup>*Id.* at 520. Ineligible patients’ forms were placed in boxes for storage and no further action was taken regarding these forms. *Id.*

<sup>176</sup>*Id.*

<sup>177</sup>*Biddle*, 715 N.E.2d at 520. Neither Jacisin & Sutton stated where they worked. *Id.* Specifically, Jacisin and Sutton stated, “[y]ou might be entitled to Social Security benefits that might help you pay your medical bill.” *Id.*

<sup>178</sup>*Id.* Heller claimed that he did not tell the patients that Elliott Heller would be representing them. *Id.* Instead, Heller said the patients retained Elliott Heller from their own free will. *Biddle*, 715 N.E.2d at 520.

<sup>179</sup>*Id.*

patient testified that even though she never retained Elliott Heller, the firm's name appeared in her letter from the Social Security Administration denying her benefits.<sup>180</sup> Although approximately one hundred phone calls were made,<sup>181</sup> Heller met with only five individuals, and only a couple of those patients were able to recover any financial assistance from the Social Security Administration through this process.<sup>182</sup>

The agreement between Elliott Heller and Warren Hospital was first disclosed on WFMJ-TV in Youngstown.<sup>183</sup> Sutton sent photocopies of patient registration forms to the television station in retaliation of learning the firm was terminating her employment.<sup>184</sup> When the television investigation began, the relationship between Elliott Heller and Warren Hospital ended.<sup>185</sup> This class action for breach of patient confidentiality and the inducement of the breach was filed less than a month later.<sup>186</sup>

#### *B. Reasoning of the Ohio Supreme Court*

The analysis of *Biddle* includes similar explorations of law as the cases previously cited. The court divided its treatment into five questions of law.<sup>187</sup> First, was whether a hospital could be liable for the unauthorized disclosure of confidential information learned from the fiduciary relationship.<sup>188</sup> In making the declaration, the court drew support from Ohio's lower court decisions that held a physician liable for an unauthorized disclosure.<sup>189</sup> The court wasted no time in acknowledging that a physician or hospital could be held liable for unauthorized disclosures of patient information.<sup>190</sup>

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<sup>180</sup>*Id.* at 521.

<sup>181</sup>It is unknown how many phone calls Sutton made because she did not testify. *See Biddle*, 1998 WL 156997, at \*1, \*13.

<sup>182</sup>*Biddle*, 715 N.E.2d at 520. *See also* Appellants Robert L. Heller and Elliott, Heller, Maas, Moro & Magill Co. L.P.A. Merit Brief at 4, *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518 (Ohio 1999) (No. 98-0952).

<sup>183</sup>*Biddle*, 715 N.E.2d at 521.

<sup>184</sup>*Id.*

<sup>185</sup>*Id.*

<sup>186</sup>*Id.* Other causes of action were also alleged, but the court stated the breach of confidentiality and inducement of the breach were the proper causes of action for unauthorized disclosures of confidential medical information. *Id.* at 520. These include invasion of privacy, intentional infliction of emotional distress, negligence, breach of implied contract, and improper solicitation. *Biddle*, 715 N.E.2d at 520.

<sup>187</sup>*Id.* at 521.

<sup>188</sup>*Id.* at 522.

<sup>189</sup>*Id.* *See also* *Hammonds*, 243 F. Supp. at 793; *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 529 N.E.2d 449 (Ohio 1988); *Prince*, 484 N.E.2d at 265; *Levias*, 500 N.E.2d at 370; *Nationwide Mut. Ins. Co.*, 226 N.E.2d at 760.

<sup>190</sup>*Biddle*, 715 N.E.2d at 522.

The second issue was whether breach of confidence in a physician-patient setting could be recognized as an independent tort.<sup>191</sup> The court stated that there were no “serious” arguments against the recognition of breach of confidence as an independent tort.<sup>192</sup> In an effort to avoid stretching legal theories and ignoring doctrinal limitations, the Ohio Supreme Court established that the unauthorized disclosure of medical information to a third party was an independent tort.<sup>193</sup> Support was also drawn from the nature of the physician-patient relationship itself due to its underlying purpose of confidence and its fiduciary character.<sup>194</sup>

Third, the court had to determine if the hospital’s duty “to hold patient information confidential [was] absolute.”<sup>195</sup> The court held that the duty was not because disclosures made pursuant to statutory mandate or common law duty have been permitted in lower Ohio courts and other state courts.<sup>196</sup> In these cases, “disclosure [was] necessary to protect or further a countervailing interest which outweighs the patient’s interest in confidentiality.”<sup>197</sup> However, no special circumstances permitting or requiring unauthorized disclosures existed that allowed Warren Hospital to release the patient registration forms to Elliott Heller.<sup>198</sup> The agreement was merely an attempt to collect unpaid medical bills, and disclosures are not prescribed by Ohio law for this purpose.<sup>199</sup>

The fourth issue was whether the hospital obtained clear patient consent of this type of disclosure.<sup>200</sup> Warren Hospital’s patient consent form for release of medical

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<sup>191</sup>*Id.*

<sup>192</sup>*Id.*

<sup>193</sup>*Id.* at 523. In addressing other theories of liability, the court held, “many...courts have endeavored to fit a breach of confidence into a number of traditional or accepted legal theories. *Id.* In much the same way as trying to fit a round peg into a square hole...these theories prove ill-suited for the purpose, and their application contrived, as they are designed to protect diverse interests that only coincidentally overlap that of preserving patient confidentiality.” *Biddle*, 715 N.E.2d at 523.

<sup>194</sup>*Id.* The court cited the oft-quoted first state supreme court case exploring the issue of unauthorized medical disclosures, *Smith v. Driscoll*, when it stated, “[f]or so palpable a wrong, the law provides a remedy.” *Smith v. Driscoll*, 162 P. 572, 572 (Wash. 1917), *cited in Biddle*, 715 N.E.2d at 522.

<sup>195</sup>*Biddle*, 715 N.E.2d at 524.

<sup>196</sup>*Id.* See, e.g., *Estates of Morgan*, 673 N.E.2d at 1324; *Hague*, 181 A.2d at 349; *Berry*, 331 P.2d at 817-18; *Jones*, 160 N.E. at 456; *Simonsen*, 177 N.W. at 832, *cited collectively in Biddle*, 715 N.E.2d at 524.

<sup>197</sup>*Biddle*, 715 N.E.2d at 524.

<sup>198</sup>*Id.* Elliot Heller did have several arguments explaining that the information was never disclosed outside of the privilege due to the attorney-client privilege between Elliot Heller and Warren Hospital by showing how the privileged information stayed with in a “closed loop” and that the law firm was an alter ego of the hospital. *Id.* at 524-27. In addition, the firm argued that no extra information was released than would have been for the collection a debt. *Id.* at 527. However, the court did not agree with any of the arguments. See text of § IV(C), *infra*.

<sup>199</sup>*Biddle*, 715 N.E.2d at 524.

<sup>200</sup>*Id.* at 527.

information stated that authorization was only granted to an “insurance company and/or third party payor.”<sup>201</sup> The court stated that consent forms must be “fairly specific” as to who is authorized to have access to the patients’ confidential medical information.<sup>202</sup> Since the registration forms were sent to the law firm despite the fact that the original consent did not permit the release to anyone except an insurance company or third party payor, the court held the hospital liable for unauthorized disclosure of the patient registration forms.<sup>203</sup> The court urged medical professionals, who wished to utilize this type of procedure, to obtain specific written consent for each disclosure.<sup>204</sup>

Finally, the court recognized the tort of a third party inducement of an unauthorized disclosure of confidential medical information.<sup>205</sup> The court held that the intent was to protect the patient’s interest in obtaining medical care and limit disclosure to those who have a “legitimate interest in the patient’s health.”<sup>206</sup> In addition, the court stated that each patient should be the controller of the patient’s interests, and it was the patient’s right to determine who is to have access to confidential medical information.<sup>207</sup> After reiterating the elements for the inducement of an unauthorized disclosure as previously held in other cases, the court found that reasonable minds could conclude that the hospital breached its duty of confidentiality and the law firm induced the breach.<sup>208</sup>

### C. Failed Arguments

The Ohio Supreme Court entertained a number of arguments by the hospital and law firm, which it determined to be inadequate for a variety of reasons. The first was

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<sup>201</sup>*Id.* It is implied that a general authorization does not provide enough protection for patients’ rights to confidentiality. *Id.*

<sup>202</sup>*Id.* The insinuation is that if the hospital had continued the pre-screening process, explicit consent could be obtained by the patient giving authorization to the hospital to send the records to the law firm. *Biddle*, 715 N.E.2d at 527. See discussion in § IV(D), *infra*.

<sup>203</sup>*Biddle*, 715 N.E.2d at 528.

<sup>204</sup>*Id.* at 527-28. As shown by the harsh result in *Biddle*, it is also in the discloser’s best interest to obtain specific consent in order to avoid liability. *Id.* at 529.

<sup>205</sup>*Id.* at 528. The court stated that other forms of liability are not adequate due to the various limitations previously examined. *Id.* at 529. However, the other theories may be explored when the facts of the case fall outside the breach of confidence tort. *Biddle*, 715 N.E.2d at 529. In conclusion, the court stated, “it is the very awkwardness of the traditional causes of action that justifies the recognition of the tort for breach of confidence in the first place.” *Id.*

<sup>206</sup>*Id.* The court still acknowledged that certain situations exist that justify disclosure. *Id.*

<sup>207</sup>*Id.*

<sup>208</sup>*Biddle*, 715 N.E.2d at 528. The elements include “(1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.” *Id.*

an extension of the qualified privilege doctrine, which encourages the uninhibited flow of information from a client to an attorney.<sup>209</sup> The defendants argued that since the attorney was also subject to a duty of confidentiality, the disclosure from Warren Hospital to Elliott Heller was privileged – a “closed loop in which confidential or privileged information goes from the patient to the hospital and then from the hospital to its lawyers.”<sup>210</sup> In support of this argument, the appellants’ cited *Neal v. Corning Glass Works Corp.*,<sup>211</sup> which held that a patient’s confidential medical information could be disclosed to another physician because the duty to the patient is the same for both physicians. However, the court rejected this argument because “[t]he main thrust of these arguments is to focus our attention on the nature of the relationship between attorney and client, rather than between physician and patient.”<sup>212</sup> The court distinguished *Neal* in its ruling because, unlike a physician that owes a duty of confidentiality to the patient, the law firm instead owes a duty of confidentiality to its client, the hospital, and no duty was directly owed to the patient.<sup>213</sup>

Moreover, the court reasoned that each defendant was bound by a completely different set of ethical regulations,<sup>214</sup> and the law firm’s duty to its client does not stem or depend on a confidential relationship that exists between its client and a stranger.<sup>215</sup> In *Biddle*, the client of the law firm is the hospital, and the client of the hospital is the patient.<sup>216</sup> Although this may appear to be a continual chain of confidence, the duties of an attorney towards his or her client are different from that of a doctor towards his or her patient.<sup>217</sup> The two relationships independently do not create an attorney-client relationship between the law firm and the hospital patients.<sup>218</sup> Because Elliott Heller’s duty was to Warren Hospital, and not to any of

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<sup>209</sup>*Id.* at 524-25.

<sup>210</sup>*Id.* at 525.

<sup>211</sup>*Id.* at 524-25, citing *Neal*, 745 F. Supp. at 1294 (holding physician not held liable for revealing patient’s positive drug test).

<sup>212</sup>*Biddle*, 715 N.E.2d at 525. The court foresaw even extreme examples avoiding liability, such as “the individual medical practitioner who releases the bulk of his or her office files without authorization so that a lawyer can search through them for potential workers’ compensation or personal injury claimants. *Id.*”

<sup>213</sup>*Id.* at 525-26.

<sup>214</sup>*Id.* at 522. An extension of the court’s reasoning was that the law firm is bound by the OHIO CODE OF PROF’L RESPONSIBILITY DR 4-101 and EC 4-1, which require an attorney to hold the confidences and secrets of clients confidential. *Id.* at 525-26. The court concluded that the law firm’s duty under DR 4-101 is to keep the confidences and secrets of its client, the hospital, but not the patients of the hospital; therefore, the privilege of the doctor in *Neal* is distinguishable. *Biddle*, 715 N.E.2d at 525-26.

<sup>215</sup>*Id.* at 526.

<sup>216</sup>*Id.* at 520.

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

the hospital's patients, no "closed loop" allowed the disclosure to remain privileged.<sup>219</sup>

A second argument addressed by the court was that the law firm was merely an "alter ego" of the hospital because the law firm qualified as a third party through its status as the hospital's agent, and it could not be held to induce a breach of confidentiality.<sup>220</sup> The court held that the authorities, on which the appellants' relied for this theory did not apply to the facts at hand.<sup>221</sup> First, the defendants relied on Ohio Revised Code § 2317.021, which provides the definition of "client" within the attorney-client relationship as being a person who communicates directly or through an agent with an attorney.<sup>222</sup> The court felt that the attorney was the party who communicated with the agent, and could not fulfill both the attorney and agent roles simultaneously.<sup>223</sup> In addition, the court thought the Uniform Health-Care Information Act did not carry much weight for the "alter ego" theory because it was not adopted in Ohio or in a majority of other states.<sup>224</sup> Even if the "alter ego" theory were applicable, it would not give free license to a principal to disclose confidential information to the agent.<sup>225</sup> Rather than give great deference to the alter-ego concept, the court provided a strict interpretation of the Code in order to protect the rights of patients.<sup>226</sup>

Another argument, which was only addressed in passing, was that the hospital was merely taking action in good faith by collecting a bill that would otherwise have been a write-off.<sup>227</sup> While the court acknowledged that the law is not settled in Ohio, it speculated that the only information that the hospital needed to disclose was information that was clearly necessary to collect the debt.<sup>228</sup> This argument was weakened when a witness testified that if unpaid bills were the only matter at hand, the only disclosures that would be required are the amount of the bill owed, any

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<sup>219</sup>*Biddle*, 715 N.E.2d at 525.

<sup>220</sup>*Id.* at 525-26.

<sup>221</sup>*Id.* at 526. The appellants' relied on OHIO REV. CODE ANN. § 2317.021 (West 1963) and the Uniform Health-Care Information Act. *Id.*

<sup>222</sup>*Id.* at 526.

<sup>223</sup>*Biddle*, 715 N.E.2d at 526. The court stated, "a refusal to recognize a privilege in this case will not sound the death knell of the attorney-client relationship. *Id.* By withholding a privilege in this case, we do no more than recognize that there are some circumstances under which a hospital can be held liable for the unauthorized disclosure of confidential medical information to an attorney." *Id.*

<sup>224</sup>*Id.*

<sup>225</sup>*Id.*

<sup>226</sup>*Biddle*, 715 N.E.2d at 526. The court did not address the breach of the legal secretary of law firm when the legal secretary disclosed the registration forms to the television station. *Id.* at 521. This may be because it felt public policy would excuse her actions because she was disclosing a wrong done to many people. Additionally, whether the hospital has a claim against the law firm for contribution of its breach is also not discussed.

<sup>227</sup>*Id.* at 527 n.1.

<sup>228</sup>*Id.* (quoting Johnston, *Breach of Medical Confidence in Ohio*, 19 AKRON L. REV. 373, 391 (1986)).

payment history, and any insurance information.<sup>229</sup> The medical conditions of each patient released in *Biddle* were more than was required to collect a bill and, as a result, the court found that it was not crucial to treat this issue at that time.<sup>230</sup> Because the issue was that confidential information not be disclosed, the court thought that the fact that the law firm was trying to help patients with their medical bills in good faith did not matter.<sup>231</sup> In addition, the claim that the law firm acted in good faith is placed in doubt because one of the law firm's legal assistants knew enough about the potential risk of liability that she copied numerous pages of the patient registrations and sent them to the television station in order to retaliate against her soon-to-be former employer.<sup>232</sup> Therefore, creative lawyering through the use of the "closed loop" theory, the "alter ego" theory, and the good faith collection of an unpaid bill argument was not enough to distract the attention of the Ohio Supreme Court from its main concern – protecting patients from unauthorized disclosures of confidential medical information.

#### V. TREATMENT OF LAW POST-*BIDDLE* v. *WARREN GENERAL HOSPITAL*

Since *Biddle*'s recent decision, courts have begun to treat the analysis of the case in a positive manner; *Thompson v. Eiler* demonstrates looser treatment.<sup>233</sup> In *Thompson*, a medical facility released records regarding carpal tunnel syndrome, which also documented treatment for depression in order to process a workers' compensation claim.<sup>234</sup> In the course of her claim, the patient signed two separate release forms.<sup>235</sup> The First District Court of Appeals of Ohio cited *Biddle* when it

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<sup>229</sup>*Id.*

<sup>230</sup>*Biddle*, 715 N.E.2d at 527 n.1. The court stated, "[p]laced in its proper perspective, such a privilege would also protect the individual medical practitioner who releases the bulk of his or her office files without authorization so that a lawyer can search through them for potential worker's compensation or personal injury claimants." *Id.* The court stated, "[t]he hospital's actions may, only in the broadest possible sense, be characterized as a collection effort," and but it is certainly not the kind of collection effort contemplated by those authorities who would grant a privilege to collect an overdue debt." *Id.*

<sup>231</sup>*Id.* at 528. This is also supported by the Court's statement that the particular need for the information did not matter. *Id.* The Court stated, "the inducer's need for the information is irrelevant unless it is to advance or protect some interest giving rise to a privilege." *Biddle*, 715 N.E.2d at 528. This holding is further supported by the federal Northern District of Ohio court's previous decision in *Hammonds* that no malicious motive was needed in order to be liable for an unauthorized disclosure of confidential medical information. *Hammonds*, 243 F. Supp. at 798.

<sup>232</sup>*Biddle*, 715 N.E.2d at 521.

<sup>233</sup>*Thompson v. Eiler*, No. C-990634, 2000 Ohio App. LEXIS 2895 (Ohio Ct. App. June 30, 2000); *Fair v. St. Elizabeth Med. Ctr.*, No. 17942, 2000 Ohio App. LEXIS 56 (Ohio Ct. App. January 14, 2000).

<sup>234</sup>*Thompson*, 2000 Ohio App. LEXIS 2895, at \*4.

<sup>235</sup>*Id.*, at \*4-5. Specifically, the first form stated "**READ CAREFULLY BEFORE SIGNING \*\*\*** By signing this application I expressly waive all provisions of law which forbid any person, persons, or medical facility who heretofore did or who hereafter may medically attend, treat, or examine me or who may have information of any kind which may be used to render a decision in my claim, from disclosing such knowledge or information to

recognized that an independent tort exists for the unauthorized disclosure of confidential medical information, but did not hold the medical facility liable for the disclosure.<sup>236</sup> Because the patient had signed two appropriate consent forms and filed a claim for workers' compensation, the court held that the patient authorized the release of the records that regarded her carpal tunnel syndrome.<sup>237</sup> Moreover, the facility was not liable for the disclosure of the depression records because a statute required the Bureau of Worker's Compensation to investigate and determine which statements were appropriate for each claim.<sup>238</sup> The court noted that it was the claimant's decision to run the risk of a potential disclosure by participating in the state's insurance fund.<sup>239</sup> Thus, although the court based its ruling on the *Biddle* decision, it applies a looser standard when filing a worker's compensation claim.

*Biddle* was also cited as "new law" concerning unauthorized disclosures of medical information in *Fair v. St. Elizabeth Medical Center*, where the plaintiff sued a Medical Center for failing to protect her when another psychiatric patient attacked her in a community area.<sup>240</sup> The patient argued that the alleged attacker's confidential medical records should be admitted at trial in order to establish that a special relationship existed between the attacker and the medical center and to determine that the medical center had breached a duty to control the attacker.<sup>241</sup> The court acknowledged *Biddle*'s "appropriate circumstance" exception where the rights of an injured party supercede those of a patient and create a conditional or qualified privilege to disclose.<sup>242</sup> Disclosure was found to be the appropriate action because the medical center had a duty to reasonably protect the plaintiff from assault or battery by third persons, even if it was from another patient.<sup>243</sup>

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the Bureau of Workers' Compensation, its agents or the Industrial Commission." *Id.* In full, the second note stated, "To Whom It May Concern: I agree to release my physician's and or hospital records to Michelman, Inc. for the purpose of my Worker's Comp evaluation. Please accept this fax as authorization for you to release only the records regarding my Carpal Tunnel Syndrome to Michelman, Inc. and its representatives." *Id.*

<sup>236</sup>*Id.* at \*1.

<sup>237</sup>*Thompson*, 2000 Ohio App. LEXIS 2895, at \*13. OHIO REV. CODE ANN. § 2317.02 permits the filing of a workers' compensation claim to constitute a compulsory waiver of the physician-patient privilege. *Id.* at \*12.

<sup>238</sup>*Id.* at \*14-15.

<sup>239</sup>*Id.* at \*16.

<sup>240</sup>*Fair*, 2000 Ohio App. LEXIS 56, at \*11. Interestingly, the court did not rely on *Estates of Morgan*, 673 N.E.2d at 1311, in which a statute providing that no person is liable for any harm that comes as a result of failing to disclose any confidential information about mental health does not preclude a finding that a the psychotherapist has a special duty to take affirmative steps to control a patient's conduct.

<sup>241</sup>*Id.* at \*7.

<sup>242</sup>*Id.* at \*7, \*9 (overruling *Johnston v. Miami Valley Hosp.*, 572 N.E.2d 169 (Ohio Ct. App. 1989)), which refused to create an exception to the physician-patient privilege to prove the existence of a special relationship between a hospital and patient who caused injury to another patient).

<sup>243</sup>*Id.* at \*10.

Whether these cases, which take a much more lenient approach to patients right than *Biddle*, are representative of a trend is yet to be seen. But it is apparent from these two cases, in which, despite the strict nature of *Biddle*, it is still possible to disclose pursuant to a statutory mandate or common law exception, including those which are not specified in the Ohio Supreme Court's opinion.

## VI. POSSIBLE SOLUTIONS

### A. Pre-screening

The result in *Biddle* could have been avoided by minimal action on the part of the hospital and the law firm. One possibility is that the hospital could have continued its procedure of obtaining consent by using the hospital staff to call the patients that were potentially eligible for Supplemental Security Income. The process of informing the patients of the potential to have a portion of their medical bills paid and providing the patients with the phone number of the law firm to receive more information would give the law firm an opportunity to receive consent from the patients directly.

### B. Redaction

In a situation where only a part of a document contains confidential information, another possible solution is to redact those areas that are confidential. This is applicable to the physician-patient privilege and the attorney-client privilege, but the act of redaction must be completed by the party who enjoys the privilege in order to prevent the privileged information from being disclosed. Blocking out confidential information and still preserving the document remains in the spirit of only disclosing what is absolutely necessary in order to obtain payment for a bill or to accomplish another goal.

### C. Educate Other Fiduciaries

Another possible solution is to invoke seminars, performed by attorneys in order to educate medical professionals about *Biddle*, its defenses, and the potential liability that may arise from various disclosures. The attorneys can provide case studies, or other examples, in an attempt to explain what a proper procedure is for disclosing confidential information. In essence, it is practicing preventative medicine. These seminars may be particularly important in states that do not follow the traditional analyses regarding disclosure liability.

### D. Staff Training

Often liability is incurred because an office staff person at a medical facility breaks protocol or mistakenly sends extra confidential information than what is actually authorized. Creating strict in-house procedures for staff members should alleviate the temptation for any staff members to disclose information at the request of the public. Requiring permission in order to send out patient information may also avoid any close-calls in which a staff member might use mistaken judgment. Also, training sessions, especially for beginners, that explain disclosure procedures and the liability that can be incurred personally and on behalf of the facility may help to prevent any unknowing disclosures.

### E. Consent/ Waiver

Finally, the best way to avoid liability is to receive explicit, written consent from the patient. Perhaps the result of *Biddle* will be the use of patient waivers that are of the length and detail of a car lease in order to ensure explicit consent. The specific fact that a consent form was signed in *Biddle* occurs less frequently in other situations because a consent form does not always exist. However, the impact of *Biddle's* holding is clearly important because the holding may also be applied to cases where no consent form is involved.

What Warren Hospital and Elliott Heller should have done was to create a waiver of liability that specifically named the law firm as a party authorized to receive confidential medical information that was signed by each patient. The waiver may provide insulation from liability, as it does for insurance companies and others today. Guidance in drafting waiver forms can be found in other situations where waiver forms have been utilized, and the legislature has been highly specific regarding what information is mandatory in each waiver.<sup>244</sup> The disclosure and inducing of the disclosure can occur either if no consent form exists, or if the form is inadequate. Having key phrases in larger and bolded font can increase the effectiveness of a consent form or waiver. The important message to convey to the patient is that by signing, patients are potentially waiving liability for disclosures or at least granting authorization to confidential medical information for the specific purpose noted. The more clearly a consent form portrays this message, the more likely the consent form will be upheld.

## VII. CONCLUSION

*Biddle v. Warren General Hospital* is the Ohio Supreme Court's warning for medical professionals and entities, as well as the third parties who relate with them, to take notice of the strict analysis used for the unauthorized disclosure of confidential medical information. It is a call to all those in the medical profession to quickly examine and possibly alter their procedures for collection or other disclosures. A major concern of those opposed to the holding of *Biddle* is that the attorney-client privilege is headed for impending doom. However, the Ohio Supreme Court reassured that this is not the case by stating that the "death knell" of the attorney-client relationship will not be sounded by the court's holding.<sup>245</sup> The court stated, "by withholding a privilege in this case, we do no more than recognize that there are some circumstances under which a hospital can be held liable for the

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<sup>244</sup>For example, in order to release records from a drug treatment program, the consent form must "(1) [s]pecifically identif[y] the person, official, or entity to whom the information is to be provided; (2) [d]escribe[] with reasonable specificity the record, records, or information to be disclosed; and (3) [d]escribe[] with reasonable specificity the purposes of the disclosure and the intended use of the disclosed information." OHIO REV. CODE ANN. § 3793.13(B) (West 1999). Also, in order to obtain informed consent from a patient, the consent is required to "set[] forth in general terms the nature and purpose of the procedure or procedures, and what the procedures are expected to accomplish, together with the reasonably known risks, and, except in emergency situations, set[] forth the names of the physicians who shall perform the intended surgical procedures" in addition to acknowledging that the disclosure has been made and any questions answered. § 2317.54(A) & (B).

<sup>245</sup>*Biddle*, 715 N.E.2d at 526.

unauthorized disclosure of confidential medical information to an attorney.”<sup>246</sup> Although a cry for help is being heard for those who fear that *Biddle* means endless liability for the medical profession, the cases since *Biddle*'s decision have not made this apparent. Therefore, let the overall lesson be learned - if adequate protection of patient confidentiality is not maintained, no court will support the disclosure unless the situation falls under one of the statutory or common law exceptions previously mentioned.<sup>247</sup> Fiduciaries may find themselves facing a holding similar to that of *Biddle*: “We can find no interest, public or private, that would justify the recognition of a privilege under these circumstances.”<sup>248</sup>

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<sup>246</sup>*Id.*

<sup>247</sup>The exceptions include when danger to a patient, a patient's spouse, or other person exists; when the physical condition of the patient is an element of the claim; if the patient has a highly contagious or infectious disease; or in a general duty to warn case; if the physician is testifying during a judicial proceeding; if the duty is not recognized within that jurisdiction; in First Amendment and Public Right to Know situations; if the disclosure is required for a medical peer review process; when a medical malpractice claim is brought by the patient against the physician; if a crime or a fraud is disclosed; or if authorized by a court order, although a controversy exists as to whether this is permitted *ex parte*; disclosure to a potential victim or their family that the victim's life may be in danger because the patient wanted to kill him or her. OHIO REV. CODE ANN. §§ 2151.421, 2317.02, 2921.22, 3701.243, and 5122.31 (West 1999).

<sup>248</sup>*Biddle*, 715 N.E.2d at 527.