

COURT WATCH

FROM THE LAW OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC

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Hageman v. Southwest Gen. Health Ctr.

Slip Opinion No. 2008-Ohio-3343

Appeal from the Court of Appeals for Cuyahoga County

Supreme Court of Ohio

ISSUE: Whether an attorney may be liable for the unauthorized disclosure to a third party of medical information regarding an opposing party that was obtained in the course of litigation.

The Supreme Court of Ohio recently considered the above question in Hageman v. Southwest Gen. Health Ctr., and held that a person may sue if unauthorized release of personal information has caused harm. In Hageman, Mr. Hageman began meeting with Dr. Thysseril, a psychiatrist, in January 2003 and admitted to homicidal thoughts about his wife soon thereafter. Dr. Thysseril determined that Hageman has bipolar disorder and treated him for the condition through July 2003.

In February 2003, Hageman's wife filed for divorce and retained Barbara Belovich as her attorney. In response to the divorce, Hageman brought a counterclaim against his wife seeking legal custody of the couple's minor child. However, while both the divorce case and psychiatric treatment were ongoing, Hageman allegedly assaulted his wife. Criminal charges were brought against him, and his wife was able to obtain a civil domestic-violence protection order against him. She was also awarded temporary custody of the child until a hearing could be held on the matter.

Prior to the custody hearing, attorney Belovich issued subpoenas to Hageman's psychiatrist seeking the production of his medical records. She did so under the assumption that Hageman had waived his privilege to the records under Ohio law by filing a counterclaim for custody in the divorce hearing. In Ohio the Court has held that a parent who seeks custody of a minor child in a divorce action makes his or her mental condition an issue in the case, and thus, the physician/patient privilege does not apply.¹ Although Hageman never signed a release for the information, Dr. Thysseril's office faxed the records to Belovich in response to her subpoena.

On the date of the civil-protection order hearing, attorney Belovich met the prosecuting attorney responsible for prosecuting the criminal charges against Hageman and provided him with a copy of Hageman's medical records. Sometime thereafter, Hageman and his wife entered into a separation agreement that was later incorporated into a divorce decree by the Court. Hageman's medical records were never admitted into evidence in either the divorce/protection order or criminal matters, and Hageman was later acquitted of the criminal charges.

¹ Gill v. Gill, 2007-Ohio-5402, 2007 WL 2916128, at ¶ 19 (Ohio App. 5 Dist. Oct. 8, 2007).

Shortly after the separation agreement was completed, Hageman filed suit against attorney Belovich, Hageman's ex-wife, Dr. Thysseril and his medical practice group and the hospital housing the doctor's practice group, alleging that each had improperly disclosed his medical records without his authorization. The trial court granted summary judgment in favor of the defendants on all of Hageman's claims. The court of appeals affirmed all but the judgment in favor of Belovich. In reversing, the Court stated that the attorney had "overstepped her bounds as [the ex-wife's] divorce attorney when she disseminated information regarding [Hageman's] psychiatric condition to the prosecution."² The Supreme Court of Ohio then accepted Belovich's discretionary appeal.³

In reviewing the case, the Supreme Court began by recognizing that medical records are generally considered confidential,⁴ pursuant to the Ohio Public Records Act, the Health Information Portability and Accountability Act of 1996 (HIPAA), and Biddle v. Warren Gen. Hospital, wherein the Ohio Court recognized a separate tort for breach of confidentiality related to medical information.⁵ In Biddle, the Court recognized two related causes of action: one against physicians and hospitals for the disclosure of medical information, and another against third parties who induce physicians and hospitals to disclose medical information.⁶

Though Belovich argued against the application of Biddle to her situation, the Supreme Court found that the rationale for that decision also applied to her unauthorized disclosure of Hageman's records. In applying the Biddle decision to the Hageman case, the Court stated that "[i]f the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information."⁷ The Court declined to address what affects the failure to take steps to keep medical records private, such as seeking a protective order, may have on the tort given different facts.

In response to Belovich's primary argument that confidentiality had been waived under Gill v. Gill, the Court held that "[w]hatever discomfort arose from this disclosure of private and confidential information was tempered by the possibility of success on his custody claim. However, there is neither a legal justification for nor a practical benefit to the proposition that a waiver for a specific, limited purpose is a waiver for another purpose."⁸ The Court also noted that such an expansive waiver would not be desirable public policy.⁹

Ultimately the Court held that a waiver of medical confidentiality for litigation purposes is limited to the specific case for which the records are sought, and that an attorney who violates this limited waiver by disclosing the records to a third party unconnected to the litigation may be held liable for these actions. Thus, as in Biddle, the Court concluded that an independent tort exists to provide an injured individual with a remedy for such an action. The judgment of the

² Hageman v. Southwest Gen. Health Ctr., 2006-Ohio-6765, 2006 WL 3743095, at ¶¶ 29-30 (Ohio App. 8 Dist. Dec. 21, 2006).

³ Hageman v. Southwest Gen. Health Ctr., 114 Ohio St. 3d 1410, 2007-Ohio-2632, 867 N.E.2d 844.

⁴ Hageman v. Southwest Gen. Health Ctr., 2008-Ohio-3343, 2008 WL 2715717, at ¶ 9 (Ohio July 9, 2008).

⁵ Biddle v. Warren Gen. Hosp., 86 Ohio St.3d 395, 395, 715 N.E.2d 518, 519 (1999).

⁶ 86 Ohio St.3d at 295, 715 N.E.2d at 519.

⁷ Hageman v. Southwest Gen. Health Ctr., 2008-Ohio-3343, 2008 WL 2715717, at ¶ 13 (Ohio July 9, 2008).

⁸ Id. at ¶ 14.

⁹ Id. at ¶ 15.

Court of Appeals of Cuyahoga County was affirmed and the case was remanded for further proceedings consistent with the opinion.

West Virginia mental health record disclosures

While the Hageman v. Southwest Gen. Health Ctr. decision is not binding on West Virginia courts, it does provide guidance as to when the confidentiality of medical records can be considered waived. It is important to note, however, that the Hageman decision deals with psychiatric records rather than general health records. Under the 2007 West Virginia Mental Health Act, there are only six specific instances when confidential mental health records can be released. This change represents an attempt by the West Virginia Legislature to incorporate provisions that are more consistent with HIPAA into the statute. However, the changes do not make the state requirements identical to HIPAA; instead, the provider must make a good faith effort to obtain consent, must limit the release to the minimum necessary, and must provide notice to the patient. Further, the statutory provision likely limits the ability to release information without patient consent only within the first 30 days after admission to a mental health facility.

As to the extent to which confidentiality can be waived, Ohio law now runs counter to the notion that after a privilege has been waived, it is waived for all future purposes. Though it is unknown whether other states, including West Virginia., will follow Ohio's lead on the issue of secondary disclosure, the Hageman v. Southwest Gen. Health Ctr. decision makes clear that lawyers and the physicians they represent should remain aware of the liabilities that can be created by the unauthorized disclosure of medical records to third parties.