IN THE SUPREME COURT OF OHIO

CASE NO. 2019-0939

MENORAH PARK CENTER FOR SENIOR LIVING
Plaintiff-Appellant

-vs-

IRENE ROLSTON
Defendant-Appellee

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CASE NO. CA-18-107615

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS (OACTA) IN SUPPORT OF DEFENDANT-APPELLANT, MENORAH PARK CENTER FOR SENIOR LIVING

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I. STATEMENT OF INTEREST AND INTRODUCTION

The Ohio Association of Civil Trial Attorneys ("OACTA") has a wide array of members including attorneys, corporate executives, and claims professionals dedicated to the defense of tort litigation and civil disputes throughout Ohio. For over fifty years, OACTA has provided a forum where professionals work together to promote and improve the administration of justice in Ohio. OACTA supports laws and policies that promote predictability, stability, and consistency in Ohio's civil justice system.

OACTA's focus on the issue before this Court is the extent to which *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 715 N.E.2d 518, 1999-Ohio-115 affects health care providers throughout Ohio, the claims they can lawfully make for serviced rendered to Ohio patients and consumers, and the impact of both Ohio and federal law on their ability to collect on medical debts. The case before this Court is one that will greatly affect both individual consumers of medical services throughout Ohio and health care professionals that routinely provide medical care, treatment, and services to Ohio consumers.

From OACTA's perspective, the issues before this Court are not necessarily whether or not federal law preempts state law or whether *Biddle* should provide a common law claim for Ohio consumers. The issues before this Court are rather, if this Court does continue to permit a common law claim regarding the unauthorized disclosure of public health information: (1) what constitutes an unauthorized disclosure of health information; and (2) to what extent can a health care provider submit health information to a court of law or other third party in order to obtain payment for debts incurred by Ohio consumers.

As these are issues of first impression to this Court, it is important to look to federal law and regulations as guidance, regardless of whether or not preemption applies. Both parties in this

case agree that the Health Insurance Portability and Accountability Act ("HIPAA"), Pub.L. 104-191, 100 Stat. 2548 (Aug. 21, 1996), regulations supersede contrary state laws. (Def.-Appellee Memo. Opp. Juris. at 11 (Aug. 9, 2019)); (Ptf.-Appellant Memo. in Supp. Juris. at 5-7 (Jul. 10, 2019)). This Court can provide both parties with their request by adopting HIPAA privacy regulations and providing a narrowly tailored common law exception under *Biddle* that would exempt health care providers from liability where limited health information is disclosed for the purposes of medical debt collection. However, should the Court determine not to fully adopt HIPAA privacy regulations and the exception should not be absolute, it should instead hold that health care providers have a qualified privilege under *Biddle* where limited health information is disclosed that would provide a rebuttable presumption of immunity.

In determining whether or not to adopt HIPAA privacy regulations as an exception for *Biddle*, this Court should not merely look to federal law and regulations for guidance, but should also consider the ways and scenarios through which federal law will intersect with state law on the issues before the Court. Federal law under HIPAA has been the gold standard, since its enactment, for health care providers and how they disclose protected health information ("PHI"). Further, the Fair Debt Collection Practices Act ("FDCPA"), Pub.L. 95-109, 15 U.S.C. §§ 1692-1692p, has been the gold standard, since its enactment, for debt collectors and how they can lawfully obtain payment for debts incurred by consumers. These two Congressional Acts currently conflict with Ohio law under Biddle and cause a significant controversy for health care providers and the ways in which they can legally collect medical debt. Thus, the Court should consider all relevant federal and Ohio laws in order to determine how *Biddle*, HIPAA, and the FDCPA apply not only to this case, but all of Ohio's consumers and health care providers.

OACTA urges the Court to reverse the order of the Eighth District Court of Appeals and hold that HIPAA privacy regulations supersede Ohio law and provide a narrowly tailored, common law exception to *Biddle* that exempts health care providers from liability where a limited disclosure of health information occurs for the purpose of collecting a medical debt. At a minimum, OACTA urges the Court to reverse the order of the Eighth District Court of Appeals and hold that health care providers have a qualified privilege to disclose health information for the purpose of obtaining payment on a medical debt under *Biddle.*

II. STATEMENT OF FACTS

On March 21, 2018, Plaintiff-Appellant Menorah Park Center for Senior Living ("Menorah Park") filed a complaint in the Shaker Heights Small Claims Court ("Small Claims Court") against Defendant-Appellee, Irene Rolston ("Rolston") for unpaid debt from medical services provided by Menorah Park. The amount of the unpaid debt was $463.53. Menorah Park filed a "Statement of Claim" which alleged that Rolston owed an outstanding balance "for therapy services" that she incurred while admitted to "Menorah Park for rehabilitation."

Menorah Park attached two billing statements to its Complaint. These billing statements had an abbreviated description of the services received; the dates of service; the procedure code; and the charges, credits, and balances of the account. None of Rolston's medical diagnoses, medical conditions, or medical records were disclosed in the documents filed by Menorah Park. The extent of health information provided was Rolston's identity and the medical services she received.

The undersigned has independently attempted to pull these records through the Small Claims Court's online docket system and cannot view any of the individual documents. Therefore, these documents are not readily accessible to the public. Instead, for a member of the public to

view these documents, he/she would have to personally request a copy through the Small Claims Court and submit payment of $35.00 to receive them.

Rolston filed a counterclaim and class action lawsuit and the Municipal Court transferred the case to its regular docket. Rolston's individual claim alleged she sustained damages between $6,000 and $15,000. Rolston further claimed that the class was estimated to be more than forty (40) individuals with the same damage amounts. Under Rolston's alleged claims, Menorah Park could be liable for an amount between $240,000 and $3.75 million.

Menorah Park moved to dismiss claiming that HIPAA permitted the disclosure of Rolston's information in order to obtain payment of medical bills, pursuant to 45 C.F.R. §§ 164.502(a)(1)(ii) and 45 C.F.R. 164.506(c)(1).[1] Rolston responded that pursuant to *Biddle*, her claim arose under Ohio common law for the unauthorized disclosure of her health information. Rolston further claimed that Menorah Park violated the HIPAA exemption because it failed to make "reasonable efforts" to limit disclosure of her health information for the "minimum necessary" purpose.

The trial court rejected Rolston's argument and held that Rolston's claims were preempted by HIPAA. Rolston appealed to the Eight District Court of Appeals which held that, pursuant to *Biddle*, Rolston's claims were not preempted by HIPAA. Menorah Park appealed to the Ohio Supreme Court where the issue is now being presented for the first time.

III. LAW AND ARGUMENT

> Proposition of Law No. 1: Ohio should adopt the HIPAA privacy regulations and provide a narrowly tailored, common law exception to *Biddle v. Warren General Hospital* that exempts health care providers from liability where a limited disclosure of health information occurs for the purpose of collecting a medical debt.

[1] 45 C.F.R. §§ 502(a)(1)(ii) and 164.506(c)(1) permit the disclosure of an individual's protected health information for the purposes of collecting a medical debt, provided that the information is disclosed for the "minimum necessary" purpose of obtaining payment.

A. The intersection of Ohio law and federal law with a health care provider's disclosure of health information in order to obtain payment for medical debt incurred by patients.

Under federal law, both the HIPAA and FDCPA provide mandates, restrictions, guidelines, and regulations for the collection of medical debt by health care providers.[2] The Court should be guided by these mandates, restrictions, guidelines, and regulations in this case, because should they not be adopted in Ohio, health care providers could still be liable for violations of federal law if Ohio and federal law conflict regarding the methods of medical debt collection.

1. The current effect of *Biddle's* independent tort for the "unauthorized, unprivileged disclosure" of an individual's nonpublic health information on Ohio law.

In *Biddle*, the Supreme Court established an independent tort "for the unauthorized, unprivileged disclosure" of a patient's "nonpublic health information" to a third party. *Biddle, supra*, at 523. The Court, however, did not hold that the duty to maintain confidentiality of a patient's health information was absolute. *Id.* at 524. The Court recognized that physicians may be "privileged to disclose otherwise confidential health information in those special situations where…disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." *Id*. at 402. Further, the Court held that "special situations may exist where the interest of the public, the patient, the physician, or a third person are of sufficient importance to justify the creation of a conditional or qualified privilege to disclose in the absence of any statutory mandate or common-law duty." *Id*. In other words, under certain circumstances, a health care provider can disclose a patient's health information under two circumstances: (1) where the disclosure is necessary to protect or further a countervailing interest which outweighs

[2] The reference to health care providers throughout this Amicus Brief includes all health care providers that would consist of "covered entities" pursuant to HIPAA, which requires them to follow the privacy regulations promulgated by HIPAA. Health care providers are any providers of medical or health services "and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. §

the patient's interest in confidentiality; or (2) where the disclosure is of enough importance that a conditional or qualified privilege is created.

The Second, Eighth, and Tenth District decisions regarding HIPAA pre-emption have created a "seemingly unsolvable conundrum," as stated by the Second District in *Sheldon v. Kettering Health Network*, 2nd Dist. No. 26432, 2015-Ohio-3268, regarding HIPAA pre-emption for post-*Biddle* claims. The Second District acknowledged circumstances in which Ohio law may conflict with HIPAA requirements, despite the fact that HIPAA does not provide a private right of action. *Id*. at ¶ 28. The Tenth District determined that HIPAA regulations apply for the disclosure of health information for the purposes of payment because federal law preempts state law where there are "no applicable exceptions to preemption." *OhioHealth Corp. v. Ryan*, 10th Dist. No. 10AP-937, 2012-Ohio-60 at ¶17, 2012 WL 68733 (10th Dist.). Now the Eighth District has determined that federal preemption does not apply for an alleged unauthorized disclosure of health information.

Perhaps most importantly, the Ninth District reversed a case where the only evidence provided by a hospital regarding a medical debt was the dates and the amounts allegedly owed to the hospital. *Barberton Hosp. v. Hughes*, 9th Dist. No. 29783, 2013-Ohio-5800, ¶¶ 15-16, 2013 WL 6870032 (2013) (Holding that while a hospital is considered a "covered entity" under HIPAA, HIPAA permits the use or disclosure of individually identifiable health information when it is for the purposes of obtaining payment). Thus, had Menorah Park only provided the dates and amounts owed when it filed a claim against Rolston, it would not have been considered sufficient evidence to prove that Rolston actually incurred the medical debt.

The conundrum created between *Biddle* and HIPAA also involves the FDCPA. This conflict does not just arise where a health care provider directly discloses health information for

payment purposes, but also where a health care provider is required under the FDCPA to disclose health information for payment purposes to a third party – including attorneys retained to collect medical debt. Based upon the current status of both Ohio and federal law, Menorah Park had (and Ohio health care providers have) the following options to collect medical debts: (1) file independently in small claims court (as in this case) or in common pleas court (if the claims exceed the small claims amount) without legal representation; (2) file in court with legal representation; or (3) sell the debt to a "debt collector." Since the debt in this case was merely $463.53, Menorah Park opted file independently in small claims court and forgo legal representation.

While court filings are typically considered "public filings," the information provided by Menorah Park in compliance with Civil Rule 10(D)(1) was not significant enough to ascertain a medical diagnosis and is not so readily available to the public as one might imagine. In order for a member of the public to even remotely ascertain Rolston's medical diagnosis(es) in this case, an individual would have to do the following to access the information: (1) have prior knowledge that a small claim was brought against Rolston; (2) have knowledge of the exact court in which the small claim was brought; (3) access an electronic copy of the pleadings or, as in this case, where an electronic copy is unavailable, personally request the pleadings from the court and then pay for copies; (4) research the procedure codes to determine what exact procedures were provided; and (5) determine what medical conditions those procedures are used for by health care providers.

Plus, a procedure is not a diagnosis. A single procedure can be used for multiple medical conditions and diagnoses, depending upon what an individual patient needs to treat his or her specific diagnosis or condition. Menorah Park did not disclose Rolston's medical conditions or diagnosis(es). Menorah Park disclosed the procedures and services Rolston received for treatment. The procedures and services do not conclusively provide what Rolston's medical diagnoses and

conditions currently are or were at the time she received those services. It is highly unlikely that an average member of the public would even know how to access this information and, to the extent that he or she did, what procedures were utilized for what treatment purposes. Even if an average member of the public could ascertain what procedures were utilized, individuals would only be led to a variety of potential medical diagnoses or conditions that might exist for the purpose of receiving those treatments or services as single treatment can be used for multiple medical conditions.

Thus, in reliance on Ohio law, federal law, and the HIPAA exemption, Menorah Park filed a complaint against Rolston for $463.53 in compliance with the Ohio Rules of Civil Procedure in order to obtain payment on a medical debt for services rendered. If Ohio law begins requiring health care providers to hire attorneys for $463.53 worth of medical debt every time they file a small claim, health care providers will need to start considering legal fees and costs of debt collection in calculating the costs of medical procedures and services provided to Ohio consumers. Ohio's health care providers will have to consider legal fees for small claims not only to ensure compliance with both Ohio and federal law, but also because the only way to prove their claims without filing the accountings will be through in camera reviews. Not only will this increase the cost of health care services across Ohio, but this will also use more taxpayer funds by burdening the courts to conduct in camera reviews even where, like here, it is highly unlikely that lay persons accessing this information would even be able to ascertain what a patient's actual medical diagnosis(es) and conditions are from the limited information provided.

As a matter of public policy, the benefit of permitting the disclosure of such limited information far outweighs the substantial likelihood that health care costs in Ohio will increase if health care providers are required to hire attorneys every time they file a small claim for $463.53.

As discussed in *Biddle*, under these circumstances, disclosure of such limited health information outweighs the patient's interest in confidentiality to permit health care providers to receive payment for medical debt without increasing the cost of health care in Ohio any further. Perhaps more importantly, the U.S. Department of Health and Human Services ("HHS") has actually carved out an exception for the purposes of payment where HHS specifically recognizes circumstances in which a patient's entire medical record may need to be disclosed for purposes of collecting payment. 67 C.F.R. § 157, 53197 (Aug. 14, 2002).

2. The relationship of HIPAA to *Biddle* and the claims before this Court.

On August 21, 1999, Congress enacted HIPAA to protect unauthorized disclosure of individuals' health information. Pub. L. 104-191, 110 Stat. 1936 (Aug. 21, 1996). HIPAA authorized HHS to create and adopt privacy regulations for individuals' health information. *Id*. HHS created and adopted the Privacy Rule, for "three major purposes:

> (1) To protect and enhance the rights of consumers by providing them access to their health information and **controlling the inappropriate use** of that information;
> (2) To improve the quality of health care in the U.S. by restoring trust in the health care system among consumers, health care professionals…; and
> (3) To improve the efficiency and effectiveness of health care delivery by creating a national framework for health privacy protection **that builds on efforts by states, health systems, and individual organizations and individuals.**"

65 C.F.R. § 250, 82463 (Dec. 28, 2000). (**Emphasis added**). HHS acknowledged that while, at the time, most states had enacted some form of privacy safeguards, state laws "[did] not extend comprehensive protections **to people's medical records**." *Id*. at 82464. (**Emphasis added**).

The Privacy Rule specifically discussed, in its purpose, the use of individuals' health information by "malicious or inquisitive persons…for purposes ranging from identity theft to embarrassment to prurient interest…" *Id*. at 82465. The Privacy Rule detailed many instances where third parties had maliciously disclosed individuals' medical diagnoses to the individuals'

detriment.[3] *Id*. at 82468. The malicious disclosure of these individuals' medical diagnoses resulted in substantial negative effects in their personal and professional lives. *Id*. Thus, the original purpose of the Privacy Rule was to prevent malicious use of health information.

HIPAA permits the disclosure of health information for the purposes of payment. 45 C.F.R. § 164.506(c)(3). Payment includes "activities undertaken by" a health care provider "to obtain or provide reimbursement for the provision of health care." 45 C.F.R. § 164.501. When disclosing health information, a provider "must make reasonable efforts to limit [health information] to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." 45 C.F.R. § 164.502(b).

In regard to how the minimum necessary standard applies to a provider's disclosure for payment purposes, HHS stated,

> "The minimum necessary standard is not intended to impede…payment**…[HHS] recognizes that, in some cases, an individual's entire medical record may be necessary for payment…purposes**…However, [HHS] does not believe that disclosure of a patient's entire medical record is always justified for such purposes. **The Privacy Rule does not prohibit the…release of, entire medical records in such circumstances, provided that the covered entity has documented the specific justification for…disclosure…**" (**Emphasis added**).

67 C.F.R. § 157 at 53197 (Aug. 14, 2002). A health care provider "is permitted to disclose information to any person or entity as necessary to obtain payment for health care services. The minimum necessary provisions apply to such disclosures but permit the [health care provider] to disclose the amount and types of information that are necessary to obtain payment." *Id*. at 53198.

Rolston claims that Menorah Park did not meet the minimum necessary requirements in this case. In fact, in quoting *Biddle*, Rolston acknowledges that, "[I]n the absence of prior

[3] These included where a banker foreclosed on homes of individuals he discovered had cancer; the suspension of a physician's surgical privileges after the disclosure of his AIDS diagnosis; a Congressional candidate's campaign derailment after the disclosure of a suicide attempt; and an FBI veteran placed on administrative leave when his pharmacy disclosed his diagnosis of depression.

authorization, a physician or hospital is privileged to disclose otherwise confidential health information in those special situations where disclosure is made in accordance with a statutory mandate or common-law-duty, **or where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality.**" (Def. Appellee Memo. Opp. Juris. at 4 (Aug. 9, 2019)) (**Emphasis added**).

According to HHS, Menorah Park could have attached Rolston's entire medical record if it was necessary to secure payment. Thus, not only has HHS carved out an exception to *Biddle*, but has specifically acknowledged that the full disclosure of medical records may be necessary in certain circumstances for providers to obtain payment for medical services. Menorah Park, however, did not even attach Rolston's medical records to its Complaint or even included a diagnosis. Rather, Menorah Park provided a medical bill with procedure codes and an abbreviated description of services, which fully complies with the minimum standard promulgated by HIPAA and HHS.

Rolston also "agrees with Menorah Park that 'HIPAA privacy regulations supersede contrary state laws." (*Id*. at 11). However, even where a *Biddle* claim gives rise to a separate common law cause of action in Ohio, Menorah Park did not violate HIPAA privacy regulations or the minimum necessary standard, because Menorah Park released less information than permitted by HHS under the minimum necessary standard.

As applied to this case, a narrowly tailored exception to *Biddle* would authorize the disclosure of the procedure codes and an abbreviated description of services only for the purposes of obtaining payment. This would not provide a private right of action under HIPAA – only a narrowly tailored exception to *Biddle* for the purposes of debt collection. Not only would this comply with Civil Rule 10(D)(1), but it would not disclose a patient's full medical records or even

the diagnosis of their medical conditions. This would also comply with the minimum necessary standard pursuant to HIPAA. Thus, this Court should adopt a narrowly tailored exception to *Biddle* and agree with both parties that HIPAA's privacy regulations "supersede contrary state laws" for the purposes of payment and the collection of medical debts.

3. The relationship of the FDCPA to *Biddle* and the claims before this Court.

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). A "debt collector" is any person or entity "who regularly attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Debt collectors are not people or entities attempting to collect debt owed directly to them, unless the person or entity uses another name or entity solely for the purpose of debt collection. 15 U.S.C. § 1692a(6).

While the plain language of the statute generally carves out an exception for a person "serving or attempting to serve legal process…in connection with the judicial enforcement of any debt," various courts have held that attorneys and law firms are considered debt collectors under the FDCPA, depending on the frequency with which they "regularly engage" in debt collection. 15 U.S.C. § 1692a(6)(D); *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 489 (1995); *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 72 N.E.3d 573 (2016). In *Biddle*, however, the Court determined that the law firm acting on behalf of the hospital was not an "alter ego" of the hospital, but instead constituted a third party. *Biddle, supra,* at 404-07. If the logic of *Biddle* still holds true today, then any law firm engaged in the "regular practice" of debt collection on behalf of health care providers are considered "debt collectors" under the FDCPA.

Under the FDCPA, debt collectors must provide an initial communication to the consumer including: (1) the amount of the debt; (2) the name of the creditor; (3) a statement that notifies the consumer they have thirty (30) days to dispute the validity of the debt; and (4) a statement that if the consumer disputes the debt, "the debt collector will obtain verification of the debt or a copy of a judgment against the consumer." 15 U.S.C. § 1692g(a). Consumers then have thirty (30) days from receiving the initial communication to dispute the existence of a debt in writing. 15 U.S.C. § 1692g(b). However, "a communication in the form of a formal pleading in a civil action shall not be treated as an initial communication." 15 U.S.C. § 1692g(d).

In other words, a creditor can either file suit to collect a debt and bypass the verification requirements or hire a third party debt collector (which includes attorneys). If a health care provider hires a debt collector or attorney, the provider must then provide sufficient proof of debt or they cannot collect on their claim. With either of these actions, a creditor is required to provide enough proof of a debt to either the court or a third party debt collector that would prove the debt is owed by the consumer to the creditor.

Biddle does not just create a conundrum between HIPAA and Ohio law, but also between the FDCPA and Ohio law. If Ohio law continues with the same logic initially propounded under *Biddle*, any health care providers hiring attorneys to collect debts on their behalf would be required, pursuant to the FDCPA, to turn over sufficient health information to adequately prove that the consumer owes the debt – whether the initial action is filed directly in court or the consumer is contacted separately. The conundrum here is that health care providers still have to disclose health information to a third party to comply with the FDCPA, and yet potentially be in violation of Ohio's common law claims under *Biddle.*

The most important issue created by the overlap in these contrary laws, however, is that it provides Ohio consumers with the ability to not only dispute medical debt, but potentially avoid medical debt altogether. If health care providers are prohibited by *Biddle* from disclosing actual proof of services, they are prohibited by the FDCPA from further attempting to collect the debt. This would provide any Ohio consumer that disputes a medical debt with the ability to either sue under *Biddle* for an unauthorized disclosure of health information, where a health care provider discloses health information to collect on a debt, or permits Ohio consumers to completely avoid the payment of medical debt, where a health care provider avoids disclosing health information to collect on a debt.

As applied to this case, a narrowly tailored exception to *Biddle* for the purposes of payment would permit the disclosure of the same information provided by Menorah Park for the purposes of debt collection and to obtain payment. Not only would this comply with the FDCPA proof of debt requirement, but it would also rectify the contradictions between what health care providers can disclose for purposes of debt collection under the FDCPA. This would provide health care providers with a clear standard to follow when attempting to collect a debt from consumers and provide consumers with the ability to dispute a debt without wholly foreclosing a provider's ability to receive payment for medical services. Thus, this Court should adopt a narrowly tailored exception to *Biddle* to comply with the FDCPA's debt validation requirements so as to not fully foreclose health care providers' ability to collect debts owed should consumers, such as Rolston, dispute their medical debts.

Proposition of Law No. 2: Alternatively, Ohio should adopt the HIPAA privacy regulations and hold that health care providers have a qualified privilege to disclose health information for the purpose of obtaining payment on a medical debt under *Biddle v. Warren General Hospital*.

A. The application of a qualified privilege under Biddle v. Warren General Hospital would allow health care providers to disclose limited patient information to obtain payment for medical debt.

Qualified or conditional privileges (collectively "qualified privilege" as they are one in the same) are "based upon public policy and the need to protect the publication of a communication made in good faith." *Jacobs v. Frank*, 60 Ohio St.3d 111, 114, 573 N.E.2d 609 (1991) (public policy mandates that physicians providing information to licensing boards be provided with a qualified privilege to maintain quality health care in Ohio); *see also, A&B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283, 1995-Ohio-66 (public policy mandates that persons providing confidential information to public officials regarding bidders of public work contracts be provided with a qualified privilege to improve the quality and safety of public works).

Ohio's public policy supporting qualified privilege has been rationalized as follows: communications "made in good faith on any subject matter in which the person communicating has an interest, or…to which he has a duty," is privileged when made to another person having an interest or duty in the communication, even if the communication might otherwise be "actionable." *Jacobs, supra,* at 113-14. The duty may not necessarily be a legal one, but a moral or social duty of imperfect obligation. *Id.*

The elements of a communication with a qualified privilege are: (1) the communication occurs in good faith; (2) the communicator has an interest to uphold; (3) the statement is limited in both scope and purpose; (3) the occasion through which the communication is made is proper; (4) publication occurs in the proper manner; and (5) publication occurs only to the proper parties. *Id.* "The concept of a qualified privilege is based upon public policy and the need to protect the

publication of a communication made in good faith." *Id*. However, if the publication is made with malice, qualified privilege does not apply. *Id*. at 115-16.

As applied to the collection of medical debt, a qualified privilege is both necessary and appropriate:

(1) When health care providers disclose health information to collect debt incurred from services rendered to non-paying patients, these disclosures are often made in good faith. To the extent that such disclosures are made out of malice, a debtor can still challenge a health care provider's claims against him/her;

(2) Health care providers have an interest in communicating this information in order to be paid for services rendered to non-paying patients. If health care providers cannot collect for medical services provided to patients, their businesses will not survive;

(3) The purpose of a communication such as this would be entirely appropriate, and lawful, under both HIPAA and the FDCPA. In fact, if medical claims do not have sufficient information in accordance with the FDCPA, not only could health care providers potentially be barred from receiving payment altogether, they could also be subject to violations of federal law;

(4) Pursuant to Civil Rule 10(D)(1), health care providers must attach a copy of the account or written instrument upon which their claim is based. Based on the Ohio Rules of Civil Procedure, Menorah Park was merely complying with the procedural rules to maintain its claims against indebted patients like Rolston; and

(5) If health care providers are barred from providing sufficient proof of a patient's debt for medical services to a court, they will be unable to obtain a judgment and collect payment from indebted patients like Rolston. Health care providers across Ohio would be substantially dissuaded from ever filing a claim for medical debt against their patients if they are not provided with a qualified privilege to release the requisite amount of health information needed to prove their claims in court.

The issue presents a substantial interest of public policy to the State of Ohio, as it will directly affect the cost of health care provided to Ohio consumers. If health care providers must hire attorneys before they can collect unpaid patient debt for medical services, the cost of health care is going to increase. Providers will have to factor the cost of attorneys' fees into the costs of health care services. If health care providers opt not to hire attorneys, they may begin to require payment beforehand, which would substantially effect patients of lower socioeconomic incomes that cannot afford to do so or those that do not have sufficient health insurance to cover the needed

services. Not only is a qualified privilege for health care providers collecting medical debt both necessary and appropriate, but it is a public policy interest to limit the cost of legal services for debt collection to prevent the cost of Ohio's health care from increasing any further. Thus, if the Court does not adopt a narrowly tailored absolute exemption for the purposes of collecting medical debt, it should at least provide a qualified privilege for health care providers needing to disclose health information for the purposes of collecting medical debt.

IV. CONCLUSION

While a qualified privilege would provide protection to health care providers, it would still give rise to litigation from overly litigious consumers that want to contest and avoid medical debt. A qualified privilege is merely a defense and could be rebutted by a consumer asserting a malicious purpose. Thus, it would still require health care providers to hire attorneys for their defense, resulting in higher costs of health care and lower quality medical services. Thus, the most optimal ruling would be to provide a narrowly tailored exception to *Biddle* that exempts health care providers from liability where disclosure of health information occurs for the purposes of debt collection. As a matter of public policy, Ohio should seek to prevent circumstances which could result in a higher cost of health care and/or a lower quality of health care.

Accordingly, OACTA urges the Court to reverse the order of the Eighth District Court of Appeals and hold that HIPAA privacy regulations supersede Ohio law and provide a narrowly tailored, common law exception to *Biddle* that exempts health care providers from liability where a limited disclosure of health information occurs for the purpose of collecting a medical debt. At a minimum, OACTA urges the Court to reverse the order of the Eighth District Court of Appeals and hold that health care providers have a qualified privilege to disclose health information for the purpose of obtaining payment on a medical debt under *Biddle.*

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that the foregoing was filed via the Court's electronic filing system and served via electronic mail, this 15th day of November 2019, upon:

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