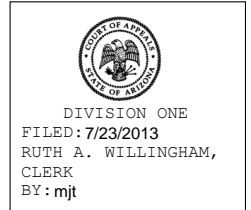


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ORIANA MENDY,) 1 CA-SA 13-0149
)
Petitioner,) DEPARTMENT C
)
v.) Maricopa County Superior
) Court No. CV2012-011025
THE HONORABLE MICHAEL J. HERROD,)
Judge of the SUPERIOR COURT OF) **DECISION ORDER**
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
ANGELA STAUFFER and JOHN DOE)
STAUFFER, wife and husband,)
)
Real Parties in Interest.)
_____)

This special action arises out of an order entered by the superior court compelling petitioner, Oriana Mendy, to execute authorizations to obtain medical and school records. The court, Associate Presiding Judge Patricia K. Norris, and Judges Patricia A. Orozco and Maurice Portley, participating, has considered with certain exceptions¹ the parties' written submissions. Because special action is an appropriate means of

¹We have not considered Mendy's deposition excerpts and affidavit of defense counsel in the appendix submitted by Angela Stauffer, the real party in interest, because she did not submit these materials to the superior court for its consideration in connection with the motion to compel.

relief when the superior court orders a party to disclose what is or may be privileged, e.g. *Blazek v. Superior Court In and For Cnty. of Maricopa*, 177 Ariz. 535, 536, 869 P.2d 509, 510 (App. 1994), we accept jurisdiction, and as explained below, grant relief in part and deny relief in part.

Mendy sued Stauffer for personal injuries and pain and suffering arising out of an August 2010 automobile accident. Mendy sought medical treatment from several doctors and other healthcare providers that she identified in a January 2013 disclosure statement. In her disclosure statement, she also explained she had taken a leave of absence from school because of the accident. Mendy attached medical records from these providers to the disclosure statement and stated she had requested her school records and would supplement the disclosure statement after she had received them.

In December 2012 -- before Mendy served her disclosure statement -- Stauffer requested Mendy execute authorizations that would have directed Mendy's doctors and other healthcare providers to give Stauffer's counsel "any and all medical records of any kind," including "all confidential HIV related information . . . confidential alcohol or drug abuse related information . . . and confidential mental health diagnosis/treatment, psychiatric treatment evaluation, psychotherapy notes and information." Additionally, in April 2013, Stauffer

requested Mendy execute authorizations that would have directed two colleges and a university to give Stauffer's counsel Mendy's academic records (collectively, "educational authorizations"). After Mendy disclosed in her deposition that she had been involved in another automobile accident in May 2011, Stauffer requested Mendy execute additional medical authorizations -- identical in form to the December 2012 medical authorizations -- that would have directed the healthcare providers who treated Mendy for that accident to produce their treatment records to Stauffer's counsel. For ease of reference, in this decision order we refer to all authorizations for medical records as "medical authorizations" and to all doctors and healthcare providers who were the intended recipients of those medical authorizations as "providers."

Mendy did not execute any of the medical or educational authorizations. Stauffer moved to compel her to do so. In response, Mendy argued "no authority" required her to sign any authorization that would allow Stauffer to obtain her entire medical and school history, asserted the medical authorizations were overbroad and would require the providers to disclose medical records unrelated to any medical condition at issue in the case, and offered to file with the court her "medical records not 'placed at issue'" for an *in camera* inspection. The court granted Stauffer's motion to compel.

I. Medical Authorizations

In Arizona, statutory provisions protect the privacy of a person's communications with medical professionals and his or her medical records. *E.g.*, Arizona Revised Statutes ("A.R.S.") § 12-2235 (2003) (physician may not testify in civil action regarding patient communications without patient consent); A.R.S. § 12-2292 (Supp. 2012) (medical records are privileged and confidential and may not be disclosed without patient's written authorization). Nevertheless, a party will be deemed to have waived or consented to the disclosure of such privileged communications and records by "pursuing a course of conduct which is inconsistent with the observance of the privilege, such as by placing the underlying [medical] condition at issue as a claim or an affirmative defense." *Blazek*, 177 Ariz. at 541, 869 P.2d at 515 (citations omitted); *see also Duquette v. Superior Court In and For Cnty. of Maricopa*, 161 Ariz. 269, 272, 778 P.2d 634, 637 (App. 1989) (holder of physician-patient privilege impliedly waives "only his right to object to discovery of pertinent medical information") (emphasis in original).

The record before us reflects Mendy provided Stauffer with certain medical records that she contends pertained to her injuries and treatment arising out of the 2012 automobile accident. Stauffer, however, argues she is entitled to see all

of the providers' records to verify for herself whether Mendy has disclosed all medical records relevant to this case. Thus, as Stauffer puts it, she is entitled to the "raw data," all of it. We disagree.

Although a superior court has considerable discretion in resolving discovery disputes, it may not order a party to disclose information regarding that party's medical condition which the party has not placed at issue. *Blazek*, 177 Ariz. at 541, 869 P.2d at 515; see also Ariz. R. Civ. P. 26(b)(1)(A). Here, given the breadth of the medical authorizations, and the superior court's implicit rejection of Mendy's request for an *in camera* inspection of the providers' records she contended were not at issue, the superior court's order essentially did just that.

We were presented with a similar situation in *Blazek*. There, the plaintiff accused the defendant of sexual harassment and rape. 177 Ariz. at 536, 869 P.2d at 510. Because the plaintiff was claiming emotional distress damages, the defendant argued plaintiff had placed at issue her psychological condition and asserted he was entitled to inspect all of her psychological and medical records held by two psychologists who had either consulted with or evaluated her about matters unrelated to her claims against the defendant. *Id.* at 541, 869 P.2d at 515.

There, as here, the plaintiff had given the defendant access to the psychological and medical records she contended pertained to her injuries and treatment stemming from the alleged sexual harassment and rape, but there, as here, the defendant wanted to see all the plaintiff's medical records. *Id.* Without conducting an *in camera* inspection, the superior court found the plaintiff had placed her psychological condition at issue by claiming she was suffering from severe emotional distress and ordered her to either waive her claim for emotional distress damages or disclose all the records. *Id.*

We vacated the superior court's order and held that "on the face of the trial court's order," it had abused its discretion by permitting unlimited discovery of the psychologists' records without first determining the relevance of the information. *Id.* at 542, 869 P.2d at 516. We stated:

The scope of an implied waiver of a psychologist-patient privilege is limited only to those communications concerning the specific condition which petitioner has placed at issue. The trial court may have determined which specific mental conditions petitioner has placed at issue, but the court did not know whether all the information contained in the psychologists' records relate[d] to those conditions. Before allowing [defendant] complete access to petitioner's psychological records, the trial court should have conducted an *in camera* review of them to determine what information, if any, [was] reasonably calculated to lead to admissible evidence concerning petitioner's claims.

Id. (emphasis in original) (internal citations omitted).

Consistent with *Blazek*, the superior court should have inspected *in camera* the providers' records that Mendy argued were not at issue and offered to provide to the court. We therefore remand this matter to the superior court. On remand, Mendy shall provide the superior court with the providers' records and the superior court shall conduct an *in camera* inspection to determine whether any information in those records "might lead to the discovery of admissible evidence, and hence, what portions, if any," Stauffer would be entitled to review. *Id.*

Finally, we need not decide Mendy's argument that as a matter of law, a superior court may not order a party to execute an authorization for medical records. Under Arizona Rule of Civil Procedure 26(b)(1)(A), Stauffer is entitled to "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." See also *Catrone v. Miles*, 215 Ariz. 446, 454-55, ¶ 25, 160 P.3d 1204, 1212-13 (App. 2007). Because Mendy had offered to provide the medical records to the court and we have directed the court to conduct an *in camera* inspection, we need not do more.

II. Educational Authorizations

In her reply in support of her petition for special action, Mendy acknowledges "her scholastic records are relevant and are not privileged." She argues, however, the superior court cannot compel her to execute the educational authorizations because no rule, statute, or precedent requires this. We disagree. Under Rule 34 of the Arizona Rules of Civil Procedure, a party may be required to produce documents "in the possession, custody or control of [that] party." Rule 34 control does not require actual possession of the document -- only that a party has the right and ability to obtain the document. *Helge v. Druke*, 136 Ariz. 434, 437-38, 666 P.2d 534, 537-38 (App. 1983) (witness may be compelled to produce document he controls though he does not have possession of it); see also *Pres. Products, LLC v. Nutraceutical Clinical Labs. Int'l, Inc.*, 214 F.R.D. 494, 496 (N.D. Ill. 2003) ("The fact that [a party] does not currently have copies in his possession is not significant because he has 'control' of those documents by signing the necessary request form."); 8B Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 2210 (3d ed.) (Westlaw, database updated April 2013) ("Inspection can be had if the party to whom the request is made has the legal

right to obtain the document, even though in fact it has no copy.").

Here, Mendy was able to obtain her educational records and the superior court was entitled to compel her to produce them. As such, the court was entitled to compel Mendy to sign the educational authorizations as a means of production. The superior court, thus, did not abuse its discretion in ordering Mendy to execute the educational authorizations.

Accordingly,

IT IS ORDERED that, in the exercise of its discretion, this court accepts jurisdiction of the special action petition.

IT IS FURTHER ORDERED vacating the superior court's order insofar as it compelled Mendy to sign the medical authorizations.

IT IS FURTHER ORDERED that Mendy shall provide the superior court with the providers' medical records so the superior court may conduct an *in camera* inspection of those records. After reviewing the records and considering any redaction it deems appropriate, the superior court shall order disclosure of those records, if any, that are relevant to the case. Nothing in this order shall preclude the superior court from making any additional orders that will assist it in making the *in camera* inspection, such as requiring Mendy to submit a

privilege log meeting the requirements of Rule 26.1(f) of the Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED affirming the superior court's order insofar as it compelled Mendy to sign the educational authorizations.

/s/
PATRICIA K. NORRIS, Presiding Judge