DIVISION ONE
FILED: 08-10-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LINDA BONFELD-DAVIS, a single woman, Petitioner, v. THE HONORABLE JOHN DITSWORTH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, RAMONA HAUGER and WILLIAM R. HAUGER, wife and husband, Real Parties in Interest.	No. 1 CA-SA 10-0143 DEPARTMENT A Maricopa County Superior Court No. CV2009-091443 **DECISION ORDER**

This special action was considered by Presiding Judge Peter B. Swann and Judges Margaret H. Downie and Lawrence F. Winthrop during a regularly scheduled conference held on August 4, 2010. After consideration, and for the reasons that follow,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action and grants relief.

FACTS AND PROCEDURAL HISTORY

Ramona A. and William R. Hauger (collectively, "Plaintiffs") filed a complaint in superior court against Linda Bonfeld-Davis ("Defendant") for negligence, seeking recovery for injuries that plaintiff Ramona Hauger sustained as the result of an automobile accident. The complaint alleged that at the time of the accident, Defendant was driving her vehicle in an "impaired condition." Defendant filed an answer denying that she was impaired and asserting affirmative defenses of assumption of the risk and comparative negligence.

Discovery proceeded and Plaintiffs served Defendant with Uniform Personal Injury Interrogatories. Interrogatory #20 provided: "State whether you . . . ingested any drugs within 48 hours prior to the accident . . . ." Defendant answered: "The day prior to the accident, Defendant took one pill prescribed to her for anxiety; and another the morning of the accident. Food was also ingested."

Plaintiffs then sought to discover Defendant's medical records. When Defendant refused to disclose the records, Plaintiffs filed a motion to compel disclosure. Defendant filed a response and argued that the records are protected from discovery by the physician-patient privilege and the privilege was not waived.

The superior court granted Plaintiffs' motion to compel disclosure and ordered Defendant to disclose her medical records for the 36 months preceding the accident. Defendant brought this special action seeking relief from the court's order.

JURISDICTION

We accept special action jurisdiction. "Special action review of an order compelling discovery over the objection of a party asserting a privilege is appropriate because there is no equally plain, speedy, or adequate remedy by appeal." *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 252, ¶ 3, 63 P.3d 282, 283 (2003).

DISCUSSION

We review *de novo* the questions whether a privilege exists and whether it has been waived. *Id.* at 254, ¶ 10, 63 P.3d at 285.

Plaintiffs concede that Defendant's medical records fall within the physician-patient privilege, and we agree. The privilege applies to communications made by a patient to her physician for the purpose of treatment, A.R.S. § 12-2235 (2003), and the privilege includes medical records. *Ziegler v. Superior Court (DeVito)*, 131 Ariz. 250, 251, 640 P.2d 181, 182 (1982).

Generally, privileged materials are not discoverable. Ariz. R. Civ. P. 26(b)(1)(A) ("Parties may obtain discovery regarding any matter, not privileged, which is

relevant . . . ."); *Tucson Med. Ctr. Inc. v. Rowles*, 21 Ariz. App. 424, 425, 520 P.2d 518, 519 (1974). But they are discoverable where the privilege has been waived. *See Buffa v. Scott*, 147 Ariz. 140, 708 P.2d 1331 (App. 1985).

Here, Plaintiffs contend that Defendant waived the privilege because her family members made statements to plaintiff Ramona Hauger concerning Defendant's medical history. The physician-patient privilege cannot, however, be waived by third parties in the absence of the patient's authorization. *Buffa*, 147 Ariz. at 143, 708 P.2d at 1334. Plaintiffs do not contend that Defendant authorized her relatives' statements.

Plaintiffs also contend that Defendant waived the privilege because her answer to Interrogatory #20 placed her medical condition at issue. A.R.S. § 12-2236 provides that a patient waives the privilege when he "offers himself as a witness and voluntarily testifies with reference to the [privileged] communications." In *Buffa*, we held that a patient's testimony on compulsory cross-examination at a deposition was not "voluntary" and therefore did not constitute a waiver. 147 Ariz. at 142, 708 P.2d at 1333. Similarly, Defendant's answers to the interrogatories were not "voluntary." Further, we note that a patient's statement concerning her intake of medicine in the days immediately preceding the conduct at issue is not necessarily a waiver of the physician-patient privilege

surrounding her medical records, because it relates to her own action -- not the communications she made to her physicians. *See id.* at 143, 708 P.2d at 1334.

Plaintiffs finally contend that Defendant impliedly waived the privilege by raising affirmative defenses. To determine whether a privilege has been impliedly waived, Arizona courts apply the test set forth in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 57, ¶ 11, 13 P.3d 1169, 1174 (2000). The *Hearn* test provides that a privilege is impliedly waived when:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit [or raising an affirmative defense], by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

State Farm Mut. Auto. Ins. Co., 199 Ariz. at 56, ¶ 10, 13 P.3d at 1173 (quoting *Hearn*, 68 F.R.D. at 581) (alteration in original).

Here, Defendant raised two affirmative defenses: assumption of the risk and comparative negligence. Her assertion of these defenses, however, did not put her medical condition or history at issue. It was Plaintiffs who placed

Defendant's medical condition at issue -- not Defendant as *Hearn* requires.

Defendant did disclose, without assertion of the privilege, that she had taken a pill prescribed for anxiety. Information pertaining to that act, including the type of medication, the dosage and the time at which she took it, is therefore fairly discoverable. Such information is not protected by the privilege for the same reason that its disclosure did not waive the privilege.

CONCLUSION

We accept jurisdiction of this special action and grant relief. Defendant's medical records are not discoverable because they fall within the physician-patient privilege and the privilege was not waived. The superior court's order requiring Defendant to disclose the records is therefore vacated.

/s/
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Peter B. Swann, Presiding Judge