[Cite as *Marcum v. Miami Valley Hosp.*, 2015-Ohio-1582.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

BRIANNA MARCUM, ADMINISTRATOR OF THE ESTATE OF FREDDIE MARCUM	:	Appellate Case No. 26318
	:	Trial Court Case No. 2013-CV-6827
Plaintiff-Appellant	:	
	:	(Civil Appeal from
v.	:	Common Pleas Court)
	:	
MIAMI VALLEY HOSPITAL, et al.	:	
	:	
Defendants-Appellees		

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O P I N I O N

Rendered on the 24th day of April, 2015.

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PER CURIAM:

{¶ 1} Plaintiff-appellant Brianna Marcum, Administrator of the Estate of Freddie Marcum, appeals from an order of the trial court requiring her to execute medical authorizations for 10 years of medical records of the deceased, Freddie Marcum. In a decision and entry filed September 3, 2014, this Court determined that the trial court's discovery order was a final appealable order, pursuant to R.C. 2505.02. Marcum contends that the trial court's discovery order mandates the disclosure of privileged documents, and that the court erred in refusing to conduct an in camera review of the documents prior to their disclosure.

{¶ 2} For the reasons set forth below, we conclude that the trial court did not abuse its discretion by ordering Marcum to execute authorizations, in a wrongful death action, for disclosure of medical records of the deceased for a period of ten years prior to his death, without conducting an in camera review. Accordingly, the order of the trial court is Affirmed.

I. The Scope of Proceedings

{¶ 3} A wrongful death action, based on alleged medical malpractice, was filed against the defendant-appellees, Miami Valley Hospital, Premier Health Partners, two other medical groups, five doctors, two nurses and ten unidentified medical professionals who may be connected to the death of Freddie Marcum. According to the allegations raised in the complaint and the parties' briefs, on December 6, 2012, Freddie Marcum went to Greene Memorial Hospital on an emergency basis, complaining of severe chest

pain, and was transferred the next day to Miami Valley Hospital, where he remained until his death on December 12, 2012. During this time, tests were inconclusive as to the cause of his pain, and Marcum was treated with pain medication. It is alleged that medical negligence occurred when Marcum was treated with a higher dosage of pain medication and died of Fentanyl intoxication. Miami Valley Hospital acknowledged that it had information regarding Marcum's past medical history that included treatment for hypertension, sleep apnea, obesity and diabetes, and that Marcum had a twenty-year history of smoking.

{¶ 4} During the initial stages of discovery, Miami Valley Hospital asked opposing counsel to obtain the signature of the estate's representative on forms authorizing the release of the entire record of Marcum's medical history at Greene Memorial Hospital and Cedarville Family Practice for the period of twelve years prior to his death. Marcum objected on the basis that the medical records were privileged, but offered to obtain the records, review them, and provide any non-privileged records. After Marcum's counsel reviewed the records, he provided opposing counsel with the entire chart from Cedarville Family Practice, and a privilege log, asserting a doctor-patient privilege for all Greene Memorial Hospital records, claiming that the records were not causally or historically related to Marcum's death, and suggested that they seek the trial court's in camera review. Miami Valley Hospital responded by moving to compel discovery. In response to the motion, Marcum provided the trial court with correspondence between the parties, including the privilege log for the Greene Memorial Hospital records, which lists 21 sets of records from 2003 to 2011, describing them as records from the lab, radiology, pathology, surgeon and hospital records.

{¶ 5} In support of its motion to compel, Miami Valley Hospital argued that the physician-patient privilege was waived as to all medical records when the civil case was filed. Miami Valley Hospital asserted that, "[t]here are many medical issues which will be relevant to this medical malpractice case, including the issue of cause of death, plaintiff's underlying medical conditions and health status and his previous treatment." Dkt. 50 at pg. 5. Miami Valley Hospital also claimed that plaintiff's past medical records "are relevant to issues involving standard of care, causation and damages. Plaintiff's past medical history, for example, can have a bearing on potential life expectancy opinions, damage issues and the decedent's medical status before he presented to Miami Valley Hospital." Dkt. 53 at pg. 3. Therefore, Miami Valley Hospital contended that all of Marcum's past medical records are relevant and plaintiff should be compelled to sign blanket medical authorizations for the records. Marcum argued that mandating the disclosure of Marcum's entire medical record would naturally include records that are not causally or historically related, which would effectively abrogate the privilege statute, and render it meaningless.

{¶ 6} The trial court held that the statute providing for the physician/patient privilege allows for a waiver upon filing suit, and that the medical records are discoverable because they are "within the ambit" of the waiver. The trial court noted, "[e]specially in a wrongful death action such as this, where the decedent's prior medical history may well have affected his life expectancy and thus the amount of damages recoverable for his premature death, the Court concludes that Mr. Marcum's medical records for conditions other than that for which he was being treated at the time of his death definitely fall 'within the ambit' of discoverable information," with the trial court to decide admissibility issues

closer to the time of trial. Dkt. 59 at pg. 8. The trial court did limit disclosure of past medical records to a ten-year period. From the order mandating disclosure of all medical records for the past ten years, Marcum appeals.

II. The Scope of the Physician/Patient Privilege

{¶ 7} Marcum's First Assignment of Error states:

> THE TRIAL COURT ERRED IN ORDERING APPELLANT TO EXECUTE BLANKET MEDICAL AUTHORIZATIONS FOR RECORDS OF FREDDIE MARCUM, WITHOUT PROPERLY LIMITING ITS ORDER TO ONLY THOSE RECORDS WHICH ARE CAUSALLY AND HISTORICALLY RELEVANT PURSUANT TO R.C. 2317.02(B)(1).

{¶ 8} Civ. R. 26(B)(1) provides that "[p]arties may obtain discovery regarding any matter, **not privileged,** which is relevant to the subject matter involved in the pending action ***." Civ. R. 26(B)(1) further provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

{¶ 9} R.C. 2317.02(B)(3)(a) provides that communications between patients and their physicians are privileged, but the privilege does not apply when the patient files a civil action and the records are "related causally or historically to physical or mental injuries that are relevant to issues in the *** action for wrongful death [or] other civil action***."

{¶ 10} It has been held that our review of a privilege issue necessarily requires interpretation of the statute, and is therefore a de novo review. *Med. Mutual of Ohio v.*

Schlotterer, 122 Ohio St. 3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13. We have held that "the existence of a Civ.R. 26 (B) (1) 'privilege'***[is a] discretionary determination to be made by the trial court." *Rollert v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. Miami No. 87-CA-15, 1987 WL 29483, *4 (Dec. 16, 1987).

{¶ 11} Therefore, we are presented with a mixed question of law and fact. Whether the privilege statute applies in this case is a question of law, and whether the specific requested records are relevant and discoverable is a question of fact. "'Whether a discovery privilege applies is a matter of law, but the question of whether specific materials are part of a privileged medical study is a factual question within that legal determination.'" *Bogart v. Blakely*, 2d Dist. Miami No. 2010-CA-13, 2010-Ohio-4526, ¶ 24, quoting *Selby v. Fort Hamilton Hospital*, 12th Dist. Butler No. 2007-05-126, 2008-Ohio-2413.

{¶ 12} Miami Valley Hospital argues that the privilege statute should be interpreted as an automatic waiver of the privilege for all past medical records, when a plaintiff files a medical malpractice action. The privilege statute provides that a plaintiff in a civil action waives the physician/patient privilege with respect to health information "that [is] related causally or historically to physical or mental injuries that are relevant to issues in the civil action. * * * Whether particular health information is relevant is a question of fact that we review for abuse of discretion." (Citations omitted.) *Higbee v. Higbee*, 2d Dist. Clark No. 2013-CA-81, 2014-Ohio-954, ¶¶ 10 & 11. As in *Higbee*, "[t]he question here, then, is whether the trial court abused its discretion by finding that the health information that the authorization form allows to be disclosed is relevant to the issues in this action. " *Higbee* at ¶ 11.

{¶ 13} In Marcum's wrongful death complaint, the estate is seeking damages for pain, suffering, mental anguish, loss of life expectancy, loss of consortium, medical and death expenses. The defendants have raised affirmative defenses related to causation. Even without conducting an in camera review, the trial court may still exercise its discretion to conclude that the past medical records are discoverable when the issues of causation and damages are in dispute and it is clear that past medical records are relevant to the contested issues. Therefore, the trial court did not err in finding that the waiver in the privilege statute applied.

{¶ 14} Therefore, Marcum's first assignment of error is overruled.

III. Conducting an In Camera Review

{¶ 15} Marcum's Second Assignment of Error states:

> THE TRIAL COURT ERRED BY REFUSING TO CONDUCT AN IN CAMERA REVIEW OF MEDICAL RECORDS OVER WHICH APPELLANT ASSERTED PRIVILEGE PRIOR TO ORDERING DISCLOSURE OF THOSE RECORDS IN DISCOVERY.

{¶ 16} Civ. R. 26 (B)(6) provides that "[w]hen information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." In response to a discovery dispute, Civ. R. 26(C) allows the court to fashion an appropriate protective order "that justice requires to protect a party or person from annoyance, embarrassment, oppression, or

undue burden or expense." Although the rule does not specifically identify an "in camera review" as one of the options available to resolve a discovery dispute,[1] in camera review is recognized as one method available to the trial court to resolve discovery disputes involving privilege. *Peyko v. Frederick*, 25 Ohio St. 3d 164, 495 N.E.2d 918 (1986); *Wooten v. Westfield Ins. Co*., 181 Ohio App. 3d 59, 2009-Ohio-494, 907 N.E. 2d 1219 (8th Dist.); *Moore v. Ferguson*, 5th Dist. Richland No. 12CA58, 2012-Ohio-6087, ¶ 35.

{¶ 17} The trial court has inherent power and broad discretion to control the discovery process, to assure disclosure of relevant medical evidence and to protect confidentiality and privacy of medical records. *Wooten* at ¶ 20. Before the court becomes involved in the discovery process, it is incumbent upon the parties to attempt informal resolution of any discovery dispute, and to follow the civil rules. See Civ. R. 26 (C). In a personal injury action, when the defendant asks the plaintiff to execute authorizations for the release of medical records, the burden is on the plaintiff either to convince the defendant that the records are privileged or to seek a protective order from the court to protect their privacy. Civ. R. 26 (C). "Because the physician-patient privilege is statutory and in derogation of the common law, it must be strictly construed against the party seeking to assert it." *Csonka-Cherney v. ArcelorMittal Cleveland, Inc.*, 2014-Ohio-836, 9 N.E.3d 515, ¶ 15 (8th Dist.). By seeking a protective order, it is the movant's burden to present the court with sufficient information to allow the court to make a factual finding whether the medical records are not subject to the statutory waiver because the records

[1] The privilege statute, R.C. 2317.02, expressly provides for the disclosure of privileged records after the court determines the relevancy of the records based on an "in camera" review for therapy and counseling records and crisis response records but no such procedure is expressly provided for medical records covered by the physician/patient privilege.

are not causally or historically related to the medical issues in the case. *Id.* Even if the plaintiff does not file a motion for a protective order, the issue may be raised by the defendant by filing a motion to compel discovery pursuant to Civ. R. 37.

{¶ 18} Marcum refused to sign the blanket medical authorizations, but did not move for a protective order. In response to Miami Valley Hospital's motion to compel, Marcum supplied the trial court with a privilege log claiming that all the hospital records were privileged. Marcum offered to provide the records to the trial court for an in camera inspection, but failed to explain why the specific records were not causally or historically related to the claims in the action. Instead, Marcum argued that the blanket authorizations are so broad, that to comply will necessarily require disclosure of non-relevant medical history.

{¶ 19} Marcum did not meet his burden of proof to establish that the past medical records were not subject to the privilege waiver when the civil action claiming medical negligence was filed. "[D]ocuments and/or communications are not privileged for the purposes of Civ.R. 26(1) [sic] merely because the parties themselves have deemed them confidential." *Ro-Mai Industries, Inc. v. Manning Properties*, 11th Dist. Portage No. 2009-P-66, 2010-Ohio-2290, ¶ 28. As recognized by the Sixth District, "something more than a mere recitation that documents are not causally or historically related to a claimed injury must be set forth by the party claiming the privilege before any in camera inspection of the documents is necessary." *Chasteen v. Stone Transport,* 6th Dist. Fulton No. F-09-12, 2010-Ohio-1701.

{¶ 20} We recognize that numerous other districts have held, under the particular circumstances of each case, that it is error for a trial court to refuse to conduct

an in camera review whenever a reasonable discovery dispute raises a genuine issue of fact over a privilege issue. *See, e.g., Cargile v. Barrow,* 182 Ohio App.3d 55, 2009-Ohio-371, 911 N.E.2d 911 (1st Dist.); *Nester v. Lima Memorial Hospital*, 139 Ohio App. 3d 883, 745 N.E. 2d 1153 (3rd Dist. 2000); *Miller v. Milano*, 2014-Ohio-5539, 25 N.E.3d 458 (5th Dist.); *Piatt v. Miller*, 6th Dist. Lucas No.L-09-1202, 2010-Ohio-1363; *Whitacre v. Nationwide Ins. Co*., 7th Dist. Belmont No. 11-BE-5, 2012-Ohio-4557; C*sonka–Cherney v. ArcelorMittal Cleveland, Inc.,* 2014-Ohio-836, 9 N.E.3d 515, ¶ 16 (8th Dist.); *Gentile v. Duncan*, 2013-Ohio-5540, 5 N.E.3d 100 (10th Dist.); *Sullivan v. Smith*, 11th Dist. Lake No. 2008-L-107, 2009-Ohio-289; *Neftzer v. Neftzer*, 140 Ohio App. 3d 618, 748 N.E. 2d 608 (12th Dist. 2000). We have also found, under appropriate facts, that a court errs by failing to conduct an in camera review. *Unklesbay v. Fenwick*, 167 Ohio App. 3d 408, 2006-Ohio-2630, 855 N.E. 2d 516 (2d Dist.). We agree that an in camera review by the trial court is one appropriate method of resolving a discovery dispute, but it is not always required, and the trial court does have discretion to consider and order alternative options, including full disclosure when the pleadings present a broad claim necessarily implicating the injured party's entire medical history.

{¶ 21} We have been sensitive to the burden placed on trial courts to examine documents in camera to determine relevancy, when medical records can be voluminous and contain technical and scientific terminology not within the trial court's expertise. *Bogart* at ¶ 70. Although each case presents a different situation, the trial court does have the discretion to order full disclosure when it can be determined, based on the pleadings, that the records are relevant to the issues in the case. When appropriate, the trial court has the discretion to establish a procedure that will allow the court to review

sufficient evidentiary support to enable the court to make a factual finding that the records are "causally or historically relevant," so that the privilege waiver applies. This may or may not require the trial court's in camera review.

{¶ 22} Some courts have recognized the procedure followed in this case, which included review of the records by plaintiff's counsel and the preparation of a privilege log, may be sufficient to develop a factual record of the type and nature of the records claimed to be privileged. *Csonka-Cherney* at ¶ 20; *see also Hartzell v. Breneman*, 7th Dist. Mahoning No. 10-MA-67, 2011-Ohio-2472. However, the burden lies on the party seeking to protect the records from disclosure to present sufficient evidence to support that party's claim that the records are not causally or historically related to the claims in the case. *Pinnix v. Marc Glassman, Inc*., 8th Dist. Cuyahoga Nos. 97998, 97999, 2012-Ohio-3263. We agree with the Eighth District when it stated, "[w]e recognize that the discovery process should be kept as simple as possible and that a trial court does not need to conduct an in camera review in every instance that a privilege is asserted. Moreover, the party claiming the privilege has the burden to show that the records are not causally or historically related. Thus, an in camera inspection is not necessary when there is no 'factual basis' justifying the trial court's in camera review." *Id.* at ¶ 11.

{¶ 23} In the case before us, the trial court properly exercised its discretion to find that the records sought were causally or historically related to the issues that necessarily arise in this medical negligence wrongful death action, including causation and damages. We are not persuaded to depart from our established precedent that an in camera review is unnecessary when the medical records sought " 'might be within the ambit' of the plaintiff's physician-patient-privilege waiver" when a civil action is filed alleging a claim

that necessarily involves medical records. *Higbee v. Higbee,* 2d Dist. Clark No. 2013-CA-81, 2014-Ohio-954, ¶ 13. "We further note that discovery is an issue separate from the question of whether evidence may be admissible at trial or even if it can be disclosed outside the litigation. Those are matters properly reserved to the sound discretion of the trial court on appropriate motion which is not before us at this juncture." *Id*. at ¶ 14.

{¶ 24} Whenever any medical records are disclosed, it is the duty of the court to assure that the privacy and confidentiality of those records be carefully maintained until their admissibility is later determined at trial. When disclosure is ordered, it is appropriate for the parties to prepare and submit an agreed protective order outlining in detail how the records will be handled throughout the litigation process, who will have access, how access will be documented, how confidentiality will be maintained, and when the records will be returned or destroyed.[2] "Trial courts may use protective orders to prevent confidential information, such as that contained in the medical records at issue, from being unnecessarily revealed." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 23. An agreed protective order will also support the purpose of the privilege statute, "to create an atmosphere of confidentiality." *Wargo v. Buck,* 123 Ohio App. 3d 110, 120, 703 N.E. 2d 811 (7th Dist. 1997). An appropriate agreed protective order in which the parties have agreed to treat the records as confidential should eliminate the need for an in camera inspection. *Langenfeld v. Armstrong World Industries, Inc.*, 299 F.R.D. 547, 555 (S.D.Ohio 2014). The appropriate order will depend on the particular facts of each case.

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[2] A sample Agreed Protective Order is found in Appendix L to the local civil rules for the U.S. District Court for the Northern District of Ohio.

{¶ 25} Marcum's Second Assignment of Error is overruled. The court did not err by ordering Marcum to execute blanket medical authorizations for Marcum's complete medical records for a ten-year period, without conducting an in camera inspection.

IV. The Final Appealable Order Issue is Moot

{¶ 26} Marcum's Third Assignment of Error states:

> THE TRIAL COURT ERRED IN CLASSIFYING ITS ORDER REQUIRING APPELLANT TO PRODUCE SIGNED BLANKET MEDICAL AUTHORIZATIONS AS NOT FINAL AND APPEALABLE.

{¶ 27} The issues raised in Marcum's third assignment of error were presented to this court in Miami Valley Hospital's motion to dismiss this appeal, and Marcum's response to the motion. In a decision and entry filed September 3, 2014, we overruled the motion, holding that the trial court's discovery order is a provisional remedy, because it compels the disclosure of allegedly privileged information, and that a post-disclosure, post-judgment appeal would not afford appellant a meaningful or effective remedy for protecting the privileged material. Therefore, Marcum's Third Assignment of Error is overruled as moot.

V. Conclusion

{¶ 28} Marcum's First and Second Assignments of Error having been overruled, and Marcum's Third Assignment of Error having been overruled as moot, the order of the trial court from which this appeal is taken is Affirmed.

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FAIN, HALL, and WELBAUM, JJ., concur.

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