[Cite as *Piatt v. Miller*, 2010-Ohio-1363.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Sandra Piatt, et al.

Appellant

v.

Michael J. Miller, et al.

Appellee

Court of Appeals No. L-09-1202

Trial Court No. CI08-3937

DECISION AND JUDGMENT

Decided: March 31, 2010

* * * * *

Samuel G. Bolotin and Andrew J. Stough, for appellant.

Stephen House, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals an order of the Lucas County Court of Common Pleas, denying her motion for a protective order and granting appellee's motion to compel the release of medical records. For the reasons that follow, we reverse.

{¶ 2} Appellant is Sandra Piatt, individually and as executrix of the estate of her deceased husband, Harry Piatt. The Piatts were injured in a December 6, 2006 auto

accident with appellee, Michael J. Miller. The parties agree that Harry Piatt's death, approximately six months later, was unrelated to the accident.

{¶ 3} On May 8, 2008, appellant sued Miller, the owner of the car he was driving, and her own insurer. The car owner and insurer were later dismissed from the suit.

{¶ 4} Appellee eventually conceded, and appellant was awarded partial summary judgment on, the issues of negligence and the Piatts' lack of comparative negligence. The only issues remaining in the case are those of proximate cause and damages.

{¶ 5} The controversy in the present matter arises out of discovery. According to appellee, documents provided by appellant on her initial response revealed notes suggesting appellant's pre-accident treatment for a knee injury at Bay Park Hospital and reference to surgery by a Dr. Biyani. With respect to Harry Piatt, appellee observed that notes documented multiple fractures from an earlier airplane crash. The medical records suggested that treatment for these injuries was provided at St. Vincent Mercy Medical Center. A chart note also referenced the "Toledo Clinic." Appellee requested appellant execute medical information releases for St. Vincent's, The Toledo Clinic, Bay Park Hospital and the University of Toledo Medical Center for the records of Dr. Biyani.

{¶ 6} Appellant responded with a motion for a protective order, arguing the releases requested were overbroad and burdensome. Appellant insisted she had already produced all documents "causally and historically" related to her claimed injuries.

{¶ 7} According to appellant, the authorizations requested granted access from the Piatts' dates of birth. Filing a lawsuit did not, appellant maintained, constitute a

waiver of medical privilege for the Piatts' entire life history. Moreover, such disclosure would violate the federal Health Insurance Portability and Accountability Act ("HIPAA").

{¶ 8} Appellee replied to appellant's motion with a memorandum in opposition and counter-motion to compel discovery. In his memorandum, appellee insisted his request for medical releases was neither unduly burdensome, nor intrusive as the releases were limited to specific areas identified from the discovery already provided by appellant.

{¶ 9} Appellant responded, reiterating that she had already provided accident related medical records and those prior records historically or causally related to the claimed injuries. Appellant suggested, alternatively, that the court examine the requested records in camera to determine their discoverability.

{¶ 10} The trial court denied appellant's motion for a protective order and granted appellee's motion to compel. From this judgment, appellant brings this appeal. Appellant sets forth a single assignment of error:

{¶ 11} "The trial court erred in denying Appellant's motion for a protective order and granting Appellee's motion to compel Appellant to sign blanket medical record authorizations disclosing privileged medical records spanning an entire life time without first conducting an *in camera* inspection of the records to determine whether same were causally or historically related to the injuries at issue in the case."

{¶ 12} Discovery may be had for any unprivileged matter relevant to the litigation, including information that is inadmissible if such material appears reasonably calculated to lead to the discovery of admissible evidence. Civ.R. 26(B)(1).

{¶ 13} Communication with a physician by a patient, the physician's advice to the patient and the records relating to such communication are privileged unless the patient waives or is deemed to have waived the privilege. R.C. 2317.02(B)(1). A patient or the personal representative of the estate of a deceased patient who has filed a civil action is deemed to have waived the privilege, R.C. 2317.02(B)(1)(a)(iii), to the extent that such communication or records are "related causally or historically to physical or mental injuries" relevant to the claim. R.C. 2317.02(B)(3)(a).[1]

{¶ 14} On appeal, discovery issues are ordinarily reviewed by an abuse of discretion standard. *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 151-52. The issue of privilege, however, is a matter of law that must be reviewed de novo. *Cornwell v. N. Ohio Surgical Ctr.*, 6th Dist. No. E-09-001, 2009-Ohio-6975, ¶ 18, citing *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13.

{¶ 15} There are competing methodologies concerning the manner in which courts should resolve the question of whether potential discovery matter is causally or historically related to a claim and, therefore, discoverable. In its supplemental authority, appellee directs us to *Horton v. Addy* (Jan. 25, 1993), 2d Dist. No. 13524, vacated on other grounds (1994), 69 Ohio St.3d 181. In *Horton*, the appellate court held that the

[1]HIPPA does not supersede this statute. *May v. N. Health Facilities*, 8th Dist. No. 2008-P-0054, 2009-Ohio-1442, ¶ 9.

burden of establishing privilege rests with the party asserting the privilege. To keep the discovery process simple, without involving the court unless "absolutely necessary," the court ruled that the disputed medical records should be turned over to opposing counsel or provided to opposing counsel's physician or specialist to determine whether the documents were causally or historically related. The cost of this review would be taxed to the objecting party.

{¶ 16} In her response to supplemental authority, appellant suggests that *Horton* is no longer good law, even in the Second District. We have not found the express repudiation of the case that appellant suggests. Nevertheless, the *Horton* approach is unquestionably the minority position. Most Ohio appellate courts have concluded that, where there is a factual basis for a dispute as to whether medical records are causally and historically related to injuries at issue, the documents should be provided to the court for an in camera examination and a determination of the documents' relevance. See, e.g., *Ward v. Johnson's Ind. Caterers* (June 25, 1998), 10th Dist. No. 97APE11-1531; *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618; *Nester v. Lima Mem. Hosp.* (2000), 139 Ohio App.3d 883, 2000-Ohio-1916; *Patterson v. Zdanski*, 7th Dist. No. 03 BE 1, 2003-Ohio-5464.

{¶ 17} Although we agree with the *Horton* court that discovery should be kept as simple as possible and rarely involve the court, we believe the same result may be obtained within the majority structure, specifically by requiring a factual basis antecedent to any in camera inspection. As stated in *Zdanski* at ¶ 19:

{¶ 18} "[B]efore engaging in an in-camera inspection of the material, '"the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person" that in camera review of the materials may reveal evidence establishing an applicable privilege or that the privilege is outweighed by other rights.' *State v. Hoop* (1999), 134 Ohio App. 3d 627, 639, quoting *United States v. Zolin* (1989), 491 U.S. 554, 572. This is because the party opposing the discovery request has the burden to establish that the requested information would not reasonably lead to discovery of admissible evidence. *State ex rel. Fisher v. Rose Chevrolet, Inc.* (1992), 82 Ohio App. 3d 520, 523. Thus, if the trial court believes there is not a good faith belief that a review of the materials may reveal privileged material, then it does not need to conduct an in-camera inspection of those materials."

{¶ 19} In the present matter, appellant asserted to the trial court that the notation "Toledo Clinic" in the revealed discovery was actually a reference to the Toledo Veterans Affairs Clinic records, which had already been provided. The reference to surgery by Dr. Biyani relative to appellant was a misstatement of a reference to Harry Piatt's treatment by Dr. Biyani, records of which had already been provided.

{¶ 20} Appellee characterizes appellant's representations with respect to the St. Vincent's and Bay Park records as an assertion that any medical treatment provided prior to the injuries sustained in the accident are not causally or historically related. Such a broad assertion would hardly be sufficient to form a factual basis for assertion of the privilege. A fair reading of appellant's representations to the trial court, however, shows

an assertion that appellant examined the records in question and found nothing to suggest prior treatment that might, in any way, be related to the injuries the Piatts sustained on December 6, 2006. In our view, such a presentment is a sufficient factual basis to prompt an in camera review of the documents at issue.

{¶ 21} Accordingly, appellant's sole assignment of error is well-taken.

{¶ 22} On consideration whereof, the order of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay court costs of this appeal, pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J.
CONCUR. _____
JUDGE

Keila D. Cosme, J. _____
CONCURS AND JUDGE
WRITES SEPARATELY.

COSME, J.

{¶ 23} I concur with the majority's decision, but write separately to emphasize the framework created by Civ.R. 26(B)(1) and R.C. 2317.02(B) in establishing appropriate limits on the reach of discovery.

{¶ 24} While undoubtedly broad, Civ.R. 26(B)(1) nevertheless establishes two limitations on the right to discovery. The information sought must not be privileged, and it must be relevant to the subject matter of the action. Medical records are privileged. R.C. 2317.02(B)(1). The purpose of this privilege is "to encourage patients to make full disclosure of their symptoms and conditions to their physicians without fear that such matters will later become public." *State v. Antill* (1964), 176 Ohio St. 61, 64-65. R.C. 2317.02(B)(1) and (3) provide that a plaintiff who files a civil action waives this privilege, but only to the extent of matters that are "causally or historically" related to the injuries claimed in the action. The "casually and historically related" clause defines both the extent of waiver of the privilege, and the outer limit of relevance for purposes of discovery under Civ.R. 26(B)(1).

{¶ 25} Discovery requests demanding information beyond that which is casually and historically related are improperly overbroad. See *Mason v. Booker*, 10th Dist. No. 09AP-500, 2009-Ohio-6198 (trial court erred in ordering disclosure, before first determining whether requested privileged medical records were causally or historically related to injuries at issue); *Campolieti v. City of Cleveland*, 8th Dist. No. 92238, 2009-Ohio-5224 (city's request for unlimited access to firefighter's medical records for previous ten years was overbroad and improper because it was irrelevant to determine damages or ability to perform less strenuous job); *Wooten v. Westfield*, 8th Dist. No. 91447, 2009-Ohio-494 (blanket request for "all" medical records within a certain time period was not properly limited to discover "causally or historically related" to injuries);

Patterson v. Zdanski, 7th Dist. No. 03 BE 1, 2003-Ohio-5464 (in camera review necessary regarding broad request for obstetric/gynecology medical records which had no relevance to plaintiff's claims).

{¶ 26} Having established these parameters, this discovery dispute is no different from any other context in which one party possesses all of the information and the other demands more access to the information that is withheld on the basis of relevance or privilege. Typically it is the party crying foul who must demonstrate a factual predicate for the relief sought. The proverbial "fishing expedition" results from ill-defined, imprecise conjecture that there must be more than has already been disclosed by the producing party. The discovery rules impose duties on the producing party, who must affirm good faith adherence through Civ.R. 11, without the need of court intervention under Civ.R. 37.

{¶ 27} Demanding a blanket medical release from the plaintiff is nothing more than an attempt to transfer the responsibility to assure disclosure in conformity with the discovery rules from the producing party's counsel to the requesting party. To warrant an in camera inspection, one would expect an identifiable fact-based connection between the inquiry being pursued and the records sought. Examination beyond this takes us back to overbreadth. A producing party has no duty to respond to discovery to the extent it becomes overbroad. If an adequate factual basis is shown to support a reasonable good faith assertion that some requested materials are not relevant and remain privileged, the court must conduct an in camera review of the disputed materials. See *Sweet v. Sweet*,

11th Dist. No. 20004-A-0062, 2005-Ohio-7060; *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618 (12th Dist.); *Nester v. Lima Mem. Hosp.* (2000), 139 Ohio App.3d 883 (3rd Dist.).

{¶ 28} Requiring discovery requests to be carefully tailored provides a two-fold benefit. First, such requests prevent the waste of both judicial and attorney time and resources. Overbroad discovery requests automatically create discovery disputes. Plaintiff objects, which in turn, triggers the likelihood of court involvement. Discovery requests that are properly framed to solicit only relevant information would reduce the need for in camera inspections. Court involvement would only be required when a factual based true impasse arises concerning the discoverability of specific records.

{¶ 29} The majority implies that, from the outset, it is the plaintiff's duty to show that the requested documents are privileged. But in my view, the disclosing party has no duty to respond to discovery requests that exceed the confines of Civ.R. 26 and R.C. 2317.02(B). Blanket requests for any medical records created during plaintiff's entire lifetime, even those unrelated to the claimed injuries, simply do not conform to these limitations.

{¶ 30} Second, broad discovery requests for a plaintiff's entire medical history, such as demanding an all-encompassing HIPPA release, are improper "fishing expeditions," designed to embarrass, intimidate and stifle a plaintiff's claims. There is no provision in the discovery rules to compel execution of such a release, which is tantamount to requiring the creation of documents that do not exist. Further, granting a

motion to compel such overbroad requests creates a chilling effect on an injured plaintiff's willingness to file suit and risk the unnecessary exposure of private, unrelated medical information. Perhaps analogous to the rationale that shields a rape victim from the disclosure of irrelevant sexual history, an injured plaintiff is statutorily protected from the disclosure of medical information not "causally and historically" related to the claimed injuries.

{¶ 31} In this case, the discovery requests that are the subject of this appeal are overbroad, demanding the execution of HIPPA release forms, and encompass the plaintiffs' medical histories from birth. I find that these requests are not properly formulated to limit both the scope and relevance of the requested documents to the claimed injuries, under the parameters delineated by Civ.R. 26(B) and R.C. 2317.02(B). Furthermore, when the discovery requests comply with Civ.R. 26 and R.C. 2317.02(B), and judicial intervention is sought, an in camera review is required to safeguard the privilege, before production of casually and historically related information may be compelled.