[Cite as *Chasteen v. Stone Transport, Inc.*, 2010-Ohio-1701.]

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

Thomas W. Chasteen	Court of Appeals No. F-09-012
Appellant	Trial Court No. 08-CV-000376
v.	
Stone Transport, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: April 16, 2010

* * * * *

Marc G. Williams-Young and Elaine B. Szuch, for appellant.

Richard Cordray, Ohio Attorney General, and Carolyn S. Bowe, Assistant Attorney General for appellee, Administrator, Ohio Bureau of Workers' Compensation for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals an order to compel discovery issued by the Fulton County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} In 2005, appellant, Thomas W. Chasteen, was injured in an on the job accident while working for his employer, Stone Transport, Inc.[1] Appellant applied for and was awarded benefits by appellee, Administrator, Ohio Bureau of Workers' Compensation.

{¶ 3} In 2006, appellant sought to amend his workers' compensation claim to include "aggravation of pre-existing lumbar degenerative arthritis L2-S1 and spondylolisthesis at L5." When appellant's additional claim was denied and his administrative appeals exhausted, he appealed with a notice of appeal and petition filed in the trial court, pursuant to R.C. 4123.512.

{¶ 4} During discovery in the trial court, appellee requested that appellant provide medical releases for treatment records from Toledo Hospital and Bay Park Hospital. Appellee stated that prior workers' compensation records indicated that appellant had previously been treated for low back pain at these facilities. Appellant responded to the request, advising appellee that he would review the requested records and provide releases "[i]f they include orthopedic conditions * * *." If not, the records would be provided to the court for an in camera inspection.

{¶ 5} When, after nearly two months, the releases had not been provided, appellee moved to compel. Appellant responded with a memorandum in opposition, noting that R.C. 2317.02 protects plaintiffs from medical record disclosure unless the records are "causally and historically" related to the issues in the claim. Appellant argued

[1]Stone Transport, Inc. is nominally an appellee in this appeal, but did not file a brief.

that, since appellee failed to put forth proof that the records at issue were "causally and historically" related to appellant's claim, its motion to compel should be denied. Alternatively, appellant offered to submit the medical records to the court for an in camera inspection.

{¶ 6} Appellee answered with a reply brief in which it argued its position and requested that a release from appellant's family physician also be compelled. Following this, according to appellant, he reviewed the records and determined that records from the Toledo Hospital related to treatment for his back. Appellant executed a release for Toledo Hospital, but declined to do so for the other medical providers.

{¶ 7} Following what appellant characterizes as a hearing and appellee calls a pretrial conference, the trial court granted appellee's motion to compel, reserving its decision of the admissibility of the material produced. From this order, appellant now brings this appeal, setting forth the following assignment of error:

{¶ 8} "The trial court erred when it granted Defendant/Appellee Administrator's motion to compel and ordered Plaintiff/Appellant to execute medical authorizations releasing confidential medical records without first conducting an in camera inspection of the records to determine whether these records are causally or historically related to the injuries at issue in this worker's compensation case."

{¶ 9} "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *. It 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." Civ.R. 26(B)(1).

{¶ 10} "The following persons shall not testify in certain respects:

{¶ 11} "* * *

{¶ 12} "(B) (1) A physician * * * concerning a communication made to the physician * * * by a patient in that relation or the physician's * * * advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by [R.C. 2151.421] to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

{¶ 13} "The testimonial privilege established under this division does not apply, and a physician * * * may testify or may be compelled to testify, in any of the following circumstances:

{¶ 14} "(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under [workers' compensation], under any of the following circumstances:

{¶ 15} "* * *

{¶ 16} "(iii) If * * * a claim under [workers' compensation] is filed by the patient * * *." R.C. 2317.02(B)(1)(a)(iii).

{¶ 17} "If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician * * * may be

compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician * * * by the patient in question in that relation, or the physician's * * * advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the * * * claim under [workers' compensation.]" R.C. 2317.02(B)(3)(a).

{¶ 18} Accordingly, a defendant "* * * may discover [a plaintiff's] communications to his physicians, including medical records, but only those that relate causally or historically to his claimed injuries." *Patterson v. Zdanski*, 7th Dist. No. 03 BE 1, 2003-Ohio-5464, ¶ 15

{¶ 19} 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. If the discovery issue is one of privilege, however, it is a question 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.

{¶ 20} Citing numerous Ohio appellate cases, appellant insists that the proper method for a court to ascertain whether medical records are causally or historically related to a worker's claim and, therefore, subject to discovery is to conduct an in camera inspection of the documents. Had the court examined the documents, appellant suggests, it would have discovered that the Bay Park Hospital records relate to a hammertoe surgery and there are no mentions of appellant's back in his personal physician's records.

Consequently, according to appellant, neither set of documents are causally or historically related to appellant's claimed injury. When the court refused appellant's offer for inspection of these documents, appellant argues, the court erred.

{¶ 21} In response, appellee initially notes that appellant failed to support its assertion of error with a transcript of the proceedings in the trial court or a suitable substitute, pursuant to App.R. 9. App.R. 10(A) places the burden of providing such a transcript or substitute on the appellant, who bears the burden of showing error by reference to such a record. When transcripts, or appropriate substitutes, necessary for the resolution of the assigned errors are omitted, the appellate court must presume the regularity of the proceedings and affirm the trial court's decision. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197,199.

{¶ 22} Moreover, appellee maintains, it is the burden of the party asserting a privilege to prove the validity of the privilege. Since the privilege appellant asserts is dependent on the documents not being causally or historically related to his claim, it is appellant who has the burden of showing the lack of such a connection. To place the burden on appellee to prove that such a relation exists in documents it has never examined would simply be unfair, appellee insists.

{¶ 23} Notwithstanding its lack of duty to show a relation, appellee points to its original demand letter, attached as an exhibit to its motion to compel. The letter states that, in reviewing its records from a prior workers' compensation claim, it found that appellant had been subject to low back problems since 1998 and that he appears to have

been treated at Bay Park Hospital and the Toledo Hospital for this condition. A second document, attached to a later memorandum, claims that appellant's physician treated appellant for a lumbar sprain in 1998. According to appellee, neither of these assertions is anywhere refuted in the record. As a result, appellee insists, the causal and historic relation of the records at issue to appellant's claim is established.

{¶ 24} Ohio appellate courts have differed in methodology as to the manner in which a causal and historic relationship is established. The minority position is articulated in *Horton v. Addy* (Jan. 25, 1993), 2d Dist. No. 13524, vacated on other grounds (1994), 69 Ohio St. 3d 181. The *Horton* court expressly rejected the notion that all such issues be resolved by an in camera inspection and held that the burden of establishing a lack of causal and historic relation is on the party asserting the privilege. As a result, the court concluded, the party asserting the privilege should either provide to opposing counsel the material requested, "* * * or [supply] all medical records to the opposing counsel's physician or specialist so that that specialist can determine relevancy and the costs of the physician's review and report must be borne by the objecting party." The court's rationale for this conclusion was that "* * * the discovery process should be as simple as possible and not involve the Court unless absolutely necessary."

{¶ 25} The *Horton* analysis was rejected in *Ward v. Johnson's Ind. Caterers* (June 25, 1998), 10th Dist. No. 97APE11-1531. There a plaintiff, who sued for injuries to her neck, shoulders, back and leg, refused to sign a general medical records release. The trial court granted the defendant's motion to compel a general release. When the plaintiff

again refused to sign a general release, the court dismissed her complaint. On appeal the court vacated the dismissal and order to compel, concluding that "[w]hile the trial court does not have to get involved every time there is a dispute at the discovery stage, the facts in the case at bar warrant that the trial court here should have. [Defendants] believed they needed all medical records. [Plaintiff] asserted that only medical records regarding her neck, shoulders, low back and left leg were discoverable. At this point, the trial court should have conducted an in camera review of [plaintiff's] medical records in order to ascertain what was causally or historically related." Id. Many Ohio appellate courts approve of an in camera inspection of records when there is a factual dispute over the scope of discovery. See, e.g., *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618 (12th Dist. Only medical records related physical injuries relevant to custody case); *Nester v. Lima Mem. Hosp.* (2000), 139 Ohio App.3d 883, 2000-Ohio-1916 (3d Dist. Pre-1990 medical records should be examined by court to determine relevance to 1997 medical negligence claim.)

{¶ 26} We agree that something more that 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. As the Seventh District Court of Appeals noted in *Patterson*, supra, at ¶ 19:

{¶ 27} "[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."

{¶ 28} However, we have found a sufficient factual basis for an in-camera inspection by the trial court where the party asserting the privilege has asserted in the record that it has actually examined the materials requested, and did not find them causally or historically related. In *Piatt v. Miller*, 6th Dist. No. L-09-1202, 2010-Ohio-1363, we recently discussed a similar assignment of error. In *Piatt*, appellant appealed a trial court order in a personal injury case denying her motion for a protective order and granting appellee's motion to compel authorizations disclosing privileged medical records from appellant's date of birth forward, without the court first conducting an in camera inspection of the records to determine whether or not they were causally or historically related to the injuries claimed in the accident. We reversed the trial court because we found that the appellant had asserted to the trial court that she had examined the requested records and did not find them to be related. We found a sufficient factual basis for an in camera examination by the trial court.

{¶ 29} Here, appellant states that he has reviewed the documents at issue from both Bay Park Hospital and appellant's physician's records, and that they are devoid of information concerning treatment for back pain. However, there is nothing in the record before us to suggest that these assertions were ever before the trial court. All the record reveals is a bare assertion of the privilege and a suggestion that it was appellee's responsibility to prove otherwise. Thus, appellant, attempting to shift the burden to appellee, failed to put forth any factual basis by which the court could have concluded that an in camera examination would reveal evidence establishing an applicable privilege.

{¶ 30} Absent such evidence, we cannot say that the trial court erred in denying appellant's request for document inspection or in granting appellee's motion to compel. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 31} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. This case is remanded to the trial court for further proceedings. It is ordered that appellant pay court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR. _____
JUDGE

Keila D. Cosme, J., dissents

{¶ 32} COSME, J. I must respectfully dissent from the majority's decision regarding the requirements for obtaining an in camera review upon the party's assertion that the BWC administrator's request for medical records was not historically and causally related to the workers' compensation claim or his previous claim. Although Civ.R. 26(B)(1) is liberally construed, discovery is still limited to non-privileged, relevant information which is "causally and historically" related to the plaintiff's claims. R.C. 2317.02(B).

{¶ 33} As I recently noted in my concurrence in *Piatt v. Miller*, 6th Dist. No. L-09-1202, 2010-Ohio- 1363, broadly stated, unlimited HIPPA releases do not comply with Civ.R. 26(B) and R.C. 2317.02(B)(1) and (3). The initial burden is on the requesting party to adequately tailor the discovery request for release of only causally and

historically related privileged records or information. Where the request is too broadly stated, the burden to respond should not transfer to the party asserting a privilege until the request has been properly narrowed. See *Mason v. Booker*, 10th Dist. No. 09AP-500, 2009-Ohio-6198; *Campolieti v. City of Cleveland*, 8th Dist. No. 92238, 2009-Ohio-5224; *Wooten v. Westfield*, 8th Dist. No. 91447, 2009-Ohio-494; *Patterson v. Zdanski*, 7th Dist. No. 03 BE 1, 2003-Ohio-5464.

{¶ 34} The majority's focus is on what information appellant divulged to the trial court in order to assert the privilege. Rather, the focus, in this instance, should be on whether the initial medical record releases for Toledo Hospital and Bay Park Hospital were adequately tailored to solicit only relevant medical records to which the privilege arguably has been waived. They were not, but the record indicates that appellant was, nevertheless, attempting to comply with those requests. In fact, after determining that records from Toledo Hospital were related to the claim, appellant executed a release for that provider.

{¶ 35} Appellant opposed the motion to compel, stating that the releases were overbroad and would include records that were not relevant to appellant's claim. In my view, appellant's objection and notice to the court that counsel was still reviewing records to determine which were "causally and historically" related was enough to warrant denial of the motion to compel. If the court required a better factual basis, then an in camera inspection should have been conducted to preserve appellant's privacy interests.

{¶ 36} In this case, the unreleased Bay Park Hospital records allegedly included foot operation information which was not provided to the trial court. Although, in this case, the unrelated procedure is perhaps less embarrassing or private, it nevertheless remained private. In other cases, a broad release creates an unacceptable risk that highly private, sensitive, and unrelated conditions or procedures may be unnecessarily disclosed. The majority decision does not establish just how much a party must disclose, but declares that it must be some "factual basis" and not a "bare assertion of the privilege." In the present case, the assertion that counsel was still reviewing records or that the records were not "causally or historically related" to the claim, should have been enough to trigger the need for an in camera review. Moreover, although the court reserved the issue of admissibility, if appellant is required to divulge unrelated, but private, medical records, the cat is already out of the bag, and the protection of R.C. 2317.02(B) is meaningless.