

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



DIVISION ONE
FILED: 1/24/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN EICKELBERG, M.D.,) No. 1 CA-SA 12-0295
)
Petitioner,) DEPARTMENT C
)
v.) Maricopa County
) Superior Court
) No. CV 2011-001950
THE HONORABLE RANDALL WARNER,)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,) **DECISION ORDER**
)
Respondent Judge,)
)
NATASHA FRITZ-LAMB and RAYMOND)
LAMB,)
)
Real Parties in Interest.)
_____)

This special action came on regularly for conference on January 16, 2013, before Presiding Judge Samuel A. Thumma, Judge Michael J. Brown and Judge Diane M. Johnsen.

Wife and Husband were married in May 2008. Husband petitioned for dissolution of marriage on November 25, 2009. After entry of their dissolution decree in August 2010, Wife sued Husband in this matter, alleging assault and other torts committed during the marriage.

Petitioner is a psychiatrist who treated Wife and Husband, together and separately, during their marriage. Wife asked the

superior court to order Husband to disclose records of his treatment with Petitioner. After reviewing the records *in camera*, the court found the records were discoverable and released them to Wife.

Wife then subpoenaed Petitioner for deposition. Petitioner moved to quash the subpoena, and Husband joined Petitioner's argument that the doctor-patient privilege prohibits Wife from deposing Petitioner about his communications with Husband. The superior court held Petitioner's testimony is relevant and that Husband waived the doctor-patient privilege with regard to statements made in the parties' joint sessions with Petitioner. Petitioner filed this special action, which Husband has joined.

The existence of a privilege is a question of law and exercise of special action jurisdiction is appropriate when a party is ordered to disclose information that may be protected by privilege. *Blazek v. Superior Court*, 177 Ariz. 535, 536, 869 P.2d 509, 510 (App. 1994). An appeal is not an adequate remedy "[w]hen a trial court orders disclosures that a party or witness believes to be protected by a privilege." *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 25-26, 764 P.2d 759, 760-61 (App. 1988). Accordingly, we exercise our discretion to accept jurisdiction of the special action petition.

We review *de novo* whether a party has waived a privilege; “[w]e apply an abuse of discretion standard when we review any necessary fact finding conducted by the trial court in order to resolve these issues.” *State v. Archibeque*, 223 Ariz. 231, 234, ¶ 5, 221 P.3d 1045, 1048 (App. 2009) (citing *State v. Wilson*, 200 Ariz. 390, 393, ¶ 4, 26 P.3d 1161, 1164 (App. 2001)).

Arizona Revised Statutes (“A.R.S.”) section 12-2235 (West 2013)¹ provides:

In a civil action a physician or surgeon shall not, without the consent of his patient, or the conservator or guardian of the patient, be examined as to any communication made by his patient with reference to any physical or mental disease or disorder or supposed physical or mental disease or disorder or as to any such knowledge obtained by personal examination of the patient.

The patient may waive the privilege, however. “Any voluntary disclosure by the holder of [the physician-patient] privilege is inconsistent with the confidential relationship and thus waives the privilege.” *Danielson v. Superior Court*, 157 Ariz. 41, 43, 754 P.2d 1145, 1147 (App. 1987) (quoting *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).

Wife argues Husband expressly waived the doctor-patient privilege by a letter and an email, both dated December 7, 2009,

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

in which Husband granted her permission to speak to Petitioner about his sessions with Husband and correspondingly authorized Petitioner to speak to her about his treatment of Husband. She also argues Husband waived the privilege by testifying without objection in his deposition about his communications with Petitioner. See A.R.S. § 12-2236 (West 2013). She further argues the doctor-patient privilege does not protect Petitioner from testifying in this case about communications made during Petitioner's joint sessions with her and Husband.

In his December 7, 2009 letter to Petitioner, Husband expressly authorized him to allow Wife "to obtain my medical information rendered by you and that was discussed during our sessions with you on my behalf." In his email to Wife the same day, Husband said, "please see [Petitioner] & feel free to have him discuss my issues & talks w/him." Petitioner and Husband argue Husband made the December 2009 writings while he was still married and only to "assist the couple with reconciliation." Husband asserts that once the divorce was effective, the consent expired. Neither the letter nor the email, however, limited the timeframe during which Wife could access the information or the purpose for which she might do so. Nor does Husband argue he took any acts to revoke the consent he gave in the letter and the email. Moreover, although Husband and Wife were married at

the time he wrote the letter and email, Husband had filed a petition for dissolution less than two weeks earlier.

Petitioner also argues that the letter and email do not satisfy regulations of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the United States Code), for the authorized release of medical records.² But Petitioner offers no authority for the proposition that federal medical-records law controls a waiver of a state statutory privilege.

Finally, Petitioner argues the superior court did not properly limit the scope of the examination to which he might be subjected at his deposition. To the contrary, the court ordered that Petitioner could be examined only about communications made during the parties' joint sessions.

Upon consideration, the superior court did not err in holding Husband waived any privilege that might apply to his joint counseling sessions with Wife.³ Accordingly,

² Petitioner specifically argues the writings do not limit the use or duration of the authorization or describe the records to be disclosed. See 45 C.F.R. § 164.508(c) (2013).

³ Because we conclude Husband's letter and email waived the privilege, we need not address Wife's additional argument that Husband waived the privilege by testifying about his communications with Petitioner and her argument that the privilege never attached to communications made during their joint sessions.

IT IS ORDERED accepting jurisdiction of the special action petition;

IT IS FURTHER ORDERED denying the petition for relief from the superior court's order dated November 2, 2012.

/s/
SAMUEL A. THUMMA, Presiding Judge