IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

SHIRLEY HEAPHY, PERSONAL REPRESENTATIVE OF
THE ESTATE OF CHARLES HEAPHY,
Petitioner,

v.

HON. D. DOUGLAS METCALF, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

WILLOW CANYON HEALTHCARE, INC. DBA PUEBLO SPRINGS REHABILITATION
CENTER; NICHOLAS BASTIAMPILLAI, D.O.; QUINCE HOLDINGS, LLC,
Real Parties in Interest.

No. 2 CA-SA 2020-0001
Filed June 18, 2020

Special Action Proceeding
Pima County Cause No. C20191130

JURISDICTION ACCEPTED; RELIEF GRANTED

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Shirley Heaphy seeks special-action relief from the respondent judge's order requiring disclosure of the medical records of statutory beneficiaries in a wrongful death action against the real-parties-in-interest, Willow Canyon Healthcare Inc., Nicholas Bastiampillai, and Quince Holdings LLC (collectively, "Willow Canyon"). Because Heaphy has no remedy by appeal and the issue is a purely legal one of first

impression that may arise again in the future, we accept special action jurisdiction. *See Abeyta v. Soos ex rel. Cty. of Pinal*, 234 Ariz. 190, ¶ 1 (App. 2014); *State ex rel. Romley v. Martin*, 203 Ariz. 46, ¶ 4 (App. 2002) ("Special action jurisdiction is appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again."); *see also* Ariz. R. P. Spec. Act. 1(a). And because Willow Canyon has identified no particular medical condition of the beneficiaries that they have placed at issue, we grant relief.

Background

¶2 Charles Heaphy died in December 2017 while in the care of Willow Canyon. His wife, Shirley Heaphy subsequently filed a wrongful death action, grounded in medical malpractice, against the Willow Canyon defendants. The statutory beneficiaries include Heaphy and her and Charles's three adult children. Willow Canyon sought discovery of the beneficiaries' medical records. Heaphy asserted she and the other beneficiaries had not waived the physician-patient privilege as to those records and the records were not "relevant to life expectancy." The respondent permitted discovery of some recent records, determining that, because the beneficiaries had claimed an ongoing loss of companionship by the decedent, their life expectancies were at issue in the case, and their medical records could be relevant to that issue. Thus, the respondent concluded the beneficiaries had waived the physician-patient privilege. Heaphy then filed a motion for reconsideration. The respondent denied that motion without explanation. This special action followed.

Discussion

¶3 In her special-action petition, Heaphy again argues that the statutory beneficiaries have not waived the physician-patient privilege and that life-expectancy evidence is irrelevant absent a claim for future pecuniary damages. We need address only the first issue. Communications between a physician and patient, as well as medical records, are privileged in Arizona. A.R.S. §§ 12-2235, 12-2292; *see also Tucson Med. Ctr., Inc. v. Misevch*, 113 Ariz. 34, 37 (1976). Implied waiver of the physician-patient privilege occurs in two circumstances. First, under A.R.S. § 12-2236, the privilege is waived if the privilege holder "offers himself as a witness and voluntarily testifies with reference to" privileged communications and, second, when the holder "places a particular medical condition at issue by means of a claim or affirmative defense." *Bain v. Superior Court*, 148 Ariz. 331, 334 (1986).

¶4 The second circumstance described in *Bain* is implicated here: implied waiver by placing "a particular medical condition at issue."[1] But, placing a condition "at issue" means more than a possibility the condition could be relevant; upholding the privilege must instead "deny the inquiring party access to proof needed fairly to resist the [privileged party]'s own evidence on that very issue." *Accomazzo v. Kemp,* 234 Ariz. 169, ¶ 9 (App. 2014) (quoting *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, ¶ 16 (2000)). "The bare assertion of a claim or defense does not necessarily place privileged communications at issue in the litigation, and the mere fact that privileged communications would be relevant to the issues before the court is of no consequence to the issue of waiver." *Id.* Moreover, the party seeking to overcome the privilege has the burden of showing waiver. *State v. Miles*, 211 Ariz. 475, n.4 (App. 2005).

¶5 Willow Canyon argues that, by seeking future damages, the life expectancy of the statutory beneficiaries is "at issue" and their medical records are thus relevant and any applicable privilege is waived. But, as we have noted, that privileged information may be relevant to a claim is not sufficient to overcome the privilege.[2] *Accomazzo*, 234 Ariz. 169, ¶ 9. And, even if denying access to the beneficiaries' medical records denies Willow Canyon access to evidence that counters the beneficiaries' future damages claims, the privilege still is not waived because there is no particular medical condition at issue.[3]

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[1]Heaphy disclosed aspects of her medical history in her answers to uniform interrogatories. Willow Canyon has not asserted this constituted waiver. And, Heaphy has not asserted that she is suffering from any physical or mental malady because of her husband's wrongful death.

[2]We express no opinion whether the beneficiaries' life expectancies are relevant to their damages claims in this case. We also express no opinion whether the statutory beneficiaries would place a medical condition at issue by presenting evidence relevant to their respective life expectancies.

[3]A claim for future damages arguably is, in the broadest possible sense, a course of conduct inconsistent with observance of the physician-patient privilege as to medical evidence relevant to a person's life expectancy. *See Bain*, 148 Ariz. at 334 (discussing conduct-based waiver of psychologist-patient privilege). But that is not the entire inquiry identified by our supreme court, which limits waiver of the physician-patient privilege to when a "particular medical condition" is at issue. *Id.*

¶6 Arizona cases discussing privilege show that merely placing one's general health at issue is insufficient to waive the medical privilege. Instead, the privilege holder must make an assertion about or present evidence about a particular condition before waiver may be implied. For example, in *Throop v. F.E. Young & Co.*, 94 Ariz. 146, 156-58 (1963), our supreme court concluded the decedent's medical privilege regarding records of treatment for heart problems had been waived when the estate claimed the decedent's death occurred from a "sudden heart attack." Similarly, relying on *Throop*, the court in *Bain* rejected the argument that a plaintiff had "placed her psychological condition at issue" because a conversion reaction—emotional stress appearing as a physical symptom—had caused the back pain at issue in the medical malpractice claim. *Bain*, 148 Ariz. at 332-33, 335. The court thus limited the scope of the waiver to those records related to the conversion reaction and excluded other mental-health records. *Id.* at 335.

¶7 This court has determined a defendant's testimony about her ingestion of alcohol did not necessarily waive the privilege as to medical records that included blood alcohol test results. *Buffa v. Scott*, 147 Ariz. 140, 143 (App. 1985). The tipping point was instead when she elicited expert testimony about her possible blood alcohol level based on the amount of alcohol she claimed to have consumed—a level far less than that appearing in the medical records—making her testimony "contrary to the medical facts" contained in the test results. *Id.* at 142-44.

¶8 In *Blazek v. Superior Court*, 177 Ariz. 535, 541 (App. 1994), this court concluded that a waiver determination could not be made without knowing "exactly what kind of mental injuries" the plaintiff had alleged. We emphasized that implied waiver of the psychologist-patient privilege "is limited only to those communications concerning the specific condition which petitioner has placed at issue." *Id.* at 542. And, in *Cabanas v. Pineda*, 246 Ariz. 12, ¶¶ 18, 25 (App. 2018), we determined a defendant seeking sentencing relief due to his "transient immaturity" had not waived his privilege as to mental-health records. We observed that no such waiver would occur until the defendant relied on "expert testimony or other clinical reference to his mental health." *Id.* ¶ 25.

¶9 Willow Canyon has cited no Arizona case finding waiver in circumstances like these. The only case it cites that supports its position that alleging future damages waives a medical privilege is wholly

unpersuasive.[4] In *McCluskey v. United States*, 562 F. Supp. 515, 516 (S.D.N.Y. 1983), a federal trial court stated the beneficiaries "actual life expectancy" were relevant in a wrongful death action, and the beneficiaries had thus waived the medical privilege "by the bringing of this action, thus putting into issue the pecuniary loss suffered by the next of kin." The court cited *Freeman v. Corbin Bus Co.*, 401 N.Y.S.2d 224, 225 (App. Div. 1978), which did not address waiver of the beneficiary's privilege, instead concluding a wrongful death action waived the privilege as to the records of the decedent. Indeed, the court's statement in *McCluskey* appears inconsistent with New York law. *See Scalone v. Phelps Mem'l Hosp. Ctr.*, 591 N.Y.S.2d 419, 424 (App. Div. 1992) ("[T]he mere fact that the plaintiff has commenced this [wrongful death] action as a personal representative and distributee is insufficient to effect a waiver of her [medical] privilege.").

¶10 Willow Canyon's position would mean that a plaintiff waives the physician-patient privilege in any case involving future damages—an expansion of Arizona law prohibited by our supreme court's precedent. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378 (App. 1993) (court of appeals has "no authority to overrule, modify or disregard" supreme court). We recognize that the physician-patient privilege may prevent Willow Canyon from presenting evidence that could mitigate a damage award. But all privileges may exclude relevant evidence and "present[] an obstacle to the truth-seeking goal of the justice system." *Phx. City Prosecutor v. Lowery*, 245 Ariz. 424, ¶ 9 (2018). "The obvious policy underlying the physician-patient privilege is that patients should be encouraged to make full and frank disclosures to those who are attending them." *State v. Magby*, 113 Ariz. 345, 351 (1976) (quoting *State v. Evans*, 104 Ariz. 434, 436 (1969)).

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[4] The only other case Willow Canyon identifies that addresses implied waiver of a beneficiary's medical history putting facts at issue also does not aid its position. In *Prine v. Bailey*, the Louisiana Court of Appeals concluded a claim for "mental anguish" waived a privilege as to mental-health treatment records. 964 So. 2d 435, 443 (La. Ct. App. 2007). The court applied a standard similar to Arizona's that no privilege exists "[w]hen the communication is relevant to an issue of the health condition of the patient in any proceeding in which the patient is a party and relies upon the condition as an element of his claim or defense." *Id.* at 440-41, 443 (quoting La. Code Evid. art. 510). The court's reasoning in *Prine* appears consistent with Arizona law. A claim for "mental anguish," if viewed generously, could implicate the plaintiff's mental-health condition. And, it is not clear from that decision whether the plaintiff described specific mental-health symptoms as evidence of mental anguish.

Our supreme court has determined the benefits of the privilege outweigh any evidentiary obstacles unless a particular medical condition is at issue. *See Bain*, 148 Ariz. at 334; *see also Readenour v. Marion Power Shovel, Inc.*, 149 Ariz. 442, 446 (1986) ("Privilege statutes prohibit the use of highly relevant evidence in order to further policy goals such as physician-patient confidentiality."). Because no such condition is present here, there has been no implied waiver of the physician-patient privilege.

Disposition

¶11 We accept special-action jurisdiction and grant relief. The respondent judge's order requiring disclosure of the statutory beneficiaries' medical records is vacated.