SUPREME COURT OF MISSOURI
en banc

STATE ex rel. DARIN LUTMAN, Relator, v. THE HONORABLE M. BRANDON BAKER, Respondent.	)	*Opinion issued December 21, 2021* No. SC99139

ORIGINAL PROCEEDING IN PROHIBITION

Darin Lutman petitions this Court for a writ of prohibition to prevent the continued release of his medical records from Compass Health Network and Missouri Psychiatric Center. Lutman contends the circuit court erred by ordering the release of his medical records because his records were protected by the physician-patient privilege. Because Lutman has neither placed his medical conditions at issue nor taken any action sufficient to waive the physician-patient privilege, this Court's preliminary writ is now made permanent.

Background

In September 2019, a vehicle driven by Lutman crossed the centerline on Missouri Highway 7 and struck a vehicle driven by Sondra Murrell. Sondra Murrell died as a result

of the crash. Her grandson, D.M., was in her vehicle and allegedly sustained personal injuries.

Immediately after the accident, Lutman told investigating police officers he "blacked out," "fainted," or "had a heart attack" at the time of the accident. At a later date, Lutman wrote a letter to Sondra Murrell's family, apologizing for the accident and attempting to explain what happened. Lutman wrote, "I simply became [an] alcoholic and addicted to medication and lost control of my life." He went on, "I want you to know I felt like I was having a heart attack and was going to blackout. I tried to turn in to the gravel on the left and that is all I remember."

Tanya Bush, Sondra Murrell's daughter, filed a wrongful death suit against Lutman. Timothy Murrell, Sondra Murrell's son and D.M.'s natural father, intervened individually and as D.M.'s next friend.[1]

On May 13, 2021, the Murrell family filed notices of depositions and subpoenas for Lutman's medical records with Compass Health Network and Missouri Psychiatric Center. In response, Lutman filed a motion to quash those depositions and subpoenas, arguing the requested information was protected by the physician-patient privilege. Lutman's motion emphasized he did not place his medical condition at issue in any pleading.

On May 20, 2021, the circuit court issued an order overruling Lutman's motion to quash and commanding Compass Health Network and Missouri Psychiatric Center to "produce and disclose *all medical records and files* in their possession related to Darin

[1] Hereinafter, the plaintiff, Bush, and intervenor, Timothy Murrell, will collectively be referred to as the "Murrell family." No disrespect is intended.

Lutman." (Emphasis added). The order stated, "The medical records at issue contain information relevant to the claims raised in the above-referenced case."

On Friday, May 21, 2021, Lutman filed a petition for writ of prohibition in the court of appeals, seeking to prevent the release of his medical records. Shortly after, Lutman's counsel e-mailed Bush's counsel to confirm all parties would treat Lutman's medical records as sealed pending a ruling from the court of appeals. Bush's counsel promptly agreed to treat the records as sealed for the time being. Later that day, the court of appeals denied Lutman's petition.

On Monday morning, May 24, 2021, Lutman's counsel e-mailed Bush's counsel to advise Lutman would be filing a writ petition with this Court and reiterated all parties should continue to treat Lutman's medical records as sealed. Bush's counsel responded by stating, "Your writ was denied. We sent the records to the court reporters and to [Timothy Murrell's counsel]."

On May 25, 2021, Lutman filed a petition for writ of prohibition with this Court. On June 1, 2021, this Court issued a preliminary writ of prohibition commanding the circuit court to take no further action in this matter other than to show cause as to why this writ should not issue.

Jurisdiction and Standard of Review

This Court has jurisdiction to issue original remedial writs pursuant to article V, section 4 of the Missouri Constitution.

> A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court

> lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

State ex rel. Becker v. Wood, 611 S.W.3d 510, 513 (Mo. banc 2020). Specifically, "[p]rohibition is an appropriate remedy when a party is ordered to produce material that is protected from discovery by some privilege." *State ex rel. Stinson v. House*, 316 S.W.3d 915, 918 (Mo. banc 2010).

The Physician-Patient Privilege

Section 491.060(5)[2] governs the physician-patient privilege in Missouri. Section 491.060(5) provides:

> The following persons shall be incompetent to testify:
> …
> (5) A physician licensed pursuant to chapter 334, a chiropractor licensed pursuant to chapter 331, a licensed psychologist or a dentist licensed pursuant to chapter 332, concerning any information which he or she may have acquired from any patient while attending the patient in a professional character, and which information was necessary to enable him or her to prescribe and provide treatment for such patient as a physician, chiropractor, psychologist or dentist.

Notably, while section 491.060(5) speaks in terms of competence to testify, it "is construed as a privilege statute." *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 566 (Mo. banc 2006). "Any information a physician acquires from a patient while attending the patient and which is necessary to enable the physician to provide treatment is privileged." *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. banc 1997). Additionally, the physician-patient privilege applies to medical records. *Dean*, 182 S.W.3d at 567. "The privilege is for the benefit of the patient and belongs to the patient, not the physician." *Id.*

[2] All statutory references are to RSMo 2016, unless otherwise noted.

at 566 n.5. Therefore, even when medical records are directly relevant to a party's claims, if they are protected by the privilege, they are not discoverable. *Stinson*, 316 S.W.3d at 919. "The purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information." *Dean*, 182 S.W.3d at 567.

The physician-patient privilege is not absolute, however, and "[t]he fact that documents fall within the scope of the physician-patient privilege does not end the inquiry." *State ex rel. Health Midwest Dev. Grp., Inc. v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998). A patient can waive the privilege by either express or implied waiver. *Dean*, 182 S.W.3d at 567. The most common waiver cases "involve plaintiffs who voluntarily place their medical condition in issue by filing a petition alleging that they suffered physical or mental injuries." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 63 (Mo. banc 1999). Nonetheless, "[a] party may also impliedly waive the privilege through an act showing a *clear, unequivocal purpose* to divulge the confidential information." *Id.* (emphasis added) (internal quotation marks omitted); *see also Fitzgerald v. Metro. Life Ins. Co.*, 149 S.W.2d 389, 391 (Mo. App. 1941) (explaining: "To make out a case of implied waiver there must be a clear, unequivocal and decisive act showing such purpose, or acts amounting to an estoppel. In other words, the intention to waive must plainly appear or else the acts or conduct relied upon as constituting a waiver must involve some element of estoppel.").

Analysis

It is undisputed that: (1) Lutman's medical records fall within the scope of the physician-patient privilege; and (2) Lutman never expressly waived the privilege. The only question is whether Lutman placed his medical conditions in issue or took any other steps to constitute implied waiver of the privilege. The Murrell family argues Lutman waived the privilege through his statements to the investigating police officers immediately after the accident and in his letter to the Murrell family.

This Court addressed a similar challenge in *Rodriguez*, 996 S.W.2d at 54, in which the plaintiff was seriously injured when the vehicle in which she was a passenger lost control and rolled. The plaintiff sued the vehicle's manufacturer, Suzuki, and the vehicle's driver, Dubis. *Id.* In response, Suzuki brought a cross-claim against Dubis, alleging she was intoxicated. *Id.* Significantly, Dubis admitted to having consumed at least three sampler glasses and two full glasses of wine shortly before the accident. *Id.* at 61. Suzuki sought to discover the results of Dubis blood alcohol tests taken at the hospital immediately following the crash. *Id.* Dubis moved to quash Suzuki's requests, arguing the physician-patient privilege applied. *Id.* The circuit court sustained Dubis motions, and Suzuki appealed. *Id.*

On appeal, Suzuki argued the circuit court erred in quashing its discovery requests because Dubis waived her physician-patient privilege by: (1) testifying she was not intoxicated in rebuttal to Suzuki's offer of proof; (2) responding to questions concerning her intoxication on cross-examination; and (3) having her counsel elicit testimony from

other witnesses about the issue of intoxication. *Id.* at 63.[3] This Court rejected Suzuki's arguments, stating, "Suzuki has not demonstrated that Dubis waived her statutory privilege under any recognized theory." *Id.* This Court explained Dubis did not bring any action for injuries she suffered and did not plead any facts creating an issue about her medical condition. *Id.* "For the same reason that Dubis does not waive the privilege by filing an answer denying the allegations in Suzuki's cross-petition that she was intoxicated, she does not waive the privilege by introducing non-medical evidence at trial." *Id.* at 63-64.[4]

The Murrell family argues Lutman waived the physician-patient privilege at the scene of the accident by telling investigating police officers that he "blacked out," "fainted," or "had a heart attack."[5] This argument is of no merit. To constitute an implied waiver, the patient's act must show a clear, unequivocal purpose to divulge confidential

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[3] Prior to determining whether Dubis waived the physician-patient privilege, this Court held Dubis met her burden of establishing that the blood alcohol tests taken after the accident were not ordered by investigating police officers. *Rodriguez*, 996 S.W.3d at 62-63.

[4] Pursuant to *Rodriguez*, both parties agree Lutman's denial of the allegations in the Murrell family's pleadings does not constitute a waiver of the physician-patient privilege. 996 S.W.2d at 63 (stating: "As explained in *State ex rel. Hayter v. Griffin,* 785 S.W.2d 590, 593 (Mo. App. 1990), a denial of an allegation cannot constitute a waiver of the physician-patient privilege because to do so would force the patient to choose between suffering judgment by default or waiving the physician-patient privilege."); *see also Stinson*, 316 S.W.3d at 918 (Mo. banc 2010) (holding: "The mere fact that Mr. Stinson has denied liability and is defending against the present suit does not constitute a waiver of the privilege.").

[5] Notably, Lutman's statements to the investigating police officers at the scene of the accident are not protected by the privilege because "the physician-patient privilege extends only to information acquired by the physician for the purposes of prescribing and treatment." *Hayter*, 785 S.W.2d at 595; *see also* section 491.060(5). But whether Lutman's statements to the investigating police officers may be admissible has no bearing on whether those statements also constitute a waiver of the privilege.

information. *Rodriguez*, 996 S.W.2d at 63. Lutman's statements to the investigating police officers, which did not contain privileged information, do not indicate a clear, unequivocal purpose to divulge his confidential medical information. *See id.* In other words, "it would not appear that [Lutman's statements] … were made with an intention and willingness on the part of the patient to waive or renounce the secrecy secured by the statute." *State v. Scott*, 491 S.W.2d 514, 519 (Mo. banc 1973). In the same way Dubis' mention of drinking wine did not constitute a waiver in *Rodriguez*, 996 S.W.2d at 63-64, Lutman's admission of a medical condition does not constitute a waiver here. *See also State v. Ermatinger*, 752 S.W.2d 344, 350 (Mo. App. 1988) (testifying at a deposition that a doctor was his treating physician did not waive the confidentiality of discussions pursuant to that treatment).[6] This Court is not persuaded that Lutman's brief and nondescript statements to investigating police officers constituted an intent to waive the physician-patient privilege.

Similarly, the Murrell family claims Lutman's apology letter constituted a waiver of the physician-patient privilege because Lutman stated to the Murrell family that he was an addict who felt like he was having a heart attack or blacking out right before the crash. Again, however, without more, Lutman's statements in the letter do not clearly and unequivocally indicate an intent to waive the physician-patient privilege. Even when read

[6] Other state courts that have addressed similar challenges also have held disclosing basic facts about treatment, addiction, or the existence of a physician-patient relationship is insufficient to establish a waiver. *See, e.g.*, *In re Lifschutz*, 467 P.2d 557, 567 (Cal. 1970) (revealing the existence of psychotherapist-patient relationship did not constitute a waiver); *Styers v. Superior Ct., Cnty. of Mohave*, 779 P.2d 352, 354 (Ariz. Ct. App. 1989) (holding: "One may acknowledge the fact of treatment without consenting to the disclosure of its confidential details.").

in the light most favorable to the Murrell family, there is no way to reasonably construe Lutman's apology and explanation as an indication of his desire to share his confidential medical records.[7] Moreover, contrary to the Murrell family's claims, "[t]he mere fact that the privileged medical records may be relevant … does not mean that the medical records are discoverable. The very nature of an evidentiary privilege is that it removes evidence that is otherwise relevant and discoverable from the scope of discovery." *Stinson*, 316 S.W.3d at 919.

For these reasons, Lutman did not waive the physician-patient privilege and the circuit court erred in ordering the disclosure of his medical records.[8]

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[7] Furthermore, even had Lutman's actions constituted an implied waiver of the physician-patient privilege, "the open-ended scope of [the] authorizations is indefensibly broad." *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 465 (Mo. banc 1995). Orders must provide safeguards to protect the patient's privacy. *Benoit v. Randall*, 431 S.W.2d 107, 110 (Mo. banc 1968) (finding an order impermissible because it did not provide adequate safeguards). Here, the circuit court's order impermissibly granted the Murrell Family access to all of Lutman's records with the two healthcare providers, irrespective of the age of the records or whether they were relevant to the medical conditions at issue. *See also State ex rel. Camillo v. Beck*, 423 S.W.3d 795, 798 (Mo. App. 2013) ("Vague, broad, or open-ended authorizations simply will not do.").

[8] The Murrell family claims a writ of prohibition is inappropriate because Lutman's medical records were already disclosed. However, "[p]rohibition will lie to undo acts done in excess of [the] court's [authority], as long as some part of the court's duties in the matter remain to be performed." *State ex rel. Palmer by Palmer v. Goeke*, 8 S.W.3d 193, 196 (Mo. App. 1999) (internal quotation marks omitted).

The United States Supreme Court dealt with a similar challenge in *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), and its holding is instructive. In *Church of Scientology*, the issue was whether an appeal was moot because confidential tape recordings had been disclosed prior to the appeal. *Id.* In holding the appeal was not moot, the Supreme Court stated:

> Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial

Conclusion

The preliminary writ of prohibition is made permanent.

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Robin Ransom, Judge

All concur.

> remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot.

Id. at 13. This Court is similarly able to effectuate a partial remedy because the harm to Lutman is ongoing. Additionally, given the specific facts of this case, it would be unjust to deny relief to Lutman solely because counsel for Bush disclosed Lutman's medical records in the brief period of time between the court of appeals' denial of Lutman's petition and his petition to this Court.