[Cite as *Bogart v. Blakely*, 2010-Ohio-4526.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

DAVID W. BOGART :

Plaintiff-Appellant : C.A. CASE NO. 2010 CA 13

v. : T.C. NO. 09860

DAVID B. BLAKELY, et al. : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 24th day of September, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of David W. Bogart, filed April 13, 2010. On September 10, 2009, Bogart filed a "Complaint for Money" against David B. Blakely and John Does 1 through 5, after Bogart and Blakely were in an automobile accident on September 18, 2009. According to the Complaint, "As a result of

the Defendants' negligence, Plaintiff David W. Bogart was caused to suffer severe and permanent personal injuries, suffered a loss of time and income from employment, suffered great pain of body and mind, a loss of enjoyment of life, mental aguish, required medical care and treatment in the past, and will continue to suffer said losses in the future, all to his expense and obligation."

{¶ 2} On February 18, 2010, Blakely filed a Motion to Compel Discovery, asking the trial court to order Bogart to "provide full information regarding his past medical history and authorizations sufficient to obtain release of all medical records generated within the last ten years within a date certain * * *." Specifically, Blakely sought authorizations for the release of "medical records, Social Security disability records, employment records and Bureau of Workers' Compensation records." Bogart filed a memorandum in opposition, in which he argued in part that "the use of an in camera review can be used to determine what is and what is not discoverable." Blakely filed a Reply, in which he asserted in part that "Defendant is entitled to, at a minimum, executed authorizations regarding the prior issues involving the neck and back."

{¶ 3} On March 15, 2010, the trial court issued an order granting Blakely's motion that provided in part, "The issue is whether the Plaintiff may be required to sign blanket medical authorizations as have been requested during discovery. In this appellate district the answer is yes. *State ex rel. Floyd v. Court of Common Pleas* (1978), 55 Ohio St. 2d 27, and the Second District Court of Appeals decisions of *Menda v. Springfield Radiologists, Inc.* (2000), 136 Ohio App.3d 656, and *Horton v. Addy* (Jan. 25, 1993), Montgomery App. No. 13524." The court ordered Bogart to "execute complete medical authorizations as

identified in Blakely's motion to compel," which was limited to 10 years, within 14 days. The court's order further provides that "upon determination of discovery of additional providers who have treated and/or examined Plaintiff, Defendant shall also be entitled to medical authorizations concerning those providers." Finally, the order provided that the "records obtained as a result of the authorizations shall be subject to the following protective order: (1). The records shall only be disclosed to, used, or reviewed by the attorneys representing the parties in this action, their support staff and experts assisting them in this case, except as disclosure [is] needed during motions, depositions, and trial or otherwise allowed by Plaintiff. (2). Counsel for Defendant Blakely shall furnish copies to Plaintiff's Counsel within a reasonable time after receipt. (3). Any such records obtained, including all copies, which are not marked or admitted as motion, deposition, or trial exhibits shall be returned to Plaintiff's Counsel within ninety days after the final disposition of this case."

{¶ 4} Bogart asserts two assignments of error. His first assignment of error is as follows:

{¶ 5} "1. THE TRIAL COURT ERRED BY GRANTING DEFENDANT BLAKELY'S MOTION FOR AN ORDER TO COMPEL DISCOVERY AS TO MEDICAL AUTHORIZATIONS.

{¶ 6} "A. By Civil Rule and by Statute, Privileged Information is not Discoverable, let alone Admissible.

{¶ 7} "B. The Trial Court Relied on Case Law that is Superceded or Outdated.

{¶ 8} "C. Case Law from other Ohio Jurisdictions Honors the Privilege and R.C. 2317.02(B)."

{¶ 9} Initially, we must determine the correct standard of review to be applied herein. Bogart argues that we should apply a de novo standard, while Blakely argues that an abuse of discretion is the appropriate standard of review. "In general, discovery orders are reviewed under an abuse-of-discretion standard. (Citation omitted). But whether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo. (Citation omitted). When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate. (Citations omitted).

{¶ 10} "Medical records are generally privileged from disclosure under R.C. 2317.02(B)." (Citation omitted). *Med. Mut. of Ohio v. Schlotterer,* 122 Ohio St.3d 181, 2009-Ohio-2496,¶ 13-14. Civ.R. 26 governs discovery, and section (B)(1) provides that "[p]arties 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."

{¶ 11} Civ.R. 16 governs pretrial procedure and provides in part, "In any action, the court may schedule one or more conferences before trial to accomplish the following objectives: * * * (6) The exchange of medical reports and hospital records. * * * The production by any party of medical reports or hospital records does not constitute a waiver of the privilege granted under section 2317.02 of the Revised Code."

{¶ 12} R.C. 2317.02 codifies the physician-patient privilege and provides in relevant part as follows:

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

{¶ 14} " * * *

{¶ 15} "(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, * * *.

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

{¶ 17} "(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, * * * under any of the following circumstances:

{¶ 18} "* * *

{¶ 19} "(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, * * * [or] any other type of civil action, * * * is filed by the patient, * * * .

{¶ 20} * *

{¶ 21} "(3)(a) 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 or dentist 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 or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally

or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, * * * .”

{¶ 22} “ ‘Communication’ means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A ‘communication’ may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.” R.C. 2317.02(B)(5)(a).

{¶ 23} It is well settled that there “existed no physician-privilege at common law. McCormick, Evidence (3 Ed. Lawyer’s Ed. 1984), 243, Section 98; (citation omitted). Since the privilege is in derogation of the common law, it must be strictly construed against the party seeking to assert it. (Citation omitted); *Weis v. Weis* (1947), 147 Ohio St. 416 * * *.” *Hollis v. Finger* (1990), 69 Ohio App.3d 286, 293. “ * * * [O]ur decisions have long reflected the belief that discovery should be liberally allowed.” *Arroyo v. Wagon Wheel Auto Sales Inc.* (Aug. 11, 2000), Montgomery App. No. 18235, citing, in part, *Horton v. Addy.*

{¶ 24} Regarding the appropriate standard of review, it is clear that the purely legal question herein has been resolved, namely that physician-patient communications are privileged. By filing suit, Bogart has waived the privilege as to the specific information that is “related causally or historically” to the injuries that form the basis of his complaint. In other words, the privilege Bogart asserts is dependent upon his records not being causally or historically related to the allegations in his complaint, and whether the privilege applies

specifically to Bogart's records is a factual issue. Accordingly, we apply an abuse of discretion standard of review. See *Selby v. Fort Hamilton Hospital* , Butler App. No. 2007-05-126, 2008-Ohio-2413, ¶ 10. (" 'Whether a discovery privilege applies is a matter of law, but the question of whether specific materials are part of a privileged medical study is a factual question within that legal determination.' ")

{¶ 25} " 'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 26} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 27} We will first examine those authorities relied upon by the trial court in ruling for Blakely. In *Floyd*, the plaintiffs, relators in a personal injury action, sought a writ of prohibition to prevent a judge from enforcing pretrial orders providing for discovery of allegedly privileged medical information. The Supreme Court of Ohio, in a per curiam opinion, upheld the order issued by the trial court in *Floyd v. Copas* (1977), 9 Ohio Ops.3d 298 (Rice, J.) The physician-patient privilege statute in effect then did not provide for waiver of the privilege by the filing of a civil action, as it does now, and the Supreme Court determined, it "is clear that such privilege has not been waived. A party does not waive the

physician-patient privilege accorded to him by R.C. 2317.02(B) merely by filing suit and claiming personal injuries arising from an accident.

{¶ 28} "Relators are seemingly confusing waiver with disclosure of privileged information. Until a waiver occurs, defense counsel may not use the information at trial." *Floyd,* at 28-29. It was significant to the Supreme Court that the trial court relied upon Civ.R. 16, which provided in part, "A court may adopt rules concerning pretrial procedure to accomplish the following objectives: * * * (6) The exchange of medical reports and hospital records." The rule further provided that " 'producing by any party of medical records or hospital records does not constitute a waiver of the privilege granted under Section 2317.02, Revised Code.' " The Court noted that "Local Rule 2.21(C) reflects this grant of authority by providing that in a pre-trial order the court may order the 'exchange (of) medical reports and hospital records.' " Id., at 29. Based upon the distinction between a court-ordered disclosure, pursuant to Civ.R. 16 and local rule, and the use at discovery or trial of that information pursuant to a waiver of the privilege, the Court denied the writ of prohibition. Id.

{¶ 29} In *Horton v. Addy*, we relied upon *Floyd* when deciding an interlocutory appeal from an order to plaintiffs' counsel to provide "all medical records, both before and after, the accident," to defense counsel, or to provide the records to the court for forwarding to a physician for the purpose of determining whether the records were discoverable in the personal injury action. We note that *Horton* was overturned on a procedural issue by the Ohio Supreme Court, 69 Ohio St.3d 181 (1994). At the time of *Horton*, as now, the physician-patient privilege was waived if the patient filed a civil action. The plaintiffs

argued that the order at issue required them to provide medical information beyond that which is " 'related causally or historically to physical or mental injuries that are relevant to the issues in the * * * civil action.' In other words, they claim they have been required to waive the physician-patient privilege, without their consent, beyond the extent to which they waived the privilege by filing suit." *Horton v. Addy* (Jan. 25, 1993), Montgomery App. No. 13524.

{¶ 30} We noted that "Judge Rice responded to a similar argument in *Floyd v. Copas* * * *:

{¶ 31} " 'An argument could be made that the scope of court ordered disclosure must be limited to only those medical reports made by those persons who will testify at the trial, to those hospital records from institutions in which the injured plaintiff was a patient following the incident which forms the basis of the lawsuit in question, to prior hospitalizations for the same or similar physical conditions or injuries claimed as arising from the incident in question, or, at the outside, to those records that are relevant to the issues framed by the pleadings.

{¶ 32} " 'This court cannot agree with such a contention because, *inter alia*, it would make the court, or the party against whom disclosure is sought, the arbiter of what is and what is not either relevant or likely to lead to the discovery of relevant evidence.

{¶ 33} "* * *

{¶ 34} " 'Therefore, as long as the item to be disclosed might be within the ambit of the injured plaintiff's possible waiver of the physician-patient privilege, the disclosure will be ordered. The court can think of nothing more unfair than for an injured plaintiff,

concealing items under the guise of the physician-patient privilege, expressly waiving said privilege at trial by testimony which would, by catching the adversary unawares (the revelation being theretofore undisclosed and, perhaps unknown), effectively foreclose said adverse party from meaningful and effective cross-examination. Pre-trial disclosure, pursuant to the theory advanced by the court, will forestall that possibility - there can be no use of the disclosed material, absent a waiver of the privilege, on a specific subject, but, once the privilege is waived, the defendant will be able, armed with the knowledge and information gained through disclosure, to effectively cross-examine and counter the information upon which the privilege has been waived." Id.

{¶ 35} We noted, "while the trial court is necessarily the final arbiter of what is and is not relevant, disputes over what must be revealed during pretrial preparation has the potential of involving the trial court in such disputes at a point at which the court is not in a good position to make ultimate determinations as to relevance. The time for the trial court to become involved is immediately prior to, or during trial, when both sides have been afforded complete discovery and complete disclosure, when both sides have finalized their trial objectives, strategies, and tactics, and when both sides are in the optimum position to apprise the trial court of their respective positions concerning the relevance of certain information obtained by either discovery or disclosure. We thus approve, as did the Supreme Court, at least tacitly, in [*Floyd*], of the order made in this case, notwithstanding that the Hortons may well be required to disclose more than is relevant under R.C. 2317.02, as amended." Id.

{¶ 36} We further noted that in *Floyd*, "the Supreme Court observed that the

Montgomery County Court of Common Pleas, had, by local rule and under the authority of Civ.R. 16, provided for the exchange of medical reports and hospital records. Since that time, the common pleas court has provided in Loc.R. 2.19(b) that 'counsel will participate in pretrial discovery conferences and shall freely exchange discoverable information and documents upon informal request.' During the same period of time, the common pleas court appears to have amended Loc.R. 2.21 and no longer specifically provides that the court may order the 'exchange of medical reports and hospital records.' Given the fact that *Floyd v. Copas* was a Montgomery County Court of Common Pleas case, we believe that it is well within the spirit of present Loc.R. 2.19(b) that the court intends that 'disclosable' as well as 'discoverable' information and documents be freely exchanged.

{¶ 37} "* * *

{¶ 38} "The distinction between 'discovery' and 'disclosure' is not without difficulty. Although 'disclosed' information may not also be 'discovered' information, disclosed information is nevertheless revealed to third parties. Judge Rice restricted the defendant's use of disclosed information to 'preparing the instant litigation for trial' and 'strictly and expressly prohibited' any other use." Id. (quoting *Floyd v. Copas*).

{¶ 39} As was noted in the concurring opinion in *Horton*, "At the time of the *Floyd* cases, the medical privilege was not deemed to have been waived until the plaintiff took the stand and testified concerning his medical condition. As Judge Rice noted in his opinion, * * * that worked a terrible injustice upon the defendant, who had no opportunity to discover the plaintiff's medical evidence until during trial.

{¶ 40} "Today, a plaintiff is deemed to have waived his medical privilege as soon as

he files a lawsuit in which his medical condition is material. However, the waiver is not complete; it is limited to those matters that are relevant to issues in the lawsuit. Under today's rules concerning the medical privilege, the rather strained distinction worked out in the *Floyd* cases between the disclosure and the discovery of privileged information may no longer be necessary to avoid working a substantial injustice upon a defendant.

{¶ 41} "Nevertheless, unless and until the Ohio Supreme Court should see fit to reconsider its approval, in *State , ex rel. Floyd v. Court of Common Pleas* (1978), 55 Ohio St.2d 27, of the distinction between the disclosure and the discovery of privileged information, we must assume that that distinction is still good law." Id. (Fain, J., concurring).

{¶ 42} Finally, in *Menda v. Springfield Radiologists, Inc.*, a patient and his mother sued a doctor and the corporation in which he was a shareholder for malpractice. We affirmed the trial court's denial of the doctor's request for a protective order barring discovery of evidence relating to the doctor's emotional and psychiatric condition, which had been obtained in a separate lawsuit involving a business dispute brought by the doctor against the corporation. We noted that "other courts may have concluded that a waiver of the physician-patient privilege in one case does not constitute a waiver in another case." (Citations omitted). Id., at 661. We determined, however, "because we are convinced that the primary purpose of the physician-patient privilege - privacy - cannot be furthered by allowing a party to invoke the privilege after he has disclosed his physical or mental condition in a separate lawsuit, and because R.C. 2317.02(B)(1)(a)(iii) provides that putting one's physical or mental condition at issue in 'any other type of civil action' waives the

privilege, we conclude that the trial court did not err in refusing to grant a protective order." Id.

{¶ 43} Bogart contends that none of the above authorities apply to the matter herein. Bogart asserts that *Floyd* was decided under a previous version of the privilege statute, and that the waiver of privilege and the restrictions on that waiver that apply herein were added after *Floyd* was decided. Bogart further asserts that *Floyd* is distinguishable from the instant matter because it addressed the disclosure of information pursuant to Civ.R. 16(6) and local rule, and that Civ.R. 26(B) applies herein.

{¶ 44} Bogart initially directs our attention to *Calihan v. Fullen* (Jan. 15,1992), 78 Ohio App.3d 266. Calihan brought a medical malpractice case against her physician following a surgical procedure in November, 1987. She sought the physician's medical records, having learned in the course of his deposition that he had been diagnosed with multiple sclerosis in 1988, and that he had experienced sensory problems since 1979. The trial court granted the plaintiff's motion to compel. The First District determined that the records were relevant to Calihan's claims but privileged pursuant to R.C. 2317.02. The court further held that *Floyd* did "not mandate a contrary result," since the Hamilton County Common Pleas Court did not provide by local rule for the exchange of medical reports and hospital records, and the trial court's order in *Calihan* was issued pursuant to Civ.R. 26(B), which exempts privileged information from discovery. Id., at 271. Given the "significance of the difference between Civ.R. 16 and Civ.R. 26," the First District determined that "the holding in *Floyd* is inapplicable to the issue of the physician-patient privilege in discovery matters." Id., at 272.

{¶ 45} Further, Bogart asserts that the holding in *Floyd* only applies to hospital records, in reliance upon *Brown v. Yothers* (Nov. 14, 1988), 56 Ohio App.3d 29, a personal injury action in which Yothers sought the production of Brown's physician's office records and to depose Brown's physician. In reversing the trial court's denial of Brown's motion for a protective order, the Fifth District noted, under the statutes in effect at the time, there were "only two avenues which would permit appellee to obtain the confidential information she seeks: (1) plaintiff's waiver of privilege, or (2) via Civ.R. 16(C), a rule created to ease and speed discovery as to *medical reports and hospital records."* Id., at 31 (emphasis in original). At the time, waiver was not effected by the filing of a civil action. The Fifth District noted that *Floyd* "applied Civ.R. 16(6) and ordered the exchange of hospital records as provided for in the rule. If hospital records were the object of the cause *sub judice*[,] then *Floyd* would be squarely applicable and we would invoke it without hesitation. To the contrary, the narrow and specific holding of the *per curiam Floyd* decision cannot be extrapolated to provide any more authority than what the Supreme Court sets forth." Id., at 32. The court concluded that Civ.R. 16(6) should not "be expanded to include office records and the taking of a deposition." Id.

{¶ 46} Regarding *Horton*, Bogart asserts that it is the minority position in Ohio and that we should align our case law with other jurisdictions, directing our attention initially to two Sixth District cases. In *Piatt v. Miller*, Lucas App. No. L-09-1202, 2010-Ohio-1363, the plaintiff brought an action individually and as executrix of her husband's estate following a car accident. The trial court granted defendant's motion to compel discovery of medical records, including records of treatments prior to the accident, and it denied

plaintiff's motion for a protective order. In reversing the trial court, the Sixth District considered *Horton* and noted, "[w]e 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 inspection and a determination of the document's relevance." (Citations omitted). Id., ¶ 16. Bogart further cites *Chasteen v. Stone Transport, Inc.*, Fulton App. No. F-09-012, 2010-Ohio-1701, ¶ 24. ("Ohio 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* * * * .")

{¶ 47} Finally, Bogart points out that the Tenth District is critical of *Horton.* In *Ward v. Johnson's Industrial Caterers, Inc.* (June 25, 1998), Franklin App. No. 97APE11-1531, the defendants filed a motion to compel authorizations for the release of medical records in a negligence cause of action. Ward had returned the releases signed but with additional language "limiting the release of those records concerning any injury, condition, treatment or complaint relative to her neck, shoulders, low back and left leg." She also requested an in camera review and filed a motion for a protective order. "The trial court indicated * * * that the proper time for determining what is related causally or historically to the alleged injuries is at trial," and it granted the motion to compel and denied the motion for a protective order.

{¶ 48} The Tenth District applied a de novo standard of review to the issue and determined that the trial court erred in two ways. "Most importantly, R.C. 2317.02(B)

states not merely that a physician may be compelled to *testify* only as to a communication that is causally or historically related, but also indicates a physician may be compelled to submit to *discovery* of only those communications that relate causally or historically to the injuries. Hence, the protection afforded under the statute covers discovery and, therefore, it is entirely proper for a trial court to, if necessary, determine at the discovery phase what is causally or historically related.

{¶ 49} "In addition, the trial court cited to *Horton v. Addy* * * * in support of its position. We do not agree with the analysis in such case. The *Horton* court concluded that disputes over what must be revealed during pre-trial preparation has the potential of involving the trial court when such court is not in a good position to make ultimate determinations as to what is relevant. The court of appeals stated that the time for the trial court to become involved was immediately prior to or during trial. Id. * * *

{¶ 50} "The holding in *Horton* seemingly ignores the fact that R.C. 2317.02(B)(2)'s protection regarding records that are causally or historically related extends to discovery, not just to testimony. While 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. Appellees believed they needed all medical records. Appellant asserted 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 appellant's medical records in order to ascertain what was causally or historically related." The Tenth District reversed and remanded the matter.

{¶ 51} Finally, regarding *Menda*, Bogart points to *Hageman v. Southwest General*

Health Center, 119 Ohio St.3d 185, 190, 2008-Ohio-3343, ¶ 17, in which the Supreme Court determined that "when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case." In *Hageman*, the Supreme Court of Ohio held that an attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation. Id., at ¶ 1. Hageman's wife initiated divorce proceedings, and Hageman filed a counterclaim for custody of their minor child. While the divorce was ongoing, Hageman was receiving psychiatric treatment. After he allegedly assaulted his wife, criminal charges were brought. Counsel for Hageman's wife in the divorce subpoenaed and received Hageman's medical records from his psychiatrist, and she gave the prosecutor in the criminal matter a copy of the records. Hageman then sued, inter alia, his wife's counsel for the unauthorized disclosure. The Supreme Court determined that permitting attorneys "with such information obtained through discovery to treat the information as public would violate the policy of maintaining the confidentiality of individual medical records." Id., at ¶ 20. Bogart points out that we have noted, "our holding in *Menda* has most probably been overruled" by *Hageman*. *State v. Branch*, Montgomery App. No. 22030, 2009-Ohio-3946, ¶ 77.

{¶ 52} Having attempted to discredit *Floyd*, *Horton* and *Menda*, Bogart directs our attention to case law from other Ohio jurisdictions examining the physician-patient privilege. In addition to *Hageman*, and *Ward*, Bogart relies upon *McCoy v. Maxwell* (Oct. 2, 2000), 139 Ohio App.3d 356, to again assert that his waiver only extends to the information that is related causally or historically to his injuries. McCoy filed a complaint against Maxwell, alleging malicious prosecution, libel and slander. The trial court granted Maxwell's motion

to compel discovery of the name of McCoy's psychologist and or psychiatrist and her treatment records. The Eleventh District determined that the records remained privileged because "they are not communications that relate causally or historically to physical or mental injuries that are relevant to the issue in the defamation suit filed by appellant." Id., at 359. The court recognized "that information contained in appellant's psychological or psychiatric records may be extremely relevant to appellee's defense of the defamation suit; however, relevancy alone does not waive the physician-patient or psychologist-client privilege. Because appellant has not made a claim for emotional distress or mental anguish and has merely alleged that statements made by appellee damaged her personal and professional reputation, she did not waive the [privilege]." Id. The Eleventh District reversed and remanded the matter.

{¶ 53} Bogart also directs our attention to *Hudson v. United Services Automobile Association Insurance Company et al* (Oct. 21, 2008), 150 Ohio Misc.2d 23, 2008-Ohio-7084, ¶ 5, in which the Greene County Court of Common Pleas reviewed a request for medical information " 'during [plaintiff's] lifetime,' " and it determined that it "must reluctantly but dutifully involve itself in discovery." The *Hudson* court relied upon *Miller v. Bassett*, Cuyahoga App. No. 86938, 2006-Ohio-3590, which, according to the common pleas court, "found that requesting medical records over the previous ten years was overbroad. To ask for information on a lifetime of medical treatment is even more overbroad, and the court rejects it." *Hudson*, at ¶ 26.

{¶ 54} Having reviewed the above authorities, we agree with Blakely that Bogart's attempts to discredit *Floyd* and *Horton* fail. *Floyd* has not been overturned or superseded

by statute. There has been no "express repudiation" of *Horton*, as recently noted by the Sixth District in *Piatt*. *Calihan* is distinguishable on its facts, as Blakely asserts, since the defendant physician therein had not waived his privilege, as here, by filing a civil action. We further conclude that *Brown* is distinguishable in that the defendant therein sought deposition testimony, and we note that Blakely properly seeks medical records. We find that *Ward* applied the incorrect standard of review to the dispute therein, and that it was within the trial court's discretion to find that "the proper time for determining what is related causally or historically to the alleged injuries is at trial."

{¶ 55} We further agree with Blakely that whether waiver in a prior suit equates to waiver in a subsequent suit is not at issue, thus whether *Menda* has been overruled pursuant to *Hageman* and *Branch* is irrelevant. While the concern in *Hageman* was the anticipated result of permitting attorneys with privileged information "to treat the information as public," we note that the trial court herein expressly restricted the dissemination of Bogart's records, as did the trial court in *Floyd v. Copas*.

{¶ 56} Regarding the other authorities relied upon by Bogart, *McCoy* is distinguishable because McCoy alleged injury merely to his personal and professional reputation. In contrast, Bogart alleges permanent and extensive physical and mental injuries. An examination of *Miller v. Bassett*, the authority relied upon in *Hudson*, which the Greene County Court of Common Pleas oversimplifies, supports our distinction. Miller appealed from the trial court's grant of Bassett's motion to compel discovery, arguing in part that the motion was not related to the subject matter of Miller's professional negligence action. Miller alleged negligent infliction of emotional distress and serious mental anguish. In

discovery, Bassett sought the name of Miller's primary physician, any medical condition requiring hospitalization or that had arisen over the past 10 years, any drug or alcohol use in the last 10 years, and all motor vehicle accidents in which Miller was a party over the last 15 years. The Eighth District held, "we cannot see how such an allegation places Miller's physical condition at issue to the large extent requested by Bassett." According to the court, "in a case of professional accounting negligence and emotional distress," the incidence of "motor vehicle accidents occurring over the past fifteen years has no applicability to the case, and Miller has not put such a claim into issue." Further, "any records regarding drug or alcohol abuse, including * * * the frequency of such use over the past ten years, exceeds the scope of discovery, and as Miller has not put this facet of his 'health' in issue, any treatment sought as to this alleged use of illegal substances, treatment, etc. would be protected by the physician-patient privilege as well." Id., at ¶ 23.

{¶ 57} The Eighth District further determined, regarding "disclosure of Miller's primary/family physician, any medical condition which required hospitalization over the last ten years, and disclosure of any mental or physical condition present within the last ten years, * * * the trial court's order compelling discovery must partially stand. By asserting claims of negligent infliction of severe emotional distress, Miller has put his mental health directly in issue. While * * * the underlying action is nonetheless a professional negligence action, when a party directly places their health at issue, the basis for this underlying cause of action is discoverable." Id., at ¶ 24.

{¶ 58} Regarding the request for information on any medical condition that has required hospitalization or that has arisen within the past ten years, the court concluded,

"there are two problems with compelling discovery in this instance.

{¶ 59} "First, Miller put his 'mental health' directly at issue by contending that Bassett caused him to suffer from severe emotional distress. He makes no further assertion of failing physical health, nor has any discovery been conducted to an extent that this court could find that Miller also put his physical health at issue, or to assert that these claims of emotional distress contain a physical element. Therefore, any discovery that seeks information regarding Bassett's physical health is not germane at this time, and would be protected under the doctrine of physician patient-privilege. To clarify, this court can see no waiver of privilege and, therefore, we find that information relating to Miller's physical health is protected by physician-patient privilege.

{¶ 60} "The second issue surrounding the trial court's order compelling discovery is the time frame during which Bassett seeks to discover information. Although Bassett requests a ten-year 'look-back' period, there is no indication why such a time span was chosen or when the time frame would begin to run. * * * Since there is no indication as to the proper look-back period, an evidentiary hearing must be held on the issue of timing so that specific dates can be given." Id., at ¶ 26-27.

{¶ 61} The *Miller* court reversed the decision of the trial court compelling production of discovery as to alleged drug and alcohol use and regarding all motor vehicle accidents. The court affirmed the grant of the motion to compel "as to any request for the mental health information that Miller has directly put at issue and through his claim for severe emotional distress," subject to the evidentiary hearing. Id., at ¶ 28.

{¶ 62} Unlike Miller (and McCoy), Bogart has alleged multiple and permanent

physical and mental injuries and thereby put his physical and mental health at issue. As Blakely asserts, and discussed further in response to Bogart's second assigned error, Bogart did not move the court for protection or for in camera review. Further Bogart does not contest Blakely's assertion that Bogart has suffered from back problems since 1986, and that a request for documents from the Bureau of Worker's Compensation resulted in over 1200 pages of records. Given Bogart's extensive allegations, the information sought "'to be disclosed might be within the ambit of [his] possible waiver of the physician-patient privilege,'" *Horton,* quoting *Floyd v. Copas,* and the disclosure was properly ordered.

{¶ 63} As we noted in *Horton,* "The distinction between discovery and disclosure attempts to accommodate three competing values: the confidentiality of privileged medical information, a personal injury defendant's right to effectively prepare for trial, and minimization of judicial involvement in pretrial discovery disputes. Perhaps no better accommodation is possible, particularly when trial judges must manage increasing numbers of cases. Unless and until the Supreme Court withdraws its tacit approval of the order entered in *Floyd v. Copas,* supra, orders similar to the order in this case should survive appellate scrutiny." We note, in granting the motion to compel, our resolution of this assigned error is addressed to the court's control of pretrial proceedings and not to the scope of Bogart's waiver of the physician-patient privilege and the admissibility at trial of his records.

{¶ 64} Since the trial court did not abuse its discretion in granting Blakely's motion to compel, Bogart's first assigned error is overruled.

{¶ 65} Bogart's second assignment of error is as follows:

{¶ 66} "2. IN CAMERA REVIEW IS A NECESSITY WHEN THE PARTIES CANNOT AGREE ON WHETHER MEDICAL RECORDS ARE RELATED CAUSALLY OR HISTORICALLY TO THE INJURIES CLAIMED."

{¶ 67} Again, Bogart directs our attention to several cases from other districts to assert that he is entitled to in camera review. In *Mason v. Booker*, Franklin App. No. 09AP-500, 2009-Ohio-6198, a personal injury case, the Tenth District conducted de novo review and determined, citing *Ward*, that the trial court's failure to conduct an in camera review required reversal of its order to compel the release of all medical records from a specific hospital. Bogart further relies upon *Piatt*, which held, "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 by requiring a factual basis antecedent to any in camera inspection. As stated in [*Patterson v. Zdanski*, Belmont App. No. 03 BE 1, 2003-Ohio-5464], ¶ 19:

{¶ 68} " '[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." (Citations omitted). 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. (Citation omitted). 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.' " *Piatt,* at ¶ 17-18.

Accord *Cargile v. Barrow*, Hamilton App. No. C-080423, 2009-Ohio-371; *Folmar v. Griffin*, Delaware App. No. 2005CAE080057, 2006-Ohio-1849.

{¶ 69} The *Zandanski* court, quoted in *Piatt*, noted that in camera review serves two purposes: " 'First, it allows the trial court to make an informed decision as to the evidentiary nature of the material in question rather than depending on the representations of counsel. Secondly, the in camera inspection allows the trial court to discern that aspect of the evidence which has evidentiary value from that which does not, as well as to allow the trial court to restrict the availability of that evidence, which has limited evidentiary value.' " (citation omitted). *Zandanski*, at ¶ 18.

{¶ 70} We note that while the above authorities require a "factual basis" justifying the trial court's in camera review, as Blakely asserts, Bogart failed to move the court for an in camera inspection. Bogart has alleged multiple and permanent injuries. Prior to trial, it is unreasonable and impractical to require a trial judge to attempt to determine whether a plaintiff's extensive medical history is relevant to the underlying action, and we accordingly conclude that Bogart is not entitled to in camera review. See *Nester v. Lima Memorial Hospital* , 139 Ohio App.3d 883, 2000-Ohio-1916, Walters, J., dissenting ("The appellant in this case has alleged a myriad of physical and mental ailments, * * * . This extensive range of allegations essentially places the appellant's entire medical history at issue. Therefore, I believe that the trial court did not abuse its discretion by ordering discovery of all medical records from 1973 to the present. Furthermore, I cannot agree with the majority's decision to remand for an *in camera* inspection, since I fail to see how a trial judge is supposed to determine whether a previous medical problem is relevant to the

underlying action when such a variety of disorders have been injected into the lawsuit.")

{¶ 71} Bogart's second assignment of error is overruled, and the judgment of the trial court is affirmed.

. . . . . .

FAIN, J., concurs.

GRADY, J., concurring:

{¶ 72} Bogart's complaint waived his privilege with respect to medical records of his treatment for injuries that proximately resulted from Blakely's alleged negligence. If Bogart wished to withhold the access to his medical records that Blakely sought through discovery, on a claim of privilege, it was Bogart's duty to make that claim "expressly . . . supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable (Blakely) to contest the claim." Civ.R. 26(B)(6)(a). Instead, Bogart flatly refused to sign the medical records release Blakely asked him to sign, claiming that its breadth could allow Blakely to obtain material unrelated to Bogart's alleged injuries that therefore remain privileged. That shifted the burden to Blakely to explain how any records he might wish to have are <u>not</u> privileged, which is inconsistent with the burden of demonstration that Civ.R. 26(B)(6)(a) imposed on Bogart. It also imposed an unreasonable burden on Blakely, requiring him to show how records he might wish to have are not privileged, before he even knows what they may be. Therefore, the trial court was correct when it ordered Bogart to sign the authorization, but limited to a ten-year period.

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