[Cite as *Sweet v. Sweet*, 2005-Ohio-7060.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

LORI L. SWEET,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2004-A-0062**
- vs -	:	
GREGORY A. SWEET,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2003 DR 350.

Judgment: Reversed and Remanded.

Merrie Frost, Law Offices of Merrie M. Frost, 7784 Reynolds Road, Mentor, OH 44060 (For Plaintiff-Appellant).

Leo J. Talikka, Leo J. Talikka Co., L.P.A., Talidyne Building, #100, 2603 Riverside Drive, Painesville, OH 44077-5173 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Lori L. Sweet ("Lori"), appeals from a judgment of the Ashtabula County Court of Common Pleas that granted a motion filed by appellee, Gregory A. Sweet ("Greg"), for the release of all of her medical records.

{¶2} The parties were married on August 28, 1993, and have two minor children. On August 11, 2003, Lori filed a complaint for divorce. On May 25, 2004, the court awarded temporary custody of the minor children to Lori and granted her

residential parent status. On June 30, 2004, Greg filed a counterclaim seeking sole custody of the minor children. On July 19, 2004, Lori filed a motion for appointment of a guardian ad litem for the minor children, which the court granted on July 28, 2004.

{¶3} On September 2, 2004, Greg filed a motion for release of Lori's medical records. In his motion, Greg stated in part "*** [Lori] has stated in a previous deposition that she was being treated by a physician for a condition that may affect directly the care of the *** children." In his affidavit in support of the motion, Greg stated the following: "*** he is concerned that [Lori] may be withholding more medical information regarding her medical, mental and/or physical condition." In response, Lori filed a motion for protective order, and memorandum in opposition to the motion for release. On September 9, 2004, the trial court granted Greg's motion, and denied Lori's motion for protective order. On September 14, 2004, Lori filed a motion to stay the court's order to release her medical records, pending appeal to this court. The court granted Lori's motion to stay the release on September 15, 2004.

{¶4} Lori filed a timely notice of appeal from the September 9, 2004 judgment entry and raises the following assignment of error for our review:

{¶5} "The trial court committed reversible error by granting defendant Gregory Sweet's motion for plaintiff's medical records."

{¶6} Under her sole assignment of error, Lori argues that the trial court erred in failing to conduct an in camera inspection to determine the relevancy of the medical records to be disclosed. We agree.

{¶7} The trial court has broad discretion in regulating the discovery process and, therefore, the trial court's decisions on discovery matters will not be reversed

absent an abuse of discretion. *Mauzy v. Kelly Services, In*c. (1996), 75 Ohio St.3d 578, 592; *Kelley v. Ford Motor Credit Co*. (2000), 137 Ohio App.3d 12, 18. Such a standard of review mandates affirming a trial court's decision absent a showing that the court acted unreasonably, unconscionably or arbitrarily. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. An appellate court may not substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138; *Wescott v. Associated Estates Realty Corp*., 11th Dist. Nos. 2003-L-059 and 2003-L-060, 2004-Ohio-6183, at ¶17.

{¶8} Generally, a person's medical records are privileged and, thus, undiscoverable. However, R.C. 2317.02(B)(1) provides that the physician-patient privilege is waived when the patient files any type of civil action. It states as follows: "*** [t]he 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: (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 Chapter 4123. of the Revised Code, under any of the following circumstances: *** (iii) If a medical claim *** [or] *any other type of civil action* *** is filed by the patient ***." (Emphasis added.) R.C. 2317.02(B)(1).

{¶9} "'Whenever custody of children is in dispute, the party seeking custodial authority subjects *him or herself* to extensive investigation of all factors relevant to the permanent custody award. Of major importance *** is the mental and physical health of not only the child but also the *parents*.' Emphasis added.)" *Schill v. Schill*, 11th Dist.

No. 2002-G-2465, 2004-Ohio-5114, at ¶47, quoting *Gill v. Gill,* 8th Dist. No. 81463, 2003-Ohio-180, at ¶18.

{¶10} In the case sub judice, the discovery order was made during contested custody proceedings, in an underlying divorce action. In seeking custody of the minor children, Lori's mental and physical condition, as it relates to her ability to parent her children, constituted one of the criteria to be considered by the court, under R.C. 3109.04(F)(1)(e), and Lori waived the physician-patient privilege, but solely in regard to that issue.

{¶11} This court must note that her waiver is not a complete abrogation of the physician-patient privilege. R.C. 2317.02(B)(3)(a) limits discoverable communications. It provides in relevant part: "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 submit to discovery under the Rules of Civil Procedure only as to a communication *** that related causally or historically to physical or mental injuries that are relevant to issues in the *** civil action ***." R.C. 2317.02(B)(3)(a). Thus, Greg may discover Lori's communications to her physicians, including medical records, but only those that relate causally or historically to a condition relevant to the custody issue.

{¶12} Upon review of the record, we agree that the trial court erred by ordering the release of all of her medical records without first conducting an in camera hearing for inspection of the records.

{¶13} Generally, when there is a dispute over whether certain medical records are causally or historically related to the issues in the case, a trial court should conduct

an in camera inspection of those records in order to make its determination. See *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618, 622; *Nester v. Lima Mem. Hosp.* (2000), 139 Ohio App.3d 883, 887; *Weierman v. Mardis* (1994), 101 Ohio App.3d 774, 776; *Trangle v. Rojas*, 150 Ohio App.3d 549, 2002-Ohio-6510, at ¶35 (it is incumbent on a trial court to conduct an in camera review of allegedly privileged material which may be discoverable). This inspection serves two functions: "[f]irst, 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." *Patterson v. Zdanski*, 7th Dist. No. 03 BE 1, 2003-Ohio-5464, at ¶18, citing *State v. Geis* (1981), 2 Ohio App.3d 258, 260.

{¶14} The party opposing the discovery request has the burden to establish that the requested information would not reasonably lead to discovery of relevant admissible evidence. *State ex rel. Fisher v. Rose Chevrolet, Inc.* (1992), 82 Ohio App.3d 520, 523. Thus, prior to conducting 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. Upon a showing of a good faith belief that a review of the materials

may reveal privileged material, it is necessary for the court to conduct an in camera inspection of those materials.

{¶15} In the case sub judice, Lori filed a motion for protective order, and a memorandum in opposition to the motion for release. Lori asserted that Greg's motion for release was a "fishing expedition," founded upon harassment. Lori noted that by requesting the release of her medical records, the motion was unlimited as to the nature of her medical records to be disclosed. Further, the motion for release failed to specify any prescribed time period for the medical records sought by Greg. Thus, Lori requested the court to conduct an in camera inspection of all of her medical records to determine the relevancy of her medical information to the custody and divorce proceedings.[1]

{¶16} Upon review, we find that Lori met her burden to establish a good faith belief that the release of her medical records may reveal privileged information, i.e., evidence not relating causally or historically to mental or physical conditions relevant to the custody issues. Further, Greg's blanket discovery request for release of all of Lori's medical records is overly broad on its face, and sufficient to support Lori's burden that the requested information would not reasonably lead to the discovery of relevant admissible evidence. In its order, the court granted unlimited access to all of "Lori's medical records," presumably from birth forward, including all thirty-five years of her life. The medical information to be released includes all pre-marital medical records ranging from Lori's childhood years through her adult life, without reference to any particular

1. Lori further requested that the in camera inspection be conducted "by a female judge or magistrate." However, Lori fails to present any argument in support of this request and we find no basis in the law to support it. Thus, we shall not consider this issue in her assignment of error.

medical condition related to custody issues. This fact alone establishes a basis to support a finding by the court of a good faith belief by a reasonable person that an in camera inspection of materials may reveal applicable privileged evidence. Further, we note that to require the production of thirty-five years of medical records relative to a custody proceeding without first conducting an in camera inspection or otherwise restricting the request to issues of relevancy, places an undue burden on medical facilities and medical providers in order to comply with such requests. It is clear that the court could not have reasonably determined that all of Lori's medical records were discoverable without conducting an in camera hearing. *Neftzer* at 622 (holding that an in camera inspection was required when the "'trial court's order was too broad in that it allowed unbridled disclosure of [appellant's medical records]. *** Only those deemed to be causally or historically related to physical or mental injuries that are relevant to the issues in the case are discoverable.'") (Citations omitted.)

{¶17} Based upon the foregoing, we conclude that the trial court abused its discretion by ordering all Lori's medical records be released without first conducting an in camera inspection of the medical record information. Lori's sole assignment of error is with merit.

{¶18} Accordingly, the judgment of the trial court is reversed, and this case is remanded, with instructions for the trial court to conduct an in camera inspection of the requested medical records to determine which records, if any, are relevant to the parties' custody action. Specifically, the court should only permit the discovery of medical records that relate causally or historically to a condition relevant to the issue of

custody. Further, the discovery of any relevant medical information must be subject to a confidentiality order.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶19} I respectfully dissent.

{¶20} The majority concludes that "Lori met her burden to establish a good faith belief that the release of her medical records may reveal privileged information, i.e., evidence not relating causally or historically to mental or physical conditions relevant to the custody issues." This conclusion is not supported by any evidence in the record. As acknowledged by the majority, "[w]herever custody of children is in dispute, the party seeking custodial authority subjects *him or herself* to extensive investigation of all factors relevant to the permanent custody award. Of major importance *** is the mental and physical health of not only the child but also the *parents.*" *Schill v. Schill*, 11th Dist. No. 2002-G-2465, 2004-Ohio-5114, at ¶47 (citation omitted) (emphasis sic). Lori's filing of the complaint of divorce and request for custody of the children "waives privilege as to any privileged communication that relates to an issue in the civil action." Id. at ¶46 (citation omitted); *Whiteman v. Whiteman* (Jun. 26, 1995), 12th Dist. No. CA94-12-229, 1995 Ohio App. LEXIS 2700, at *6. Unquestionably, Lori's physical and mental health is

relevant in a best interest analysis, as it pertains to the custody of the Sweets' minor children. See 3109.04(F)(1)(e); *Butland v. Butland* (Jun. 27, 1996), 10th Dist. No. 95APF09-1151, 1996 Ohio App. LEXIS 2773, at *9-*10.

{¶21} Greg Sweet motioned the trial court for an "order allowing the release of Plaintiff's medical records for the reason that Mrs. Sweet has stated in a previous deposition that she was being treated by a physician for a condition that may affect directly the care of the parties' children ***."

{¶22} Attached to the motion was an affidavit in which Greg Sweet alleged he was not aware that Lori was being treated or being prescribed medication for mood swings until she disclosed this information during deposition, and he expressed concern that she might be withholding other relevant information relating to her physical and mental health.

{¶23} In her affidavit attached to the brief in opposition to Greg's motion for release of medical records, Lori stated that she "did not believe" Greg needed the medical records and asserted that the request was a "harassment tool."

{¶24} Under Civ.R. 26, the parties have "broad powers of discovery." *State ex rel. Fisher v. Rose Chevrolet, Inc.* (1992), 82 Ohio App.3d 520, 523. "At the same time, a court may limit discovery to prevent 'fishing expeditions' in which a party gives an overly broad discovery request in the hopes of stumbling across *unforeseen* information that aids his case." *Kalaitsides v. Greene* (Jun. 12, 1996), 9th Dist. No. 17196, 1996 Ohio App. LEXIS 2395, at *10 (emphasis added). However, the court's power to limit discovery in no way modifies the well-established rule that the party opposing the discovery request always bears the burden of establishing, via operative facts, "that the

requested information would not reasonably lead to the discovery of admissible evidence." *Fisher*, 82 Ohio App.3d at 524.

{¶25} In opposing the discovery request, Lori does not deny that she consulted a physician for treatment for "mood swings." Lori simply alleged that the motion was a "fishing expedition," filed for the purpose of harassment, without citing to any underlying factual basis for her allegations. As a result, Lori has wholly failed to sustain her burden. For this court to rule otherwise creates a real risk of eviscerating the discovery process in cases of divorce and custody which, unfortunately, are all too often characterized by the need for judicial scrutiny of what otherwise might be considered confidential information.

{¶26} An in camera inspection is likewise not necessary in this case. "Because no physician-patient privilege existed at common law, the exercise of the privilege must be strictly construed against the party seeking to assert it." *Menda v. Springfield Radiologists, Inc.* (2000), 136 Ohio App.3d 656, 659 (citation omitted). Here, the majority does not dispute that Lori *waived her privilege* with respect to physical and mental health issues relevant to the best interest of her children. Moreover, "[a] party is not entitled, as a matter of right, to an in camera [inspection] when privilege is asserted," unless the party demonstrates "*a factual basis*, adequate to support a good faith belief establishing an applicable privilege or that the privilege is outweighed by other rights." *Patterson*, 2003-Ohio-5464, at ¶19; *Yoe v. Cleveland Clinic Found.*, 8th Dist. No. 81335, 2003-Ohio-875, at ¶14 (citations omitted) (emphasis added). Again, no factual basis whatsoever is offered by Lori in opposition to Greg's discovery motion. Without

a sufficient factual predicate to the contrary, the trial court did not abuse its discretion in granting Greg's motion to release medical records without an in camera inspection.

{¶27} Contrary to the majority's assertion, there is nothing *in the record* to indicate that the request for release of medical records was overly broad on its face. Lori's filing of the civil action put any and all questions about her physical and mental health directly in issue. Greg's discovery request specifically referred to Lori's treatment for "mood swings" by her physician and requested records from a single treating physician located in Erie, Pennsylvania. Furthermore, we have no proof *in the record*, nor does Lori allege in her motion in opposition, that these records encompass "all pre-marital records ranging from Lori's childhood years through her adult life." Even if this had been the case, Lori has not alleged any facts showing that these records are irrelevant to issues relating to the care and custody of her children.

{¶28} Moreover, the majority's reliance on *Neftzer* is inapposite, since the issue in that case was whether the trial court properly granted a motion to compel four of appellant's health care providers to respond to subpoenas served to them by the appellee, when no *notice* of the subpoenas was provided to the appellant. 140 Ohio App.3d at 620, 621-622. In the instant matter, discovery was requested pursuant to a properly filed motion. Thus, the burden was on Lori, and Lori alone, to demonstrate operative facts showing that the request was not reasonably designed to lead to discoverable information. It is not the role of the appellate court to engage in speculation and supposition when an appellant fails to allege any facts in support of their position. See *State v. Lorraine* (Feb. 23, 1996), 11th Dist. No. 95-T-5196, 1996

Ohio App. LEXIS 642, at *9 ("[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal") (citation omitted).

{¶29} Accordingly, I would affirm the decision of the Ashtabula County Court of Common Pleas, Juvenile Division.