[Cite as *Hoyt v. Mercy St. Vincent Med. Ctr.*, 2013-Ohio-320.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rachel K. Hoyt, et al.	Court of Appeals No. L-12-1055
Appellants	Trial Court No. CI0201007312
v.	
Mercy St. Vincent Medical Center, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: February 1, 2013

* * * * *

Daniel R. Michel and Joseph W. O'Neill, for appellants.

Beth A. Wittmann, John S. Wasung and Anne M. Brossia, for appellees Anna McMaster, M.D. and Henry County Family Physicians, Inc.

Peter R. Casey III and Jeffrey M. Stopar, for appellee John C. Mareska, M.D.

* * * * *

HANDWORK, J.

{¶ 1} This is an interlocutory appeal by the plaintiffs in a medical malpractice lawsuit. They have appealed a discovery ruling of the Lucas County Court of Common Pleas compelling appellant Rachel K. Hoyt to produce "pastoral counseling records" over

her assertion that the records are privileged under R.C. 2317.02. We reverse but for reasons other than those urged by Hoyt.

I. Background

{¶ 2} On October 21, 2010, the Hoyts filed a complaint alleging medical malpractice and medical claims against defendants Dr. Anna McMaster, Dr. John Mareska and Mercy St. Vincent Medical Center (appellees herein). The claims arise from injuries Hoyt sustained due to the on-set of a condition known as pseudo-tumor cerebri. Allegedly this condition resulted from a delay in diagnosis by Hoyt's primary care physician, McMaster, and by Mareska, the neurologist to whom she was referred. The complaint further claimed that the delayed diagnosis led to permanent injuries to Hoyt's optic nerves and blindness. Hoyt's husband, Chad, asserted a claim for the loss of her services and consortium. Appellees all answered, denying the Hoyts' claims and raising affirmative defenses.

{¶ 3} Discovery commenced and McMaster sought the production of records of "psychiatric, psychological, mental, emotional or other counseling or treatment [pertaining to Rachel Hoyt] prior to August 26, 2009" and "from August 26, 2009 to the present." Although Hoyt produced a number of documents to appellees, she resisted producing others, including "pastoral counseling records" from counseling sessions that occurred from June 25, 2007 through August 2, 2007. The alleged acts and omissions by appellees that gave rise to the Hoyts' claims occurred sometime between August 26, 2009 and November 2009.

{¶ 4} Ultimately McMaster moved to compel production of these records and certain others not relevant here. Hoyt's counsel responded that he had reviewed the records and determined them to be privileged under R.C. 2317.02, but would submit them to the trial court for an in camera review if ordered to do so. On January 20, 2012, the court issued an order which, in part, directed Hoyt to "submit all allegedly privileged records to the court for in camera inspection, along with a privilege log stating the factual basis for claiming that the records/documents are privileged and not discoverable." Hoyt's counsel then submitted the log and the records under seal for the court's in camera review, pursuant to the procedure outlined by this court in *Chasteen v. Stone Transport, Inc.*, 6th Dist. No. F-09-012, 2010-Ohio-1701 and *Piatt v. Miller*, 6th Dist. No. L-09-1202, 2010-Ohio-1363.

{¶ 5} On February 13, 2012, the trial court issued an opinion and order to compel, stating, in pertinent part:

> The Court has completed its *in camera* inspection of the privilege log and pastoral counseling records that Plaintiffs submitted pursuant to the [previous order]. * * * The Court finds that the documents listed in Plaintiffs' Privilege Log (Bates stamped 0001 to 0012) are discoverable by Defendants, notwithstanding Plaintiffs' claims to the contrary, because they *may be relevant* to Plaintiff Chad A. Hoyt's loss of consortium claim and *may also be relevant* to Plaintiff Rachel K. Hoyt's claim that her enjoyment

of life has suffered as a result of Defendants' negligence. (Emphasis added).

{¶ 6} The court then ordered Hoyt to produce the counseling records to defendants no later than February 29, 2012, ordered the parties and their counsel to hold the documents in confidence, and ordered the clerk to maintain the privilege log and the submitted documents under seal. The Hoyts have appealed the trial court's order of February 13, 2012.[1]

{¶ 7} The sole error assigned for our review states:

> The trial court erred in granting defendant's motion to compel production of plaintiff's pastoral counseling records when plaintiff had not expressly or impliedly waived her statutory privilege.

II. Standard of Review

{¶ 8} In general, discovery disputes are reviewed for an abuse of discretion. If, however, the disputed issue involves the application or scope of a particular privilege, it is a question of law that must be reviewed de novo. *Ward v. Summa Health Sys.*, 128

[1] While this appeal was pending, we note that the Hoyts filed a notice of voluntary dismissal in the trial court, pursuant to Civ.R. 41(A), and then re-filed their complaint. This was improper. *See State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga County Court of Common Pleas,* 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 and *Huntington National Bank v. Syroka*, 6th Dist. No. L-09-1240, 2010-Ohio-1358, ¶ 3-7 (trial court divested of jurisdiction once a notice of appeal is filed).

Ohio St.3d 212, 2010-Ohio- 6275, 943 N.E.2d 514, ¶ 13; *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237.

{¶ 9} Counsel for appellee McMaster, however, attempts to avoid a de novo review, suggesting that while that level of review is appropriate for "purely legal questions," such as whether a particular communication is privileged, the narrower question of whether the pastoral counseling records are "causally or historically [related]" under R.C. 2317.02(B) (3)(a) to Hoyt's injuries in the medical claim is a factual issue that warrants review under the more deferential abuse-of-discretion standard.[2] For this contention, McMaster cites *Bogart v. Blakely*, 2d Dist. No. 2010-CA13, 2010-Ohio-4526.

{¶ 10} We do not agree, and although reversal is required for a different reason, we will briefly address that issue.

{¶ 11} "[W]hether *the information sought* is confidential and privileged from disclosure is *a question of law that is reviewed de novo*." (Emphasis added). *Schlotterer* at ¶ 13. Counsel has misconstrued the import of the "causally or historically [related]"

[2] In pertinent part, R.C. 2317.02(B)(3)(a) states:

> If the [physician-patient 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 * * * 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* * * * by the patient in question in that relation, *or the physician'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*[.]" Emphasis added.

language in R.C.2317.02(B)(3)(a). That language is integral to a full withdrawal of the privilege for confidential communications in medical records. It operates as a secondary, determining limitation that might, or might not, further shield particular medical records from disclosure once the privilege becomes *partially* inapplicable under R.C. 2317.02(B)(1)(a)(iii) because the claimant filed a civil action asserting a medical claim. *Patterson v. Zdanski*, 7th Dist. No. 03-BE-1, 2003-Ohio-5464, ¶ 13-15 ("But this exception [for 'casually or historically' related communications or records] does not totally abrogate the privilege.")

{¶ 12} Correctly assessing this limitation as it bears on the medical records at issue goes directly to "whether the information sought" remains privileged or is discoverable. Although in some sense a more particularized question, it is embedded in the operation of the privilege itself, and thus whether it was decided correctly is a matter of law. More generally, when the basis for a lower court's judgment is asserted to be an erroneous interpretation or application of a statute, the abuse-of-discretion standard is simply inappropriate. *Schlotterer, supra; Giusti v. Akron Gen. Med. Ctr*., 178 Ohio App.3d 53, 2008-Ohio-4333, 896 N.E.2d 769, ¶ 12 (9th Dist.); *Huntsman v. Aultman Hosp.*, 5th Dist. No. 2006 CA 00331, 2008-Ohio-2554, ¶ 50.

{¶ 13} Hence, the entirety of the privilege issue before us is subject to de novo review. *Cornwell v. N. Ohio Surgical Ctr.*, 6th Dist. No. E-09-001, 2009-Ohio-6975, ¶ 18.

III. Analysis

A) Which Privilege?

{¶ 14} Absent a valid waiver, privileged matter is excepted from the scope of permissible discovery.[3] The parties agree that the disputed records in this appeal are those of a "licensed social worker," Kelly J. McMaster, MSW, LSW.[4] The records pertain to counseling sessions between McMaster and Hoyt that took place over a six-week period two years *before* the alleged negligent acts or omissions of appellees that gave rise to Hoyt's suit. Communications between a licensed social worker and her client are unquestionably privileged. *Rulong v. Rulong*, 8th Dist. No. 84953, 2004-Ohio-6919, ¶ 8, citing *Voss v. Voss*, 62 Ohio App.3d 200, 205, 574 N.E.2d 1175 (8th Dist.1989).

{¶ 15} Notwithstanding that the parties have argued less about whether Hoyt waived the *physician-patient* privilege in filing suit and more vigorously about the reach of R.C. 2317.02(B)(3)(a)'s "causally or historically [related]" limitation in pursuing McMaster's *counseling* records, that privilege is inapplicable here. The relevant privilege is determined not by the type of the lawsuit, but by the nature of the

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[3] "Discovery may be had for any *unprivileged* matter relevant to the litigation, including information that is inadmissible if such material appears reasonably calculated to lead to the discovery of admissible evidence. Civ.R. 26(B)(1)." (Emphasis added). *Piatt*, 6th Dist. No. L-09-1363, 2010-Ohio-1363, ¶ 12.

[4] To avoid confusion, the parties have represented that counselor Kelly J. McMaster is unrelated to defendant-appellee, Dr. Anna McMaster.

professional relationship in which the confidential communications occurred and during which any records reflecting those communications were created. R.C. 2317.02(G)(1) establishes the professional privilege for counseling records, and yet in their briefs the parties only passingly refer to it. That section addresses confidential communications and advice between certain *mental-health professionals* and their clients, which includes communications with a licensed social worker. The parties and (apparently) the trial court simply assumed that the provisions of R.C. 2317.02(B) apply to the waiver of the counselor-patient privilege under R.C. 2317.02(G). They do not.[5]

B) Counselor-Patient Privilege

{¶ 16} Under R.C. 2317.02, the framework for lifting the professional privilege from counseling records differs from that for medical records. *Folmar v. Griffin*, 166

[5] Neither party has suggested that the counseling records here were compiled in a hospital setting. *See Rulong, supra,* at ¶ 7. Nor has it been claimed that counselor McMasters is somehow a physician for the purpose of applying R.C. 2317.02(B). *See Folmar, supra,* at ¶ 22-26. ("Appellant's records [may] contain both psychiatric records from psychiatrists, who *are* physicians, and also therapy records from mental-health professionals who *are not* physicians." Emphasis added.) Regarding that point, R.C. 4732.19 states: "The confidential relations and communications between a licensed psychologist or licensed school psychologist and client *are placed upon the same basis* as those between physician and patient under [R.C.2317.02(B)]." The emphasized language has been construed to mean that *all* the provisions of the physician-patient privilege for medical records, including the "causally and historically [related]" limitation, extend to "psychiatric *or psychological* records," even though psychologists are not physicians. *See McCoy v. Maxwell*, 139 Ohio App.3d 356, 358-359, 743 N.E.2d 974 (11th Dist.2000).

Ohio App.3d 154, 2006-Ohio-1849, 849 N.E.2d 324, ¶ 23 (5th Dist.). For counseling records, the pertinent portion of R.C. 2317.02 states:

> The following persons shall not testify in certain respects:
>
> * * *
>
> (G)(1) A school guidance counselor, * * * *a person licensed* * * * *as a* professional clinical counselor, *professional counselor, social worker, independent social worker*, marriage and family therapist or independent marriage and family therapist, or [registered social work assistant] *concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies*:
>
> (a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.
>
> (b) The client gives express consent to the testimony.
>
> (c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent.
>
> (d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the client is not germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code. (Emphasis added).

C) Application

{¶ 17} In a medical malpractice/medical claims lawsuit, if the disputed records are covered by R.C. 2317.02(B), because they are a *physician's* records, then R.C. 2317.02(B)(1)(a)(iii) partially removes the privilege, but the records remain subject to a further determination under R.C. 2317.02(B)(3)(a) that they are "related causally or historically to physical or mental injuries that are relevant to issues in the medical claim." If, however, the disputed records are the counseling records of a licensed social worker or other mental-health professional or therapist identified in Subsection (G)(1), they are governed by that subsection and are discoverable *only if* a circumstance listed in

(a) through (g) is found to apply. If not, they are privileged and not discoverable. *Folmar* at ¶ 26; *Thompson v. Chapman*, 176 Ohio App.3d 334, 2008-Ohio-2282, 891 N.E.2d 1247, ¶ 20 (5th Dist.) ("[C]ounseling records [are] governed by subsection (G), [and] they are admissible only if one or more of the statutory exceptions applies"). Finally, even when a professional privilege is found to be inapplicable to certain records, and thus no bar to their discovery under the Civil Rules, they may yet be inadmissible at trial under the Rules of Evidence.

IV. Conclusion

{¶ 18} Nothing in the record or in the challenged order indicates that the trial court applied the provisions of R.C. 2317.02(G)(1) in assessing whether Hoyt's pastoral counseling records were properly discoverable. Instead, the court accepted appellees' contention that the waiver provisions for physician-patient communications applied to these records and ruled that they were "relevant" to Rachel Hoyt's claim that her "physical capacities, function, and enjoyment of life have suffered," and to her husband's loss of consortium claim. Consequently, this case must be remanded to the trial court to reconduct an in camera review and explicitly determine whether the pastoral counseling records fall under one of the exceptions contained in R.C. 2317.02(G)(1). Any record that the court finds to be privileged should be placed in the file under seal, so we may review that finding if assigned as error in a subsequent appeal.

{¶ 19} Accordingly, and for the foregoing reasons, the Hoyts' sole assigned error is well-taken.

{¶ 20} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby reversed as to the order compelling production of Hoyt's pastoral counseling records. This case is remanded to the trial court for further proceedings consistent with this decision. Pursuant to App.R. 24, costs are assessed against appellees.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE