IN THE SUPREME COURT OF OHIO

CASE NO. 20-1100

DEBRA A. HEIMBERGER,
Plaintiff-Appellant,

-vs.-

MICHAEL HEIMBERGER, et al.,
Defendants-Appellees.

DEFENDANTS-APPELLEES' MEMORANDUM IN RESPONSE

Appeal from the Court of Appeals, Eleventh Appellate District
Court of Appeals Case No. 94270

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1. STATEMENT OF DEFENDANTS-APPELLEES' POSITION AS TO WHETHER A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED, AND AS TO WHETHER THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.

The Memorandum in Support of Jurisdiction filed by Plaintiff-Appellant Debra Heimberger ("Appellant") is deficient, as it does not contain a "thorough explanation of why a substantial constitutional question is involved, [or] why the case is of public or great general interest," which is required by Rule 7.02(C)(2) of the Rules of Practice of this Court.

In fact, there is no substantial constitutional question raised in this civil action, which involves trial court rulings on discovery disputes and the applicability of various alleged privileges thereto.

Also, this is not a case of public or great general interest. In her Memorandum, Appellant rehashes her flawed appellate arguments regarding the trial courts' application of her alleged mediator privilege and doctor-patient privilege to the discovery process in this action. Her arguments are more fully addressed below, along with the rulings properly made by the trial and appellate courts. Notably, in reaching their rulings, the courts applied the applicable statutes, the Civil Rules and well-settled case law to the unique facts of this case. There were no departures from precedent, new constructions, novel interpretations or surprises in the decisions, and there is no public or great general interest in any further review by this Court.

Thus, this Court should decline to exercise its discretionary jurisdiction in this case.

2. STATEMENT OF THE CASE AND FACTS.

a. Procedural History.

Appellant commenced this civil action by filing her Complaint on April 26, 2019. In the Complaint, Appellant asserted claims against her brother, Defendant-Appellee Michael Heimberger, and her sister-in-law, Defendant-Appellee Laura Heimberger. Appellant asserted claims for tortious interference with her alleged expectancy of an inheritance from her parents, Robert and Barbara Heimberger. Also, she asserted that Appellees engaged in unspecified acts of "extreme and egregious behavior" that caused her to suffer emotional distress and anxiety. Notably, her allegations date back to alleged promises made at Easter 2004, and in some cases refer vaguely to much earlier childhood events. Appellant seeks compensatory and punitive damages, costs and other relief.

In response, Appellees filed their Answer and Counterclaims, denying the allegations of the Complaint, and raising affirmative defenses, including Appellant's failure to state a claim and the applicable statutes of limitations. Additionally, they asserted counterclaims, including a claim that Appellant is engaging in frivolous conduct and that Appellant is a vexatious litigator.

Thereafter, Appellees sought initial written discovery from Appellant in separate sets of interrogatories and requests for the production of documents, and Appellees sought to compel Appellant to appear for a video-taped deposition. In connection therewith, Appellant refused to provide answers or responses, and Appellant declined to appear for deposition, causing the parties to file multiple discovery-related motions,

including Appellees' motions to compel discovery and a deposition, and Appellant's motion for a protective order.

The trial court granted Appellees' motions to compel discovery and denied Appellant's motion for protective order, ordering Appellant to provide full responses to Appellees' written discovery requests and to appear for a videotaped deposition.

In response, Appellant filed a notice of appeal to the Court of Appeals, Eleventh District, seeking reversal of the trial court's rulings, including the trial court's finding that there is no mediator communication privilege applicable in this civil action and the trial court's finding that Appellees are entitled to discovery of information regarding Appellant's relevant medical and psychological treatments, including the names and addresses of persons who have provided such treatments to her, if any.

Following oral argument, the Court of Appeals issued its opinion on July 27, 2020, affirming the trial court's rulings.

On September 10, 2020, Appellant filed her Notice of Appeal and Memorandum in Support of Jurisdiction in this Court, asking this Court to exercise its discretionary jurisdiction.

b. Summary of Facts Relevant to this Appeal.

First, Appellant is asserting that the trial court and court of appeals "totally" disregarded her alleged mediator privilege. This is untrue.

Although her alleged privilege appears to arise in the context of her refusal to respond to the pending written discovery requests of Appellees, or perhaps her speculation regarding her future deposition, the specific application of the alleged

privilege remains unclear to this day. Appellant provided no answers, responses or objections to the discovery requests of Appellee Laura Heimberger, and she never asserted a privilege in response to any specific interrogatory or request for production therein. Appellant provided some superficial responses to a few of the interrogatories of Appellee Michael Heimberger, but she only asserted a privilege on two occasions, as follows:

> i. In response to his Interrogatory 10, which seeks the identity of "all persons who are serving as legal counsel for [Appellant] in connection with this civil action."
>
> ii. In response to his Interrogatory 13, which seeks the identity of "all persons with whom [Appellant] is consulting, and all persons with whom [Appellant has] consulted, regarding issues of law or legal process or procedure in relation to this civil action."

She has never explained the relevancy and applicability of a privilege for mediation communication to these interrogatories. By doing so, Appellant is withholding information that is highly relevant to Appellees' defense of the Appellant's claims, as well as their counterclaims regarding frivolous conduct and vexatious litigation.

Further, Appellees note that Appellant has identified Robert Churilla as a person holding one or more unidentified privileges. Mr. Churilla is a former attorney who was permanently disbarred from the practice of law in Ohio in 1997 by reason (*inter alia*) of his continuing course of deceit and misrepresentation to both clients and the courts. See, *Cuyahoga County Bar Association v. Churilla* (1997), 78 Ohio St.3d 348, 349-350. If Mr. Churilla is providing legal advice and counsel to Appellant, then he may be a

necessary party to this or another civil action. Also, he will be a relevant fact witness regarding Appellees' counterclaims, and he may be engaged in the unauthorized practice of law. Neither Appellant nor Mr. Churilla should not allowed to hide such misconduct behind an alleged privilege for mediation communication in this action.

The dimensions of Appellant's alleged privilege for mediation communication are vague at best, as Appellant has never provided Appellees or any court with a description of the information or documents that she is withholding, and as she has never expressly identified the requests where she is asserting any such privilege.

The sole exception was provided in Appellant's Motion for Protective Order, where she asserted that Mr. Churilla sent a letter to Appellees' parents in June 2015, offering to serve as a mediator in a prior lawsuit. The parents declined the offer, and Mr. Churilla was never engaged to serve as a mediator in that dispute. Moreover, his letter was never sent to Appellees, who were not parties to that dispute. Thus, the relevancy of that episode is entirely unclear, and it is hard to justify Appellant's continued use of it to block all relevant discovery in this action.

Second, Appellant is asserting that the trial and appellate courts have given Appellees "unbridled and unlimited rights to ask for any medical records of Appellant that violates her right to a doctor-patient privilege." This is plainly untrue, too.

In their discovery requests, Appellees sought basic information regarding the injuries alleged in the Complaint, which allegedly include extreme emotional distress and similar medical and psychological injuries. To conduct basic, preliminary discovery regarding Appellant's claims, Appellees requested a disclosure of the relevant medical

and psychological providers. In response, Appellant refused to identify any of her providers, so nobody has any idea who – if anyone – has provided any medical or psychological treatment in connection with Appellant's alleged injuries. Thus, Appellees have been unable to conduct any discovery regarding the alleged injuries, and Appellees have been unable to request or obtain any relevant records.

As is noted above, Appellant provided no responses to Appellee Laura Heimberger's discovery requests, and Appellant provided superficial responses to only a few of Appellee Michael Heimberger's discovery requests. In his Interrogatory 19, he sought information regarding the people who provided care or treatment to Appellant for the "immense fear" referenced in Paragraph 15 of the Complaint. In response, Appellant merely stated, "Will supplement as needed after [Appellees'] response to [Appellant's] discovery." This evasive response makes no sense, especially considering that Appellant has never propounded any discovery in this action. Also, this response makes reference to no privilege for physician-patient communication.

At other points, Appellant asserted that she is unable to identify her providers until Appellees' counsel creates a "waiver or release." Yet, without knowing the names or addresses of the providers, it is impossible to create any such releases.

As a result of Appellant's refusal to provide any information or documents relating to her medical or psychological treatments or providers, Appellees have been denied a full and fair discovery. The trial court correctly ordered Appellant to provide responses to Appellees' discovery, and to appear for deposition, and the appellate court correctly affirmed.

3. ARGUMENT IN SUPPORT OF DEFENDANTS-APPELLEES' POSITIONS REGARDING APPELLANT'S PROPOSITIONS OF LAW.

Appellant's First Proposition of Law:

> "The Appeals Court erred in finding a mediator privilege did not exist when it held that Defendant-Appellees could conduct discovery on mediator communications in another case not in which they were not parties [sic]."

Contrary to this awkwardly-worded proposition, neither the trial nor appellate court questioned the existence of a privilege for mediation communication. Rather, the trial and appellate courts found that Appellant has not properly asserted it in this action.

Initially, contrary to Appellant's protestations, there is no privilege for mediation communication unless and until the parties to a dispute are required to mediate, or until they agree to mediate. Ohio's Uniform Mediation Act (the "Act") is found at Chapter 2710 of the Ohio Revised Code, and it has been effective in Ohio since October 2005. As is set forth in Section 2710.02(A), the Act is applicable in the following circumstances:

> (1) The mediation parties are *required* to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator.
> (2) The mediation parties and the mediator *agree* to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure.
> (3) The mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

Ohio Rev. Code §2710.02(A) (emphasis added).

Thereafter, to the extent the Act is applicable, a privilege arises in connection with any "mediation communication," which is defined as a "statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of

considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." Ohio Rev. Code §2710.01(A). The scope of the privilege is outlined in Ohio Rev. Code §2710.03, which provides privileges for mediation parties, mediators and non-party participants.

As the Act expressly provides, however, mediation communications are only confidential "to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code." Ohio Rev. Code §2710.07. Thus, there is no mediation – and no privilege for mediation communication – until the parties to a dispute are either required to mediate, or they agree to mediate.

In this case, Appellant is not entitled to withhold any information or documentation from Appellees on the basis of any purported mediation privilege, because Appellant has failed to show that any such privilege even exists. Appellees have never been *required* to mediate with Appellant in connection with any of the claims in this action, and Appellees never *agreed* to mediate with Appellant in connection with any such claims. Moreover, nobody else – including Appellant's long-suffering parents – were required or agreed to mediate with her.

Appellant has provided citations to several cases, in an effort to show that no mediation requirement or agreement is necessary. However, none of those cases found a mediation privilege in the absence of a requirement or agreement to mediate.

Next, the author of Appellant's appellate brief vigorously argues that the trial court "does not have statutory authority to determine who can act as a private mediator."

In its Judgment Entry, the trial court noted the circumstances that made Mr. Churilla unacceptable to Appellant's parents. However, the trial court never found that he was disqualified to serve as a mediator, and this argument is generally irrelevant.

Notably, neither Appellant nor Mr. Churilla can use an alleged "mediator-client privilege" to conceal the unauthorized practice of law, if it is occurring. See, Ohio Rev. Code §2710.04(C) and §2710.05(A)(4).

Finally, even if Appellant could show that she was a party to a mediation at some point in her past, Appellant failed to show that she is entitled to a protective order in this case on the basis of any privilege for mediation communication. The burden of showing that information or documents are confidential or privileged is on the party seeking to exclude the material. *Lemley v. Kaiser*, 6 Ohio St.3d 258, 263-264 (1983); *Ro-Mai Industries, Inc. v. Manning Properties*, 2010 Ohio 2290 at P25 (Portage Cty. 2010). In this case, Appellant wholly failed to meet this burden at every stage.

As is noted above, Appellant failed to demonstrate that her parents or Appellees ever mediated any dispute with her. Thus, the Act does not appear to apply at all, and Appellant cannot show that she possesses any information or documentation that constitute privileged "mediation communication" within the definition of that term in Ohio Rev. Code §2710.01(A).

Further, per Civil Rule 26(B)(6)(a), a party seeking a protective order is required to support a claim of privilege with "a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Even if there was a mediator or mediation at some point, Appellant

has never described any of the information or documents that she claims to be privileged by reason thereof. Instead, she simply refused to answer Appellees' discovery requests.

Further, even if Appellant could prove that she has possession of some information or documents that constitute privileged "mediation communication" between Mr. Churilla and her parents, Appellees have not sought to discover any such information or documents. Appellees' written discovery requests are directed to Appellant's claims and Appellees' counterclaims in this civil action.

A trial court enjoys considerable discretion in the regulation of discovery. *Li v. Olympic Steel, Inc.*, 2012 Ohio 603 (Cuyahoga Cty. 2012); *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d 663, 668 (Summit Cty. 1990). Generally, a trial court's decision to deny a motion for protective order should be reviewed for an abuse of discretion. *Mauzy v. Kelly Services, Inc*., 75 Ohio St.3d 578, 592 (1996). As this Court has indicated, an "abuse of discretion" is more than an error of judgment, and it implies that the trial court's ruling was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). In this case, Appellant plainly failed to show an abuse of discretion.

Of course, when a trial court decides whether information or documents are themselves confidential or privileged, that decision is a question of law, and that decision is reviewed *de novo*. *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 183 (2009); *Ro-Mai*, 2010 Ohio 2290 at P26. In this case, however, Appellant has not identified any information or documents that are allegedly confidential or privileged, so

the trial court was never asked to make any such decision, and there are no such decisions for this Court to review *de novo*.

In this case, the trial court's Judgment Entry granting Appellees' motions to compel, and denying Appellant's motion for protective order, was correctly affirmed by the appellate court, and this Court need conduct no further review of the matter.

Appellant's Second Proposition of Law:

> "The Appeals Court erred in finding a doctor-patient privilege did not exist for some of her medical documents with no regard to any limitations on the time frame that records could be sought."

Despite the assertions made in Appellant's memorandum, Appellant never asked the trial court to put time parameters on Appellees' requests for medical and psychological discovery. It is difficult to understand Appellant's assertions that the trial court erred on this issue, as the request was never made by her.

In any case, Appellant is not entitled to any such protective order. Appellees' discovery requests are addressed to the claims made in the Complaint, and do not go back to the beginning of time. Also, at this stage, Appellees have merely requested the names of the persons who provided treatment for the injuries alleged in the Complaint. The mere names and address of her medical and psychological providers are not privileged physician-patient communications.

Also, once again, Appellant made no effort to satisfy the requirements for a protective order. First, as is noted above, whenever a party seeks to withhold information or documents on a claim that they are privileged, "the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or

things not produced that is sufficient to enable the demanding party to contest the claim." Civil Rule 26(B)(6)(a). Appellant has not done this.

Second, to the extent Appellant seeks to withhold information or documents on the basis of a physician-patient privilege, it is her burden to show that the privilege should be so applied. In this regard, Appellant must overcome Ohio Rev. Code §2317.02(B)(3)(a), which provides that communication between patients and their physicians are privileged, but also provides that the privilege does not apply when the patient files a civil action and the records are related causally or historically to physical or mental injuries that are relevant to the issues in the action. See, *Marcum v. Miami Valley Hospital*, 2015 Ohio 1582, at P9 (Montgomery Cty. 2015). As one Ohio court stated, "Because the physician-patient privilege is statutory and in derogation of common law, it must be strictly construed against the party seeking to assert it." *Csonka-Cherney v. ArcelorMittal Cleveland, Inc.*, 2014 Ohio 836, at P. 15. As another court stated, it is the movant's burden to present the court with sufficient information to allow the court to make a factual finding whether the medical records are not subject to the statutory waiver because the records are not causally or historically related to the medical issues in the case. *Marcum*, 2015 Ohio 1582, at P17.

Appellant has not done this. Rather, she is withholding relevant discovery behind broad, vague assertions that she is being "bulldozed" because Appellees have the audacity to request the names of the providers of her medical and psychological treatment for the injuries described in her Complaint.

Appellant has alleged extreme emotional distress in her Complaint, and she is seeking an award of monetary damages from Appellees by reason thereof. By doing so, Appellant made her medical and psychological records relevant, and waived her right to a privilege to the extent those records are relevant to her claims.

Third, it is notable that Appellant continues to assert that the trial court "abrogated is responsibility to examine the physician-counsel-patient privilege" and failed to conduct "an *in camera* hearing … to determine what records are relevant to the issues in this case." (Appellant brief, pgs. 13 – 14.) Yet, THERE ARE NO RECORDS TO REVIEW, whether *in camera* or otherwise. Appellant has refused to identify her providers, so Appellees have been unable to request any records, and there are no records to review.

4. CONCLUSION

For the foregoing reasons and authorities, Defendants-Appellees Michael and Laura Heimberger respectfully request this Court to decline to exercise jurisdiction in this civil action. The trial and appellate courts correctly applied settled law to the unique facts of this case, and there is no public or great general interest in any further review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendants-Appellees' Memorandum in Response has been sent by ordinary U. S. mail, postage prepaid, this 11th day of October 2020, to the following:

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