Overview of Ohio Workers' Comp and Personal Injury Litigation and Privilege Considerations for Ohio New Lawyer Training --by Jedidiah Bressman, Esq.

Summary and Attachments

1. Overview of PI and Worker's Compensation Court Litigation

2. Physician-Patient Privilege
   a. R.C. 2317.02(B)
   b. Dineen v. Pelfrey, 2022-Ohio-2035
   c. Gentile v. Duncan, 2013-Ohio-5540

3. Attorney-Client Privilege
   a. R.C. 2317.02(A)
   b. MA Equip. Leasing I, LLC v. Tilton, 980 N.E. 1072.
   c. Clapp v. Mueller Elec. Co., 162 Ohio App. 3d 810.

ORC Ann. 2317.02

Current through File 132 of the 134th (2021-2022) General Assembly; acts signed as of as of July 29, 2022.

Page's Ohio Revised Code Annotated > Title 23: Courts — Common Pleas (Chs. 2301 — 2337) > Chapter 2317: Evidence (§§ 2317.01 — 2317.62) > Competency of Witness and Evidence (§§ 2317.01 — 2317.20)

§ 2317.02 Privileged communications.

The following persons shall not testify in certain respects:

(A)

(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by *section 2151.421 of the Revised Code* to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning either of the following:

(a) A communication between a client in a capital case, as defined in *section 2901.02 of the Revised Code*, and the client's attorney if the communication is relevant to a subsequent ineffective assistance of counsel claim by the client alleging that the attorney did not effectively represent the client in the case;

(b) A communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

(B)

(1) A physician, advanced practice registered nurse, or dentist concerning a communication made to the physician, advanced practice registered nurse, or dentist by a patient in that relation or the advice of a physician, advanced practice registered nurse, or dentist given to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by *section 2151.421 of the Revised Code* to have waived any

testimonial privilege under this division, the physician or advanced practice registered nurse may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician, advanced practice registered nurse, 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:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in *section 2305.113 of the Revised Code*, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered 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.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician, advanced practice registered nurse, or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician, advanced practice registered nurse, or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician, advanced practice registered nurse, or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)

(i) If the communication was between a patient who has since died and the deceased patient's physician, advanced practice registered nurse, or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, advanced practice registered nurse, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)

(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to *section 2317.022 of the Revised Code*, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of *section 2317.422 of the Revised Code* does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(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, advanced practice registered nurse, 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, advanced practice registered nurse, or dentist by the patient in question in that relation, or the advice of the physician, advanced practice registered nurse, or dentist given 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, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician, advanced practice registered nurse, or dentist as provided in division (B)(1)(c) of this section, the physician, advanced practice registered nurse, or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of *section 2317.422 of the Revised Code* does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician or advanced practice registered nurse to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient or advanced practice registered nurse-patient relation.

(5)

(a) As used in divisions (B)(1) to (4) of this section, “communication” means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician, advanced practice registered nurse, 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.

(b) As used in division (B)(2) of this section, “health care provider” means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) “Ambulatory care facility” means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. “Ambulatory health care facility” does not include the private office of a physician, advanced practice registered nurse, or dentist, whether the office is for an individual or group practice.

(ii) “Emergency facility” means a hospital emergency department or any other facility that provides emergency medical services.

(iii) “Health care practitioner” has the same meaning as in *section 4769.01 of the Revised Code*.

(iv) “Hospital” has the same meaning as in *section 3727.01 of the Revised Code*.

(v) “Long-term care facility” means a nursing home, residential care facility, or home for the aging, as those terms are defined in *section 3721.01 of the Revised Code*; a residential facility licensed under *section 5119.34 of the Revised Code* that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults; a nursing

facility, as defined in *section 5165.01 of the Revised Code*; a skilled nursing facility, as defined in *section 5165.01 of the Revised Code*; and an intermediate care facility for individuals with intellectual disabilities, as defined in *section 5124.01 of the Revised Code*.

(vi) "Pharmacy" has the same meaning as in *section 4729.01 of the Revised Code*.

(d) As used in divisions (B)(1) and (2) of this section, "drug of abuse" has the same meaning as in *section 4506.01 of the Revised Code*.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, advanced practice registered nurses, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by *section 307.628 of the Revised Code* or the immunity from civil liability conferred by *section 2305.33 of the Revised Code* upon physicians or advanced practice registered nurses who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in *section 2305.33 of the Revised Code* and "advanced practice registered nurse" has the same meaning as in *section 4723.01 of the Revised Code*.

(C)

(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of *section 2151.421 of the Revised Code* to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(F) A person who, if a party, would be restricted under *section 2317.03 of the Revised Code*, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G)

(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in *section 3319.22 of the Revised Code*, a person licensed under Chapter 4757. of the Revised Code as a licensed professional clinical counselor, licensed professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a 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.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under *section 2151.421 of the Revised Code*.

(H) A mediator acting under a mediation order issued under division (A) of *section 3109.052 of the Revised Code* or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to *section 4931.06 of the Revised Code* or Title II of the "Communications Act of 1934," *104 Stat. 366* (1990), *47 U.S.C. 225*, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

Nothing in this section shall limit any immunity or privilege granted under federal law or regulation.

(J)

(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, 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:

(a) If the patient or the guardian or other legal representative of the patient gives express consent.

(b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in *section 2305.113 of the Revised Code*, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor'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, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.

(4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to, any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(K)

(1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.

(2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:

(a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.

(b) The individual who received crisis response services gives express consent to the testimony.

(c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L)

(1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about any of the following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply to any of the following:

(a) A criminal action or proceeding involving an offense under *sections 2903.01* to *2903.06 of the Revised Code* if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

History

RS § 5241; S&S 558; S&C 1038; 51 v 57, § 315; 67 v 113, § 314; GC § 11494; Bureau of Code Revision, 10-1-53; 125 v 313 (Eff 10-13-53); 136 v H 682 (Eff 7-28-75); 136 v H 1426 (Eff 7-1-76); 138 v H 284 (Eff 10-22-80); 140 v H 205 (Eff 10-10-84); 141 v H 528 (Eff 7-9-86); 141 v H 529 (Eff 3-11-87); 142 v H 1 (Eff 1-5-88); 143 v S 2 (Eff 11-1-89); 143 v H 615 (Eff 3-27-91); 143 v S 3 (Eff 4-11-91); *144 v S 343* (Eff 3-24-93); *145 v S 121* (Eff 10-29-93); *145 v H 335* (Eff 12-9-94); *146 v S 230* (Eff 10-29-96); *146 v S 223* (Eff 3-18-97); *147 v H 606* (Eff 3-9-99); *148 v H 448* (Eff 10-5-2000); *148 v S 172* (Eff 2-12-2001); *148 v S 180* (Eff 3-22-2001); *148 v H 506* (Eff 4-10-2001); *149 v H 94* (Eff 9-5-2001); *149 v H 533* (Eff 3-31-2003); *149 v H 374* (Eff 4-7-2003); *149 v S 281*. Eff 4-11-2003; *151 v S 19*, § 1, eff. 1-27-06; *151 v H 144*, § 1, eff. 6-15-06; *151 v S 17*, § 1, eff. 8-3-06; *151 v S 8*, § 1, eff. 8-17-06; *151 v S 117*, § 1, eff. 10-31-07; *153 v S 162*, § 1, eff. 9-13-10; *2011 HB 153*, § 101.01, eff. July 1, 2011; *2012 HB 487*, § 101.01, eff. Sept. 10, 2012; *2012 HB 461*, § 1, eff. Mar. 22, 2013; *2013 HB 59*, § 101.01, eff. Sept. 29, 2013; *2014 HB 232*, § 1, eff. July 10, 2014; *2014 hb663*, § 1, effective March 23, 2015; *2016 hb216*, § 1, effective April 6, 2017.

Annotations

Notes

Editor's Notes

This date is provided by the Ohio Secretary of State. The effective date was determined in *State ex rel. Ohio General Assembly v. Brunner (2007 Ohio LEXIS 1954, 2007 Ohio 4460, 115 Ohio St. 3d 103, 873 NE2d 1232*) subject to the filing of a referendum petition.

The provisions of §§ 6 and 7 of *151 v S 117* read as follows:

SECTION 6. The General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The common law established in *Boone v. Vanliner Ins. Co. (2001), 91 Ohio St.3d 209*, *Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638*, and *Peyko v. Frederick (1986), 25 Ohio St.3d 164*, is modified accordingly to provide for judicial review regarding the privilege.

SECTION 7. *Section 2317.02 of the Revised Code* is presented in this act as a composite of the section as amended by Sub. H.B. 144, Sub. S.B. 8, and Am. Sub. S.B. 17 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of *section 1.52 of the Revised Code* that amendments are to

be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 3 of *151 v S 19* read as follows:

SECTION 3. *Section 2317.02 of the Revised Code* is presented in this act as a composite of the section as amended by Am. Sub. H.B. 374, Am. H.B. 533, and Am. Sub. S.B. 281, all of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of *section 1.52 of the Revised Code* that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Amendment Notes

The 2016 amendment by HB 216 inserted “advanced practice registered nurse” or variants throughout the section; substituted “advice of the physician, advanced practice registered nurse, or dentist given” for “physician's or dentist's advice” in the first introductory paragraph of (B)(1) and in (B)(3)(a); inserted “or advanced practice registered nurse-patient “in (B)(4); and added “and ‘advanced practice registered nurse’ has the same meaning as in section 4723.01 of the Revised Code” at the end of (B)(7).

The 2014 amendment by HB 663, added “either of the following” to the end of the introductory language of the second paragraph of (A)(1); added (A)(1)(a); and added the (A)(1)(b) designation.

The 2014 amendment by HB 663 inserted: “either of the following: (a) A communication between a client in a capital case, as defined in section 2901.02 of the Revised Code, and the client’s attorney if the communication is relevant to a subsequent ineffective assistance of counsel claim by the client alleging that the attorney did not effectively represent the client in the case; (b)” in (A)(1).

The 2014 amendment by HB 232 inserted “licensed” preceding “professional” twice in the introductory language of (G)(1).

The 2013 amendment, in (B)(5)(c)(v), substituted “section 5119.34” for “section 5119.22”, substituted “as defined in section 5165.01” for “or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20” following “a nursing facility”, and substituted “skilled nursing facility, as defined in section 5165.01 of the Revised Code; and an intermediate care facility for individuals with intellectual disabilities, as defined in section 5124.01 of the Revised Code” for “facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the ‘Social Security Act,’ 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended”.

The 2012 amendment by HB 461, in the first paragraph of (A)(1), inserted “concerning” following “that relation or” in the first sentence and substituted “reveals the substance of attorney-client communications in a nonprivileged context” for “testifies” in the second sentence.

The 2012 amendment by HB 487, in (B)(5)(c)(v), substituted “a residential facility licensed under section 5119.22” for “an adult care facility, as defined in section 5119.70” and inserted “that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults”; and made a stylistic change.

The 2011 amendment substituted “section 5119.70” for “section 3722.01” in (B)(5)(c)(v).

153 v S 162, effective September 13, 2010, corrected internal references.

151 v S 117, effective October 31, 2007, added (A)(2); and corrected internal references and made minor stylistic changes.

151 v S 8, effective August 17, 2006, in (B)(1)(c) and (2)(a), substituted “a combination of them, a controlled substance, or a metabolite of a controlled substance” for “or alcohol and a drug of abuse”, and inserted “whole” and “blood serum or plasma”; added (B)(5)(d).

151 v S 17, effective August 3, 2006, rewrote (C).

151 v H 144, effective June 15, 2006, rewrote (A) and (B)(1)(e); deleted (B)(3)(c), pertaining to will contest actions; and, in (B)(7), inserted “of the Revised Code” following “307.628”, and “the immunity from civil liability conferred by section”.

151 v S 19, effective January 27, 2006, added (K) and (L).

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Constitutionality.

Defendant had not established, beyond a reasonable doubt, that this provision was facially unconstitutional as he failed to point to a single case wherein the statute was found to be unconstitutional on its face. The defendant's unsupported claim that this provision violated the Fourth Amendment was insufficient to prove that the statute was unconstitutional beyond a reasonable doubt. *State v. Gubanich, 2022-Ohio-2815, 194 N.E.3d 850, 2022 Ohio App. LEXIS 2661 (Ohio Ct. App., Medina County 2022)*.

Adoption records generally

Trial court abused its discretion when it ordered the production of certain medical records in a guardianship proceeding without first conducting an in camera inspection of the records to determine their whether they were protected by privilege and if they were relevant to the proceedings as defined in Civ.R. 26. *In re Guardianship of Sharp, 2014-Ohio-3613, 2014 Ohio App. LEXIS 3560 (Ohio Ct. App., Muskingum County 2014)*.

Because the trial court had not yet journalized a case plan, and the county children services board failed to obtain a court-ordered assessment, the supplemental assessment voluntarily obtained by the father was not admissible at the adjudicatory hearing, absent any suggestion in the record that the father gave express consent that the testimony be admitted at the hearing; therefore, the child was adjudicated a dependent child based on evidence that was not properly before the trial court. *In re L.F., 2014-Ohio-3800, 2014 Ohio App. LEXIS 3726 (Ohio Ct. App., Summit County 2014)*.

Where adoptive parents brought a wrongful adoption action in their own capacity after the child had obtained the age of majority, the department of human services could not compel disclosure of the adoptee's medical and

psychological records without the adoptee's consent: *Sirca v. Medina County Dep't of Human Servs., 145 Ohio App. 3d 182, 762 N.E.2d 407, 2001 Ohio App. LEXIS 3477 (Ohio Ct. App., Medina County 2001)*.

Applicability

Trial court did not err in denying a lawyer's motion to quash and for a protective order related to the attorney's Interest on Lawyers' Trust Accounts (IOLTA) records because IOLTA banking transactions were not confidential communications between the attorney and the client, and, accordingly, the attorney-client privilege did not apply. *Yost v. Schaffner, 2020-Ohio-4225, 2020 Ohio App. LEXIS 3120 (Ohio Ct. App., Guernsey County)*, aff'd, *2020-Ohio-5127, 161 N.E.3d 857, 2020 Ohio App. LEXIS 3988 (Ohio Ct. App., Guernsey County 2020)*.

Proscriptions of constitutional search and seizure requirements and the exclusionary rule were inapplicable to the statutory scheme involving blood draws because there was no governmental action, as the blood draw was taken for medical purposes by a private entity. *State v. Saunders, 2017-Ohio-7348, 2017 Ohio App. LEXIS 3640 (Ohio Ct. App., Morrow County 2017)*.

Attorney-client privilege

Lower court did not err in declining to allow the mother's counsel's inquiry into the financial arrangement between the father and his counsel because it necessarily required the father to reveal potentially privileged communications between himself and counsel; the evidence would not have established that Ohio was an inconvenient forum. *Kraemer v. Kraemer, 2018-Ohio-3847, 2018 Ohio App. LEXIS 4166 (Ohio Ct. App., Butler County 2018)*.

Terminated employees did not make the requisite showing in order to obtain information protected by work product. Because the employer's general counsel was not part of the management team and she provided legal advice in anticipation of a specific concern for possible litigation, the record did not support the employees' claim that she simply assisted the employer (the county housing authority) with its business decisions or a human relations matter. *Watson v. Cuyahoga Metro. Hous. Auth., 2014-Ohio-1617, 2014 Ohio App. LEXIS 1555 (Ohio Ct. App., Cuyahoga County 2014)*.

Case was remanded for the trial court to determine what requests were work-product and whether an insurer had shown good cause to permit their disclosure because the trial court erred in failing to distinguish between attorney-client communications and attorney work-product; the trial court did not address the issue of the work-product doctrine but instead, concluded that there was no privilege at all. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

In a legal malpractice case arising from an underlying case in which a voluntarily dismissed complaint was not timely refiled, a client's counsel was properly disqualified, under Ohio R. Prof. Conduct 3.7, because counsel was a necessary witness as, inter alia, counsel's testimony was not barred by the attorney-client privilege in *R.C. 2317.02(A)(1)*, since the testimony did not concern any communication from the client to counsel or any advice given by counsel to the client. *Rock v. Sanislo, 2009-Ohio-6913, 2009 Ohio App. LEXIS 5799 (Ohio Ct. App., Medina County 2009)*.

Hospital official's blanket assertion in an affidavit that the hospital's unusual occurrence reports contained confidential communications between hospital personnel and the hospital's attorneys was insufficient to substantiate the existence of the attorney-client privilege. *Ward v. Summa Health Sys., 2009-Ohio-4859, 184 Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009)*, aff'd, *2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

Because defendant insured was not seeking to compel attorney testimony, the protection against disclosure under *R.C. 2317.02(A)* did not apply, and an amendment to *R.C. 2317.02(A)* that did not become effective until after suit was filed was not expressly made retroactive to pending cases, it did not apply in the instant case, and it was not

necessary to interpret its scope. *In re Professionals Direct Ins. Co., 578 F.3d 432, 2009 FED App. 0306P, 2009 U.S. App. LEXIS 18966 (6th Cir. 2009)*.

Investigative report prepared by the port authority's outside counsel was excepted by the attorney-client privilege from disclosure under the public records act: *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth., 2009-Ohio-1767, 121 Ohio St. 3d 537, 905 N.E.2d 1221, 2009 Ohio LEXIS 1014 (Ohio 2009)*.

When an insurer's bad faith was alleged and the insurer sent a notice to take the deposition of the suing parties' counsel to that counsel, it was not an abuse of discretion to deny a protective order, under Civ.R. 26(C), to prohibit the deposition, because (1) facts surrounding counsel's negotiations with the insurer's agents were relevant, and (2) counsel could object to any specific questions seeking information that was privileged, under *R.C. 2317.02(A)(1)*, or protected by the work product doctrine. *Kirtos v. Nationwide Ins. Co., 2008-Ohio-870, 2008 Ohio App. LEXIS 725 (Ohio Ct. App., Mahoning County 2008)*.

Trial court did not abuse its discretion by refusing to give another jury instruction concerning the attorney-client privilege where it had already instructed the jury concerning the privilege: *Sicklesmith v. Hoist, 2006-Ohio-6137, 169 Ohio App. 3d 470, 863 N.E.2d 677, 2006 Ohio App. LEXIS 6103 (Ohio Ct. App., Columbiana County 2006)*.

In an executor's suit for judicial construction and reformation of a trust, the trial court erred in excluding the testimony of the attorney who drafted the trust on the ground that the executor had waived the attorney-client privilege in *R.C. 2317.02(A)* when she filed the suit because the Ohio Supreme Court has rejected the doctrine of implied waiver. *Smith v. Smith, 2006-Ohio-6975, 2006 Ohio App. LEXIS 6935 (Ohio Ct. App., Hamilton County 2006)*.

Since the requested information could have fallen under the umbrella of either opinion work product or ordinary fact work product, the possibility of two differing forms of protection under the attorney-client privilege necessitated an evidentiary hearing. Any blanket grant compelling discovery, under Civ.R. 26, 37(A)(2), and 34, was an abuse of discretion because the trial court had to first conduct a hearing to determine the nature of the privilege. *Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006)*.

Defendant was not denied a fair trial as the record failed to reflect any coercion by the trial court; when defendant gave a written statement to the police in which he characterized the property deed as the one he gave to his lawyer to have his ex-wife (the victim) sign, he voluntarily disclosed a matter protected by his attorney-client privilege and, therefore, he waived that privilege. He made an informed decision to waive the privilege and he later testified on his own behalf to explain his written statement. *State v. Storey, 2006-Ohio-3498, 2006 Ohio App. LEXIS 3441 (Ohio Ct. App., Cuyahoga County 2006)*.

Trial court did not abuse its discretion under *R.C. 2317.02(A)* where it denied a construction company's motion to compel the file and complete trial testimony of the company's clients' attorney, and where it granted the clients' motion for a protective order, as the information disclosed by the clients was not relevant to the case and accordingly, under the tripartite test for determination of whether the privilege was waived, there was no such waiver found; further, the fact that the clients' architect was present while the settlement negotiations were ongoing in the parties' mediation, for which the attorney's file and testimony was sought, was not shown to have constituted a waiver of the attorney-client privilege. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Where plaintiffs sought to withdraw a stipulation of dismissal, as the other clients that plaintiffs' law firm represented in suits against the same defendants had not waived their attorney-client privilege, a magistrate judge properly excluded information about these clients' cases under *R.C. 2317.02(A)*. *Kraras v. Safeskin Corp., 2005 U.S. Dist. LEXIS 31819 (S.D. Ohio Aug. 17, 2005)*.

—Address of client

When the attorney-client privilege exists, the privilege has been held to encompass the protection of the address of the client. While Civil Rule 10(A) requires that every complaint should include the addresses of all the parties, the filing of the complaint does not constitute a waiver of the attorney-client privilege and an attorney may refuse to testify as to a subsequent address of his client: *Waldmann v. Waldmann, 48 Ohio St. 2d 176, 2 Ohio Op. 3d 373, 358 N.E.2d 521, 1976 Ohio LEXIS 730 (Ohio 1976)*.

—Admissible testimony

Testimony of defendant's first attorney was outside the scope of the attorney-client privilege under *R.C. 2317.02(A)(1)* because the testimony revealed neither communication from defendant nor the first attorney's advice to defendant. Defendant's first attorney testified that he made several attempts to get notice of the scheduled trial date to defendant. *State v. Hicks, 2009-Ohio-3115, 2009 Ohio App. LEXIS 2665 (Ohio Ct. App., Highland County 2009)*.

—Attorney as witness to instrument

There was no error in denying the pharmacist's request to call the victim's attorney as a witness because the scope of the letter sent by the attorney to the pharmacist spoke for itself and the intent of the letter would have required the attorney to reveal privileged communications he had with the victim. *Welborn-Harlow v. Fuller, 2013-Ohio-54, 2013 Ohio App. LEXIS 36 (Ohio Ct. App., Wood County 2013)*.

If an attorney acts as a witness to an instrument, particularly where such witnessing is required by statute to render validity to the instrument, the "privilege" statute does not apply and he may be called to testify and may be examined and cross-examined as to the facts and circumstances, properly the subject of such examination: *Sweeney v. Palus, 16 Ohio Op. 2d 373, 172 N.E.2d 925, 86 Ohio Law Abs. 29, 1961 Ohio Misc. LEXIS 343 (Ohio P. Ct. 1961)*.

—Bank accounts

Trial court did not err in overruling the lawyers' objections to the discovery as to interrogatories 5 and 6 based on the attorney-client privilege because they simply sought the identification of their bank accounts and did not seek information protected from disclosure by the attorney-client privilege. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—Banking transactions

Trial court did not err in overruling the lawyers' objections to the discovery based on the attorney-client privilege because IOLTA banking transactions were not confidential communications between an attorney and his or her client. Accordingly, the attorney-client privilege did not apply. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—Burden of proof

Estate beneficiary failed to establish that documents which he requested in estate litigation should have been produced, as even if the attorney-client privilege had been waived as to the value of attorney's fees, the scope of the waiver would have been limited to the fee issue only, and he also failed to show that the work-product exception to the attorney-client privilege applied. *In re Estate of Weiner, 2019-Ohio-2354, 138 N.E.3d 604, 2019 Ohio App. LEXIS 2458 (Ohio Ct. App., Montgomery County 2019)*.

The burden of showing that testimony sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude it: *141 Ohio St. 87, 25 Ohio Op. 225, 47 N.E.2d 388*.

—Client's name

The confidentiality of a client's name or identity is dependent upon several factors: (1) In most instances, the client's name or identity is not one of the facts about which the client seeks advice; therefore, it is, in most instances, not confidential; (2) If the client's name or identity are matters about which the client seeks advice, then the client's name and identity are confidential; (3) The privilege is lost if it is used as a cover for the attorney's cooperation in his client's wrongdoing: *In re Burns, 42 Ohio Misc. 2d 12, 536 N.E.2d 1206, 1988 Ohio Misc. LEXIS 12 (Ohio C.P. 1988)*.

—Common law

Fraud action was barred by the limitations period in *R.C. 2305.09*, and the time period was not tolled by the discovery rule because an insured admitted that his standard policy was to review a declaration page and discuss the policy with his insurance agent; the insured knew that he was paying for separate uninsured/underinsured premiums for each vehicle. Under the common law, the insured impliedly waived his attorney-client privilege, and it was incumbent upon him to provide evidence of the recently discovered facts in order to survive summary judgment; the attorney-client privilege asserted was not based upon the testimonial privilege outlined in *R.C. 2317.02(A)* as the insured was not seeking to preclude his attorney from testifying concerning communication to him or advice given by him. *Beck v. Westfield Nat'l Ins. Co., 2010 Ohio Misc. LEXIS 564 (Ohio C.P. Dec. 3, 2010)*.

Common law attorney-client privilege affords a greater scope of privilege than does *R.C. 2317.02*. *R.C. 2317.02* does not abrogate the common law implied waiver doctrine because the statutory attorney-client privilege is a testimonial privilege. The trial court abused its discretion by compelling discovery of an entire case file without holding an evidentiary hearing or conducting an in camera review: *Grace v. Mastruserio, 2007-Ohio-3942, 182 Ohio App. 3d 243, 912 N.E.2d 608, 2007 Ohio App. LEXIS 3580 (Ohio Ct. App., Hamilton County 2007)*.

The common law rule that confidential communications between attorney and client are privileged is modified by statute in Ohio: *Spitzer v. Stillings, 109 Ohio St. 297, 142 N.E. 365, 2 Ohio Law Abs. 100, 2 Ohio Law Abs. 119, 1924 Ohio LEXIS 421 (Ohio 1924)*.

—Communications protected

Final draft revisions of a custodial account agreement were reviewed, analyzed, and revised by counsel and were integral to the give-and-take communications wherein legal advice was sought and given; thus, these final draft revisions of the agreement were submitted to counsel for the dominant purpose of obtaining legal advice and were protected by the attorney-client privilege. *Jacobs v. Equity Trust Co., 2020-Ohio-6882, 2020 Ohio App. LEXIS 4723 (Ohio Ct. App., Lorain County 2020)*.

Interrogatory Nos. 9 and 11 invaded the attorney-client privilege because, if the lawyers were to identify clients who met the descriptions set forth in the requests, they would have directly, or by reasonable inference, revealed the content of privileged attorney-client communications. Because there had been no claim or showing that any clients waived the attorney-client privilege with respect to such communications, the trial court erred in ordering the lawyers to respond to those requests. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

Interrogatory No. 7 and the clients' request for copies of any checks and deposits that clients made payable to the lawyer to cover tax liabilities invaded the attorney-client privilege because so much had already been disclosed in the requests themselves that identification of clients or production of documents in response to the requests would

in effect reveal privileged attorney-client communications, i.e., by linking clients to the content of particular attorney-client communications. Because the attorney-client privilege had not been waived with respect to such communications, the trial court erred in ordering the lawyers to respond to those requests. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—Company employees

Chief financial officer's counsel was properly allowed to question a company employee, who had changed her testimony, as to whether she had had communications with defense counsel; the attorney-client privilege protected only the substance of the communications, not the fact that the employee had such communications. *Clapp v. Mueller Elec. Co., 2005-Ohio-4410, 162 Ohio App. 3d 810, 835 N.E.2d 757, 2005 Ohio App. LEXIS 3990 (Ohio Ct. App., Cuyahoga County 2005)*.

—Corporations

Trial court did not err in ordering the disclosure of communications between a corporation and its legal counsel because the attorney-client privilege was not applicable to the corporation's affiliates in that the trial court did not abuse its discretion by finding that no attorney-client relationship existed between the corporation's affiliates and the corporation's legal counsel. *MA Equip. Leasing I, LLC v. Tilton, 2012-Ohio-4668, 980 N.E.2d 1072, 2012 Ohio App. LEXIS 4102 (Ohio Ct. App., Franklin County 2012)*.

Contents of communications between a company's attorney and its employees are privileged, not the mere fact that a communication took place. The employee could be asked whether she had discussed certain matters with the attorney: *Clapp v. Mueller Elec. Co., 2005-Ohio-4410, 162 Ohio App. 3d 810, 835 N.E.2d 757, 2005 Ohio App. LEXIS 3990 (Ohio Ct. App., Cuyahoga County 2005)*.

In camera inspection by a trial court of documents that a shareholder requested from a law firm, which represented the shareholder's corporation, was ordered so as to determine the reasonableness of the shareholder's belief that the law firm represented him, as well as the corporation, after the corporation asserted the attorney-client privilege; however, a waiver of the attorney-client privilege by the shareholder so the shareholder could obtain documents that he requested from a law firm, which represented the shareholder's corporation, was defective because the shareholder could not waive the attorney-client privilege as to the corporation. *Stuffleben v. Cowden, 2003-Ohio-6334, 2003 Ohio App. LEXIS 5676 (Ohio Ct. App., Cuyahoga County 2003)*.

—Death of client

In the event of the death of a client, *R.C. 2317.02(A)* authorizes the surviving spouse of that client to waive the attorney-client privilege protecting communications between the deceased spouse and attorneys who had represented that deceased spouse. The attorney of a deceased client may not assert attorney-client privilege to justify refusal to answer questions of a grand jury where the surviving spouse of the attorney's client has waived the privilege in conformity with *R.C. 2317.02(A)*, and the attorney has been ordered to testify by a court: *State v. Doe, 2004-Ohio-705, 101 Ohio St. 3d 170, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (Ohio)*, cert. denied, *543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6968 (U.S. 2004)*.

R.C. 2317.02 did not totally preclude the deposing of the decedent's attorney in a will contest action. The court should have conducted an in camera inspection of the decedent's medical records to determine if there were any privileged communications: *Weierman v. Mardis, 101 Ohio App. 3d 774, 656 N.E.2d 734, 1994 Ohio App. LEXIS 1971 (Ohio Ct. App., Hamilton County 1994)*.

The privilege as to communications between an attorney and client does not expire with the death of the client: *Taylor v. Sheldon, 172 Ohio St. 118, 15 Ohio Op. 2d 206, 173 N.E.2d 892, 1961 Ohio LEXIS 488 (Ohio 1961)*.

Under R.C. 2317.02 (125 v 313) and 2317.03, an attorney who represents both a husband and wife in a transaction may testify concerning such transaction, where, after the decease of one of the parties thereto, the surviving spouse gives his consent: *Alliance First Nat. Bank v. Maus, 100 Ohio App. 433, 60 Ohio Op. 350, 137 N.E.2d 305 (1955)*.

Under this section, communications between the testatrix and the attorney who was the legal advisor of the testatrix respecting the subject matter contained in, and the estate of, her last will and testament, which is involved in the proceedings, are privileged and therefore inadmissible: *108 N.E.2d 101, 64 Ohio Law Abs. 28*.

When the validity of fees paid by an administrator for legal services rendered decedent is challenged on exceptions to the administrator's account, the attorney may testify to matters which are not excluded by this section: *In re Butler's Estate, 137 Ohio St. 96, 17 Ohio Op. 432, 28 N.E.2d 186, 1940 Ohio LEXIS 427 (Ohio 1940)*, [connected case, *137 Ohio St. 115, 17 Ohio Op. 440, 28 N.E.2d 196 (1940)*.].

—Depositions

When an insurer's bad faith was alleged and the insurer sent a notice to take the deposition of the suing parties' counsel to that counsel, it was not an abuse of discretion to deny a protective order, under Civ.R. 26(C), to prohibit the deposition, because (1) facts surrounding counsel's negotiations with the insurer's agents were relevant, and (2) counsel could object to any specific questions seeking information that was privileged, under *R.C. 2317.02(A)(1)*, or protected by the work product doctrine. *Kirtos v. Nationwide Ins. Co., 2008-Ohio-870, 2008 Ohio App. LEXIS 725 (Ohio Ct. App., Mahoning County 2008)*.

—Dissolution matters

Trial court did not abuse its discretion in determining that a husband was not entitled to a separate interest in businesses, and that the businesses constituted marital property rather than separate property under *R.C. 3105.171(A)(6)(a)(vii)*, as he did not show that his parents had given the shares in the businesses exclusively to him, and his testimony regarding gifting was deemed "materially false" and not credible by the trial court; further, the trial court's determination that the husband's attorney's testimony regarding the gifting issue would waive the attorney-client privilege and thus subject him to cross-examination on matters that would have been considered privileged pursuant to *R.C. 2317.02(A)* was proper. *Janosek v. Janosek, 2007-Ohio-68, 2007 Ohio App. LEXIS 59 (Ohio Ct. App., Cuyahoga County 2007)*, writ denied, *2009-Ohio-1098, 2009 Ohio App. LEXIS 863 (Ohio Ct. App., Cuyahoga County 2009)*.

—Employees of attorney

Conversations a client has with her attorney's secretary may be privileged under *R.C. 2317.02*: *Kler v. Mazzeo, 1991 Ohio App. LEXIS 1204 (Ohio Ct. App., Cuyahoga County Mar. 21, 1991)*.

—Evidence of crime

An attorney who receives physical evidence from a third party relating to a possible crime by a client is obligated to relinquish that evidence to law enforcement authorities and must comply with a subpoena to that effect: *In re Original Grand Jury Investigation, 2000-Ohio-170, 89 Ohio St. 3d 544, 733 N.E.2d 1135, 2000 Ohio LEXIS 2062 (Ohio 2000)*.

—Exception

When appellee, the executor of appellant's deceased father, argued that property transferred to appellant, who held a power of attorney, was part of the estate of the father, when the ultimate issue was whether appellant met her burden of proof on the issue of fairness of the underlying transactions, and when the crux of appellant's argument was that she had relied upon the legal advice of the father's attorney, the trial court erred in excluding the attorney's affidavit on the ground that it was subject to attorney-client privilege which had not been waived by appellee. The exception to the privilege pertaining to disputes between parties claiming through deceased clients applied. *Miller v. Shreve (In re Miller), 2014-Ohio-4612, 21 N.E.3d 666, 2014 Ohio App. LEXIS 4510 (Ohio Ct. App., Guernsey County 2014)*.

Trial court erred in issuing its ruling that the crime-fraud exception applied to preclude attachment of the attorney-client privilege prior to giving the attorney the opportunity to respond to the pharmacy's submission of supplemental exhibits, which the trial court relied on in issuing its ruling. The pharmacy did not indicate that it was going to submit materials to support its allegation that the crime-fraud exception applied, nor was there any discussion or admission of exhibits at the hearing. *Lytle v. Mathew, 2014-Ohio-1606, 2014 Ohio App. LEXIS 1549 (Ohio Ct. App., Summit County 2014)*.

Under the self-protection exception to the attorney-client privilege, defendant client was required to produce communications between defendant and other counsel because defendant alleged that plaintiff law firm breached a contract and engaged in malpractice by failing to represent plaintiff in cases related to the shareholder squeeze out dispute in which defendant was represented by plaintiff and plaintiff could defend itself against defendant's counterclaims only by having access to defendant's "other-attorney communications" in the related cases. *Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis, 2013 U.S. Dist. LEXIS 123936 (S.D. Ohio July 12, 2013)*.

Trial court erred in granting an insurer's motion to compel discovery because none the exceptions to the attorney-client privilege applied to the materials the insurer requested. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

Because an insured and an insurer retained their own attorneys in a lawsuit involving a former director of the insured, the joint-representation exception to the attorney-client privilege was not applicable. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

Common interest exception to the attorney-client privilege did not apply because the communications between an insured and an insurer were in keeping with the terms of the insurance policy, rather than the two parties formulating a common legal strategy. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

Lack of good faith exception to the attorney-client privilege was inapplicable because an insurer was able to defend against the allegations of a lawsuit by simply presenting to the trial court what information it had when it made its decisions. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

When a trial court ordered a party's attorney to testify and provide an accounting, remand of the case was necessary for the trial court to journalize whether it found the crime-fraud exception to the attorney-client privilege to exist, or whether it found that documents simply did not contain privileged communications. *Martin v. Martin, 2012-Ohio-4889, 2012 Ohio App. LEXIS 4271 (Ohio Ct. App., Trumbull County 2012)*.

State was properly denied access to defendant inmate's trial counsel's file pursuant to Crim.R. 17(C), as the State failed to assert that the file was not privileged under the self-protection exception to the attorney'client privilege under *R.C. 2317.02(A)*, but in any event, the exception was inapplicable where the issue did not involve counsel's fee recovery or defense of a legal malpractice claim. *State v. Caulley, 2012-Ohio-2649, 2012 Ohio App. LEXIS 2330 (Ohio Ct. App., Franklin County 2012)*, aff'd, *2013-Ohio-3673, 136 Ohio St. 3d 325, 995 N.E.2d 227, 2013 Ohio LEXIS 1932 (Ohio 2013)*.

Applying state law under *Fed. R. Evid. 501*, documents sought in a legal malpractice case were not discoverable because Ohio would have enforced the attorney-client privilege for the loss prevention communications involved; none of the factors identified in Ohio decisions would have led an Ohio court to recognize an exception. There were other sources of proof, the discussions mostly involved actions or inactions that took place in the past, and the alleged conduct was not criminal, illegal or fraudulent. *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio Feb. 3, 2011)*.

—Fee dispute between attorneys

In an action between attorneys who formerly practiced together alleging breach of an agreement for division of fees, the attorney-client privilege belonged to the client, not to either attorney: *Lightbody v. Rust, 137 Ohio App. 3d 658, 739 N.E.2d 840, 2000 Ohio App. LEXIS 1737 (Ohio Ct. App., Cuyahoga County)*, dismissed, *90 Ohio St. 3d 1424, 735 N.E.2d 901, 2000 Ohio LEXIS 2339 (Ohio 2000)*.

—Freedom of speech

A public employee may not be discharged for exercising free speech rights on an issue of public concern. However, the attorney-client privilege is so strong that it prevails over the right of free speech: *Edwards v. Buckley, 106 Ohio App. 3d 800, 667 N.E.2d 423, 1995 Ohio App. LEXIS 4430 (Ohio Ct. App., Cuyahoga County 1995)*.

—Generally

Resident's writ of mandamus to compel the attorney general's office to provide unredacted copies of requested records was denied as documents covered by the attorney-client privilege, *R.C. 2317.02(A)*, were properly withheld, *R.C. 149.43*; the documents contained material pertinent to the investigation and were transferred to the attorney general's office during the time period it would have been investigating the representative's matter for the attorney general. *State ex rel. Lanham v. DeWine, 2013-Ohio-199, 135 Ohio St. 3d 191, 985 N.E.2d 467, 2013 Ohio LEXIS 252 (Ohio 2013)*.

Trial court did not err in denying a plaintiff's motion to compel the deposition of an attorney because the trial court found that the attorney was not a fact witness in the case, that the summary judgment motion which the attorney's affidavit supported had been abandoned, that the attorney was not filing an affidavit in support of a renewed motion for summary judgment, and that there was no evidence that the attorney's client had waived the attorney-client privilege. *Helfrich v. Madison, 2012-Ohio-551, 2012 Ohio App. LEXIS 484 (Ohio Ct. App., Licking County 2012)*.

R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived. A showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable: *Jackson v. Greger, 2006-Ohio-4968, 110 Ohio St. 3d 488, 854 N.E.2d 487, 2006 Ohio LEXIS 2902 (Ohio 2006)*.

In a legal malpractice action, the client did not waive his attorney-client privilege as to other counsel that he consulted. A party asserting privilege does not place protected materials in issue merely because the materials might be useful to the opposing party's defense: *McMahon v. Shumaker, Loop & Kendrick, LLP, 2005-Ohio-4436, 162 Ohio App. 3d 739, 834 N.E.2d 894, 2005 Ohio App. LEXIS 4020 (Ohio Ct. App., Lucas County 2005)*.

In a prosecution for failure to appear, testimony by the defendant's former counsel that she had provided him with notice of the hearing date did not violate the attorney-client privilege: *State v. Kemper, 2004-Ohio-4050, 158 Ohio App. 3d 185, 814 N.E.2d 540, 2004 Ohio App. LEXIS 3677 (Ohio Ct. App., Clark County 2004)*.

Trial court erred in ruling that the subpoenaed documents involving attorney-client communications fell within an exception to the attorney-client privilege based on fundamental fairness and fair play because there was no allegation of bad faith. *Garcia v. O'Rourke, 2003-Ohio-2780, 2003 Ohio App. LEXIS 2497 (Ohio Ct. App., Gallia County 2003)*.

The court abused its discretion by ordering a party to produce documents claimed to be protected by the attorney-client privilege or work-product doctrine without allowing the party to amend its privilege log or, alternatively, conducting an in camera inspection: *Cargotec, Inc. v. Westchester Fire Ins. Co., 2003-Ohio-7257, 155 Ohio App. 3d 653, 802 N.E.2d 732, 2003 Ohio App. LEXIS 6533 (Ohio Ct. App., Lucas County 2003)*.

A monitoring attorney appointed in a disciplinary action may not review privileged materials without a specific waiver by the client of the respondent: *Allen County Bar Ass'n v. Williams, 2002-Ohio-2006, 95 Ohio St. 3d 160, 766 N.E.2d 973, 2002 Ohio LEXIS 1116 (Ohio 2002)*.

The attorney-client privilege applied to communications between the coroner and a county prosecutor. The attorney-client privilege may be waived when the client and attorney deliberately place the contents of their communications in issue by presenting sworn statements and raising advice of counsel as a defense: *Kremer v. Cox, 114 Ohio App. 3d 41, 682 N.E.2d 1006, 1996 Ohio App. LEXIS 3904 (Ohio Ct. App., Summit County 1996)*, dismissed, *77 Ohio St. 3d 1519, 674 N.E.2d 372, 1997 Ohio LEXIS 173 (Ohio 1997)*.

Where a party moves to strike an attorney's affidavit on the basis that there was a prior attorney-client relationship with the attorney, but such relationship is denied by the attorney, an evidentiary hearing will ordinarily be required to assess the witnesses' credibility: *Maust v. Palmer, 94 Ohio App. 3d 764, 641 N.E.2d 818, 1994 Ohio App. LEXIS 2008 (Ohio Ct. App., Franklin County 1994)*.

Where a motorist contacts an attorney about his involvement in an accident and the attorney then calls the highway patrol to discuss resolving the matter, it is a violation of the attorney-client privilege for the prosecution to introduce a tape of the call at trial: *State v. Shipley, 94 Ohio App. 3d 771, 641 N.E.2d 822, 1994 Ohio App. LEXIS 2196 (Ohio Ct. App., Licking County)*, dismissed, *70 Ohio St. 3d 1465, 640 N.E.2d 527, 1994 Ohio LEXIS 2349 (Ohio 1994)*.

An attorney may not be compelled to disclose the identity of a person who has contacted him for legal advice about a possible hit-and-run accident: *Miller v. Begley, 93 Ohio App. 3d 527, 639 N.E.2d 139, 1994 Ohio App. LEXIS 2565 (Ohio Ct. App., Butler County 1994)*.

The city was the "client" of its chief prosecutor. The prosecutor's pessimistic assessment of the chances of a conviction, based on the likely jury instructions, was not admissible. The fact that it was "leaked" by an unauthorized person did not waive the privilege: *State v. Today's Bookstore, 86 Ohio App. 3d 810, 621 N.E.2d 1283, 1993 Ohio App. LEXIS 1672 (Ohio Ct. App., Montgomery County 1993)*.

The attorney-client privilege belongs to the client, and the only materials protected are those which involve communications with his attorney. The work-product doctrine, on the other hand, belongs to the attorney and assures him that his private files shall remain free from intrusions of opposing counsel in the absence of special circumstances. The work-product doctrine generally protects a broader range of materials than does the attorney-client privilege because the work-product doctrine protects all materials prepared in anticipation of trial. Whether work product prepared during prior litigation is protected by the work-product doctrine must be determined on a case-by-case basis: *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, 82 Ohio App. 3d 322, 612 N.E.2d 442, 1992 Ohio App. LEXIS 4427 (Ohio Ct. App., Montgomery County 1992)*.

An attorney has no right under USConst amend I or *Ohio Const. art I, § 11* to disseminate information protected by the attorney-client privilege: *American Motors Corp. v. Huffstutler, 61 Ohio St. 3d 343, 575 N.E.2d 116, 1991 Ohio LEXIS 1951 (Ohio 1991)*.

A partial, voluntary disclosure of privileged communications can result in the loss of privilege for all other communications which deal with the same subject matter. The rule applies to disclosure of materials covered by an

attorney-client privilege and to disclosure of materials which are protected by the work product doctrine: *Mid-American Nat'l Bank & Trust Co. v. Cincinnati Ins. Co., 74 Ohio App. 3d 481, 599 N.E.2d 699, 1991 Ohio App. LEXIS 2617 (Ohio Ct. App., Wood County 1991)*.

Affidavit of appellant's counsel was admissible where it consisted essentially of communication between counsel for the parties: *Carroll v. Carroll, 1990 Ohio App. LEXIS 1339 (Ohio Ct. App., Columbiana County Apr. 5, 1990)*.

A communication between client and attorney which is not intended to be confidential is not privileged: *Cannell v. Rhodes, 31 Ohio App. 3d 183, 509 N.E.2d 963, 1986 Ohio App. LEXIS 10144 (Ohio Ct. App., Cuyahoga County 1986)*.

When an attorney improperly answers interrogatories propounded to his client, and when, at trial, the client testifies contrary to the answers, the court should conduct an in camera hearing of the offending attorney, under oath, with opposing counsel being permitted to cross-examine the offending attorney as to the answer or answers at issue. The basic purpose of such hearing is to determine to what extent, if any, the party who submitted the interrogatory was prejudiced: *Inzano v. Johnston, 33 Ohio App. 3d 62, 514 N.E.2d 741, 1986 Ohio App. LEXIS 10204 (Ohio Ct. App., Lake County 1986)*.

An attorney representing a spouse in a domestic relations action is not representing the children of the marriage as "clients." In a hearing concerning custody of the children he may be held in contempt if he fails to divulge the address of the children: *Waldmann v. Waldmann, 48 Ohio St. 2d 176, 2 Ohio Op. 3d 373, 358 N.E.2d 521, 1976 Ohio LEXIS 730 (Ohio 1976)*.

Where a person approaches an attorney with the view of retaining his services to act on the former's behalf, an attorney-client relationship is created, and communications made to such attorney during the preliminary conferences prior to the actual acceptance or rejection by the attorney of the employment are privileged communications: *Taylor v. Sheldon, 172 Ohio St. 118, 15 Ohio Op. 2d 206, 173 N.E.2d 892, 1961 Ohio LEXIS 488 (Ohio 1961)*.

Privileged communications between attorney and client under this section assume that the communications are made with the intention of the confidentiality. When confidence ceases, privilege ceases: *Emley v. Selepchak, 76 Ohio App. 257, 31 Ohio Op. 558, 63 N.E.2d 919, 1945 Ohio App. LEXIS 588 (Ohio Ct. App., Medina County 1945)*.

This section, relative to privileged communications, is not violated by an attorney answering in the affirmative the question whether he prepared the will handed to him on the witness stand: *Platte v. Stephens, 27 Ohio Law Abs. 561, 1938 Ohio Misc. LEXIS 1017 (Ohio Ct. App., Montgomery County July 22, 1938)*.

The testimony of an attorney as to a deceased client's sanity, based solely upon his general observation of the client, does not constitute a privileged communication within the meaning of this section: *Heiselmann v. Franks, 48 Ohio App. 536, 2 Ohio Op. 123, 194 N.E. 604, 18 Ohio Law Abs. 553, 1934 Ohio App. LEXIS 314 (Ohio Ct. App., Hamilton County 1934)*.

—Governmental clients

Board of commissioners did not meet its burden of establishing applicability of the attorney-client privilege because all that the former commissioner's testimony established was the attorney's presence in the room and the mere presence of counsel in the room was insufficient to invoke the attorney-client privilege. *Maddox v. Bd. of Comm'rs, 2014-Ohio-1541, 2014 Ohio App. LEXIS 1494 (Ohio Ct. App., Greene County 2014)*.

Attorney-client privilege applies to communications between a state agency and its in-house counsel, even when that counsel is not an assistant attorney general: *State ex rel. Leslie v. Ohio Hous. Fin. Agency, 2005-Ohio-1508, 105 Ohio St. 3d 261, 824 N.E.2d 990, 2005 Ohio LEXIS 701 (Ohio 2005)*.

The attorney-client privilege covers communications between government clients and their attorneys: *Carver v. Township of Deerfield, 139 Ohio App. 3d 64, 742 N.E.2d 1182, 2000 Ohio App. LEXIS 4588 (Ohio Ct. App., Portage County 2000)*.

The attorney-client privilege establishes an exclusion to disclosure under the Ohio Public Records Law, *R.C. 149.43*, of records consisting of communications between attorneys and government clients, even when such records do not fall within the "trial preparation" exception set forth in *R.C. 149.43(A)(4)*, since the release of such records is "prohibited by state law": *Woodman v. Lakewood, 44 Ohio App. 3d 118, 541 N.E.2d 1084, 1988 Ohio App. LEXIS 1899 (Ohio Ct. App., Cuyahoga County 1988)*.

—Hearing required

Since the requested information could have fallen under the umbrella of either opinion work product or ordinary fact work product, the possibility of two differing forms of protection under the attorney-client privilege necessitated an evidentiary hearing. Any blanket grant compelling discovery, under Civ.R. 26, 37(A)(2), and 34, was an abuse of discretion because the trial court had to first conduct a hearing to determine the nature of the privilege. *Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006)*.

—Hospitals

Hospital did not substantiate the existence of an attorney-client privilege as to the unusual occurrence reports: *Ward v. Summa Health Sys., 2009-Ohio-4859, 184 Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009)*, aff'd, *2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

Attorney-client privilege applied to a hospital incident report where it was prepared by a hospital employee for use by its attorneys in anticipation of litigation: *Flynn v. Univ. Hosp., Inc., 2007-Ohio-4468, 172 Ohio App. 3d 775, 876 N.E.2d 1300, 2007 Ohio App. LEXIS 4071 (Ohio Ct. App., Hamilton County 2007)*.

—Identity

Lawyers' argument that the identities of their clients and the documents at issue were within the protective ambit of the attorney-client privilege and, therefore, not discoverable, based solely on the "specialized" nature of their tax practice was rejected. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—In camera review

Where an employer retained an attorney after an employee alleged sexual harassment to conduct an investigation and render legal advice, some documents related to the attorney's investigation were privileged and an in camera review to determine whether the attorney-client privilege and the work-product doctrine exempted the investigative documents from discovery or a description of the documents sufficient to make such a determination was required; documents whose existence preceded the attorney's investigation or were created independent of that investigation, the identity of those who participated in the investigation and any recordings or transcripts of the substance of an interview with the employee were not privileged. *Smith v. Tech. House, Ltd., 2019-Ohio-2670, 2019 Ohio App. LEXIS 2780 (Ohio Ct. App., Portage County 2019)*; *2019 Ohio App. LEXIS 278 (June 28, 2019)*.

In an action by a minor patient and her parents against a medical center, alleging that a pediatric cardiologist who performed a cardiac catheterization on the patient was negligently credentialed, as the peer review privilege asserted by the center was closely intertwined with its claim of attorney client privilege, the trial court erred in

compelling production of the documents without allowing the center to produce additional information as to the privilege and in camera inspection before ruling that they be produced. *Cousino v. Mercy St. Vincent Med. Ctr., 2018-Ohio-1550, 111 N.E.3d 529, 2018 Ohio App. LEXIS 1701 (Ohio Ct. App., Lucas County 2018)*.

—Inadvertent disclosure

Although a Litigation Analysis arguably was subject to the attorney-client privilege, the disclosure of paragraphs 18(a) and (b) was properly ordered because the document had been inadvertently disclosed to the workers' counsel, who had had a full opportunity to review the document, analyze its content, and assess its import on the case, the paragraphs dealt directly with issues germane to the case and the information was not provided in the company's responses to discovery. *Tucker v. Compudyne Corp., 2014-Ohio-3818, 18 N.E.3d 836, 2014 Ohio App. LEXIS 3739 (Ohio Ct. App., Cuyahoga County 2014)*.

—In camera review

Trial court abused its discretion by compelling discovery of the employee's entire criminal case file without holding an evidentiary hearing or conducting an in-camera review because the order was overly broad because some of the information may have been subject to a claim of work-product privilege, pursuant to Civ.R. 26(B). To distinguish between protected and unprotected materials, the trial court should have, at a minimum, conducted an evidentiary hearing or undertaken an in-camera review of the case file. *Caiazza v. Mercy Med. Ctr., Inc., 2012-Ohio-3940, 2012 Ohio App. LEXIS 3457 (Ohio Ct. App., Stark County 2012)*.

—Injunction against violation

In order to protect the attorney-client and work product privilege, injunctive relief is appropriate, particularly where it is demonstrated that the attorney has already violated the privilege and threatens to continue such practice: *American Motors Corp. v. Huffstutler, 61 Ohio St. 3d 343, 575 N.E.2d 116, 1991 Ohio LEXIS 1951 (Ohio 1991)*.

—Insurance matters

2007 amendment of *R.C. 2317.02* does not apply in cases related to prejudgment interest proceedings under *R.C. 1343.03(C)* and the determination of a lack of a good faith effort to settle because *R.C. 2317.02* applies only in cases of alleged bad faith in insurance coverage cases, where the client is an insurance company. *Cobb v. Shipman, 2012-Ohio-1676, 2012 Ohio App. LEXIS 1474 (Ohio Ct. App., Trumbull County 2012)*.

Claims-file materials showing an insurer's lack of good faith in processing, evaluating, or refusing to pay a claim are unworthy of the protection afforded by the attorney-client or work-product privilege, regardless of whether the insurer ever denied the claim outright. The trial court abused its discretion by failing to conduct an in camera review of the claims file: *Unklesbay v. Fenwick, 2006-Ohio-2630, 167 Ohio App. 3d 408, 855 N.E.2d 516, 2006 Ohio App. LEXIS 2515 (Ohio Ct. App., Clark County 2006)*.

The critical issue in evaluating the discoverability of otherwise privileged materials in an insurer's claims file is not whether the attorney-client communications related to the existence of coverage, but whether they may cast light on bad faith on the part of the insurer. Attorney work product is discoverable to the same extent as attorney-client communications: *Garg v. State Auto. Mut. Ins. Co., 2003-Ohio-5960, 155 Ohio App. 3d 258, 800 N.E.2d 757, 2003 Ohio App. LEXIS 5297 (Ohio Ct. App., Miami County 2003)*.

Neither the atttorney-client nor the work-product privilege prevented discovery of documents from a business which procured insurance policies on behalf of its clients. Ordinary fact or unprivileged fact work product, such as witness statements and underlying facts, receives lesser protection that opinion work product: *Perfection Corp. v. Travelers*

Cas. & Sur., 2003-Ohio-3358, 153 Ohio App. 3d 28, 790 N.E.2d 817, 2003 Ohio App. LEXIS 3065 (Ohio Ct. App., Cuyahoga County 2003).

In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage: *Boone v. Vanliner Ins. Co., 2001-Ohio-27, 91 Ohio St. 3d 209, 744 N.E.2d 154, 2001 Ohio LEXIS 905 (Ohio)*, cert. denied, *534 U.S. 1014, 122 S. Ct. 506, 151 L. Ed. 2d 415, 2001 U.S. LEXIS 10289 (U.S. 2001)*.

In an *R.C. 1343.03(C)* proceeding for prejudgment interest, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery: *Radovanic v. Cossler, 140 Ohio App. 3d 208, 746 N.E.2d 1184, 2000 Ohio App. LEXIS 4896 (Ohio Ct. App., Cuyahoga County 2000)*.

The defendant's statement taken by his insurer's adjuster and then forwarded to the attorney for defendant was within the attorney-client privilege: *Breech v. Turner, 127 Ohio App. 3d 243, 712 N.E.2d 776, 1998 Ohio App. LEXIS 1663 (Ohio Ct. App., Scioto County 1998)*.

In an *R.C. 1343.03(C)* proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes the discovery of the contents of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered: *Moskovitz v. Mt. Sinai Medical Ctr., 1994 Ohio 324, 69 Ohio St. 3d 638, 635 N.E.2d 331, 1994 Ohio LEXIS 1613 (Ohio)*, cert. denied, *513 U.S. 1059, 115 S. Ct. 668, 130 L. Ed. 2d 602, 1994 U.S. LEXIS 8870 (U.S. 1994)*.

Plaintiff's statement taken by the defendant's insurer's claim representative and subsequently turned over to defendant's counsel after suit commencement, is not privileged from disclosure: *Koller v. W. E. Plechaty Co., 6 Ohio Misc. 57, 35 Ohio Op. 2d 113, 216 N.E.2d 399, 1965 Ohio Misc. LEXIS 268 (Ohio Mun. Ct. 1965)*.

—Jailhouse lawyer

An attorney-client privilege does not apply to communications made to a person claiming to be a jailhouse lawyer: *State v. Fair, 1991 Ohio App. LEXIS 3324 (Ohio Ct. App., Franklin County July 9, 1991)*, dismissed, *62 Ohio St. 3d 1469, 580 N.E.2d 1099, 1991 Ohio LEXIS 2819 (Ohio 1991)*.

—Multiple clients

Trial court erred in finding that two documents were subject to discovery because each of the 11 joint clients shared a joint attorney-client privilege, which protected their communications from compelled disclosure to persons outside the joint representation. Because he could not unilaterally waive the privilege as to the emails, all of which involved other joint clients, he could not show that the privilege was waived. *Galati v. Pettorini, 2015-Ohio-1305, 2015 Ohio App. LEXIS 1242 (Ohio Ct. App., Cuyahoga County 2015)*.

It was unnecessary to determine whether the interrogatories were privileged under the work-product doctrine because they were not discoverable. Because each of the interrogatories asked the attorney to divulge information that directly related to his work in the underlying case, which involved ten other joint clients, pursuant to the joint-client privilege, the interrogatories were covered under attorney-client privilege. *Galati v. Pettorini, 2015-Ohio-1305, 2015 Ohio App. LEXIS 1242 (Ohio Ct. App., Cuyahoga County 2015)*.

Where plaintiffs sought to withdraw a stipulation of dismissal, as the other clients that plaintiffs' law firm represented in suits against the same defendants had not waived their attorney-client privilege, a magistrate judge properly excluded information about these clients' cases under *R.C. 2317.02(A)*. *Kraras v. Safeskin Corp., 2005 U.S. Dist. LEXIS 31819 (S.D. Ohio Aug. 17, 2005)*.

—Not found

Trial court did not err when it ordered an employee of the state agency in charge of Ohio's Medicaid program to answer the question of whether she met with the director of the agency concerning rate reconsideration requests because the question was a simple “yes” or “no” answer that was not subject to confidentiality and nondisclosure and not protected by the attorney-client privilege. *State ex rel. Ohio Acad. of Nursing Homes, Inc. v. Ohio Dep't of Medicaid, 2017-Ohio-8000, 2017 Ohio App. LEXIS 4325 (Ohio Ct. App., Franklin County 2017)*.

Trial court did not err in denying appellants’ motion to quash on the grounds that the communications between the doctor and their uncle were not protected under the attorney-client privilege because they did not prove that the privilege applied to the requested information. There was no evidence from which one could conclude that appellants designated, appointed, or otherwise requested the uncle to act as their agent and representative for purposes of the litigation. Further, appellants never requested an evidentiary hearing and the trial court was not required to hold an evidentiary hearing prior to ruling on a motion to quash. *Zimpfer v. Roach, 2016-Ohio-5176, 2016 Ohio App. LEXIS 3048 (Ohio Ct. App., Shelby County 2016)*.

Although correspondence between counsel for a fire district board and counsel for a fire chief during the pendency of the appeal in a prior proceeding against the fire chief, which discussed the possibility of a settlement in that case, was not a privileged document and should not have been excluded in a subsequent proceeding, there was no reversible error in the exclusion because it had no value, even on the issue of res judicata. *Fulmer v. W. Licking Joint Fire Dist., 2016-Ohio-5301, 2016 Ohio App. LEXIS 3160 (Ohio Ct. App., Licking County 2016)*.

Defendants were not entitled to a protective order barring plaintiff from disclosing or using a letter from their counsel to plaintiff’s counsel; as the letter was not a communication from an attorney to his clients or which contained an attorney’s advice to the clients, but a communication between adversaries in active litigation, it was not protected by the attorney-client privilege. Condos. at Stonebridge Owners’ Ass’n v. K&d *Group, Inc., 2014 Ohio 503, 2014 Ohio App. LEXIS 493 (Feb. 13, 2014)*.

Attorney, who did not file a request for findings of fact and conclusions of law, as required by Civ.R. 52, was properly held in contempt for failing to testify before a grand jury with respect to a conversation that she had with an inmate during the course of her investigation with respect to a postconviction petition filed on behalf of another inmate, who was her client, because some evidence supported the finding that the conversation was not protected by the attorney-client privilege, in that, even though the attorney subsequently represented the client in some capacity, the attorney did not prove that statements were connected with matter for which she had been retained by the inmate. *In re Grand Jury Subpoenas, 2005-Ohio-4607, 2005 Ohio App. LEXIS 4170 (Ohio Ct. App., Scioto County 2005)*.

—Not protected

Trial court did not err when it determined that communications and documents sought by a manufacturer were not protected by the attorney-client privilege under *R.C. 2317.02(A)* as the communication and documents at issue were not communications between a client and an attorney; instead, they were internal communications between attorneys at the law firm and communications between the firm’s attorneys and the attorneys’ co-counsel regarding a document it received from a third party. There was no communication by a client or advice to a client. *Sherwin-Williams Co. v. Motley Rice LLC, 2012-Ohio-809, 2012 Ohio App. LEXIS 703 (Ohio Ct. App., Cuyahoga County 2012)*.

—Presence of third person

The general rule that communications between an attorney and his client in the presence of a third person are not privileged does not apply when such third person is the agent of either the client or the attorney: *Foley v. Poschke, 137 Ohio St. 593, 19 Ohio Op. 350, 31 N.E.2d 845 (1941)*, affirming *66 Ohio App. 227 (1940)]*, discussed in *23 Ohio Op. 419*; *Nicholl v. Bergner, 76 Ohio App. 245, 31 Ohio Op. 529, 63 N.E.2d 828, 1945 Ohio App. LEXIS 596 (Ohio Ct. App., Lorain County 1945)*.

—Protected communication

Trial court erred by relying on defendant's letter to his counsel during sentencing because the contents of the letter were protected by the attorney-client privilege, since it was a communication from defendant to his trial counsel in counsel's professional capacity. Further, none of the discretionary exceptions applied and neither of the relevant statutory privilege waivers were met. *State v. Hoover, 2019-Ohio-4229, 2019 Ohio App. LEXIS 4311 (Ohio Ct. App., Belmont County 2019)*.

—Protective order

Trial court abused its discretion in prohibiting an employee from taking discovery depositions of the employer's attorneys in the employee's action for tortious interference with or destruction of evidence because the trial court's blanket protective order was overly broad, and the attorney deponents had an opportunity to assert the attorney-client and work-product protections if and when they were asked questions regarding information they believed was protected. *Elliott-Thomas v. Smith, 2017-Ohio-702, 79 N.E.3d 606, 2017 Ohio App. LEXIS 693 (Ohio Ct. App., Trumbull County 2017)*, rev'd, *2018-Ohio-1783, 154 Ohio St. 3d 11, 2018 Ohio LEXIS 1106 (Ohio 2018)*.

To properly address whether communications or material sought in pre-trial discovery are subject to the attorney-client privilege, it is, at a minimum, necessary to ask the questions first and for the privilege rule to be invoked, after which, a trial court then can, at hearing, determine if, in fact, privileged matters may be disclosed. *Riggs v. Richard, 2007-Ohio-490, 2007 Ohio App. LEXIS 437 (Ohio Ct. App., Stark County 2007)*.

When a trial court denied a lawyer's motion for a protective order, under Civ.R. 26(C), seeking to limit the lawyer's deposition to matters not protected by the attorney-client privilege in *R.C. 2317.02(A)*, the lawyer's appeal of that denial was premature until the deposition occurred, at which time the lawyer could state her objection to specific questions, fully developing the record for purposes of appeal. *Riggs v. Richard, 2007-Ohio-490, 2007 Ohio App. LEXIS 437 (Ohio Ct. App., Stark County 2007)*.

—Public records

Respondents were correct by asserting that itemized legal bills fell within the attorney-client privilege under this provision because they necessarily revealed confidential information, and it had been determined that the narrative portions of itemized attorney-fee billing statements containing descriptions of legal services performed by counsel were protected by the attorney-client privilege. *State ex rel. Ames v. Baker, 2022-Ohio-171, 2022 Ohio App. LEXIS 147 (Ohio Ct. App., Portage County 2022)*.

As billing statements of an attorney and his law firm for work performed for a city contained narrative descriptions of the legal services performed, they were protected by the attorney-client privilege under *R.C. 2317.02(A)* and were exempt from disclosure under *R.C. 149.43* of the Public Records Act; mandamus relief was not warranted to the records requester. *State ex rel. Anderson v. City of Vermilion, 2012-Ohio-1868, 2012 Ohio App. LEXIS 1636 (Ohio Ct. App., Erie County)*, aff'd in part and rev'd in part, *2012-Ohio-5320, 134 Ohio St. 3d 120, 980 N.E.2d 975, 2012 Ohio LEXIS 2876 (Ohio 2012)*.

Records requested from a school district by a parent were exempt from disclosure under the Ohio Public Records Act, *R.C. 149.43*, pursuant to *R.C. 149.43(A)(1)(v)*, because the school district met its burden of establishing the

applicability of the attorney-client privilege to the itemized attorney-fee bills that were requested by the parent because the statements contained detailed descriptions of work performed by the district's attorneys, statements concerning their communications to each other and insurance counsel, and the issues they researched. Moreover, a letter from the school district's insurance carrier to the district identifying an attorney as the district's attorney and describing the liability and exposure of the district and insurance company in the parent's lawsuit against the district was also protected by the attorney-client privilege. *State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist., 2011-Ohio-6009, 131 Ohio St. 3d 10, 959 N.E.2d 524, 2011 Ohio LEXIS 2972 (Ohio 2011)*.

—Self-incrimination

The privilege against self-incrimination applies when testimony is compelled from a person claiming to be incriminated by disclosure. Where an attorney or the attorney's agent is being subpoenaed, only the attorney-client privilege and the work product doctrine may be invoked to protect the client. A court may hold an in camera hearing to review allegedly privileged material: *State v. Hoop, 134 Ohio App. 3d 627, 731 N.E.2d 1177, 1999 Ohio App. LEXIS 3522 (Ohio Ct. App., Brown County)*, dismissed, *87 Ohio St. 3d 1441, 719 N.E.2d 5, 1999 Ohio LEXIS 3556 (Ohio 1999)*.

—Self-protection exception

In addressing whether the common-law self-protection exception to the attorney-client privilege, permitting an attorney to reveal attorney-client communications when necessary to establish a claim or defense on the behalf of the attorney, applied as an exception to *R.C. 2317.02(A)*, which provided that an attorney shall not testify concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, the court found that recognition of the common-law self-protection exception to the attorney-client privilege as part of Ohio law aided the administration of justice and was supported by decisions of other jurisdictions addressing the issue; therefore, pursuant to the common-law self-protection exception to the attorney-client privilege, an attorney should be permitted to testify concerning attorney-client communications where necessary to collect a legal fee or to defend against a charge of malpractice or other wrongdoing in litigation against a client or former client. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 2010-Ohio-4469, 127 Ohio St. 3d 161, 937 N.E.2d 533, 2010 Ohio LEXIS 2284 (Ohio 2010)*.

—Settlement agreement

Trial court properly concluded that a settlement agreement entered between a tenant and an insurer in earlier case did not constitute a privileged attorney-client communication as it was not compiled in anticipation of a suit; thus, the discovery of the settlement agreement was not barred by *R.C. 2317.02(A)* and/or the attorney-client privilege. *Ro-Mai Indus. v. Manning Props., 2010-Ohio-2290, 2010 Ohio App. LEXIS 1890 (Ohio Ct. App., Portage County 2010)*.

—Subsequent acts by client

Although an attorney may not testify about conversations considered confidential by him and his client, the privilege does not extend to subsequent acts by the client relating to the discussions: *Hawgood v. Hawgood, 33 Ohio Misc. 227, 62 Ohio Op. 2d 427, 294 N.E.2d 681, 1973 Ohio Misc. LEXIS 242 (Ohio C.P. 1973)*.

—Unlawful adoption

Where an attorney assists in the illegal, private placement of a child for adoption, the client's name and address are not privileged: *Lemley v. Kaiser, 6 Ohio St. 3d 258, 452 N.E.2d 1304, 1983 Ohio LEXIS 818 (Ohio 1983)*.

—Waiver

Defendant's testimony waived his attorney-client privilege not only with respect to communications regarding the terms of his plea, but also with respect to whether he had a viable defense to the charges against him; given defendant's testimony, the prosecutor was not precluded by attorney-client privilege from questioning defendant's counsel about the viability of self-defense and whether counsel was aware of the factual bases for the potential defense prior to the plea. *State v. Goodwin, 2020-Ohio-5274, 2020 Ohio App. LEXIS 4121 (Ohio Ct. App., Montgomery County 2020)*.

Attorney's disclosure of client's confidential information was not excused based on the attorney's claim that it was not confidential because it was published in three newspaper articles, as the disclosed information regarding the client's allegedly false statements surrounding a fire that destroyed his property was not part of the known disclosure, and the attorney-client privilege had not been waived. *Disciplinary Counsel v. Shimko, 2019-Ohio-2881, 157 Ohio St. 3d 58, 131 N.E.3d 52, 2019 Ohio LEXIS 1452 (Ohio 2019)*.

With regard to a privileged communication between the Ohio Environmental Protection Agency and its legal counsel that was inadvertently produced to appellee, the trial court erred when it failed to conduct a hearing on whether the agency had waived the attorney-client privilege with regard to that communication. *Morgan v. Butler, 2017-Ohio-816, 85 N.E.3d 1188, 2017 Ohio App. LEXIS 807 (Ohio Ct. App., Franklin County 2017)*.

Appellate court had jurisdiction over a crime victim's challenge regarding the trial court's orders requiring the victim to disclose information to her counsel to then be disclosed to a defense expert because the victim claimed the communications were privileged; however, the victim's appeal was moot because the victim voluntarily disclosed all of the information sought in the orders to the trial court, thereby waiving the privilege. *State v. Hendon, 2017-Ohio-352, 83 N.E.3d 282, 2017 Ohio App. LEXIS 356 (Ohio Ct. App., Summit County 2017)*.

Trial court did not err in determining that the husband did not waive the attorney-client privilege through implied waiver because the statute provided the exclusive means by which privilege communications directly between could attorney and a client could be waived. *Stepka v. McCormack, 2016-Ohio-3103, 66 N.E.3d 32, 2016 Ohio App. LEXIS 1956 (Ohio Ct. App., Lorain County 2016)*.

It was error to grant a motion by company owners to compel discovery compliance in an employee's action, arising from the owners' alleged breach of their verbal promise, because it was unclear without conducting a hearing to evaluate the case-by-case balancing test, whether the employee had waived his attorney-client privilege by voluntarily, but inadvertently, disclosing a memo that contained his attorney's litigation advice. *See v. Haugh, 2014-Ohio-5290, 2014 Ohio App. LEXIS 5129 (Ohio Ct. App., Cuyahoga County 2014)*.

Exclusive means of waiver of attorney-client privilege were not met because the client did not expressly consent, and the individual employees could not waive a privilege that was owned by the entire organization. *Watson v. Cuyahoga Metro. Hous. Auth., 2014-Ohio-1617, 2014 Ohio App. LEXIS 1555 (Ohio Ct. App., Cuyahoga County 2014)*.

Even if the attorney-client privilege had been applicable, the trial court did not err by denying a protective order because the board of commissioner's assertion of the affirmative advice of counsel waived the attorney-client privilege with regard to such advice. The board could not avoid waiver of the attorney-client privilege by disavowing itself of its own answer. *Maddox v. Bd. of Comm'rs, 2014-Ohio-1541, 2014 Ohio App. LEXIS 1494 (Ohio Ct. App., Greene County 2014)*.

Trial court properly denied defendant's motion to withdraw his plea because, by raising an ineffective assistance of counsel claim in postconviction proceedings, he waived the attorney-client privilege. *State v. Montgomery, 2013-Ohio-4193, 997 N.E.2d 579, 2013 Ohio App. LEXIS 4404 (Ohio Ct. App., Cuyahoga County 2013)*.

Trial court has no discretion to impose policy limitations on a surviving spouse's statutory waiver of the decedent's attorney-client privilege. Thus, a court is not to weigh whether there is a conflict between the interests of the

surviving spouse and those of the decedent or the decedent's estate, and the surviving spouse's waiver is not statutorily limited to communications occurring during the period of marriage. *In re Estate of Hohler v. Hohler, 2011-Ohio-5469, 197 Ohio App. 3d 237, 967 N.E.2d 219, 2011 Ohio App. LEXIS 4475 (Ohio Ct. App., Carroll County 2011)*.

Once defendant testified concerning the substance of defendant's communication with defendant's trial attorney concerning whether to tender a plea, that communication was no longer confidential and privileged, so that the trial court did not err in overruling defendant's objection to defendant's former attorney testifying concerning that communication. *State v. Houck, 2010-Ohio-743, 2010 Ohio App. LEXIS 607 (Ohio Ct. App., Miami County 2010)*.

Trial court properly concluded that the attorney-client privilege between a decedent and his attorney was waived by the surviving spouse as, pursuant to *R.C. 2317.02(A)*, trial court's only decision was whether the decedent was married at the time of his death and whether the spouse wished to waive the privilege. There were no limitations on waiver in such an instance. *Estate of Hohler v. Hohler, 2009-Ohio-7013, 185 Ohio App. 3d 420, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878 (Ohio Ct. App., Carroll County 2009)*.

Personal representative voluntarily waived the attorney-client privilege on three occasions because he affirmatively asserted, without being asked, that he acted on the advice of his patent attorneys and voluntarily offered that contention as a defense to counter the fact that he misappropriated his client's trademark rights. It was not forced out of him by the client's counsel on cross-examination; the personal representative could not prevent the patent firm from discussing communications that could absolve it from any wrongdoing—communications that he himself put in issue. *Meyers, Roman, Friedberg & Lewis v. Malm, 2009-Ohio-2577, 183 Ohio App. 3d 195, 916 N.E.2d 832, 2009 Ohio App. LEXIS 2188 (Ohio Ct. App., Cuyahoga County 2009)*.

When a former wife sought relief from a qualified domestic relations order's provision barring the wife's receipt of part of the wife's former husband's pension if the wife remarried before a certain age, it was not an abuse of discretion for a trial court to deny the former husband access to correspondence between the former wife and the former wife's counsel because (1) the former wife did not expressly consent to having counsel produce the correspondence, (2) the former wife did not waive the former wife's attorney-client privilege by filing the former wife's motion for relief, and (3) the former wife did not voluntarily testify about the former wife's conversations or correspondence with counsel. *Bagley v. Bagley, 2009-Ohio-688, 181 Ohio App. 3d 141, 908 N.E.2d 469, 2009 Ohio App. LEXIS 567 (Ohio Ct. App., Greene County 2009)*, overruled in part, *Pearl v. Pearl, 2012-Ohio-4752, 980 N.E.2d 1095, 2012 Ohio App. LEXIS 4160 (Ohio Ct. App., Champaign County 2012)*.

Trial court has no discretion to impose policy limitations on a surviving spouse's statutory waiver of a decedent's attorney-client privilege. Nevertheless, documents prepared in anticipation of litigation may constitute protected work product: *Estate of Hohler v. Hohler, 2009-Ohio-7013, 185 Ohio App. 3d 420, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878 (Ohio Ct. App., Carroll County 2009)*.

Client voluntarily waived the attorney-client privilege when he testified that he knowingly made false statements on a trademark application on the advice of counsel: *Meyers, Roman, Friedberg & Lewis v. Malm, 2009-Ohio-2577, 183 Ohio App. 3d 195, 916 N.E.2d 832, 2009 Ohio App. LEXIS 2188 (Ohio Ct. App., Cuyahoga County 2009)*.

Employer's *Fed. R. Civ. P. 37* motion to compel its former employee's attorney to testify regarding his communications with the employee regarding his settlement authority was granted because the testimony was admissible pursuant to *Fed. R. Civ. P. 26(b)(1)* on two grounds; under *R.C. 2317.02(A)*, because the employee testified that he did not authorize the attorney to accept a settlement offer, he waived the attorney-client privilege. Further, granting settlement authority was not a confidential communication. *Rubel v. Lowe's Home Ctrs., Inc., 580 F. Supp. 2d 626, 2008 U.S. Dist. LEXIS 91198 (N.D. Ohio 2008)*.

Company waived the attorney-client privilege in an e-mail it inadvertently produced to a customer during discovery in a breach of contract action due to an affidavit by a former director of operations for the company that dealt with the same subject matter as the affidavit and was filed with the company's motion for summary judgment prior to the

inadvertent disclosure of the e-mail. *Air-Ride, Inc. v. DHL Express (USA), Inc., 2008-Ohio-5669, 2008 Ohio App. LEXIS 4761 (Ohio Ct. App., Clinton County 2008)*.

R.C. 2317.02 did not abrogate the common-law implied-waiver doctrine because the statutory attorney-client privilege was a testimonial privilege; where the statute was not implicated, the common law applied. The implied-waiver exception to the attorney-client privilege was relevant to records, documents, and communications unless *R.C. 2317.02(A)* applied, in which case the client could only waive the privilege expressly or by testifying on the issue. *Grace v. Mastruserio, 2007-Ohio-3942, 182 Ohio App. 3d 243, 912 N.E.2d 608, 2007 Ohio App. LEXIS 3580 (Ohio Ct. App., Hamilton County 2007)*.

Under Hearn, a party impliedly waives the attorney-client privilege through its own affirmative conduct if (1) assertion of the privilege is the result of some affirmative act, such as filing suit, by the asserting party, (2) through the affirmative act, the asserting party has placed the protected information at issue by making it relevant to the case, and (3) application of the privilege would deny the opposing party access to information vital to its defense. *Gialousis v. Eye Care Assocs., 2007-Ohio-1120, 2007 Ohio App. LEXIS 1042 (Ohio Ct. App., Mahoning County 2007)*.

When a patient sued physicians and their practice for medical malpractice, and the physicians asserted a statute of limitations defense, it was proper for the trial court, after inspecting, in camera, records from a law firm the patient had consulted, to release certain of those records to the physicians because the patient waived her attorney-client privilege, under *R.C. 2317.02(A)*, as to records from that firm concerning the subject matter of her consultation with them because she had filed an affidavit stating that she did not consult them concerning her claim against the physicians, placing the scope of that consultation in issue, and, because the records were vital to the physicians' statute of limitations defense, waiving the privilege. *Gialousis v. Eye Care Assocs., 2007-Ohio-1120, 2007 Ohio App. LEXIS 1042 (Ohio Ct. App., Mahoning County 2007)*.

In an executor's suit for judicial construction and reformation of a trust, the trial court erred in excluding the testimony of the attorney who drafted the trust on the ground that the executor had waived the attorney-client privilege in *R.C. 2317.02(A)* when she filed the suit because the Ohio Supreme Court has rejected the doctrine of implied waiver. *Smith v. Smith, 2006-Ohio-6975, 2006 Ohio App. LEXIS 6935 (Ohio Ct. App., Hamilton County 2006)*.

Attorney-client privilege was not waived under *R.C. 2317.02(A)* for purposes of an attorney's request for disclosure of communications in his former law client's legal malpractice action against him, as her privilege regarding documents from a civil action against a city and its police officers, arising from their arrest of her, was not waived by either of the express methods statutorily indicated and there was no implied waiver. *Jackson v. Greger, 2006-Ohio-4968, 110 Ohio St. 3d 488, 854 N.E.2d 487, 2006 Ohio LEXIS 2902 (Ohio 2006)*.

Defendant was not denied a fair trial as the record failed to reflect any coercion by the trial court; when defendant gave a written statement to the police in which he characterized the property deed as the one he gave to his lawyer to have his ex-wife (the victim) sign, he voluntarily disclosed a matter protected by his attorney-client privilege and, therefore, he waived that privilege. He made an informed decision to waive the privilege and he later testified on his own behalf to explain his written statement. *State v. Storey, 2006-Ohio-3498, 2006 Ohio App. LEXIS 3441 (Ohio Ct. App., Cuyahoga County 2006)*.

Trial court did not abuse its discretion under *R.C. 2317.02(A)* where it denied a construction company's motion to compel the file and complete trial testimony of the company's clients' attorney, and where it granted the clients' motion for a protective order, as the information disclosed by the clients was not relevant to the case and accordingly, under the tripartite test for determination of whether the privilege was waived, there was no such waiver found; further, the fact that the clients' architect was present while the settlement negotiations were ongoing in the parties' mediation, for which the attorney's file and testimony was sought, was not shown to have constituted a waiver of the attorney-client privilege. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Where submitted documents fell into one of three categories: (1) communications soliciting the legal advice that resulted in the drafting of a Memorandum that had been voluntarily and deliberately disclosed; (2) other versions of the Memorandum; and (3) communications between defendant, a client of the law firm addressing legal concerns raised in the Memorandum and prompted by the responses received from third persons to whom the Memorandum was disclosed, the court held that the attorney-client privilege as to those documents had been waived by the client and the law firm pursuant to *R.C. 2317.02*, and therefore those documents were ordered to be disclosed. *Cline v. Reliance Trust Co., 2005 U.S. Dist. LEXIS 26066 (N.D. Ohio Oct. 31, 2005)*.

As *R.C. 2317.02* only addresses the testimonial aspect of the attorney-client privilege, it was not applicable to a dispute as to whether the privilege was waived concerning a subpoena duces tecum for certain documents. That issue must be resolved under the common law of Ohio. *Cline v. Reliance Trust Co., 2005 U.S. Dist. LEXIS 26066 (N.D. Ohio Oct. 31, 2005)*.

The attorney-client privilege was impliedly waived by the party asserting it where he filed an action which placed the protected information at issue by making it relevant to the case and where applying the privilege would deny the opposing party access to information vital to its defense: *Ward v. Graydon, Head & Ritchey, 2001-Ohio-8654, 147 Ohio App. 3d 325, 770 N.E.2d 613, 2001 Ohio App. LEXIS 5340 (Ohio Ct. App., Clermont County 2001)*.

A waiver of the attorney-client privilege did not occur as a result of a witness's deposition testimony during cross-examination because cross-examination testimony is not voluntary, since the client and his counsel do not have control of the questions or the information which is to be elicited: *Carver v. Township of Deerfield, 139 Ohio App. 3d 64, 742 N.E.2d 1182, 2000 Ohio App. LEXIS 4588 (Ohio Ct. App., Portage County 2000)*.

R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived: *State v. McDermott, 1995-Ohio-80, 72 Ohio St. 3d 570, 651 N.E.2d 985, 1995 Ohio LEXIS 1459 (Ohio 1995)*.

When a client brings a malpractice action against his former attorney, he waives the privilege as to any subject pertinent to his claim. DR 4-101(B) authorizes an attorney to reveal confidences as necessary to defend his associates against a claim of wrongful conduct: *Surovec v. LaCouture, 82 Ohio App. 3d 416, 612 N.E.2d 501, 1992 Ohio App. LEXIS 5146 (Ohio Ct. App., Montgomery County 1992)*, dismissed, *66 Ohio St. 3d 1420, 607 N.E.2d 843, 1993 Ohio LEXIS 434 (Ohio 1993)*.

Waiver of the attorney-client privilege occurs when the client discloses communications that were made pursuant to the privilege to a third-party; any such disclosure that is inconsistent with the maintenance of the confidential nature of the attorney-client relationship waives the privilege: *State v. McDermott, 79 Ohio App. 3d 772, 607 N.E.2d 1164, 1992 Ohio App. LEXIS 2450 (Ohio Ct. App., Lucas County)*, dismissed, *65 Ohio St. 3d 1430, 600 N.E.2d 675, 1992 Ohio LEXIS 2549 (Ohio 1992)*.

A court may not require an attorney to answer leading questions in order to determine whether a client waived the privilege by disclosing information to a third party: *State v. McDermott, 73 Ohio App. 3d 689, 598 N.E.2d 147, 1991 Ohio App. LEXIS 3059 (Ohio Ct. App., Lucas County 1991)*.

An attorney may testify about a communication made to him by his client in that relation or his advice to his client if the client voluntarily testifies about that communication or advice in any proceeding in which the client is a party: *Walsh v. Barcelona Associates, Inc., 16 Ohio App. 3d 470, 476 N.E.2d 1090, 1984 Ohio App. LEXIS 10018 (Ohio Ct. App., Franklin County 1984)*.

Where a client authorizes the delivery of information revealed in an attorney-client relationship to a third person, the confidential nature of the communication no longer exists and the privilege against divulging such information may not be invoked: *Hawgood v. Hawgood, 33 Ohio Misc. 227, 62 Ohio Op. 2d 427, 294 N.E.2d 681, 1973 Ohio Misc. LEXIS 242 (Ohio C.P. 1973)*.

If the defendant in a criminal case voluntarily testifies, his attorney may be compelled to testify on the same subject unless barred by the constitutional rights of the defendant: *State v. Crissman, 31 Ohio App. 2d 170, 60 Ohio Op. 2d 279, 287 N.E.2d 642, 1971 Ohio App. LEXIS 474 (Ohio Ct. App., Columbiana County 1971)*.

When a testatrix, in the presence of her attorney who drew the will, asks a witness to look the will over and tell her what he thinks of it, and if it is all right, and the witness reads the will, the acquainting of the witness with all the subject matter of her will in the presence of her attorney constitutes an express waiver of the privilege of attorney and client otherwise assured to her under this section in so far as the contents of the will are concerned: *In re Estate of Eliker, 32 Ohio Law Abs. 465, 1940 Ohio App. LEXIS 1040 (Ohio Ct. App., Darke County June 17, 1940)*.

Attorney—client privilege.

Court sustained the university's second objection because it met its burden to show that the withheld records, with the exception of the final approved versions, fell squarely within a statutory exception since the withheld records, except as noted, facilitated the rendition of legal services or advice for which the attorney-client privilege applied. *Smith v. Ohio State Univ. Off. of Compliance & Integrity, 2022-Ohio-2657, 2022 Ohio Misc. LEXIS 212 (Ohio Ct. Cl. 2022)*.

Attorney—client privilege; —Protected communication.

Defendant properly withheld the 18 emails that contained discussions between defense counsel and employees of defendant because they were privileged attorney-client communications since each of these emails contained comments from defense counsel to defendant about the status of the lawsuit or information written or produced by an employee of defendant at the request of counsel so that counsel could render it legal advice. *N.E. Monarch Constr., Inc. v. Morganti Enter., 2022-Ohio-3551, 2022 Ohio App. LEXIS 3359 (Ohio Ct. App., Cuyahoga County 2022)*.

Blood alcohol test

Trial court did not err when it found that the officer acted in good faith and denied defendant's motion to suppress because given the case represented an issue of first impression for the court, the officer lacked any guidance from the appellate district at the time she requested defendant's blood test results. *State v. Gubanich, 2022-Ohio-2815, 194 N.E.3d 850, 2022 Ohio App. LEXIS 2661 (Ohio Ct. App., Medina County 2022)*.

Police officer's warrantless acquisition of defendant's medical records was in violation of his Fourth Amendment rights as defendant retained a reasonable expectation of privacy in the alcohol-and drug-test results created during his emergency treatment, even the statutes required the hospital to comply with the officer's request for the information and the information was exempt from Ohio's physician-patient privilege; the officer's reliance on the statutes to obtain the records was in good faith, and the exclusionary rule did not require the suppression of those unlawfully obtained test results. *State v. Eads, 2020-Ohio-2805, 154 N.E.3d 538, 2020 Ohio App. LEXIS 1781 (Ohio Ct. App., Hamilton County 2020)*.

Trial court erred in denying defendant's motion to suppress without first finding that the blood-alcohol test performed by a hospital was in fact performed for medical purposes and not an improper warrantless action performed only because the hospital had received request for medical information pursuant to *R.C. 2317.022* from a deputy. *State v. Hepler, 2016-Ohio-2662, 2016 Ohio App. LEXIS 1539 (Ohio Ct. App., Wood County 2016)*.

In a case involving aggravated vehicular homicide and operating under the influence of alcohol or drugs, a motion to suppress evidence was properly granted because there was no substantial compliance with *OAC 3701-53-05* where a nurse who withdrew blood used an alcohol-based antiseptic swab, it was unclear whether a solid anticoagulant was used, as required by *OAC 3701-53-05(C)*, and the blood sample could have been stored at room temperature for as long as 22 hours and 15 minutes, in violation of *OAC 3701-53-05(F)*. In order to be admitted under *R.C. 4511.19(D)(1)(a)*, the sample had to be both withdrawn and analyzed at any health care provider, as defined in *R.C. 2317.02(B)(5)(b)*; the State did not present evidence suggesting that the blood was analyzed at a health care provider. *State v. Oliver, 2010-Ohio-6306, 2010 Ohio App. LEXIS 5269 (Ohio Ct. App., Summit County 2010)*.

Admission of blood alcohol test evidence does not violation the doctor-patient privilege, pursuant to *R.C. 2317.02(B)(1)(b)*; defendant’s conviction for aggravated vehicular assault, was affirmed where, despite defendant’s claims that the trial court erred in admitting blood alcohol evidence taken by a laboratory technician who was not certified, the lab was certified by the major inspection organization for clinical laboratories, and the technician, while not certified, had met all of the educational requirements for certification. *State v. Wells, 2004-Ohio-1026, 2004 Ohio App. LEXIS 902 (Ohio Ct. App., Greene County 2004)*.

Breach of confidentiality

Expressly recognizing the tort of breach of confidentiality in Ohio, the court held that in order to establish a cause of action for breach of confidentiality, a plaintiff must demonstrate an unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship: *Biddle v. Warren Gen. Hosp., 1998 Ohio App. LEXIS 1273 (Ohio Ct. App., Trumbull County Mar. 27, 1998)*, aff'd, *1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999)*.

Burden of proof

Court of Claims erred in ruling against the decedent’s state on grounds that it had failed to carry a burden that was not its to carry by incorrectly shifting the defendant's burden to the plaintiff. Evidence as to the inmate’s mental state leading up to the attack and his psychiatric condition and propensity for violence were discoverable absent Ohio Department of Rehabilitation and Correction demonstrating that they should not be subject to discovery for whatever reason it posited. *Frash v. Ohio Dep't of Rehab. & Corr., 2016-Ohio-360, 59 N.E.3d 566, 2016 Ohio App. LEXIS 311 (Ohio Ct. App., Franklin County 2016)*.

Child abuse

Court concluded that parents failed to demonstrate that trial court erred in allowing the social worker to testify about mother’s admission of prenatal drug use as her admission to social worker that she used fentanyl “a handful of times” shortly before the child was born fell within the meaning of clear and present danger. *In re H.P., 2022-Ohio-778, 2022 Ohio App. LEXIS 698 (Ohio Ct. App., Summit County 2022)*.

As former *R.C. 2151.421(H)* (prior to the amendments by Am. Sub. H.B. 280, Gen. Assem. (Ohio 2008)) made no exception for discovery under Civ.R. 26(B)(1) of abuse reports of nonparties in a civil action by parents of a minor who had an abortion and the physician-patient privilege applied under *R.C. 2317.02*, reports of nonparties were not discoverable; the matter did not arise from a report submitted about the parents' own daughter, such that

§ 2151.421(G)(b) was inapplicable. Roe v. Planned Parenthood Southwest Ohio Region, 2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009).

Where an appellate court previously upheld a trial court's finding that a report by a social worker contained an indication of present or past abuse by defendant, such that it was admissible in his criminal trial on charges of multiple sexual offenses, pursuant to R.C. 2317.02(G)(1)(a), the law of the case doctrine prevented relitigation of that issue on another appeal. State v. Orwick, 2005-Ohio-4444, 2005 Ohio App. LEXIS 4032 (Ohio Ct. App., Hancock County 2005), rev'd in part, 2006-Ohio-2109, 109 Ohio St. 3d 313, 847 N.E.2d 1174, 2006 Ohio LEXIS 1161 (Ohio 2006).

Any privilege under R.C. 2317.02 or 4732.19 is automatically waived under R.C. 2151.42.1(A)(3) in certain child abuse cases: State v. Stewart, 111 Ohio App. 3d 525, 676 N.E.2d 912, 1996 Ohio App. LEXIS 2326 (Ohio Ct. App., Medina County 1996).

Child custody

Any error by the juvenile court in admitting the testimony of the child's physician was harmless because the physician's testimony relating to the child's medical condition and treatments was merely cumulative of evidence adduced from other witnesses' testimony, and the father failed to show how he was prejudiced by the admission of the physician's testimony. In re J.R., 2019-Ohio-1151, 2019 Ohio App. LEXIS 1213 (Ohio Ct. App., Summit County 2019).

Communications a caseworker had with a parent were not privileged according to R.C. 2317.02(G)(1)(a) because whether the parent could provide care and a safe environment for the parent's children was the critical issue for the court in determining whether to grant permanent custody to an agency. In re R.M., 2012-Ohio-4290, 2012 Ohio App. LEXIS 3770 (Ohio Ct. App., Cuyahoga County 2012).

As a mother's mental health was at issue with respect to a permanent custody and parental rights termination proceeding commenced by a county social service agency, and the agency was required to maintain a case plan for the child pursuant to R.C. 2151.412, the mother's mental health and medical records were not privileged or protected from disclosure pursuant to R.C. 2317.02 and Ohio R. Juv. P. 17(G). In re D.E.P., 2009-Ohio-3076, 2009 Ohio App. LEXIS 2575 (Ohio Ct. App., Cuyahoga County 2009).

Assuming, arguendo, that the mother did not seek prenatal care until 37 weeks gestation and that the statement made by the mother relative to her unborn child was privileged, any error in admitting the mother's statements was harmless because overwhelming clear and convincing evidence established that the child could not be returned to his mother's care within a reasonable time and that it was in his best interest to award permanent custody to the agency. In re Henry James M., 2007-Ohio-2830, 2007 Ohio App. LEXIS 2648 (Ohio Ct. App., Fulton County 2007).

When a father who was being treated for bipolar disorder sought custody of his child, he placed his mental health in issue, and his medical records from his psychiatrist could be released to the divorce court in which he sought custody because, under R.C. 2317.02(B), the filing of any civil action by a patient waived the physician-patient privilege as to any communication that related causally or historically to the physical or mental injuries put at issue by such civil action, and, as stated in R.C. 3109.04(F)(1)(e), the mental health of the parents, in a custody action, was of major importance, so § 3109.04 put their mental conditions in issue. Hageman v. Southwest Gen. Health Ctr., 2006-Ohio-6765, 2006 Ohio App. LEXIS 6670 (Ohio Ct. App., Cuyahoga County 2006), aff'd, 2008-Ohio-3343, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008 Ohio LEXIS 1773 (Ohio 2008).

Trial court erred by ordering the release of all of the mother's medical records without first conducting an in camera hearing for inspection of the records because the request was too broad on its face. Although the mother waived the physician-patient privilege, pursuant to R.C. 2317.02(B)(1) and R.C. 3109.04(F)(1)(e), she waived the privilege solely in regard to the issue of custody; her waiver was not a complete abrogation of the physician-patient privilege. Sweet v. Sweet, 2005-Ohio-7060, 2005 Ohio App. LEXIS 6331 (Ohio Ct. App., Ashtabula County 2005).

In the absence of a specific statutory waiver or exception, the testimonial privileges established under R.C. 2317.02(B)(1) (concerning communications between a physician and patient), R.C. 4732.19 (concerning communications between a licensed psychologist and client), and R.C. 2317.02(G) (concerning communications between a licensed counselor or licensed social worker and client) are applicable to communications made by a parent in the course of treatment ordered as part of a reunification plan in an action for dependency and neglect: *In re Wieland, 2000-Ohio-233, 89 Ohio St. 3d 535, 733 N.E.2d 1127, 2000 Ohio LEXIS 2064 (Ohio 2000)*.

By seeking custody of the children in a divorce action, a spouse makes his or her mental and physical condition an element to be considered by the court in awarding custody: *Neftzer v. Neftzer, 140 Ohio App. 3d 618, 748 N.E.2d 608, 2000 Ohio App. LEXIS 5910 (Ohio Ct. App., Clermont County 2000)*.

Appellant waived the physician-patient privilege when he filed the divorce action and sought custody of his children: *Whiteman v. Whiteman, 1995 Ohio App. LEXIS 2700 (Ohio Ct. App., Butler County June 26, 1995)*.

An order requiring a parent who seeks to retain custody of her child to execute a waiver of her rights under R.C. 2317.02 as to communications with her social worker is a final appealable order: *Voss v. Voss, 62 Ohio App. 3d 200, 574 N.E.2d 1175, 1989 Ohio App. LEXIS 2003 (Ohio Ct. App., Cuyahoga County 1989)*.

In an action seeking a determination of dependency and neglect and an order of permanent custody of a child, the statutes of Ohio make no exception to the privilege attaching to the communications between psychiatrist and patient, psychologist and patient (or client), and to the privilege, if it exists, between social workers employed in the office of the psychiatrist and psychologist and client: *In re Decker, 20 Ohio App. 3d 203, 485 N.E.2d 751, 1984 Ohio App. LEXIS 12566 (Ohio Ct. App., Van Wert County 1984)*.

Children services agency records

A defendant is entitled to the court's in camera inspection of children services agency records where the defendant shows that there is a reasonable probability, grounded on some demonstrable fact, that the records contain material relevant to the defense: *State v. Allan, 1996 Ohio App. LEXIS 272 (Ohio Ct. App., Lucas County Feb. 2, 1996)*.

Chiropractors

The physician-patient privilege does not apply to chiropractors: *In re Polen, 108 Ohio App. 3d 305, 670 N.E.2d 572, 1996 Ohio App. LEXIS 106 (Ohio Ct. App., Franklin County 1996)*.

Civil commitment proceedings

R.C. 2317.02 makes no exception for civil commitment proceedings: *In re Miller, 63 Ohio St. 3d 99, 585 N.E.2d 396, 1992 Ohio LEXIS 226 (Ohio 1992)*.

Clergy

Because the religious organizations did not show that the Bodies of Elders letters satisfied the statutory requirements for the clergy privilege, since they did not seek to impart spiritual wisdom, the trial court did not err by ordering their production. *McFarland v. West Congregation of Jehovah's Witnesses, Lorain, OH, Inc., 2016-Ohio-5462, 60 N.E.3d 39, 2016 Ohio App. LEXIS 3356 (Ohio Ct. App., Lorain County 2016)*.

Trial court erred when it ordered the organizations to produce four of the documents because they were protected from disclosure by virtue of the clergy-penitent privilege, since the letters were not secular in nature. However, the trial court did not err when it concluded that the remaining 15 documents were not protected from disclosure by

virtue of either the clergy-penitent privilege or the First Amendment. *McFarland v. West Congregation of Jehovah's Witnesses, Lorain, OH, Inc., 2016-Ohio-5462, 60 N.E.3d 39, 2016 Ohio App. LEXIS 3356 (Ohio Ct. App., Lorain County 2016)*.

Defendant was not entitled to rely on either the confessional or counseling privilege because he and his spiritual advisor did not have a pastoral relationship; neither his spiritual advisor's church nor the church defendant actually attended recognized confession as a sacrament or religious obligation; the spiritual advisor had no training as a pastor or Christian counselor; and the spiritual advisor would have been under a duty to report any information pertaining to a crime disclosed during a Christian counseling session. *State v. Billman, 2013-Ohio-5774, 2013 Ohio App. LEXIS 6064 (Ohio Ct. App., Monroe County 2013)*.

Defendant's attempted sexual battery conviction, under *R.C. 2923.02* and *2907.03(A)(12)*, was not against the manifest weight of the evidence because it was sufficiently proved that defendant was a "cleric," and that defendant's church was legally cognizable, under *R.C. 2317.02*. *State v. Curtis, 2009-Ohio-192, 2009 Ohio App. LEXIS 144 (Ohio Ct. App., Butler County 2009)*.

The legislature did not intend *R.C. 2317.02* to protect persons against disclosures by a counseling minister outside legal proceedings. However, there may be a claim for common law negligence. A cause of action for clergy malpractice is not available when other torts provide a remedy. Disclosures do not constitute an invasion of privacy where they are to a counselee's spouse and the spouse's family, rather than the public at large: *Alexander v. Culp, 124 Ohio App. 3d 13, 705 N.E.2d 378, 1997 Ohio App. LEXIS 3994 (Ohio Ct. App., Cuyahoga County 1997)*.

Psychological counseling and evaluation provided by church authorities to a priest accused of child sexual abuse are privileged under *R.C. 2317.02* if they are performed for treatment purposes. They are not privileged if performed in order to determine the church's response to the misconduct: *Niemann v. Cooley, 93 Ohio App. 3d 81, 637 N.E.2d 943, 1994 Ohio App. LEXIS 207 (Ohio Ct. App., Hamilton County 1994)*.

The clergyman-penitent privilege did not apply in this instance because the challenged testimony concerned only a conversation, and not a confession, between the clergyman and a member of his church: *Radecki v. Schuckardt, 50 Ohio App. 2d 92, 4 Ohio Op. 3d 60, 361 N.E.2d 543, 1976 Ohio App. LEXIS 5851 (Ohio Ct. App., Lucas County 1976)*.

A communication made to a clergyman or priest to be deemed privileged under authority of *R.C. 2317.02*, must apply only to a confession made in the understood pursuance of church discipline which gives rise to the confessional relation and not to a communication of other tenor: *In re Estate of Soeder, 7 Ohio App. 2d 271, 36 Ohio Op. 2d 404, 220 N.E.2d 547, 1966 Ohio App. LEXIS 443 (Ohio Ct. App., Cuyahoga County 1966)*.

Communications, generally

There was no violation of doctor/patient privilege because defendant did not establish that a definitive "communication" was improperly implicated via the doctor's testimony. The doctor's testimony included what test was ordered, why the test was ordered, and his own observations made without even speaking with defendant. *State v. Frangella, 2012 Ohio App. LEXIS 1654 (Ohio Ct. App., Richland County Apr. 25, 2012)*.

The term, "communication," as used in *R.C. 2317.02* relating to privileged communications, includes not only knowledge transmitted by words but also that gained by observations: *Taylor v. Sheldon, 172 Ohio St. 118, 15 Ohio Op. 2d 206, 173 N.E.2d 892, 1961 Ohio LEXIS 488 (Ohio 1961)*.

Counselor-client privilege

In the parties' divorce action, whereupon the trial court adopted the magistrate's parenting determination, there was no error in allowing testimony of a licensed counselor who had conducted private counseling with the husband, as

the counselor was not statutorily disqualified as a witness and the non-privileged communications were a proper subject of testimony. *Roby v. Roby, 2016-Ohio-7851, 2016 Ohio App. LEXIS 4723 (Ohio Ct. App., Washington County 2016)*.

Agency referred a parent to counseling and the referral was journalized in the case plan; the counselor's testimony concerned communications between herself and the parent during these counseling sessions. Therefore, the counselor-patient privilege codified in *R.C. 2317.02(G)(1)* permitted disclosure of the communications between the parent and the counselor. *In re T.J., 2009-Ohio-1844, 2009 Ohio App. LEXIS 1550 (Ohio Ct. App., Preble County 2009)*.

Letter written by the director of clinical services at a treatment center, informing the judge of the behavioral problems that defendant was having in relating with her peers, was not a privileged communication because the director, in writing the letter, was acting as the director of clinical services, not as defendant's counselor; thus, the letter did not contain communications from a counsel to his or her client, and its admission did not violate Evid.R. 101(B). Moreover, by providing information to the trial court that she had admitted herself to the rehab center, defendant voluntarily put her treatment there at issue, allowing the State to rebut defendant's testimony under *R.C. 2317.02(G)(1)(d)*. *State v. Ball, 2009-Ohio-999, 2009 Ohio App. LEXIS 823 (Ohio Ct. App., Ashtabula County 2009)*.

Because the agency referred the mother to counseling and the referral was journalized in the case plan, her statements regarding cocaine use and other communications between herself and her counselor were not privileged, pursuant to *R.C. 2317.02(G)(1)(g)*, in the permanent custody hearing. *In re Brown, 2006-Ohio-2863, 2006 Ohio App. LEXIS 2719 (Ohio Ct. App., Athens County 2006)*.

Trial court erred in not conducting an in camera inspection of the records to determine whether they were medical or psychiatric documents subject to *R.C. 2317.02(B)* or counseling records subject to *R.C. 2317.02(G)*: *Folmar v. Griffin, 2006-Ohio-1849, 166 Ohio App. 3d 154, 849 N.E.2d 324, 2006 Ohio App. LEXIS 1697 (Ohio Ct. App., Delaware County 2006)*.

Because the agency referred the mother to counseling and the referral was journalized in the case plan, her statements regarding cocaine use and other communications between herself and her counselor were not privileged, pursuant to *R.C. 2317.02(G)(1)(g)*, in the permanent custody hearing. *In re Brown, 2006-Ohio-2863, 2006 Ohio App. LEXIS 2719 (Ohio Ct. App., Athens County 2006)*.

Statements made to a licensed psychologist or social worker in the course of a court ordered examination for forensic purposes were not privileged communications pursuant to *R.C. 4732.19*; a mother's various statements were made during course of forensic examinations in her custody case, and were not privileged. *In re Patfield, 2005-Ohio-3769, 2005 Ohio App. LEXIS 3452 (Ohio Ct. App., Lake County 2005)*.

Defendant's failure to invoke the therapist-patient privilege, under *R.C. 2317.02(G)(1)*, regarding the statements that he made to the residential facility (whose function was to provide care for minors with special problems) waived the privilege. *State v. Miller, 2005-Ohio-4032, 2005 Ohio App. LEXIS 3683 (Ohio Ct. App., Champaign County 2005)*.

Juvenile court did not err in allowing the disclosure of and admitting statements that the mother made to her mental health counselors to the effect that she had become frustrated with her first daughter, had forcefully shaken her in response to that frustration, had fantasies about causing further harm to her first daughter, and that she did not want the child, as the statements were related to past or present child abuse, and, thus, were not protected or privileged communications between a counselor and a patient. *In re Hauenstein, 2004-Ohio-2915, 2004 Ohio App. LEXIS 2550 (Ohio Ct. App., Hancock County 2004)*.

Statements made by an individual to a licensed psychologist or licensed independent social worker in the course of an examination ordered by a court for forensic purposes are not communications received "from a client in that

relation," R.C. 2317.02(G)(1): In re Jones, 2003-Ohio-3182, 99 Ohio St. 3d 203, 790 N.E.2d 321, 2003 Ohio LEXIS 1701 (Ohio 2003).

The only privilege applicable to a communication to a psychiatric social worker is the privilege established by R.C. 2317.02(G)(1); communications indicating a clear and present danger to the client or other persons are excluded from this statutory privilege established for social workers: State v. Moore, 1999 Ohio App. LEXIS 1644 (Ohio Ct. App., Montgomery County Apr. 16, 1999).

Although privilege has been consistently held to be in the possession of the individual seeking professional advice, psychologists, psychiatrists and a variety of other counselors have independent obligations to maintain certain confidences as a result of both state and federal laws, rules and regulations. However, a marriage counselor may be compelled to testify where one spouse has already testified about the counseling process and the advice received: Eichenberger v. Eichenberger, 82 Ohio App. 3d 809, 613 N.E.2d 678, 1992 Ohio App. LEXIS 5067 (Ohio Ct. App., Franklin County 1992).

Where the mother of a minor releases to a county prosecutor the contents of records made by a social worker during counseling, the counselor-client relationship as to that minor is waived: State v. Cartee, 1992 Ohio App. LEXIS 6325 (Ohio Ct. App., Vinton County Dec. 8, 1992).

—Sexual abuse exception

Where defendant admitted to a counselor that he had "fondled" an 11-year-old victim, such admission was properly allowed into evidence in defendant's criminal trial on sexual molestation charges, as it was within the exception to the privilege pursuant to R.C. 2317.02(G)(a); however, the admission of other evidence and information that defendant gave the counselor should have been excluded as privileged, and it was prejudicial to defendant where it indicated that he had thought of absconding from the authorities, as that evidence could have been considered as an admission of his guilt. State v. Dunn, 2005-Ohio-5873, 2005 Ohio App. LEXIS 5285 (Ohio Ct. App., Trumbull County 2005).

—Waiver

As a victim did not voluntarily testify as to the nature and discussions of his counseling with a licensed clinical counselor, the counselor could not be compelled to testify on the subject without a valid waiver from the victim; the victim testified at trial, on cross-examination, as to attending counseling, but never testified on the record as to the nature of the counseling or any specific discussions he had with the counselor. State v. Miller, 2016-Ohio-8248, 2016 Ohio App. LEXIS 5097 (Ohio Ct. App., Perry County 2016).

Defendant's failure to invoke the therapist-patient privilege, under R.C. 2317.02(G)(1), regarding the statements that he made to the residential facility (whose function was to provide care for minors with special problems) waived the privilege. State v. Miller, 2005-Ohio-4032, 2005 Ohio App. LEXIS 3683 (Ohio Ct. App., Champaign County 2005).

The inmate had signed a waiver as to mental health services that not all communications were confidential: State v. Farthing, 2001-Ohio-7077, 146 Ohio App. 3d 720, 767 N.E.2d 1242, 2001 Ohio App. LEXIS 5929 (Ohio Ct. App., Greene County 2001).

The mere act of plaintiff's filing a wrongful death action as the personal representative of her deceased son did not waive her privilege under R.C. 2317.02 and 4732.19 as to counseling provided by her psychologist: Colling v. Franklin County Children Services, 76 Ohio App. 3d 736, 603 N.E.2d 338, 1991 Ohio App. LEXIS 6007 (Ohio Ct. App., Franklin County 1991), dismissed, *63 Ohio St. 3d 1467, 590 N.E.2d 1267, 1992 Ohio LEXIS 1155 (Ohio 1992)*.

Court-ordered mental evaluation

R.C. 2945.371(J) permits a defendant's statements during a court-ordered mental evaluation to be used against the defendant on the issue of the defendant's mental condition, but not to prove factual guilt: *State v. Hancock, 2006-Ohio-160, 108 Ohio St. 3d 57, 840 N.E.2d 1032, 2006 Ohio LEXIS 215 (Ohio 2006)*.

Crime-fraud exception

Trial court erred in requiring the disclosure of communications subject to the attorney-client privilege under *R.C. 2317.02(A)* as the crime-fraud exception to the privilege did not apply, in that the communications were not made in furtherance of wrongful conduct. The communications were made for the purpose of defending against claims brought against a law firm by a worker, not for the purpose of actively concealing wrongful conduct. *Sutton v. Stevens Painton Corp., 2011-Ohio-841, 193 Ohio App. 3d 68, 951 N.E.2d 91, 2011 Ohio App. LEXIS 727 (Ohio Ct. App., Cuyahoga County 2011)*.

Dentists

The dentist-patient privilege cannot be invoked to prevent the state dental board from requiring a licensee under investigation to produce records: *Ohio State Dental Bd. v. Rubin, 104 Ohio App. 3d 773, 663 N.E.2d 387, 1995 Ohio App. LEXIS 2546 (Ohio Ct. App., Hamilton County 1995)*.

A dentist or a dental surgeon does not fall within *R.C. 2317.02(A)* and is not granted a privilege from testifying: *Belichick v. Belichick, 37 Ohio App. 2d 95, 66 Ohio Op. 2d 166, 307 N.E.2d 270, 1973 Ohio App. LEXIS 806 (Ohio Ct. App., Mahoning County 1973)*.

Discovery orders

In a complaint alleging defamation and intentional infliction of emotional distress, the trial court did not err in its order compelling the production of forensic imaging of the cellphone because the trial court engaged in the proper analysis; it both weighed the privacy and confidentiality concerns against the necessity of forensic imaging and adopted a protocol with substantial precautions to safeguard against the exposure of confidential or privileged information. *Li v. Du, 2022-Ohio-917, 186 N.E.3d 343, 2022 Ohio App. LEXIS 814 (Ohio Ct. App., Summit County 2022)*.

Environmental Review Appeals Commission erred by granting appellee's motion to compel production of unredacted communications that were protected from disclosure by the attorney-client privilege; each of the three subject e-mails was prepared and submitted to appellant EPA's legal counsel and other EPA employees involved in an investigation and review of the appellee's verified complaint, seeking legal advice and assistance from legal counsel. *Morgan v. Butler, 2017-Ohio-816, 85 N.E.3d 1188, 2017 Ohio App. LEXIS 807 (Ohio Ct. App., Franklin County 2017)*.

Discovery order requiring a driver to sign medical authorizations for release of medical records relating to his eyesight to counsel for one of the pedestrians and allowing counsel to inquire further about his eyesight was overbroad because at least some of the medical records covered by the order were protected under this statute; there was not enough information in the record to decide whether allowing further inquiry about the driver's eyesight was justified. *Harvey v. Cincinnati Ins. Co., 2017-Ohio-9226, 2017 Ohio App. LEXIS 5669 (Ohio Ct. App., Montgomery County 2017)*.

Order requiring appellant to produce certain e-mails directly to a receiver was a "provisional remedy" order that was subject to immediate appeal because the order could require appellant to release documents covered by the

attorney-client privilege without any in camera inspection or evidentiary hearing. *Williamson v. Recovery L.P., 2016-Ohio-1087, 2016 Ohio App. LEXIS 983 (Ohio Ct. App., Franklin County 2016)*.

As *R.C. 2317.02(A)(2)* created a testimonial privilege, it was inapplicable to the production of documents, such that an insurer could not rely on it to avoid producing documents in an insurance coverage dispute. *Little Italy Dev., LLC v. Chi. Title Ins. Co., 2011 U.S. Dist. LEXIS 119698 (N.D. Ohio Oct. 17, 2011)*.

Trial court properly required a bank's attorney to testify as to the efforts that were made to serve property interest holders prior to seeking to serve them by publication in the bank's foreclosure action, as such testimony was not protected by the attorney-client privilege under *R.C. 2317.02(A)* because it did not involve confidential communications between the bank and the attorney; further, the trial court properly did not quash the subpoena to the attorney pursuant to Civ.R. 45(C)(5), as a legal assistant's testimony on the issue was not sufficient. *Huntington Nat'l Bank v. Dixon, 2010-Ohio-4668, 2010 Ohio App. LEXIS 3950 (Ohio Ct. App., Cuyahoga County 2010)*.

Even if a surviving spouse's motion to compel testimony by the attorney for her deceased husband was premature under Civ.R. 37(A)(2) on the ground that it was filed before the attorney had not yet appeared for deposition and refused to answer certain questions, this did not mean that the trial court could not rule that the attorney should testify without asserting attorney-client privilege where the trial court had already appropriately ruled that the privilege was waived; thus, prejudice was lacking by the trial court's granting of the motion to compel. Moreover, the estate filed for a protective order under Civ.R. 26 and, therefore, consented to application of the rule, which allowed the trial court, upon denying the motion, to order the attorney to provide discovery on terms and conditions that were just. *Estate of Hohler v. Hohler, 2009-Ohio-7013, 185 Ohio App. 3d 420, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878 (Ohio Ct. App., Carroll County 2009)*.

Where a medical expert was subpoenaed to produce various information, none of which was privileged, the privilege in *R.C. 2317.02* did not apply and no substantial right for purposes of *R.C. 2505.02(B)(2)* and (4) was affected by the trial court's order denying the expert's motion to quash the subpoena; the expert had an adequate remedy at law through appeal after final judgment was entered. *Fredricks v. Good Samaritan Hosp., 2008-Ohio-3480, 2008 Ohio App. LEXIS 2947 (Ohio Ct. App., Montgomery County 2008)*.

Trial court's order that required an attorney to disclose various discovery logs was error where it encompassed documents that were protected by the attorney-client privilege or the work product doctrine under *R.C. 2317.02(A)(1)*, Ohio R. Prof. Conduct 1.6, and Civ.R. 26(B)(3); the only discoverable items related to a party's correspondence with a third-party that was within the attorney's file. *AultCare Corp. v. Roach, 2007-Ohio-5686, 2007 Ohio App. LEXIS 4995 (Ohio Ct. App., Stark County 2007)*.

Trial court erred in compelling the deposition and trial testimony of a mediator who assisted the parties in reaching a settlement of their contract dispute, and in denying a motion in limine to prevent disclosure of mediation communications, as such matter was privileged under *R.C. 2317.023(B)* and the exceptions of *§ 2317.023(C)(2)* and (4) did not apply where no hearing was held and the parties and the mediator did not all consent to disclosure. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Discovery orders generally

Trial court erred in granting appellee's motion to compel disclosure of appellant's counseling records pursuant to *R.C. 2317.02(G)* in the parties' multiple tort claims against each other, arising from an altercation, as it was unclear without examining the records in camera first whether they were physician or psychiatric records pursuant to *R.C. 2317.02(B)* and (G) and whether the exceptions applied to allow their disclosure; the court should have ordered an in camera review, determined which type of records they were, and found if the exceptions for purposes of disclosure as to each type of record applied. *Folmar v. Griffin, 2006-Ohio-1849, 166 Ohio App. 3d 154, 849 N.E.2d 324, 2006 Ohio App. LEXIS 1697 (Ohio Ct. App., Delaware County 2006)*.

Trial court erred in compelling the deposition and trial testimony of a mediator who assisted the parties in reaching a settlement of their contract dispute, and in denying a motion in limine to prevent disclosure of mediation communications, as such matter was privileged under *R.C. 2317.023(B)* and the exceptions of *§ 2317.023(C)(2)* and (4) did not apply where no hearing was held and the parties and the mediator did not all consent to disclosure. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Trial court properly denied a surgeon's motion for a protective order, pursuant to Civ.R. 26(C), where he did not satisfy his burden of showing that documents, requested by his former counsel in an action arising from a motor vehicle accident that the surgeon was involved in, were protected by the attorney-client privilege, pursuant to *R.C. 2317.02*; the surgeon's blanket claim that all documents relating to the fee agreements, billing, and/or fees were specifically protected lacked merit. *Muehrcke v. Housel, 2005-Ohio-5440, 2005 Ohio App. LEXIS 4917 (Ohio Ct. App., Cuyahoga County 2005)*.

Trial court properly determined that an investigation which was initially claimed by a company to have been conducted for purposes of employee safety was not subject to the attorney-client privilege under *R.C. 2317.02(A)*, although the company asserted that the information was privileged because it was conducted in anticipation of litigation and at the suggestion of counsel once the complaint had been filed; the trial court properly granted the motion of the injured machine operator and his wife to compel production, pursuant to Civ.R. 26, as the company's change of reasoning as to why the investigation was performed was in contravention of public policy and there was no showing that the information was privileged. *Harpster v. Advanced Elastomer Sys., L.P., 2005-Ohio-6919, 2005 Ohio App. LEXIS 6220 (Ohio Ct. App., Summit County 2005)*.

In a workplace intentional tort action, a trial court did not abuse its discretion in finding that an employer either produced the necessary documents pursuant to a motion to compel, or that such documents were privileged as work product under Civ.R. 26(B)(3) or under the attorney-client privilege of *R.C. 2317.02(A)* and *2317.021*, based on a review of the documents; as the administratrix for the deceased employee, who sought to compel disclosure, failed to provide the appellate court with the transcript from the proceeding on the motion, as required by App.R. 9(B), the regularity of the proceedings before the trial court were presumed. *Geggie v. Cooper Tire & Rubber Co., 2005-Ohio-4750, 2005 Ohio App. LEXIS 4248 (Ohio Ct. App., Hancock County 2005)*.

Interlocutory discovery orders entered in common-law or equity actions, even those requiring a nonlitigant to produce privileged information, are not immediately appealed notwithstanding their impact on the substantial rights of the parties and nonparties. Such orders may only be appealed after final judgment: *Kelly v. Daly, 99 Ohio App. 3d 670, 651 N.E.2d 513, 1995 Ohio App. LEXIS 3256 (Ohio Ct. App., Montgomery County 1995)*.

A discovery order compelling disclosure of medical records affects a substantial right and the harm from disclosure could not be mitigated on a later merit appeal: *Grant v. Collier, 1992 Ohio App. LEXIS 555 (Ohio Ct. App., Montgomery County Feb. 17, 1992)*.

An order permitting discovery of information which is protected by the physician-patient privilege is a final appealable order: *Talvan v. Siegel, 80 Ohio App. 3d 781, 610 N.E.2d 1120, 1992 Ohio App. LEXIS 3838 (Ohio Ct. App., Franklin County 1992)*.

Discovery, in camera review

In a case which arose from automobile accident, appeal of trial court's order denying defendant's motion for relief from court's order to produce medical records to court for in-camera review, was dismissed because the trial court's order to produce the records did not grant or deny a provisional remedy as it did not address whether records will be disclosed to plaintiffs. Trial court's order was not a final appealable order, therefore, appellate court had no jurisdiction to consider appeal. *Clark v. Boyd, 2022-Ohio-58, 2022 Ohio App. LEXIS 46 (Ohio Ct. App., Richland County 2022)*.

Remand was necessary for an evidentiary hearing or an in camera inspection to determine whether the motion to compel granted discovery of privileged information, because it was undisputed that the trial court did not hold an evidentiary hearing or conduct an in camera review of the requested material, and neither the employer's discovery requests nor the employee's answers were part of the record. *Harvey v. KP Props., 2012-Ohio-276, 2012 Ohio App. LEXIS 228 (Ohio Ct. App., Cuyahoga County 2012)*.

In a negligence case, a trial court erred when it refused to conduct an in-camera inspection of disputed hospital records that were ordered disclosed; an injured party informally asked the trial court to conduct this inspection of at least some of the disputed records, and the trial court was not allowed to ignore *R.C. 2317.02(B)*. *Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009)*.

Trial court erred in denying appellant's motion for protective order as insurer's request for medical information sought "all" of appellant's medical and pharmaceutical records and did not comply with *R.C. 2317.02(B)(3)(a)* by limiting discovery to records causally related to injuries that were relevant to issues in case. Trial court should have conducted in camera inspection pursuant to Civ.R. 26(C) to determine which records were discoverable. *Wooten v. Westfield Ins. Co., 2009-Ohio-494, 181 Ohio App. 3d 59, 907 N.E.2d 1219, 2009 Ohio App. LEXIS 418 (Ohio Ct. App., Cuyahoga County 2009)*.

Motorist's motion to compel a driver to disclose all of her medical records from a five-year period preceding a motor vehicle accident that resulted in a personal injury action by the driver should not have been granted outright without the trial court first conducting an in camera inspection under *R.C. 2317.02(B)* to determine whether the records should remain privileged; only records which were historically or causally connected to the action were to be disclosed. *Cargile v. Barrow, 2009-Ohio-371, 182 Ohio App. 3d 55, 911 N.E.2d 911, 2009 Ohio App. LEXIS 310 (Ohio Ct. App., Hamilton County 2009)*.

Order that partially granted employers' motion to compel the production of an employee's obstetrics/gynecology records in her discrimination action, arising from the alleged improper treatment she received during the course of her two pregnancies, was erroneous where the trial court did not require an in camera review of the records prior to disclosure pursuant to *R.C. 2317.02(B)(3)(a)(iii)* in order to determine which records were causally or historically related to the employee's discrimination claims. *Groening v. Pitney Bowes, Inc., 2009-Ohio-357, 2009 Ohio App. LEXIS 297 (Ohio Ct. App., Cuyahoga County 2009)*.

Property owner's psychiatric and psychological treatment records sought by appellees in their personal injury suit against the owner were privileged and confidential under *R.C. 2317.02*, and the record did not show that a judicially created waiver was appropriate. The trial court erred in ordering all the records be provided directly to appellees; instead, it should have ordered the records delivered under seal so that it could conduct an in camera inspection to determine whether each record was covered by *§ 2317.02(B)* or (G) and whether the conditions for disclosure were present.. *Thompson v. Chapman, 2008-Ohio-2282, 176 Ohio App. 3d 334, 891 N.E.2d 1247, 2008 Ohio App. LEXIS 1955 (Ohio Ct. App., Richland County 2008)*.

Since the injured person claimed that she suffered a jaw injury from the traffic accident underlying her personal injury claim, the trial court properly ordered production of her dental records without an in camera inspection; however, since nothing in the complaint indicated that she was claiming injuries which would have likely been found in her obstetric/gynecological records, the trial court should have conducted in camera review before ordering production of her obstetric/gynecological records. *Patterson v. Zdanski, 2003-Ohio-5464, 2003 Ohio App. LEXIS 4926 (Ohio Ct. App., Belmont County 2003)*.

An order granting a motion to compel production of the personnel file of a health care system doctor for an in-camera inspection was not a final appealable order: *Ingram v. Adena Health Sys., 2001-Ohio-2537, 144 Ohio App. 3d 603, 761 N.E.2d 72, 2001 Ohio App. LEXIS 3466 (Ohio Ct. App., Ross County 2001)*.

Where a medical malpractice action concerned events occurring in 1997, an order allowing discovery of all of the plaintiff's medical records back to 1973 was overly broad. The court must conduct an in camera inspection to

determine which documents are discoverable: *Nester v. Lima Mem'l Hosp., 2000-Ohio-1916, 139 Ohio App. 3d 883, 745 N.E.2d 1153, 2000 Ohio App. LEXIS 5280 (Ohio Ct. App., Allen County 2000)*.

Evidence

—Doctor-patient privilege

Father's claim he was entitled to relief due to the intervening decision in the case of Torres Friedenberg v. Friedenberg which supported his claim to compel the release of mother's mental-health record since without the mental health record the trial court did not satisfy the statute requirement lacked merit because neither the court nor the trial court held that the mother's mental-health records were privileged or irrelevant to the issues in the divorce proceeding. *Rummelhoff v. Rummelhoff, 2022-Ohio-1224, 187 N.E.3d 1079, 2022 Ohio App. LEXIS 516 (Ohio Ct. App., Hamilton County 2022)*.

Assuming, arguendo, that the mother did not seek prenatal care until 37 weeks gestation and that the statement made by the mother relative to her unborn child was privileged, any error in admitting the mother's statements was harmless because overwhelming clear and convincing evidence established that the child could not be returned to his mother's care within a reasonable time and that it was in his best interest to award permanent custody to the agency. *In re Henry James M., 2007-Ohio-2830, 2007 Ohio App. LEXIS 2648 (Ohio Ct. App., Fulton County 2007)*.

Exception

In a legal malpractice matter, the trial court erred in compelling the production of the former client's confidential communications with her subsequent attorneys in the underlying divorce action because the communications did not fall under the self-protection exception to the attorney-client privilege and, as such, the communications were not subject to disclosure on that basis. *Cook v. Bradley, 2015-Ohio-5039, 2015 Ohio App. LEXIS 4886 (Ohio Ct. App., Lorain County 2015)*.

Federal courts generally

In a civil case involving claims based on state law, the existence of a privilege is to be determined in accordance with state, not federal, law: *Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990)*.

There is no common-law rule of physician-patient privilege, and none has been accorded in the federal courts as a general evidentiary principle. However, the basic physician-patient privilege of the Ohio statute will be recognized by a federal district court sitting in Ohio, although the federal court will retain a free hand in defining the scope of such privilege: *Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 20 Ohio Op. 2d 341, 1962 U.S. Dist. LEXIS 3917 (N.D. Ohio 1962)*.

Final appealable order

Order compelling the car accident victim to turn over all medical records from the last 10 years was a final, appealable order because it implicitly included a finding that the victim had waived the privilege by filing the instant action. *Bircher v. Durosko, 2013-Ohio-5873, 2013 Ohio App. LEXIS 6169 (Ohio Ct. App., Fairfield County 2013)*.

In a negligence case, a trial court's judgment entry from August 5, 2009 was a final, appealable order under *R.C. 2505.02*. Even though discovery orders were generally not subject to immediate appeal, there was an exception where a discovery order required the disclosure of communications between a physician and a patient that were

ordinarily privileged under *R.C. 2317.02(B)*. *Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009)*.

Habeas corpus

When ordering a physician to testify before the grand jury concerning communications that he has had with his patient and to deliver records bearing the patient's name, the trial court must limit its order to information that has been shown to be unprivileged; when a physician has been held in contempt and incarcerated as a result of his failure to comply with an order that is not properly limited to unprivileged information, a writ of habeas corpus may be sought: *State ex rel. Buchman v. Stokes, 36 Ohio App. 3d 109, 521 N.E.2d 515, 1987 Ohio App. LEXIS 10512 (Ohio Ct. App., Hamilton County 1987)*.

Health care provider

Results of defendant's blood-alcohol test were properly admitted; because aggravated homicide was an "equivalent offense" to operating a vehicle while under the influence of alcohol, the results of defendant's blood test were properly admitted for purposes of establishing the violation since his blood was withdrawn and analyzed at a "health care provider." Further, at the suppression hearing, the hospital's director of clinical chemistry and toxicology testified that all of the proper protocol was complied with in regard to the collection of defendant's blood sample; since defendant's blood-alcohol test was "medical," and non-forensic, he was unable to establish a proper chain of custody. *State v. Davenport, 2009-Ohio-557, 2009 Ohio App. LEXIS 475 (Ohio Ct. App., Fayette County 2009)*.

History

General Code §§ 11493, 11494 and 11495 (*R.C. 2317.01*, *2317.02* and *2317.03*) relate to the same subject matter-the competency of persons as witnesses, and incompetency of certain testimony. The legislature is presumed to have had the whole subject before it in drafting these three statutes, as shown by the express reference to these several statutes in GC § 11495 (*R.C. 2317.03*). General Code § 11495 (*R.C. 2317.03*) expressly excludes "proceedings involving the validity of a deed, will, or codicil." The judicial branch of the government is not warranted in adding said clause to this section, as the legislature did to GC § 11495 (*R.C. 2317.03*): *Swetland v. Miles, 101 Ohio St. 501, 130 N.E. 22, 1920 Ohio LEXIS 105 (Ohio 1920)*.

Hospital incident reports

Trial court erred when it ordered the hospital to provide a report to plaintiffs in a medical malpractice action because the hospital demonstrated that the nurse's incident report was a communication prepared by its employee for the use of its attorneys in anticipation of litigation. Thus, the hospital demonstrated the existence of the attorney-client relationship and that the communication occurred in the context of that relationship. *Flynn v. Univ. Hosp., Inc., 2007-Ohio-4468, 172 Ohio App. 3d 775, 876 N.E.2d 1300, 2007 Ohio App. LEXIS 4071 (Ohio Ct. App., Hamilton County 2007)*.

Hospital incident reports which are submitted to its legal counsel and to its utilization committee are exempt from discovery under *R.C. 2317.02* and *2305.24*: *Ware v. Miami Valley Hosp., 78 Ohio App. 3d 314, 604 N.E.2d 791, 1992 Ohio App. LEXIS 652 (Ohio Ct. App., Montgomery County 1992)*.

Hospital records

Trial court did not abuse its discretion when it denied the hospital's motion to compel discovery of the patient's medical records because, under *R.C. 2317.02(B)*, the hospital could have discovered the patient's communications

to her doctors, including medical records, but only those that related causally or historically to her claimed injuries. If the hospital believed that it did not have all of the necessary and pertinent records, it could have attempted to subpoena the documents to which it believed it was entitled; the record indicated that the hospital made no effort to do so. *McManaway v. Fairfield Med. Ctr., 2006-Ohio-1915, 2006 Ohio App. LEXIS 1756 (Ohio Ct. App., Fairfield County 2006)*.

Trial court properly refused to suppress the results of defendant's first blood draw as the prosecuting attorney was a law enforcement officer for purposes of *R.C. 2317.02* and the subpoena did not have to strictly comply with the statute; as the results of the first blood draw supported defendant's conviction, the failure to suppress the results of the second blood draw was harmless. *State v. Scharf, 2005-Ohio-4206, 2005 Ohio App. LEXIS 3849 (Ohio Ct. App., Lake County 2005)*.

Where an appellate court did not consider that portion of a trial court order requiring a hospital to provide certain privileged information, the order was a final appealable order pursuant to *R.C. 2505.02(B)(4)* and the hospital's motion for reconsideration was granted and the appeal reinstated. *Walker v. Firelands Cmty. Hosp., 2003-Ohio-2908, 2003 Ohio App. LEXIS 2626 (Ohio Ct. App., Erie County 2003)*.

Admission of hospital records in violation of *R.C. 2317.02* may constitute harmless error: *State v. Webb, 1994-Ohio-425, 70 Ohio St. 3d 325, 638 N.E.2d 1023, 1994 Ohio LEXIS 2092 (Ohio 1994)*, cert. denied, *514 U.S. 1023, 115 S. Ct. 1372, 131 L. Ed. 2d 227, 1995 U.S. LEXIS 2111 (U.S. 1995)*.

The address of a hospital patient who is a potential witness to a fall by another patient is not privileged information under *R.C. 2317.02*: *Hunter v. Hawkes Hosp. of Mt. Carmel, 62 Ohio App. 3d 155, 574 N.E.2d 1147, 1989 Ohio App. LEXIS 1449 (Ohio Ct. App., Franklin County 1989)*.

The evidentiary privilege of *R.C. 2317.02(B)* extends to hospital records containing privileged communications: *State v. McKinnon, 38 Ohio App. 3d 28, 525 N.E.2d 821, 1987 Ohio App. LEXIS 10616 (Ohio Ct. App., Summit County 1987)*.

Any hospital records of a party may not be released to anyone if such matters are privileged, unless such privilege is waived by the party who is the subject of the records: *Pacheco v. Ortiz, 11 Ohio Misc. 2d 1, 463 N.E.2d 670, 1983 Ohio Misc. LEXIS 427 (Ohio C.P. 1983)*.

A waiver of privilege by the party being treated in regard to his hospital records may be either actual or implied, and, absent such waiver, the records may not be released even though a subpoena duces tecum has been properly served upon the custodian of the records: *Pacheco v. Ortiz, 11 Ohio Misc. 2d 1, 463 N.E.2d 670, 1983 Ohio Misc. LEXIS 427 (Ohio C.P. 1983)*.

The Ohio physician-patient privilege does not extend to hospital records, and therefore the production of hospital records will be ordered notwithstanding defendant's assertion of the privilege: *Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 20 Ohio Op. 2d 341, 1962 U.S. Dist. LEXIS 3917 (N.D. Ohio 1962)*.

Hospital records made in connection with examinations made of decedent by physicians engaged by decedent's employer are not privileged communications where such examinations did not include treatment nor advice and clearly were not for the purpose of alleviating decedent's pain nor curing his malady: *Suetta v. Carnegie-Illinois Steel Corp., 144 N.E.2d 292, 75 Ohio Law Abs. 487, 1955 Ohio App. LEXIS 738 (Ohio Ct. App., Mahoning County 1955)*.

Where hospital records include communications between the patient and his physician, such portions of the records are, in the absence of waiver of the privilege, inadmissible in evidence by virtue of the express provisions of this section: *Weis v. Weis, 147 Ohio St. 416, 34 Ohio Op. 350, 72 N.E.2d 245, 1947 Ohio LEXIS 418 (Ohio 1947)*.

Husband-wife privilege

Hospitals' motion for disqualification indicated it intended to seek testimony from the clients' attorney regarding alleged in-person communications at the hospital, telephone calls with representatives of the hospital, physical evidence of alleged recordings, and alleged promises the hospital made to the attorney; none of these matters implicated spousal communications. *Reo v. Univ. Hosps. Health Sys., 2019-Ohio-1411, 131 N.E.3d 986, 2019 Ohio App. LEXIS 1520 (Ohio Ct. App., Lake County 2019)*.

Difficult choice foisted upon married defendants does not render Dayton, Ohio, Rev. Code Gen. Ordinances § 70.121 unconstitutional on its face; assuming, that the ordinance might abrogate spousal privilege in some cases, it would necessarily do so only in those cases in which one spouse is driving with the other in the car. *Toney v. City of Dayton, 2017-Ohio-5618, 94 N.E.3d 179, 2017 Ohio App. LEXIS 2669 (Ohio Ct. App., Montgomery County 2017)*.

Search warrant affidavit containing a wife's statements about the wife's husband was not precluded by the spousal privilege because this privilege applied to testimony at a trial and not to search warrant affidavits. *State v. Fairfield, 2012-Ohio-5060, 2012 Ohio App. LEXIS 4428 (Ohio Ct. App., Cuyahoga County 2012)*.

Trial court erred in ruling that *R.C. 2317.02(D)* prohibited the State from using the testimony of defendant's wife to prosecute defendant because the contemporaneous act of brandishing a firearm while intoxicated, if true, was in no sense behavior constituting a marital "confidence," much less something inspired by the euphoria of a blissful matrimony. No public interest was furthered by prohibiting the wife from testifying against her husband on the weapons charge, even though it was not among those offenses enumerated in *R.C. 2945.42*. *State v. Greaves, 2012-Ohio-1989, 971 N.E.2d 987, 2012 Ohio App. LEXIS 1746 (Ohio Ct. App., Huron County 2012)*.

Defendant did not show that he received ineffective assistance of counsel because counsel did not assert a spousal privilege regarding the testimony of defendant's wife because the statements defendant sought to exclude were made before defendant was married to this person, so they were not subject to the spousal privilege, under *R.C. 2317.02(D)*. *State v. Evans, 2006-Ohio-1425, 2006 Ohio App. LEXIS 1305 (Ohio Ct. App., Montgomery County 2006)*.

When a wife reported to police that her husband was using drugs, a tape of her call to police was not inadmissible at her husband's trial, under the spousal privilege in *R.C. 2317.02(D)*, because it was not a communication between husband and wife. *State v. Jackson, 2005-Ohio-6143, 2005 Ohio App. LEXIS 5529 (Ohio Ct. App., Champaign County 2005)*.

Surgeon's motion for a protective order, pursuant to Civ.R. 26(C), seeking to prevent his wife from being deposed in his malpractice action against his former attorney, was properly denied by the trial court, as the surgeon sought to prevent "any and all" privileged commuincation which occurred during the term of the marriage, and while some matters could have been within the spousal privilege, the all-encompassing protection sought under *R.C. 2317.02(D)* was overly broad. *Muehrcke v. Housel, 2005-Ohio-5440, 2005 Ohio App. LEXIS 4917 (Ohio Ct. App., Cuyahoga County 2005)*.

Defendant could not claim the spousal communication privilege because he and his wife were not living as husband and wife when the wife surreptitiously recorded his phone statements which incriminated him in an arson and the wife obviously had no intention of returning to defendant. *State v. Sparkman, 2004-Ohio-1338, 2004 Ohio App. LEXIS 1184 (Ohio Ct. App., Huron County 2004)*.

The spousal privilege did not apply to the taped conversations, since the parties were separated and living apart: *State v. Shaffer, 114 Ohio App. 3d 97, 682 N.E.2d 1040, 1996 Ohio App. LEXIS 4040 (Ohio Ct. App., Hardin County 1996)*, dismissed, *77 Ohio St. 3d 1543, 674 N.E.2d 1183, 1997 Ohio LEXIS 319 (Ohio 1997)*.

A conversation between spouses is not privileged and is admissible in a criminal trial when the conversation was conducted in the presence or hearing of third persons. Ohio's spousal privilege statutes protect oral communications with one's spouse intended to be private, but do not protect written communications with one's spouse, even though it is reasonably expected that the communication will remain confidential: *State v. Howard, 62*

Ohio App. 3d 910, 577 N.E.2d 749, 1990 Ohio App. LEXIS 4357 (Ohio Ct. App., Clark County 1990), dismissed, *58 Ohio St. 3d 713, 570 N.E.2d 277, 1991 Ohio LEXIS 729 (Ohio 1991)*.

A criminal defendant's privilege to exclude testimony by his spouse as to acts done in the presence of the spouse is, like the privilege to exclude testimony of confidential communications, inapplicable to spouses who are separated and not living as husband and wife: *State v. Bradley, 30 Ohio App. 3d 181, 507 N.E.2d 396, 1986 Ohio App. LEXIS 10065 (Ohio Ct. App., Cuyahoga County 1986)*.

Federal and state parameters of the husband-wife privilege discussed: *Trammel v. United States, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186, 1980 U.S. LEXIS 84 (U.S. 1980)*.

The privilege accorded under the provisions of *R.C. 2317.02* to a husband and wife not to testify "concerning any communication made by one to the other, or an act done by either in the presence of the other" is personal to husband and wife and may not be invoked by a third party: *Diehl v. Wilmot Castle Co., 26 Ohio St. 2d 249, 55 Ohio Op. 2d 484, 271 N.E.2d 261 (1971)*, reversing *21 Ohio App. 2d 191, 50 Ohio Op. 2d 331, 256 N.E.2d 220*.].

The activities of the husband and wife, in driving separate cars on a public street and in the driveway to a public hospital, were activities open to general observation by all those persons who may be, and conceivably were, in the area at the time of the experiment, and testimony of the husband and the wife regarding this experiment is not within the ambit of the statutorily protected communication accorded under the provisions of *R.C. 2317.02*: *Diehl v. Wilmot Castle Co., 26 Ohio St. 2d 249, 55 Ohio Op. 2d 484, 271 N.E.2d 261 (1971)*, reversing *21 Ohio App. 2d 191, 50 Ohio Op. 2d 331, 256 N.E.2d 220*.].

A statement by a husband to his wife concerning his duties and whereabouts for the next few days made in order for her to communicate with him does not come within the true intent and meaning of *R.C. 2317.02* concerning privileged communications between husband and wife: *Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216, 81 Ohio Law Abs. 417, 1958 Ohio App. LEXIS 894 (Ohio Ct. App., Mahoning County 1958)*.

It is just as reasonable to assume that a conversation between husband and wife was held in the presence of a third person as it is to assume that it was not held in the presence of a third person, in the absence of evidence in that respect: *Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216, 81 Ohio Law Abs. 417, 1958 Ohio App. LEXIS 894 (Ohio Ct. App., Mahoning County 1958)*.

The true intent of the legislature in passing *R.C. 2317.02*, providing that a husband and wife shall not testify concerning any communication made by one to the other, was for the protection of the marital relationship and was intended to cover those conversations, or acts, between husband and wife which are confidential in nature, and was not necessarily intended to exclude all types of conversation between married persons: *Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216, 81 Ohio Law Abs. 417, 1958 Ohio App. LEXIS 894 (Ohio Ct. App., Mahoning County 1958)*.

In a proceeding for determination of heirship, where petitioner, claiming to be the natural child of the decedent, was born while his mother was married to a person other than the decedent who later married the mother, evidence of admission by decedent, not in presence of third person, that petitioner is his child is admissible: *Snyder v. McClelland, 83 Ohio App. 377, 38 Ohio Op. 434, 81 N.E.2d 383, 51 Ohio Law Abs. 600, 1948 Ohio App. LEXIS 786 (Ohio Ct. App., Franklin County 1948)*.

Where the record is silent as to the presence of a third person, there is a presumption of admissibility of testimony as to statements between husband and wife during coverture: *F. A. Requarth Co. v. Holland, 78 Ohio App. 493, 34 Ohio Op. 231, 66 N.E.2d 329, 47 Ohio Law Abs. 117, 1946 Ohio App. LEXIS 595 (Ohio Ct. App., Montgomery County 1946)*.

A decedent's widower called as a witness in proceedings involving the administration of decedent's estate, is incompetent under this section to testify to statements and conversations he had had with his wife during the period

of coverture relative to the subject matter in question: *In re Ruhl's Estate, 43 N.E.2d 760, 36 Ohio Law Abs. 250, 1941 Ohio App. LEXIS 1049 (Ohio Ct. App., Franklin County 1941)*.

This section, prohibiting one spouse from testifying to communications or acts of other not made or done in the presence of a third person, does not exclude wife's testimony, in action on an accident and life policy, concerning what she observed immediately after husband's accident though no one else was present: *Marsh v. Preferred Acci. Ins. Co., 89 F.2d 932, 1937 U.S. App. LEXIS 3633 (6th Cir. Ohio)*, cert. denied, *302 U.S. 716, 58 S. Ct. 36, 82 L. Ed. 553, 1937 U.S. LEXIS 840 (U.S. 1937)*, cert. denied, *302 U.S. 715, 58 S. Ct. 36, 82 L. Ed. 552, 1937 U.S. LEXIS 839 (U.S. 1937)*.

In an action by a former husband against his divorced wife to have her declared a trustee for him as to property purchased with his money, he cannot testify as to communication between himself and his wife before the divorce, unless in the known presence or hearing of a third person who is a competent witness: *Dischner v. Dischner, 16 Ohio App. 86, 21 Ohio L. 260 (1921)*, motion to certify record overruled, Dischner v. Dischner, 20 Ohio L. 84 (1922).].

In an action on a promissory note, where one of the makers is denying that he executed the note or that there was consideration therefor, it is not error to permit the widow of the other maker to testify as to certain matters which arose between herself and her husband when no other person competent to be witness was present: *31 Ohio Cir. Dec. 157, 20 Ohio C.C. 113*.

—Waiver

Failure to object at trial to questions posed by the state to appellant's husband constituted a waiver of *R.C. 2317.02(D)*: *State v. Simpson, 1994 Ohio App. LEXIS 4472 (Ohio Ct. App., Lake County Sept. 30, 1994)*, dismissed, *71 Ohio St. 3d 1477, 645 N.E.2d 1257, 1995 Ohio LEXIS 563 (Ohio 1995)*.

Under the husband-wife privilege, the party seeking to introduce a privileged statement must secure a waiver from both spouses or, in the case of a holder's death, from the successor in interest (usually the executor or administrator) of the deceased: *Merrill v. William E. Ward Ins., 87 Ohio App. 3d 583, 622 N.E.2d 743, 1993 Ohio App. LEXIS 2410 (Ohio Ct. App., Franklin County 1993)*.

Medical laboratory technicians

A medical laboratory technician is not one of the persons encompassed by *R.C. 2317.02*: *In re Washburn, 70 Ohio App. 3d 178, 590 N.E.2d 855, 1990 Ohio App. LEXIS 4761 (Ohio Ct. App., Wyandot County 1990)*.

Medical records generally

Supreme Court of Ohio held that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) did not preclude a claim under the decision in Biddle when the limited disclosure of medical information was part of a court filing for the purpose of obtaining a past-due payment on an account for medical services. *Menorah Park Ctr. for Senior Living v. Rolston, 2020-Ohio-6658, 164 Ohio St. 3d 400, 173 N.E.3d 432, 2020 Ohio LEXIS 2719 (Ohio 2020)*.

Trial court was directed to redact medical and financial information from the personnel files of a nursing home which were ordered to be produced in a negligence action because the trial court's blanket release of all the medical and financial records contained in the personnel files of its employees was unreasonable under Civ.R. 26. Indeed, medical records were generally privileged documents that were not subject to discovery, under *R.C. 2317.02(B)*, absent an exception or a showing that they are necessary to protect or further a countervailing interest that

outweighed the privilege. *Dubson v. Montefiore Home, 2012-Ohio-2384, 2012 Ohio App. LEXIS 2102 (Ohio Ct. App., Cuyahoga County 2012)*.

Defendant's medical records, other than the blood test results, were cumulative and irrelevant, and as a general rule, would have been privileged and inadmissible in an aggravated vehicular homicide case, had defendant not opened the door to admissibility by raising the issue. Additionally, any error in allowing defendant's medical records at trial would have been harmless under Crim.R. 52(A) in light of the overwhelming evidence against defendant. *State v. Andera, 2010-Ohio-3304, 2010 Ohio App. LEXIS 2795 (Ohio Ct. App., Cuyahoga County 2010)*.

Parents' request for discovery under Civ.R. 26(B)(1) of nonparty medical records regarding minors other than their daughter who obtained abortions from an abortion provider was properly denied, as the information sought was confidential and privileged from disclosure under *R.C. 2151.421(H)(1)* and *2317.02*; Biddle did not authorize the parents to discover those records, as it applied as a defense to the tort of unauthorized dislosures of confidential medical information. *Roe v. Planned Parenthood Southwest Ohio Region, 2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009)*.

City that firefighter had sued for age discrimination filed a motion to compel discovery of his medical records for the past 10 years. The request was properly denied, because unlimited access to his medical records for the limited purpose of determining the amount of his damages was inappropriate. *Campolieti v. City of Cleveland, 2009-Ohio-5224, 184 Ohio App. 3d 419, 921 N.E.2d 286, 2009 Ohio App. LEXIS 4417 (Ohio Ct. App., Cuyahoga County 2009)*.

R.C. 2317.02(B)(1) did not bar use of a mirror imaging process to copy medical information stored on a computer where appropriate safeguards were employed: *Cornwall v. N. Ohio Surgical Ctr., Ltd., 2009-Ohio-6975, 185 Ohio App. 3d 337, 923 N.E.2d 1233, 2009 Ohio App. LEXIS 5814 (Ohio Ct. App., Erie County 2009)*.

In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship. Employee's physician was not liable where he was authorized to submit a FMLA form to the employer and subsequently responded to a request for clarification by the employer: *Garland v. Seven Seventeen Credit Union, Inc., 2009-Ohio-5214, 184 Ohio App. 3d 339, 920 N.E.2d 1034, 2009 Ohio App. LEXIS 4453 (Ohio Ct. App., Trumbull County 2009)*.

Balancing test in *Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999)*.

Plaintiff filing a personal injury claim does not open herself to exposure, without limitation, of all her medical records. Rather, *R.C. 2317.02(B)(3)(a)* limits discovery in such a case to medical records that are causally or historically related to the physical or mental injuries that are relevant to the issues in the case. The trial court had authority, without a request from the plaintiff, to order an in camera inspection of the requested medical records and determine which records were discoverable: *Wooten v. Westfield Ins. Co., 2009-Ohio-494, 181 Ohio App. 3d 59, 907 N.E.2d 1219, 2009 Ohio App. LEXIS 418 (Ohio Ct. App., Cuyahoga County 2009)*.

Attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation: *Hageman v. Southwest Gen. Health Ctr., 2008-Ohio-3343, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008 Ohio LEXIS 1773 (Ohio 2008)*.

Medical practice's motion under Civ.R. 37 to compel production of medical records by a doctor who had worked in the practice was proper, as allegations in the parties' claims against one another involved the doctor's possible abuse of prescription drugs and raised issues related thereto; the records were relevant and within the scope of discovery under Civ.R. 26 and *R.C. 2317.02(B)*. *Banks v. Ohio Physical Med. & Rehab., Inc., 2008-Ohio-2165, 2008 Ohio App. LEXIS 1883 (Ohio Ct. App., Fairfield County 2008)*.

Trial court erred in not conducting an in camera inspection of the records to determine whether they were medical or psychiatric documents subject to *R.C. 2317.02(B)* or counseling records subject to *R.C. 2317.02(G)*: *Folmar v.*

Griffin, 2006-Ohio-1849, 166 Ohio App. 3d 154, 849 N.E.2d 324, 2006 Ohio App. LEXIS 1697 (Ohio Ct. App., Delaware County 2006).

The employee's medical and psychological records were discoverable, even though she did make claims for physical or mental injuries, where the employer's defense was that the employee acted irrationally: *Porter v. Litig. Mgmt., 2001-Ohio-4298, 146 Ohio App. 3d 558, 767 N.E.2d 735, 2001 Ohio App. LEXIS 4215 (Ohio Ct. App., Cuyahoga County 2001)*.

Medical records, pretrial procedure

Trial court's blanket order to provide discovery of all of the disputed records, without an in camera review, was erroneous because the disputed documents had to be analyzed in the first instance by the trial court for each of the privilege claims, as well as for relevancy. Additionally, even if the trial court again were to conclude, following an in camera review, that the documents had to be produced, information concerning other patients as well as social security numbers and other sensitive information had to still be redacted from the records. *Howell v. Park East Care & Rehab., 2018-Ohio-2054, 2018 Ohio App. LEXIS 2225 (Ohio Ct. App., Cuyahoga County 2018)*.

Medical records release authorizations

Trial court did not abuse its discretion by ordering an administrator to execute authorizations, in a wrongful death action, for disclosure of the decedent's medical records for a period of ten years prior to his death, without conducting an in camera review because this statute allowed for a waiver upon filing suit, and the records were "within the ambit" of the waiver; the issues of causation and damages were in dispute and the past medical records were relevant to the contested issues. *Marcum v. Miami Valley Hosp., 2015-Ohio-1582, 32 N.E.3d 974, 2015 Ohio App. LEXIS 1526 (Ohio Ct. App., Montgomery County 2015)*.

When motorists sued a driver for personal injuries from a vehicle accident, alleging the driver was under the influence of alcohol, it was an abuse of discretion for a trial court to grant the motorists' motion to compel the driver to produce an executed authorization giving the motorists access to the driver's medical records because (1) the motorists' request for a "hospital emergency room record" was overbroad and would reveal communications privileged under *R.C. 2317.02(B)*, and (2) the driver's blood test results, which the motorists sought, could be privileged, under *R.C. 2317.02*, as the case was civil and the evidence sought was apparently obtained for medical treatment or diagnosis. *Sullivan v. Smith, 2009-Ohio-289, 2009 Ohio App. LEXIS 262 (Ohio Ct. App., Lake County 2009)*.

Patient's consent to the release of medical information is valid, and waives the physician-patient privilege, if the release is voluntary, express, and reasonably specific in identifying to whom the information is to be delivered: *Med. Mut. of Ohio v. Schlotterer, 2009-Ohio-2496, 122 Ohio St. 3d 181, 909 N.E.2d 1237, 2009 Ohio LEXIS 1591 (Ohio 2009)*.

R.C. 2317.02(B)(2)'s provisions regarding records that are causally or historically related to the injuries relevant to the civil action extends to discovery, not just to testimony; thus, the trial court erred as a matter of law in ordering the plaintiff to execute general medical records release authorizations: *Ward v. Johnson's Indus. Caterers, 1998 Ohio App. LEXIS 2841 (Ohio Ct. App., Franklin County June 25, 1998)*.

Civ.R. 16(6) establishes only two exceptions, for medical reports and hospital records, to the privilege embodied in *R.C. 2317.02(B)*. The rule may not be expanded to create additional exceptions for office records and the taking of a deposition: *Brown v. Yothers, 56 Ohio App. 3d 29, 564 N.E.2d 714, 1988 Ohio App. LEXIS 4588 (Ohio Ct. App., Stark County 1988)*.

Medical records, pretrial procedure

Insurer's motion to compel with respect to the interrogatory seeking information on the car accident victim's lifetime of medical treatment was denied because it was overbroad. The insurer had to be reasonable in his requests for discovery of the victim's medical history. *Hudson v. United Servs. Auto. Ass'n Ins. Co., 2008-Ohio-7084, 150 Ohio Misc. 2d 23, 902 N.E.2d 101, 2008 Ohio Misc. LEXIS 303 (Ohio C.P. 2008)*.

Medical technologists

The relation of medical technologist and patient not being named in *R.C. 2317.02(B)* (concerning privileged communications), a medical technologist is not prohibited by the statute from testifying as to the blood-alcohol content of a blood sample taken from an injured driver who was brought to a hospital emergency room following an automobile collision: *State v. McKinnon, 38 Ohio App. 3d 28, 525 N.E.2d 821, 1987 Ohio App. LEXIS 10616 (Ohio Ct. App., Summit County 1987)*.

Mental health records generally

During defendant's trial for attempted burglary and other crimes arising out of his attempt, while an inmate, to break into a prison pharmacy, his motion to compel disclosure of exculpatory evidence was properly denied because the information he sought about medications provided to the State's eyewitness, another inmate, and the inmate's mental health records was privileged under *R.C. 2317.02(B)(1)*, (4); there was no evidence that the eyewitness waived the physician-patient or pharmacist-patient privileges, and he testified on cross-examination that he had a mental health disorder and received a medication to treat the same. *State v. Bell, 2006-Ohio-6560, 2006 Ohio App. LEXIS 6485 (Ohio Ct. App., Fairfield County 2006)*.

Plaintiff's psychiatric or psychological records remained privileged because they were not communications that related causally or historically to physical or mental injuries relevant to issues in the defamation suit. Plaintiff did not make a claim for emotional distress or mental anguish: *McCoy v. Maxwell, 139 Ohio App. 3d 356, 743 N.E.2d 974, 2000 Ohio App. LEXIS 4567 (Ohio Ct. App., Portage County 2000)*.

In a premises liability case, the trial court erred by granting defendants' motion to compel disclosure of plaintiff's mental health records from the 1970's to the present; given the sensitive nature of the information at issue, the trial court should have conducted an in camera inspection in order to determine which, if any, of the subject records were causally or historically related to plaintiff's claims. *Deering v. Beatty, 2021-Ohio-3461, 2021 Ohio App. LEXIS 3372 (Ohio Ct. App., Cuyahoga County 2021)*.

Motion in limine

Denial of a motion in limine to prevent psychological witnesses from testifying at a hearing was not a final appealable order: *Henderson v. Henderson, 2002-Ohio-6496, 150 Ohio App. 3d 339, 780 N.E.2d 1072, 2002 Ohio App. LEXIS 6280 (Ohio Ct. App., Franklin County 2002)*.

Nurses

Court admitted testimony from the nurse of appellant's physician in child neglect action. The exception of *R.C. 2151.42.1* does not apply to the challenged testimony because the nurse's statements went beyond whether appellant kept her appointments to appellant's diagnosis, treatment and medication: *In re Riddle, 1996 Ohio App. LEXIS 2054 (Ohio Ct. App., Guernsey County Apr. 11, 1996)*, aff'd, *1997-Ohio-391, 79 Ohio St. 3d 259, 680 N.E.2d 1227, 1997 Ohio LEXIS 1806 (Ohio 1997)*.

A physician may be held liable for the acts of a nurse-employee in violating a patient's right to confidentiality. Unauthorized disclosure of a patient's pregnancy to her family, resulting in strong expresssions of the family's

disapproval, constitutes intentional infliction of emotional distress: *Hobbs v. Lopez, 96 Ohio App. 3d 670, 645 N.E.2d 1261, 1994 Ohio App. LEXIS 2959 (Ohio Ct. App., Scioto County 1994)*.

This section, being in derogation of the common law, must be strictly construed, and consequently such section affords protection only to those relationships which are specifically named therein. The relationship of nurse and patient not being named in the statute, no privilege is extended to communications between a patient and his nurse: *Weis v. Weis, 147 Ohio St. 416, 34 Ohio Op. 350, 72 N.E.2d 245, 1947 Ohio LEXIS 418 (Ohio 1947)*.

Communications between patient and nurse are not privileged: *Weis v. Weis, 147 Ohio St. 416, 34 Ohio Op. 350, 72 N.E.2d 245, 1947 Ohio LEXIS 418 (Ohio 1947)*.

While the Ohio statute does not grant any privilege as to communications between a patient and a nurse, nevertheless if it appears that the latter is a private nurse employed by the physician, she is his agent and cannot disclose information she learns while acting in capacity of assistant: *Humble v. John Hancock Life Ins. Co., 28 Ohio N.P. (n.s.) 481, 1931 Ohio Misc. LEXIS 1585 (Ohio C.P. June 8, 1931)*, aff'd, *John Hancock Mut. Life Ins. Co. v. Humble, 31 N.E.2d 887, 1932 Ohio App. LEXIS 504 (Ohio Ct. App., Montgomery County 1932)*.

Parole officers

Only those relationships specifically named in *R.C. 2317.02* give rise to privileged communications and acts. A parolee and his parole officer do not occupy a confidential relationship: *State v. Halleck, 24 Ohio App. 2d 74, 53 Ohio Op. 2d 195, 263 N.E.2d 917, 1970 Ohio App. LEXIS 280 (Ohio Ct. App., Pickaway County 1970)*.

Parties with common interest

Where there is a degree of common interest between joint defendants in any information, communication, or legal advice concerning a court action, such information, communication, or advice is not privileged from being divulged by one party to the other in a subsequent action between them: *Netzley v. Nationwide Mut. Ins. Co., 34 Ohio App. 2d 65, 63 Ohio Op. 2d 127, 296 N.E.2d 550, 1971 Ohio App. LEXIS 386 (Ohio Ct. App., Montgomery County 1971)*.

—Appeal of discovery order

Medical professionals generally have standing to appeal a discovery order that requires them to violate the mandate of the physician-patient privilege. HIPAA does not preempt *R.C. 2317.02(B)(1)*. Disclosing the information required under the discovery order, even redacted, would compromise the privacy of the nonparty patient: *Grove v. Northeast Ohio Nephrology Assocs., 2005-Ohio-6914, 164 Ohio App. 3d 829, 844 N.E.2d 400, 2005 Ohio App. LEXIS 6225 (Ohio Ct. App., Summit County 2005)*.

Permanent custody

Use of the proper standard of review and the admission of evidence in accordance to law did not result in constitutional error and the mother did not object to the testimony during the course of the proceedings, the testimony presented by the drug and alcohol counselors was mainly objective in nature, relating to the urinalysis test results, the medications prescribed to the mother, and her attendance in various programs. The mother failed to make any specific arguments as to how the information testified to denied her of due process of law and the information between the parents and the service providers was not privileged. *In re N.K., 2015-Ohio-1790, 2015 Ohio App. LEXIS 1732 (Ohio Ct. App., Sandusky County 2015)*.

Physician-patient privilege

Mental patient's medical file was privileged from discovery under R.C. 2317.02(B), since the treatment plan and other items in the file were communications from the patient's physicians to the patient concerning the physician-patient relationship, and none of the statutory exceptions applied. Evans v. Summit Behavorial Healthcare, 2016-Ohio-5857, 70 N.E.3d 1217, 2016 Ohio App. LEXIS 3701 (Ohio Ct. App., Franklin County 2016).

Trial court order compelling disclosure of information involving physician-patient confidentiality constitutes a final appealable order. Trial court erred by ordering release of privileged medical records without first conducting an in camera inspection to determine their relevance to the party's claimed injuries: Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009).

With respect to the physician-patient privilege, R.C. 2317.02 grants a patient the right to prevent the physician from testifying concerning his or her communications with the patient, but does not give the patient the right to refuse to testify. However, that does not prevent a trial court from issuing a protective order where appropriate: Ward v. Summa Health Sys., 2009-Ohio-4859, 184 Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009), aff'd, 2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010).

Trial court erred in ordering disclosure under Civ.R. 26 by a clinic of 10 years' of minors' abortion records in an identity-concealing format, as they were covered by the patient-physician privilege under R.C. 2317.02(B) and any possible probative value of the records was far outweighed by the potential invasion of privacy rights of the patients. The parents of a minor abortion patient's claims did not require disclosure thereof, as the clinic had acted in good faith in attempting to comply with the parental notification requirement of former R.C. 2919.12 and the enforcement of R.C. 2919.121 was enjoined at the time of the procedure, punitive damages were obtainable upon a showing of a single violation of either R.C. 2919.12 or 2317.56, such that additional patient records were not necessary, and any duty to report suspected child abuse under R.C. 2151.421 was confidential and was not admissible as evidence. Roe v. Planned Parenthood Southwest Ohio Region, 2007-Ohio-4318, 173 Ohio App. 3d 414, 878 N.E.2d 1061, 2007 Ohio App. LEXIS 3868 (Ohio Ct. App., Hamilton County 2007), aff'd on other grounds, 2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009).

Trial court did not err in denying defendant access to the medical records of one of the victims of his vehicular criminal offense, as the Health Insurance Portability and Accountability Act did not preempt the physican-patient privilege under R.C. 2317.02(B) and there was no indication that the victim had waived that privilege. State v. Flanigan, 2007-Ohio-3158, 2007 Ohio App. LEXIS 2909 (Ohio Ct. App., Montgomery County 2007).

When a client sued a lawyer for legal malpractice arising from the lawyer's representation of the client in the client's claim for negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 et seq., the client was not entitled to a protective order barring the client's physician from testifying as an expert witness for the lawyer because (1) the physician's testimony was not privileged, even though it was derived from the physician's treatment of the client, because, when the client filed a civil action involving the physician's treatment of the client, the client waived the client's physician-patient privilege, under R.C. 2317.02(B)(1)(a)(iii), and (2) the physician's testimony was relevant, under R.C. 2317.02(B)(3)(a) because it related causally or historically to physical injuries that were relevant to the client's claim. Smalley v. Friedman, Damiano & Smith Co., L.P.A., 2007-Ohio-2646, 172 Ohio App. 3d 108, 873 N.E.2d 331, 2007 Ohio App. LEXIS 2475 (Ohio Ct. App., Cuyahoga County 2007).

Trial court's decision to compel production of discovery as to two of the interrogatories was reversed as the answers sought were protected by the physician-patient privilege, pursuant to R.C. 2317.02(B)(1), and the order to compel discovery as to one interrogatory was affirmed as to any request for the mental health information that the owner had directly put at issue through his claim for severe emotional distress. However, an evidentiary hearing was required to determine the appropriate look-back time frame of the discovery request. Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006).

—Applicability

Appellant's claim trial court erred by admitting his medical records since the admission violated his physician patient privilege lacked merit because the physician-patient privilege did not apply as the state sought disclosure of appellant's HIV test records in connection with its prosecution of appellant for felonious assault and demonstrated a compelling need for the records, which would satisfy one of the elements of the charged offense. *State v. Worship, 2022-Ohio-52, 2022 Ohio App. LEXIS 30 (Ohio Ct. App., Warren County 2022)*.

Defendant's contention that he was entitled to assert a physician-patient privilege lacked merit because it was not entirely clear who he was arguing with (in the emergency room) and why the conversation took place. *State v. Greene, 2022-Ohio-1357, 2022 Ohio App. LEXIS 1245 (Ohio Ct. App., Auglaize County 2022)*.

Present case dif not involve an official criminal investigation seeking the results of tests administered to the instigator to determine his blood-alcohol/drug content; as such, the statute did not apply to the present case. *Skorvanek v. Ohio Dep't of Rehab. & Corr., 2018-Ohio-3870, 2018 Ohio App. LEXIS 4198 (Ohio Ct. App., Franklin County 2018)*.

—Blood tests

Trial court properly granted defendant's motion to suppress the lab results from a blood draw taken while he was in the hospital, which indicated the presence of alcohol in his blood and resulted in charges against him for OVI violations, as no warrant was obtained prior to taking the blood draw and no basis for that warrantless search existed. *State v. Saunders, 2017-Ohio-7348, 2017 Ohio App. LEXIS 3640 (Ohio Ct. App., Morrow County 2017)*.

—Exceptions

Patient's filing of a divorce action, with claims for child custody and spousal support triggered a statutory exception to the physician-patient privilege because the patient's mental and physical conditions were mandatory considerations for the trial court's determination of both child custody and spousal support. Furthermore, the trial court appropriately examined in camera the submitted mental-health records to determine their relevance before ordering their release, subject to a protective order. *Friedenberg v. Friedenberg, 2020-Ohio-3345, 161 Ohio St. 3d 98, 161 N.E.3d 546, 2020 Ohio LEXIS 1401 (Ohio 2020)*.

All of the couple's discovery requests except one related causally or historically to the physical and/or mental injuries alleged in the sister's complaint; there was no need for the court to fix "time parameters" on the discovery requests because such parameters were included in the requests themselves. *Heimberger v. Heimberger, 2020-Ohio-3853, 2020 Ohio App. LEXIS 2764 (Ohio Ct. App., Lake County 2020)*.

—Generally

Language of *R.C. 2317.02* is clear and unambiguous that it applies in any criminal action against a physician. *State v. Adams, 2009-Ohio-6491, 2009 Ohio App. LEXIS 5449 (Ohio Ct. App., Scioto County 2009)*.

Trial court may not simply ignore the requirements of *R.C. 2317.02(B)*. *Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009)*.

As the physician-patient privilege has no common law roots to protect the patient's testimony, and as *R.C. 2317.02(B)(1)* does not extend the privilege to prevent the patient's testimony from being compelled, the physician-patient privilege is not as broad as the attorney-client privilege. *Ward v. Summa Health Sys., 2009-Ohio-4859, 184*

Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009), aff'd, *2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

R.C. 2317.02(B) protects only communications, not the underlying facts. The names of drugs to which a party had been addicted and the names of the party's health care providers were not "communications": *Ingram v. Adena Health Sys., 2002-Ohio-4878, 149 Ohio App. 3d 447, 777 N.E.2d 901, 2002 Ohio App. LEXIS 4932 (Ohio Ct. App., Ross County 2002)*.

R.C. 2317.02 does not prevent a physician from testifying under oath that he was consulted in a professional capacity by a person on a certain date. Since the statute only prohibits a physician or dentist from testifying, interrogatories directed to the patient about what prescribed medications she was taking at the time of the accident did not fall under *R.C. 2317.02(B)*: *Binkley v. Allen, 2001 Ohio App. LEXIS 421 (Ohio Ct. App., Stark County Feb. 5, 2001)*.

In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship: *Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999)*.

The term "communication" as defined by *R.C. 2317.02(B)(4)(a)* is sufficiently broad to encompass a patient's communication with a nurse performing duties to assist a physician in the diagnosis and treatment of a patient; thus, the defendant's hospital records containing the nurse's notes and observations were privileged, and the admission of those records and the nurse's testimony regarding the defendant's statement contained in them was error: *State v. Napier, 1998 Ohio App. LEXIS 3939 (Ohio Ct. App., Hamilton County Aug. 28, 1998)*.

Where a treating physician contacts defense counsel and opines that a malpractice defendant was not negligent, the contact is a mere private conversation. *R.C. 2317.02* does not limit or prevent such conversations. The privilege does not extend to testimony by a treating physician concerning matters causally and historically related to an injury which is the subject of a malpractice action: *Chaffin v. Mercy Medical Ctr., 1996 Ohio App. LEXIS 5956 (Ohio Ct. App., Clark County Dec. 27, 1996)*.

The physician-patient privilege did not apply to a psychiatrist who was retained by defense counsel to provide favorable testimony at a bindover proceeding: *State v. Hopfer, 112 Ohio App. 3d 521, 679 N.E.2d 321, 1996 Ohio App. LEXIS 3063 (Ohio Ct. App., Montgomery County)*, dismissed, *77 Ohio St. 3d 1488, 673 N.E.2d 146, 1996 Ohio LEXIS 2838 (Ohio 1996)*.

In a malpractice action against a doctor, the doctor's own medical records are privileged under *R.C. 2317.02*: *Calihan v. Fullen, 78 Ohio App. 3d 266, 604 N.E.2d 761, 1992 Ohio App. LEXIS 108 (Ohio Ct. App., Hamilton County 1992)*.

Files and records containing a doctor's diagnosis of individuals performed within the context of a second opinion or independent medical examination constitute "communications" within the meaning of *R.C. 2317.02(B)(3)* which potentially could affect the course of a patient's treatment and are therefore privileged. The risk of disclosing a patient's identity cannot be entirely eliminated by the masking of a patient's name or identifying personal data such as telephone or social security numbers: *Wozniak v. Kombrink, 1991 Ohio App. LEXIS 606 (Ohio Ct. App., Hamilton County Feb. 13, 1991)*.

Trial court did not err by refusing to allow appellant to raise the issue of appellee's invocation of the physician-patient privilege and thus allow the jury to draw a negative inference from the invocation of the privilege: *Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990)*.

Medical records of an allegedly intoxicated driver are protected by the physician-patient privilege: *Akron v. Springston, 67 Ohio App. 3d 645, 588 N.E.2d 160, 1990 Ohio App. LEXIS 1888 (Ohio Ct. App., Summit County 1990)*.

R.C. 2317.02(B) does not prevent a non-party treating physician from testifying as to non-privileged matters: *Berlinger v. Mt. Sinai Medical Center, 68 Ohio App. 3d 830, 589 N.E.2d 1378, 1990 Ohio App. LEXIS 4411 (Ohio Ct. App., Cuyahoga County 1990)*, dismissed, *58 Ohio St. 3d 707, 569 N.E.2d 505, 1991 Ohio LEXIS 638 (Ohio 1991)*.

Where the physician-patient privilege contained in *R.C. 2317.02(B)* has not been waived, a non-party treating physician may testify as an expert witness "provided that in answering the questions he disregards what he learned and observed while attending the patient and his own opinion formed therefrom." (*Strizak v. Indus. Comm. [1953], 159 OS 475 [50 OO 394]*, paragraph two of the syllabus, applied and followed.: *Moore v. Grandview Hospital, 25 Ohio St. 3d 194, 25 Ohio B. 259, 495 N.E.2d 934 (1986)*.

Even though a plaintiff does not waive the physician-patient privilege afforded by *R.C. 2317.02*, his attending physician may be called as a witness by the defendant; and as such witness, the physician may testify to all competent matters other than communications made to him in his professional capacity by his patient, or his advice to his patient given in that capacity: *Vincenzo v. Newhart, 7 Ohio App. 2d 97, 36 Ohio Op. 2d 213, 219 N.E.2d 212 (1966)*, affirmed *11 Ohio St. 2d 63, 40 Ohio Op. 2d 67, 227 N.E.2d 627*.].

A doctor should not disclose information to a third party without the patient's consent: *Hammonds v. Aetna Casualty & Surety Co., 237 F. Supp. 96, 3 Ohio Misc. 83, 31 Ohio Op. 2d 174, 1965 U.S. Dist. LEXIS 6449 (N.D. Ohio 1965)*.

Privileged communications between patient and physician may be by exhibition of the body to the physician for examination or treatment as well as by oral or written communications between physician and patient; and a physician may not testify in respect to either unless there is a waiver in reference thereto: *In re Roberto, 106 Ohio App. 303, 7 Ohio Op. 2d 63, 151 N.E.2d 37, 79 Ohio Law Abs. 1, 1958 Ohio App. LEXIS 804 (Ohio Ct. App., Cuyahoga County 1958)*.

The relationship of physician and patient was not created by an examination of decedent by physicians engaged by decedent's employer where such examination did not include treatment nor advice and clearly was not for the purpose of alleviating decedent's pain nor curing his malady: *Suetta v. Carnegie-Illinois Steel Corp., 144 N.E.2d 292, 75 Ohio Law Abs. 487, 1955 Ohio App. LEXIS 738 (Ohio Ct. App., Mahoning County 1955)*.

The statute which precludes a physician from testifying "concerning a communication made to him by his patient in that relation" should be strictly construed, in a will contest action, to apply only to the communication made to a physician in his professional capacity at the time: *Meier v. Peirano, 76 Ohio App. 9, 31 Ohio Op. 342, 62 N.E.2d 920, 1945 Ohio App. LEXIS 650 (Ohio Ct. App., Hamilton County 1945)*.

Submission to a physical examination by a physician constitutes a communication from the patient to the physician within the meaning and inhibition of this section: *McKee v. New Idea, Inc., 44 N.E.2d 697, 36 Ohio Law Abs. 563, 1942 Ohio App. LEXIS 947 (Ohio Ct. App., Mercer County 1942)*.

A medical examination by a physician for the purpose of determining the eligibility of a person for admission to a state asylum for the blind, and not for the purpose of medical treatment, does not establish a physician-patient relationship within the meaning of this section: *Bowers v. Indus. Comm., 30 Ohio Law Abs. 353, 1939 Ohio Misc. LEXIS 908 (Ohio Ct. App., Franklin County Sept. 20, 1939)*.

—Alteration of prescription

In a criminal case involving the alteration of a prescription by the patient, the history and contents of the prescription are not privileged by the physician-patient privilege since the communication was not intended as a confidential communication and was not a communication between patient and physician: *State v. Treadway, 69 Ohio Op. 2d 507, 328 N.E.2d 825, 1974 Ohio App. LEXIS 2793 (Ohio Ct. App., Butler County 1974)*.

—Appeal of discovery order

As the grant of employers' motion to compel discovery involved an employee's allegedly privileged medical records, review on appeal was pursuant to the de novo standard because it presented a question of law. *Csonka-Cherney v. Arcelormittal Cleveland, Inc., 2014-Ohio-836, 9 N.E.3d 515, 2014 Ohio App. LEXIS 808 (Ohio Ct. App., Cuyahoga County 2014)*.

Trial court properly overruled a guardian's motion to quash a daughter's subpoena for medical information related to the daughter's mother, who was the guardian's ward, because, inter alia, the trial court's judgment appointing the guardian specifically authorized the daughter to make urgent health care decisions for the ward, if the guardian were unavailable, making it necessary for the daughter to be as well informed about the ward's health care as the guardian. *In re Guardianship of Marcia S. Clark, 2009-Ohio-6577, 2009 Ohio App. LEXIS 5509 (Ohio Ct. App., Franklin County 2009)*.

Trial court properly overruled a guardian's motion to quash a daughter's subpoena for information related to the daughter's mother, who was the guardian's ward, because, inter alia, while some of the documents sought by the subpoena were arguably privileged, under the physician-patient privilege in *R.C. 2317.02(B)*, other documents might or might not be. *In re Guardianship of Marcia S. Clark, 2009-Ohio-6577, 2009 Ohio App. LEXIS 5509 (Ohio Ct. App., Franklin County 2009)*.

Trial court's decision to compel production of discovery as to two of the interrogatories was reversed as the answers sought were protected by the physician-patient privilege, pursuant to *R.C. 2317.02(B)(1)*, and the order to compel discovery as to one interrogatory was affirmed as to any request for the mental health information that the owner had directly put at issue through his claim for severe emotional distress. However, an evidentiary hearing was required to determine the appropriate look-back time frame of the discovery request. *Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006)*.

An order allowing a party to depose an opposing party's physician, where the opposing party has attempted to invoke the physician-patient privilege, is a final, appealable order under *R.C. 2305.02*: *Brown v. Yothers, 56 Ohio App. 3d 29, 564 N.E.2d 714, 1988 Ohio App. LEXIS 4588 (Ohio Ct. App., Stark County 1988)*.

—Applicability

Mother's psychological evaluations, present and past, were forensic in nature because they were for the specific purpose of determining her psychological fitness as a parent, not for the purpose of treatment in a therapeutic relationship, and the past evaluations were relevant to the evaluator in making a comprehensive recommendation to the trial court. *In re F.I., 2014-Ohio-2350, 2014 Ohio App. LEXIS 2297 (Ohio Ct. App., Fairfield County 2014)*.

Trial court did not abuse its discretion by finding a wife's health information was relevant to the spousal-support issues in the parties' divorce action because the wife claimed a disability limited her earning ability, and, as such, the wife's health information was not protected by the physician-patient privilege and was discoverable. *Higbee v. Higbee, 2014-Ohio-954, 2014 Ohio App. LEXIS 890 (Ohio Ct. App., Clark County 2014)*.

Trial court erred in granting a protective order to preclude a patient, who contracted Hepatitis B following surgery, from using a deposition to question his surgeon as to the surgeon's personal health information as such information was relevant to whether the surgeon was the source of the Hepatitis B. *R.C. 2317.02(B)* does not protect a person from having to disclose his or her own medical information when that information is relevant to the subject matter involved in a pending civil action. *Ward v. Summa Health Sys., 2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

—Blood donors

A blood donor is not a "patient" for purposes of the physician-patient privilege of R.C. 2317.02(B)(1), nor is information he supplies with his blood donation a "communication" as defined in R.C. 2317.02(B)(3): Doe v. University of Cincinnati, 42 Ohio App. 3d 227, 538 N.E.2d 419, 1988 Ohio App. LEXIS 5317 (Ohio Ct. App., Franklin County 1988).

—Blood tests

In a prosecution for aggravated vehicular assault, under R.C. 2903.08(A)(1)(a), when defendant's motion in limine sought to exclude the results of his blood alcohol tests, based on the physician-patient privilege, his motion could not be granted because R.C. 2317.02(B)(1)(c) provided that the testimonial privilege applicable to communications between a patient and a physician did not apply in an criminal action concerning any test or the results of any test that determined the presence or concentration of alcohol in the patient's blood at any time relevant to the criminal offense in question. State v. Baker, 2006-Ohio-7085, 170 Ohio App. 3d 331, 867 N.E.2d 426, 2006 Ohio App. LEXIS 7013 (Ohio Ct. App., Greene County 2006).

State's argument that because R.C. 2317.02(B) was amended, to make blood tests available in criminal prosecutions despite the patient-physician privilege, well after the addition of the requirements now found in R.C. 4511.19(D)(1), the Ohio legislature intended for the records of tests taken by medical personnel to be admissible, and that blood-alcohol tests should be admitted just as any other medical test might be, subject to proper foundation with cross-examination of any expert witness, unde r Evid.R. 702(C) and 803(6) was rejected; R.C. 2317.02(B) does not set forth the standard by which the test results will be deemed reliable to establish proof beyond a reasonable doubt, and nothing in § 2317.02(B)(2) exempts a hospital from complying with the testing standards contained in R.C. 4511.19(D)(1). State v. Mayl, 2005-Ohio-4629, 106 Ohio St. 3d 207, 833 N.E.2d 1216, 2005 Ohio LEXIS 2063 (Ohio 2005).

Trial court did not err in denying defendant's motion to suppress medical records of his blood-alcohol content following a one-car accident; the statute permitting the city to obtain the records did not violate defendant's constitutional right to privacy since it provided only a limited waiver of the physician-patient privilege for situations relating to criminal offenses. City of Cleveland v. Dames, 2003-Ohio-6054, 2003 Ohio App. LEXIS 5389 (Ohio Ct. App., Cuyahoga County 2003).

Regardless of whether the defendant consented to the test, the hospital's blood test did not constitute state action for purposes of implicating the fourth amendment. R.C. 4511.19(D)(1) is not limited to tests conducted at the request of a law enforcement officer: State v. Meyers, 2001-Ohio-2282, 146 Ohio App. 3d 563, 767 N.E.2d 739, 2001 Ohio App. LEXIS 4395 (Ohio Ct. App., Allen County 2001).

Federal law did not prohibit disclosure of the defendant's blood-alcohol test performed by the hospital: State v. Williams, 94 Ohio Misc. 2d 113, 703 N.E.2d 1284, 1998 Ohio Misc. LEXIS 47 (Ohio C.P. 1998).

A blood sample is lawfully obtained where it is taken by medical personnel at the direction of a police officer with a warrant for the sample. The physician-patient privilege does not apply to such a sample: State v. Kutz, 87 Ohio App. 3d 329, 622 N.E.2d 362, 1993 Ohio App. LEXIS 2149 (Ohio Ct. App., Lucas County), dismissed, *67 Ohio St. 3d 1463, 619 N.E.2d 698, 1993 Ohio LEXIS 1997 (Ohio 1993)*.

The court erroneously admitted privileged testimony regarding the result of a blood-alcohol test performed at the direction of defendant's physician: State v. Lampman, 82 Ohio App. 3d 515, 612 N.E.2d 779, 1992 Ohio App. LEXIS 4788 (Ohio Ct. App., Lake County 1992).

Blood-alcohol tests administered at the hospital where a party was treated after an accident are not privileged under R.C. 2317.02(B): Kromenacker v. Blystone, 43 Ohio App. 3d 126, 539 N.E.2d 675, 1987 Ohio App. LEXIS 10874 (Ohio Ct. App., Lucas County 1987).

In a criminal prosecution for a violation of R.C. 4511.19 (driving while intoxicated), the physician-patient privilege, as expressed in R.C. 2317.02(B), does not preclude the receipt in evidence of hospital records containing the results of a blood-alcohol test administered to the defendant by a treating physician or other hospital employee. Nor does the privilege prevent the admission of properly qualified expert testimony necessary to provide foundational support for such evidence. (State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982).

Where, in a prosecution for driving while intoxicated (R.C. 4511.19), the defendant seeks to suppress the results of a blood-alcohol test on the basis that such evidence is not admissible due to the physician-patient privilege set forth in R.C. 2317.02(B), and where the evidence shows that the blood-alcohol test was not administered at the request of a police officer pursuant to R.C. 4511.19 and 4511.19(A), but was administered solely pursuant to the request of the defendant's attending physician following an accident, the public interest in the sensible and efficient administration of criminal justice outweighs the policy considerations which support the physician-patient privilege and the results of the blood-alcohol test are admissible, notwithstanding the physician-patient privilege of R.C. 2317.02(B): State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982).

A blood-alcohol test administered in connection with a patient's physical examination constitutes a "communication" as the word is used in R.C. 2317.02(B): State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982).

—Causal connection

Trial court erred in denying an injured customer's motion for an in camera inspection of medical records sought by a retailer because an affidavit submitted by the customer set forth a reasonable factual basis to establish that the records included privileged information not causally or historically related to the injuries for which a recovery was sought by the customer. Pinnix v. Marc Glassman, Inc., 2012-Ohio-3263, 2012 Ohio App. LEXIS 2868 (Ohio Ct. App., Cuyahoga County 2012).

Trial court properly denied the injured pedestrian's motion to compel discovery because the requested medical records, including a list of medications, were privileged communications between patient and physician. Nothing in the police report, in the driver's deposition testimony, or the description by other witnesses indicated that the accident was causally connected to any medical condition affecting the driver. Wallace v. Hipp, 2012-Ohio-623, 2012 Ohio App. LEXIS 537 (Ohio Ct. App., Lucas County 2012).

—Date of consultation

R.C. 2317.02 does not prevent testimony by a physician as to the fact that he was consulted in a professional capacity by a person on a certain date: *Jenkins v. Metropolitan Life Ins. Co., 171 Ohio St. 557, 15 Ohio Op. 2d 14, 173 N.E.2d 122, 1961 Ohio LEXIS 689 (Ohio 1961)*.

—Decedents' estates

Where an executor files a will for probate, the physician-patient privilege has been waived under R.C. 2317.02: Verba v. Orum, 1995 Ohio App. LEXIS 1352 (Ohio Ct. App., Belmont County Mar. 30, 1995).

—Duty to report certain matters

Where a physician is required by former R.C. 2917.44 (see now R.C. 2921.22) to report to a law-enforcement officer a gunshot wound or wound inflicted by a deadly weapon, the former may testify, without violating the

physician-patient privilege, as to the description of the wounded person, as to his name and address, if known, and as to the description of the nature and location of such wound, obtained by examination, observation and treatment of the victim: *State v. Antill, 176 Ohio St. 61, 26 Ohio Op. 2d 366, 197 N.E.2d 548, 1964 Ohio LEXIS 866 (Ohio 1964)*.

—Employee of physician

An employee of a physician has no legal duty to refrain from divulging confidential medical information concerning a patient of that physician. Under a proper factual posture, the patient may have a claim for relief for invasion of her right to privacy: *Knecht v. Vandalia Medical Center, Inc., 14 Ohio App. 3d 129, 470 N.E.2d 230, 1984 Ohio App. LEXIS 11257 (Ohio Ct. App., Montgomery County 1984)*.

—Employer's treating physician

A physician is not rendered incompetent by this section to testify that the relation of physician and patient existed and that treatment was administered: *Willig v. Prudential Ins. Co., 71 Ohio App. 255, 26 Ohio Op. 89, 49 N.E.2d 421, 38 Ohio Law Abs. 492, 1942 Ohio App. LEXIS 563 (Ohio Ct. App., Hamilton County 1942)*.

—Exceptions

Physician-patient privilege did not apply because a patient's statements to emergency room personnel in a prior case were causally and historically related to the injuries that were relevant to issues in the patient's cross-claim for indemnification or contribution in a subsequent action. *Leopold v. Ace Doran Hauling & Rigging Co., 2013-Ohio-3107, 136 Ohio St. 3d 257, 994 N.E.2d 431, 2013 Ohio LEXIS 1689 (Ohio 2013)*.

When motorists sued a driver for personal injuries from a vehicle accident, alleging the driver was under the influence of alcohol, and moved a trial court to compel the driver to produce an executed authorization giving the motorists access to the driver's medical records, it was essential to know how blood alcohol test results the motorists sought were obtained because there was an exception to the privilege in *R.C. 2317.02(B)* for the results of tests performed to determine the presence of alcohol in a patient's blood, under *R.C. 2317.02(B)(1)(c)*. *Sullivan v. Smith, 2009-Ohio-289, 2009 Ohio App. LEXIS 262 (Ohio Ct. App., Lake County 2009)*.

R.C. 2921.22(B) provides a statutory exception to the physician-patient privilege: *State v. Jones, 2000-Ohio-187, 90 Ohio St. 3d 403, 739 N.E.2d 300, 2000 Ohio LEXIS 2995 (Ohio 2000)*.

—Fraudulent misrepresentation by patient

Physician-patient privilege did not protect disclosure of a fraudulent communication by the patient (defendant) to the physician, since its purpose was not to facilitate obtaining medical treatment, but to facilitate, or to commit, insurance fraud. *State v. Branch, 2009-Ohio-3946, 2009 Ohio App. LEXIS 3377 (Ohio Ct. App., Montgomery County 2009)*.

When communications between a patient and his physician are predicated upon the patient's fraudulent misrepresentations, the physician-patient relationship is not properly established and the physician-patient privilege does not attach: *State ex rel. Buchman v. Stokes, 36 Ohio App. 3d 109, 521 N.E.2d 515, 1987 Ohio App. LEXIS 10512 (Ohio Ct. App., Hamilton County 1987)*.

—Grand jury

Clinic was not entitled to judgment as a matter of law after providing medical records in response to a grand jury subpoena because there was neither a statutory exception permitting disclosure under R.C. 2317.02(B) nor a countervailing interest outweighing the privacy rights of a police officer and his wife. Turk v. Oiler, 2010 U.S. Dist. LEXIS 8169 (N.D. Ohio Feb. 1, 2010).

Hospital, which released plaintiff's medical records in response to a grand jury subpoena, were not entitled to judgment as a matter of law with respect to plaintiff's invasion of privacy claims because Ohio's physician-patient privilege, R.C. 2317.02(B), did not contain an exception permitting disclosure in response to a grand jury subpoena. Turk v. Oiler, 732 F. Supp. 2d 758, 2010 U.S. Dist. LEXIS 81340 (N.D. Ohio 2010).

When a grand jury subpoenaed a physician's patients' records, the physician's motion to quash the subpoena should have been granted because, inter alia, no statutory exception to the physician-patient privilege, in R.C. 2317.02(B)(1), (2) or (3), applied as the records were subpoenaed in a grand jury proceeding, so the action was not civil in nature and no civil actions exceptions applied, and no evidence showed the case was a criminal action (1) involving tests to determine the presence of alcohol or drugs in a patient's blood or (2) against the physician. In re Banks, 2008-Ohio-2339, 2008 Ohio App. LEXIS 1986 (Ohio Ct. App., Scioto County 2008).

Trial court should have granted a physician's motion to quash a grand jury subpoena for records of the physician's patients because (1) no statutory exception to the physician-patient privilege, under R.C. 2317.02(B), applied, and (2) an appellate court was not inclined to judicially create a new public policy exception for grand jury subpoenas. In re Banks, 2008-Ohio-2339, 2008 Ohio App. LEXIS 1986 (Ohio Ct. App., Scioto County 2008).

The physician-patient privilege embodied in R.C. 2317.02(B) does not preclude disclosure to the grand jury of the medical records of a person under investigation: In re Brink, 42 Ohio Misc. 2d 5, 536 N.E.2d 1202, 1988 Ohio Misc. LEXIS 10 (Ohio C.P. 1988).

—Hypothetical questions

In an action, the purpose of which is to recover compensation or damages for a physical injury, a physician who has treated the plaintiff professionally for such injury is not thereby precluded by this section, relating to privileged communications, from giving expert testimony in response to proper hypothetical questions, provided that in answering the questions he disregards what he learned and observed while attending the patient and his own opinion formed therefrom: 159 Ohio St. 475, 50 Ohio Op. 394, 112 N.E.2d 537.

—In camera inspection

Trial court erred in not conducting an in camera inspection of the medical records before ordering them disclosed because the magistrate's broad production order could conceivably have included items which were privileged. Banchefsky v. Banchefsky, 2014-Ohio-899, 2014 Ohio App. LEXIS 845 (Ohio Ct. App., Franklin County 2014).

It was error to grant employers' motion to compel discovery relating to an employee's medical information in her employment dispute because the trial court should have conducted an in camera inspection of the records to determine if they were causally or historically related to the issues in the case, based on the employee's claim of privilege. Csonka-Cherney v. Arcelormittal Cleveland, Inc., 2014-Ohio-836, 9 N.E.3d 515, 2014 Ohio App. LEXIS 808 (Ohio Ct. App., Cuyahoga County 2014).

In a workers' compensation case, the trial court abused its discretion in granting a motion to compel discovery of an injured worker's medical records that were privileged without first conducting an in camera inspection to determine which records were causally or historically related to the action. Collins v. Interim Healthcare of Columbus, Inc., 2014-Ohio-40, 2014 Ohio App. LEXIS 30 (Ohio Ct. App., Perry County 2014).

Trial court did not err under R.C. 2317.02(B)(3)(a) in denying an employee's request for document inspection or in compelling the production of the employee's medical records because the employee failed to provide a basis by which the court could have concluded that an in camera examination would have established a privilege. Chasteen v. Stone Transp., Inc., 2010-Ohio-1701, 2010 Ohio App. LEXIS 1403 (Ohio Ct. App., Fulton County 2010).

—In camera review

Since the evidence did not demonstrate that an injured person had waived the doctor-patient privilege, certainly as it related to any records of sexually-transmitted diseases and the like, and such conditions did not appear to be at issue, not could it be concluded that a judicially created waiver might be appropriate, an in camera review was appropriate. Moore v. Ferguson, 2012-Ohio-6087, 2012 Ohio App. LEXIS 5265 (Ohio Ct. App., Richland County 2012).

Motion to compel discovery was improperly granted in a personal injury case because, even though the scope of discovery under Civ.R. 26(B)(1) was broad, an executrix presented a sufficient factual basis to prompt an in camera review of medical records that were allegedly privileged; she asserted that the records were not related to a car accident at issue. Piatt v. Miller, 2010-Ohio-1363, 2010 Ohio App. LEXIS 1149 (Ohio Ct. App., Lucas County 2010).

—Insurance matters

Court could appropriately order the insureds to sign medical releases as requested by the insurer, because the insureds waived their claims of privilege by their failure to follow the proper procedure under Civ.R. 26(B)(6)(a) by failing to provide the insurer with even the unprivileged medical records, failing to file a privilege log, and failing to submit the records alleged to be privileged to the court for an in-camera inspection as a result of their insistence that the records be held by a third-party service company before they constructed their privilege log. Hartzell v. Breneman, 2011-Ohio-2472, 2011 Ohio App. LEXIS 2126 (Ohio Ct. App., Mahoning County 2011).

In a suit by an insurance company for the cancellation of life insurance policy on ground of fraud in the application, physician's testimony relative to diagnosis and treatment of insured and insured's statements to him, and patient's hospital record, are inadmissible under the privileged communication rule: Prudential Ins. Co. v. Heaton, 20 Ohio Law Abs. 454, 1935 Ohio Misc. LEXIS 1199 (Ohio Ct. App., Van Wert County June 25, 1935).

—Involuntary commitment

The physician-patient privilege set forth in R.C. 2317.02(B) does not apply to involuntary commitment proceedings pursuant to R.C. 5122.11 to 5122.15, because the privilege applies only when the patient has voluntarily sought treatment: In re Winstead, 67 Ohio App. 2d 111, 21 Ohio Op. 3d 422, 425 N.E.2d 943, 1980 Ohio App. LEXIS 9617 (Ohio Ct. App., Summit County 1980).

—Liability for unlawful disclosure

In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship: Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999).

—Liability to third parties

A physician was not liable to a third party who contracted a disease from a patient allegedly due to the physician's negligent treatment and advising of the patient: *D'Amico v. Delliquadri, 114 Ohio App. 3d 579, 683 N.E.2d 814, 1996 Ohio App. LEXIS 4212 (Ohio Ct. App., Trumbull County 1996)*.

—Mirror imaging

In a wrongful death case, an order allowing the creation of mirror image files of computer hard drives was appropriate; *R.C. 2317.02(B)(1)* did not bar that process since there was no risk of viewing patient files, the trial court determined whether items on a log were privileged, and access was permitted under Civ.R. 34 where there was a direct relationship between the computer hard drives and the claims of spoliation and fraud. Moreover, the trial court set forth a specific protocol, definite search terms, and the means necessary to protect privileged information. *Cornwall v. N. Ohio Surgical Ctr., Ltd., 2009-Ohio-6975, 185 Ohio App. 3d 337, 923 N.E.2d 1233, 2009 Ohio App. LEXIS 5814 (Ohio Ct. App., Erie County 2009)*.

—Motion for protective order

When a client sued a lawyer for legal malpractice arising from the lawyer's representation of the client in the client's claim for negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 et seq., the client was not entitled to a protective order barring the client's physician from testifying as an expert witness for the lawyer because (1) the physician's testimony was not privileged, even though it was derived from the physician's treatment of the client, because, when the client filed a civil action involving the physician's treatment of the client, the client waived the client's physician-patient privilege, under *R.C. 2317.02(B)(1)(a)(iii)*, and (2) the physician's testimony was relevant, under *R.C. 2317.02(B)(3)(a)* because it related causally or historically to physical injuries that were relevant to the client's claim. *Smalley v. Friedman, Damiano & Smith Co., L.P.A., 2007-Ohio-2646, 172 Ohio App. 3d 108, 873 N.E.2d 331, 2007 Ohio App. LEXIS 2475 (Ohio Ct. App., Cuyahoga County 2007)*.

The physician-patient privilege set forth in *R.C. 2317.02(B)* may be "activated" for discovery purposes by the plaintiff-patient filing a motion for a protective order pursuant to Civ.R. 26: *Baker v. Quick Stop Oil Change & Tune-Up, 61 Ohio Misc. 2d 526, 580 N.E.2d 528, 1990 Ohio Misc. LEXIS 41 (Ohio C.P. 1990)*.

—Nonparties

In a medical negligence case, a health care provider should not have been ordered to produce redacted laboratory results from a non-party patient's medical record because they were privileged under *R.C. 2317.02(B)(1)*, (B)(5)(a), and the Biddle case did not create a litigant's right to discovery of confidential medical records of non-parties. *Bednarik v. St. Elizabeth Health Ctr., 2009-Ohio-6404, 2009 Ohio App. LEXIS 5359 (Ohio Ct. App., Mahoning County 2009)*.

—Not related

In a case involving murder, aggravated burglary, and kidnapping, defendant failed to show that any excluded communication between himself and a psychiatric patient were related to the action, as required by *R.C. 2317.02*, where emails between the two were sent several years before the murder. Although the trial court did arguably abuse its discretion by preventing defendant from impeaching the patient under Evid.R.s 616(B) by questioning her about a disorder's impact on her ability to observe, remember, and relate the events surrounding her husband's murder, any error the court committed by limiting cross-examination on this subject was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt concerning the charges the patient testified about. *State v. Adams, 2009-Ohio-6491, 2009 Ohio App. LEXIS 5449 (Ohio Ct. App., Scioto County 2009)*.

—Physician, defined

"Physician," as used in *R.C. 2317.02(B)* is one who has been duly authorized and licensed by the state medical board to engage in the general practice of medicine: *Belichick v. Belichick, 37 Ohio App. 2d 95, 66 Ohio Op. 2d 166, 307 N.E.2d 270, 1973 Ohio App. LEXIS 806 (Ohio Ct. App., Mahoning County 1973)*.

—Physician disciplinary proceedings

R.C. 2317.02(B) may not be used by a physician to prevent the State Medical Board from compelling production of patient records pursuant to *R.C. 4731.22(C)(1)*: Ohio *State Medical Bd. v. Miller, 44 Ohio St. 3d 136, 541 N.E.2d 602, 1989 Ohio LEXIS 173 (Ohio 1989)*.

—Police transportation to hospital

Where an intoxicated arrestee is involuntarily transported to a hospital by police officers, the privilege under *R.C. 2317.02* is applicable to observations made by medical personnel and communications made by the defendant: *City of Cleveland v. Haffey, 94 Ohio Misc. 2d 79, 703 N.E.2d 380, 1998 Ohio Misc. LEXIS 42 (Ohio Mun. Ct. 1998)*.

—Relevance

Because the trial court did not have any evidence before it regarding the husband's mental or emotional health, it could not have made a determination regarding his mental health in the divorce decree. Thus, collateral estoppel and res judicata did not render the pre-decree mental health records irrelevant to the current action. *Banchefsky v. Banchefsky, 2014-Ohio-899, 2014 Ohio App. LEXIS 845 (Ohio Ct. App., Franklin County 2014)*.

—Scope

There was no plain error in the admission of defendant's medical records, which included his statement to his treating physician that he had stabbed his girlfriend, because whether the doctor-patient privilege was waived or not, based on the other evidence, it could not be shown that in the absence of that admission the outcome of the trial clearly would have been different. *State v. Harris, 2014-Ohio-4237, 2014 Ohio App. LEXIS 4151 (Ohio Ct. App., Hamilton County 2014)*.

Trial court erred in granting a broad discovery order with respect to the car accident victim's medical records, and in refusing to conduct an in camera review to ascertain what was causally or historically related, because the medical authorizations were essentially unlimited as to scope, as well as the time period for which the medical records were sought. The driver's claim that the medical release forms were necessarily broad due to the possibility of a pre-existing injury did not justify a request for blanket authorizations without any limitations in scope and time. *Gentile v. Duncan, 2013-Ohio-5540, 5 N.E.3d 100, 2013 Ohio App. LEXIS 5783 (Ohio Ct. App., Franklin County 2013)*.

Clinic could not be liable for disclosing the names of the medical providers of a police officer and his prior to issuance of a subpoena because the identity of medical providers, in and of itself, was not privileged under *R.C. 2317.02*. *Turk v. Oiler, 2010 U.S. Dist. LEXIS 8169 (N.D. Ohio Feb. 1, 2010)*.

Trial court properly granted a motion to compel the disclosure of the names and addresses of a deceased nursing home resident's roommates, as they were not confidential medical information where they did not concern any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for the patient pursuant to *R.C. 2317.02*. *May v. Northern Health Facilities, Inc., 2009-Ohio-1442, 2009 Ohio App. LEXIS 1195 (Ohio Ct. App., Portage County 2009)*.

Trial court erred in ordering disclosure under Civ.R. 26 by a clinic of 10 years' of minors' abortion records in an identity-concealing format, as they were covered by the patient-physician privilege under *R.C. 2317.02(B)* and any possible probative value of the records was far outweighed by the potential invasion of privacy rights of the patients; the parents of a minor abortion patient's claims did not require disclosure thereof, as the clinic had acted in good faith in attempting to comply with the parental notification requirement of former *R.C. 2919.12* and the enforcement of *R.C. 2919.121* was enjoined at the time of the procedure, punitive damages were obtainable upon a showing of a single violation of either *R.C. 2919.12* or *2317.56*, such that additional patient records were not necessary, and any duty to report suspected child abuse under *R.C. 2151.421* was confidential and was not admissible as evidence. *Roe v. Planned Parenthood Southwest Ohio Region, 2007-Ohio-4318, 173 Ohio App. 3d 414, 878 N.E.2d 1061, 2007 Ohio App. LEXIS 3868 (Ohio Ct. App., Hamilton County 2007)*, aff'd on other grounds, *2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009)*.

Trial court did not err in denying defendant access to the medical records of one of the victims of his vehicular criminal offense, as the Health Insurance Portability and Accountability Act did not preempt the physican-patient privilege under *R.C. 2317.02(B)* and there was no indication that the victim had waived that privilege. *State v. Flanigan, 2007-Ohio-3158, 2007 Ohio App. LEXIS 2909 (Ohio Ct. App., Montgomery County 2007)*.

When, in an aggravated murder case, defendant pled not guilty by reason of insanity, and was examined by a forensic psychiatrist for the State, the fact that the psychiatrist consulted with defendant's treatment providers did not render the psychiatrist's testimony at trial a violation of the physician-patient privilege, under *R.C. 2317.02(B)(1)*, because (1) it was not obvious that the testimony violated this privilege, which was in derogation of the common law and strictly construed, nor (2) did the psychiatrist testify to any "communication made to a physician" "by a patient" "in that relation," and (3) *R.C. 2945.371(F)* provided that, in conducting an evaluation of a defendant's mental condition at the time of an offense charged, the court-appointed examiner was to consider all relevant evidence. *State v. Hancock, 2006-Ohio-160, 108 Ohio St. 3d 57, 840 N.E.2d 1032, 2006 Ohio LEXIS 215 (Ohio 2006)*.

—Standing to assert

General liability insurer lacked standing to prosecute an appeal of a trial court's order denying the general liability insurer's motion to quash the videotape depositions of a patient's doctors as privileged because the general liability insurer could not show that it would sustain an injury in fact if the depositions of the doctors went forward. The general liability insurer would not be subject to sanctions for violating both the physician-patient privilege in *R.C. 2317.02(B)(1)* and the Health Insurance Portability and Accountability Act (HIPAA) as the patient's privilege was waived when her estate filed the wrongful death action, and since the privacy requirements of *§ 2317.02(B)(1)* were more extensive than those mandated by HIPAA, it was inapplicable. *Progressive Preferred Ins. Co. v. Certain Underwriters at Lloyd's London, 2008-Ohio-2508, 2008 Ohio App. LEXIS 2114 (Ohio Ct. App., Lake County 2008)*.

—Waiver

Based on the plain language of the complaint, the insured was seeking redress for both physical and emotional pain and suffering caused by the crash with the uninsured driver. Because she explicitly stated that she suffered both physical and emotional pain and suffering, she waived her doctor-patient privilege for medical records of both the physical and psychological/psychiatric varieties and both categories of medical records were causally and historically related to the injuries claimed in the suit. *Bokma v. Raglin, 2022-Ohio-960, 2022 Ohio App. LEXIS 859 (Ohio Ct. App., Montgomery County 2022)*.

Trial court did not abuse its discretion in ordering plaintiff to sign the medical authorizations because plaintiff never sought a protective order, never requested an in camera inspection of any document, failed to articulate a factual

basis by which the court could have concluded that a record was not properly discoverable, and admitted relevant injuries dating back to 2005, the same year from which he complained defendant sought records. *Pietrangelo v. Hudson, 2019-Ohio-1988, 136 N.E.3d 867, 2019 Ohio App. LEXIS 2051 (Ohio Ct. App., Cuyahoga County 2019)*, cert. denied, *141 S. Ct. 254, 208 L. Ed. 2d 27, 2020 U.S. LEXIS 4088 (U.S. 2020)*.

By asserting a claim for loss of consortium in both the survivorship and wrongful death claims, the decedent's wife placed her relationship with her husband directly at issue and the request for the decedent's psychological records related to marital counseling fell within the waiver of privilege under this section. *Karimian-Dominique v. Good Samaritan Hosp., 2019-Ohio-2750, 139 N.E.3d 1237, 2019 Ohio App. LEXIS 2864 (Ohio Ct. App., Montgomery County 2019)*.

Filing a civil action to recover for an alleged breach of confidentiality of medical records that occurred in prior litigation in which the patient was not a party does not function as a waiver of confidentiality allowing disclosure of those records in the prior litigation. Thus, when appellant, who was a potential witness in but not a party to post-decree proceedings in the present divorce case, filed a subsequent separate civil action alleging that a breach of confidentiality of the medical records had occurred in the divorce case, this did not waive his physician-patient privilege in the ongoing divorce case. *Montei v. Montei, 2016-Ohio-8190, 2016 Ohio App. LEXIS 5052 (Ohio Ct. App., Clark County 2016)*.

Trial court abused its discretion in granting the driver's motion to compel discovery of the car accident victim's medical records without first conducting an in camera inspection to determine which records were causally or historically related to the action. *Bircher v. Durosko, 2013-Ohio-5873, 2013 Ohio App. LEXIS 6169 (Ohio Ct. App., Fairfield County 2013)*.

Deposition of a non-party physician concerning the standard of care, causation, and the prior and subsequent treatment of a patient by others relative to the medical condition at issue was allowed in the patient's medical malpractice suit against a doctor because the physician participated in the treatment at issue and would not be divulging the information surreptitiously, but through the normal discovery process; by filing the suit, the patient already waived the *R.C. 2317.02* physician-patient privilege. Allowing the physician to be deposed did not undermine the privilege. *Brant v. Summa Health Sys., 2012 U.S. Dist. LEXIS 56660 (N.D. Ohio Apr. 23, 2012)*.

Trial court did not err by denying the driver's motion for a protective order because her decision to file a personal injury claim against the company and its employee, which was based upon the same accident that underlay the basis for the claims and defenses proposed by the instant parties, served to waive the driver's physician-patient privilege with respect to the accident, pursuant to *R.C. 2317.02(B)*. *Leopold v. Ace Doran Hauling & Rigging Co., 2012-Ohio-497, 2012 Ohio App. LEXIS 432 (Ohio Ct. App., Cuyahoga County 2012)*, aff'd, *2013-Ohio-3107, 136 Ohio St. 3d 257, 994 N.E.2d 431, 2013 Ohio LEXIS 1689 (Ohio 2013)*.

By a vehicle occupant's filing of a negligence action against a driver, arising from an automobile accident, the occupant waived the physician-patient privilege under *R.C. 2317.02(B)* as to the specific information that was "related causally or historically" to the injuries that formed the basis of his complaint, including mental and physical injuries; accordingly, there was no abuse of discretion by the trial court's order to compel medical records and authorizations pursuant to Civ.R. 26. *Bogart v. Blakely, 2010-Ohio-4526, 2010 Ohio App. LEXIS 3827 (Ohio Ct. App., Miami County 2010)*.

Trial court properly overruled a guardian's motion to quash a daughter's subpoena for medical information related to the daughter's mother, who was the guardian's ward, because, inter alia, the guardian had previously shared such information with the daughter, waiving any privilege as to that information. *In re Guardianship of Marcia S. Clark, 2009-Ohio-6577, 2009 Ohio App. LEXIS 5509 (Ohio Ct. App., Franklin County 2009)*.

In custody proceedings, it was an abuse of discretion for a trial court to deny a father's motion to compel production of a mother's medical records because (1) the mother waived her *R.C. 2317.02(B)(1)* physician-patient privilege by seeking custody, which put her mental and physical condition at issue, and (2) her records could be highly relevant, based on the facts that *R.C. 3109.04(F)(1)(e)* required the court to consider her mental and physical health, the

father alleged that she had attempted suicide, which she denied, and the evidence showed that she took medication to control anxiety and depression.(1) the mother waived the mother's physician-patient privilege, under *R.C. 2317.02(B)(1)*, by seeking custody of the parties' children, which put the mother's mental and physical condition at issue, and (2) the mother's records could be highly relevant, based on the facts that *R.C. 3109.04(F)(1)(e)* required the trial court to consider the mother's mental and physical health, the father alleged that the mother had attempted suicide, which the mother denied, and the evidence showed that the mother took medication to control anxiety and depression. *In re Kelleher, 2009-Ohio-2960, 2009 Ohio App. LEXIS 2607 (Ohio Ct. App., Jefferson County 2009)*.

Patient's consent to the release of medical information is valid, and waives the physician-patient privilege, if the release is voluntary, express, and reasonably specific in identifying to whom the information is to be delivered. *Med. Mut. of Ohio v. Schlotterer, 2009-Ohio-2496, 122 Ohio St. 3d 181, 909 N.E.2d 1237, 2009 Ohio LEXIS 1591 (Ohio 2009)*.

Consent provisions in certificates of coverage provided to all of an insurer's insureds that were patients of a doctor met the necessary requirements for disclosure: the provisions were voluntary, they qualified as express consent given that the provisions specifically stated that the patients consented to the release of medical information to the insurer when they enrolled, and the provisions were specific in identifying that the release was to be made to the insurer. Discovery of the medical records at issue was also not inconsistent with any stated purpose in the consent provisions; thus, the physician-patient privilege in *R.C. 2317.02(B)(1)* did not preclude the doctor from providing the patients' medical records to the insurer. *Med. Mut. of Ohio v. Schlotterer, 2009-Ohio-2496, 122 Ohio St. 3d 181, 909 N.E.2d 1237, 2009 Ohio LEXIS 1591 (Ohio 2009)*.

When a father was involved in both a domestic relations case and a prosecution for domestic violence, and he waived the physician-patient privilege between himself and his psychiatrist for purposes of the domestic relations case by asking his psychiatrist to report his prognosis to that court and by seeking custody of his child, this waiver did not apply to the domestic violence prosecution, so his ex-wife's attorney was not authorized to provide the information released to the domestic relations court to the prosecutor in the domestic violence case, who was required to obtain it by proper discovery. *Hageman v. Southwest Gen. Health Ctr., 2006-Ohio-6765, 2006 Ohio App. LEXIS 6670 (Ohio Ct. App., Cuyahoga County 2006)*, aff'd, *2008-Ohio-3343, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008 Ohio LEXIS 1773 (Ohio 2008)*.

—Wrongful death

Discovery was precluded regarding information that contained reports of child abuse, discussed information contained in a report of abuse, or identified a person making the report, pursuant to *R.C. 2151.421(H)(1)*; however, discovery was not precluded of all discussions about injuries or conditions that resulted from abuse. A trial court was ordered to enter a protective order allowing depositions of several health care providers to go forward subject to restrictions on the scope of inquiry; the physician/patient privilege had been waived by the estate in this wrongful death case. *Nash v. Cleveland Clinic Found., 2010-Ohio-10, 2010 Ohio App. LEXIS 5 (Ohio Ct. App., Cuyahoga County 2010)*, dismissed, *2014 Ohio Misc. LEXIS 11941 (Ohio C.P. Apr. 16, 2014)*.

Plain error

Where a husband claimed on appeal that the trial court erred in admitting evidence of the parties' marital therapy session and mediation sessions in their divorce action, in violation of *R.C. 2317.02* and *2317.023*, but he failed to object to the admission of the evidence in the trial court, such error was not preserved for review under Evid.R. 103(A)(1), and review was made under the plain error standard of review; there was no plain error by the admission of that evidence, as it did not seriously affect the basic fairness, integrity, or public reputation of the judicial process. *Brooks-Lee v. Lee, 2005-Ohio-2288, 2005 Ohio App. LEXIS 2188 (Ohio Ct. App., Franklin County 2005)*.

Preemption

Ohio's physician-patient privilege, *R.C. 2317.02(B)*, was not preempted by the Health Information Portability and Accountability Act of 1996 (HIPAA), because *R.C. 2317.02(B)* prohibited use or disclosure of health information when such use or disclosure would be allowed under HIPAA. *Turk v. Oiler, 732 F. Supp. 2d 758, 2010 U.S. Dist. LEXIS 81340 (N.D. Ohio 2010)*.

Since *R.C. 2317.02(B)(1)* is more stringent then *45 C.F.R. § 164.512* of the Health Insurance Portability and Accountable Act of 1996, the Act did not preempt *§ 2317.02(B)(1)*. *May v. Northern Health Facilities, Inc., 2009-Ohio-1442, 2009 Ohio App. LEXIS 1195 (Ohio Ct. App., Portage County 2009)*.

—Prescriptions

Where unrebutted evidence supports the contention that prescribed drugs far exceed the dosage levels generally accepted in the medical community, that circumstance takes the claimed communication outside the realm of privilege under *R.C. 2317.02*: *State v. Spencer, 126 Ohio App. 3d 335, 710 N.E.2d 352, 1998 Ohio App. LEXIS 2111 (Ohio Ct. App., Cuyahoga County 1998)*.

—Reports by employer

Under Ohio law, *R.C. 2317.02* and *4731.22*, a physician may not disclose a patient's medical records without the patient's consent. The limited exception to this rule is found in *R.C. 3701.05* which permits disclosure of an "occupational disease" in reports to the Ohio Department of Health. Therefore, an employer is not required to submit medical records identified by name and address of employees to federal agencies without specific consent of the employee involved: *459 F. Supp. 235*.

—Roommates

Motion to compel was properly granted in a medical malpractice case because the disclosure of a patient's roommates was not barred by *R.C. 2317.02(B)(1)* since it did not concern any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for a patient. Further, the disclosure of the requested material did not violate Health Insurance Portability and Accountability Act (HIPAA); *R.C. 2317.02* was more restrictive, and it was not preempted by HIPAA. *Dauterman v. Toledo Hosp., 2011-Ohio-148, 2011 Ohio App. LEXIS 130 (Ohio Ct. App., Lucas County 2011)*.

—Scope

Hospital was not liable for disclosing the names of plaintiff's medical providers because the identity of medical providers, in and of itself, was not privileged. *Turk v. Oiler, 732 F. Supp. 2d 758, 2010 U.S. Dist. LEXIS 81340 (N.D. Ohio 2010)*.

Where, in the former patients' class action against the hospital alleging that the hospital inhumanely or improperly disposed of fetal tissue that resulted from the patients' miscarriages or stillbirths, the trial court improperly ordered the hospital to provide the former patients with confidential information about the identity of potential class members, information privileged under the physician-patient privilege; the appeals court reversed, holding the information was confidential and thus it was for potential class members to decide their interests not a physician, lawyer, or court. *Walker v. Firelands Cmty. Hosp., 2004-Ohio-681, 2004 Ohio App. LEXIS 656 (Ohio Ct. App., Erie County 2004)*.

—Standing to assert

The employer had standing to assert the physician-patient privilege on behalf of its employees where an overly broad discovery order would have compelled disclosure of their medical records: *Whitt v. ERB Lumber, 2004-Ohio-1302, 156 Ohio App. 3d 518, 806 N.E.2d 1034, 2004 Ohio App. LEXIS 1151 (Ohio Ct. App., Clark County 2004)*.

Prior to ordering disclosure of the plaintiff's medical records in a medical malpractice action, the court should have conducted an in camera inspection and provided the parties an opportunity to present their positions on disclosure: *Penwell v. Nanavati, 2003-Ohio-4628, 154 Ohio App. 3d 96, 796 N.E.2d 78, 2003 Ohio App. LEXIS 4113 (Ohio Ct. App., Marion County 2003)*.

—Strict construction

R.C. 2317.02 providing that a physician shall not testify concerning communications made to him by his patient in that relation, or his advice to his patient, without the patient's express consent, and providing further that if the patient voluntarily testifies, the physician may be compelled to testify on the same subject, is in derogation of common law and hence must be strictly construed: *In re Petition of Loewenthal, 101 Ohio App. 355, 1 Ohio Op. 2d 302, 134 N.E.2d 158, 1956 Ohio App. LEXIS 706 (Ohio Ct. App., Cuyahoga County 1956)*.

—Waiver

By filing an action against a doctor who treated the decedent, and by intervening in the insurer's declaratory action against the doctor, the decedent's family members waived the medical privilege. *Care Risk Retention Group v. Martin, 2010-Ohio-6091, 191 Ohio App. 3d 797, 947 N.E.2d 1214, 2010 Ohio App. LEXIS 5124 (Ohio Ct. App., Montgomery County 2010)*.

Plaintiff waived the physician-patient privilege as to a former treating physician where he filed a legal malpractice claim and the physician's testimony was relevant to the defense of the action: *Smalley v. Friedman, Damiano & Smith Co., L.P.A., 2007-Ohio-2646, 172 Ohio App. 3d 108, 873 N.E.2d 331, 2007 Ohio App. LEXIS 2475 (Ohio Ct. App., Cuyahoga County 2007)*.

R.C. 3701.243, authorizing disclosure of HIV/AIDS information in certain circumstances, implicitly waives the physician-patient privilege: *State v. Gonzalez, 2003-Ohio-4421, 154 Ohio App. 3d 9, 796 N.E.2d 12, 2003 Ohio App. LEXIS 3930 (Ohio Ct. App., Hamilton County 2003)*.

Although *R.C. 2317.02(B)(1)(a)(iii)* provides that the physician-patient privilege does not apply to a patient who has filed a civil action, *R.C. 2317.02(B)(3)(a)* places a limit on what communications may be discovered: *McCoy v. Maxwell, 139 Ohio App. 3d 356, 743 N.E.2d 974, 2000 Ohio App. LEXIS 4567 (Ohio Ct. App., Portage County 2000)*.

The applicability of the psychologist-patient privilege turns upon whether a statutory waiver or exception has been invoked; the issue of whether the psychological treatment was sought voluntarily or involuntarily is not controlling: *In re Kyle, 2000 Ohio App. LEXIS 5619 (Ohio Ct. App., Portage County Dec. 1, 2000)*.

Plaintiff waived the physician-patient privilege by filing a civil action. There was no evidence that a treating physician violated a duty of confidentiality: *Wargo v. Buck, 123 Ohio App. 3d 110, 703 N.E.2d 811, 1997 Ohio App. LEXIS 4499 (Ohio Ct. App., Mahoning County 1997)*.

R.C. 2317.02(B)(1) provides that the privilege is waived in accord with the discovery provisions of the Civil Rules. Those rules provide, however, that discovery is limited to matters which are not privileged. The privilege is not waived merely by filing suit or testifying: *Dellenbach v. Robinson, 95 Ohio App. 3d 358, 642 N.E.2d 638, 1993 Ohio App. LEXIS 2321 (Ohio Ct. App., Franklin County 1993)*.

Where plaintiff waived her privilege under R.C. 2317.02 by filing the personal injury action, she could not sue the opposing party's counsel for invasion of privacy merely because counsel obtained medical records plaintiff considered embarrassing: Kahler v. Roetzel & Andress, 1994 Ohio App. LEXIS 2477 (Ohio Ct. App., Franklin County June 7, 1994).

The physician-patient privilege is not waived merely because the patient testifies: State v. Brown, 1993 Ohio App. LEXIS 3496 (Ohio Ct. App., Portage County July 9, 1993).

When a patient files a workers' compensation claim, that operates as a waiver of the physician-patient privilege for purposes of pursuing remedies under R.C. Chapter 4123.: Kokitka v. Ford Motor Co., 1993 Ohio App. LEXIS 3075 (Ohio Ct. App., Cuyahoga County June 17, 1993), amended, 1993 Ohio App. LEXIS 3660 (Ohio Ct. App., Cuyahoga County July 22, 1993), dismissed, *68 Ohio St. 3d 1449, 626 N.E.2d 690, 1994 Ohio LEXIS 312 (Ohio 1994)*.

Any physician-patient privilege was waived by defendant's failure to object to the testimony at trial. A motion to suppress which does not refer to the privilege does not preserve the objection; neither does the granting of a motion in limine. Information acquired by a hospital nurse may fall within the privilege: State v. Cherukuri, 79 Ohio App. 3d 228, 607 N.E.2d 56, 1992 Ohio App. LEXIS 1901 (Ohio Ct. App., Lake County 1992).

R.C. 2317.02(B)(2) pertains only to claims brought by or on behalf of the deceased for which waiver is applicable pursuant to R.C. 2317.02(B)(1)(c). A court cannot create a public policy exception to the privilege: Cline v. Finney, 71 Ohio App. 3d 571, 594 N.E.2d 1100, 1991 Ohio App. LEXIS 1298 (Ohio Ct. App., Franklin County 1991).

Answering questions as to treatment from a physician in response to questions on cross-examination does not waive the privilege of confidentiality because it is not voluntary within the meaning of R.C. 2317.02: Hanly v. Riverside Methodist Hosp. Foundation, Inc., 71 Ohio App. 3d 778, 595 N.E.2d 429, 1991 Ohio App. LEXIS 1550 (Ohio Ct. App., Franklin County 1991).

When a waiver of the physician-patient privilege by a party to a lawsuit is inevitable or reasonably probable to occur, the trial court may, within its discretion, order the physician to submit to a discovery deposition, upon the express proviso that information discovered or gained from such discovery not be used until such time as actual waiver occurs; the physician-patient privilege is waived when the party who owns the privilege takes the deposition of his own treating physician for use at trial; upon waiver of the physician-patient privilege, properly discovered testimony of the physician may be used to oppose a motion for summary judgment: Garrett v. Jeep Corp., 77 Ohio App. 3d 402, 602 N.E.2d 691, 1991 Ohio App. LEXIS 4558 (Ohio Ct. App., Lucas County 1991).

Under Ohio law, physician-patient privilege may be waived by the express consent of the surviving spouse; initial agreement by plaintiff's counsel to make physician available to defense for deposition did not constitute "express consent" by surviving spouse to waive the privilege: Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990).

Waiver of the physician-patient privilege may occur, absent expressed consent, where the party asserting the privilege testifies as to the specifics of the physician's treatment, except where the party asserting the privilege did not attempt to benefit from the testimony: Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990).

Pursuant to R.C. 2317.02(B)(1)(c), when a person files a tort action for injuries received in an accident, he waives any physician-patient privilege for communications made to any treating physician or his advice to the plaintiff-patient to the extent the communication or advice is "related causally or historically to [the] physical or mental injuries that are relevant to issues in the * * * civil action" (R.C. 2317.02[B][2]). R.C. 2317.02 (B)(2) contemplates actual testimony by the physician and not by a recordskeeper from his office or a hospital. Pursuant to R.C. 2317.02(B)(4), hospital records are not included in the R.C. 2317.02(B)(1)(c) waiver of the physician-patient waiver, except to the extent that the records are a "communication" as defined in R.C. 2317.02(B)(3), as established

through the physician's deposition testimony: *Baker v. Quick Stop Oil Change & Tune-Up, 61 Ohio Misc. 2d 526, 580 N.E.2d 528, 1990 Ohio Misc. LEXIS 41 (Ohio C.P. 1990)*.

Pursuant to *R.C. 2317.02(B)*, the patient-physician privilege is waived relating to a physician when suit is brought against him in a malpractice claim with regard to his care and treatment of the patient-plaintiff so that he may effectively defend himself: *Long v. Isakov, 58 Ohio App. 3d 46, 568 N.E.2d 707, 1989 Ohio App. LEXIS 2334 (Ohio Ct. App., Cuyahoga County)*, dismissed, *47 Ohio St. 3d 701, 547 N.E.2d 986, 1989 Ohio LEXIS 2051 (Ohio 1989)*.

Under *R.C. 2317.02(B)*, a patient may waive the patient-physician privilege by voluntarily testifying as to the privileged matter, which may consist of admitting into evidence records containing privileged communications: *Long v. Isakov, 58 Ohio App. 3d 46, 568 N.E.2d 707, 1989 Ohio App. LEXIS 2334 (Ohio Ct. App., Cuyahoga County)*, dismissed, *47 Ohio St. 3d 701, 547 N.E.2d 986, 1989 Ohio LEXIS 2051 (Ohio 1989)*.

For purposes of *R.C. 2317.02*, the guardian of an incompetent ward may expressly consent to waive the ward's physician-patient privilege: *In re Guardianship of Escola, 41 Ohio App. 3d 42, 534 N.E.2d 866, 1987 Ohio App. LEXIS 10749 (Ohio Ct. App., Stark County 1987)*.

The industrial commission may not require a claimant to waive his physician-patient privilege as a precondition to consideration of the claim: *State ex rel. Holman v. Dayton Press, Inc., 11 Ohio St. 3d 66, 463 N.E.2d 1243, 1984 Ohio LEXIS 1106 (Ohio 1984)*.

A party's testifying in his own behalf as to his injuries, communications made to him by his physician and the physician's treatment of him waives his privilege against having the physician testify as to the same matters already disclosed by him, and in such cases the physician may be compelled to testify. Merely answering questions on cross-examination as to treatment from a physician does not waive the physician-patient privilege: *9 Ohio Misc. 2d 19, 9 Ohio B. 621, 460 N.E.2d 327*.

When a patient testifies about (his or) her medical condition, (his or) her physician may testify concerning the same subject: *Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465, 1983 Ohio App. LEXIS 11000 (Ohio Ct. App., Franklin County 1983)*.

Civ.R. 35(B)(2) indicates that a party waives any physician-patient privilege when he requests and obtains a report of an examination that has either been ordered by the court or agreed to by the parties: *9 Ohio Misc. 2d 19, 9 Ohio B. 621, 460 N.E.2d 327*.

The physician-patient privilege set forth in *R.C. 2317.02(B)* can be waived only by the methods provided for in that statute. Since *R.C. 2317.02(B)* does not make reference to *R.C. 4511.19.1(A)* (the implied consent statute), *R.C. 4511.19.1(A)* may not be used to defeat the physician-patient privilege of *R.C. 2317.02(B)*: *State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982)*.

Under the following circumstances, the patient-physician privilege of *R.C. 2317.02(B)* is waived and the physician's testimony about a woman's health (including an existing cancerous condition) may be received and considered in a suit against an insurer for life insurance after the woman's death: her husband signed both his name and hers to the insurance application, paid all premiums and was the sole beneficiary; the application specifically authorized release of information about the woman's (insured's) health; and the policy was issued on his information without a physical examination of the woman (insured): *Evans v. Occidential Life Ins. Co., 7 Ohio App. 3d 286, 455 N.E.2d 678, 1982 Ohio App. LEXIS 11165 (Ohio Ct. App., Hamilton County 1982)*.

The statutory physician-patient privilege is a substantive right; it can be waived and it is not against public policy to enforce such waiver: *Woelfling v. Great-West Life Assurance Co., 30 Ohio App. 2d 211, 59 Ohio Op. 2d 351, 285 N.E.2d 61, 1972 Ohio App. LEXIS 406 (Ohio Ct. App., Lucas County 1972)*.

A plaintiff in a personal injury action does not waive the physician-patient privilege provided in *R.C. 2317.02* by the commencement of this action, so as to empower the common pleas court to order him to turn over to the defendant

hospital records and medical reports made by his attending physicians in relation to his injury: *State ex rel. Lambdin v. Brenton, 21 Ohio St. 2d 21, 50 Ohio Op. 2d 44, 254 N.E.2d 681, 1970 Ohio LEXIS 429 (Ohio 1970)*.

A court will closely scrutinize an advance waiver of the physician-patient privilege in order to adequately protect the interests of the insured, and, where there is any doubt or ambiguity in the language of the insurance contract, it will be strictly construed against the insurer and in favor of the insured: *Nationwide Mut. Ins. Co. v. Jackson, 10 Ohio App. 2d 137, 39 Ohio Op. 2d 242, 226 N.E.2d 760, 1967 Ohio App. LEXIS 455 (Ohio Ct. App., Cuyahoga County 1967)*.

Where, in an action to recover damages for personal injuries, the plaintiff voluntarily testifies on the subject of the arthritic condition of his right knee before and after the accident, there is a waiver of the privileged communications between patient and physician granted by this section, and the physician may testify on that subject: *Ramey v. Mets, 3 Ohio App. 2d 329, 32 Ohio Op. 2d 434, 210 N.E.2d 449, 1964 Ohio App. LEXIS 506 (Ohio Ct. App., Pickaway County 1964)*.

In order to make applicable the waiver provision of *R.C. 2317.02* that, "if the. . . patient voluntarily testifies, the. . . physician may be compelled to testify on the same subject," such patient's testimony in a negligence action must be voluntary (i.e., not given on cross-examination) and its subject must concern communications by the patient to the physician and advice by the physician to the patient (i.e., the subject matter of such communications and advice): *Black v. Port, Inc., 120 Ohio App. 369, 29 Ohio Op. 2d 238, 202 N.E.2d 638, 1963 Ohio App. LEXIS 679 (Ohio Ct. App., Mahoning County 1963)*.

An employee, who, following an alleged industrial injury and treatment therefor, voluntarily signs, as part of an application for adjustment of claim, a waiver of physician-patient privilege, is chargeable with knowledge of the contents thereof. Pursuant to the provisions of this section, the physician who treated such employee-claimant may testify about relevant matters which came to his knowledge by reason of such treatment: *Ronald v. Young, 117 Ohio App. 362, 24 Ohio Op. 2d 137, 187 N.E.2d 74, 1963 Ohio App. LEXIS 830 (Ohio Ct. App., Cuyahoga County 1963)*.

Under Ohio law, a plaintiff does not waive the physician-patient privilege in regard to certain medical records by his testimony on cross-examination at the taking of his deposition: *Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 20 Ohio Op. 2d 341, 1962 U.S. Dist. LEXIS 3917 (N.D. Ohio 1962)*.

Under *R.C. 2317.02* there is no implied waiver of physician-patient privilege except that effected through the voluntary testifying of the patient himself, and a patient does not waive the privilege merely by answering questions as to treatment on cross-examination since such testimony is not "voluntary," within the purview of the statute: *Jenkins v. Metropolitan Life Ins. Co., 113 Ohio App. 163, 15 Ohio Op. 2d 387, 168 N.E.2d 625, 1960 Ohio App. LEXIS 582 (Ohio Ct. App., Hamilton County 1960)*, aff'd, *171 Ohio St. 557, 15 Ohio Op. 2d 14, 173 N.E.2d 122, 1961 Ohio LEXIS 689 (Ohio 1961)*.

By signing an instrument authorizing "any physician" to communicate to "bearer" any of his records pertaining to the illness of the decedent and at the same time authorizing the "bearer" to turn over to the insurer a copy of any records thus obtained, the decedent's widow expressly waived the privilege, and in her action on a policy insuring the decedent's life, the insurer was justified in calling as witnesses, physicians who had attended the decedent, and such witnesses could testify concerning the ailment or disability of which the patient had complained to them: *Jenkins v. Metropolitan Life Ins. Co., 113 Ohio App. 163, 15 Ohio Op. 2d 387, 168 N.E.2d 625, 1960 Ohio App. LEXIS 582 (Ohio Ct. App., Hamilton County 1960)*, aff'd, *171 Ohio St. 557, 15 Ohio Op. 2d 14, 173 N.E.2d 122, 1961 Ohio LEXIS 689 (Ohio 1961)*.

A person who voluntarily testifies, by deposition, as to his condition and treatment generally but does not testify as to his physician's findings upon examination and the diagnosis of his condition, waives the patient-physician privilege attaching thereto, whether such findings and diagnosis are within such person's knowledge or not; and such physician can be required to answer inquiries relating thereto: *In re Roberto, 106 Ohio App. 303, 7 Ohio Op. 2d 63, 151 N.E.2d 37, 79 Ohio Law Abs. 1, 1958 Ohio App. LEXIS 804 (Ohio Ct. App., Cuyahoga County 1958)*.

Under R.C. 2317.02, where a plaintiff seeking damages for personal injuries testifies fully as to his physical condition and mentions a physician who treated him and the treatment administered, there is a waiver with respect thereto, and such physician may testify: 103 Ohio App. 385, 2 Ohio Op. 2d 411, 145 N.E.2d 467.

A person testifying for his own benefit as to his injuries and communications made by him to his physician and the physician's treatment and advice to him in a deposition hearing instituted by him for the purpose of perpetuating his testimony in his personal injury suit, thereby waives the privilege against the physician's testimony as to the same matters already disclosed by him, and in such case the physician may be compelled to testify by deposition at the instance of the defendant, on the same subject as provided by R.C. 2317.02: In re Petition of Loewenthal, 101 Ohio App. 355, 1 Ohio Op. 2d 302, 134 N.E.2d 158, 1956 Ohio App. LEXIS 706 (Ohio Ct. App., Cuyahoga County 1956).

In an action by a widow to recover compensation under the workmen's compensation act for the death of her husband resulting from injuries sustained by him in the course of his employment, the testimony of a physician who attended decedent in his illness resulting from such injuries, as to knowledge and information gained by such physician in his professional capacity, relating to decedent's physical condition, may be admitted in evidence where the widow waives the statutory physician-patient privilege; and objection of the industrial commission to the waiver of such privilege is properly overruled: 131 Ohio St. 140, 5 Ohio Op. 505, 2 N.E.2d 248.

Where the insured voluntarily testifies as to physicians having examined him, it is error to refuse testimony of such physicians offered by the insurer, as examination of the insured's body is a communication to his physician, and the insured in testifying waived his privilege of the communication secured to him by this section: Metropolitan Life Ins. Co. v. McKim, 54 Ohio App. 66, 7 Ohio Op. 390, 6 N.E.2d 9, 6 N.E. 9, 22 Ohio Law Abs. 618, 1935 Ohio App. LEXIS 352 (Ohio Ct. App., Licking County 1935).

A waiver in an application for insurance of the right to object to the testimony of physicians is not against public policy and binds all beneficiaries; and the insurer may require the testimony of physicians to show fraud: New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N.E. 176, 5 Ohio Law Abs. 380, 1927 Ohio LEXIS 279 (Ohio 1927).

—Wrongful death

The specific mention in R.C. 2317.02(B) of the right of a surviving spouse or administratrix to waive the deceased patient's physician-patient privilege, and its inclusion in the general evidentiary chapter of the Ohio Revised Code along with the legislature's failure to exempt wrongful death actions specifically, as it does medical malpractice actions from the scope of the statute indicates the applicability of R.C. 2317.02 to wrongful death actions: *Urseth v. City of Dayton, 653 F. Supp. 1057 (S.D. 1986)*.

Police records

One having custody and control of the records (chief of police) of a police department made in the detection and prevention of crime, is not generally privileged from disclosing the same in taking of depositions in a civil action: In re Story, 159 Ohio St. 144, 50 Ohio Op. 116, 111 N.E.2d 385, 1953 Ohio LEXIS 553 (Ohio 1953).

Privileged communications

Information and documents sought by the former wife in her motion to compel did not fall within any of the enumerated privileged communications and, while the information sought may have been considered a "trade secret", the husband did not claim that the information was subject to trade secret protection. In any event, although confidential, trade secret information was not absolutely privileged and the husband could have sought a protective order but did not do so. Gauthier v. Gauthier, 2019-Ohio-4397, 2019 Ohio App. LEXIS 4471 (Ohio Ct. App., Warren County 2019), dismissed, *2020-Ohio-1256, 158 Ohio St. 3d 1456, 142 N.E.3d 677, 2020 Ohio LEXIS 840 (Ohio 2020)*.

Trial court did not abuse its discretion when it denied an attorney's request to review the trial case file of a former partner's counsel without limitation because the attorney offered nothing more than the remote possibility that examination of the client file could lead to information supporting his motion for costs; because an objective standard applied, the partner's knowledge or understanding was not highly relevant pursuant to Civ.R. 26(B)(3). *Schiff v. Dickson, 2013-Ohio-5253, 4 N.E.3d 433, 2013 Ohio App. LEXIS 5462 (Ohio Ct. App., Cuyahoga County 2013)*.

Privileged records generally

Trial court erred in ordering the production of the incident reports as it correctly found that the skin assessments contained in Exhibits A-31 through A-34 were not covered by the peer-review privilege because the affidavits of the Medical and Executive Directors failed to state that the documents were prepared for or even reviewed by the Quality Assurance Committee at their facility. *Sexton v. Healthcare Facility Mgmt. LLC, 2022-Ohio-963, 2022 Ohio App. LEXIS 857 (Ohio Ct. App., Montgomery County)*, different results reached on reconsid., *2022-Ohio-2376, 2022 Ohio App. LEXIS 2237 (Ohio Ct. App., Montgomery County 2022)*.

Motion to compel discovery was properly granted in a medical malpractice case because the privilege under *R.C. 2317.02(B)(1)* only protected communications; it did not protect time data that other jurisdictions had found to be non-privileged. Moreover, because the discovery order at issue did not involve the disclosure of the identities of any non-party patients nor any reasonable basis from which their identities could have been determined, it did not violate the Health Insurance Portability and Accountability Act. *Medina v. Medina Gen. Hosp., 2011-Ohio-3990, 2011 Ohio App. LEXIS 3336 (Ohio Ct. App., Cuyahoga County 2011)*.

When there is a dispute about whether records are privileged, and when a party reasonably asserts that records should remain privileged, a trial court must conduct an in camera inspection of the records to determine if they are discoverable: *Cargile v. Barrow, 2009-Ohio-371, 182 Ohio App. 3d 55, 911 N.E.2d 911, 2009 Ohio App. LEXIS 310 (Ohio Ct. App., Hamilton County 2009)*.

Probating will

Under *R.C. 2317.02* as in effect prior to 1-5-88, filing an application to probate the decedent's will did not waive the privilege as to the decedent's communications with his physician: *Hollis v. Finger, 69 Ohio App. 3d 286, 590 N.E.2d 784, 1990 Ohio App. LEXIS 4166 (Ohio Ct. App., Scioto County 1990)*.

Psychiatric/psychological records

Trial court erred in allowing discovery of the defendant's psychiatric/psychological records without conducting an in camera inspection in order to determine whether each record was covered by *R.C. 2317.02(B)* or (G) and whether the conditions for disclosure set out in the applicable subsection are met: *Thompson v. Chapman, 2008-Ohio-2282, 176 Ohio App. 3d 334, 891 N.E.2d 1247, 2008 Ohio App. LEXIS 1955 (Ohio Ct. App., Richland County 2008)*.

Psychiatrists

Sealed mental health record at issue contained communications between the instigator and his treating psychiatrists, and the record contained the instigator's diagnosed conditions, his psychiatrist's plan of treatment for him, and his prescribed medications; these communications were protected from disclosure under the statute, there was no exception to the privilege which applied to the records, and the instigator did not consent to a release of his

mental health record, and his mental health record was not subject to discovery. *Skorvanek v. Ohio Dep't of Rehab. & Corr., 2018-Ohio-3870, 2018 Ohio App. LEXIS 4198 (Ohio Ct. App., Franklin County 2018)*.

Admission of testimony of the mother's psychiatrist in violation of *R.C. 2317.02* and *4732.19* at the hearing on termination of parental rights was prejudicial: *In re Brown, 98 Ohio App. 3d 337, 648 N.E.2d 576, 1994 Ohio App. LEXIS 4984 (Ohio Ct. App., Marion County 1994)*.

The employee waived the privilege under *R.C. 2317.02(B)* in a wrongful discharge action to the extent that testimony of his psychiatrist was necessary to establish that he was handicapped and required medical attention: *Hayes v. Cleveland Pneumatic Co., 92 Ohio App. 3d 36, 634 N.E.2d 228, 1993 Ohio App. LEXIS 4843 (Ohio Ct. App., Cuyahoga County 1993)*, dismissed, *69 Ohio St. 3d 1415, 630 N.E.2d 376, 1994 Ohio LEXIS 837 (Ohio 1994)*.

Psychologists

Trial court did not err in applying the statutory exception to the psychologist-client privilege because the evaluation was conducted pursuant to a court-ordered case plan and was relevant to the dependency proceeding. The trial court further found that the statute specifically mentioned the statute addressing juvenile court case plans and "dependency, neglect or abuse," indicating that the legislature intended that statute to apply to juvenile court proceedings. *In re I.T., 2016-Ohio-555, 2016 Ohio App. LEXIS 482 (Ohio Ct. App., Summit County 2016)*.

When a member of a parish sued the church's education director for various tort claims and subpoenaed both the person and records of the director's former psychologist, claiming that the director placed the director's mental health in issue when the director sought a civil stalking protection order against the member stating that the member caused the director mental distress, the subpoena was properly quashed because both the psychologist's testimony and the records were privileged, under *R.C. 2317.02* and *4732.19*, the member did not demonstrate any exception overcoming the privilege, and the trial court could reasonably find that any bearing the director's mental health might have on the director's civil stalking protection order petition was too remote from the member's claims to justify overcoming the privilege. *Hiddens v. Leibold, 2007-Ohio-6688, 2007 Ohio App. LEXIS 5877 (Ohio Ct. App., Montgomery County 2007)*.

Trial court did not err in denying defendant's motion to suppress. The psychologist's evaluation was an evaluation and/or assessment and was part of a court-ordered case plan. Therefore, the psychologist-client privilege did not attach to the psychologist's evaluation and she was permitted to testify. *State v. Rader, 2007-Ohio-1136, 2007 Ohio App. LEXIS 1027 (Ohio Ct. App., Richland County 2007)*.

Under *R.C. 4732.19* and *R.C. 2317.02(B)*, the testimony of the psychologist who conducted the mother's evaluation for the permanent custody proceeding was admissible as part of the case plan journalized under *R.C. 2151.412*. *In re Morales/Mendez Children, 2006-Ohio-6403, 2006 Ohio App. LEXIS 6349 (Ohio Ct. App., Stark County 2006)*.

In light of *R.C. 2317.02(B)(1)*, as amended, and *4732.19*, counsel's failure to object to a doctor's testimony in a termination of parental rights proceeding did not constitute ineffective assistance of counsel where the doctor's report stated that there should be great caution in any consideration of placing any child with the mother and that the mother's prognosis was poor; counsel's failure to object did not fall below an objective standard of reasonable representation and was not violative of any essential duties to the mother. *In re Fell, 2005-Ohio-5790, 2005 Ohio App. LEXIS 5216 (Ohio Ct. App., Guernsey County 2005)*.

The communications were not privileged pursuant to *R.C. 4732.19* and *2317.02(B)* where the psychologist was not licensed: *State v. Wood, 141 Ohio App. 3d 634, 752 N.E.2d 990, 2001 Ohio App. LEXIS 1192 (Ohio Ct. App., Greene County 2001)*.

Removal of executor

Although refusing to waive the physician-patient privilege may be a basis for removing an executor, it is error to remove him without holding a hearing: *In re Estate of Russolillo, 69 Ohio App. 3d 448, 590 N.E.2d 1324, 1990 Ohio App. LEXIS 4117 (Ohio Ct. App., Franklin County 1990)*.

Sanity of client, generally

The testimony of a physician as to a deceased patient's sanity, based solely upon his general observation of the patient, does not constitute a privileged communication within the meaning of this section; the same rule applies to an attorney's testimony as to his deceased client: *Heiselmann v. Franks, 48 Ohio App. 536, 2 Ohio Op. 123, 194 N.E. 604, 18 Ohio Law Abs. 553, 1934 Ohio App. LEXIS 314 (Ohio Ct. App., Hamilton County 1934)*.

Scope

—Insurance matters

Trial court erred by ordering the disclosure of an insurer's attorney-client communications because the disputed emails were in the files of the insurer's attorneys rather than the insurer's claims file and, as such, the emails were not discoverable; the exception in subsection (A)(2) of this statute did not apply. *Bausman v. Am. Family Ins. Group, 2016-Ohio-836, 60 N.E.3d 772, 2016 Ohio App. LEXIS 744 (Ohio Ct. App., Montgomery County 2016)*.

—Applicability

Records relied on by an expert witness and by the trial court in determining whether appellant should continue in his commitment, originally imposed when he was found not guilty of a crime by reason of insanity, did not fall under the privilege afforded by this statute. *State v. Rohrer, 2015-Ohio-5333, 54 N.E.3d 654, 2015 Ohio App. LEXIS 5156 (Ohio Ct. App., Ross County 2015)*.

In defendant's criminal trial, there was no error in the admission of certain hearsay statements contained in a hospital report because the report was not obtained in violation of the doctor-patient privilege, as it was released via a prior court order, and it was only used for credibility purposes on cross-examination. *State v. Pace, 2015-Ohio-2884, 2015 Ohio App. LEXIS 2792 (Ohio Ct. App., Morgan County 2015)*.

Social worker's records

Trial court erred in failing to analyze the claim that the records of the licensed social worker in the case, which defendants in a medical malpractice suit sought to discover, were privileged under the provisions relating to mental health professionals. Nothing in the record or in the challenged order indicated that the trial court applied the provisions of *R.C. 2317.02(G)(1)* in assessing whether the patient's pastoral counseling records were properly discoverable. *Hoyt v. Mercy St. Vincent Med. Ctr., 2013-Ohio-320, 988 N.E.2d 650, 2013 Ohio App. LEXIS 245 (Ohio Ct. App., Lucas County 2013)*.

Strict construction generally

The provisions of *R.C. 2317.02* are in derogation of the common law and should be strictly construed; it does not anticipate and should not be extended to included prior statements made by witness and reduced to writing, so as to enable the holder thereof to claim privilege: *Arnovitz v. Wozar, 9 Ohio App. 2d 16, 38 Ohio Op. 2d 27, 222 N.E.2d 660, 1964 Ohio App. LEXIS 419 (Ohio Ct. App., Montgomery County 1964)*.

Waiver

Two exclusive means by which privileged communications can be waived are (1) express consent of the client; and (2) when the client voluntarily reveals the substance of the attorney-client communications in a nonprivileged context. *Ohio v. Verbanac, 2022-Ohio-3743, 2022 Ohio App. LEXIS 3529 (Ohio Ct. App., Cuyahoga County 2022)*.

Record did not contain any evidence indicating that the client gave express consent to waive the attorney-client privilege under *R.C. 2317.02(A)(1)* or voluntarily revealed the substance of his one-on-one communications with counsel; the trial court's order compelled counsel to testify as to any statement by any person, and this was error because it included the conversation between the two where the record did not indicate that the attorney-client privilege was waived. *Ohio v. Verbanac, 2022-Ohio-3743, 2022 Ohio App. LEXIS 3529 (Ohio Ct. App., Cuyahoga County 2022)*.

Trial court improperly applied the physician-patient privilege with respect to defendant's April 26, 2017 appointment, and her statements and reactions upon learning of her pregnancy were not protected by the physician-patient privilege; applying the privilege to defendant's statements and reactions did not further the purposes of the physician-patient privilege above the interest of the public in detecting crimes in order to protect society. *State v. Richardson, 2018-Ohio-4254, 121 N.E.3d 730, 2018 Ohio App. LEXIS 4595 (Ohio Ct. App., Warren County 2018)*.

When plaintiff alleged that she had suffered mental and emotional trauma from her automobile accident, she had put her subsequent psychological treatment into play, and the trial court properly found that she had waived the patient-physician privilege as to her subsequent psychological records. *Miller v. Milano, 2014-Ohio-5539, 25 N.E.3d 458, 2014 Ohio App. LEXIS 5377 (Ohio Ct. App., Stark County 2014)*.

Trial court's order that a party was to disclose records generated as a result of counseling sessions was reversed and remanded because the record did not support a statutory exception to the claimed privilege, pursuant to *R.C. 2317.02*, as the record did not reveal the nature of the provider who was treating the party. The trial court based its finding of waiver upon its conclusion that the statutory privilege accorded to physician-patient communications under *R.C. 2317.02(B)* applied, subject to the statutory exceptions thereto; however, the appellate court was not able to determine that the records at issue were generated by a physician, as opposed to the party's contention that they were generated by a licensed counselor, to which a different statutory privilege, *R.C. 2317.02(G)*, with different exceptions applied. *McGregor v. McGregor, 2012-Ohio-3389, 2012 Ohio App. LEXIS 2979 (Ohio Ct. App., Clark County 2012)*.

Claimants could not bring an action against attorneys at a law firm for the unauthorized disclosure of the claimants' psychological reports which were disclosed in discovery because the reports became available for anyone to view as the claimants waived any right to assert privilege or bring an action against the attorneys for disclosing them. *Kodger v. Ducatman, 2012-Ohio-2517, 2012 Ohio App. LEXIS 2208 (Ohio Ct. App., Cuyahoga County 2012)*.

In a case filed against a counselor and his employer based on testimony that the counselor gave during a divorce case, a client's failure to invoke privilege constituted a waiver of such; the client knew that the counselor had been subpoenaed to testify, and the client did not object until questions regarding his individual therapy were raised. Since the trial court sustained those objections and struck the questions and answers from the record, any error that existed was harmless. *Medley v. Russell, 2009-Ohio-5667, 2009 Ohio App. LEXIS 4764 (Ohio Ct. App., Richland County 2009)*.

In a former employee's discrimination action under *42 U.S.C.S. § 1981*, Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., and *R.C. 4112.01* et seq., the former employer was entitled to compel production of the employee's medical records under *Fed. R. Civ. P. 37* because the employee placed her mental health at issue and

thus waived any physician-patient privilege under *Fed. R. Evid. 501* and under R.C. 2317.02 and 4732.19; further, the medical records pertaining to the employee's emotional distress were relevant under *Fed. R. Civ. P. 26(b)(1)*. *White v. Honda of Am. Mfg., 2008 U.S. Dist. LEXIS 106188 (S.D. Ohio Nov. 3, 2008)*.

Decedent's executors could not impliedly waive the decedent's attorney-client privilege because R.C. 2317.02(A) only allowed executors to expressly waive a decedent's attorney-client privilege. *Wallace v. McElwain, 2006-Ohio-5226, 2006 Ohio App. LEXIS 5205 (Ohio Ct. App., Jefferson County 2006)*.

Decedent's petition, under Civ.R. 27, to perpetuate his testimony, did not expressly or impliedly waive his attorney-client privilege, under R.C. 2317.02(A), because the petition did not place any of decedent's communications with his attorney in issue, so the decedent's niece and nephew were not entitled to depose the decedent's attorney regarding his representation of the decedent. *Wallace v. McElwain, 2006-Ohio-5226, 2006 Ohio App. LEXIS 5205 (Ohio Ct. App., Jefferson County 2006)*.

Attorney of a deceased client may not assert attorney-client privilege to justify refusal to answer questions of a grand jury where the surviving spouse of the attorney's client has waived the privilege in conformity with R.C. 2317.02(A) and the attorney has been ordered to testify by a court. *State v. Doe, 2004-Ohio-705, 101 Ohio St. 3d 170, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (Ohio)*, cert. denied, *543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6968 (U.S. 2004)*.

In the event of the death of a client, R.C. 2317.02(A) authorizes the surviving spouse of that client to waive the attorney-client privilege protecting communications between the deceased spouse and attorneys who had represented that deceased spouse. *State v. Doe, 2004-Ohio-705, 101 Ohio St. 3d 170, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (Ohio)*, cert. denied, *543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6968 (U.S. 2004)*.

Where court-ordered treatment or services were ordered as part of a case plan journalized under R.C. 2151.41.2 and/or were necessary or relevant to the proceedings under R.C. 2151, a biological father's waiver of the statutory psychologist-client privilege was in effect when his psychologist testified; therefore, the trial court properly allowed the testimony because the communications were exempt under R.C. 2317.02(B)(1)(b), 4732.19. *In re Aristotle R., 2004-Ohio-217, 2004 Ohio App. LEXIS 189 (Ohio Ct. App., Sandusky County 2004)*.

—Not found

In an action against defendants for fraudulent conveyance, the trial court erred by determining that defendant husband voluntarily waived his attorney-client privilege because he objected to a question on cross-examination by invoking his attorney-client privilege and refused to answer. *Mancz v. McHenry, 2021-Ohio-82, 2021 Ohio App. LEXIS 73 (Ohio Ct. App., Greene County 2021)*.

Trial court did not abuse its discretion in ruling that defendant could not cross-examine an alleged coconspirator and State's witness as to his privileged statements because the witness's testimony at a suppression hearing was not a waiver of his attorney-client privilege; nothing in the record indicated that the witness waived his attorney-client privilege, either prior to making the statement in question or during his testimony at the suppression hearing. *State v. Brunson, 2020-Ohio-5078, 2020 Ohio App. LEXIS 3933 (Ohio Ct. App., Cuyahoga County 2020)*.

Trial court did not err in granting appellees' motions to quash the subpoenas and motion for a protective order because their counsel did not waive the attorney-client privilege by disclosing an otherwise privileged document during the sergeant's deposition. *Teodecki v. Litchfield Twp., 2015-Ohio-2309, 38 N.E.3d 355, 2015 Ohio App. LEXIS 2234 (Ohio Ct. App., Medina County 2015)*.

Opinion Notes

ATTORNEY GENERAL OPINIONS

A person may refuse to answer during a formal coroner's inquest under oath on the ground of privilege: 1975 Ohio Op. Att'y Gen. No. 011 (1975).

Subject to the exceptions set forth in R.C. 2317.02(G)(1)-(6), R.C. 2317.02(G) prohibits a Rehabilitation Services Commission employee, who is licensed as a professional counselor under R.C. 4757.07 and serves as a professional counselor of RSC clients, from testifying concerning a confidential communication made to him by an RSC client in the professional counselor-client relationship or his advice to his client. (1946 OAG No. 931, p.305, overruled.): 1987 Ohio Op. Att'y Gen. No. 005 (1987).

When records collected for the trauma system registry or the emergency medical services incidence reporting system pursuant to R.C. 4765.06 constitute a medical record, as defined at R.C. 149.43(A)(3), or are confidential, pursuant to the physician-patient privilege of R.C. 2317.02(B), or some other provision of state or federal law, such records do not become public records and the state board of emergency medical services is not required to disclose such records to the public under R.C. 149.43(B) or R.C. 4765.06. Additionally, in utilizing such non-public records that have been collected in the trauma system registry or emergency medical services incidence reporting system under R.C. 4765.06, the board is required to maintain the confidentiality of any patient-identifying information contained therein: 1996 Ohio Op. Att'y Gen. No. 005 (1996).

Information on a run sheet created and maintained by a county emergency medical services organization that documents medication or other treatment administered to a patient by an EMS unit, diagnostic procedures performed by an EMS unit, or the vital signs and other indicia of the patient's condition or diagnosis, and is relied upon by a physician for diagnostic or treatment purposes, is a communication covered by the physician-patient testimonial privilege of R.C. 2317.02(B), and thus is confidential information, the release of which is prohibited by law for purposes of R.C. 149.43(A)(1)(v). (1996 OAG No. 96-005 and 1999 OAG No. 99-006, approved and followed.) If a physician authorizes an emergency medical technician (EMT) to administer a drug or perform other emergency medical services, documentation of the physician's authorization and administration of the treatment or procedure by the EMS unit may also fall within the physician-patient testimonial privilege: OAG No. 2001-041 (2001).

If a claimant for workers' compensation voluntarily and knowingly signs an application form that includes a statement to the effect that the claimant waives all provisions of law forbidding any physician from disclosing information about claimant, a regional board of review has the power, pursuant to R.C. 4123.51.8, to compel the claimant to authorize the employer's counsel to obtain the records of the claimant's attending physician, to the extent that such records are pertinent to identify the cause of the particular injury or occupational disease which forms the basis for the claim: 1979 Ohio Op. Att'y Gen. No. 047 (1979).

Any information contained in a workmen's compensation claim file which was gained through communication or observation by a physician from a claimant who has contacted him for treatment or for diagnosis looking toward treatment would generally be subject to the patient-physician privilege under R.C. 2317.02(A) and may not be released except upon the authorization of the patient-claimant. However, the privilege attached to such information is waived if such information was obtained and placed in the claim file pursuant to a written medical waiver voluntarily signed by the claimant or if the claimant voluntarily testifies or introduces otherwise privileged information at a public hearing. Where the claimant has waived the patient-physician privilege, then pursuant to R.C. 4123.88 a member of the industrial commission, the employer or the administrator of the bureau of workmen's compensation may authorize anyone to examine such medical records which may be contained in the claim file: 1975 Ohio Op. Att'y Gen. No. 062 (1975).

Research References & Practice Aids

Cross-References to Related Sections

Application for interception warrant, *RC § 2933.53*.

Instructions to officers, *RC § 2933.58*.

Oral approval for an interception, *RC § 2933.57*.

Attorney-client privilege—

Client defined; application of attorney-client privilege to dissolved corporation or association, *RC § 2317.021*.

Election commission or panel considered client of full-time attorney hired for representation, *RC § 3517.157*.

Insurance fraud, *RC § 2913.47*.

Party caucuses, *RC § 101.301*.

Patient care incident or risk management report, *RC § 2305.252*.

Required report by attorneys of suspected child abuse; exceptions, *RC § 2151.421*.

Cases in which a party shall not testify, *RC § 2317.03*.

Husband-wife communication rule not applicable in prostitution cases, *RC § 2907.26*.

Mediation communication; disclosure, *RC § 2317.023*.

Pharmacist privilege not to interfere with criminal investigations, *RC § 4729.19*.

Physician-patient privilege—

Duty of physician and others to report serious physical harm believed to have resulted from violent offense, *RC § 2921.22*.

Nursing, rest, community alternative home and adult care facilities patient records, *RC § 2317.422*.

Psychologist and client; privileged communications, *RC § 4732.19*.

Request to health care provider for results of alcohol or drug tests for use in criminal proceeding, *RC § 2317.022*.

Required report by physicians of suspected child abuse; exceptions, *RC § 2151.421*.

State medical board proceedings; applicability of physician-patient privilege, *RC §§ 4730.26*, *4731.22*.

Statement of physician required for school employee's sick leave not waiver of privilege, *RC § 3319.141*.

Telecommunications relay service; privileged nature of assisted communications, *RC § 4931.35*.

Ohio Rules

General rule of privileges, EvR 501.

Physical and mental examination of persons, Civ.R. 35.

Pretrial procedure, Civ.R. 16.

Ohio Administrative Code

Bureau of workers' compensation —

Health partnership program (HPP): confidentiality of records. **OWCH:** *OAC 4123-6-15*.

State board of psychology—

Rules of professional conduct pertaining to confidential communications and physician-patient privilege. *OAC 4732-17-01*.

Practice Manuals and Treatises

Ohio Transaction Guide: Family Law & Forms § 6.34 Medical Records and Communications

Anderson's Ohio Civil Practice with Forms § 74.04 Hospital Records

Anderson's Ohio Civil Practice with Forms § 163.08 Waiver of Privilege

Practice Guides

Anderson's Ohio Probate Practice and Procedure § 6.08 Special evidentiary issues

Anderson's Ohio Probate Practice and Procedure § 27.09 Special evidentiary issues

Practice Checklists

Report of Child Abuse or Neglect, Ohio Transaction Guide: Family Law & Forms § 4.112

Checklist: Opposing Discovery on Privilege Grounds, 1-2-2 Ohio Litigation Checklists § 2.06

Practice Forms

Authorization for Release of Information in Medical Records, Ohio Transaction Guide: Family Law & Forms § 6.220

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Dineen v. Pelfrey

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

June 16, 2022, Decided

No. 21AP-547

Reporter
2022-Ohio-2035 *; 2022 Ohio App. LEXIS 1921 **; 2022 WL 2167430

Patrick Dineen, M.D., Plaintiff-Appellant, v. Dorothea Pelfrey, Defendant-Appellee.

Prior History: [**1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 20CV-5317).

Disposition: Judgment reversed; cause remanded.

Core Terms

discovery, trial court, deposition, injuries, physician-patient, motion to compel, records, medical record, authorizations, privileged, discovery request, protective order, ten years, disclosure, causally, ordering, motion for a protective order, motor vehicle accident, confidential, questions, assigned error, discoverable, privileged information, medical information, request information, trial court's order, motion to dismiss, civil action, neck injury, interrogatories

Case Summary

Overview
HOLDINGS: [1]-In a case which arose from a motor vehicle accident involving the parties, decision granting the motions to compel ordering plaintiff to sign authorizations for release of medical and billing records was reversed because trial court erred under R.C. 2317.02(B) in ordering broad access to plaintiff's medical information without considering, upon request, whether requested records were causally and historically related to injuries at issue and without determining whether confidential and privileged information may need to be protected. The parties agreed the case had narrowed to plaintiff's assertion of a neck injury allegedly caused by the parties' accident. Nevertheless, trial court summarily found all the information requested in defendant's discovery requests to be discoverable without considering the appropriate timeframe for discovery or imposing any other limitation.

Outcome
Judgment reversed. Matter remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

HN1 **Appellate Jurisdiction, Final Judgment Rule**

Generally, discovery orders are not subject to immediate appeal. However, an order compelling discovery of information alleged to be privileged or protected may be final and appealable if certain requirements of *R.C. 2505.02* are met. Whether a discovery order that compels discovery of information alleged to be privileged or protected warrants an interlocutory appeal is evaluated on a case-by-case basis.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

HN2 **Supplemental Jurisdiction, Ancillary**

Jurisdiction

R.C. 2505.02(A)(3) and (B)(4) provide a framework for analyzing whether an order pertaining to information claimed to be privileged may be reviewed on appeal. Under R.C. 2505.02(A)(3), a provisional remedy means a proceeding ancillary to an action including discovery of privileged matter.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Evidence > Burdens of Proof > Allocation

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > Discovery & Disclosure > Disclosure > Motions to Compel

HN3 **Appellate Jurisdiction, Interlocutory Orders**

An appellant has the burden of establishing the appellate court's jurisdiction over an interlocutory appeal. The appellant must establish not only that he has a colorable claim that the order compels the disclosure of information subject to a privilege but also that any harm from its disclosure could not be remedied on appeal from a final judgment. A party attempting to appeal an order compelling discovery of privileged materials must affirmatively establish that an immediate appeal is necessary to afford the appellant a meaningful and effective remedy.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN4 **Appellate Jurisdiction, Final Judgment Rule**

A trial court order compelling disclosure of information concerning physician-patient confidentiality constitutes a final, appealable order.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

HN5 **Standards of Review, Abuse of Discretion**

Trial court orders concerning discovery, including protective orders, are generally reviewed under an abuse-of-discretion standard. However, whether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo.

Evidence > Burdens of Proof > Allocation

Evidence > Privileges > Doctor-Patient Privilege > Waiver

Evidence > Privileges > Doctor-Patient Privilege > Exceptions

Evidence > Privileges > Doctor-Patient Privilege > Scope

Evidence > Privileges > Doctor-Patient Privilege > Elements

HN6 **Burdens of Proof, Allocation**

R.C. 2317.02(B) sets forth the physician-patient privilege and waiver of that privilege. Medical records are generally privileged from disclosure under R.C. 2317.02(B). R.C. 2317.02(B)(1) and (5)(a). However, the physician-patient privilege is not absolute. The privilege does not apply when the patient gives express consent to the release of medical information or when the patient places his medical condition in issue by filing a medical claim or wrongful-death action. R.C. 2317.02(B)(1)(a)(iii) expressly provides that the patient waives the physician-patient privilege in civil actions filed by the patient.). When the physician-patient privilege described in R.C. 2317.02(B)(1) does not apply, the communication must be 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); Under R.C. 2317.02(B) the filing of any civil action waives the physician-patient privilege as to any communication (including a medical record) that relates causally and historically to the injuries at issue in the action. The burden of showing that the privilege applies rests on the party asserting the privilege.

Evidence > Privileges > Doctor-Patient Privilege > Exceptions

HN7 **Doctor-Patient Privilege, Exceptions**

A trial court errs in ordering broad access to a plaintiff's medical information without considering, upon request, whether the requested records are causally and historically related to the injuries at issue and without determining whether confidential and privileged information may need protected. The appellate courts acknowledge that there are many methods for obtaining medical records and determining their relevance before requiring their disclosure in discovery. A trial court may not, however, simply ignore the requirements of R.C. 2317.02(B).

Evidence > Privileges > Doctor-Patient Privilege > Elements

Evidence > Privileges > Doctor-Patient Privilege > Waiver

HN8 **Doctor-Patient Privilege, Elements**

When an appellant has waived the physician-patient privilege by filing a civil action, he only does so as to communications that are causally or historically related to the injuries presented in the civil action, and a trial court must ensure the scope of discovery reflects this limitation. R.C. 2317.02(B)(3)(a).

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Evidence > Privileges > Doctor-Patient Privilege > Exceptions

Evidence > Privileges > Doctor-Patient Privilege > Scope

Evidence > Privileges > Doctor-Patient Privilege > Waiver

HN9 **Discovery, Protective Orders**

A trial court is in the best position to determine the most appropriate method to protect privileged records in a particular case, but the court may not ignore the need to preserve the statutory physician-patient privilege The appellate courts intend no intrusion upon a trial court's authority to determine the most appropriate method for protecting privileged medical records in a given case. Even if the physician-patient privilege does not apply, the trial court must still consider whether the doctor is entitled to a protective order.

Counsel: On brief: Henderson Mokhtari & Weatherly, Al A. Mokhtari, for appellant. Argued: Al A. Mokhtari.

On brief: Ritzler, Coughlin & Paglia, Jonathon M. Angarola, for appellee. Argued: Jonathon M. Angarola.

Judges: SADLER, J. KLATT and BEATTY BLUNT, JJ., concur.

Opinion by: SADLER

Opinion

(ACCELERATED CALENDAR)

SADLER, J.

[*P1] Plaintiff-appellant, Patrick Dineen, M.D., appeals a judgment entered by the Franklin County Court of Common Pleas granting two motions to compel filed by defendant-appellee, Dorothea Pelfrey, ordering appellant to sign authorizations for release of medical and billing records, and denying appellant's motions to strike, for a protective order, and for sanctions. For the following reasons, we reverse the trial court judgment and remand the matter for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

[*P2] Following an August 2018 motor vehicle accident involving appellant and appellee, appellant and his wife filed a complaint in August 2020 asserting claims of No. 21AP-547 2 negligence, uninsured/underinsured motorist and medical coverage, subrogation, and loss of consortium. Appellant alleged in his [**2] complaint that,

> [a]s a direct result of the crash, Plaintiff may have

> suffered significant injuries and/or an aggravation of pre-existing injuries to his body, causing physical pain, mental distress, anxiety, loss of enjoyment of life, physical impairment and/or an inability to perform ordinary activities, which injuries may be permanent, as well as miscellaneous unreimbursed costs, expenses and losses.

(Compl. at 3.) On October 2, 2020, appellee filed an answer and served her first set of combined interrogatories and requests for production of documents on appellant. The interrogatories included multiple questions about diagnosis and treatment provided by medical practitioners, physicians, surgeons, and psychologists, and the documents requested by appellee included copies of "all hospital and medical records relating to the treatment received by [appellant]" and "copies of any reports [all medical professionals] have prepared to date." (Oct. 2, 2020 Interrogs. and Req. for Produc. of Docs. at 10.)

[*P3] Appellant did not respond to the first set of interrogatories. Appellant did authorize certain medical providers (Physical Medical Associates, Columbus Internal Medicine, OhioHealth Riverside [**3] Radiology, and McConnell Heart Health Center) to release to appellee's lawyer medical treatment and billing records spanning August 28, 2018 (the accident) through August 2020. The parties then scheduled depositions for June 30, 2021.

[*P4] During appellant's deposition, appellant's counsel instructed appellant not to answer several questions, including: his hospitalizations over the past ten years excluding treatment for this accident; any emergency room or urgent care treatment he sought in the past ten years excluding treatment for this accident; any orthopedist treatment he sought in the last ten years excluding treatment for this accident; any pain management treatment he sought in the last ten years excluding treatment for this accident; any orthopedist treatment he sought in the last ten years excluding treatment for this accident; and what prescription medication he was on at the time of this accident. Appellant's counsel also instructed appellant not to answer questions about the circumstances surrounding a car accident in the early 1990's and whether he had been treated after that accident; whether he had been involved in any other motor vehicle accidents, prior to ten years before [**4] the deposition, aside from the instant accident and the accident in the 1990's; whether he had filed a claim for disability prior to ten years before the deposition; whether he had filed for bankruptcy prior to five years before the deposition; and whether he had consumed alcohol within 24 hours of the accident. During the deposition, appellant testified he believed his "neck and initially part of [his] upper back" were injured in the accident, and appellant's counsel did allow inquiry into appellant's prior neck treatment during the past ten years. (Dineen Dep. at 37.)

[*P5] Shortly after the depositions, appellee filed a motion to compel appellant's participation in a second deposition. Within it, appellee explained that while appellant "claims he sustained a neck injury in this accident and first sought medical treatment after this accident on September 20, 2018," appellee disputed proximate cause of the asserted injury and damages. (July 2, 2021 Mot. to Compel at 1.) Appellee argued that appellant's "recent medical history, his involvement in other court proceedings, his involvement in other motor vehicle accidents, and his state of mind at the time of this accident" were relevant "to [**5] whether the motor vehicle accident at issue proximately caused his neck injury." (July 2, 2021 Mot. to Compel at 3.)

[*P6] Appellee additionally filed a motion to compel appellant to respond to appellee's written discovery requests and sign medical authorizations. Specifically, appellee asserted appellant had not responded to appellee's October 2, 2020 written discovery requests, including a set of interrogatories and production of documents, or appellee's July 9, 2021 request for authorizations to release medical records related to information gained in appellant's deposition.[1]

[*P7] Appellant filed a combined memorandum contra appellee's motions to compel, a motion to strike, a motion for a protective order, and a motion for sanctions. Within it, appellant argued the discovery deadline had passed, the "discovery each party actually needs for trial [had] already been completed," that appellee was only entitled to discovery of matter causally and historically related to the injuries at issue, and that appellee fabricated a discovery dispute to improperly delay the case. (July 16, 2021 Memo. Contra at 2.) Appellee filed a reply contending the parties rescheduled the deposition to accommodate appellant's [**6] dog's health issues, and that appellant further caused delay by not responding to discovery requests or answering questions in the deposition. Appellee filed motions in limine to exclude expert

[1] The requests for authorization do not appear in the appellate record. Neither party raises an issue on appeal based on the absence of these documents from the record.

medical testimony, permanent damages, evidence of insurance, and certain billing records unrelated to the accident. Appellant opposed those motions.

[*P8] On October 11, 2021, the trial court filed an entry granting appellee's motions to compel a second deposition and to compel responses to written discovery and denying appellant's motions to strike, for a protective order, and for sanctions. According to the trial court, "[t]o this day, [appellant] has not responded to the written discovery and has not signed the authorizations to release medical and billing records from the providers with whom he obtained treatment after the accident" as discussed by appellant in his deposition. (Trial Court Entry at 2.) The trial court found that "the information requested in [appellee's] discovery requests is discoverable and that the discovery responses are necessary for [appellee] to thoroughly evaluate [appellant's] claims, prepare a proper defense, and conduct meaningful additional discovery. The need to conduct [**7] additional discovery can only be determined after reviewing [appellant's] outstanding overdue discovery responses, which further supports granting [appellee's] Motion to Compel." (Trial Court Entry at 2-3.)

[*P9] In conjunction with granting appellee's motions to compel, the trial court ordered appellant to, within 14 days of the order, serve his answers to appellant's first set of interrogatories and request for production of documents, sign and return the authorizations for release of medical and billing records, and make himself available for a second deposition. The trial court warned that appellant's failure to comply with the orders could result in sanctions including dismissal of appellant's claims.

[*P10] Appellant filed a timely appeal. Appellee filed a motion to dismiss the appeal, arguing appellant sought interlocutory relief that is not final and appealable pursuant to *R.C. 2505.02(B)(4)*. By entry, this court indicated appellee's motion to dismiss would be determined when we considered the merits of the appeal.

II. ASSIGNMENTS OF ERROR

[*P11] Appellant assigns three assignments of error for review:

> I. THE TRIAL COURT ERRED IN DENYING APPELLLANT'S MOTION FOR PROTECTIVE ORDER
>
> II. THE TRIAL COURT ERRED IN GRANTING [**8] APPELLEE'S MOTION TO COMPEL A SECOND DEPOSITION OF APPELLANT
>
> III. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO COMPEL WRITTEN DISCOVERY RESPONSES AND SIGNED MEDICAL AUTHORIZATIONS

III. ANALYSIS

[*P12] We first consider whether the trial court's October 11, 2021 entry constitutes a final, appealable order. In her motion to dismiss, appellee contends that the entry appealed in this case is an interlocutory order not subject to review at this time under *R.C. 2505.02(B)(4)*.

[*P13] ***HN1***[↑] Generally, discovery orders are not subject to immediate appeal. *In re Special Grand Jury Investigation, 10th Dist. No. 17AP-446, 2018-Ohio-760, ¶ 7, 107 N.E.3d 793*. "However, an order compelling discovery of information alleged to be privileged or protected may be final and appealable if certain requirements of *R.C. 2505.02* are met." *Id.* Whether a discovery order that compels discovery of information alleged to be privileged or protected warrants an interlocutory appeal is evaluated on a case-by-case basis. *State v. Glenn, 165 Ohio St.3d 432, 2021-Ohio-3369, ¶ 28, 179 N.E.3d 1205*.

[*P14] ***HN2***[↑] *R.C. 2505.02(A)(3)* and *(B)(4)* provide a framework for analyzing whether an order pertaining to information claimed to be privileged may be reviewed on appeal. Under *R.C. 2505.02(A)(3)*, a "provisional remedy" means "a proceeding ancillary to an action" including "discovery of privileged matter." *R.C. 2505.02(B)(4)* then provides:

> [a]n order is a final order that may be reviewed, affirmed, modified, [**9] or reversed, with or without retrial, when it is one of the following:
>
> * * *
>
> An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings,

issues, claims, and parties in the action.

[*P15] ***HN3***[↑] The appellant has the "burden of establishing the appellate court's jurisdiction over an interlocutory appeal." *Glenn at ¶ 22*, citing *Smith v. Chen, 142 Ohio St.3d 411, 2015-Ohio-1480, ¶ 8, 31 N.E.3d 633*. The appellant "must establish not only that he has a colorable claim that the order compels the disclosure of [information subject to a privilege] but also that any harm from its disclosure could not be remedied on appeal from a final judgment." *Glenn at ¶ 22*. *In re Special Grand Jury Investigation at ¶ 11* ("[A] party attempting to appeal an order compelling discovery of privileged materials must affirmatively establish that an immediate appeal is necessary to afford the appellant a meaningful and effective remedy.").

[*P16] In this case, the order at issue in part directs appellant to disclose [**10] information he claims is protected by the physician-patient privilege. The trial court found, without reserve, the information requested in appellee's discovery requests (including diagnosis and treatment by medical professionals) to be discoverable, ordered appellant to sign and return the authorizations for release of medical records, and threatened sanctions for the failure to do so. In his brief on appeal, appellant argues orders compelling disclosure of information concerning physician-patient confidentiality, privileged under *R.C. 2317.02(B)*, constitute an exception warranting appellate review at this juncture. In further briefing concerning the motion to dismiss, appellant argued the trial court in essence permitted a "blanket" order into confidential and privileged information that, once disclosed, could not be undone. (Dec. 13, 2021 Memo. Contra. Mot. to Dismiss at 18.)

[*P17] In similar circumstances to this case, this court has held "that ***HN4***[↑] a trial court order compelling disclosure of information concerning physician-patient confidentiality constitutes a final, appealable order." *Mason v. Booker, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶ 11, 922 N.E.2d 1036 (10th Dist.)*, citing *Talvan v. Siegel, 80 Ohio App.3d 781, 784, 610 N.E.2d 1120 (1992)*. *See, e.g.*, *Gentile v. Duncan, 2013-Ohio-5540, 5 N.E.3d 100, ¶ 8 (10th Dist.)* (concluding trial court's order granting appellee's motion to compel appellant to execute medical [**11] release authorizations was a final, appealable order); *Randall v. Cantwell Mach. Co., 10th Dist. No. 12AP-786, 2013-Ohio-2744, ¶ 8* (concluding, "to the extent that the decision orders appellant to grant an unaltered medical release that could lead to the production of privileged information and denies a protective order related to that information, it is a final, appealable order.").

[*P18] Appellee asserts that we should not rely on *Mason* since it was decided prior to the Supreme Court of Ohio decision in *Chen*. However, we do not find *Chen* controls this case as it did not address physician-patient privilege. Specifically, *Chen* concerned a trial court order compelling the appellants to turn over a surveillance video that the appellants contended was attorney-work product. Within that context, the Supreme Court found the appellants failed to establish why an immediate appeal was necessary in that case. The Supreme Court has since commented that the holding in *Chen* is limited to the context of "discovery protections that do not involve common-law, constitutional, or statutory guarantees of confidentiality, such as the attorney-work-product doctrine" and distinguished the protection provided by the attorney-work-product doctrine from the protection provided by an asserted privilege. *See, [**12] e.g.*, *Burnham v. Cleveland Clinic, 151 Ohio St.3d 356, 2016-Ohio-8000, ¶ 2, 89 N.E.3d 536* (lead opinion) (remarking that, as opposed to attorney work-product, "an order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal"); *In re Grand Jury Proceeding of Doe, 150 Ohio St.3d 398, 2016-Ohio-8001, ¶ 22, 82 N.E.3d 1115* ("When a party is compelled to produce material protected by the attorney-client privilege, harm extends beyond the actual case being litigated and causes the loss of a right that cannot be rectified by a later appeal, and *R.C. 2505.02(B)(4)(b)* is accordingly satisfied"); *State ex rel. Thomas v. McGinty, 164 Ohio St.3d 167, 2020-Ohio-5452, ¶ 47, 172 N.E.3d 824*, quoting *In re Grand Jury Proceeding of Doe at ¶ 22* ("In the context of an order to disclose materials protected by the attorney-client privilege, there is 'the loss of a right that cannot be rectified by a later appeal.' "). *See generally* *In re Special Grand Jury Investigation of Medicaid Fraud & Nursing Homes, 10th Dist. No. 18AP-730, 2019-Ohio-2532, ¶ 23* (detailing the leading cases emanating from the Supreme Court on this issue).

[*P19] Therefore, we do not find *Chen* determines this case and instead apply this court's precedent as stated in *Mason*, *Gentile*, and *Randall*. Doing so, we similarly conclude that the October 11, 2021, order at issue in this case is final and appealable under *R.C. 2505.02* to the extent it requires disclosure of information protected

by the physician-patient privilege.[2] *Randall at ¶ 8*. Considering all the above, we deny appellee's motion to dismiss and limit our review to only those issues concerning appellant's assertion of the physician-patient privilege.

[*P20] Appellant's assignments of error challenge the trial court's decision to deny his motion for a protective order and grant appellant's motions to compel. Because appellant's assignments of error all concern discovery of allegedly privileged information and are interrelated, we will address them together. *Gentile at ¶ 8*. ***HN5***[↑] Trial court orders concerning discovery, including protective orders, are generally reviewed under an abuse-of-discretion standard. *Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13, 909 N.E.2d 1237*; *Randall at ¶ 11*. However, "[w]hether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo." *Schlotterer at ¶ 13*.

[*P21] Generally, "[u]nless otherwise limited by court order, * * * [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Civ.R. 26(B)(1)*. "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* "When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly [**14] 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." *Civ.R. 26(B)(8)*. "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Civ.R. 26(C)* (addressing protective orders).

[*P22] ***HN6***[↑] *R.C. 2317.02(B)* sets forth the "physician-patient privilege" and waiver of that privilege. *Gentile at ¶ 16*. "Medical records are generally privileged from disclosure" under *R.C. 2317.02(B)*. *Schlotterer at ¶ 14*. *R.C. 2317.02(B)(1)* and *(5)(a)*. However, "[t]he physician-patient privilege * * * is not absolute." *Ward v. Summa Health Sys., 128 Ohio St.3d 212, 2010-Ohio-6275, ¶ 22, 943 N.E.2d 514*. "[T]he privilege does not apply when the patient gives express consent to the release of medical information or when the patient places his medical condition in issue by filing a medical claim or wrongful-death action." *Id.* *Friedenberg v. Friedenberg, 161 Ohio St.3d 98, 2020-Ohio-3345, ¶ 33, 161 N.E.3d 546* ("*R.C. 2317.02(B)(1)(a)(iii)* * * * expressly provides that the patient waives the physician-patient privilege in civil actions filed by the patient."). When the physician-patient privilege described in *R.C. 2317.02(B)(1)* does not apply, the communication must be "related causally or historically [**15] to physical or mental injuries that are relevant to issues" in the civil action. *R.C. 2317.02(B)(3)(a)*; *Leopold v. Ace Doran Hauling & Rigging Co., 136 Ohio St.3d 257, 2013-Ohio-3107, ¶ 18, 994 N.E.2d 431*; *Mason at ¶ 14* ("[U]nder [*R.C. 2317.02(B)*] the filing of any civil action waives the physician-patient privilege as to any communication (including a medical record) that relates causally and historically to the injuries at issue in the action."). "The burden of showing that the privilege applies rests on the party asserting the privilege." *State v. Tench, 156 Ohio St.3d 85, 2018-Ohio-5205, ¶ 234, 123 N.E.3d 955*.

[*P23] Here, appellant contends he testified in deposition that he sustained a neck injury as a result of this crash and that he had no prior neck "injury, issue, symptom, or * * * treatment" during the ten years before the motor vehicle accident. (Appellant's Brief at 15.) In appellant's view, the information the trial court ordered him to produce via written discovery, medical authorizations and a second deposition is both incumbent upon medical diagnosis and treatment and is not causally or historically related to the motor vehicle accident or the injuries he sustained in the accident. Appellant believes the trial court, by failing to set proper limits, has effectively permitted "an unmitigated fishing expedition" into appellee's confidential medical history. (Appellant's Brief at 15.)

[*P24] Appellee [**16] counters that appellant was required to answer questions during his deposition requesting non-privileged information and, under *Vega v. Tivurcio, 10th Dist. No. 14AP-327, 2014-Ohio-4588, ¶ 29*, could not refuse to do so based on relevancy. Appellee also contends appellant failed to meet his burden of showing privilege since he did not specify how

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[2] We agree with appellee that "[a]ppellant['s] citation to physician-patient privilege under *R.C. 2317.02(B)(3)* has no bearing on [a]ppellant['s] refusal to respond to written discovery at all and [appellant's] refusal to answer" questions in his deposition "based on relevancy alone" unconnected to an assertion of physician-patient privilege. (Appellee's Mot. to Dismiss at 3.)

the information requested is privileged, akin to *Pietrangelo v. Hudson, 8th Dist. No. 107344, 2019-Ohio-1988, 136 N.E.3d 867* citing *Civ.R. 26(B)(8)(a)* and *Heimberger v. Heimberger, 11th Dist. No. 2019-L-139, 2020-Ohio-3853, ¶ 29*.

[*P25] The cases raised by appellee are distinguishable. *Vega* concerned the plaintiff's right to assert her *Fifth Amendment* privilege at a pre-trial deposition. We found no error in the trial court's order granting appellee's motion to compel where the plaintiff failed, under case law specific to the *Fifth Amendment* privilege, to show that she had reasonable cause to apprehend a real danger of incrimination if she were to respond to the questions raised in the motion to compel. Because *Vega* does not involve standards and analysis pertaining to the assertion of the physician-patient privilege, we decline to apply it here.

[*P26] The two Eighth District cases, *Heimberger* and *Pietrangelo*, also diverge from this case in ways that undercut a direct comparison. In *Heimberger*, the Eighth District held the trial court did not abuse its discretion in compelling discovery considering the discovery requests at issue [**17] in that case. The court found all of the discovery requests except one related causally or historically to the physical and/or mental injuries alleged by the plaintiff since they included appropriate time parameters, and the one outlier seeking information for medical care "at any time" to nevertheless not violate the privilege since it only asked for names and contact information of doctors. *Id. at ¶ 26-27*. While the Eighth District also commented that the plaintiff did not comply with civil rules with respect to her assertion of privilege, it did so as an add-on "note" without further elaboration. *Id. at ¶ 29*. Moreover, the plaintiff in *Heimberger*, unlike the instant case, did not seek a protective order pertaining to medical records.

[*P27] In *Pietrangelo*, the plaintiff brought a negligence action against the defendant alleging injuries to his head, neck, and back. "After learning that [the plaintiff] had previously suffered injuries to the same areas for which he now claimed harm, [the defendant] sought [the plaintiff's] prior medical records" and the plaintiff refused to sign the release authorizations. *Id. at ¶ 1*. The plaintiff refused to comply without seeking a protective order or any other means to protect asserted privileged [**18] information. The Eighth District found the plaintiff had failed to articulate a factual basis by which the trial court could have concluded that a record was not properly discoverable and had not demonstrated the trial court erred in granting his motion to compel.

[*P28] Notably, *Pietrangelo at ¶ 23* distinguishes itself from its earlier case, *Wooten v. Westfield Ins. Co., 181 Ohio App.3d 59, 2009-Ohio-494, 907 N.E.2d 1219 (8th Dist.)*, in which the Eighth District reversed and remanded a trial court's denial of a plaintiff's motion for a protective order where the defendant's request for the medical information was "a blanket one," seeking all of appellant's medical and pharmaceutical records, with only a time limitation and "the authorizations were not limited * * * to the alleged injuries." *Wooten at ¶ 15*. The *Wooten* court concluded in these circumstances the defendant's request was too broad and remanded the matter to the trial court to determine which medical records were discoverable. *Id. at ¶ 21*.

[*P29] In the instant case, unlike *Pietrangelo*, appellant did not testify to having previous injuries to the same areas for which he now claimed harm (the neck injury), the information sought is not constrained to the claimed injury, and appellant did seek a protective order. These circumstances are more aligned with *Wooten*, where the trial court improperly [**19] issued a "blanket" order to compel production of medical information and denied the plaintiff's motion for a protective order.

[*P30] ***HN7***[⬆] Similar to *Wooten*, this court has determined that a trial court errs in ordering broad access to a plaintiff's medical information without considering, upon request, whether the requested records are causally and historically related to the injuries at issue and without determining whether confidential and privileged information may need protected. *See e.g., Mason at ¶ 22* ("We acknowledge that there are many methods for obtaining medical records and determining their relevance before requiring their disclosure in discovery. * * * A trial court may not, however, simply ignore the requirements of *R.C. 2317.02(B)*."); *Randall at ¶ 15* (concluding, in a case where some requested records sought in discovery may have included communications regarding unrelated conditions, the trial court erred by not granting the plaintiff's motion for a protective order "or implementing some other measure * * * to determine whether certain records were privileged"); *Gentile at ¶ 24* (citing *Mason, Wooten*, and *Randall* in holding that "a trial court errs in ordering a plaintiff to execute 'general medical records release authorizations' that are not tailored [**20] to physical or mental injuries relevant to the issues in the case" and that a "trial court should take measures to ensure that privileged medical records are protected from disclosure.").

[*P31] Here, the parties agree the case has narrowed

to appellant's assertion of a neck injury allegedly caused by the parties' motor vehicle accident. Nevertheless, the trial court summarily found all the information requested in appellee's discovery requests to be discoverable without considering the appropriate timeframe for discovery or imposing any other limitation, even though those requests included questions admittedly concerning the diagnosis and treatment of "any condition" and medical diagnosis and treatment "not involving this accident." (First Set of Interrogs. at 2; Appellee's Mot. to Compel Second Dep. at 1-2.) Moreover, the trial court denied appellant's motion for a protective order and did so without explanation. Considering the parties' agreement of the (now narrowed) injury at issue in this case and the extensive scope of appellee's discovery requests, we agree with appellant that the trial court erred by ordering broad, unprotected access to his medical information. ***HN8***[⬆] While appellant waived [**21] the physician-patient privilege by filing his civil action, he only did so as to communications that are causally or historically related to the injuries presented in the civil action, and a trial court must ensure the scope of discovery reflects this limitation. *R.C. 2317.02(B)(3)(a)*; *Leopold at ¶ 17*.

[*P32] Accordingly, we sustain appellant's three assignments of error to the extent indicated herein. The matter is remanded to the trial court to determine whether the records it ordered disclosed are causally or historically related to appellant's claimed injuries and to determine how to appropriately protect the information and records at issue in this case. *Randall at ¶ 15*, citing *Mason* ("[W]e recognize that ***HN9***[⬆] the trial court is in the best position to determine the most appropriate method to protect privileged records in a particular case, but the court may not ignore the need to preserve the statutory physician-patient privilege."); *Mason at ¶ 22* ("[W]e intend no intrusion upon a trial court's authority to determine the most appropriate method for protecting privileged medical records in a given case."). *See also Ward at ¶ 32*, citing *Civ.R. 26(C)* (finding that even if the physician-patient privilege does not apply, "the trial court must still consider whether the doctor is entitled [**22] to a protective order"). We express no opinion as to whether the requested information and records are casually and historically related to appellant's claimed injuries. *Randall at ¶ 15*.

IV. CONCLUSION

[*P33] Having sustained appellant's three assignments of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for further proceedings consistent with this decision.

Judgment reversed; *cause remanded*.

KLATT and BEATTY BLUNT, JJ., concur.

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Gentile v. Duncan

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

December 17, 2013, Rendered

No. 12AP-1023

Reporter
2013-Ohio-5540 *; 5 N.E.3d 100 **; 2013 Ohio App. LEXIS 5783 ***; 2013 WL 6708393

Rebecca R. Gentile, Plaintiff-Appellant, v. David D. Duncan et al., Defendants-Appellees.

Prior History: [***1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 11CVC-10-12421).

Gentile v. Duncan, 2012 Ohio Misc. LEXIS 5214 (Ohio C.P., Nov. 13, 2012)

Disposition: Order reversed and cause remanded.

Core Terms

medical record, records, authorizations, trial court, discovery, injuries, billing, in camera, execute, neck, motion to compel, pre-existing, causally, releases, collision, limitations, privileged, providers, ordering, patient, birth, summary judgment motion, trial court's order, medical condition, time period, communications, disclosure, inspection, contends, diseases

Case Summary

Overview

HOLDINGS: [1]-Pursuant to *Civ.R. 26(B)(1)* and *R.C. 2317.02(B)(3)(a)*, the trial court erred in granting a broad discovery order with respect to the car accident victim's medical records, and in refusing to conduct an in camera review in order to ascertain what was causally or historically related, because the medical authorizations submitted by the driver were essentially unlimited as to scope, as well as the time period for which the medical records were sought. The driver's claim that the medical release forms were necessarily broad due to the possibility of a pre-existing injury did not justify a request for blanket authorizations without any limitations in scope and time; [2]-To the extent that the victim's assignments of error challenged the trial court's order as it related to billing and payment records, the ruling was interlocutory and not ripe for review under *R.C. 2505.02*.

Outcome

Discovery order reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Evidence > Privileges > Doctor-Patient Privilege > Exceptions

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN1[] **Appellate Jurisdiction, Final Judgment Rule**

Discovery orders are considered interlocutory and not immediately appealable. However, orders requiring the disclosure of privileged information are final and appealable. While discovery orders are not ordinarily subject to immediate appeal, an exception has been recognized where a discovery order requires the disclosure of communications between a physician and patient, communications that are ordinarily privileged pursuant to *R.C. 2317.02(B)*. Accordingly, a trial court order compelling disclosure of information concerning physician-patient confidentiality constitutes a final, appealable order under *R.C. 2505.02*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Privileges > Doctor-Patient Privilege > General Overview

Civil Procedure > ... > Discovery > Privileged Communications > Attorney-Client Privilege

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] Standards of Review, Abuse of Discretion

A trial court possesses broad discretion over the discovery process and, therefore, appellate courts generally review a trial court's decision regarding a discovery matter only for an abuse of discretion. Nevertheless, an abuse of discretion standard is inappropriate for reviewing a judgment based upon a question of law, including an erroneous interpretation of the law. In general, the issue as to whether information sought in discovery is confidential and privileged is a question of law that is reviewed de novo. However, with respect to a privilege claim, the appropriate standard of review depends on whether the privilege claim presents a question of law or a question of fact. Accordingly, when it is necessary to interpret and apply statutory language to determine whether certain information is confidential and privileged, a de novo standard applies. By contrast, when a claim of privilege requires review of factual questions, such as whether an attorney-client relationship existed, an abuse-of-discretion standard applies.

Civil Procedure > Discovery & Disclosure > General Overview

Evidence > Privileges > Doctor-Patient Privilege > Exceptions

Evidence > Privileges > Doctor-Patient Privilege > Scope

HN3[] Civil Procedure, Discovery & Disclosure

Civ.R. 26(B)(1) states that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. R.C. 2317.02(B) governs the physician-patient privilege and any waiver of that privilege. That statute generally precludes a physician from testifying concerning a communication made by a patient to the physician or the physician's advice to the patient. There exist circumstances, however, where the general privilege does not apply and a physician may be compelled to testify or to submit to discovery in that action as to communications between the patient and physician that related causally or historically to physical or mental injuries that are relevant to issues in the action.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Doctor-Patient Privilege > Scope

HN4[] Discovery, Privileged Communications

While a defendant is entitled to discovery of matters causally or historically related to the injuries at issue, a plaintiff filing a personal injury claim does not open "herself up to exposure, without limitation, of all her medical records.

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > Privileges > Doctor-Patient Privilege > Scope

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN5[] Appeals, Standards of Review

A trial court errs in ordering a plaintiff to execute general medical records release authorizations that are not tailored to physical or mental injuries relevant to the issues in the case.

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > Privileges > Doctor-Patient Privilege > Scope

Civil Procedure > ... > Discovery > Privileged

Communications > General Overview

HN6[] **Appeals, Standards of Review**

Because time limits and designations of health care providers tie the medical authorizations to the particular case and the injuries pled, an authorization lacking them is improper because it would entitle defendants to any and all of the plaintiff's medical records, from any provider who has ever treated the plaintiff from his birth to the present day.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Doctor-Patient Privilege > Scope

HN7[] **Discovery, Privileged Communications**

Although it might be the "normal practice" for attorneys to draft blanket medical authorizations without time limits, it is a practice that creates too great a risk that non-relevant and privileged information may be released to the defendants.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Doctor-Patient Privilege > Scope

HN8[] **Discovery, Privileged Communications**

A trial court must balance the privacy right of a plaintiff against a defendant's right to obtain information potentially relating to pre-existing medical conditions.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN9[] **Appellate Jurisdiction, Final Judgment Rule**

To the extent an order pertains to matters other than those concerning discovery of privileged matters, the order is deemed interlocutory and therefore not final and appealable.

Counsel: Scott Elliot Smith, LPA, and Scott Elliot Smith, for appellant.

Marshall W. Guerin, for appellee David D. Duncan.

Judges: BROWN, J. SADLER and CONNOR, JJ., concur.

Opinion by: BROWN

Opinion

[**102] (REGULAR CALENDAR)

DECISION

BROWN, J.

[*P1] This is an appeal by plaintiff-appellant, Rebecca R. Gentile, from an entry of the Franklin County Court of Common Pleas granting a motion to compel discovery filed by defendant-appellee, David D. Duncan.

[*P2] On October 6, 2011, appellant filed a complaint against appellee and State Farm Fire & Casualty Company ("State Farm"). According to the complaint, appellant was operating a motor vehicle on October 13, 2009; while stopped in traffic, her vehicle was struck from behind by a vehicle driven by appellee, causing injuries to appellant's back and neck. At the time of the accident, appellant had an automobile liability insurance policy issued by State Farm. On October 18, 2011, appellant filed an amended complaint, alleging negligence on the part of appellee, and alleging claims against State Farm for breach of contract and declaratory judgment for medical payment subrogation. State [***2] Farm filed an answer and a cross-claim against appellee, asserting a right of subrogation.

[*P3] On December 16, 2011, appellant filed a motion for summary judgment seeking a determination that appellee was negligent per se for violating Ohio's assured clear distance statute. On December 29, 2011, appellee filed a memorandum in opposition to the motion for summary judgment. Appellee did not dispute he owed a duty of care to appellant and that he breached that duty; he asserted, however, that jury

issues remained as to causation and damages. On February 1, 2012, appellant filed a motion for summary judgment on the issue of whether her injuries, treatment, and medical bills were a proximate result of the automobile collision of October 13, 2009. Attached to the motion was the affidavit of Dr. Gladstone C. McDowell. Appellee filed a memorandum in opposition to the motion for summary judgment.

[*P4] On February 12, 2012, appellee filed a motion to compel appellant to execute medical releases and for an in camera review of records. In the accompanying memorandum, appellee argued that appellant was claiming neck and back injuries caused by the accident and that a review of the records already produced [***3] by appellant showed degenerative disc space narrowing. Appellee requested that the court order appellant to execute three "medical authorization" release forms attached to the motion as exhibit No. 9. Two of the release forms specifically requested medical billing information.

[*P5] On February 17, 2012, appellant filed a memorandum contra appellee's motion to compel the execution of medical releases and for an in camera inspection. Appellant argued she had provided all medical records and bills with respect to treatment she had received as a result of the collision, and had supplemented discovery responses to include all medical records of her treating physician related to neck and back treatment pre-dating the accident.

[*P6] On November 13, 2012, the trial court filed a journal entry granting appellant's motion for summary judgment on the issue of duty and breach, but denying it on the issue of proximate cause. Further, [**103] the court granted appellee's motion to compel, ordering appellant to "execute the necessary medical releases if she has not already done so." The court denied the motion with respect to an in camera review of records.

[*P7] On appeal, appellant sets forth the following four assignments [***4] of error for this court's review:

> I. The trial court erred in ordering the Plaintiff [to] execute medical authorizations for the Defendant to obtain all unrelated and related medical records of Plaintiff from Plaintiff's medical providers from birth to the present without ordering an in camera inspection.
>
> II. The trial court erred in requiring Plaintiff to produce all medical records from birth to present in contravention of R.C. 2317.02(B)(3)(a).
>
> III. The trial court erred in failing to order an in camera inspection of Plaintiff's medical records which are privileged and are not causally or historically related to claimed injuries.
>
> IV. The trial court erred in ordering Plaintiff [to] execute medical authorizations for her medical records without limitation in time or breadth related to Plaintiff's claimed neck and back injuries, even though the Plaintiff had already provided medical records that pre-existed and were causally and historically related to the injuries claimed from the trauma producing incident.

[*P8] Appellant's assignments of error, all addressing the trial court's order granting appellee's motion to compel appellant to execute medical release authorizations, are interrelated [***5] and will be considered together. Under these assignments of error, appellant challenges the motion to compel as overly broad and argues that the trial court erred in failing to conduct an in camera inspection to determine which of her medical records were related to her claim.

[*P9] At the outset, we note the general rule that ***HN1***[] discovery orders are considered interlocutory and not immediately appealable. *Legg v. Hallet, 10th Dist. No. 07AP-170, 2007-Ohio-6595, ¶ 16*. However, orders requiring the disclosure of privileged information "are final and appealable." *Id*. While discovery orders are not ordinarily subject to immediate appeal, this court has recognized an exception "where a discovery order requires the disclosure of communications between a physician and patient, communications that are ordinarily privileged pursuant to *R.C. 2317.02(B)*." *Mason v. Booker, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶ 11, 922 N.E.2d 1036 (10th Dist.)*, citing *Talvan v. Siegel, 80 Ohio App.3d 781, 784, 610 N.E.2d 1120 (10th Dist.1992)*. Accordingly, "a trial court order compelling disclosure of information concerning physician-patient confidentiality constitutes a final, appealable order under *R.C. 2505.02*." *Id. See also Pinnix v. Marc Glassman, Inc., 8th Dist. No. 97998, 2012-Ohio-3263, ¶ 8* [***6] ("An order compelling the production of allegedly privileged documents to an opposing party is a final appealable order").

[*P10] ***HN2***[] A trial court "possesses broad discretion over the discovery process," and therefore appellate courts "generally review a trial court's decision regarding a discovery matter only for an abuse of discretion." *MA Equip. Leasing I, LLC v. Tilton, 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 13, 980 N.E.2d 1072*. Nevertheless, an abuse of discretion standard "is

inappropriate for reviewing a judgment based upon a question of law, including an erroneous interpretation of the law." *Id*. In general, the issue as to "whether information sought in discovery is confidential and privileged 'is a question of law that is reviewed de [**104] novo.'" *Id*., quoting *Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13, 909 N.E.2d 1237*. This court has also recognized, however, "with respect to a privilege claim, the appropriate standard of review depends on whether the privilege claim presents a question of law or a question of fact." *Randall v. Cantwell Mach. Co., 10th Dist. No. 12AP-786, 2013-Ohio-2744, ¶ 9*. Accordingly, "[w]hen it is necessary to interpret and apply statutory language to determine whether [***7] certain information is confidential and privileged, a de novo standard applies." *Id*. By contrast, "[w]hen a claim of privilege requires review of factual questions, such as whether an attorney-client relationship existed, an abuse-of-discretion standard applies." *Id*.

[*P11] As noted under the facts, appellee filed a motion to compel appellant to execute medical release authorizations and for an in camera review of records; specifically, appellee requested that the court order appellant "to execute the medical releases which are attached as Exhibit 9." In the accompanying memorandum in support, appellee claimed that a magnetic resonance imaging ("MRI") test of appellant from 2010 showed a variety of conditions, some of which were or could be degenerative. Appellee noted that appellant, in response to certain interrogatory requests, had answered that "[n]one of my pre-existing medical conditions were aggravated by the collision," and that "I continue to treat as necessary and needed." Appellee further claimed that appellant had failed to specifically identify what parts of her body were injured in response to interrogatory No. 5. Appellee argued that the motion was also supported by averments [***8] in an affidavit filed in support of appellant's motion for summary judgment on the issue of proximate cause and damages. Specifically, appellee cited a response by Dr. McDowell to an inquiry as to whether appellant's injury or condition involved a pre-existing condition, in which the physician responded: "This is unknown."

[*P12] The medical authorization forms, attached to appellee's motion to compel, were directed to Integrated Pain Solutions, Mt. Carmel West/Mt. Carmel Health, and Dr. Soldano/American Health Network. The forms requested those entities/individuals to:

> [R]elease protected health information contained in my patient records, including information about communicable diseases, non-communicable and serious communicable diseases and infections (which include venereal disease "VD", tuberculosis "TB"), alcohol, drug abuse, and/or HIV-AIDS test results or diagnostic records protected under the regulations in 42 CFR, Part 2, and *Ohio Revised Code §3701.243*, if any; psychological or psychotherapy service records, if any; and social services records, if any, including communications made by me to a social worker or psychologist, to the individuals or organization listed below * * *, [***9] only under the conditions listed below. Further disclosure of any/all of these patient records by the Recipient to persons with need to know for all purposes related to claims processing and/or discovery before and during trial/arbitration is hereby expressly authorized.

[*P13] The authorization form addressed to "Dr. Soldano/American Health Network" also requested the following "[s]pecific type of information to be disclosed: Any and all medical records including those from treatment by Dr. James Soldano." Further, the authorization forms addressed to Integrated Pain Solutions and Mt. Carmel West/Mt. Carmel Health also requested "any and all bills (that show the original amounts, insurance and non-insurance [**105] adjustments, credits, payments and write-offs) from treatment at [those entities]."

[*P14] On appeal, appellant notes that she was treated by several medical providers for neck and back injuries following the collision involving appellee's vehicle. Specifically, appellant treated with the following individuals: Dr. McDowell, a pain care specialist, Dr. Soldano (her primary care physician), and Ryan Smith, D.C. According to appellant, her neck injuries and symptoms resolved but she continued [***10] to suffer back injuries which were diagnosed as chronic low back pain, disc herniation, sciatica, and lumbago.

[*P15] Appellant contends she provided appellee with all medical records and bills for treatment she received subsequent to the collision, and that she supplemented the discovery responses and provided medical records of her treating physicians that pre-dated the collision as related to neck and back treatment, including medical records of her primary care physician (Dr. Soldano) from 2002 through 2009. Appellant maintains that appellee has offered no reasonable basis why she should provide all of her medical records dating back to birth, especially in light of the fact that seven years of pre-existing

records have already been provided to appellee. Appellant asserts that appellee's request for blanket authorization of medical records from birth to present was in contravention of R.C. 2317.02(B)(3)(a).

[*P16] HN3[↑] Civ.R. 26(B)(1) states in part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." R.C. 2317.02(B) "governs the physician-patient privilege and any waiver of that privilege." Mason at ¶ 14. That [***11] statute "generally precludes a physician from testifying concerning a communication made by a patient to the physician or the physician's advice to the patient." *Id*. There exist circumstances, however, where the general privilege does not apply and a physician "may be compelled to testify or to submit to discovery in that action as to communications between the patient and physician 'that related causally or historically to physical or mental injuries that are relevant to issues' in the action." *Id*., citing R.C. 2317.02(B)(3)(a).

[*P17] Both appellant and appellee cite to this court's decision in *Mason* in support of their arguments on appeal. Under the facts of *Mason*, appellee asked the injured party, appellant, to sign authorizations during discovery for the release of medical records. The appellant refused to sign the releases, contending that the appellee sought privileged records that were irrelevant to the action. The appellee then filed a motion to compel the appellant to execute the releases, which the trial court granted. The appellant had requested that the trial court conduct an in camera inspection of at least some disputed medical records, but the court refused. On appeal, this [***12] court reversed the trial court's order granting the motion to compel "[b]ecause the trial court did not determine, upon request, whether the records it ordered disclosed are causally or historically related to appellant's claimed injuries." Id. at ¶ 23.

[*P18] This court's decision in Mason relied in part upon our earlier decision in Ward v. Johnson's Indus. Caterers, Inc., 10th Dist. No. 97APE11-1531, 1998 Ohio App. LEXIS 2841 (June 25, 1998), in which we held that the trial court abused its discretion in ordering the appellant to execute general medical release authorizations without first conducting an in camera review. Under the facts of *Ward*, the appellant sued for injuries to her neck, shoulders, lower back, and left leg. While appellees "believed [**106] they needed all medical records," the appellant argued that "only medical records regarding her neck, shoulders, low back and left leg were discoverable." *Id*. This court held that, "[a]t 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." (Emphasis sic.) *Id*.

[*P19] In the instant case, appellant's complaint alleged in part the following:

> Between October 16, 2009 [***13] and December 2, 2009, Ms. Gentile was treated by a chiropractor for back and neck pain. She also received treatment from a licensed massage therapist and acupuncturist.
> In July, 2010, Ms. Gentile experienced a significant loss of strength in her right leg. She sought treatment and was diagnosed with herniated L4 and L5 discs. These injuries were directly attributable to the car accident. Treatment for these injuries concluded in January, 2011.

[*P20] Accordingly, appellant's pleading placed at issue medical conditions relating to her neck and back as a result of the collision. Appellee disputes whether all of the injuries claimed by appellant were caused by the accident, arguing that appellant's response to interrogatories, as well as the records that have been disclosed to date, raise a legitimate issue whether she has a pre-existing medical condition. Although appellee maintains the trial court did not err in requiring appellant to execute the medical releases at issue, appellee does not dispute the need for an in camera inspection of the medical records. While appellee frames the issue as one that can be resolved via an in camera review by the trial court of challenged materials, appellee [***14] acknowledges that the language of the medical releases he submitted is broad; appellee contends, however, that a defendant in a civil action must have the ability to access prior medical records when there is a legitimate issue as to whether or not a plaintiff has a pre-existing medical condition.

[*P21] In challenging the breadth of the authorization request, appellant notes there is no claim in the instant case of an independent emotional or psychological injury, but argues the authorizations at issue are so broadly worded as to provide for disclosure of such records. Appellant also contends that, pursuant to the court's order, not only was appellee entitled to all of her medical records from birth to present, but also any information regarding routine PAP smears, menstrual cycles, birth control, menopause, and other similar privacy issues unrelated to her claimed injuries arising

under the complaint.

[*P22] Upon review, we find merit with appellant's argument that the authorizations submitted by appellee are essentially unlimited as to scope, as well as the time period for which the medical records are sought. The medical authorizations at issue request the release of "protected health information" [***15] contained in appellant's patient records, including "information about communicable diseases, non-communicable and aerloue communicable diseases and infections (which include venereal disease 'VD', tuberculosis 'TB'), alcohol, drug abuse, and/or HIV-AIDS test results or diagnostic records protected under the regulations in 42 CFR, Part 2, and Ohio Revised Code §3701.243," as well as "psychological or psychotherapy service records, if any; and social services records, if any, including communications made by me to a social worker or psychologist."

[*P23] ***HN4***[↑] While appellee is entitled to discovery of matters causally or historically related to the injuries at issue, a plaintiff [**107] filing a personal injury claim does not open "herself up to exposure, without limitation, of *all* her medical records." (Emphasis sic.) Wooten v. Westfield Ins. Co., 181 Ohio App.3d 59, 2009-Ohio-494, ¶ 16, 907 N.E.2d 1219 (8th Dist.). *See also* McCoy v. Maxwell, 139 Ohio App.3d 356, 359, 743 N.E.2d 974 (11th Dist.2000) reversing court's order granting motion to compel discovery on basis that "appellant's psychiatric or psychological records remain privileged because they are not communications that relate causally or historically to physical or mental injuries [***16] that are relevant to issues in the defamation suit filed by appellant").

[*P24] As noted above, this court has previously found that ***HN5***[↑] a trial court errs in ordering a plaintiff to execute "general medical records release authorizations" that are not tailored to physical or mental injuries relevant to the issues in the case. Ward. Here, the absence of any such limitations renders the trial court's order for a "blanket release" of appellant's medical records "unreasonable." Dubson v. The Montefiore Home, 8th Dist. No. 97104, 2012-Ohio-2384, ¶ 18. Under such circumstances, "the trial court should take measures to ensure that privileged medical records are protected from disclosure." Randall at ¶ 15.

[*P25] For purposes of the instant case, we believe that appropriate measures include not only limitations in scope as to those medical conditions causally or historically related to the injuries relevant to the issues in the action, but also limitations as to a relevant time period for the medical authorizations. Courts in other jurisdictions have noted the risks posed by discovery requests for medical authorizations not limited in time. *See, e.g.,* State ex rel. Jones v. Syler, 936 S.W.2d 805, 808 (Mo.1997), [***17] quoting State ex rel. Stecher v. Dowd, 912 S.W.2d 462, 465 (Mo.1995) (***HN6***[↑] "because time limits and designations of health care providers 'tie the authorizations to [the] particular case and the injuries pleaded', an authorization lacking them is improper because it 'would entitle [defendants] to any and all of [plaintiff's] medical records, from any provider who has ever treated the plaintiff * * * from his birth to the present day'"). Thus, it has been observed, ***HN7***[↑] "although it might be the 'normal practice' for attorneys to draft blanket medical authorizations without time limits * * *, 'it is a practice that creates too great a risk that non-relevant and privileged information may be released to the defendants.'" *Id*., quoting *Stecher*.

[*P26] Appellee's claim that the medical release forms are necessarily broad due to the possibility of a pre-existing injury does not justify a request for blanket authorizations without any limitations in scope and time. *See* St. John v. Napolitano, 274 F.R.D. 12, 17 (D.D.C.2011) (defendant's claim that medical records request involving lengthy time period was necessary because latent medical conditions can manifest themselves in different ways over period of time [***18] "is a weak basis for seeking records over such a broad time period"; request of plaintiff's medical records from many years prior to the events alleged in the complaint are "highly unlikely to contain much relevant evidence," but "are likely to contain sensitive personal information"). Rather,***HN8***[↑] a trial court must balance the privacy right of a plaintiff against a defendant's right to obtain information potentially relating to pre-existing conditions.

[*P27] In the instant case, we conclude that the trial court erred in granting such a broad discovery order with respect to appellant's medical records, and in refusing to conduct an in camera review "in order to ascertain what was causally or [**108] historically related." Ward. Upon remand, we direct the trial court to determine a reasonable time period for the scope of the discovery request, i.e., the court should limit the authorizations to an appropriate number of years prior to the accident. The issue as to potential pre-existing injuries relating to the causes of appellant's neck and back injuries can be adequately explored based upon a reasonable time period relative to the accident at issue. Once the court has established reasonable limitations

[***19] as to scope and time, it "should implement appropriate measures to determine whether any of the records are covered by the physician-patient privilege and how to protect any records that are subject to that privilege." *Randall at ¶ 15*.

[*P28] Appellant further contends the authorizations she was ordered to execute included a blanket request for her medical bills. Appellant maintains she provided all medical bills received from each medical provider for neck and back treatment subsequent to the collision, including bills from both medical providers and her health insuring corporation.

[*P29] In response, appellee argues that certain medical billing and payment information submitted by appellant appears to be incorrect. Appellee further argues, however, that this court does not have jurisdiction to review issues arising from the trial court's order with respect to the releases for billing and payment records. Specifically, appellee contends that the only information he seeks with respect to the authorizations directed to Mt. Carmel West and Integrated Pain Solutions are billing and payment information, not medical records. Appellee argues that, in light of appellant's representations throughout the [***20] litigation that she has provided all of the medical billing information from the above providers, there are no existing privilege issues with respect to those materials.

[*P30] This court has previously held, ***HN9***[⬆] "[t]o the extent an order pertains to matters other than those concerning discovery of privileged matters, the order is deemed interlocutory and therefore not final and appealable." *Legg at ¶ 16*. Upon review, we agree with appellee that this court lacks jurisdiction over the discovery issues relating to medical billing, as the dispute over these records appears to be based upon appellant's contention that the request is overbroad and that she has already turned over all relevant materials, not that the billing and payment records implicate privileged materials. *See Hope Academy Broadway Campus v. White Hat Mgmt., LLC, 10th Dist. No. 12AP-116, 2013-Ohio-911, ¶ 43* (trial court ruling not a final appealable order; appellate courts have declined to consider arguments that materials to be produced under a discovery order are not relevant). Thus, to the extent appellant's assignments of error challenge the trial court's order as it relates to billing and payment records, such ruling is interlocutory [***21] and not ripe for this court's review at this time.

[*P31] Based upon the foregoing, appellant's first, second, third, and fourth assignments of error are sustained to the extent provided above, the discovery order of the Franklin County Court of Common Pleas granting appellee's motion to compel is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Order reversed and cause remanded.

SADLER and CONNOR, JJ., concur.

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ORC Ann. 2317.02

Current through File 132 of the 134th (2021-2022) General Assembly; acts signed as of as of July 29, 2022.

Page's Ohio Revised Code Annotated > Title 23: Courts — Common Pleas (Chs. 2301 — 2337) > Chapter 2317: Evidence (§§ 2317.01 — 2317.62) > Competency of Witness and Evidence (§§ 2317.01 — 2317.20)

§ 2317.02 Privileged communications.

The following persons shall not testify in certain respects:

(A)

(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by *section 2151.421 of the Revised Code* to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning either of the following:

(a) A communication between a client in a capital case, as defined in *section 2901.02 of the Revised Code*, and the client's attorney if the communication is relevant to a subsequent ineffective assistance of counsel claim by the client alleging that the attorney did not effectively represent the client in the case;

(b) A communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

(B)

(1) A physician, advanced practice registered nurse, or dentist concerning a communication made to the physician, advanced practice registered nurse, or dentist by a patient in that relation or the advice of a physician, advanced practice registered nurse, or dentist given to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by *section 2151.421 of the Revised Code* to have waived any

testimonial privilege under this division, the physician or advanced practice registered nurse may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician, advanced practice registered nurse, 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:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in *section 2305.113 of the Revised Code*, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered 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.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician, advanced practice registered nurse, or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician, advanced practice registered nurse, or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician, advanced practice registered nurse, or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e)

(i) If the communication was between a patient who has since died and the deceased patient's physician, advanced practice registered nurse, or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, advanced practice registered nurse, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2)

(a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to *section 2317.022 of the Revised Code*, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of *section 2317.422 of the Revised Code* does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made.

(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, advanced practice registered nurse, 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, advanced practice registered nurse, or dentist by the patient in question in that relation, or the advice of the physician, advanced practice registered nurse, or dentist given 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, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician, advanced practice registered nurse, or dentist as provided in division (B)(1)(c) of this section, the physician, advanced practice registered nurse, or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of *section 2317.422 of the Revised Code* does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician or advanced practice registered nurse to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient or advanced practice registered nurse-patient relation.

(5)

(a) As used in divisions (B)(1) to (4) of this section, “communication” means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician, advanced practice registered nurse, 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.

(b) As used in division (B)(2) of this section, “health care provider” means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) “Ambulatory care facility” means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. “Ambulatory health care facility” does not include the private office of a physician, advanced practice registered nurse, or dentist, whether the office is for an individual or group practice.

(ii) “Emergency facility” means a hospital emergency department or any other facility that provides emergency medical services.

(iii) “Health care practitioner” has the same meaning as in *section 4769.01 of the Revised Code*.

(iv) “Hospital” has the same meaning as in *section 3727.01 of the Revised Code*.

(v) “Long-term care facility” means a nursing home, residential care facility, or home for the aging, as those terms are defined in *section 3721.01 of the Revised Code*; a residential facility licensed under *section 5119.34 of the Revised Code* that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults; a nursing

facility, as defined in *section 5165.01 of the Revised Code*; a skilled nursing facility, as defined in *section 5165.01 of the Revised Code*; and an intermediate care facility for individuals with intellectual disabilities, as defined in *section 5124.01 of the Revised Code*.

(vi) "Pharmacy" has the same meaning as in *section 4729.01 of the Revised Code*.

(d) As used in divisions (B)(1) and (2) of this section, "drug of abuse" has the same meaning as in *section 4506.01 of the Revised Code*.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, advanced practice registered nurses, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by *section 307.628 of the Revised Code* or the immunity from civil liability conferred by *section 2305.33 of the Revised Code* upon physicians or advanced practice registered nurses who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in *section 2305.33 of the Revised Code* and "advanced practice registered nurse" has the same meaning as in *section 4723.01 of the Revised Code*.

(C)

(1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of *section 2151.421 of the Revised Code* to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(F) A person who, if a party, would be restricted under *section 2317.03 of the Revised Code*, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G)

(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in *section 3319.22 of the Revised Code*, a person licensed under Chapter 4757. of the Revised Code as a licensed professional clinical counselor, licensed professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a 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.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under *section 2151.421 of the Revised Code*.

(H) A mediator acting under a mediation order issued under division (A) of *section 3109.052 of the Revised Code* or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to *section 4931.06 of the Revised Code* or Title II of the "Communications Act of 1934," *104 Stat. 366* (1990), *47 U.S.C. 225*, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

Nothing in this section shall limit any immunity or privilege granted under federal law or regulation.

(J)

(1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, 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:

(a) If the patient or the guardian or other legal representative of the patient gives express consent.

(b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in *section 2305.113 of the Revised Code*, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor'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, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.

(4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to, any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(K)

(1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.

(2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:

(a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.

(b) The individual who received crisis response services gives express consent to the testimony.

(c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L)

(1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about any of the following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply to any of the following:

(a) A criminal action or proceeding involving an offense under *sections 2903.01* to *2903.06 of the Revised Code* if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

History

RS § 5241; S&S 558; S&C 1038; 51 v 57, § 315; 67 v 113, § 314; GC § 11494; Bureau of Code Revision, 10-1-53; 125 v 313 (Eff 10-13-53); 136 v H 682 (Eff 7-28-75); 136 v H 1426 (Eff 7-1-76); 138 v H 284 (Eff 10-22-80); 140 v H 205 (Eff 10-10-84); 141 v H 528 (Eff 7-9-86); 141 v H 529 (Eff 3-11-87); 142 v H 1 (Eff 1-5-88); 143 v S 2 (Eff 11-1-89); 143 v H 615 (Eff 3-27-91); 143 v S 3 (Eff 4-11-91); *144 v S 343* (Eff 3-24-93); *145 v S 121* (Eff 10-29-93); *145 v H 335* (Eff 12-9-94); *146 v S 230* (Eff 10-29-96); *146 v S 223* (Eff 3-18-97); *147 v H 606* (Eff 3-9-99); *148 v H 448* (Eff 10-5-2000); *148 v S 172* (Eff 2-12-2001); *148 v S 180* (Eff 3-22-2001); *148 v H 506* (Eff 4-10-2001); *149 v H 94* (Eff 9-5-2001); *149 v H 533* (Eff 3-31-2003); *149 v H 374* (Eff 4-7-2003); *149 v S 281*. Eff 4-11-2003; *151 v S 19*, § 1, eff. 1-27-06; *151 v H 144*, § 1, eff. 6-15-06; *151 v S 17*, § 1, eff. 8-3-06; *151 v S 8*, § 1, eff. 8-17-06; *151 v S 117*, § 1, eff. 10-31-07; *153 v S 162*, § 1, eff. 9-13-10; *2011 HB 153*, § 101.01, eff. July 1, 2011; *2012 HB 487*, § 101.01, eff. Sept. 10, 2012; *2012 HB 461*, § 1, eff. Mar. 22, 2013; *2013 HB 59*, § 101.01, eff. Sept. 29, 2013; *2014 HB 232*, § 1, eff. July 10, 2014; *2014 hb663*, § 1, effective March 23, 2015; *2016 hb216*, § 1, effective April 6, 2017.

Annotations

Notes

Editor's Notes

This date is provided by the Ohio Secretary of State. The effective date was determined in *State ex rel. Ohio General Assembly v. Brunner (2007 Ohio LEXIS 1954, 2007 Ohio 4460, 115 Ohio St. 3d 103, 873 NE2d 1232*) subject to the filing of a referendum petition.

The provisions of §§ 6 and 7 of *151 v S 117* read as follows:

SECTION 6. The General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The common law established in *Boone v. Vanliner Ins. Co. (2001), 91 Ohio St.3d 209*, *Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638*, and *Peyko v. Frederick (1986), 25 Ohio St.3d 164*, is modified accordingly to provide for judicial review regarding the privilege.

SECTION 7. *Section 2317.02 of the Revised Code* is presented in this act as a composite of the section as amended by Sub. H.B. 144, Sub. S.B. 8, and Am. Sub. S.B. 17 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of *section 1.52 of the Revised Code* that amendments are to

be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 3 of *151 v S 19* read as follows:

SECTION 3. *Section 2317.02 of the Revised Code* is presented in this act as a composite of the section as amended by Am. Sub. H.B. 374, Am. H.B. 533, and Am. Sub. S.B. 281, all of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of *section 1.52 of the Revised Code* that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Amendment Notes

The 2016 amendment by HB 216 inserted “advanced practice registered nurse” or variants throughout the section; substituted “advice of the physician, advanced practice registered nurse, or dentist given” for “physician's or dentist's advice” in the first introductory paragraph of (B)(1) and in (B)(3)(a); inserted “or advanced practice registered nurse-patient “in (B)(4); and added “and ‘advanced practice registered nurse’ has the same meaning as in section 4723.01 of the Revised Code” at the end of (B)(7).

The 2014 amendment by HB 663, added “either of the following” to the end of the introductory language of the second paragraph of (A)(1); added (A)(1)(a); and added the (A)(1)(b) designation.

The 2014 amendment by HB 663 inserted: “either of the following: (a) A communication between a client in a capital case, as defined in section 2901.02 of the Revised Code, and the client’s attorney if the communication is relevant to a subsequent ineffective assistance of counsel claim by the client alleging that the attorney did not effectively represent the client in the case; (b)” in (A)(1).

The 2014 amendment by HB 232 inserted “licensed” preceding “professional” twice in the introductory language of (G)(1).

The 2013 amendment, in (B)(5)(c)(v), substituted “section 5119.34” for “section 5119.22”, substituted “as defined in section 5165.01” for “or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20” following “a nursing facility”, and substituted “skilled nursing facility, as defined in section 5165.01 of the Revised Code; and an intermediate care facility for individuals with intellectual disabilities, as defined in section 5124.01 of the Revised Code” for “facility or portion of a facility certified as a skilled nursing facility under Title XVIII of the ‘Social Security Act,’ 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended”.

The 2012 amendment by HB 461, in the first paragraph of (A)(1), inserted “concerning” following “that relation or” in the first sentence and substituted “reveals the substance of attorney-client communications in a nonprivileged context” for “testifies” in the second sentence.

The 2012 amendment by HB 487, in (B)(5)(c)(v), substituted “a residential facility licensed under section 5119.22” for “an adult care facility, as defined in section 5119.70” and inserted “that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults”; and made a stylistic change.

The 2011 amendment substituted “section 5119.70” for “section 3722.01” in (B)(5)(c)(v).

153 v S 162, effective September 13, 2010, corrected internal references.

151 v S 117, effective October 31, 2007, added (A)(2); and corrected internal references and made minor stylistic changes.

151 v S 8, effective August 17, 2006, in (B)(1)(c) and (2)(a), substituted “a combination of them, a controlled substance, or a metabolite of a controlled substance” for “or alcohol and a drug of abuse”, and inserted “whole” and “blood serum or plasma”; added (B)(5)(d).

151 v S 17, effective August 3, 2006, rewrote (C).

151 v H 144, effective June 15, 2006, rewrote (A) and (B)(1)(e); deleted (B)(3)(c), pertaining to will contest actions; and, in (B)(7), inserted “of the Revised Code” following “307.628”, and “the immunity from civil liability conferred by section”.

151 v S 19, effective January 27, 2006, added (K) and (L).

Notes to Decisions

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—Client's name

—Common law

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—Death of client

—Depositions

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—Employees of attorney

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—Governmental clients

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Attorney—client privilege.

Attorney—client privilege; —Protected communication.

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—Blood tests

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—Wrongful death

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Scope

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—Applicability

Social worker's records

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Waiver

—Not found

Constitutionality.

Defendant had not established, beyond a reasonable doubt, that this provision was facially unconstitutional as he failed to point to a single case wherein the statute was found to be unconstitutional on its face. The defendant's unsupported claim that this provision violated the Fourth Amendment was insufficient to prove that the statute was unconstitutional beyond a reasonable doubt. *State v. Gubanich, 2022-Ohio-2815, 194 N.E.3d 850, 2022 Ohio App. LEXIS 2661 (Ohio Ct. App., Medina County 2022)*.

Adoption records generally

Trial court abused its discretion when it ordered the production of certain medical records in a guardianship proceeding without first conducting an in camera inspection of the records to determine their whether they were protected by privilege and if they were relevant to the proceedings as defined in Civ.R. 26. *In re Guardianship of Sharp, 2014-Ohio-3613, 2014 Ohio App. LEXIS 3560 (Ohio Ct. App., Muskingum County 2014)*.

Because the trial court had not yet journalized a case plan, and the county children services board failed to obtain a court-ordered assessment, the supplemental assessment voluntarily obtained by the father was not admissible at the adjudicatory hearing, absent any suggestion in the record that the father gave express consent that the testimony be admitted at the hearing; therefore, the child was adjudicated a dependent child based on evidence that was not properly before the trial court. *In re L.F., 2014-Ohio-3800, 2014 Ohio App. LEXIS 3726 (Ohio Ct. App., Summit County 2014)*.

Where adoptive parents brought a wrongful adoption action in their own capacity after the child had obtained the age of majority, the department of human services could not compel disclosure of the adoptee's medical and

psychological records without the adoptee's consent: *Sirca v. Medina County Dep't of Human Servs., 145 Ohio App. 3d 182, 762 N.E.2d 407, 2001 Ohio App. LEXIS 3477 (Ohio Ct. App., Medina County 2001)*.

Applicability

Trial court did not err in denying a lawyer's motion to quash and for a protective order related to the attorney's Interest on Lawyers' Trust Accounts (IOLTA) records because IOLTA banking transactions were not confidential communications between the attorney and the client, and, accordingly, the attorney-client privilege did not apply. *Yost v. Schaffner, 2020-Ohio-4225, 2020 Ohio App. LEXIS 3120 (Ohio Ct. App., Guernsey County)*, aff'd, *2020-Ohio-5127, 161 N.E.3d 857, 2020 Ohio App. LEXIS 3988 (Ohio Ct. App., Guernsey County 2020)*.

Proscriptions of constitutional search and seizure requirements and the exclusionary rule were inapplicable to the statutory scheme involving blood draws because there was no governmental action, as the blood draw was taken for medical purposes by a private entity. *State v. Saunders, 2017-Ohio-7348, 2017 Ohio App. LEXIS 3640 (Ohio Ct. App., Morrow County 2017)*.

Attorney-client privilege

Lower court did not err in declining to allow the mother's counsel's inquiry into the financial arrangement between the father and his counsel because it necessarily required the father to reveal potentially privileged communications between himself and counsel; the evidence would not have established that Ohio was an inconvenient forum. *Kraemer v. Kraemer, 2018-Ohio-3847, 2018 Ohio App. LEXIS 4166 (Ohio Ct. App., Butler County 2018)*.

Terminated employees did not make the requisite showing in order to obtain information protected by work product. Because the employer's general counsel was not part of the management team and she provided legal advice in anticipation of a specific concern for possible litigation, the record did not support the employees' claim that she simply assisted the employer (the county housing authority) with its business decisions or a human relations matter. *Watson v. Cuyahoga Metro. Hous. Auth., 2014-Ohio-1617, 2014 Ohio App. LEXIS 1555 (Ohio Ct. App., Cuyahoga County 2014)*.

Case was remanded for the trial court to determine what requests were work-product and whether an insurer had shown good cause to permit their disclosure because the trial court erred in failing to distinguish between attorney-client communications and attorney work-product; the trial court did not address the issue of the work-product doctrine but instead, concluded that there was no privilege at all. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

In a legal malpractice case arising from an underlying case in which a voluntarily dismissed complaint was not timely refiled, a client's counsel was properly disqualified, under Ohio R. Prof. Conduct 3.7, because counsel was a necessary witness as, inter alia, counsel's testimony was not barred by the attorney-client privilege in *R.C. 2317.02(A)(1)*, since the testimony did not concern any communication from the client to counsel or any advice given by counsel to the client. *Rock v. Sanislo, 2009-Ohio-6913, 2009 Ohio App. LEXIS 5799 (Ohio Ct. App., Medina County 2009)*.

Hospital official's blanket assertion in an affidavit that the hospital's unusual occurrence reports contained confidential communications between hospital personnel and the hospital's attorneys was insufficient to substantiate the existence of the attorney-client privilege. *Ward v. Summa Health Sys., 2009-Ohio-4859, 184 Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009)*, aff'd, *2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

Because defendant insured was not seeking to compel attorney testimony, the protection against disclosure under *R.C. 2317.02(A)* did not apply, and an amendment to *R.C. 2317.02(A)* that did not become effective until after suit was filed was not expressly made retroactive to pending cases, it did not apply in the instant case, and it was not

necessary to interpret its scope. *In re Professionals Direct Ins. Co., 578 F.3d 432, 2009 FED App. 0306P, 2009 U.S. App. LEXIS 18966 (6th Cir. 2009)*.

Investigative report prepared by the port authority's outside counsel was excepted by the attorney-client privilege from disclosure under the public records act: *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth., 2009-Ohio-1767, 121 Ohio St. 3d 537, 905 N.E.2d 1221, 2009 Ohio LEXIS 1014 (Ohio 2009)*.

When an insurer's bad faith was alleged and the insurer sent a notice to take the deposition of the suing parties' counsel to that counsel, it was not an abuse of discretion to deny a protective order, under Civ.R. 26(C), to prohibit the deposition, because (1) facts surrounding counsel's negotiations with the insurer's agents were relevant, and (2) counsel could object to any specific questions seeking information that was privileged, under *R.C. 2317.02(A)(1)*, or protected by the work product doctrine. *Kirtos v. Nationwide Ins. Co., 2008-Ohio-870, 2008 Ohio App. LEXIS 725 (Ohio Ct. App., Mahoning County 2008)*.

Trial court did not abuse its discretion by refusing to give another jury instruction concerning the attorney-client privilege where it had already instructed the jury concerning the privilege: *Sicklesmith v. Hoist, 2006-Ohio-6137, 169 Ohio App. 3d 470, 863 N.E.2d 677, 2006 Ohio App. LEXIS 6103 (Ohio Ct. App., Columbiana County 2006)*.

In an executor's suit for judicial construction and reformation of a trust, the trial court erred in excluding the testimony of the attorney who drafted the trust on the ground that the executor had waived the attorney-client privilege in *R.C. 2317.02(A)* when she filed the suit because the Ohio Supreme Court has rejected the doctrine of implied waiver. *Smith v. Smith, 2006-Ohio-6975, 2006 Ohio App. LEXIS 6935 (Ohio Ct. App., Hamilton County 2006)*.

Since the requested information could have fallen under the umbrella of either opinion work product or ordinary fact work product, the possibility of two differing forms of protection under the attorney-client privilege necessitated an evidentiary hearing. Any blanket grant compelling discovery, under Civ.R. 26, 37(A)(2), and 34, was an abuse of discretion because the trial court had to first conduct a hearing to determine the nature of the privilege. *Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006)*.

Defendant was not denied a fair trial as the record failed to reflect any coercion by the trial court; when defendant gave a written statement to the police in which he characterized the property deed as the one he gave to his lawyer to have his ex-wife (the victim) sign, he voluntarily disclosed a matter protected by his attorney-client privilege and, therefore, he waived that privilege. He made an informed decision to waive the privilege and he later testified on his own behalf to explain his written statement. *State v. Storey, 2006-Ohio-3498, 2006 Ohio App. LEXIS 3441 (Ohio Ct. App., Cuyahoga County 2006)*.

Trial court did not abuse its discretion under *R.C. 2317.02(A)* where it denied a construction company's motion to compel the file and complete trial testimony of the company's clients' attorney, and where it granted the clients' motion for a protective order, as the information disclosed by the clients was not relevant to the case and accordingly, under the tripartite test for determination of whether the privilege was waived, there was no such waiver found; further, the fact that the clients' architect was present while the settlement negotiations were ongoing in the parties' mediation, for which the attorney's file and testimony was sought, was not shown to have constituted a waiver of the attorney-client privilege. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Where plaintiffs sought to withdraw a stipulation of dismissal, as the other clients that plaintiffs' law firm represented in suits against the same defendants had not waived their attorney-client privilege, a magistrate judge properly excluded information about these clients' cases under *R.C. 2317.02(A)*. *Kraras v. Safeskin Corp., 2005 U.S. Dist. LEXIS 31819 (S.D. Ohio Aug. 17, 2005)*.

—Address of client

When the attorney-client privilege exists, the privilege has been held to encompass the protection of the address of the client. While Civil Rule 10(A) requires that every complaint should include the addresses of all the parties, the filing of the complaint does not constitute a waiver of the attorney-client privilege and an attorney may refuse to testify as to a subsequent address of his client: *Waldmann v. Waldmann, 48 Ohio St. 2d 176, 2 Ohio Op. 3d 373, 358 N.E.2d 521, 1976 Ohio LEXIS 730 (Ohio 1976)*.

—Admissible testimony

Testimony of defendant's first attorney was outside the scope of the attorney-client privilege under *R.C. 2317.02(A)(1)* because the testimony revealed neither communication from defendant nor the first attorney's advice to defendant. Defendant's first attorney testified that he made several attempts to get notice of the scheduled trial date to defendant. *State v. Hicks, 2009-Ohio-3115, 2009 Ohio App. LEXIS 2665 (Ohio Ct. App., Highland County 2009)*.

—Attorney as witness to instrument

There was no error in denying the pharmacist's request to call the victim's attorney as a witness because the scope of the letter sent by the attorney to the pharmacist spoke for itself and the intent of the letter would have required the attorney to reveal privileged communications he had with the victim. *Welborn-Harlow v. Fuller, 2013-Ohio-54, 2013 Ohio App. LEXIS 36 (Ohio Ct. App., Wood County 2013)*.

If an attorney acts as a witness to an instrument, particularly where such witnessing is required by statute to render validity to the instrument, the "privilege" statute does not apply and he may be called to testify and may be examined and cross-examined as to the facts and circumstances, properly the subject of such examination: *Sweeney v. Palus, 16 Ohio Op. 2d 373, 172 N.E.2d 925, 86 Ohio Law Abs. 29, 1961 Ohio Misc. LEXIS 343 (Ohio P. Ct. 1961)*.

—Bank accounts

Trial court did not err in overruling the lawyers' objections to the discovery as to interrogatories 5 and 6 based on the attorney-client privilege because they simply sought the identification of their bank accounts and did not seek information protected from disclosure by the attorney-client privilege. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—Banking transactions

Trial court did not err in overruling the lawyers' objections to the discovery based on the attorney-client privilege because IOLTA banking transactions were not confidential communications between an attorney and his or her client. Accordingly, the attorney-client privilege did not apply. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—Burden of proof

Estate beneficiary failed to establish that documents which he requested in estate litigation should have been produced, as even if the attorney-client privilege had been waived as to the value of attorney's fees, the scope of the waiver would have been limited to the fee issue only, and he also failed to show that the work-product exception to the attorney-client privilege applied. *In re Estate of Weiner, 2019-Ohio-2354, 138 N.E.3d 604, 2019 Ohio App. LEXIS 2458 (Ohio Ct. App., Montgomery County 2019)*.

The burden of showing that testimony sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude it: *141 Ohio St. 87, 25 Ohio Op. 225, 47 N.E.2d 388*.

—Client's name

The confidentiality of a client's name or identity is dependent upon several factors: (1) In most instances, the client's name or identity is not one of the facts about which the client seeks advice; therefore, it is, in most instances, not confidential; (2) If the client's name or identity are matters about which the client seeks advice, then the client's name and identity are confidential; (3) The privilege is lost if it is used as a cover for the attorney's cooperation in his client's wrongdoing: *In re Burns, 42 Ohio Misc. 2d 12, 536 N.E.2d 1206, 1988 Ohio Misc. LEXIS 12 (Ohio C.P. 1988)*.

—Common law

Fraud action was barred by the limitations period in *R.C. 2305.09*, and the time period was not tolled by the discovery rule because an insured admitted that his standard policy was to review a declaration page and discuss the policy with his insurance agent; the insured knew that he was paying for separate uninsured/underinsured premiums for each vehicle. Under the common law, the insured impliedly waived his attorney-client privilege, and it was incumbent upon him to provide evidence of the recently discovered facts in order to survive summary judgment; the attorney-client privilege asserted was not based upon the testimonial privilege outlined in *R.C. 2317.02(A)* as the insured was not seeking to preclude his attorney from testifying concerning communication to him or advice given by him. *Beck v. Westfield Nat'l Ins. Co., 2010 Ohio Misc. LEXIS 564 (Ohio C.P. Dec. 3, 2010)*.

Common law attorney-client privilege affords a greater scope of privilege than does *R.C. 2317.02*. *R.C. 2317.02* does not abrogate the common law implied waiver doctrine because the statutory attorney-client privilege is a testimonial privilege. The trial court abused its discretion by compelling discovery of an entire case file without holding an evidentiary hearing or conducting an in camera review: *Grace v. Mastruserio, 2007-Ohio-3942, 182 Ohio App. 3d 243, 912 N.E.2d 608, 2007 Ohio App. LEXIS 3580 (Ohio Ct. App., Hamilton County 2007)*.

The common law rule that confidential communications between attorney and client are privileged is modified by statute in Ohio: *Spitzer v. Stillings, 109 Ohio St. 297, 142 N.E. 365, 2 Ohio Law Abs. 100, 2 Ohio Law Abs. 119, 1924 Ohio LEXIS 421 (Ohio 1924)*.

—Communications protected

Final draft revisions of a custodial account agreement were reviewed, analyzed, and revised by counsel and were integral to the give-and-take communications wherein legal advice was sought and given; thus, these final draft revisions of the agreement were submitted to counsel for the dominant purpose of obtaining legal advice and were protected by the attorney-client privilege. *Jacobs v. Equity Trust Co., 2020-Ohio-6882, 2020 Ohio App. LEXIS 4723 (Ohio Ct. App., Lorain County 2020)*.

Interrogatory Nos. 9 and 11 invaded the attorney-client privilege because, if the lawyers were to identify clients who met the descriptions set forth in the requests, they would have directly, or by reasonable inference, revealed the content of privileged attorney-client communications. Because there had been no claim or showing that any clients waived the attorney-client privilege with respect to such communications, the trial court erred in ordering the lawyers to respond to those requests. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

Interrogatory No. 7 and the clients' request for copies of any checks and deposits that clients made payable to the lawyer to cover tax liabilities invaded the attorney-client privilege because so much had already been disclosed in the requests themselves that identification of clients or production of documents in response to the requests would

in effect reveal privileged attorney-client communications, i.e., by linking clients to the content of particular attorney-client communications. Because the attorney-client privilege had not been waived with respect to such communications, the trial court erred in ordering the lawyers to respond to those requests. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—Company employees

Chief financial officer's counsel was properly allowed to question a company employee, who had changed her testimony, as to whether she had had communications with defense counsel; the attorney-client privilege protected only the substance of the communications, not the fact that the employee had such communications. *Clapp v. Mueller Elec. Co., 2005-Ohio-4410, 162 Ohio App. 3d 810, 835 N.E.2d 757, 2005 Ohio App. LEXIS 3990 (Ohio Ct. App., Cuyahoga County 2005)*.

—Corporations

Trial court did not err in ordering the disclosure of communications between a corporation and its legal counsel because the attorney-client privilege was not applicable to the corporation's affiliates in that the trial court did not abuse its discretion by finding that no attorney-client relationship existed between the corporation's affiliates and the corporation's legal counsel. *MA Equip. Leasing I, LLC v. Tilton, 2012-Ohio-4668, 980 N.E.2d 1072, 2012 Ohio App. LEXIS 4102 (Ohio Ct. App., Franklin County 2012)*.

Contents of communications between a company's attorney and its employees are privileged, not the mere fact that a communication took place. The employee could be asked whether she had discussed certain matters with the attorney: *Clapp v. Mueller Elec. Co., 2005-Ohio-4410, 162 Ohio App. 3d 810, 835 N.E.2d 757, 2005 Ohio App. LEXIS 3990 (Ohio Ct. App., Cuyahoga County 2005)*.

In camera inspection by a trial court of documents that a shareholder requested from a law firm, which represented the shareholder's corporation, was ordered so as to determine the reasonableness of the shareholder's belief that the law firm represented him, as well as the corporation, after the corporation asserted the attorney-client privilege; however, a waiver of the attorney-client privilege by the shareholder so the shareholder could obtain documents that he requested from a law firm, which represented the shareholder's corporation, was defective because the shareholder could not waive the attorney-client privilege as to the corporation. *Stuffleben v. Cowden, 2003-Ohio-6334, 2003 Ohio App. LEXIS 5676 (Ohio Ct. App., Cuyahoga County 2003)*.

—Death of client

In the event of the death of a client, *R.C. 2317.02(A)* authorizes the surviving spouse of that client to waive the attorney-client privilege protecting communications between the deceased spouse and attorneys who had represented that deceased spouse. The attorney of a deceased client may not assert attorney-client privilege to justify refusal to answer questions of a grand jury where the surviving spouse of the attorney's client has waived the privilege in conformity with *R.C. 2317.02(A)*, and the attorney has been ordered to testify by a court: *State v. Doe, 2004-Ohio-705, 101 Ohio St. 3d 170, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (Ohio)*, cert. denied, *543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6968 (U.S. 2004)*.

R.C. 2317.02 did not totally preclude the deposing of the decedent's attorney in a will contest action. The court should have conducted an in camera inspection of the decedent's medical records to determine if there were any privileged communications: *Weierman v. Mardis, 101 Ohio App. 3d 774, 656 N.E.2d 734, 1994 Ohio App. LEXIS 1971 (Ohio Ct. App., Hamilton County 1994)*.

The privilege as to communications between an attorney and client does not expire with the death of the client: *Taylor v. Sheldon, 172 Ohio St. 118, 15 Ohio Op. 2d 206, 173 N.E.2d 892, 1961 Ohio LEXIS 488 (Ohio 1961)*.

Under R.C. 2317.02 (125 v 313) and 2317.03, an attorney who represents both a husband and wife in a transaction may testify concerning such transaction, where, after the decease of one of the parties thereto, the surviving spouse gives his consent: *Alliance First Nat. Bank v. Maus, 100 Ohio App. 433, 60 Ohio Op. 350, 137 N.E.2d 305 (1955)*.

Under this section, communications between the testatrix and the attorney who was the legal advisor of the testatrix respecting the subject matter contained in, and the estate of, her last will and testament, which is involved in the proceedings, are privileged and therefore inadmissible: *108 N.E.2d 101, 64 Ohio Law Abs. 28*.

When the validity of fees paid by an administrator for legal services rendered decedent is challenged on exceptions to the administrator's account, the attorney may testify to matters which are not excluded by this section: *In re Butler's Estate, 137 Ohio St. 96, 17 Ohio Op. 432, 28 N.E.2d 186, 1940 Ohio LEXIS 427 (Ohio 1940)*, [connected case, *137 Ohio St. 115, 17 Ohio Op. 440, 28 N.E.2d 196 (1940)*.].

—Depositions

When an insurer's bad faith was alleged and the insurer sent a notice to take the deposition of the suing parties' counsel to that counsel, it was not an abuse of discretion to deny a protective order, under Civ.R. 26(C), to prohibit the deposition, because (1) facts surrounding counsel's negotiations with the insurer's agents were relevant, and (2) counsel could object to any specific questions seeking information that was privileged, under *R.C. 2317.02(A)(1)*, or protected by the work product doctrine. *Kirtos v. Nationwide Ins. Co., 2008-Ohio-870, 2008 Ohio App. LEXIS 725 (Ohio Ct. App., Mahoning County 2008)*.

—Dissolution matters

Trial court did not abuse its discretion in determining that a husband was not entitled to a separate interest in businesses, and that the businesses constituted marital property rather than separate property under *R.C. 3105.171(A)(6)(a)(vii)*, as he did not show that his parents had given the shares in the businesses exclusively to him, and his testimony regarding gifting was deemed "materially false" and not credible by the trial court; further, the trial court's determination that the husband's attorney's testimony regarding the gifting issue would waive the attorney-client privilege and thus subject him to cross-examination on matters that would have been considered privileged pursuant to *R.C. 2317.02(A)* was proper. *Janosek v. Janosek, 2007-Ohio-68, 2007 Ohio App. LEXIS 59 (Ohio Ct. App., Cuyahoga County 2007)*, writ denied, *2009-Ohio-1098, 2009 Ohio App. LEXIS 863 (Ohio Ct. App., Cuyahoga County 2009)*.

—Employees of attorney

Conversations a client has with her attorney's secretary may be privileged under *R.C. 2317.02*: *Kler v. Mazzeo, 1991 Ohio App. LEXIS 1204 (Ohio Ct. App., Cuyahoga County Mar. 21, 1991)*.

—Evidence of crime

An attorney who receives physical evidence from a third party relating to a possible crime by a client is obligated to relinquish that evidence to law enforcement authorities and must comply with a subpoena to that effect: *In re Original Grand Jury Investigation, 2000-Ohio-170, 89 Ohio St. 3d 544, 733 N.E.2d 1135, 2000 Ohio LEXIS 2062 (Ohio 2000)*.

—Exception

When appellee, the executor of appellant's deceased father, argued that property transferred to appellant, who held a power of attorney, was part of the estate of the father, when the ultimate issue was whether appellant met her burden of proof on the issue of fairness of the underlying transactions, and when the crux of appellant's argument was that she had relied upon the legal advice of the father's attorney, the trial court erred in excluding the attorney's affidavit on the ground that it was subject to attorney-client privilege which had not been waived by appellee. The exception to the privilege pertaining to disputes between parties claiming through deceased clients applied. *Miller v. Shreve (In re Miller), 2014-Ohio-4612, 21 N.E.3d 666, 2014 Ohio App. LEXIS 4510 (Ohio Ct. App., Guernsey County 2014)*.

Trial court erred in issuing its ruling that the crime-fraud exception applied to preclude attachment of the attorney-client privilege prior to giving the attorney the opportunity to respond to the pharmacy's submission of supplemental exhibits, which the trial court relied on in issuing its ruling. The pharmacy did not indicate that it was going to submit materials to support its allegation that the crime-fraud exception applied, nor was there any discussion or admission of exhibits at the hearing. *Lytle v. Mathew, 2014-Ohio-1606, 2014 Ohio App. LEXIS 1549 (Ohio Ct. App., Summit County 2014)*.

Under the self-protection exception to the attorney-client privilege, defendant client was required to produce communications between defendant and other counsel because defendant alleged that plaintiff law firm breached a contract and engaged in malpractice by failing to represent plaintiff in cases related to the shareholder squeeze out dispute in which defendant was represented by plaintiff and plaintiff could defend itself against defendant's counterclaims only by having access to defendant's "other-attorney communications" in the related cases. *Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis, 2013 U.S. Dist. LEXIS 123936 (S.D. Ohio July 12, 2013)*.

Trial court erred in granting an insurer's motion to compel discovery because none the exceptions to the attorney-client privilege applied to the materials the insurer requested. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

Because an insured and an insurer retained their own attorneys in a lawsuit involving a former director of the insured, the joint-representation exception to the attorney-client privilege was not applicable. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

Common interest exception to the attorney-client privilege did not apply because the communications between an insured and an insurer were in keeping with the terms of the insurance policy, rather than the two parties formulating a common legal strategy. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

Lack of good faith exception to the attorney-client privilege was inapplicable because an insurer was able to defend against the allegations of a lawsuit by simply presenting to the trial court what information it had when it made its decisions. *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co., 2013-Ohio-3508, 2013 Ohio App. LEXIS 3613 (Ohio Ct. App., Summit County 2013)*.

When a trial court ordered a party's attorney to testify and provide an accounting, remand of the case was necessary for the trial court to journalize whether it found the crime-fraud exception to the attorney-client privilege to exist, or whether it found that documents simply did not contain privileged communications. *Martin v. Martin, 2012-Ohio-4889, 2012 Ohio App. LEXIS 4271 (Ohio Ct. App., Trumbull County 2012)*.

State was properly denied access to defendant inmate's trial counsel's file pursuant to Crim.R. 17(C), as the State failed to assert that the file was not privileged under the self-protection exception to the attorney'client privilege under *R.C. 2317.02(A)*, but in any event, the exception was inapplicable where the issue did not involve counsel's fee recovery or defense of a legal malpractice claim. *State v. Caulley, 2012-Ohio-2649, 2012 Ohio App. LEXIS 2330 (Ohio Ct. App., Franklin County 2012)*, aff'd, *2013-Ohio-3673, 136 Ohio St. 3d 325, 995 N.E.2d 227, 2013 Ohio LEXIS 1932 (Ohio 2013)*.

Applying state law under *Fed. R. Evid. 501*, documents sought in a legal malpractice case were not discoverable because Ohio would have enforced the attorney-client privilege for the loss prevention communications involved; none of the factors identified in Ohio decisions would have led an Ohio court to recognize an exception. There were other sources of proof, the discussions mostly involved actions or inactions that took place in the past, and the alleged conduct was not criminal, illegal or fraudulent. *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio Feb. 3, 2011)*.

—Fee dispute between attorneys

In an action between attorneys who formerly practiced together alleging breach of an agreement for division of fees, the attorney-client privilege belonged to the client, not to either attorney: *Lightbody v. Rust, 137 Ohio App. 3d 658, 739 N.E.2d 840, 2000 Ohio App. LEXIS 1737 (Ohio Ct. App., Cuyahoga County)*, dismissed, *90 Ohio St. 3d 1424, 735 N.E.2d 901, 2000 Ohio LEXIS 2339 (Ohio 2000)*.

—Freedom of speech

A public employee may not be discharged for exercising free speech rights on an issue of public concern. However, the attorney-client privilege is so strong that it prevails over the right of free speech: *Edwards v. Buckley, 106 Ohio App. 3d 800, 667 N.E.2d 423, 1995 Ohio App. LEXIS 4430 (Ohio Ct. App., Cuyahoga County 1995)*.

—Generally

Resident's writ of mandamus to compel the attorney general's office to provide unredacted copies of requested records was denied as documents covered by the attorney-client privilege, *R.C. 2317.02(A)*, were properly withheld, *R.C. 149.43*; the documents contained material pertinent to the investigation and were transferred to the attorney general's office during the time period it would have been investigating the representative's matter for the attorney general. *State ex rel. Lanham v. DeWine, 2013-Ohio-199, 135 Ohio St. 3d 191, 985 N.E.2d 467, 2013 Ohio LEXIS 252 (Ohio 2013)*.

Trial court did not err in denying a plaintiff's motion to compel the deposition of an attorney because the trial court found that the attorney was not a fact witness in the case, that the summary judgment motion which the attorney's affidavit supported had been abandoned, that the attorney was not filing an affidavit in support of a renewed motion for summary judgment, and that there was no evidence that the attorney's client had waived the attorney-client privilege. *Helfrich v. Madison, 2012-Ohio-551, 2012 Ohio App. LEXIS 484 (Ohio Ct. App., Licking County 2012)*.

R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived. A showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable: *Jackson v. Greger, 2006-Ohio-4968, 110 Ohio St. 3d 488, 854 N.E.2d 487, 2006 Ohio LEXIS 2902 (Ohio 2006)*.

In a legal malpractice action, the client did not waive his attorney-client privilege as to other counsel that he consulted. A party asserting privilege does not place protected materials in issue merely because the materials might be useful to the opposing party's defense: *McMahon v. Shumaker, Loop & Kendrick, LLP, 2005-Ohio-4436, 162 Ohio App. 3d 739, 834 N.E.2d 894, 2005 Ohio App. LEXIS 4020 (Ohio Ct. App., Lucas County 2005)*.

In a prosecution for failure to appear, testimony by the defendant's former counsel that she had provided him with notice of the hearing date did not violate the attorney-client privilege: *State v. Kemper, 2004-Ohio-4050, 158 Ohio App. 3d 185, 814 N.E.2d 540, 2004 Ohio App. LEXIS 3677 (Ohio Ct. App., Clark County 2004)*.

Trial court erred in ruling that the subpoenaed documents involving attorney-client communications fell within an exception to the attorney-client privilege based on fundamental fairness and fair play because there was no allegation of bad faith. *Garcia v. O'Rourke, 2003-Ohio-2780, 2003 Ohio App. LEXIS 2497 (Ohio Ct. App., Gallia County 2003)*.

The court abused its discretion by ordering a party to produce documents claimed to be protected by the attorney-client privilege or work-product doctrine without allowing the party to amend its privilege log or, alternatively, conducting an in camera inspection: *Cargotec, Inc. v. Westchester Fire Ins. Co., 2003-Ohio-7257, 155 Ohio App. 3d 653, 802 N.E.2d 732, 2003 Ohio App. LEXIS 6533 (Ohio Ct. App., Lucas County 2003)*.

A monitoring attorney appointed in a disciplinary action may not review privileged materials without a specific waiver by the client of the respondent: *Allen County Bar Ass'n v. Williams, 2002-Ohio-2006, 95 Ohio St. 3d 160, 766 N.E.2d 973, 2002 Ohio LEXIS 1116 (Ohio 2002)*.

The attorney-client privilege applied to communications between the coroner and a county prosecutor. The attorney-client privilege may be waived when the client and attorney deliberately place the contents of their communications in issue by presenting sworn statements and raising advice of counsel as a defense: *Kremer v. Cox, 114 Ohio App. 3d 41, 682 N.E.2d 1006, 1996 Ohio App. LEXIS 3904 (Ohio Ct. App., Summit County 1996)*, dismissed, *77 Ohio St. 3d 1519, 674 N.E.2d 372, 1997 Ohio LEXIS 173 (Ohio 1997)*.

Where a party moves to strike an attorney's affidavit on the basis that there was a prior attorney-client relationship with the attorney, but such relationship is denied by the attorney, an evidentiary hearing will ordinarily be required to assess the witnesses' credibility: *Maust v. Palmer, 94 Ohio App. 3d 764, 641 N.E.2d 818, 1994 Ohio App. LEXIS 2008 (Ohio Ct. App., Franklin County 1994)*.

Where a motorist contacts an attorney about his involvement in an accident and the attorney then calls the highway patrol to discuss resolving the matter, it is a violation of the attorney-client privilege for the prosecution to introduce a tape of the call at trial: *State v. Shipley, 94 Ohio App. 3d 771, 641 N.E.2d 822, 1994 Ohio App. LEXIS 2196 (Ohio Ct. App., Licking County)*, dismissed, *70 Ohio St. 3d 1465, 640 N.E.2d 527, 1994 Ohio LEXIS 2349 (Ohio 1994)*.

An attorney may not be compelled to disclose the identity of a person who has contacted him for legal advice about a possible hit-and-run accident: *Miller v. Begley, 93 Ohio App. 3d 527, 639 N.E.2d 139, 1994 Ohio App. LEXIS 2565 (Ohio Ct. App., Butler County 1994)*.

The city was the "client" of its chief prosecutor. The prosecutor's pessimistic assessment of the chances of a conviction, based on the likely jury instructions, was not admissible. The fact that it was "leaked" by an unauthorized person did not waive the privilege: *State v. Today's Bookstore, 86 Ohio App. 3d 810, 621 N.E.2d 1283, 1993 Ohio App. LEXIS 1672 (Ohio Ct. App., Montgomery County 1993)*.

The attorney-client privilege belongs to the client, and the only materials protected are those which involve communications with his attorney. The work-product doctrine, on the other hand, belongs to the attorney and assures him that his private files shall remain free from intrusions of opposing counsel in the absence of special circumstances. The work-product doctrine generally protects a broader range of materials than does the attorney-client privilege because the work-product doctrine protects all materials prepared in anticipation of trial. Whether work product prepared during prior litigation is protected by the work-product doctrine must be determined on a case-by-case basis: *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, 82 Ohio App. 3d 322, 612 N.E.2d 442, 1992 Ohio App. LEXIS 4427 (Ohio Ct. App., Montgomery County 1992)*.

An attorney has no right under USConst amend I or *Ohio Const. art I, § 11* to disseminate information protected by the attorney-client privilege: *American Motors Corp. v. Huffstutler, 61 Ohio St. 3d 343, 575 N.E.2d 116, 1991 Ohio LEXIS 1951 (Ohio 1991)*.

A partial, voluntary disclosure of privileged communications can result in the loss of privilege for all other communications which deal with the same subject matter. The rule applies to disclosure of materials covered by an

attorney-client privilege and to disclosure of materials which are protected by the work product doctrine: *Mid-American Nat'l Bank & Trust Co. v. Cincinnati Ins. Co., 74 Ohio App. 3d 481, 599 N.E.2d 699, 1991 Ohio App. LEXIS 2617 (Ohio Ct. App., Wood County 1991)*.

Affidavit of appellant's counsel was admissible where it consisted essentially of communication between counsel for the parties: *Carroll v. Carroll, 1990 Ohio App. LEXIS 1339 (Ohio Ct. App., Columbiana County Apr. 5, 1990)*.

A communication between client and attorney which is not intended to be confidential is not privileged: *Cannell v. Rhodes, 31 Ohio App. 3d 183, 509 N.E.2d 963, 1986 Ohio App. LEXIS 10144 (Ohio Ct. App., Cuyahoga County 1986)*.

When an attorney improperly answers interrogatories propounded to his client, and when, at trial, the client testifies contrary to the answers, the court should conduct an in camera hearing of the offending attorney, under oath, with opposing counsel being permitted to cross-examine the offending attorney as to the answer or answers at issue. The basic purpose of such hearing is to determine to what extent, if any, the party who submitted the interrogatory was prejudiced: *Inzano v. Johnston, 33 Ohio App. 3d 62, 514 N.E.2d 741, 1986 Ohio App. LEXIS 10204 (Ohio Ct. App., Lake County 1986)*.

An attorney representing a spouse in a domestic relations action is not representing the children of the marriage as "clients." In a hearing concerning custody of the children he may be held in contempt if he fails to divulge the address of the children: *Waldmann v. Waldmann, 48 Ohio St. 2d 176, 2 Ohio Op. 3d 373, 358 N.E.2d 521, 1976 Ohio LEXIS 730 (Ohio 1976)*.

Where a person approaches an attorney with the view of retaining his services to act on the former's behalf, an attorney-client relationship is created, and communications made to such attorney during the preliminary conferences prior to the actual acceptance or rejection by the attorney of the employment are privileged communications: *Taylor v. Sheldon, 172 Ohio St. 118, 15 Ohio Op. 2d 206, 173 N.E.2d 892, 1961 Ohio LEXIS 488 (Ohio 1961)*.

Privileged communications between attorney and client under this section assume that the communications are made with the intention of the confidentiality. When confidence ceases, privilege ceases: *Emley v. Selepchak, 76 Ohio App. 257, 31 Ohio Op. 558, 63 N.E.2d 919, 1945 Ohio App. LEXIS 588 (Ohio Ct. App., Medina County 1945)*.

This section, relative to privileged communications, is not violated by an attorney answering in the affirmative the question whether he prepared the will handed to him on the witness stand: *Platte v. Stephens, 27 Ohio Law Abs. 561, 1938 Ohio Misc. LEXIS 1017 (Ohio Ct. App., Montgomery County July 22, 1938)*.

The testimony of an attorney as to a deceased client's sanity, based solely upon his general observation of the client, does not constitute a privileged communication within the meaning of this section: *Heiselmann v. Franks, 48 Ohio App. 536, 2 Ohio Op. 123, 194 N.E. 604, 18 Ohio Law Abs. 553, 1934 Ohio App. LEXIS 314 (Ohio Ct. App., Hamilton County 1934)*.

—Governmental clients

Board of commissioners did not meet its burden of establishing applicability of the attorney-client privilege because all that the former commissioner's testimony established was the attorney's presence in the room and the mere presence of counsel in the room was insufficient to invoke the attorney-client privilege. *Maddox v. Bd. of Comm'rs, 2014-Ohio-1541, 2014 Ohio App. LEXIS 1494 (Ohio Ct. App., Greene County 2014)*.

Attorney-client privilege applies to communications between a state agency and its in-house counsel, even when that counsel is not an assistant attorney general: *State ex rel. Leslie v. Ohio Hous. Fin. Agency, 2005-Ohio-1508, 105 Ohio St. 3d 261, 824 N.E.2d 990, 2005 Ohio LEXIS 701 (Ohio 2005)*.

The attorney-client privilege covers communications between government clients and their attorneys: *Carver v. Township of Deerfield, 139 Ohio App. 3d 64, 742 N.E.2d 1182, 2000 Ohio App. LEXIS 4588 (Ohio Ct. App., Portage County 2000)*.

The attorney-client privilege establishes an exclusion to disclosure under the Ohio Public Records Law, *R.C. 149.43*, of records consisting of communications between attorneys and government clients, even when such records do not fall within the "trial preparation" exception set forth in *R.C. 149.43(A)(4)*, since the release of such records is "prohibited by state law": *Woodman v. Lakewood, 44 Ohio App. 3d 118, 541 N.E.2d 1084, 1988 Ohio App. LEXIS 1899 (Ohio Ct. App., Cuyahoga County 1988)*.

—Hearing required

Since the requested information could have fallen under the umbrella of either opinion work product or ordinary fact work product, the possibility of two differing forms of protection under the attorney-client privilege necessitated an evidentiary hearing. Any blanket grant compelling discovery, under Civ.R. 26, 37(A)(2), and 34, was an abuse of discretion because the trial court had to first conduct a hearing to determine the nature of the privilege. *Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006)*.

—Hospitals

Hospital did not substantiate the existence of an attorney-client privilege as to the unusual occurrence reports: *Ward v. Summa Health Sys., 2009-Ohio-4859, 184 Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009)*, aff'd, *2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

Attorney-client privilege applied to a hospital incident report where it was prepared by a hospital employee for use by its attorneys in anticipation of litigation: *Flynn v. Univ. Hosp., Inc., 2007-Ohio-4468, 172 Ohio App. 3d 775, 876 N.E.2d 1300, 2007 Ohio App. LEXIS 4071 (Ohio Ct. App., Hamilton County 2007)*.

—Identity

Lawyers' argument that the identities of their clients and the documents at issue were within the protective ambit of the attorney-client privilege and, therefore, not discoverable, based solely on the "specialized" nature of their tax practice was rejected. *Pales v. Fedor, 2018-Ohio-2056, 113 N.E.3d 1019, 2018 Ohio App. LEXIS 2227 (Ohio Ct. App., Cuyahoga County 2018)*.

—In camera review

Where an employer retained an attorney after an employee alleged sexual harassment to conduct an investigation and render legal advice, some documents related to the attorney's investigation were privileged and an in camera review to determine whether the attorney-client privilege and the work-product doctrine exempted the investigative documents from discovery or a description of the documents sufficient to make such a determination was required; documents whose existence preceded the attorney's investigation or were created independent of that investigation, the identity of those who participated in the investigation and any recordings or transcripts of the substance of an interview with the employee were not privileged. *Smith v. Tech. House, Ltd., 2019-Ohio-2670, 2019 Ohio App. LEXIS 2780 (Ohio Ct. App., Portage County 2019)*; *2019 Ohio App. LEXIS 278 (June 28, 2019)*.

In an action by a minor patient and her parents against a medical center, alleging that a pediatric cardiologist who performed a cardiac catheterization on the patient was negligently credentialed, as the peer review privilege asserted by the center was closely intertwined with its claim of attorney client privilege, the trial court erred in

compelling production of the documents without allowing the center to produce additional information as to the privilege and in camera inspection before ruling that they be produced. *Cousino v. Mercy St. Vincent Med. Ctr., 2018-Ohio-1550, 111 N.E.3d 529, 2018 Ohio App. LEXIS 1701 (Ohio Ct. App., Lucas County 2018)*.

—Inadvertent disclosure

Although a Litigation Analysis arguably was subject to the attorney-client privilege, the disclosure of paragraphs 18(a) and (b) was properly ordered because the document had been inadvertently disclosed to the workers' counsel, who had had a full opportunity to review the document, analyze its content, and assess its import on the case, the paragraphs dealt directly with issues germane to the case and the information was not provided in the company's responses to discovery. *Tucker v. Compudyne Corp., 2014-Ohio-3818, 18 N.E.3d 836, 2014 Ohio App. LEXIS 3739 (Ohio Ct. App., Cuyahoga County 2014)*.

—In camera review

Trial court abused its discretion by compelling discovery of the employee's entire criminal case file without holding an evidentiary hearing or conducting an in-camera review because the order was overly broad because some of the information may have been subject to a claim of work-product privilege, pursuant to Civ.R. 26(B). To distinguish between protected and unprotected materials, the trial court should have, at a minimum, conducted an evidentiary hearing or undertaken an in-camera review of the case file. *Caiazza v. Mercy Med. Ctr., Inc., 2012-Ohio-3940, 2012 Ohio App. LEXIS 3457 (Ohio Ct. App., Stark County 2012)*.

—Injunction against violation

In order to protect the attorney-client and work product privilege, injunctive relief is appropriate, particularly where it is demonstrated that the attorney has already violated the privilege and threatens to continue such practice: *American Motors Corp. v. Huffstutler, 61 Ohio St. 3d 343, 575 N.E.2d 116, 1991 Ohio LEXIS 1951 (Ohio 1991)*.

—Insurance matters

2007 amendment of *R.C. 2317.02* does not apply in cases related to prejudgment interest proceedings under *R.C. 1343.03(C)* and the determination of a lack of a good faith effort to settle because *R.C. 2317.02* applies only in cases of alleged bad faith in insurance coverage cases, where the client is an insurance company. *Cobb v. Shipman, 2012-Ohio-1676, 2012 Ohio App. LEXIS 1474 (Ohio Ct. App., Trumbull County 2012)*.

Claims-file materials showing an insurer's lack of good faith in processing, evaluating, or refusing to pay a claim are unworthy of the protection afforded by the attorney-client or work-product privilege, regardless of whether the insurer ever denied the claim outright. The trial court abused its discretion by failing to conduct an in camera review of the claims file: *Unklesbay v. Fenwick, 2006-Ohio-2630, 167 Ohio App. 3d 408, 855 N.E.2d 516, 2006 Ohio App. LEXIS 2515 (Ohio Ct. App., Clark County 2006)*.

The critical issue in evaluating the discoverability of otherwise privileged materials in an insurer's claims file is not whether the attorney-client communications related to the existence of coverage, but whether they may cast light on bad faith on the part of the insurer. Attorney work product is discoverable to the same extent as attorney-client communications: *Garg v. State Auto. Mut. Ins. Co., 2003-Ohio-5960, 155 Ohio App. 3d 258, 800 N.E.2d 757, 2003 Ohio App. LEXIS 5297 (Ohio Ct. App., Miami County 2003)*.

Neither the atttorney-client nor the work-product privilege prevented discovery of documents from a business which procured insurance policies on behalf of its clients. Ordinary fact or unprivileged fact work product, such as witness statements and underlying facts, receives lesser protection that opinion work product: *Perfection Corp. v. Travelers*

Cas. & Sur., 2003-Ohio-3358, 153 Ohio App. 3d 28, 790 N.E.2d 817, 2003 Ohio App. LEXIS 3065 (Ohio Ct. App., Cuyahoga County 2003).

In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage: *Boone v. Vanliner Ins. Co., 2001-Ohio-27, 91 Ohio St. 3d 209, 744 N.E.2d 154, 2001 Ohio LEXIS 905 (Ohio)*, cert. denied, *534 U.S. 1014, 122 S. Ct. 506, 151 L. Ed. 2d 415, 2001 U.S. LEXIS 10289 (U.S. 2001)*.

In an *R.C. 1343.03(C)* proceeding for prejudgment interest, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery: *Radovanic v. Cossler, 140 Ohio App. 3d 208, 746 N.E.2d 1184, 2000 Ohio App. LEXIS 4896 (Ohio Ct. App., Cuyahoga County 2000)*.

The defendant's statement taken by his insurer's adjuster and then forwarded to the attorney for defendant was within the attorney-client privilege: *Breech v. Turner, 127 Ohio App. 3d 243, 712 N.E.2d 776, 1998 Ohio App. LEXIS 1663 (Ohio Ct. App., Scioto County 1998)*.

In an *R.C. 1343.03(C)* proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes the discovery of the contents of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered: *Moskovitz v. Mt. Sinai Medical Ctr., 1994 Ohio 324, 69 Ohio St. 3d 638, 635 N.E.2d 331, 1994 Ohio LEXIS 1613 (Ohio)*, cert. denied, *513 U.S. 1059, 115 S. Ct. 668, 130 L. Ed. 2d 602, 1994 U.S. LEXIS 8870 (U.S. 1994)*.

Plaintiff's statement taken by the defendant's insurer's claim representative and subsequently turned over to defendant's counsel after suit commencement, is not privileged from disclosure: *Koller v. W. E. Plechaty Co., 6 Ohio Misc. 57, 35 Ohio Op. 2d 113, 216 N.E.2d 399, 1965 Ohio Misc. LEXIS 268 (Ohio Mun. Ct. 1965)*.

—Jailhouse lawyer

An attorney-client privilege does not apply to communications made to a person claiming to be a jailhouse lawyer: *State v. Fair, 1991 Ohio App. LEXIS 3324 (Ohio Ct. App., Franklin County July 9, 1991)*, dismissed, *62 Ohio St. 3d 1469, 580 N.E.2d 1099, 1991 Ohio LEXIS 2819 (Ohio 1991)*.

—Multiple clients

Trial court erred in finding that two documents were subject to discovery because each of the 11 joint clients shared a joint attorney-client privilege, which protected their communications from compelled disclosure to persons outside the joint representation. Because he could not unilaterally waive the privilege as to the emails, all of which involved other joint clients, he could not show that the privilege was waived. *Galati v. Pettorini, 2015-Ohio-1305, 2015 Ohio App. LEXIS 1242 (Ohio Ct. App., Cuyahoga County 2015)*.

It was unnecessary to determine whether the interrogatories were privileged under the work-product doctrine because they were not discoverable. Because each of the interrogatories asked the attorney to divulge information that directly related to his work in the underlying case, which involved ten other joint clients, pursuant to the joint-client privilege, the interrogatories were covered under attorney-client privilege. *Galati v. Pettorini, 2015-Ohio-1305, 2015 Ohio App. LEXIS 1242 (Ohio Ct. App., Cuyahoga County 2015)*.

Where plaintiffs sought to withdraw a stipulation of dismissal, as the other clients that plaintiffs' law firm represented in suits against the same defendants had not waived their attorney-client privilege, a magistrate judge properly excluded information about these clients' cases under *R.C. 2317.02(A)*. *Kraras v. Safeskin Corp., 2005 U.S. Dist. LEXIS 31819 (S.D. Ohio Aug. 17, 2005)*.

—Not found

Trial court did not err when it ordered an employee of the state agency in charge of Ohio's Medicaid program to answer the question of whether she met with the director of the agency concerning rate reconsideration requests because the question was a simple “yes” or “no” answer that was not subject to confidentiality and nondisclosure and not protected by the attorney-client privilege. *State ex rel. Ohio Acad. of Nursing Homes, Inc. v. Ohio Dep't of Medicaid, 2017-Ohio-8000, 2017 Ohio App. LEXIS 4325 (Ohio Ct. App., Franklin County 2017)*.

Trial court did not err in denying appellants’ motion to quash on the grounds that the communications between the doctor and their uncle were not protected under the attorney-client privilege because they did not prove that the privilege applied to the requested information. There was no evidence from which one could conclude that appellants designated, appointed, or otherwise requested the uncle to act as their agent and representative for purposes of the litigation. Further, appellants never requested an evidentiary hearing and the trial court was not required to hold an evidentiary hearing prior to ruling on a motion to quash. *Zimpfer v. Roach, 2016-Ohio-5176, 2016 Ohio App. LEXIS 3048 (Ohio Ct. App., Shelby County 2016)*.

Although correspondence between counsel for a fire district board and counsel for a fire chief during the pendency of the appeal in a prior proceeding against the fire chief, which discussed the possibility of a settlement in that case, was not a privileged document and should not have been excluded in a subsequent proceeding, there was no reversible error in the exclusion because it had no value, even on the issue of res judicata. *Fulmer v. W. Licking Joint Fire Dist., 2016-Ohio-5301, 2016 Ohio App. LEXIS 3160 (Ohio Ct. App., Licking County 2016)*.

Defendants were not entitled to a protective order barring plaintiff from disclosing or using a letter from their counsel to plaintiff’s counsel; as the letter was not a communication from an attorney to his clients or which contained an attorney’s advice to the clients, but a communication between adversaries in active litigation, it was not protected by the attorney-client privilege. Condos. at Stonebridge Owners’ Ass’n v. K&d *Group, Inc., 2014 Ohio 503, 2014 Ohio App. LEXIS 493 (Feb. 13, 2014)*.

Attorney, who did not file a request for findings of fact and conclusions of law, as required by Civ.R. 52, was properly held in contempt for failing to testify before a grand jury with respect to a conversation that she had with an inmate during the course of her investigation with respect to a postconviction petition filed on behalf of another inmate, who was her client, because some evidence supported the finding that the conversation was not protected by the attorney-client privilege, in that, even though the attorney subsequently represented the client in some capacity, the attorney did not prove that statements were connected with matter for which she had been retained by the inmate. *In re Grand Jury Subpoenas, 2005-Ohio-4607, 2005 Ohio App. LEXIS 4170 (Ohio Ct. App., Scioto County 2005)*.

—Not protected

Trial court did not err when it determined that communications and documents sought by a manufacturer were not protected by the attorney-client privilege under *R.C. 2317.02(A)* as the communication and documents at issue were not communications between a client and an attorney; instead, they were internal communications between attorneys at the law firm and communications between the firm’s attorneys and the attorneys’ co-counsel regarding a document it received from a third party. There was no communication by a client or advice to a client. *Sherwin-Williams Co. v. Motley Rice LLC, 2012-Ohio-809, 2012 Ohio App. LEXIS 703 (Ohio Ct. App., Cuyahoga County 2012)*.

—Presence of third person

The general rule that communications between an attorney and his client in the presence of a third person are not privileged does not apply when such third person is the agent of either the client or the attorney: *Foley v. Poschke, 137 Ohio St. 593, 19 Ohio Op. 350, 31 N.E.2d 845 (1941)*, affirming *66 Ohio App. 227 (1940)]*, discussed in *23 Ohio Op. 419*; *Nicholl v. Bergner, 76 Ohio App. 245, 31 Ohio Op. 529, 63 N.E.2d 828, 1945 Ohio App. LEXIS 596 (Ohio Ct. App., Lorain County 1945)*.

—Protected communication

Trial court erred by relying on defendant's letter to his counsel during sentencing because the contents of the letter were protected by the attorney-client privilege, since it was a communication from defendant to his trial counsel in counsel's professional capacity. Further, none of the discretionary exceptions applied and neither of the relevant statutory privilege waivers were met. *State v. Hoover, 2019-Ohio-4229, 2019 Ohio App. LEXIS 4311 (Ohio Ct. App., Belmont County 2019)*.

—Protective order

Trial court abused its discretion in prohibiting an employee from taking discovery depositions of the employer's attorneys in the employee's action for tortious interference with or destruction of evidence because the trial court's blanket protective order was overly broad, and the attorney deponents had an opportunity to assert the attorney-client and work-product protections if and when they were asked questions regarding information they believed was protected. *Elliott-Thomas v. Smith, 2017-Ohio-702, 79 N.E.3d 606, 2017 Ohio App. LEXIS 693 (Ohio Ct. App., Trumbull County 2017)*, rev'd, *2018-Ohio-1783, 154 Ohio St. 3d 11, 2018 Ohio LEXIS 1106 (Ohio 2018)*.

To properly address whether communications or material sought in pre-trial discovery are subject to the attorney-client privilege, it is, at a minimum, necessary to ask the questions first and for the privilege rule to be invoked, after which, a trial court then can, at hearing, determine if, in fact, privileged matters may be disclosed. *Riggs v. Richard, 2007-Ohio-490, 2007 Ohio App. LEXIS 437 (Ohio Ct. App., Stark County 2007)*.

When a trial court denied a lawyer's motion for a protective order, under Civ.R. 26(C), seeking to limit the lawyer's deposition to matters not protected by the attorney-client privilege in *R.C. 2317.02(A)*, the lawyer's appeal of that denial was premature until the deposition occurred, at which time the lawyer could state her objection to specific questions, fully developing the record for purposes of appeal. *Riggs v. Richard, 2007-Ohio-490, 2007 Ohio App. LEXIS 437 (Ohio Ct. App., Stark County 2007)*.

—Public records

Respondents were correct by asserting that itemized legal bills fell within the attorney-client privilege under this provision because they necessarily revealed confidential information, and it had been determined that the narrative portions of itemized attorney-fee billing statements containing descriptions of legal services performed by counsel were protected by the attorney-client privilege. *State ex rel. Ames v. Baker, 2022-Ohio-171, 2022 Ohio App. LEXIS 147 (Ohio Ct. App., Portage County 2022)*.

As billing statements of an attorney and his law firm for work performed for a city contained narrative descriptions of the legal services performed, they were protected by the attorney-client privilege under *R.C. 2317.02(A)* and were exempt from disclosure under *R.C. 149.43* of the Public Records Act; mandamus relief was not warranted to the records requester. *State ex rel. Anderson v. City of Vermilion, 2012-Ohio-1868, 2012 Ohio App. LEXIS 1636 (Ohio Ct. App., Erie County)*, aff'd in part and rev'd in part, *2012-Ohio-5320, 134 Ohio St. 3d 120, 980 N.E.2d 975, 2012 Ohio LEXIS 2876 (Ohio 2012)*.

Records requested from a school district by a parent were exempt from disclosure under the Ohio Public Records Act, *R.C. 149.43*, pursuant to *R.C. 149.43(A)(1)(v)*, because the school district met its burden of establishing the

applicability of the attorney-client privilege to the itemized attorney-fee bills that were requested by the parent because the statements contained detailed descriptions of work performed by the district's attorneys, statements concerning their communications to each other and insurance counsel, and the issues they researched. Moreover, a letter from the school district's insurance carrier to the district identifying an attorney as the district's attorney and describing the liability and exposure of the district and insurance company in the parent's lawsuit against the district was also protected by the attorney-client privilege. *State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist., 2011-Ohio-6009, 131 Ohio St. 3d 10, 959 N.E.2d 524, 2011 Ohio LEXIS 2972 (Ohio 2011)*.

—Self-incrimination

The privilege against self-incrimination applies when testimony is compelled from a person claiming to be incriminated by disclosure. Where an attorney or the attorney's agent is being subpoenaed, only the attorney-client privilege and the work product doctrine may be invoked to protect the client. A court may hold an in camera hearing to review allegedly privileged material: *State v. Hoop, 134 Ohio App. 3d 627, 731 N.E.2d 1177, 1999 Ohio App. LEXIS 3522 (Ohio Ct. App., Brown County)*, dismissed, *87 Ohio St. 3d 1441, 719 N.E.2d 5, 1999 Ohio LEXIS 3556 (Ohio 1999)*.

—Self-protection exception

In addressing whether the common-law self-protection exception to the attorney-client privilege, permitting an attorney to reveal attorney-client communications when necessary to establish a claim or defense on the behalf of the attorney, applied as an exception to *R.C. 2317.02(A)*, which provided that an attorney shall not testify concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, the court found that recognition of the common-law self-protection exception to the attorney-client privilege as part of Ohio law aided the administration of justice and was supported by decisions of other jurisdictions addressing the issue; therefore, pursuant to the common-law self-protection exception to the attorney-client privilege, an attorney should be permitted to testify concerning attorney-client communications where necessary to collect a legal fee or to defend against a charge of malpractice or other wrongdoing in litigation against a client or former client. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 2010-Ohio-4469, 127 Ohio St. 3d 161, 937 N.E.2d 533, 2010 Ohio LEXIS 2284 (Ohio 2010)*.

—Settlement agreement

Trial court properly concluded that a settlement agreement entered between a tenant and an insurer in earlier case did not constitute a privileged attorney-client communication as it was not compiled in anticipation of a suit; thus, the discovery of the settlement agreement was not barred by *R.C. 2317.02(A)* and/or the attorney-client privilege. *Ro-Mai Indus. v. Manning Props., 2010-Ohio-2290, 2010 Ohio App. LEXIS 1890 (Ohio Ct. App., Portage County 2010)*.

—Subsequent acts by client

Although an attorney may not testify about conversations considered confidential by him and his client, the privilege does not extend to subsequent acts by the client relating to the discussions: *Hawgood v. Hawgood, 33 Ohio Misc. 227, 62 Ohio Op. 2d 427, 294 N.E.2d 681, 1973 Ohio Misc. LEXIS 242 (Ohio C.P. 1973)*.

—Unlawful adoption

Where an attorney assists in the illegal, private placement of a child for adoption, the client's name and address are not privileged: *Lemley v. Kaiser, 6 Ohio St. 3d 258, 452 N.E.2d 1304, 1983 Ohio LEXIS 818 (Ohio 1983)*.

—Waiver

Defendant's testimony waived his attorney-client privilege not only with respect to communications regarding the terms of his plea, but also with respect to whether he had a viable defense to the charges against him; given defendant's testimony, the prosecutor was not precluded by attorney-client privilege from questioning defendant's counsel about the viability of self-defense and whether counsel was aware of the factual bases for the potential defense prior to the plea. *State v. Goodwin, 2020-Ohio-5274, 2020 Ohio App. LEXIS 4121 (Ohio Ct. App., Montgomery County 2020)*.

Attorney's disclosure of client's confidential information was not excused based on the attorney's claim that it was not confidential because it was published in three newspaper articles, as the disclosed information regarding the client's allegedly false statements surrounding a fire that destroyed his property was not part of the known disclosure, and the attorney-client privilege had not been waived. *Disciplinary Counsel v. Shimko, 2019-Ohio-2881, 157 Ohio St. 3d 58, 131 N.E.3d 52, 2019 Ohio LEXIS 1452 (Ohio 2019)*.

With regard to a privileged communication between the Ohio Environmental Protection Agency and its legal counsel that was inadvertently produced to appellee, the trial court erred when it failed to conduct a hearing on whether the agency had waived the attorney-client privilege with regard to that communication. *Morgan v. Butler, 2017-Ohio-816, 85 N.E.3d 1188, 2017 Ohio App. LEXIS 807 (Ohio Ct. App., Franklin County 2017)*.

Appellate court had jurisdiction over a crime victim's challenge regarding the trial court's orders requiring the victim to disclose information to her counsel to then be disclosed to a defense expert because the victim claimed the communications were privileged; however, the victim's appeal was moot because the victim voluntarily disclosed all of the information sought in the orders to the trial court, thereby waiving the privilege. *State v. Hendon, 2017-Ohio-352, 83 N.E.3d 282, 2017 Ohio App. LEXIS 356 (Ohio Ct. App., Summit County 2017)*.

Trial court did not err in determining that the husband did not waive the attorney-client privilege through implied waiver because the statute provided the exclusive means by which privilege communications directly between could attorney and a client could be waived. *Stepka v. McCormack, 2016-Ohio-3103, 66 N.E.3d 32, 2016 Ohio App. LEXIS 1956 (Ohio Ct. App., Lorain County 2016)*.

It was error to grant a motion by company owners to compel discovery compliance in an employee's action, arising from the owners' alleged breach of their verbal promise, because it was unclear without conducting a hearing to evaluate the case-by-case balancing test, whether the employee had waived his attorney-client privilege by voluntarily, but inadvertently, disclosing a memo that contained his attorney's litigation advice. *See v. Haugh, 2014-Ohio-5290, 2014 Ohio App. LEXIS 5129 (Ohio Ct. App., Cuyahoga County 2014)*.

Exclusive means of waiver of attorney-client privilege were not met because the client did not expressly consent, and the individual employees could not waive a privilege that was owned by the entire organization. *Watson v. Cuyahoga Metro. Hous. Auth., 2014-Ohio-1617, 2014 Ohio App. LEXIS 1555 (Ohio Ct. App., Cuyahoga County 2014)*.

Even if the attorney-client privilege had been applicable, the trial court did not err by denying a protective order because the board of commissioner's assertion of the affirmative advice of counsel waived the attorney-client privilege with regard to such advice. The board could not avoid waiver of the attorney-client privilege by disavowing itself of its own answer. *Maddox v. Bd. of Comm'rs, 2014-Ohio-1541, 2014 Ohio App. LEXIS 1494 (Ohio Ct. App., Greene County 2014)*.

Trial court properly denied defendant's motion to withdraw his plea because, by raising an ineffective assistance of counsel claim in postconviction proceedings, he waived the attorney-client privilege. *State v. Montgomery, 2013-Ohio-4193, 997 N.E.2d 579, 2013 Ohio App. LEXIS 4404 (Ohio Ct. App., Cuyahoga County 2013)*.

Trial court has no discretion to impose policy limitations on a surviving spouse's statutory waiver of the decedent's attorney-client privilege. Thus, a court is not to weigh whether there is a conflict between the interests of the

surviving spouse and those of the decedent or the decedent's estate, and the surviving spouse's waiver is not statutorily limited to communications occurring during the period of marriage. *In re Estate of Hohler v. Hohler, 2011-Ohio-5469, 197 Ohio App. 3d 237, 967 N.E.2d 219, 2011 Ohio App. LEXIS 4475 (Ohio Ct. App., Carroll County 2011)*.

Once defendant testified concerning the substance of defendant's communication with defendant's trial attorney concerning whether to tender a plea, that communication was no longer confidential and privileged, so that the trial court did not err in overruling defendant's objection to defendant's former attorney testifying concerning that communication. *State v. Houck, 2010-Ohio-743, 2010 Ohio App. LEXIS 607 (Ohio Ct. App., Miami County 2010)*.

Trial court properly concluded that the attorney-client privilege between a decedent and his attorney was waived by the surviving spouse as, pursuant to *R.C. 2317.02(A)*, trial court's only decision was whether the decedent was married at the time of his death and whether the spouse wished to waive the privilege. There were no limitations on waiver in such an instance. *Estate of Hohler v. Hohler, 2009-Ohio-7013, 185 Ohio App. 3d 420, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878 (Ohio Ct. App., Carroll County 2009)*.

Personal representative voluntarily waived the attorney-client privilege on three occasions because he affirmatively asserted, without being asked, that he acted on the advice of his patent attorneys and voluntarily offered that contention as a defense to counter the fact that he misappropriated his client's trademark rights. It was not forced out of him by the client's counsel on cross-examination; the personal representative could not prevent the patent firm from discussing communications that could absolve it from any wrongdoing—communications that he himself put in issue. *Meyers, Roman, Friedberg & Lewis v. Malm, 2009-Ohio-2577, 183 Ohio App. 3d 195, 916 N.E.2d 832, 2009 Ohio App. LEXIS 2188 (Ohio Ct. App., Cuyahoga County 2009)*.

When a former wife sought relief from a qualified domestic relations order's provision barring the wife's receipt of part of the wife's former husband's pension if the wife remarried before a certain age, it was not an abuse of discretion for a trial court to deny the former husband access to correspondence between the former wife and the former wife's counsel because (1) the former wife did not expressly consent to having counsel produce the correspondence, (2) the former wife did not waive the former wife's attorney-client privilege by filing the former wife's motion for relief, and (3) the former wife did not voluntarily testify about the former wife's conversations or correspondence with counsel. *Bagley v. Bagley, 2009-Ohio-688, 181 Ohio App. 3d 141, 908 N.E.2d 469, 2009 Ohio App. LEXIS 567 (Ohio Ct. App., Greene County 2009)*, overruled in part, *Pearl v. Pearl, 2012-Ohio-4752, 980 N.E.2d 1095, 2012 Ohio App. LEXIS 4160 (Ohio Ct. App., Champaign County 2012)*.

Trial court has no discretion to impose policy limitations on a surviving spouse's statutory waiver of a decedent's attorney-client privilege. Nevertheless, documents prepared in anticipation of litigation may constitute protected work product: *Estate of Hohler v. Hohler, 2009-Ohio-7013, 185 Ohio App. 3d 420, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878 (Ohio Ct. App., Carroll County 2009)*.

Client voluntarily waived the attorney-client privilege when he testified that he knowingly made false statements on a trademark application on the advice of counsel: *Meyers, Roman, Friedberg & Lewis v. Malm, 2009-Ohio-2577, 183 Ohio App. 3d 195, 916 N.E.2d 832, 2009 Ohio App. LEXIS 2188 (Ohio Ct. App., Cuyahoga County 2009)*.

Employer's *Fed. R. Civ. P. 37* motion to compel its former employee's attorney to testify regarding his communications with the employee regarding his settlement authority was granted because the testimony was admissible pursuant to *Fed. R. Civ. P. 26(b)(1)* on two grounds; under *R.C. 2317.02(A)*, because the employee testified that he did not authorize the attorney to accept a settlement offer, he waived the attorney-client privilege. Further, granting settlement authority was not a confidential communication. *Rubel v. Lowe's Home Ctrs., Inc., 580 F. Supp. 2d 626, 2008 U.S. Dist. LEXIS 91198 (N.D. Ohio 2008)*.

Company waived the attorney-client privilege in an e-mail it inadvertently produced to a customer during discovery in a breach of contract action due to an affidavit by a former director of operations for the company that dealt with the same subject matter as the affidavit and was filed with the company's motion for summary judgment prior to the

inadvertent disclosure of the e-mail. *Air-Ride, Inc. v. DHL Express (USA), Inc., 2008-Ohio-5669, 2008 Ohio App. LEXIS 4761 (Ohio Ct. App., Clinton County 2008)*.

R.C. 2317.02 did not abrogate the common-law implied-waiver doctrine because the statutory attorney-client privilege was a testimonial privilege; where the statute was not implicated, the common law applied. The implied-waiver exception to the attorney-client privilege was relevant to records, documents, and communications unless *R.C. 2317.02(A)* applied, in which case the client could only waive the privilege expressly or by testifying on the issue. *Grace v. Mastruserio, 2007-Ohio-3942, 182 Ohio App. 3d 243, 912 N.E.2d 608, 2007 Ohio App. LEXIS 3580 (Ohio Ct. App., Hamilton County 2007)*.

Under Hearn, a party impliedly waives the attorney-client privilege through its own affirmative conduct if (1) assertion of the privilege is the result of some affirmative act, such as filing suit, by the asserting party, (2) through the affirmative act, the asserting party has placed the protected information at issue by making it relevant to the case, and (3) application of the privilege would deny the opposing party access to information vital to its defense. *Gialousis v. Eye Care Assocs., 2007-Ohio-1120, 2007 Ohio App. LEXIS 1042 (Ohio Ct. App., Mahoning County 2007)*.

When a patient sued physicians and their practice for medical malpractice, and the physicians asserted a statute of limitations defense, it was proper for the trial court, after inspecting, in camera, records from a law firm the patient had consulted, to release certain of those records to the physicians because the patient waived her attorney-client privilege, under *R.C. 2317.02(A)*, as to records from that firm concerning the subject matter of her consultation with them because she had filed an affidavit stating that she did not consult them concerning her claim against the physicians, placing the scope of that consultation in issue, and, because the records were vital to the physicians' statute of limitations defense, waiving the privilege. *Gialousis v. Eye Care Assocs., 2007-Ohio-1120, 2007 Ohio App. LEXIS 1042 (Ohio Ct. App., Mahoning County 2007)*.

In an executor's suit for judicial construction and reformation of a trust, the trial court erred in excluding the testimony of the attorney who drafted the trust on the ground that the executor had waived the attorney-client privilege in *R.C. 2317.02(A)* when she filed the suit because the Ohio Supreme Court has rejected the doctrine of implied waiver. *Smith v. Smith, 2006-Ohio-6975, 2006 Ohio App. LEXIS 6935 (Ohio Ct. App., Hamilton County 2006)*.

Attorney-client privilege was not waived under *R.C. 2317.02(A)* for purposes of an attorney's request for disclosure of communications in his former law client's legal malpractice action against him, as her privilege regarding documents from a civil action against a city and its police officers, arising from their arrest of her, was not waived by either of the express methods statutorily indicated and there was no implied waiver. *Jackson v. Greger, 2006-Ohio-4968, 110 Ohio St. 3d 488, 854 N.E.2d 487, 2006 Ohio LEXIS 2902 (Ohio 2006)*.

Defendant was not denied a fair trial as the record failed to reflect any coercion by the trial court; when defendant gave a written statement to the police in which he characterized the property deed as the one he gave to his lawyer to have his ex-wife (the victim) sign, he voluntarily disclosed a matter protected by his attorney-client privilege and, therefore, he waived that privilege. He made an informed decision to waive the privilege and he later testified on his own behalf to explain his written statement. *State v. Storey, 2006-Ohio-3498, 2006 Ohio App. LEXIS 3441 (Ohio Ct. App., Cuyahoga County 2006)*.

Trial court did not abuse its discretion under *R.C. 2317.02(A)* where it denied a construction company's motion to compel the file and complete trial testimony of the company's clients' attorney, and where it granted the clients' motion for a protective order, as the information disclosed by the clients was not relevant to the case and accordingly, under the tripartite test for determination of whether the privilege was waived, there was no such waiver found; further, the fact that the clients' architect was present while the settlement negotiations were ongoing in the parties' mediation, for which the attorney's file and testimony was sought, was not shown to have constituted a waiver of the attorney-client privilege. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Where submitted documents fell into one of three categories: (1) communications soliciting the legal advice that resulted in the drafting of a Memorandum that had been voluntarily and deliberately disclosed; (2) other versions of the Memorandum; and (3) communications between defendant, a client of the law firm addressing legal concerns raised in the Memorandum and prompted by the responses received from third persons to whom the Memorandum was disclosed, the court held that the attorney-client privilege as to those documents had been waived by the client and the law firm pursuant to *R.C. 2317.02*, and therefore those documents were ordered to be disclosed. *Cline v. Reliance Trust Co., 2005 U.S. Dist. LEXIS 26066 (N.D. Ohio Oct. 31, 2005)*.

As *R.C. 2317.02* only addresses the testimonial aspect of the attorney-client privilege, it was not applicable to a dispute as to whether the privilege was waived concerning a subpoena duces tecum for certain documents. That issue must be resolved under the common law of Ohio. *Cline v. Reliance Trust Co., 2005 U.S. Dist. LEXIS 26066 (N.D. Ohio Oct. 31, 2005)*.

The attorney-client privilege was impliedly waived by the party asserting it where he filed an action which placed the protected information at issue by making it relevant to the case and where applying the privilege would deny the opposing party access to information vital to its defense: *Ward v. Graydon, Head & Ritchey, 2001-Ohio-8654, 147 Ohio App. 3d 325, 770 N.E.2d 613, 2001 Ohio App. LEXIS 5340 (Ohio Ct. App., Clermont County 2001)*.

A waiver of the attorney-client privilege did not occur as a result of a witness's deposition testimony during cross-examination because cross-examination testimony is not voluntary, since the client and his counsel do not have control of the questions or the information which is to be elicited: *Carver v. Township of Deerfield, 139 Ohio App. 3d 64, 742 N.E.2d 1182, 2000 Ohio App. LEXIS 4588 (Ohio Ct. App., Portage County 2000)*.

R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived: *State v. McDermott, 1995-Ohio-80, 72 Ohio St. 3d 570, 651 N.E.2d 985, 1995 Ohio LEXIS 1459 (Ohio 1995)*.

When a client brings a malpractice action against his former attorney, he waives the privilege as to any subject pertinent to his claim. DR 4-101(B) authorizes an attorney to reveal confidences as necessary to defend his associates against a claim of wrongful conduct: *Surovec v. LaCouture, 82 Ohio App. 3d 416, 612 N.E.2d 501, 1992 Ohio App. LEXIS 5146 (Ohio Ct. App., Montgomery County 1992)*, dismissed, *66 Ohio St. 3d 1420, 607 N.E.2d 843, 1993 Ohio LEXIS 434 (Ohio 1993)*.

Waiver of the attorney-client privilege occurs when the client discloses communications that were made pursuant to the privilege to a third-party; any such disclosure that is inconsistent with the maintenance of the confidential nature of the attorney-client relationship waives the privilege: *State v. McDermott, 79 Ohio App. 3d 772, 607 N.E.2d 1164, 1992 Ohio App. LEXIS 2450 (Ohio Ct. App., Lucas County)*, dismissed, *65 Ohio St. 3d 1430, 600 N.E.2d 675, 1992 Ohio LEXIS 2549 (Ohio 1992)*.

A court may not require an attorney to answer leading questions in order to determine whether a client waived the privilege by disclosing information to a third party: *State v. McDermott, 73 Ohio App. 3d 689, 598 N.E.2d 147, 1991 Ohio App. LEXIS 3059 (Ohio Ct. App., Lucas County 1991)*.

An attorney may testify about a communication made to him by his client in that relation or his advice to his client if the client voluntarily testifies about that communication or advice in any proceeding in which the client is a party: *Walsh v. Barcelona Associates, Inc., 16 Ohio App. 3d 470, 476 N.E.2d 1090, 1984 Ohio App. LEXIS 10018 (Ohio Ct. App., Franklin County 1984)*.

Where a client authorizes the delivery of information revealed in an attorney-client relationship to a third person, the confidential nature of the communication no longer exists and the privilege against divulging such information may not be invoked: *Hawgood v. Hawgood, 33 Ohio Misc. 227, 62 Ohio Op. 2d 427, 294 N.E.2d 681, 1973 Ohio Misc. LEXIS 242 (Ohio C.P. 1973)*.

If the defendant in a criminal case voluntarily testifies, his attorney may be compelled to testify on the same subject unless barred by the constitutional rights of the defendant: *State v. Crissman, 31 Ohio App. 2d 170, 60 Ohio Op. 2d 279, 287 N.E.2d 642, 1971 Ohio App. LEXIS 474 (Ohio Ct. App., Columbiana County 1971)*.

When a testatrix, in the presence of her attorney who drew the will, asks a witness to look the will over and tell her what he thinks of it, and if it is all right, and the witness reads the will, the acquainting of the witness with all the subject matter of her will in the presence of her attorney constitutes an express waiver of the privilege of attorney and client otherwise assured to her under this section in so far as the contents of the will are concerned: *In re Estate of Eliker, 32 Ohio Law Abs. 465, 1940 Ohio App. LEXIS 1040 (Ohio Ct. App., Darke County June 17, 1940)*.

Attorney—client privilege.

Court sustained the university's second objection because it met its burden to show that the withheld records, with the exception of the final approved versions, fell squarely within a statutory exception since the withheld records, except as noted, facilitated the rendition of legal services or advice for which the attorney-client privilege applied. *Smith v. Ohio State Univ. Off. of Compliance & Integrity, 2022-Ohio-2657, 2022 Ohio Misc. LEXIS 212 (Ohio Ct. Cl. 2022)*.

Attorney—client privilege; —Protected communication.

Defendant properly withheld the 18 emails that contained discussions between defense counsel and employees of defendant because they were privileged attorney-client communications since each of these emails contained comments from defense counsel to defendant about the status of the lawsuit or information written or produced by an employee of defendant at the request of counsel so that counsel could render it legal advice. *N.E. Monarch Constr., Inc. v. Morganti Enter., 2022-Ohio-3551, 2022 Ohio App. LEXIS 3359 (Ohio Ct. App., Cuyahoga County 2022)*.

Blood alcohol test

Trial court did not err when it found that the officer acted in good faith and denied defendant's motion to suppress because given the case represented an issue of first impression for the court, the officer lacked any guidance from the appellate district at the time she requested defendant's blood test results. *State v. Gubanich, 2022-Ohio-2815, 194 N.E.3d 850, 2022 Ohio App. LEXIS 2661 (Ohio Ct. App., Medina County 2022)*.

Police officer's warrantless acquisition of defendant's medical records was in violation of his Fourth Amendment rights as defendant retained a reasonable expectation of privacy in the alcohol-and drug-test results created during his emergency treatment, even the statutes required the hospital to comply with the officer's request for the information and the information was exempt from Ohio's physician-patient privilege; the officer's reliance on the statutes to obtain the records was in good faith, and the exclusionary rule did not require the suppression of those unlawfully obtained test results. *State v. Eads, 2020-Ohio-2805, 154 N.E.3d 538, 2020 Ohio App. LEXIS 1781 (Ohio Ct. App., Hamilton County 2020)*.

Trial court erred in denying defendant's motion to suppress without first finding that the blood-alcohol test performed by a hospital was in fact performed for medical purposes and not an improper warrantless action performed only because the hospital had received request for medical information pursuant to *R.C. 2317.022* from a deputy. *State v. Hepler, 2016-Ohio-2662, 2016 Ohio App. LEXIS 1539 (Ohio Ct. App., Wood County 2016)*.

In a case involving aggravated vehicular homicide and operating under the influence of alcohol or drugs, a motion to suppress evidence was properly granted because there was no substantial compliance with *OAC 3701-53-05* where a nurse who withdrew blood used an alcohol-based antiseptic swab, it was unclear whether a solid anticoagulant was used, as required by *OAC 3701-53-05(C)*, and the blood sample could have been stored at room temperature for as long as 22 hours and 15 minutes, in violation of *OAC 3701-53-05(F)*. In order to be admitted under *R.C. 4511.19(D)(1)(a)*, the sample had to be both withdrawn and analyzed at any health care provider, as defined in *R.C. 2317.02(B)(5)(b)*; the State did not present evidence suggesting that the blood was analyzed at a health care provider. *State v. Oliver, 2010-Ohio-6306, 2010 Ohio App. LEXIS 5269 (Ohio Ct. App., Summit County 2010)*.

Admission of blood alcohol test evidence does not violation the doctor-patient privilege, pursuant to *R.C. 2317.02(B)(1)(b)*; defendant’s conviction for aggravated vehicular assault, was affirmed where, despite defendant’s claims that the trial court erred in admitting blood alcohol evidence taken by a laboratory technician who was not certified, the lab was certified by the major inspection organization for clinical laboratories, and the technician, while not certified, had met all of the educational requirements for certification. *State v. Wells, 2004-Ohio-1026, 2004 Ohio App. LEXIS 902 (Ohio Ct. App., Greene County 2004)*.

Breach of confidentiality

Expressly recognizing the tort of breach of confidentiality in Ohio, the court held that in order to establish a cause of action for breach of confidentiality, a plaintiff must demonstrate an unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship: *Biddle v. Warren Gen. Hosp., 1998 Ohio App. LEXIS 1273 (Ohio Ct. App., Trumbull County Mar. 27, 1998)*, aff'd, *1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999)*.

Burden of proof

Court of Claims erred in ruling against the decedent’s state on grounds that it had failed to carry a burden that was not its to carry by incorrectly shifting the defendant's burden to the plaintiff. Evidence as to the inmate’s mental state leading up to the attack and his psychiatric condition and propensity for violence were discoverable absent Ohio Department of Rehabilitation and Correction demonstrating that they should not be subject to discovery for whatever reason it posited. *Frash v. Ohio Dep't of Rehab. & Corr., 2016-Ohio-360, 59 N.E.3d 566, 2016 Ohio App. LEXIS 311 (Ohio Ct. App., Franklin County 2016)*.

Child abuse

Court concluded that parents failed to demonstrate that trial court erred in allowing the social worker to testify about mother’s admission of prenatal drug use as her admission to social worker that she used fentanyl “a handful of times” shortly before the child was born fell within the meaning of clear and present danger. *In re H.P., 2022-Ohio-778, 2022 Ohio App. LEXIS 698 (Ohio Ct. App., Summit County 2022)*.

As former *R.C. 2151.421(H)* (prior to the amendments by Am. Sub. H.B. 280, Gen. Assem. (Ohio 2008)) made no exception for discovery under Civ.R. 26(B)(1) of abuse reports of nonparties in a civil action by parents of a minor who had an abortion and the physician-patient privilege applied under *R.C. 2317.02*, reports of nonparties were not discoverable; the matter did not arise from a report submitted about the parents' own daughter, such that

§ 2151.421(G)(b) was inapplicable. Roe v. Planned Parenthood Southwest Ohio Region, 2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009).

Where an appellate court previously upheld a trial court's finding that a report by a social worker contained an indication of present or past abuse by defendant, such that it was admissible in his criminal trial on charges of multiple sexual offenses, pursuant to R.C. 2317.02(G)(1)(a), the law of the case doctrine prevented relitigation of that issue on another appeal. State v. Orwick, 2005-Ohio-4444, 2005 Ohio App. LEXIS 4032 (Ohio Ct. App., Hancock County 2005), rev'd in part, 2006-Ohio-2109, 109 Ohio St. 3d 313, 847 N.E.2d 1174, 2006 Ohio LEXIS 1161 (Ohio 2006).

Any privilege under R.C. 2317.02 or 4732.19 is automatically waived under R.C. 2151.42.1(A)(3) in certain child abuse cases: State v. Stewart, 111 Ohio App. 3d 525, 676 N.E.2d 912, 1996 Ohio App. LEXIS 2326 (Ohio Ct. App., Medina County 1996).

Child custody

Any error by the juvenile court in admitting the testimony of the child's physician was harmless because the physician's testimony relating to the child's medical condition and treatments was merely cumulative of evidence adduced from other witnesses' testimony, and the father failed to show how he was prejudiced by the admission of the physician's testimony. In re J.R., 2019-Ohio-1151, 2019 Ohio App. LEXIS 1213 (Ohio Ct. App., Summit County 2019).

Communications a caseworker had with a parent were not privileged according to R.C. 2317.02(G)(1)(a) because whether the parent could provide care and a safe environment for the parent's children was the critical issue for the court in determining whether to grant permanent custody to an agency. In re R.M., 2012-Ohio-4290, 2012 Ohio App. LEXIS 3770 (Ohio Ct. App., Cuyahoga County 2012).

As a mother's mental health was at issue with respect to a permanent custody and parental rights termination proceeding commenced by a county social service agency, and the agency was required to maintain a case plan for the child pursuant to R.C. 2151.412, the mother's mental health and medical records were not privileged or protected from disclosure pursuant to R.C. 2317.02 and Ohio R. Juv. P. 17(G). In re D.E.P., 2009-Ohio-3076, 2009 Ohio App. LEXIS 2575 (Ohio Ct. App., Cuyahoga County 2009).

Assuming, arguendo, that the mother did not seek prenatal care until 37 weeks gestation and that the statement made by the mother relative to her unborn child was privileged, any error in admitting the mother's statements was harmless because overwhelming clear and convincing evidence established that the child could not be returned to his mother's care within a reasonable time and that it was in his best interest to award permanent custody to the agency. In re Henry James M., 2007-Ohio-2830, 2007 Ohio App. LEXIS 2648 (Ohio Ct. App., Fulton County 2007).

When a father who was being treated for bipolar disorder sought custody of his child, he placed his mental health in issue, and his medical records from his psychiatrist could be released to the divorce court in which he sought custody because, under R.C. 2317.02(B), the filing of any civil action by a patient waived the physician-patient privilege as to any communication that related causally or historically to the physical or mental injuries put at issue by such civil action, and, as stated in R.C. 3109.04(F)(1)(e), the mental health of the parents, in a custody action, was of major importance, so § 3109.04 put their mental conditions in issue. Hageman v. Southwest Gen. Health Ctr., 2006-Ohio-6765, 2006 Ohio App. LEXIS 6670 (Ohio Ct. App., Cuyahoga County 2006), aff'd, 2008-Ohio-3343, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008 Ohio LEXIS 1773 (Ohio 2008).

Trial court erred by ordering the release of all of the mother's medical records without first conducting an in camera hearing for inspection of the records because the request was too broad on its face. Although the mother waived the physician-patient privilege, pursuant to R.C. 2317.02(B)(1) and R.C. 3109.04(F)(1)(e), she waived the privilege solely in regard to the issue of custody; her waiver was not a complete abrogation of the physician-patient privilege. Sweet v. Sweet, 2005-Ohio-7060, 2005 Ohio App. LEXIS 6331 (Ohio Ct. App., Ashtabula County 2005).

In the absence of a specific statutory waiver or exception, the testimonial privileges established under R.C. 2317.02(B)(1) (concerning communications between a physician and patient), R.C. 4732.19 (concerning communications between a licensed psychologist and client), and R.C. 2317.02(G) (concerning communications between a licensed counselor or licensed social worker and client) are applicable to communications made by a parent in the course of treatment ordered as part of a reunification plan in an action for dependency and neglect: *In re Wieland, 2000-Ohio-233, 89 Ohio St. 3d 535, 733 N.E.2d 1127, 2000 Ohio LEXIS 2064 (Ohio 2000)*.

By seeking custody of the children in a divorce action, a spouse makes his or her mental and physical condition an element to be considered by the court in awarding custody: *Neftzer v. Neftzer, 140 Ohio App. 3d 618, 748 N.E.2d 608, 2000 Ohio App. LEXIS 5910 (Ohio Ct. App., Clermont County 2000)*.

Appellant waived the physician-patient privilege when he filed the divorce action and sought custody of his children: *Whiteman v. Whiteman, 1995 Ohio App. LEXIS 2700 (Ohio Ct. App., Butler County June 26, 1995)*.

An order requiring a parent who seeks to retain custody of her child to execute a waiver of her rights under R.C. 2317.02 as to communications with her social worker is a final appealable order: *Voss v. Voss, 62 Ohio App. 3d 200, 574 N.E.2d 1175, 1989 Ohio App. LEXIS 2003 (Ohio Ct. App., Cuyahoga County 1989)*.

In an action seeking a determination of dependency and neglect and an order of permanent custody of a child, the statutes of Ohio make no exception to the privilege attaching to the communications between psychiatrist and patient, psychologist and patient (or client), and to the privilege, if it exists, between social workers employed in the office of the psychiatrist and psychologist and client: *In re Decker, 20 Ohio App. 3d 203, 485 N.E.2d 751, 1984 Ohio App. LEXIS 12566 (Ohio Ct. App., Van Wert County 1984)*.

Children services agency records

A defendant is entitled to the court's in camera inspection of children services agency records where the defendant shows that there is a reasonable probability, grounded on some demonstrable fact, that the records contain material relevant to the defense: *State v. Allan, 1996 Ohio App. LEXIS 272 (Ohio Ct. App., Lucas County Feb. 2, 1996)*.

Chiropractors

The physician-patient privilege does not apply to chiropractors: *In re Polen, 108 Ohio App. 3d 305, 670 N.E.2d 572, 1996 Ohio App. LEXIS 106 (Ohio Ct. App., Franklin County 1996)*.

Civil commitment proceedings

R.C. 2317.02 makes no exception for civil commitment proceedings: *In re Miller, 63 Ohio St. 3d 99, 585 N.E.2d 396, 1992 Ohio LEXIS 226 (Ohio 1992)*.

Clergy

Because the religious organizations did not show that the Bodies of Elders letters satisfied the statutory requirements for the clergy privilege, since they did not seek to impart spiritual wisdom, the trial court did not err by ordering their production. *McFarland v. West Congregation of Jehovah's Witnesses, Lorain, OH, Inc., 2016-Ohio-5462, 60 N.E.3d 39, 2016 Ohio App. LEXIS 3356 (Ohio Ct. App., Lorain County 2016)*.

Trial court erred when it ordered the organizations to produce four of the documents because they were protected from disclosure by virtue of the clergy-penitent privilege, since the letters were not secular in nature. However, the trial court did not err when it concluded that the remaining 15 documents were not protected from disclosure by

virtue of either the clergy-penitent privilege or the First Amendment. *McFarland v. West Congregation of Jehovah's Witnesses, Lorain, OH, Inc., 2016-Ohio-5462, 60 N.E.3d 39, 2016 Ohio App. LEXIS 3356 (Ohio Ct. App., Lorain County 2016)*.

Defendant was not entitled to rely on either the confessional or counseling privilege because he and his spiritual advisor did not have a pastoral relationship; neither his spiritual advisor's church nor the church defendant actually attended recognized confession as a sacrament or religious obligation; the spiritual advisor had no training as a pastor or Christian counselor; and the spiritual advisor would have been under a duty to report any information pertaining to a crime disclosed during a Christian counseling session. *State v. Billman, 2013-Ohio-5774, 2013 Ohio App. LEXIS 6064 (Ohio Ct. App., Monroe County 2013)*.

Defendant's attempted sexual battery conviction, under *R.C. 2923.02* and *2907.03(A)(12)*, was not against the manifest weight of the evidence because it was sufficiently proved that defendant was a "cleric," and that defendant's church was legally cognizable, under *R.C. 2317.02*. *State v. Curtis, 2009-Ohio-192, 2009 Ohio App. LEXIS 144 (Ohio Ct. App., Butler County 2009)*.

The legislature did not intend *R.C. 2317.02* to protect persons against disclosures by a counseling minister outside legal proceedings. However, there may be a claim for common law negligence. A cause of action for clergy malpractice is not available when other torts provide a remedy. Disclosures do not constitute an invasion of privacy where they are to a counselee's spouse and the spouse's family, rather than the public at large: *Alexander v. Culp, 124 Ohio App. 3d 13, 705 N.E.2d 378, 1997 Ohio App. LEXIS 3994 (Ohio Ct. App., Cuyahoga County 1997)*.

Psychological counseling and evaluation provided by church authorities to a priest accused of child sexual abuse are privileged under *R.C. 2317.02* if they are performed for treatment purposes. They are not privileged if performed in order to determine the church's response to the misconduct: *Niemann v. Cooley, 93 Ohio App. 3d 81, 637 N.E.2d 943, 1994 Ohio App. LEXIS 207 (Ohio Ct. App., Hamilton County 1994)*.

The clergyman-penitent privilege did not apply in this instance because the challenged testimony concerned only a conversation, and not a confession, between the clergyman and a member of his church: *Radecki v. Schuckardt, 50 Ohio App. 2d 92, 4 Ohio Op. 3d 60, 361 N.E.2d 543, 1976 Ohio App. LEXIS 5851 (Ohio Ct. App., Lucas County 1976)*.

A communication made to a clergyman or priest to be deemed privileged under authority of *R.C. 2317.02*, must apply only to a confession made in the understood pursuance of church discipline which gives rise to the confessional relation and not to a communication of other tenor: *In re Estate of Soeder, 7 Ohio App. 2d 271, 36 Ohio Op. 2d 404, 220 N.E.2d 547, 1966 Ohio App. LEXIS 443 (Ohio Ct. App., Cuyahoga County 1966)*.

Communications, generally

There was no violation of doctor/patient privilege because defendant did not establish that a definitive "communication" was improperly implicated via the doctor's testimony. The doctor's testimony included what test was ordered, why the test was ordered, and his own observations made without even speaking with defendant. *State v. Frangella, 2012 Ohio App. LEXIS 1654 (Ohio Ct. App., Richland County Apr. 25, 2012)*.

The term, "communication," as used in *R.C. 2317.02* relating to privileged communications, includes not only knowledge transmitted by words but also that gained by observations: *Taylor v. Sheldon, 172 Ohio St. 118, 15 Ohio Op. 2d 206, 173 N.E.2d 892, 1961 Ohio LEXIS 488 (Ohio 1961)*.

Counselor-client privilege

In the parties' divorce action, whereupon the trial court adopted the magistrate's parenting determination, there was no error in allowing testimony of a licensed counselor who had conducted private counseling with the husband, as

the counselor was not statutorily disqualified as a witness and the non-privileged communications were a proper subject of testimony. *Roby v. Roby, 2016-Ohio-7851, 2016 Ohio App. LEXIS 4723 (Ohio Ct. App., Washington County 2016)*.

Agency referred a parent to counseling and the referral was journalized in the case plan; the counselor's testimony concerned communications between herself and the parent during these counseling sessions. Therefore, the counselor-patient privilege codified in *R.C. 2317.02(G)(1)* permitted disclosure of the communications between the parent and the counselor. *In re T.J., 2009-Ohio-1844, 2009 Ohio App. LEXIS 1550 (Ohio Ct. App., Preble County 2009)*.

Letter written by the director of clinical services at a treatment center, informing the judge of the behavioral problems that defendant was having in relating with her peers, was not a privileged communication because the director, in writing the letter, was acting as the director of clinical services, not as defendant's counselor; thus, the letter did not contain communications from a counsel to his or her client, and its admission did not violate Evid.R. 101(B). Moreover, by providing information to the trial court that she had admitted herself to the rehab center, defendant voluntarily put her treatment there at issue, allowing the State to rebut defendant's testimony under *R.C. 2317.02(G)(1)(d)*. *State v. Ball, 2009-Ohio-999, 2009 Ohio App. LEXIS 823 (Ohio Ct. App., Ashtabula County 2009)*.

Because the agency referred the mother to counseling and the referral was journalized in the case plan, her statements regarding cocaine use and other communications between herself and her counselor were not privileged, pursuant to *R.C. 2317.02(G)(1)(g)*, in the permanent custody hearing. *In re Brown, 2006-Ohio-2863, 2006 Ohio App. LEXIS 2719 (Ohio Ct. App., Athens County 2006)*.

Trial court erred in not conducting an in camera inspection of the records to determine whether they were medical or psychiatric documents subject to *R.C. 2317.02(B)* or counseling records subject to *R.C. 2317.02(G)*: *Folmar v. Griffin, 2006-Ohio-1849, 166 Ohio App. 3d 154, 849 N.E.2d 324, 2006 Ohio App. LEXIS 1697 (Ohio Ct. App., Delaware County 2006)*.

Because the agency referred the mother to counseling and the referral was journalized in the case plan, her statements regarding cocaine use and other communications between herself and her counselor were not privileged, pursuant to *R.C. 2317.02(G)(1)(g)*, in the permanent custody hearing. *In re Brown, 2006-Ohio-2863, 2006 Ohio App. LEXIS 2719 (Ohio Ct. App., Athens County 2006)*.

Statements made to a licensed psychologist or social worker in the course of a court ordered examination for forensic purposes were not privileged communications pursuant to *R.C. 4732.19*; a mother's various statements were made during course of forensic examinations in her custody case, and were not privileged. *In re Patfield, 2005-Ohio-3769, 2005 Ohio App. LEXIS 3452 (Ohio Ct. App., Lake County 2005)*.

Defendant's failure to invoke the therapist-patient privilege, under *R.C. 2317.02(G)(1)*, regarding the statements that he made to the residential facility (whose function was to provide care for minors with special problems) waived the privilege. *State v. Miller, 2005-Ohio-4032, 2005 Ohio App. LEXIS 3683 (Ohio Ct. App., Champaign County 2005)*.

Juvenile court did not err in allowing the disclosure of and admitting statements that the mother made to her mental health counselors to the effect that she had become frustrated with her first daughter, had forcefully shaken her in response to that frustration, had fantasies about causing further harm to her first daughter, and that she did not want the child, as the statements were related to past or present child abuse, and, thus, were not protected or privileged communications between a counselor and a patient. *In re Hauenstein, 2004-Ohio-2915, 2004 Ohio App. LEXIS 2550 (Ohio Ct. App., Hancock County 2004)*.

Statements made by an individual to a licensed psychologist or licensed independent social worker in the course of an examination ordered by a court for forensic purposes are not communications received "from a client in that

relation," R.C. 2317.02(G)(1): In re Jones, 2003-Ohio-3182, 99 Ohio St. 3d 203, 790 N.E.2d 321, 2003 Ohio LEXIS 1701 (Ohio 2003).

The only privilege applicable to a communication to a psychiatric social worker is the privilege established by R.C. 2317.02(G)(1); communications indicating a clear and present danger to the client or other persons are excluded from this statutory privilege established for social workers: State v. Moore, 1999 Ohio App. LEXIS 1644 (Ohio Ct. App., Montgomery County Apr. 16, 1999).

Although privilege has been consistently held to be in the possession of the individual seeking professional advice, psychologists, psychiatrists and a variety of other counselors have independent obligations to maintain certain confidences as a result of both state and federal laws, rules and regulations. However, a marriage counselor may be compelled to testify where one spouse has already testified about the counseling process and the advice received: Eichenberger v. Eichenberger, 82 Ohio App. 3d 809, 613 N.E.2d 678, 1992 Ohio App. LEXIS 5067 (Ohio Ct. App., Franklin County 1992).

Where the mother of a minor releases to a county prosecutor the contents of records made by a social worker during counseling, the counselor-client relationship as to that minor is waived: State v. Cartee, 1992 Ohio App. LEXIS 6325 (Ohio Ct. App., Vinton County Dec. 8, 1992).

—Sexual abuse exception

Where defendant admitted to a counselor that he had "fondled" an 11-year-old victim, such admission was properly allowed into evidence in defendant's criminal trial on sexual molestation charges, as it was within the exception to the privilege pursuant to R.C. 2317.02(G)(a); however, the admission of other evidence and information that defendant gave the counselor should have been excluded as privileged, and it was prejudicial to defendant where it indicated that he had thought of absconding from the authorities, as that evidence could have been considered as an admission of his guilt. State v. Dunn, 2005-Ohio-5873, 2005 Ohio App. LEXIS 5285 (Ohio Ct. App., Trumbull County 2005).

—Waiver

As a victim did not voluntarily testify as to the nature and discussions of his counseling with a licensed clinical counselor, the counselor could not be compelled to testify on the subject without a valid waiver from the victim; the victim testified at trial, on cross-examination, as to attending counseling, but never testified on the record as to the nature of the counseling or any specific discussions he had with the counselor. State v. Miller, 2016-Ohio-8248, 2016 Ohio App. LEXIS 5097 (Ohio Ct. App., Perry County 2016).

Defendant's failure to invoke the therapist-patient privilege, under R.C. 2317.02(G)(1), regarding the statements that he made to the residential facility (whose function was to provide care for minors with special problems) waived the privilege. State v. Miller, 2005-Ohio-4032, 2005 Ohio App. LEXIS 3683 (Ohio Ct. App., Champaign County 2005).

The inmate had signed a waiver as to mental health services that not all communications were confidential: State v. Farthing, 2001-Ohio-7077, 146 Ohio App. 3d 720, 767 N.E.2d 1242, 2001 Ohio App. LEXIS 5929 (Ohio Ct. App., Greene County 2001).

The mere act of plaintiff's filing a wrongful death action as the personal representative of her deceased son did not waive her privilege under R.C. 2317.02 and 4732.19 as to counseling provided by her psychologist: Colling v. Franklin County Children Services, 76 Ohio App. 3d 736, 603 N.E.2d 338, 1991 Ohio App. LEXIS 6007 (Ohio Ct. App., Franklin County 1991), dismissed, *63 Ohio St. 3d 1467, 590 N.E.2d 1267, 1992 Ohio LEXIS 1155 (Ohio 1992)*.

Court-ordered mental evaluation

R.C. 2945.371(J) permits a defendant's statements during a court-ordered mental evaluation to be used against the defendant on the issue of the defendant's mental condition, but not to prove factual guilt: *State v. Hancock, 2006-Ohio-160, 108 Ohio St. 3d 57, 840 N.E.2d 1032, 2006 Ohio LEXIS 215 (Ohio 2006)*.

Crime-fraud exception

Trial court erred in requiring the disclosure of communications subject to the attorney-client privilege under *R.C. 2317.02(A)* as the crime-fraud exception to the privilege did not apply, in that the communications were not made in furtherance of wrongful conduct. The communications were made for the purpose of defending against claims brought against a law firm by a worker, not for the purpose of actively concealing wrongful conduct. *Sutton v. Stevens Painton Corp., 2011-Ohio-841, 193 Ohio App. 3d 68, 951 N.E.2d 91, 2011 Ohio App. LEXIS 727 (Ohio Ct. App., Cuyahoga County 2011)*.

Dentists

The dentist-patient privilege cannot be invoked to prevent the state dental board from requiring a licensee under investigation to produce records: *Ohio State Dental Bd. v. Rubin, 104 Ohio App. 3d 773, 663 N.E.2d 387, 1995 Ohio App. LEXIS 2546 (Ohio Ct. App., Hamilton County 1995)*.

A dentist or a dental surgeon does not fall within *R.C. 2317.02(A)* and is not granted a privilege from testifying: *Belichick v. Belichick, 37 Ohio App. 2d 95, 66 Ohio Op. 2d 166, 307 N.E.2d 270, 1973 Ohio App. LEXIS 806 (Ohio Ct. App., Mahoning County 1973)*.

Discovery orders

In a complaint alleging defamation and intentional infliction of emotional distress, the trial court did not err in its order compelling the production of forensic imaging of the cellphone because the trial court engaged in the proper analysis; it both weighed the privacy and confidentiality concerns against the necessity of forensic imaging and adopted a protocol with substantial precautions to safeguard against the exposure of confidential or privileged information. *Li v. Du, 2022-Ohio-917, 186 N.E.3d 343, 2022 Ohio App. LEXIS 814 (Ohio Ct. App., Summit County 2022)*.

Environmental Review Appeals Commission erred by granting appellee's motion to compel production of unredacted communications that were protected from disclosure by the attorney-client privilege; each of the three subject e-mails was prepared and submitted to appellant EPA's legal counsel and other EPA employees involved in an investigation and review of the appellee's verified complaint, seeking legal advice and assistance from legal counsel. *Morgan v. Butler, 2017-Ohio-816, 85 N.E.3d 1188, 2017 Ohio App. LEXIS 807 (Ohio Ct. App., Franklin County 2017)*.

Discovery order requiring a driver to sign medical authorizations for release of medical records relating to his eyesight to counsel for one of the pedestrians and allowing counsel to inquire further about his eyesight was overbroad because at least some of the medical records covered by the order were protected under this statute; there was not enough information in the record to decide whether allowing further inquiry about the driver's eyesight was justified. *Harvey v. Cincinnati Ins. Co., 2017-Ohio-9226, 2017 Ohio App. LEXIS 5669 (Ohio Ct. App., Montgomery County 2017)*.

Order requiring appellant to produce certain e-mails directly to a receiver was a "provisional remedy" order that was subject to immediate appeal because the order could require appellant to release documents covered by the

attorney-client privilege without any in camera inspection or evidentiary hearing. *Williamson v. Recovery L.P., 2016-Ohio-1087, 2016 Ohio App. LEXIS 983 (Ohio Ct. App., Franklin County 2016)*.

As *R.C. 2317.02(A)(2)* created a testimonial privilege, it was inapplicable to the production of documents, such that an insurer could not rely on it to avoid producing documents in an insurance coverage dispute. *Little Italy Dev., LLC v. Chi. Title Ins. Co., 2011 U.S. Dist. LEXIS 119698 (N.D. Ohio Oct. 17, 2011)*.

Trial court properly required a bank's attorney to testify as to the efforts that were made to serve property interest holders prior to seeking to serve them by publication in the bank's foreclosure action, as such testimony was not protected by the attorney-client privilege under *R.C. 2317.02(A)* because it did not involve confidential communications between the bank and the attorney; further, the trial court properly did not quash the subpoena to the attorney pursuant to Civ.R. 45(C)(5), as a legal assistant's testimony on the issue was not sufficient. *Huntington Nat'l Bank v. Dixon, 2010-Ohio-4668, 2010 Ohio App. LEXIS 3950 (Ohio Ct. App., Cuyahoga County 2010)*.

Even if a surviving spouse's motion to compel testimony by the attorney for her deceased husband was premature under Civ.R. 37(A)(2) on the ground that it was filed before the attorney had not yet appeared for deposition and refused to answer certain questions, this did not mean that the trial court could not rule that the attorney should testify without asserting attorney-client privilege where the trial court had already appropriately ruled that the privilege was waived; thus, prejudice was lacking by the trial court's granting of the motion to compel. Moreover, the estate filed for a protective order under Civ.R. 26 and, therefore, consented to application of the rule, which allowed the trial court, upon denying the motion, to order the attorney to provide discovery on terms and conditions that were just. *Estate of Hohler v. Hohler, 2009-Ohio-7013, 185 Ohio App. 3d 420, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878 (Ohio Ct. App., Carroll County 2009)*.

Where a medical expert was subpoenaed to produce various information, none of which was privileged, the privilege in *R.C. 2317.02* did not apply and no substantial right for purposes of *R.C. 2505.02(B)(2)* and (4) was affected by the trial court's order denying the expert's motion to quash the subpoena; the expert had an adequate remedy at law through appeal after final judgment was entered. *Fredricks v. Good Samaritan Hosp., 2008-Ohio-3480, 2008 Ohio App. LEXIS 2947 (Ohio Ct. App., Montgomery County 2008)*.

Trial court's order that required an attorney to disclose various discovery logs was error where it encompassed documents that were protected by the attorney-client privilege or the work product doctrine under *R.C. 2317.02(A)(1)*, Ohio R. Prof. Conduct 1.6, and Civ.R. 26(B)(3); the only discoverable items related to a party's correspondence with a third-party that was within the attorney's file. *AultCare Corp. v. Roach, 2007-Ohio-5686, 2007 Ohio App. LEXIS 4995 (Ohio Ct. App., Stark County 2007)*.

Trial court erred in compelling the deposition and trial testimony of a mediator who assisted the parties in reaching a settlement of their contract dispute, and in denying a motion in limine to prevent disclosure of mediation communications, as such matter was privileged under *R.C. 2317.023(B)* and the exceptions of *§ 2317.023(C)(2)* and (4) did not apply where no hearing was held and the parties and the mediator did not all consent to disclosure. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Discovery orders generally

Trial court erred in granting appellee's motion to compel disclosure of appellant's counseling records pursuant to *R.C. 2317.02(G)* in the parties' multiple tort claims against each other, arising from an altercation, as it was unclear without examining the records in camera first whether they were physician or psychiatric records pursuant to *R.C. 2317.02(B)* and (G) and whether the exceptions applied to allow their disclosure; the court should have ordered an in camera review, determined which type of records they were, and found if the exceptions for purposes of disclosure as to each type of record applied. *Folmar v. Griffin, 2006-Ohio-1849, 166 Ohio App. 3d 154, 849 N.E.2d 324, 2006 Ohio App. LEXIS 1697 (Ohio Ct. App., Delaware County 2006)*.

Trial court erred in compelling the deposition and trial testimony of a mediator who assisted the parties in reaching a settlement of their contract dispute, and in denying a motion in limine to prevent disclosure of mediation communications, as such matter was privileged under *R.C. 2317.023(B)* and the exceptions of *§ 2317.023(C)(2)* and (4) did not apply where no hearing was held and the parties and the mediator did not all consent to disclosure. *O'Donnell Constr. Co. v. Stewart, 2006-Ohio-1838, 2006 Ohio App. LEXIS 1686 (Ohio Ct. App., Cuyahoga County 2006)*.

Trial court properly denied a surgeon's motion for a protective order, pursuant to Civ.R. 26(C), where he did not satisfy his burden of showing that documents, requested by his former counsel in an action arising from a motor vehicle accident that the surgeon was involved in, were protected by the attorney-client privilege, pursuant to *R.C. 2317.02*; the surgeon's blanket claim that all documents relating to the fee agreements, billing, and/or fees were specifically protected lacked merit. *Muehrcke v. Housel, 2005-Ohio-5440, 2005 Ohio App. LEXIS 4917 (Ohio Ct. App., Cuyahoga County 2005)*.

Trial court properly determined that an investigation which was initially claimed by a company to have been conducted for purposes of employee safety was not subject to the attorney-client privilege under *R.C. 2317.02(A)*, although the company asserted that the information was privileged because it was conducted in anticipation of litigation and at the suggestion of counsel once the complaint had been filed; the trial court properly granted the motion of the injured machine operator and his wife to compel production, pursuant to Civ.R. 26, as the company's change of reasoning as to why the investigation was performed was in contravention of public policy and there was no showing that the information was privileged. *Harpster v. Advanced Elastomer Sys., L.P., 2005-Ohio-6919, 2005 Ohio App. LEXIS 6220 (Ohio Ct. App., Summit County 2005)*.

In a workplace intentional tort action, a trial court did not abuse its discretion in finding that an employer either produced the necessary documents pursuant to a motion to compel, or that such documents were privileged as work product under Civ.R. 26(B)(3) or under the attorney-client privilege of *R.C. 2317.02(A)* and *2317.021*, based on a review of the documents; as the administratrix for the deceased employee, who sought to compel disclosure, failed to provide the appellate court with the transcript from the proceeding on the motion, as required by App.R. 9(B), the regularity of the proceedings before the trial court were presumed. *Geggie v. Cooper Tire & Rubber Co., 2005-Ohio-4750, 2005 Ohio App. LEXIS 4248 (Ohio Ct. App., Hancock County 2005)*.

Interlocutory discovery orders entered in common-law or equity actions, even those requiring a nonlitigant to produce privileged information, are not immediately appealed notwithstanding their impact on the substantial rights of the parties and nonparties. Such orders may only be appealed after final judgment: *Kelly v. Daly, 99 Ohio App. 3d 670, 651 N.E.2d 513, 1995 Ohio App. LEXIS 3256 (Ohio Ct. App., Montgomery County 1995)*.

A discovery order compelling disclosure of medical records affects a substantial right and the harm from disclosure could not be mitigated on a later merit appeal: *Grant v. Collier, 1992 Ohio App. LEXIS 555 (Ohio Ct. App., Montgomery County Feb. 17, 1992)*.

An order permitting discovery of information which is protected by the physician-patient privilege is a final appealable order: *Talvan v. Siegel, 80 Ohio App. 3d 781, 610 N.E.2d 1120, 1992 Ohio App. LEXIS 3838 (Ohio Ct. App., Franklin County 1992)*.

Discovery, in camera review

In a case which arose from automobile accident, appeal of trial court's order denying defendant's motion for relief from court's order to produce medical records to court for in-camera review, was dismissed because the trial court's order to produce the records did not grant or deny a provisional remedy as it did not address whether records will be disclosed to plaintiffs. Trial court's order was not a final appealable order, therefore, appellate court had no jurisdiction to consider appeal. *Clark v. Boyd, 2022-Ohio-58, 2022 Ohio App. LEXIS 46 (Ohio Ct. App., Richland County 2022)*.

Remand was necessary for an evidentiary hearing or an in camera inspection to determine whether the motion to compel granted discovery of privileged information, because it was undisputed that the trial court did not hold an evidentiary hearing or conduct an in camera review of the requested material, and neither the employer's discovery requests nor the employee's answers were part of the record. *Harvey v. KP Props., 2012-Ohio-276, 2012 Ohio App. LEXIS 228 (Ohio Ct. App., Cuyahoga County 2012)*.

In a negligence case, a trial court erred when it refused to conduct an in-camera inspection of disputed hospital records that were ordered disclosed; an injured party informally asked the trial court to conduct this inspection of at least some of the disputed records, and the trial court was not allowed to ignore *R.C. 2317.02(B)*. *Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009)*.

Trial court erred in denying appellant's motion for protective order as insurer's request for medical information sought "all" of appellant's medical and pharmaceutical records and did not comply with *R.C. 2317.02(B)(3)(a)* by limiting discovery to records causally related to injuries that were relevant to issues in case. Trial court should have conducted in camera inspection pursuant to Civ.R. 26(C) to determine which records were discoverable. *Wooten v. Westfield Ins. Co., 2009-Ohio-494, 181 Ohio App. 3d 59, 907 N.E.2d 1219, 2009 Ohio App. LEXIS 418 (Ohio Ct. App., Cuyahoga County 2009)*.

Motorist's motion to compel a driver to disclose all of her medical records from a five-year period preceding a motor vehicle accident that resulted in a personal injury action by the driver should not have been granted outright without the trial court first conducting an in camera inspection under *R.C. 2317.02(B)* to determine whether the records should remain privileged; only records which were historically or causally connected to the action were to be disclosed. *Cargile v. Barrow, 2009-Ohio-371, 182 Ohio App. 3d 55, 911 N.E.2d 911, 2009 Ohio App. LEXIS 310 (Ohio Ct. App., Hamilton County 2009)*.

Order that partially granted employers' motion to compel the production of an employee's obstetrics/gynecology records in her discrimination action, arising from the alleged improper treatment she received during the course of her two pregnancies, was erroneous where the trial court did not require an in camera review of the records prior to disclosure pursuant to *R.C. 2317.02(B)(3)(a)(iii)* in order to determine which records were causally or historically related to the employee's discrimination claims. *Groening v. Pitney Bowes, Inc., 2009-Ohio-357, 2009 Ohio App. LEXIS 297 (Ohio Ct. App., Cuyahoga County 2009)*.

Property owner's psychiatric and psychological treatment records sought by appellees in their personal injury suit against the owner were privileged and confidential under *R.C. 2317.02*, and the record did not show that a judicially created waiver was appropriate. The trial court erred in ordering all the records be provided directly to appellees; instead, it should have ordered the records delivered under seal so that it could conduct an in camera inspection to determine whether each record was covered by *§ 2317.02(B)* or (G) and whether the conditions for disclosure were present.. *Thompson v. Chapman, 2008-Ohio-2282, 176 Ohio App. 3d 334, 891 N.E.2d 1247, 2008 Ohio App. LEXIS 1955 (Ohio Ct. App., Richland County 2008)*.

Since the injured person claimed that she suffered a jaw injury from the traffic accident underlying her personal injury claim, the trial court properly ordered production of her dental records without an in camera inspection; however, since nothing in the complaint indicated that she was claiming injuries which would have likely been found in her obstetric/gynecological records, the trial court should have conducted in camera review before ordering production of her obstetric/gynecological records. *Patterson v. Zdanski, 2003-Ohio-5464, 2003 Ohio App. LEXIS 4926 (Ohio Ct. App., Belmont County 2003)*.

An order granting a motion to compel production of the personnel file of a health care system doctor for an in-camera inspection was not a final appealable order: *Ingram v. Adena Health Sys., 2001-Ohio-2537, 144 Ohio App. 3d 603, 761 N.E.2d 72, 2001 Ohio App. LEXIS 3466 (Ohio Ct. App., Ross County 2001)*.

Where a medical malpractice action concerned events occurring in 1997, an order allowing discovery of all of the plaintiff's medical records back to 1973 was overly broad. The court must conduct an in camera inspection to

determine which documents are discoverable: *Nester v. Lima Mem'l Hosp., 2000-Ohio-1916, 139 Ohio App. 3d 883, 745 N.E.2d 1153, 2000 Ohio App. LEXIS 5280 (Ohio Ct. App., Allen County 2000)*.

Evidence

—Doctor-patient privilege

Father's claim he was entitled to relief due to the intervening decision in the case of Torres Friedenberg v. Friedenberg which supported his claim to compel the release of mother's mental-health record since without the mental health record the trial court did not satisfy the statute requirement lacked merit because neither the court nor the trial court held that the mother's mental-health records were privileged or irrelevant to the issues in the divorce proceeding. *Rummelhoff v. Rummelhoff, 2022-Ohio-1224, 187 N.E.3d 1079, 2022 Ohio App. LEXIS 516 (Ohio Ct. App., Hamilton County 2022)*.

Assuming, arguendo, that the mother did not seek prenatal care until 37 weeks gestation and that the statement made by the mother relative to her unborn child was privileged, any error in admitting the mother's statements was harmless because overwhelming clear and convincing evidence established that the child could not be returned to his mother's care within a reasonable time and that it was in his best interest to award permanent custody to the agency. *In re Henry James M., 2007-Ohio-2830, 2007 Ohio App. LEXIS 2648 (Ohio Ct. App., Fulton County 2007)*.

Exception

In a legal malpractice matter, the trial court erred in compelling the production of the former client's confidential communications with her subsequent attorneys in the underlying divorce action because the communications did not fall under the self-protection exception to the attorney-client privilege and, as such, the communications were not subject to disclosure on that basis. *Cook v. Bradley, 2015-Ohio-5039, 2015 Ohio App. LEXIS 4886 (Ohio Ct. App., Lorain County 2015)*.

Federal courts generally

In a civil case involving claims based on state law, the existence of a privilege is to be determined in accordance with state, not federal, law: *Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990)*.

There is no common-law rule of physician-patient privilege, and none has been accorded in the federal courts as a general evidentiary principle. However, the basic physician-patient privilege of the Ohio statute will be recognized by a federal district court sitting in Ohio, although the federal court will retain a free hand in defining the scope of such privilege: *Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 20 Ohio Op. 2d 341, 1962 U.S. Dist. LEXIS 3917 (N.D. Ohio 1962)*.

Final appealable order

Order compelling the car accident victim to turn over all medical records from the last 10 years was a final, appealable order because it implicitly included a finding that the victim had waived the privilege by filing the instant action. *Bircher v. Durosko, 2013-Ohio-5873, 2013 Ohio App. LEXIS 6169 (Ohio Ct. App., Fairfield County 2013)*.

In a negligence case, a trial court's judgment entry from August 5, 2009 was a final, appealable order under *R.C. 2505.02*. Even though discovery orders were generally not subject to immediate appeal, there was an exception where a discovery order required the disclosure of communications between a physician and a patient that were

ordinarily privileged under *R.C. 2317.02(B)*. *Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009)*.

Habeas corpus

When ordering a physician to testify before the grand jury concerning communications that he has had with his patient and to deliver records bearing the patient's name, the trial court must limit its order to information that has been shown to be unprivileged; when a physician has been held in contempt and incarcerated as a result of his failure to comply with an order that is not properly limited to unprivileged information, a writ of habeas corpus may be sought: *State ex rel. Buchman v. Stokes, 36 Ohio App. 3d 109, 521 N.E.2d 515, 1987 Ohio App. LEXIS 10512 (Ohio Ct. App., Hamilton County 1987)*.

Health care provider

Results of defendant's blood-alcohol test were properly admitted; because aggravated homicide was an "equivalent offense" to operating a vehicle while under the influence of alcohol, the results of defendant's blood test were properly admitted for purposes of establishing the violation since his blood was withdrawn and analyzed at a "health care provider." Further, at the suppression hearing, the hospital's director of clinical chemistry and toxicology testified that all of the proper protocol was complied with in regard to the collection of defendant's blood sample; since defendant's blood-alcohol test was "medical," and non-forensic, he was unable to establish a proper chain of custody. *State v. Davenport, 2009-Ohio-557, 2009 Ohio App. LEXIS 475 (Ohio Ct. App., Fayette County 2009)*.

History

General Code §§ 11493, 11494 and 11495 (*R.C. 2317.01*, *2317.02* and *2317.03*) relate to the same subject matter-the competency of persons as witnesses, and incompetency of certain testimony. The legislature is presumed to have had the whole subject before it in drafting these three statutes, as shown by the express reference to these several statutes in GC § 11495 (*R.C. 2317.03*). General Code § 11495 (*R.C. 2317.03*) expressly excludes "proceedings involving the validity of a deed, will, or codicil." The judicial branch of the government is not warranted in adding said clause to this section, as the legislature did to GC § 11495 (*R.C. 2317.03*): *Swetland v. Miles, 101 Ohio St. 501, 130 N.E. 22, 1920 Ohio LEXIS 105 (Ohio 1920)*.

Hospital incident reports

Trial court erred when it ordered the hospital to provide a report to plaintiffs in a medical malpractice action because the hospital demonstrated that the nurse's incident report was a communication prepared by its employee for the use of its attorneys in anticipation of litigation. Thus, the hospital demonstrated the existence of the attorney-client relationship and that the communication occurred in the context of that relationship. *Flynn v. Univ. Hosp., Inc., 2007-Ohio-4468, 172 Ohio App. 3d 775, 876 N.E.2d 1300, 2007 Ohio App. LEXIS 4071 (Ohio Ct. App., Hamilton County 2007)*.

Hospital incident reports which are submitted to its legal counsel and to its utilization committee are exempt from discovery under *R.C. 2317.02* and *2305.24*: *Ware v. Miami Valley Hosp., 78 Ohio App. 3d 314, 604 N.E.2d 791, 1992 Ohio App. LEXIS 652 (Ohio Ct. App., Montgomery County 1992)*.

Hospital records

Trial court did not abuse its discretion when it denied the hospital's motion to compel discovery of the patient's medical records because, under *R.C. 2317.02(B)*, the hospital could have discovered the patient's communications

to her doctors, including medical records, but only those that related causally or historically to her claimed injuries. If the hospital believed that it did not have all of the necessary and pertinent records, it could have attempted to subpoena the documents to which it believed it was entitled; the record indicated that the hospital made no effort to do so. *McManaway v. Fairfield Med. Ctr., 2006-Ohio-1915, 2006 Ohio App. LEXIS 1756 (Ohio Ct. App., Fairfield County 2006)*.

Trial court properly refused to suppress the results of defendant's first blood draw as the prosecuting attorney was a law enforcement officer for purposes of *R.C. 2317.02* and the subpoena did not have to strictly comply with the statute; as the results of the first blood draw supported defendant's conviction, the failure to suppress the results of the second blood draw was harmless. *State v. Scharf, 2005-Ohio-4206, 2005 Ohio App. LEXIS 3849 (Ohio Ct. App., Lake County 2005)*.

Where an appellate court did not consider that portion of a trial court order requiring a hospital to provide certain privileged information, the order was a final appealable order pursuant to *R.C. 2505.02(B)(4)* and the hospital's motion for reconsideration was granted and the appeal reinstated. *Walker v. Firelands Cmty. Hosp., 2003-Ohio-2908, 2003 Ohio App. LEXIS 2626 (Ohio Ct. App., Erie County 2003)*.

Admission of hospital records in violation of *R.C. 2317.02* may constitute harmless error: *State v. Webb, 1994-Ohio-425, 70 Ohio St. 3d 325, 638 N.E.2d 1023, 1994 Ohio LEXIS 2092 (Ohio 1994)*, cert. denied, *514 U.S. 1023, 115 S. Ct. 1372, 131 L. Ed. 2d 227, 1995 U.S. LEXIS 2111 (U.S. 1995)*.

The address of a hospital patient who is a potential witness to a fall by another patient is not privileged information under *R.C. 2317.02*: *Hunter v. Hawkes Hosp. of Mt. Carmel, 62 Ohio App. 3d 155, 574 N.E.2d 1147, 1989 Ohio App. LEXIS 1449 (Ohio Ct. App., Franklin County 1989)*.

The evidentiary privilege of *R.C. 2317.02(B)* extends to hospital records containing privileged communications: *State v. McKinnon, 38 Ohio App. 3d 28, 525 N.E.2d 821, 1987 Ohio App. LEXIS 10616 (Ohio Ct. App., Summit County 1987)*.

Any hospital records of a party may not be released to anyone if such matters are privileged, unless such privilege is waived by the party who is the subject of the records: *Pacheco v. Ortiz, 11 Ohio Misc. 2d 1, 463 N.E.2d 670, 1983 Ohio Misc. LEXIS 427 (Ohio C.P. 1983)*.

A waiver of privilege by the party being treated in regard to his hospital records may be either actual or implied, and, absent such waiver, the records may not be released even though a subpoena duces tecum has been properly served upon the custodian of the records: *Pacheco v. Ortiz, 11 Ohio Misc. 2d 1, 463 N.E.2d 670, 1983 Ohio Misc. LEXIS 427 (Ohio C.P. 1983)*.

The Ohio physician-patient privilege does not extend to hospital records, and therefore the production of hospital records will be ordered notwithstanding defendant's assertion of the privilege: *Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 20 Ohio Op. 2d 341, 1962 U.S. Dist. LEXIS 3917 (N.D. Ohio 1962)*.

Hospital records made in connection with examinations made of decedent by physicians engaged by decedent's employer are not privileged communications where such examinations did not include treatment nor advice and clearly were not for the purpose of alleviating decedent's pain nor curing his malady: *Suetta v. Carnegie-Illinois Steel Corp., 144 N.E.2d 292, 75 Ohio Law Abs. 487, 1955 Ohio App. LEXIS 738 (Ohio Ct. App., Mahoning County 1955)*.

Where hospital records include communications between the patient and his physician, such portions of the records are, in the absence of waiver of the privilege, inadmissible in evidence by virtue of the express provisions of this section: *Weis v. Weis, 147 Ohio St. 416, 34 Ohio Op. 350, 72 N.E.2d 245, 1947 Ohio LEXIS 418 (Ohio 1947)*.

Husband-wife privilege

Hospitals' motion for disqualification indicated it intended to seek testimony from the clients' attorney regarding alleged in-person communications at the hospital, telephone calls with representatives of the hospital, physical evidence of alleged recordings, and alleged promises the hospital made to the attorney; none of these matters implicated spousal communications. *Reo v. Univ. Hosps. Health Sys., 2019-Ohio-1411, 131 N.E.3d 986, 2019 Ohio App. LEXIS 1520 (Ohio Ct. App., Lake County 2019)*.

Difficult choice foisted upon married defendants does not render Dayton, Ohio, Rev. Code Gen. Ordinances § 70.121 unconstitutional on its face; assuming, that the ordinance might abrogate spousal privilege in some cases, it would necessarily do so only in those cases in which one spouse is driving with the other in the car. *Toney v. City of Dayton, 2017-Ohio-5618, 94 N.E.3d 179, 2017 Ohio App. LEXIS 2669 (Ohio Ct. App., Montgomery County 2017)*.

Search warrant affidavit containing a wife's statements about the wife's husband was not precluded by the spousal privilege because this privilege applied to testimony at a trial and not to search warrant affidavits. *State v. Fairfield, 2012-Ohio-5060, 2012 Ohio App. LEXIS 4428 (Ohio Ct. App., Cuyahoga County 2012)*.

Trial court erred in ruling that *R.C. 2317.02(D)* prohibited the State from using the testimony of defendant's wife to prosecute defendant because the contemporaneous act of brandishing a firearm while intoxicated, if true, was in no sense behavior constituting a marital "confidence," much less something inspired by the euphoria of a blissful matrimony. No public interest was furthered by prohibiting the wife from testifying against her husband on the weapons charge, even though it was not among those offenses enumerated in *R.C. 2945.42*. *State v. Greaves, 2012-Ohio-1989, 971 N.E.2d 987, 2012 Ohio App. LEXIS 1746 (Ohio Ct. App., Huron County 2012)*.

Defendant did not show that he received ineffective assistance of counsel because counsel did not assert a spousal privilege regarding the testimony of defendant's wife because the statements defendant sought to exclude were made before defendant was married to this person, so they were not subject to the spousal privilege, under *R.C. 2317.02(D)*. *State v. Evans, 2006-Ohio-1425, 2006 Ohio App. LEXIS 1305 (Ohio Ct. App., Montgomery County 2006)*.

When a wife reported to police that her husband was using drugs, a tape of her call to police was not inadmissible at her husband's trial, under the spousal privilege in *R.C. 2317.02(D)*, because it was not a communication between husband and wife. *State v. Jackson, 2005-Ohio-6143, 2005 Ohio App. LEXIS 5529 (Ohio Ct. App., Champaign County 2005)*.

Surgeon's motion for a protective order, pursuant to Civ.R. 26(C), seeking to prevent his wife from being deposed in his malpractice action against his former attorney, was properly denied by the trial court, as the surgeon sought to prevent "any and all" privileged commuincation which occurred during the term of the marriage, and while some matters could have been within the spousal privilege, the all-encompassing protection sought under *R.C. 2317.02(D)* was overly broad. *Muehrcke v. Housel, 2005-Ohio-5440, 2005 Ohio App. LEXIS 4917 (Ohio Ct. App., Cuyahoga County 2005)*.

Defendant could not claim the spousal communication privilege because he and his wife were not living as husband and wife when the wife surreptitiously recorded his phone statements which incriminated him in an arson and the wife obviously had no intention of returning to defendant. *State v. Sparkman, 2004-Ohio-1338, 2004 Ohio App. LEXIS 1184 (Ohio Ct. App., Huron County 2004)*.

The spousal privilege did not apply to the taped conversations, since the parties were separated and living apart: *State v. Shaffer, 114 Ohio App. 3d 97, 682 N.E.2d 1040, 1996 Ohio App. LEXIS 4040 (Ohio Ct. App., Hardin County 1996)*, dismissed, *77 Ohio St. 3d 1543, 674 N.E.2d 1183, 1997 Ohio LEXIS 319 (Ohio 1997)*.

A conversation between spouses is not privileged and is admissible in a criminal trial when the conversation was conducted in the presence or hearing of third persons. Ohio's spousal privilege statutes protect oral communications with one's spouse intended to be private, but do not protect written communications with one's spouse, even though it is reasonably expected that the communication will remain confidential: *State v. Howard, 62*

Ohio App. 3d 910, 577 N.E.2d 749, 1990 Ohio App. LEXIS 4357 (Ohio Ct. App., Clark County 1990), dismissed, *58 Ohio St. 3d 713, 570 N.E.2d 277, 1991 Ohio LEXIS 729 (Ohio 1991)*.

A criminal defendant's privilege to exclude testimony by his spouse as to acts done in the presence of the spouse is, like the privilege to exclude testimony of confidential communications, inapplicable to spouses who are separated and not living as husband and wife: *State v. Bradley, 30 Ohio App. 3d 181, 507 N.E.2d 396, 1986 Ohio App. LEXIS 10065 (Ohio Ct. App., Cuyahoga County 1986)*.

Federal and state parameters of the husband-wife privilege discussed: *Trammel v. United States, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186, 1980 U.S. LEXIS 84 (U.S. 1980)*.

The privilege accorded under the provisions of *R.C. 2317.02* to a husband and wife not to testify "concerning any communication made by one to the other, or an act done by either in the presence of the other" is personal to husband and wife and may not be invoked by a third party: *Diehl v. Wilmot Castle Co., 26 Ohio St. 2d 249, 55 Ohio Op. 2d 484, 271 N.E.2d 261 (1971)*, reversing *21 Ohio App. 2d 191, 50 Ohio Op. 2d 331, 256 N.E.2d 220*.].

The activities of the husband and wife, in driving separate cars on a public street and in the driveway to a public hospital, were activities open to general observation by all those persons who may be, and conceivably were, in the area at the time of the experiment, and testimony of the husband and the wife regarding this experiment is not within the ambit of the statutorily protected communication accorded under the provisions of *R.C. 2317.02*: *Diehl v. Wilmot Castle Co., 26 Ohio St. 2d 249, 55 Ohio Op. 2d 484, 271 N.E.2d 261 (1971)*, reversing *21 Ohio App. 2d 191, 50 Ohio Op. 2d 331, 256 N.E.2d 220*.].

A statement by a husband to his wife concerning his duties and whereabouts for the next few days made in order for her to communicate with him does not come within the true intent and meaning of *R.C. 2317.02* concerning privileged communications between husband and wife: *Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216, 81 Ohio Law Abs. 417, 1958 Ohio App. LEXIS 894 (Ohio Ct. App., Mahoning County 1958)*.

It is just as reasonable to assume that a conversation between husband and wife was held in the presence of a third person as it is to assume that it was not held in the presence of a third person, in the absence of evidence in that respect: *Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216, 81 Ohio Law Abs. 417, 1958 Ohio App. LEXIS 894 (Ohio Ct. App., Mahoning County 1958)*.

The true intent of the legislature in passing *R.C. 2317.02*, providing that a husband and wife shall not testify concerning any communication made by one to the other, was for the protection of the marital relationship and was intended to cover those conversations, or acts, between husband and wife which are confidential in nature, and was not necessarily intended to exclude all types of conversation between married persons: *Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216, 81 Ohio Law Abs. 417, 1958 Ohio App. LEXIS 894 (Ohio Ct. App., Mahoning County 1958)*.

In a proceeding for determination of heirship, where petitioner, claiming to be the natural child of the decedent, was born while his mother was married to a person other than the decedent who later married the mother, evidence of admission by decedent, not in presence of third person, that petitioner is his child is admissible: *Snyder v. McClelland, 83 Ohio App. 377, 38 Ohio Op. 434, 81 N.E.2d 383, 51 Ohio Law Abs. 600, 1948 Ohio App. LEXIS 786 (Ohio Ct. App., Franklin County 1948)*.

Where the record is silent as to the presence of a third person, there is a presumption of admissibility of testimony as to statements between husband and wife during coverture: *F. A. Requarth Co. v. Holland, 78 Ohio App. 493, 34 Ohio Op. 231, 66 N.E.2d 329, 47 Ohio Law Abs. 117, 1946 Ohio App. LEXIS 595 (Ohio Ct. App., Montgomery County 1946)*.

A decedent's widower called as a witness in proceedings involving the administration of decedent's estate, is incompetent under this section to testify to statements and conversations he had had with his wife during the period

of coverture relative to the subject matter in question: *In re Ruhl's Estate, 43 N.E.2d 760, 36 Ohio Law Abs. 250, 1941 Ohio App. LEXIS 1049 (Ohio Ct. App., Franklin County 1941)*.

This section, prohibiting one spouse from testifying to communications or acts of other not made or done in the presence of a third person, does not exclude wife's testimony, in action on an accident and life policy, concerning what she observed immediately after husband's accident though no one else was present: *Marsh v. Preferred Acci. Ins. Co., 89 F.2d 932, 1937 U.S. App. LEXIS 3633 (6th Cir. Ohio)*, cert. denied, *302 U.S. 716, 58 S. Ct. 36, 82 L. Ed. 553, 1937 U.S. LEXIS 840 (U.S. 1937)*, cert. denied, *302 U.S. 715, 58 S. Ct. 36, 82 L. Ed. 552, 1937 U.S. LEXIS 839 (U.S. 1937)*.

In an action by a former husband against his divorced wife to have her declared a trustee for him as to property purchased with his money, he cannot testify as to communication between himself and his wife before the divorce, unless in the known presence or hearing of a third person who is a competent witness: *Dischner v. Dischner, 16 Ohio App. 86, 21 Ohio L. 260 (1921)*, motion to certify record overruled, Dischner v. Dischner, 20 Ohio L. 84 (1922).].

In an action on a promissory note, where one of the makers is denying that he executed the note or that there was consideration therefor, it is not error to permit the widow of the other maker to testify as to certain matters which arose between herself and her husband when no other person competent to be witness was present: *31 Ohio Cir. Dec. 157, 20 Ohio C.C. 113*.

—Waiver

Failure to object at trial to questions posed by the state to appellant's husband constituted a waiver of *R.C. 2317.02(D)*: *State v. Simpson, 1994 Ohio App. LEXIS 4472 (Ohio Ct. App., Lake County Sept. 30, 1994)*, dismissed, *71 Ohio St. 3d 1477, 645 N.E.2d 1257, 1995 Ohio LEXIS 563 (Ohio 1995)*.

Under the husband-wife privilege, the party seeking to introduce a privileged statement must secure a waiver from both spouses or, in the case of a holder's death, from the successor in interest (usually the executor or administrator) of the deceased: *Merrill v. William E. Ward Ins., 87 Ohio App. 3d 583, 622 N.E.2d 743, 1993 Ohio App. LEXIS 2410 (Ohio Ct. App., Franklin County 1993)*.

Medical laboratory technicians

A medical laboratory technician is not one of the persons encompassed by *R.C. 2317.02*: *In re Washburn, 70 Ohio App. 3d 178, 590 N.E.2d 855, 1990 Ohio App. LEXIS 4761 (Ohio Ct. App., Wyandot County 1990)*.

Medical records generally

Supreme Court of Ohio held that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) did not preclude a claim under the decision in Biddle when the limited disclosure of medical information was part of a court filing for the purpose of obtaining a past-due payment on an account for medical services. *Menorah Park Ctr. for Senior Living v. Rolston, 2020-Ohio-6658, 164 Ohio St. 3d 400, 173 N.E.3d 432, 2020 Ohio LEXIS 2719 (Ohio 2020)*.

Trial court was directed to redact medical and financial information from the personnel files of a nursing home which were ordered to be produced in a negligence action because the trial court's blanket release of all the medical and financial records contained in the personnel files of its employees was unreasonable under Civ.R. 26. Indeed, medical records were generally privileged documents that were not subject to discovery, under *R.C. 2317.02(B)*, absent an exception or a showing that they are necessary to protect or further a countervailing interest that

outweighed the privilege. *Dubson v. Montefiore Home, 2012-Ohio-2384, 2012 Ohio App. LEXIS 2102 (Ohio Ct. App., Cuyahoga County 2012)*.

Defendant's medical records, other than the blood test results, were cumulative and irrelevant, and as a general rule, would have been privileged and inadmissible in an aggravated vehicular homicide case, had defendant not opened the door to admissibility by raising the issue. Additionally, any error in allowing defendant's medical records at trial would have been harmless under Crim.R. 52(A) in light of the overwhelming evidence against defendant. *State v. Andera, 2010-Ohio-3304, 2010 Ohio App. LEXIS 2795 (Ohio Ct. App., Cuyahoga County 2010)*.

Parents' request for discovery under Civ.R. 26(B)(1) of nonparty medical records regarding minors other than their daughter who obtained abortions from an abortion provider was properly denied, as the information sought was confidential and privileged from disclosure under *R.C. 2151.421(H)(1)* and *2317.02*; Biddle did not authorize the parents to discover those records, as it applied as a defense to the tort of unauthorized dislosures of confidential medical information. *Roe v. Planned Parenthood Southwest Ohio Region, 2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009)*.

City that firefighter had sued for age discrimination filed a motion to compel discovery of his medical records for the past 10 years. The request was properly denied, because unlimited access to his medical records for the limited purpose of determining the amount of his damages was inappropriate. *Campolieti v. City of Cleveland, 2009-Ohio-5224, 184 Ohio App. 3d 419, 921 N.E.2d 286, 2009 Ohio App. LEXIS 4417 (Ohio Ct. App., Cuyahoga County 2009)*.

R.C. 2317.02(B)(1) did not bar use of a mirror imaging process to copy medical information stored on a computer where appropriate safeguards were employed: *Cornwall v. N. Ohio Surgical Ctr., Ltd., 2009-Ohio-6975, 185 Ohio App. 3d 337, 923 N.E.2d 1233, 2009 Ohio App. LEXIS 5814 (Ohio Ct. App., Erie County 2009)*.

In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship. Employee's physician was not liable where he was authorized to submit a FMLA form to the employer and subsequently responded to a request for clarification by the employer: *Garland v. Seven Seventeen Credit Union, Inc., 2009-Ohio-5214, 184 Ohio App. 3d 339, 920 N.E.2d 1034, 2009 Ohio App. LEXIS 4453 (Ohio Ct. App., Trumbull County 2009)*.

Balancing test in *Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999)*.

Plaintiff filing a personal injury claim does not open herself to exposure, without limitation, of all her medical records. Rather, *R.C. 2317.02(B)(3)(a)* limits discovery in such a case to medical records that are causally or historically related to the physical or mental injuries that are relevant to the issues in the case. The trial court had authority, without a request from the plaintiff, to order an in camera inspection of the requested medical records and determine which records were discoverable: *Wooten v. Westfield Ins. Co., 2009-Ohio-494, 181 Ohio App. 3d 59, 907 N.E.2d 1219, 2009 Ohio App. LEXIS 418 (Ohio Ct. App., Cuyahoga County 2009)*.

Attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation: *Hageman v. Southwest Gen. Health Ctr., 2008-Ohio-3343, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008 Ohio LEXIS 1773 (Ohio 2008)*.

Medical practice's motion under Civ.R. 37 to compel production of medical records by a doctor who had worked in the practice was proper, as allegations in the parties' claims against one another involved the doctor's possible abuse of prescription drugs and raised issues related thereto; the records were relevant and within the scope of discovery under Civ.R. 26 and *R.C. 2317.02(B)*. *Banks v. Ohio Physical Med. & Rehab., Inc., 2008-Ohio-2165, 2008 Ohio App. LEXIS 1883 (Ohio Ct. App., Fairfield County 2008)*.

Trial court erred in not conducting an in camera inspection of the records to determine whether they were medical or psychiatric documents subject to *R.C. 2317.02(B)* or counseling records subject to *R.C. 2317.02(G)*: *Folmar v.*

Griffin, 2006-Ohio-1849, 166 Ohio App. 3d 154, 849 N.E.2d 324, 2006 Ohio App. LEXIS 1697 (Ohio Ct. App., Delaware County 2006).

The employee's medical and psychological records were discoverable, even though she did make claims for physical or mental injuries, where the employer's defense was that the employee acted irrationally: *Porter v. Litig. Mgmt., 2001-Ohio-4298, 146 Ohio App. 3d 558, 767 N.E.2d 735, 2001 Ohio App. LEXIS 4215 (Ohio Ct. App., Cuyahoga County 2001)*.

Medical records, pretrial procedure

Trial court's blanket order to provide discovery of all of the disputed records, without an in camera review, was erroneous because the disputed documents had to be analyzed in the first instance by the trial court for each of the privilege claims, as well as for relevancy. Additionally, even if the trial court again were to conclude, following an in camera review, that the documents had to be produced, information concerning other patients as well as social security numbers and other sensitive information had to still be redacted from the records. *Howell v. Park East Care & Rehab., 2018-Ohio-2054, 2018 Ohio App. LEXIS 2225 (Ohio Ct. App., Cuyahoga County 2018)*.

Medical records release authorizations

Trial court did not abuse its discretion by ordering an administrator to execute authorizations, in a wrongful death action, for disclosure of the decedent's medical records for a period of ten years prior to his death, without conducting an in camera review because this statute allowed for a waiver upon filing suit, and the records were "within the ambit" of the waiver; the issues of causation and damages were in dispute and the past medical records were relevant to the contested issues. *Marcum v. Miami Valley Hosp., 2015-Ohio-1582, 32 N.E.3d 974, 2015 Ohio App. LEXIS 1526 (Ohio Ct. App., Montgomery County 2015)*.

When motorists sued a driver for personal injuries from a vehicle accident, alleging the driver was under the influence of alcohol, it was an abuse of discretion for a trial court to grant the motorists' motion to compel the driver to produce an executed authorization giving the motorists access to the driver's medical records because (1) the motorists' request for a "hospital emergency room record" was overbroad and would reveal communications privileged under *R.C. 2317.02(B)*, and (2) the driver's blood test results, which the motorists sought, could be privileged, under *R.C. 2317.02*, as the case was civil and the evidence sought was apparently obtained for medical treatment or diagnosis. *Sullivan v. Smith, 2009-Ohio-289, 2009 Ohio App. LEXIS 262 (Ohio Ct. App., Lake County 2009)*.

Patient's consent to the release of medical information is valid, and waives the physician-patient privilege, if the release is voluntary, express, and reasonably specific in identifying to whom the information is to be delivered: *Med. Mut. of Ohio v. Schlotterer, 2009-Ohio-2496, 122 Ohio St. 3d 181, 909 N.E.2d 1237, 2009 Ohio LEXIS 1591 (Ohio 2009)*.

R.C. 2317.02(B)(2)'s provisions regarding records that are causally or historically related to the injuries relevant to the civil action extends to discovery, not just to testimony; thus, the trial court erred as a matter of law in ordering the plaintiff to execute general medical records release authorizations: *Ward v. Johnson's Indus. Caterers, 1998 Ohio App. LEXIS 2841 (Ohio Ct. App., Franklin County June 25, 1998)*.

Civ.R. 16(6) establishes only two exceptions, for medical reports and hospital records, to the privilege embodied in *R.C. 2317.02(B)*. The rule may not be expanded to create additional exceptions for office records and the taking of a deposition: *Brown v. Yothers, 56 Ohio App. 3d 29, 564 N.E.2d 714, 1988 Ohio App. LEXIS 4588 (Ohio Ct. App., Stark County 1988)*.

Medical records, pretrial procedure

Insurer's motion to compel with respect to the interrogatory seeking information on the car accident victim's lifetime of medical treatment was denied because it was overbroad. The insurer had to be reasonable in his requests for discovery of the victim's medical history. *Hudson v. United Servs. Auto. Ass'n Ins. Co., 2008-Ohio-7084, 150 Ohio Misc. 2d 23, 902 N.E.2d 101, 2008 Ohio Misc. LEXIS 303 (Ohio C.P. 2008)*.

Medical technologists

The relation of medical technologist and patient not being named in *R.C. 2317.02(B)* (concerning privileged communications), a medical technologist is not prohibited by the statute from testifying as to the blood-alcohol content of a blood sample taken from an injured driver who was brought to a hospital emergency room following an automobile collision: *State v. McKinnon, 38 Ohio App. 3d 28, 525 N.E.2d 821, 1987 Ohio App. LEXIS 10616 (Ohio Ct. App., Summit County 1987)*.

Mental health records generally

During defendant's trial for attempted burglary and other crimes arising out of his attempt, while an inmate, to break into a prison pharmacy, his motion to compel disclosure of exculpatory evidence was properly denied because the information he sought about medications provided to the State's eyewitness, another inmate, and the inmate's mental health records was privileged under *R.C. 2317.02(B)(1)*, (4); there was no evidence that the eyewitness waived the physician-patient or pharmacist-patient privileges, and he testified on cross-examination that he had a mental health disorder and received a medication to treat the same. *State v. Bell, 2006-Ohio-6560, 2006 Ohio App. LEXIS 6485 (Ohio Ct. App., Fairfield County 2006)*.

Plaintiff's psychiatric or psychological records remained privileged because they were not communications that related causally or historically to physical or mental injuries relevant to issues in the defamation suit. Plaintiff did not make a claim for emotional distress or mental anguish: *McCoy v. Maxwell, 139 Ohio App. 3d 356, 743 N.E.2d 974, 2000 Ohio App. LEXIS 4567 (Ohio Ct. App., Portage County 2000)*.

In a premises liability case, the trial court erred by granting defendants' motion to compel disclosure of plaintiff's mental health records from the 1970's to the present; given the sensitive nature of the information at issue, the trial court should have conducted an in camera inspection in order to determine which, if any, of the subject records were causally or historically related to plaintiff's claims. *Deering v. Beatty, 2021-Ohio-3461, 2021 Ohio App. LEXIS 3372 (Ohio Ct. App., Cuyahoga County 2021)*.

Motion in limine

Denial of a motion in limine to prevent psychological witnesses from testifying at a hearing was not a final appealable order: *Henderson v. Henderson, 2002-Ohio-6496, 150 Ohio App. 3d 339, 780 N.E.2d 1072, 2002 Ohio App. LEXIS 6280 (Ohio Ct. App., Franklin County 2002)*.

Nurses

Court admitted testimony from the nurse of appellant's physician in child neglect action. The exception of *R.C. 2151.42.1* does not apply to the challenged testimony because the nurse's statements went beyond whether appellant kept her appointments to appellant's diagnosis, treatment and medication: *In re Riddle, 1996 Ohio App. LEXIS 2054 (Ohio Ct. App., Guernsey County Apr. 11, 1996)*, aff'd, *1997-Ohio-391, 79 Ohio St. 3d 259, 680 N.E.2d 1227, 1997 Ohio LEXIS 1806 (Ohio 1997)*.

A physician may be held liable for the acts of a nurse-employee in violating a patient's right to confidentiality. Unauthorized disclosure of a patient's pregnancy to her family, resulting in strong expresssions of the family's

disapproval, constitutes intentional infliction of emotional distress: *Hobbs v. Lopez, 96 Ohio App. 3d 670, 645 N.E.2d 1261, 1994 Ohio App. LEXIS 2959 (Ohio Ct. App., Scioto County 1994)*.

This section, being in derogation of the common law, must be strictly construed, and consequently such section affords protection only to those relationships which are specifically named therein. The relationship of nurse and patient not being named in the statute, no privilege is extended to communications between a patient and his nurse: *Weis v. Weis, 147 Ohio St. 416, 34 Ohio Op. 350, 72 N.E.2d 245, 1947 Ohio LEXIS 418 (Ohio 1947)*.

Communications between patient and nurse are not privileged: *Weis v. Weis, 147 Ohio St. 416, 34 Ohio Op. 350, 72 N.E.2d 245, 1947 Ohio LEXIS 418 (Ohio 1947)*.

While the Ohio statute does not grant any privilege as to communications between a patient and a nurse, nevertheless if it appears that the latter is a private nurse employed by the physician, she is his agent and cannot disclose information she learns while acting in capacity of assistant: *Humble v. John Hancock Life Ins. Co., 28 Ohio N.P. (n.s.) 481, 1931 Ohio Misc. LEXIS 1585 (Ohio C.P. June 8, 1931)*, aff'd, *John Hancock Mut. Life Ins. Co. v. Humble, 31 N.E.2d 887, 1932 Ohio App. LEXIS 504 (Ohio Ct. App., Montgomery County 1932)*.

Parole officers

Only those relationships specifically named in *R.C. 2317.02* give rise to privileged communications and acts. A parolee and his parole officer do not occupy a confidential relationship: *State v. Halleck, 24 Ohio App. 2d 74, 53 Ohio Op. 2d 195, 263 N.E.2d 917, 1970 Ohio App. LEXIS 280 (Ohio Ct. App., Pickaway County 1970)*.

Parties with common interest

Where there is a degree of common interest between joint defendants in any information, communication, or legal advice concerning a court action, such information, communication, or advice is not privileged from being divulged by one party to the other in a subsequent action between them: *Netzley v. Nationwide Mut. Ins. Co., 34 Ohio App. 2d 65, 63 Ohio Op. 2d 127, 296 N.E.2d 550, 1971 Ohio App. LEXIS 386 (Ohio Ct. App., Montgomery County 1971)*.

—Appeal of discovery order

Medical professionals generally have standing to appeal a discovery order that requires them to violate the mandate of the physician-patient privilege. HIPAA does not preempt *R.C. 2317.02(B)(1)*. Disclosing the information required under the discovery order, even redacted, would compromise the privacy of the nonparty patient: *Grove v. Northeast Ohio Nephrology Assocs., 2005-Ohio-6914, 164 Ohio App. 3d 829, 844 N.E.2d 400, 2005 Ohio App. LEXIS 6225 (Ohio Ct. App., Summit County 2005)*.

Permanent custody

Use of the proper standard of review and the admission of evidence in accordance to law did not result in constitutional error and the mother did not object to the testimony during the course of the proceedings, the testimony presented by the drug and alcohol counselors was mainly objective in nature, relating to the urinalysis test results, the medications prescribed to the mother, and her attendance in various programs. The mother failed to make any specific arguments as to how the information testified to denied her of due process of law and the information between the parents and the service providers was not privileged. *In re N.K., 2015-Ohio-1790, 2015 Ohio App. LEXIS 1732 (Ohio Ct. App., Sandusky County 2015)*.

Physician-patient privilege

Mental patient's medical file was privileged from discovery under R.C. 2317.02(B), since the treatment plan and other items in the file were communications from the patient's physicians to the patient concerning the physician-patient relationship, and none of the statutory exceptions applied. Evans v. Summit Behavorial Healthcare, 2016-Ohio-5857, 70 N.E.3d 1217, 2016 Ohio App. LEXIS 3701 (Ohio Ct. App., Franklin County 2016).

Trial court order compelling disclosure of information involving physician-patient confidentiality constitutes a final appealable order. Trial court erred by ordering release of privileged medical records without first conducting an in camera inspection to determine their relevance to the party's claimed injuries: Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009).

With respect to the physician-patient privilege, R.C. 2317.02 grants a patient the right to prevent the physician from testifying concerning his or her communications with the patient, but does not give the patient the right to refuse to testify. However, that does not prevent a trial court from issuing a protective order where appropriate: Ward v. Summa Health Sys., 2009-Ohio-4859, 184 Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009), aff'd, 2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010).

Trial court erred in ordering disclosure under Civ.R. 26 by a clinic of 10 years' of minors' abortion records in an identity-concealing format, as they were covered by the patient-physician privilege under R.C. 2317.02(B) and any possible probative value of the records was far outweighed by the potential invasion of privacy rights of the patients. The parents of a minor abortion patient's claims did not require disclosure thereof, as the clinic had acted in good faith in attempting to comply with the parental notification requirement of former R.C. 2919.12 and the enforcement of R.C. 2919.121 was enjoined at the time of the procedure, punitive damages were obtainable upon a showing of a single violation of either R.C. 2919.12 or 2317.56, such that additional patient records were not necessary, and any duty to report suspected child abuse under R.C. 2151.421 was confidential and was not admissible as evidence. Roe v. Planned Parenthood Southwest Ohio Region, 2007-Ohio-4318, 173 Ohio App. 3d 414, 878 N.E.2d 1061, 2007 Ohio App. LEXIS 3868 (Ohio Ct. App., Hamilton County 2007), aff'd on other grounds, 2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009).

Trial court did not err in denying defendant access to the medical records of one of the victims of his vehicular criminal offense, as the Health Insurance Portability and Accountability Act did not preempt the physican-patient privilege under R.C. 2317.02(B) and there was no indication that the victim had waived that privilege. State v. Flanigan, 2007-Ohio-3158, 2007 Ohio App. LEXIS 2909 (Ohio Ct. App., Montgomery County 2007).

When a client sued a lawyer for legal malpractice arising from the lawyer's representation of the client in the client's claim for negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 et seq., the client was not entitled to a protective order barring the client's physician from testifying as an expert witness for the lawyer because (1) the physician's testimony was not privileged, even though it was derived from the physician's treatment of the client, because, when the client filed a civil action involving the physician's treatment of the client, the client waived the client's physician-patient privilege, under R.C. 2317.02(B)(1)(a)(iii), and (2) the physician's testimony was relevant, under R.C. 2317.02(B)(3)(a) because it related causally or historically to physical injuries that were relevant to the client's claim. Smalley v. Friedman, Damiano & Smith Co., L.P.A., 2007-Ohio-2646, 172 Ohio App. 3d 108, 873 N.E.2d 331, 2007 Ohio App. LEXIS 2475 (Ohio Ct. App., Cuyahoga County 2007).

Trial court's decision to compel production of discovery as to two of the interrogatories was reversed as the answers sought were protected by the physician-patient privilege, pursuant to R.C. 2317.02(B)(1), and the order to compel discovery as to one interrogatory was affirmed as to any request for the mental health information that the owner had directly put at issue through his claim for severe emotional distress. However, an evidentiary hearing was required to determine the appropriate look-back time frame of the discovery request. Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006).

—Applicability

Appellant's claim trial court erred by admitting his medical records since the admission violated his physician patient privilege lacked merit because the physician-patient privilege did not apply as the state sought disclosure of appellant's HIV test records in connection with its prosecution of appellant for felonious assault and demonstrated a compelling need for the records, which would satisfy one of the elements of the charged offense. *State v. Worship, 2022-Ohio-52, 2022 Ohio App. LEXIS 30 (Ohio Ct. App., Warren County 2022)*.

Defendant's contention that he was entitled to assert a physician-patient privilege lacked merit because it was not entirely clear who he was arguing with (in the emergency room) and why the conversation took place. *State v. Greene, 2022-Ohio-1357, 2022 Ohio App. LEXIS 1245 (Ohio Ct. App., Auglaize County 2022)*.

Present case dif not involve an official criminal investigation seeking the results of tests administered to the instigator to determine his blood-alcohol/drug content; as such, the statute did not apply to the present case. *Skorvanek v. Ohio Dep't of Rehab. & Corr., 2018-Ohio-3870, 2018 Ohio App. LEXIS 4198 (Ohio Ct. App., Franklin County 2018)*.

—Blood tests

Trial court properly granted defendant's motion to suppress the lab results from a blood draw taken while he was in the hospital, which indicated the presence of alcohol in his blood and resulted in charges against him for OVI violations, as no warrant was obtained prior to taking the blood draw and no basis for that warrantless search existed. *State v. Saunders, 2017-Ohio-7348, 2017 Ohio App. LEXIS 3640 (Ohio Ct. App., Morrow County 2017)*.

—Exceptions

Patient's filing of a divorce action, with claims for child custody and spousal support triggered a statutory exception to the physician-patient privilege because the patient's mental and physical conditions were mandatory considerations for the trial court's determination of both child custody and spousal support. Furthermore, the trial court appropriately examined in camera the submitted mental-health records to determine their relevance before ordering their release, subject to a protective order. *Friedenberg v. Friedenberg, 2020-Ohio-3345, 161 Ohio St. 3d 98, 161 N.E.3d 546, 2020 Ohio LEXIS 1401 (Ohio 2020)*.

All of the couple's discovery requests except one related causally or historically to the physical and/or mental injuries alleged in the sister's complaint; there was no need for the court to fix "time parameters" on the discovery requests because such parameters were included in the requests themselves. *Heimberger v. Heimberger, 2020-Ohio-3853, 2020 Ohio App. LEXIS 2764 (Ohio Ct. App., Lake County 2020)*.

—Generally

Language of *R.C. 2317.02* is clear and unambiguous that it applies in any criminal action against a physician. *State v. Adams, 2009-Ohio-6491, 2009 Ohio App. LEXIS 5449 (Ohio Ct. App., Scioto County 2009)*.

Trial court may not simply ignore the requirements of *R.C. 2317.02(B)*. *Mason v. Booker, 2009-Ohio-6198, 185 Ohio App. 3d 19, 922 N.E.2d 1036, 2009 Ohio App. LEXIS 5197 (Ohio Ct. App., Franklin County 2009)*.

As the physician-patient privilege has no common law roots to protect the patient's testimony, and as *R.C. 2317.02(B)(1)* does not extend the privilege to prevent the patient's testimony from being compelled, the physician-patient privilege is not as broad as the attorney-client privilege. *Ward v. Summa Health Sys., 2009-Ohio-4859, 184*

Ohio App. 3d 254, 920 N.E.2d 421, 2009 Ohio App. LEXIS 4127 (Ohio Ct. App., Summit County 2009), aff'd, *2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

R.C. 2317.02(B) protects only communications, not the underlying facts. The names of drugs to which a party had been addicted and the names of the party's health care providers were not "communications": *Ingram v. Adena Health Sys., 2002-Ohio-4878, 149 Ohio App. 3d 447, 777 N.E.2d 901, 2002 Ohio App. LEXIS 4932 (Ohio Ct. App., Ross County 2002)*.

R.C. 2317.02 does not prevent a physician from testifying under oath that he was consulted in a professional capacity by a person on a certain date. Since the statute only prohibits a physician or dentist from testifying, interrogatories directed to the patient about what prescribed medications she was taking at the time of the accident did not fall under *R.C. 2317.02(B)*: *Binkley v. Allen, 2001 Ohio App. LEXIS 421 (Ohio Ct. App., Stark County Feb. 5, 2001)*.

In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship: *Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999)*.

The term "communication" as defined by *R.C. 2317.02(B)(4)(a)* is sufficiently broad to encompass a patient's communication with a nurse performing duties to assist a physician in the diagnosis and treatment of a patient; thus, the defendant's hospital records containing the nurse's notes and observations were privileged, and the admission of those records and the nurse's testimony regarding the defendant's statement contained in them was error: *State v. Napier, 1998 Ohio App. LEXIS 3939 (Ohio Ct. App., Hamilton County Aug. 28, 1998)*.

Where a treating physician contacts defense counsel and opines that a malpractice defendant was not negligent, the contact is a mere private conversation. *R.C. 2317.02* does not limit or prevent such conversations. The privilege does not extend to testimony by a treating physician concerning matters causally and historically related to an injury which is the subject of a malpractice action: *Chaffin v. Mercy Medical Ctr., 1996 Ohio App. LEXIS 5956 (Ohio Ct. App., Clark County Dec. 27, 1996)*.

The physician-patient privilege did not apply to a psychiatrist who was retained by defense counsel to provide favorable testimony at a bindover proceeding: *State v. Hopfer, 112 Ohio App. 3d 521, 679 N.E.2d 321, 1996 Ohio App. LEXIS 3063 (Ohio Ct. App., Montgomery County)*, dismissed, *77 Ohio St. 3d 1488, 673 N.E.2d 146, 1996 Ohio LEXIS 2838 (Ohio 1996)*.

In a malpractice action against a doctor, the doctor's own medical records are privileged under *R.C. 2317.02*: *Calihan v. Fullen, 78 Ohio App. 3d 266, 604 N.E.2d 761, 1992 Ohio App. LEXIS 108 (Ohio Ct. App., Hamilton County 1992)*.

Files and records containing a doctor's diagnosis of individuals performed within the context of a second opinion or independent medical examination constitute "communications" within the meaning of *R.C. 2317.02(B)(3)* which potentially could affect the course of a patient's treatment and are therefore privileged. The risk of disclosing a patient's identity cannot be entirely eliminated by the masking of a patient's name or identifying personal data such as telephone or social security numbers: *Wozniak v. Kombrink, 1991 Ohio App. LEXIS 606 (Ohio Ct. App., Hamilton County Feb. 13, 1991)*.

Trial court did not err by refusing to allow appellant to raise the issue of appellee's invocation of the physician-patient privilege and thus allow the jury to draw a negative inference from the invocation of the privilege: *Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990)*.

Medical records of an allegedly intoxicated driver are protected by the physician-patient privilege: *Akron v. Springston, 67 Ohio App. 3d 645, 588 N.E.2d 160, 1990 Ohio App. LEXIS 1888 (Ohio Ct. App., Summit County 1990)*.

R.C. 2317.02(B) does not prevent a non-party treating physician from testifying as to non-privileged matters: *Berlinger v. Mt. Sinai Medical Center, 68 Ohio App. 3d 830, 589 N.E.2d 1378, 1990 Ohio App. LEXIS 4411 (Ohio Ct. App., Cuyahoga County 1990)*, dismissed, *58 Ohio St. 3d 707, 569 N.E.2d 505, 1991 Ohio LEXIS 638 (Ohio 1991)*.

Where the physician-patient privilege contained in *R.C. 2317.02(B)* has not been waived, a non-party treating physician may testify as an expert witness "provided that in answering the questions he disregards what he learned and observed while attending the patient and his own opinion formed therefrom." (*Strizak v. Indus. Comm. [1953], 159 OS 475 [50 OO 394]*, paragraph two of the syllabus, applied and followed.: *Moore v. Grandview Hospital, 25 Ohio St. 3d 194, 25 Ohio B. 259, 495 N.E.2d 934 (1986)*.

Even though a plaintiff does not waive the physician-patient privilege afforded by *R.C. 2317.02*, his attending physician may be called as a witness by the defendant; and as such witness, the physician may testify to all competent matters other than communications made to him in his professional capacity by his patient, or his advice to his patient given in that capacity: *Vincenzo v. Newhart, 7 Ohio App. 2d 97, 36 Ohio Op. 2d 213, 219 N.E.2d 212 (1966)*, affirmed *11 Ohio St. 2d 63, 40 Ohio Op. 2d 67, 227 N.E.2d 627*.].

A doctor should not disclose information to a third party without the patient's consent: *Hammonds v. Aetna Casualty & Surety Co., 237 F. Supp. 96, 3 Ohio Misc. 83, 31 Ohio Op. 2d 174, 1965 U.S. Dist. LEXIS 6449 (N.D. Ohio 1965)*.

Privileged communications between patient and physician may be by exhibition of the body to the physician for examination or treatment as well as by oral or written communications between physician and patient; and a physician may not testify in respect to either unless there is a waiver in reference thereto: *In re Roberto, 106 Ohio App. 303, 7 Ohio Op. 2d 63, 151 N.E.2d 37, 79 Ohio Law Abs. 1, 1958 Ohio App. LEXIS 804 (Ohio Ct. App., Cuyahoga County 1958)*.

The relationship of physician and patient was not created by an examination of decedent by physicians engaged by decedent's employer where such examination did not include treatment nor advice and clearly was not for the purpose of alleviating decedent's pain nor curing his malady: *Suetta v. Carnegie-Illinois Steel Corp., 144 N.E.2d 292, 75 Ohio Law Abs. 487, 1955 Ohio App. LEXIS 738 (Ohio Ct. App., Mahoning County 1955)*.

The statute which precludes a physician from testifying "concerning a communication made to him by his patient in that relation" should be strictly construed, in a will contest action, to apply only to the communication made to a physician in his professional capacity at the time: *Meier v. Peirano, 76 Ohio App. 9, 31 Ohio Op. 342, 62 N.E.2d 920, 1945 Ohio App. LEXIS 650 (Ohio Ct. App., Hamilton County 1945)*.

Submission to a physical examination by a physician constitutes a communication from the patient to the physician within the meaning and inhibition of this section: *McKee v. New Idea, Inc., 44 N.E.2d 697, 36 Ohio Law Abs. 563, 1942 Ohio App. LEXIS 947 (Ohio Ct. App., Mercer County 1942)*.

A medical examination by a physician for the purpose of determining the eligibility of a person for admission to a state asylum for the blind, and not for the purpose of medical treatment, does not establish a physician-patient relationship within the meaning of this section: *Bowers v. Indus. Comm., 30 Ohio Law Abs. 353, 1939 Ohio Misc. LEXIS 908 (Ohio Ct. App., Franklin County Sept. 20, 1939)*.

—Alteration of prescription

In a criminal case involving the alteration of a prescription by the patient, the history and contents of the prescription are not privileged by the physician-patient privilege since the communication was not intended as a confidential communication and was not a communication between patient and physician: *State v. Treadway, 69 Ohio Op. 2d 507, 328 N.E.2d 825, 1974 Ohio App. LEXIS 2793 (Ohio Ct. App., Butler County 1974)*.

—Appeal of discovery order

As the grant of employers' motion to compel discovery involved an employee's allegedly privileged medical records, review on appeal was pursuant to the de novo standard because it presented a question of law. *Csonka-Cherney v. Arcelormittal Cleveland, Inc., 2014-Ohio-836, 9 N.E.3d 515, 2014 Ohio App. LEXIS 808 (Ohio Ct. App., Cuyahoga County 2014)*.

Trial court properly overruled a guardian's motion to quash a daughter's subpoena for medical information related to the daughter's mother, who was the guardian's ward, because, inter alia, the trial court's judgment appointing the guardian specifically authorized the daughter to make urgent health care decisions for the ward, if the guardian were unavailable, making it necessary for the daughter to be as well informed about the ward's health care as the guardian. *In re Guardianship of Marcia S. Clark, 2009-Ohio-6577, 2009 Ohio App. LEXIS 5509 (Ohio Ct. App., Franklin County 2009)*.

Trial court properly overruled a guardian's motion to quash a daughter's subpoena for information related to the daughter's mother, who was the guardian's ward, because, inter alia, while some of the documents sought by the subpoena were arguably privileged, under the physician-patient privilege in *R.C. 2317.02(B)*, other documents might or might not be. *In re Guardianship of Marcia S. Clark, 2009-Ohio-6577, 2009 Ohio App. LEXIS 5509 (Ohio Ct. App., Franklin County 2009)*.

Trial court's decision to compel production of discovery as to two of the interrogatories was reversed as the answers sought were protected by the physician-patient privilege, pursuant to *R.C. 2317.02(B)(1)*, and the order to compel discovery as to one interrogatory was affirmed as to any request for the mental health information that the owner had directly put at issue through his claim for severe emotional distress. However, an evidentiary hearing was required to determine the appropriate look-back time frame of the discovery request. *Miller v. Bassett, 2006-Ohio-3590, 2006 Ohio App. LEXIS 3536 (Ohio Ct. App., Cuyahoga County 2006)*.

An order allowing a party to depose an opposing party's physician, where the opposing party has attempted to invoke the physician-patient privilege, is a final, appealable order under *R.C. 2305.02*: *Brown v. Yothers, 56 Ohio App. 3d 29, 564 N.E.2d 714, 1988 Ohio App. LEXIS 4588 (Ohio Ct. App., Stark County 1988)*.

—Applicability

Mother's psychological evaluations, present and past, were forensic in nature because they were for the specific purpose of determining her psychological fitness as a parent, not for the purpose of treatment in a therapeutic relationship, and the past evaluations were relevant to the evaluator in making a comprehensive recommendation to the trial court. *In re F.I., 2014-Ohio-2350, 2014 Ohio App. LEXIS 2297 (Ohio Ct. App., Fairfield County 2014)*.

Trial court did not abuse its discretion by finding a wife's health information was relevant to the spousal-support issues in the parties' divorce action because the wife claimed a disability limited her earning ability, and, as such, the wife's health information was not protected by the physician-patient privilege and was discoverable. *Higbee v. Higbee, 2014-Ohio-954, 2014 Ohio App. LEXIS 890 (Ohio Ct. App., Clark County 2014)*.

Trial court erred in granting a protective order to preclude a patient, who contracted Hepatitis B following surgery, from using a deposition to question his surgeon as to the surgeon's personal health information as such information was relevant to whether the surgeon was the source of the Hepatitis B. *R.C. 2317.02(B)* does not protect a person from having to disclose his or her own medical information when that information is relevant to the subject matter involved in a pending civil action. *Ward v. Summa Health Sys., 2010-Ohio-6275, 128 Ohio St. 3d 212, 943 N.E.2d 514, 2010 Ohio LEXIS 3304 (Ohio 2010)*.

—Blood donors

A blood donor is not a "patient" for purposes of the physician-patient privilege of R.C. 2317.02(B)(1), nor is information he supplies with his blood donation a "communication" as defined in R.C. 2317.02(B)(3): Doe v. University of Cincinnati, 42 Ohio App. 3d 227, 538 N.E.2d 419, 1988 Ohio App. LEXIS 5317 (Ohio Ct. App., Franklin County 1988).

—Blood tests

In a prosecution for aggravated vehicular assault, under R.C. 2903.08(A)(1)(a), when defendant's motion in limine sought to exclude the results of his blood alcohol tests, based on the physician-patient privilege, his motion could not be granted because R.C. 2317.02(B)(1)(c) provided that the testimonial privilege applicable to communications between a patient and a physician did not apply in an criminal action concerning any test or the results of any test that determined the presence or concentration of alcohol in the patient's blood at any time relevant to the criminal offense in question. State v. Baker, 2006-Ohio-7085, 170 Ohio App. 3d 331, 867 N.E.2d 426, 2006 Ohio App. LEXIS 7013 (Ohio Ct. App., Greene County 2006).

State's argument that because R.C. 2317.02(B) was amended, to make blood tests available in criminal prosecutions despite the patient-physician privilege, well after the addition of the requirements now found in R.C. 4511.19(D)(1), the Ohio legislature intended for the records of tests taken by medical personnel to be admissible, and that blood-alcohol tests should be admitted just as any other medical test might be, subject to proper foundation with cross-examination of any expert witness, unde r Evid.R. 702(C) and 803(6) was rejected; R.C. 2317.02(B) does not set forth the standard by which the test results will be deemed reliable to establish proof beyond a reasonable doubt, and nothing in § 2317.02(B)(2) exempts a hospital from complying with the testing standards contained in R.C. 4511.19(D)(1). State v. Mayl, 2005-Ohio-4629, 106 Ohio St. 3d 207, 833 N.E.2d 1216, 2005 Ohio LEXIS 2063 (Ohio 2005).

Trial court did not err in denying defendant's motion to suppress medical records of his blood-alcohol content following a one-car accident; the statute permitting the city to obtain the records did not violate defendant's constitutional right to privacy since it provided only a limited waiver of the physician-patient privilege for situations relating to criminal offenses. City of Cleveland v. Dames, 2003-Ohio-6054, 2003 Ohio App. LEXIS 5389 (Ohio Ct. App., Cuyahoga County 2003).

Regardless of whether the defendant consented to the test, the hospital's blood test did not constitute state action for purposes of implicating the fourth amendment. R.C. 4511.19(D)(1) is not limited to tests conducted at the request of a law enforcement officer: State v. Meyers, 2001-Ohio-2282, 146 Ohio App. 3d 563, 767 N.E.2d 739, 2001 Ohio App. LEXIS 4395 (Ohio Ct. App., Allen County 2001).

Federal law did not prohibit disclosure of the defendant's blood-alcohol test performed by the hospital: State v. Williams, 94 Ohio Misc. 2d 113, 703 N.E.2d 1284, 1998 Ohio Misc. LEXIS 47 (Ohio C.P. 1998).

A blood sample is lawfully obtained where it is taken by medical personnel at the direction of a police officer with a warrant for the sample. The physician-patient privilege does not apply to such a sample: State v. Kutz, 87 Ohio App. 3d 329, 622 N.E.2d 362, 1993 Ohio App. LEXIS 2149 (Ohio Ct. App., Lucas County), dismissed, *67 Ohio St. 3d 1463, 619 N.E.2d 698, 1993 Ohio LEXIS 1997 (Ohio 1993)*.

The court erroneously admitted privileged testimony regarding the result of a blood-alcohol test performed at the direction of defendant's physician: State v. Lampman, 82 Ohio App. 3d 515, 612 N.E.2d 779, 1992 Ohio App. LEXIS 4788 (Ohio Ct. App., Lake County 1992).

Blood-alcohol tests administered at the hospital where a party was treated after an accident are not privileged under R.C. 2317.02(B): Kromenacker v. Blystone, 43 Ohio App. 3d 126, 539 N.E.2d 675, 1987 Ohio App. LEXIS 10874 (Ohio Ct. App., Lucas County 1987).

In a criminal prosecution for a violation of R.C. 4511.19 (driving while intoxicated), the physician-patient privilege, as expressed in R.C. 2317.02(B), does not preclude the receipt in evidence of hospital records containing the results of a blood-alcohol test administered to the defendant by a treating physician or other hospital employee. Nor does the privilege prevent the admission of properly qualified expert testimony necessary to provide foundational support for such evidence. (State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982).

Where, in a prosecution for driving while intoxicated (R.C. 4511.19), the defendant seeks to suppress the results of a blood-alcohol test on the basis that such evidence is not admissible due to the physician-patient privilege set forth in R.C. 2317.02(B), and where the evidence shows that the blood-alcohol test was not administered at the request of a police officer pursuant to R.C. 4511.19 and 4511.19(A), but was administered solely pursuant to the request of the defendant's attending physician following an accident, the public interest in the sensible and efficient administration of criminal justice outweighs the policy considerations which support the physician-patient privilege and the results of the blood-alcohol test are admissible, notwithstanding the physician-patient privilege of R.C. 2317.02(B): State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982).

A blood-alcohol test administered in connection with a patient's physical examination constitutes a "communication" as the word is used in R.C. 2317.02(B): State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982).

—Causal connection

Trial court erred in denying an injured customer's motion for an in camera inspection of medical records sought by a retailer because an affidavit submitted by the customer set forth a reasonable factual basis to establish that the records included privileged information not causally or historically related to the injuries for which a recovery was sought by the customer. Pinnix v. Marc Glassman, Inc., 2012-Ohio-3263, 2012 Ohio App. LEXIS 2868 (Ohio Ct. App., Cuyahoga County 2012).

Trial court properly denied the injured pedestrian's motion to compel discovery because the requested medical records, including a list of medications, were privileged communications between patient and physician. Nothing in the police report, in the driver's deposition testimony, or the description by other witnesses indicated that the accident was causally connected to any medical condition affecting the driver. Wallace v. Hipp, 2012-Ohio-623, 2012 Ohio App. LEXIS 537 (Ohio Ct. App., Lucas County 2012).

—Date of consultation

R.C. 2317.02 does not prevent testimony by a physician as to the fact that he was consulted in a professional capacity by a person on a certain date: *Jenkins v. Metropolitan Life Ins. Co., 171 Ohio St. 557, 15 Ohio Op. 2d 14, 173 N.E.2d 122, 1961 Ohio LEXIS 689 (Ohio 1961)*.

—Decedents' estates

Where an executor files a will for probate, the physician-patient privilege has been waived under R.C. 2317.02: Verba v. Orum, 1995 Ohio App. LEXIS 1352 (Ohio Ct. App., Belmont County Mar. 30, 1995).

—Duty to report certain matters

Where a physician is required by former R.C. 2917.44 (see now R.C. 2921.22) to report to a law-enforcement officer a gunshot wound or wound inflicted by a deadly weapon, the former may testify, without violating the

physician-patient privilege, as to the description of the wounded person, as to his name and address, if known, and as to the description of the nature and location of such wound, obtained by examination, observation and treatment of the victim: *State v. Antill, 176 Ohio St. 61, 26 Ohio Op. 2d 366, 197 N.E.2d 548, 1964 Ohio LEXIS 866 (Ohio 1964)*.

—Employee of physician

An employee of a physician has no legal duty to refrain from divulging confidential medical information concerning a patient of that physician. Under a proper factual posture, the patient may have a claim for relief for invasion of her right to privacy: *Knecht v. Vandalia Medical Center, Inc., 14 Ohio App. 3d 129, 470 N.E.2d 230, 1984 Ohio App. LEXIS 11257 (Ohio Ct. App., Montgomery County 1984)*.

—Employer's treating physician

A physician is not rendered incompetent by this section to testify that the relation of physician and patient existed and that treatment was administered: *Willig v. Prudential Ins. Co., 71 Ohio App. 255, 26 Ohio Op. 89, 49 N.E.2d 421, 38 Ohio Law Abs. 492, 1942 Ohio App. LEXIS 563 (Ohio Ct. App., Hamilton County 1942)*.

—Exceptions

Physician-patient privilege did not apply because a patient's statements to emergency room personnel in a prior case were causally and historically related to the injuries that were relevant to issues in the patient's cross-claim for indemnification or contribution in a subsequent action. *Leopold v. Ace Doran Hauling & Rigging Co., 2013-Ohio-3107, 136 Ohio St. 3d 257, 994 N.E.2d 431, 2013 Ohio LEXIS 1689 (Ohio 2013)*.

When motorists sued a driver for personal injuries from a vehicle accident, alleging the driver was under the influence of alcohol, and moved a trial court to compel the driver to produce an executed authorization giving the motorists access to the driver's medical records, it was essential to know how blood alcohol test results the motorists sought were obtained because there was an exception to the privilege in *R.C. 2317.02(B)* for the results of tests performed to determine the presence of alcohol in a patient's blood, under *R.C. 2317.02(B)(1)(c)*. *Sullivan v. Smith, 2009-Ohio-289, 2009 Ohio App. LEXIS 262 (Ohio Ct. App., Lake County 2009)*.

R.C. 2921.22(B) provides a statutory exception to the physician-patient privilege: *State v. Jones, 2000-Ohio-187, 90 Ohio St. 3d 403, 739 N.E.2d 300, 2000 Ohio LEXIS 2995 (Ohio 2000)*.

—Fraudulent misrepresentation by patient

Physician-patient privilege did not protect disclosure of a fraudulent communication by the patient (defendant) to the physician, since its purpose was not to facilitate obtaining medical treatment, but to facilitate, or to commit, insurance fraud. *State v. Branch, 2009-Ohio-3946, 2009 Ohio App. LEXIS 3377 (Ohio Ct. App., Montgomery County 2009)*.

When communications between a patient and his physician are predicated upon the patient's fraudulent misrepresentations, the physician-patient relationship is not properly established and the physician-patient privilege does not attach: *State ex rel. Buchman v. Stokes, 36 Ohio App. 3d 109, 521 N.E.2d 515, 1987 Ohio App. LEXIS 10512 (Ohio Ct. App., Hamilton County 1987)*.

—Grand jury

Clinic was not entitled to judgment as a matter of law after providing medical records in response to a grand jury subpoena because there was neither a statutory exception permitting disclosure under R.C. 2317.02(B) nor a countervailing interest outweighing the privacy rights of a police officer and his wife. Turk v. Oiler, 2010 U.S. Dist. LEXIS 8169 (N.D. Ohio Feb. 1, 2010).

Hospital, which released plaintiff's medical records in response to a grand jury subpoena, were not entitled to judgment as a matter of law with respect to plaintiff's invasion of privacy claims because Ohio's physician-patient privilege, R.C. 2317.02(B), did not contain an exception permitting disclosure in response to a grand jury subpoena. Turk v. Oiler, 732 F. Supp. 2d 758, 2010 U.S. Dist. LEXIS 81340 (N.D. Ohio 2010).

When a grand jury subpoenaed a physician's patients' records, the physician's motion to quash the subpoena should have been granted because, inter alia, no statutory exception to the physician-patient privilege, in R.C. 2317.02(B)(1), (2) or (3), applied as the records were subpoenaed in a grand jury proceeding, so the action was not civil in nature and no civil actions exceptions applied, and no evidence showed the case was a criminal action (1) involving tests to determine the presence of alcohol or drugs in a patient's blood or (2) against the physician. In re Banks, 2008-Ohio-2339, 2008 Ohio App. LEXIS 1986 (Ohio Ct. App., Scioto County 2008).

Trial court should have granted a physician's motion to quash a grand jury subpoena for records of the physician's patients because (1) no statutory exception to the physician-patient privilege, under R.C. 2317.02(B), applied, and (2) an appellate court was not inclined to judicially create a new public policy exception for grand jury subpoenas. In re Banks, 2008-Ohio-2339, 2008 Ohio App. LEXIS 1986 (Ohio Ct. App., Scioto County 2008).

The physician-patient privilege embodied in R.C. 2317.02(B) does not preclude disclosure to the grand jury of the medical records of a person under investigation: In re Brink, 42 Ohio Misc. 2d 5, 536 N.E.2d 1202, 1988 Ohio Misc. LEXIS 10 (Ohio C.P. 1988).

—Hypothetical questions

In an action, the purpose of which is to recover compensation or damages for a physical injury, a physician who has treated the plaintiff professionally for such injury is not thereby precluded by this section, relating to privileged communications, from giving expert testimony in response to proper hypothetical questions, provided that in answering the questions he disregards what he learned and observed while attending the patient and his own opinion formed therefrom: 159 Ohio St. 475, 50 Ohio Op. 394, 112 N.E.2d 537.

—In camera inspection

Trial court erred in not conducting an in camera inspection of the medical records before ordering them disclosed because the magistrate's broad production order could conceivably have included items which were privileged. Banchefsky v. Banchefsky, 2014-Ohio-899, 2014 Ohio App. LEXIS 845 (Ohio Ct. App., Franklin County 2014).

It was error to grant employers' motion to compel discovery relating to an employee's medical information in her employment dispute because the trial court should have conducted an in camera inspection of the records to determine if they were causally or historically related to the issues in the case, based on the employee's claim of privilege. Csonka-Cherney v. Arcelormittal Cleveland, Inc., 2014-Ohio-836, 9 N.E.3d 515, 2014 Ohio App. LEXIS 808 (Ohio Ct. App., Cuyahoga County 2014).

In a workers' compensation case, the trial court abused its discretion in granting a motion to compel discovery of an injured worker's medical records that were privileged without first conducting an in camera inspection to determine which records were causally or historically related to the action. Collins v. Interim Healthcare of Columbus, Inc., 2014-Ohio-40, 2014 Ohio App. LEXIS 30 (Ohio Ct. App., Perry County 2014).

Trial court did not err under R.C. 2317.02(B)(3)(a) in denying an employee's request for document inspection or in compelling the production of the employee's medical records because the employee failed to provide a basis by which the court could have concluded that an in camera examination would have established a privilege. Chasteen v. Stone Transp., Inc., 2010-Ohio-1701, 2010 Ohio App. LEXIS 1403 (Ohio Ct. App., Fulton County 2010).

—In camera review

Since the evidence did not demonstrate that an injured person had waived the doctor-patient privilege, certainly as it related to any records of sexually-transmitted diseases and the like, and such conditions did not appear to be at issue, not could it be concluded that a judicially created waiver might be appropriate, an in camera review was appropriate. Moore v. Ferguson, 2012-Ohio-6087, 2012 Ohio App. LEXIS 5265 (Ohio Ct. App., Richland County 2012).

Motion to compel discovery was improperly granted in a personal injury case because, even though the scope of discovery under Civ.R. 26(B)(1) was broad, an executrix presented a sufficient factual basis to prompt an in camera review of medical records that were allegedly privileged; she asserted that the records were not related to a car accident at issue. Piatt v. Miller, 2010-Ohio-1363, 2010 Ohio App. LEXIS 1149 (Ohio Ct. App., Lucas County 2010).

—Insurance matters

Court could appropriately order the insureds to sign medical releases as requested by the insurer, because the insureds waived their claims of privilege by their failure to follow the proper procedure under Civ.R. 26(B)(6)(a) by failing to provide the insurer with even the unprivileged medical records, failing to file a privilege log, and failing to submit the records alleged to be privileged to the court for an in-camera inspection as a result of their insistence that the records be held by a third-party service company before they constructed their privilege log. Hartzell v. Breneman, 2011-Ohio-2472, 2011 Ohio App. LEXIS 2126 (Ohio Ct. App., Mahoning County 2011).

In a suit by an insurance company for the cancellation of life insurance policy on ground of fraud in the application, physician's testimony relative to diagnosis and treatment of insured and insured's statements to him, and patient's hospital record, are inadmissible under the privileged communication rule: Prudential Ins. Co. v. Heaton, 20 Ohio Law Abs. 454, 1935 Ohio Misc. LEXIS 1199 (Ohio Ct. App., Van Wert County June 25, 1935).

—Involuntary commitment

The physician-patient privilege set forth in R.C. 2317.02(B) does not apply to involuntary commitment proceedings pursuant to R.C. 5122.11 to 5122.15, because the privilege applies only when the patient has voluntarily sought treatment: In re Winstead, 67 Ohio App. 2d 111, 21 Ohio Op. 3d 422, 425 N.E.2d 943, 1980 Ohio App. LEXIS 9617 (Ohio Ct. App., Summit County 1980).

—Liability for unlawful disclosure

In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship: Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 715 N.E.2d 518, 1999 Ohio LEXIS 2925 (Ohio 1999).

—Liability to third parties

A physician was not liable to a third party who contracted a disease from a patient allegedly due to the physician's negligent treatment and advising of the patient: *D'Amico v. Delliquadri, 114 Ohio App. 3d 579, 683 N.E.2d 814, 1996 Ohio App. LEXIS 4212 (Ohio Ct. App., Trumbull County 1996)*.

—Mirror imaging

In a wrongful death case, an order allowing the creation of mirror image files of computer hard drives was appropriate; *R.C. 2317.02(B)(1)* did not bar that process since there was no risk of viewing patient files, the trial court determined whether items on a log were privileged, and access was permitted under Civ.R. 34 where there was a direct relationship between the computer hard drives and the claims of spoliation and fraud. Moreover, the trial court set forth a specific protocol, definite search terms, and the means necessary to protect privileged information. *Cornwall v. N. Ohio Surgical Ctr., Ltd., 2009-Ohio-6975, 185 Ohio App. 3d 337, 923 N.E.2d 1233, 2009 Ohio App. LEXIS 5814 (Ohio Ct. App., Erie County 2009)*.

—Motion for protective order

When a client sued a lawyer for legal malpractice arising from the lawyer's representation of the client in the client's claim for negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 et seq., the client was not entitled to a protective order barring the client's physician from testifying as an expert witness for the lawyer because (1) the physician's testimony was not privileged, even though it was derived from the physician's treatment of the client, because, when the client filed a civil action involving the physician's treatment of the client, the client waived the client's physician-patient privilege, under *R.C. 2317.02(B)(1)(a)(iii)*, and (2) the physician's testimony was relevant, under *R.C. 2317.02(B)(3)(a)* because it related causally or historically to physical injuries that were relevant to the client's claim. *Smalley v. Friedman, Damiano & Smith Co., L.P.A., 2007-Ohio-2646, 172 Ohio App. 3d 108, 873 N.E.2d 331, 2007 Ohio App. LEXIS 2475 (Ohio Ct. App., Cuyahoga County 2007)*.

The physician-patient privilege set forth in *R.C. 2317.02(B)* may be "activated" for discovery purposes by the plaintiff-patient filing a motion for a protective order pursuant to Civ.R. 26: *Baker v. Quick Stop Oil Change & Tune-Up, 61 Ohio Misc. 2d 526, 580 N.E.2d 528, 1990 Ohio Misc. LEXIS 41 (Ohio C.P. 1990)*.

—Nonparties

In a medical negligence case, a health care provider should not have been ordered to produce redacted laboratory results from a non-party patient's medical record because they were privileged under *R.C. 2317.02(B)(1)*, (B)(5)(a), and the Biddle case did not create a litigant's right to discovery of confidential medical records of non-parties. *Bednarik v. St. Elizabeth Health Ctr., 2009-Ohio-6404, 2009 Ohio App. LEXIS 5359 (Ohio Ct. App., Mahoning County 2009)*.

—Not related

In a case involving murder, aggravated burglary, and kidnapping, defendant failed to show that any excluded communication between himself and a psychiatric patient were related to the action, as required by *R.C. 2317.02*, where emails between the two were sent several years before the murder. Although the trial court did arguably abuse its discretion by preventing defendant from impeaching the patient under Evid.R.s 616(B) by questioning her about a disorder's impact on her ability to observe, remember, and relate the events surrounding her husband's murder, any error the court committed by limiting cross-examination on this subject was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt concerning the charges the patient testified about. *State v. Adams, 2009-Ohio-6491, 2009 Ohio App. LEXIS 5449 (Ohio Ct. App., Scioto County 2009)*.

—Physician, defined

"Physician," as used in *R.C. 2317.02(B)* is one who has been duly authorized and licensed by the state medical board to engage in the general practice of medicine: *Belichick v. Belichick, 37 Ohio App. 2d 95, 66 Ohio Op. 2d 166, 307 N.E.2d 270, 1973 Ohio App. LEXIS 806 (Ohio Ct. App., Mahoning County 1973)*.

—Physician disciplinary proceedings

R.C. 2317.02(B) may not be used by a physician to prevent the State Medical Board from compelling production of patient records pursuant to *R.C. 4731.22(C)(1)*: Ohio *State Medical Bd. v. Miller, 44 Ohio St. 3d 136, 541 N.E.2d 602, 1989 Ohio LEXIS 173 (Ohio 1989)*.

—Police transportation to hospital

Where an intoxicated arrestee is involuntarily transported to a hospital by police officers, the privilege under *R.C. 2317.02* is applicable to observations made by medical personnel and communications made by the defendant: *City of Cleveland v. Haffey, 94 Ohio Misc. 2d 79, 703 N.E.2d 380, 1998 Ohio Misc. LEXIS 42 (Ohio Mun. Ct. 1998)*.

—Relevance

Because the trial court did not have any evidence before it regarding the husband's mental or emotional health, it could not have made a determination regarding his mental health in the divorce decree. Thus, collateral estoppel and res judicata did not render the pre-decree mental health records irrelevant to the current action. *Banchefsky v. Banchefsky, 2014-Ohio-899, 2014 Ohio App. LEXIS 845 (Ohio Ct. App., Franklin County 2014)*.

—Scope

There was no plain error in the admission of defendant's medical records, which included his statement to his treating physician that he had stabbed his girlfriend, because whether the doctor-patient privilege was waived or not, based on the other evidence, it could not be shown that in the absence of that admission the outcome of the trial clearly would have been different. *State v. Harris, 2014-Ohio-4237, 2014 Ohio App. LEXIS 4151 (Ohio Ct. App., Hamilton County 2014)*.

Trial court erred in granting a broad discovery order with respect to the car accident victim's medical records, and in refusing to conduct an in camera review to ascertain what was causally or historically related, because the medical authorizations were essentially unlimited as to scope, as well as the time period for which the medical records were sought. The driver's claim that the medical release forms were necessarily broad due to the possibility of a pre-existing injury did not justify a request for blanket authorizations without any limitations in scope and time. *Gentile v. Duncan, 2013-Ohio-5540, 5 N.E.3d 100, 2013 Ohio App. LEXIS 5783 (Ohio Ct. App., Franklin County 2013)*.

Clinic could not be liable for disclosing the names of the medical providers of a police officer and his prior to issuance of a subpoena because the identity of medical providers, in and of itself, was not privileged under *R.C. 2317.02*. *Turk v. Oiler, 2010 U.S. Dist. LEXIS 8169 (N.D. Ohio Feb. 1, 2010)*.

Trial court properly granted a motion to compel the disclosure of the names and addresses of a deceased nursing home resident's roommates, as they were not confidential medical information where they did not concern any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for the patient pursuant to *R.C. 2317.02*. *May v. Northern Health Facilities, Inc., 2009-Ohio-1442, 2009 Ohio App. LEXIS 1195 (Ohio Ct. App., Portage County 2009)*.

Trial court erred in ordering disclosure under Civ.R. 26 by a clinic of 10 years' of minors' abortion records in an identity-concealing format, as they were covered by the patient-physician privilege under *R.C. 2317.02(B)* and any possible probative value of the records was far outweighed by the potential invasion of privacy rights of the patients; the parents of a minor abortion patient's claims did not require disclosure thereof, as the clinic had acted in good faith in attempting to comply with the parental notification requirement of former *R.C. 2919.12* and the enforcement of *R.C. 2919.121* was enjoined at the time of the procedure, punitive damages were obtainable upon a showing of a single violation of either *R.C. 2919.12* or *2317.56*, such that additional patient records were not necessary, and any duty to report suspected child abuse under *R.C. 2151.421* was confidential and was not admissible as evidence. *Roe v. Planned Parenthood Southwest Ohio Region, 2007-Ohio-4318, 173 Ohio App. 3d 414, 878 N.E.2d 1061, 2007 Ohio App. LEXIS 3868 (Ohio Ct. App., Hamilton County 2007)*, aff'd on other grounds, *2009-Ohio-2973, 122 Ohio St. 3d 399, 912 N.E.2d 61, 2009 Ohio LEXIS 1832 (Ohio 2009)*.

Trial court did not err in denying defendant access to the medical records of one of the victims of his vehicular criminal offense, as the Health Insurance Portability and Accountability Act did not preempt the physican-patient privilege under *R.C. 2317.02(B)* and there was no indication that the victim had waived that privilege. *State v. Flanigan, 2007-Ohio-3158, 2007 Ohio App. LEXIS 2909 (Ohio Ct. App., Montgomery County 2007)*.

When, in an aggravated murder case, defendant pled not guilty by reason of insanity, and was examined by a forensic psychiatrist for the State, the fact that the psychiatrist consulted with defendant's treatment providers did not render the psychiatrist's testimony at trial a violation of the physician-patient privilege, under *R.C. 2317.02(B)(1)*, because (1) it was not obvious that the testimony violated this privilege, which was in derogation of the common law and strictly construed, nor (2) did the psychiatrist testify to any "communication made to a physician" "by a patient" "in that relation," and (3) *R.C. 2945.371(F)* provided that, in conducting an evaluation of a defendant's mental condition at the time of an offense charged, the court-appointed examiner was to consider all relevant evidence. *State v. Hancock, 2006-Ohio-160, 108 Ohio St. 3d 57, 840 N.E.2d 1032, 2006 Ohio LEXIS 215 (Ohio 2006)*.

—Standing to assert

General liability insurer lacked standing to prosecute an appeal of a trial court's order denying the general liability insurer's motion to quash the videotape depositions of a patient's doctors as privileged because the general liability insurer could not show that it would sustain an injury in fact if the depositions of the doctors went forward. The general liability insurer would not be subject to sanctions for violating both the physician-patient privilege in *R.C. 2317.02(B)(1)* and the Health Insurance Portability and Accountability Act (HIPAA) as the patient's privilege was waived when her estate filed the wrongful death action, and since the privacy requirements of *§ 2317.02(B)(1)* were more extensive than those mandated by HIPAA, it was inapplicable. *Progressive Preferred Ins. Co. v. Certain Underwriters at Lloyd's London, 2008-Ohio-2508, 2008 Ohio App. LEXIS 2114 (Ohio Ct. App., Lake County 2008)*.

—Waiver

Based on the plain language of the complaint, the insured was seeking redress for both physical and emotional pain and suffering caused by the crash with the uninsured driver. Because she explicitly stated that she suffered both physical and emotional pain and suffering, she waived her doctor-patient privilege for medical records of both the physical and psychological/psychiatric varieties and both categories of medical records were causally and historically related to the injuries claimed in the suit. *Bokma v. Raglin, 2022-Ohio-960, 2022 Ohio App. LEXIS 859 (Ohio Ct. App., Montgomery County 2022)*.

Trial court did not abuse its discretion in ordering plaintiff to sign the medical authorizations because plaintiff never sought a protective order, never requested an in camera inspection of any document, failed to articulate a factual

basis by which the court could have concluded that a record was not properly discoverable, and admitted relevant injuries dating back to 2005, the same year from which he complained defendant sought records. *Pietrangelo v. Hudson, 2019-Ohio-1988, 136 N.E.3d 867, 2019 Ohio App. LEXIS 2051 (Ohio Ct. App., Cuyahoga County 2019)*, cert. denied, *141 S. Ct. 254, 208 L. Ed. 2d 27, 2020 U.S. LEXIS 4088 (U.S. 2020)*.

By asserting a claim for loss of consortium in both the survivorship and wrongful death claims, the decedent's wife placed her relationship with her husband directly at issue and the request for the decedent's psychological records related to marital counseling fell within the waiver of privilege under this section. *Karimian-Dominique v. Good Samaritan Hosp., 2019-Ohio-2750, 139 N.E.3d 1237, 2019 Ohio App. LEXIS 2864 (Ohio Ct. App., Montgomery County 2019)*.

Filing a civil action to recover for an alleged breach of confidentiality of medical records that occurred in prior litigation in which the patient was not a party does not function as a waiver of confidentiality allowing disclosure of those records in the prior litigation. Thus, when appellant, who was a potential witness in but not a party to post-decree proceedings in the present divorce case, filed a subsequent separate civil action alleging that a breach of confidentiality of the medical records had occurred in the divorce case, this did not waive his physician-patient privilege in the ongoing divorce case. *Montei v. Montei, 2016-Ohio-8190, 2016 Ohio App. LEXIS 5052 (Ohio Ct. App., Clark County 2016)*.

Trial court abused its discretion in granting the driver's motion to compel discovery of the car accident victim's medical records without first conducting an in camera inspection to determine which records were causally or historically related to the action. *Bircher v. Durosko, 2013-Ohio-5873, 2013 Ohio App. LEXIS 6169 (Ohio Ct. App., Fairfield County 2013)*.

Deposition of a non-party physician concerning the standard of care, causation, and the prior and subsequent treatment of a patient by others relative to the medical condition at issue was allowed in the patient's medical malpractice suit against a doctor because the physician participated in the treatment at issue and would not be divulging the information surreptitiously, but through the normal discovery process; by filing the suit, the patient already waived the *R.C. 2317.02* physician-patient privilege. Allowing the physician to be deposed did not undermine the privilege. *Brant v. Summa Health Sys., 2012 U.S. Dist. LEXIS 56660 (N.D. Ohio Apr. 23, 2012)*.

Trial court did not err by denying the driver's motion for a protective order because her decision to file a personal injury claim against the company and its employee, which was based upon the same accident that underlay the basis for the claims and defenses proposed by the instant parties, served to waive the driver's physician-patient privilege with respect to the accident, pursuant to *R.C. 2317.02(B)*. *Leopold v. Ace Doran Hauling & Rigging Co., 2012-Ohio-497, 2012 Ohio App. LEXIS 432 (Ohio Ct. App., Cuyahoga County 2012)*, aff'd, *2013-Ohio-3107, 136 Ohio St. 3d 257, 994 N.E.2d 431, 2013 Ohio LEXIS 1689 (Ohio 2013)*.

By a vehicle occupant's filing of a negligence action against a driver, arising from an automobile accident, the occupant waived the physician-patient privilege under *R.C. 2317.02(B)* as to the specific information that was "related causally or historically" to the injuries that formed the basis of his complaint, including mental and physical injuries; accordingly, there was no abuse of discretion by the trial court's order to compel medical records and authorizations pursuant to Civ.R. 26. *Bogart v. Blakely, 2010-Ohio-4526, 2010 Ohio App. LEXIS 3827 (Ohio Ct. App., Miami County 2010)*.

Trial court properly overruled a guardian's motion to quash a daughter's subpoena for medical information related to the daughter's mother, who was the guardian's ward, because, inter alia, the guardian had previously shared such information with the daughter, waiving any privilege as to that information. *In re Guardianship of Marcia S. Clark, 2009-Ohio-6577, 2009 Ohio App. LEXIS 5509 (Ohio Ct. App., Franklin County 2009)*.

In custody proceedings, it was an abuse of discretion for a trial court to deny a father's motion to compel production of a mother's medical records because (1) the mother waived her *R.C. 2317.02(B)(1)* physician-patient privilege by seeking custody, which put her mental and physical condition at issue, and (2) her records could be highly relevant, based on the facts that *R.C. 3109.04(F)(1)(e)* required the court to consider her mental and physical health, the

father alleged that she had attempted suicide, which she denied, and the evidence showed that she took medication to control anxiety and depression.(1) the mother waived the mother's physician-patient privilege, under *R.C. 2317.02(B)(1)*, by seeking custody of the parties' children, which put the mother's mental and physical condition at issue, and (2) the mother's records could be highly relevant, based on the facts that *R.C. 3109.04(F)(1)(e)* required the trial court to consider the mother's mental and physical health, the father alleged that the mother had attempted suicide, which the mother denied, and the evidence showed that the mother took medication to control anxiety and depression. *In re Kelleher, 2009-Ohio-2960, 2009 Ohio App. LEXIS 2607 (Ohio Ct. App., Jefferson County 2009)*.

Patient's consent to the release of medical information is valid, and waives the physician-patient privilege, if the release is voluntary, express, and reasonably specific in identifying to whom the information is to be delivered. *Med. Mut. of Ohio v. Schlotterer, 2009-Ohio-2496, 122 Ohio St. 3d 181, 909 N.E.2d 1237, 2009 Ohio LEXIS 1591 (Ohio 2009)*.

Consent provisions in certificates of coverage provided to all of an insurer's insureds that were patients of a doctor met the necessary requirements for disclosure: the provisions were voluntary, they qualified as express consent given that the provisions specifically stated that the patients consented to the release of medical information to the insurer when they enrolled, and the provisions were specific in identifying that the release was to be made to the insurer. Discovery of the medical records at issue was also not inconsistent with any stated purpose in the consent provisions; thus, the physician-patient privilege in *R.C. 2317.02(B)(1)* did not preclude the doctor from providing the patients' medical records to the insurer. *Med. Mut. of Ohio v. Schlotterer, 2009-Ohio-2496, 122 Ohio St. 3d 181, 909 N.E.2d 1237, 2009 Ohio LEXIS 1591 (Ohio 2009)*.

When a father was involved in both a domestic relations case and a prosecution for domestic violence, and he waived the physician-patient privilege between himself and his psychiatrist for purposes of the domestic relations case by asking his psychiatrist to report his prognosis to that court and by seeking custody of his child, this waiver did not apply to the domestic violence prosecution, so his ex-wife's attorney was not authorized to provide the information released to the domestic relations court to the prosecutor in the domestic violence case, who was required to obtain it by proper discovery. *Hageman v. Southwest Gen. Health Ctr., 2006-Ohio-6765, 2006 Ohio App. LEXIS 6670 (Ohio Ct. App., Cuyahoga County 2006)*, aff'd, *2008-Ohio-3343, 119 Ohio St. 3d 185, 893 N.E.2d 153, 2008 Ohio LEXIS 1773 (Ohio 2008)*.

—Wrongful death

Discovery was precluded regarding information that contained reports of child abuse, discussed information contained in a report of abuse, or identified a person making the report, pursuant to *R.C. 2151.421(H)(1)*; however, discovery was not precluded of all discussions about injuries or conditions that resulted from abuse. A trial court was ordered to enter a protective order allowing depositions of several health care providers to go forward subject to restrictions on the scope of inquiry; the physician/patient privilege had been waived by the estate in this wrongful death case. *Nash v. Cleveland Clinic Found., 2010-Ohio-10, 2010 Ohio App. LEXIS 5 (Ohio Ct. App., Cuyahoga County 2010)*, dismissed, *2014 Ohio Misc. LEXIS 11941 (Ohio C.P. Apr. 16, 2014)*.

Plain error

Where a husband claimed on appeal that the trial court erred in admitting evidence of the parties' marital therapy session and mediation sessions in their divorce action, in violation of *R.C. 2317.02* and *2317.023*, but he failed to object to the admission of the evidence in the trial court, such error was not preserved for review under Evid.R. 103(A)(1), and review was made under the plain error standard of review; there was no plain error by the admission of that evidence, as it did not seriously affect the basic fairness, integrity, or public reputation of the judicial process. *Brooks-Lee v. Lee, 2005-Ohio-2288, 2005 Ohio App. LEXIS 2188 (Ohio Ct. App., Franklin County 2005)*.

Preemption

Ohio's physician-patient privilege, *R.C. 2317.02(B)*, was not preempted by the Health Information Portability and Accountability Act of 1996 (HIPAA), because *R.C. 2317.02(B)* prohibited use or disclosure of health information when such use or disclosure would be allowed under HIPAA. *Turk v. Oiler, 732 F. Supp. 2d 758, 2010 U.S. Dist. LEXIS 81340 (N.D. Ohio 2010)*.

Since *R.C. 2317.02(B)(1)* is more stringent then *45 C.F.R. § 164.512* of the Health Insurance Portability and Accountable Act of 1996, the Act did not preempt *§ 2317.02(B)(1)*. *May v. Northern Health Facilities, Inc., 2009-Ohio-1442, 2009 Ohio App. LEXIS 1195 (Ohio Ct. App., Portage County 2009)*.

—Prescriptions

Where unrebutted evidence supports the contention that prescribed drugs far exceed the dosage levels generally accepted in the medical community, that circumstance takes the claimed communication outside the realm of privilege under *R.C. 2317.02*: *State v. Spencer, 126 Ohio App. 3d 335, 710 N.E.2d 352, 1998 Ohio App. LEXIS 2111 (Ohio Ct. App., Cuyahoga County 1998)*.

—Reports by employer

Under Ohio law, *R.C. 2317.02* and *4731.22*, a physician may not disclose a patient's medical records without the patient's consent. The limited exception to this rule is found in *R.C. 3701.05* which permits disclosure of an "occupational disease" in reports to the Ohio Department of Health. Therefore, an employer is not required to submit medical records identified by name and address of employees to federal agencies without specific consent of the employee involved: *459 F. Supp. 235*.

—Roommates

Motion to compel was properly granted in a medical malpractice case because the disclosure of a patient's roommates was not barred by *R.C. 2317.02(B)(1)* since it did not concern any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for a patient. Further, the disclosure of the requested material did not violate Health Insurance Portability and Accountability Act (HIPAA); *R.C. 2317.02* was more restrictive, and it was not preempted by HIPAA. *Dauterman v. Toledo Hosp., 2011-Ohio-148, 2011 Ohio App. LEXIS 130 (Ohio Ct. App., Lucas County 2011)*.

—Scope

Hospital was not liable for disclosing the names of plaintiff's medical providers because the identity of medical providers, in and of itself, was not privileged. *Turk v. Oiler, 732 F. Supp. 2d 758, 2010 U.S. Dist. LEXIS 81340 (N.D. Ohio 2010)*.

Where, in the former patients' class action against the hospital alleging that the hospital inhumanely or improperly disposed of fetal tissue that resulted from the patients' miscarriages or stillbirths, the trial court improperly ordered the hospital to provide the former patients with confidential information about the identity of potential class members, information privileged under the physician-patient privilege; the appeals court reversed, holding the information was confidential and thus it was for potential class members to decide their interests not a physician, lawyer, or court. *Walker v. Firelands Cmty. Hosp., 2004-Ohio-681, 2004 Ohio App. LEXIS 656 (Ohio Ct. App., Erie County 2004)*.

—Standing to assert

The employer had standing to assert the physician-patient privilege on behalf of its employees where an overly broad discovery order would have compelled disclosure of their medical records: *Whitt v. ERB Lumber, 2004-Ohio-1302, 156 Ohio App. 3d 518, 806 N.E.2d 1034, 2004 Ohio App. LEXIS 1151 (Ohio Ct. App., Clark County 2004)*.

Prior to ordering disclosure of the plaintiff's medical records in a medical malpractice action, the court should have conducted an in camera inspection and provided the parties an opportunity to present their positions on disclosure: *Penwell v. Nanavati, 2003-Ohio-4628, 154 Ohio App. 3d 96, 796 N.E.2d 78, 2003 Ohio App. LEXIS 4113 (Ohio Ct. App., Marion County 2003)*.

—Strict construction

R.C. 2317.02 providing that a physician shall not testify concerning communications made to him by his patient in that relation, or his advice to his patient, without the patient's express consent, and providing further that if the patient voluntarily testifies, the physician may be compelled to testify on the same subject, is in derogation of common law and hence must be strictly construed: *In re Petition of Loewenthal, 101 Ohio App. 355, 1 Ohio Op. 2d 302, 134 N.E.2d 158, 1956 Ohio App. LEXIS 706 (Ohio Ct. App., Cuyahoga County 1956)*.

—Waiver

By filing an action against a doctor who treated the decedent, and by intervening in the insurer's declaratory action against the doctor, the decedent's family members waived the medical privilege. *Care Risk Retention Group v. Martin, 2010-Ohio-6091, 191 Ohio App. 3d 797, 947 N.E.2d 1214, 2010 Ohio App. LEXIS 5124 (Ohio Ct. App., Montgomery County 2010)*.

Plaintiff waived the physician-patient privilege as to a former treating physician where he filed a legal malpractice claim and the physician's testimony was relevant to the defense of the action: *Smalley v. Friedman, Damiano & Smith Co., L.P.A., 2007-Ohio-2646, 172 Ohio App. 3d 108, 873 N.E.2d 331, 2007 Ohio App. LEXIS 2475 (Ohio Ct. App., Cuyahoga County 2007)*.

R.C. 3701.243, authorizing disclosure of HIV/AIDS information in certain circumstances, implicitly waives the physician-patient privilege: *State v. Gonzalez, 2003-Ohio-4421, 154 Ohio App. 3d 9, 796 N.E.2d 12, 2003 Ohio App. LEXIS 3930 (Ohio Ct. App., Hamilton County 2003)*.

Although *R.C. 2317.02(B)(1)(a)(iii)* provides that the physician-patient privilege does not apply to a patient who has filed a civil action, *R.C. 2317.02(B)(3)(a)* places a limit on what communications may be discovered: *McCoy v. Maxwell, 139 Ohio App. 3d 356, 743 N.E.2d 974, 2000 Ohio App. LEXIS 4567 (Ohio Ct. App., Portage County 2000)*.

The applicability of the psychologist-patient privilege turns upon whether a statutory waiver or exception has been invoked; the issue of whether the psychological treatment was sought voluntarily or involuntarily is not controlling: *In re Kyle, 2000 Ohio App. LEXIS 5619 (Ohio Ct. App., Portage County Dec. 1, 2000)*.

Plaintiff waived the physician-patient privilege by filing a civil action. There was no evidence that a treating physician violated a duty of confidentiality: *Wargo v. Buck, 123 Ohio App. 3d 110, 703 N.E.2d 811, 1997 Ohio App. LEXIS 4499 (Ohio Ct. App., Mahoning County 1997)*.

R.C. 2317.02(B)(1) provides that the privilege is waived in accord with the discovery provisions of the Civil Rules. Those rules provide, however, that discovery is limited to matters which are not privileged. The privilege is not waived merely by filing suit or testifying: *Dellenbach v. Robinson, 95 Ohio App. 3d 358, 642 N.E.2d 638, 1993 Ohio App. LEXIS 2321 (Ohio Ct. App., Franklin County 1993)*.

Where plaintiff waived her privilege under R.C. 2317.02 by filing the personal injury action, she could not sue the opposing party's counsel for invasion of privacy merely because counsel obtained medical records plaintiff considered embarrassing: Kahler v. Roetzel & Andress, 1994 Ohio App. LEXIS 2477 (Ohio Ct. App., Franklin County June 7, 1994).

The physician-patient privilege is not waived merely because the patient testifies: State v. Brown, 1993 Ohio App. LEXIS 3496 (Ohio Ct. App., Portage County July 9, 1993).

When a patient files a workers' compensation claim, that operates as a waiver of the physician-patient privilege for purposes of pursuing remedies under R.C. Chapter 4123.: Kokitka v. Ford Motor Co., 1993 Ohio App. LEXIS 3075 (Ohio Ct. App., Cuyahoga County June 17, 1993), amended, 1993 Ohio App. LEXIS 3660 (Ohio Ct. App., Cuyahoga County July 22, 1993), dismissed, *68 Ohio St. 3d 1449, 626 N.E.2d 690, 1994 Ohio LEXIS 312 (Ohio 1994)*.

Any physician-patient privilege was waived by defendant's failure to object to the testimony at trial. A motion to suppress which does not refer to the privilege does not preserve the objection; neither does the granting of a motion in limine. Information acquired by a hospital nurse may fall within the privilege: State v. Cherukuri, 79 Ohio App. 3d 228, 607 N.E.2d 56, 1992 Ohio App. LEXIS 1901 (Ohio Ct. App., Lake County 1992).

R.C. 2317.02(B)(2) pertains only to claims brought by or on behalf of the deceased for which waiver is applicable pursuant to R.C. 2317.02(B)(1)(c). A court cannot create a public policy exception to the privilege: Cline v. Finney, 71 Ohio App. 3d 571, 594 N.E.2d 1100, 1991 Ohio App. LEXIS 1298 (Ohio Ct. App., Franklin County 1991).

Answering questions as to treatment from a physician in response to questions on cross-examination does not waive the privilege of confidentiality because it is not voluntary within the meaning of R.C. 2317.02: Hanly v. Riverside Methodist Hosp. Foundation, Inc., 71 Ohio App. 3d 778, 595 N.E.2d 429, 1991 Ohio App. LEXIS 1550 (Ohio Ct. App., Franklin County 1991).

When a waiver of the physician-patient privilege by a party to a lawsuit is inevitable or reasonably probable to occur, the trial court may, within its discretion, order the physician to submit to a discovery deposition, upon the express proviso that information discovered or gained from such discovery not be used until such time as actual waiver occurs; the physician-patient privilege is waived when the party who owns the privilege takes the deposition of his own treating physician for use at trial; upon waiver of the physician-patient privilege, properly discovered testimony of the physician may be used to oppose a motion for summary judgment: Garrett v. Jeep Corp., 77 Ohio App. 3d 402, 602 N.E.2d 691, 1991 Ohio App. LEXIS 4558 (Ohio Ct. App., Lucas County 1991).

Under Ohio law, physician-patient privilege may be waived by the express consent of the surviving spouse; initial agreement by plaintiff's counsel to make physician available to defense for deposition did not constitute "express consent" by surviving spouse to waive the privilege: Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990).

Waiver of the physician-patient privilege may occur, absent expressed consent, where the party asserting the privilege testifies as to the specifics of the physician's treatment, except where the party asserting the privilege did not attempt to benefit from the testimony: Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1990 U.S. App. LEXIS 4875 (6th Cir. Ohio 1990).

Pursuant to R.C. 2317.02(B)(1)(c), when a person files a tort action for injuries received in an accident, he waives any physician-patient privilege for communications made to any treating physician or his advice to the plaintiff-patient to the extent the communication or advice is "related causally or historically to [the] physical or mental injuries that are relevant to issues in the * * * civil action" (R.C. 2317.02[B][2]). R.C. 2317.02 (B)(2) contemplates actual testimony by the physician and not by a recordskeeper from his office or a hospital. Pursuant to R.C. 2317.02(B)(4), hospital records are not included in the R.C. 2317.02(B)(1)(c) waiver of the physician-patient waiver, except to the extent that the records are a "communication" as defined in R.C. 2317.02(B)(3), as established

through the physician's deposition testimony: *Baker v. Quick Stop Oil Change & Tune-Up, 61 Ohio Misc. 2d 526, 580 N.E.2d 528, 1990 Ohio Misc. LEXIS 41 (Ohio C.P. 1990)*.

Pursuant to *R.C. 2317.02(B)*, the patient-physician privilege is waived relating to a physician when suit is brought against him in a malpractice claim with regard to his care and treatment of the patient-plaintiff so that he may effectively defend himself: *Long v. Isakov, 58 Ohio App. 3d 46, 568 N.E.2d 707, 1989 Ohio App. LEXIS 2334 (Ohio Ct. App., Cuyahoga County)*, dismissed, *47 Ohio St. 3d 701, 547 N.E.2d 986, 1989 Ohio LEXIS 2051 (Ohio 1989)*.

Under *R.C. 2317.02(B)*, a patient may waive the patient-physician privilege by voluntarily testifying as to the privileged matter, which may consist of admitting into evidence records containing privileged communications: *Long v. Isakov, 58 Ohio App. 3d 46, 568 N.E.2d 707, 1989 Ohio App. LEXIS 2334 (Ohio Ct. App., Cuyahoga County)*, dismissed, *47 Ohio St. 3d 701, 547 N.E.2d 986, 1989 Ohio LEXIS 2051 (Ohio 1989)*.

For purposes of *R.C. 2317.02*, the guardian of an incompetent ward may expressly consent to waive the ward's physician-patient privilege: *In re Guardianship of Escola, 41 Ohio App. 3d 42, 534 N.E.2d 866, 1987 Ohio App. LEXIS 10749 (Ohio Ct. App., Stark County 1987)*.

The industrial commission may not require a claimant to waive his physician-patient privilege as a precondition to consideration of the claim: *State ex rel. Holman v. Dayton Press, Inc., 11 Ohio St. 3d 66, 463 N.E.2d 1243, 1984 Ohio LEXIS 1106 (Ohio 1984)*.

A party's testifying in his own behalf as to his injuries, communications made to him by his physician and the physician's treatment of him waives his privilege against having the physician testify as to the same matters already disclosed by him, and in such cases the physician may be compelled to testify. Merely answering questions on cross-examination as to treatment from a physician does not waive the physician-patient privilege: *9 Ohio Misc. 2d 19, 9 Ohio B. 621, 460 N.E.2d 327*.

When a patient testifies about (his or) her medical condition, (his or) her physician may testify concerning the same subject: *Covington v. Sawyer, 9 Ohio App. 3d 40, 458 N.E.2d 465, 1983 Ohio App. LEXIS 11000 (Ohio Ct. App., Franklin County 1983)*.

Civ.R. 35(B)(2) indicates that a party waives any physician-patient privilege when he requests and obtains a report of an examination that has either been ordered by the court or agreed to by the parties: *9 Ohio Misc. 2d 19, 9 Ohio B. 621, 460 N.E.2d 327*.

The physician-patient privilege set forth in *R.C. 2317.02(B)* can be waived only by the methods provided for in that statute. Since *R.C. 2317.02(B)* does not make reference to *R.C. 4511.19.1(A)* (the implied consent statute), *R.C. 4511.19.1(A)* may not be used to defeat the physician-patient privilege of *R.C. 2317.02(B)*: *State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312, 1982 Ohio App. LEXIS 11299 (Ohio Ct. App., Lucas County 1982)*.

Under the following circumstances, the patient-physician privilege of *R.C. 2317.02(B)* is waived and the physician's testimony about a woman's health (including an existing cancerous condition) may be received and considered in a suit against an insurer for life insurance after the woman's death: her husband signed both his name and hers to the insurance application, paid all premiums and was the sole beneficiary; the application specifically authorized release of information about the woman's (insured's) health; and the policy was issued on his information without a physical examination of the woman (insured): *Evans v. Occidential Life Ins. Co., 7 Ohio App. 3d 286, 455 N.E.2d 678, 1982 Ohio App. LEXIS 11165 (Ohio Ct. App., Hamilton County 1982)*.

The statutory physician-patient privilege is a substantive right; it can be waived and it is not against public policy to enforce such waiver: *Woelfling v. Great-West Life Assurance Co., 30 Ohio App. 2d 211, 59 Ohio Op. 2d 351, 285 N.E.2d 61, 1972 Ohio App. LEXIS 406 (Ohio Ct. App., Lucas County 1972)*.

A plaintiff in a personal injury action does not waive the physician-patient privilege provided in *R.C. 2317.02* by the commencement of this action, so as to empower the common pleas court to order him to turn over to the defendant

hospital records and medical reports made by his attending physicians in relation to his injury: *State ex rel. Lambdin v. Brenton, 21 Ohio St. 2d 21, 50 Ohio Op. 2d 44, 254 N.E.2d 681, 1970 Ohio LEXIS 429 (Ohio 1970)*.

A court will closely scrutinize an advance waiver of the physician-patient privilege in order to adequately protect the interests of the insured, and, where there is any doubt or ambiguity in the language of the insurance contract, it will be strictly construed against the insurer and in favor of the insured: *Nationwide Mut. Ins. Co. v. Jackson, 10 Ohio App. 2d 137, 39 Ohio Op. 2d 242, 226 N.E.2d 760, 1967 Ohio App. LEXIS 455 (Ohio Ct. App., Cuyahoga County 1967)*.

Where, in an action to recover damages for personal injuries, the plaintiff voluntarily testifies on the subject of the arthritic condition of his right knee before and after the accident, there is a waiver of the privileged communications between patient and physician granted by this section, and the physician may testify on that subject: *Ramey v. Mets, 3 Ohio App. 2d 329, 32 Ohio Op. 2d 434, 210 N.E.2d 449, 1964 Ohio App. LEXIS 506 (Ohio Ct. App., Pickaway County 1964)*.

In order to make applicable the waiver provision of *R.C. 2317.02* that, "if the. . . patient voluntarily testifies, the. . . physician may be compelled to testify on the same subject," such patient's testimony in a negligence action must be voluntary (i.e., not given on cross-examination) and its subject must concern communications by the patient to the physician and advice by the physician to the patient (i.e., the subject matter of such communications and advice): *Black v. Port, Inc., 120 Ohio App. 369, 29 Ohio Op. 2d 238, 202 N.E.2d 638, 1963 Ohio App. LEXIS 679 (Ohio Ct. App., Mahoning County 1963)*.

An employee, who, following an alleged industrial injury and treatment therefor, voluntarily signs, as part of an application for adjustment of claim, a waiver of physician-patient privilege, is chargeable with knowledge of the contents thereof. Pursuant to the provisions of this section, the physician who treated such employee-claimant may testify about relevant matters which came to his knowledge by reason of such treatment: *Ronald v. Young, 117 Ohio App. 362, 24 Ohio Op. 2d 137, 187 N.E.2d 74, 1963 Ohio App. LEXIS 830 (Ohio Ct. App., Cuyahoga County 1963)*.

Under Ohio law, a plaintiff does not waive the physician-patient privilege in regard to certain medical records by his testimony on cross-examination at the taking of his deposition: *Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 20 Ohio Op. 2d 341, 1962 U.S. Dist. LEXIS 3917 (N.D. Ohio 1962)*.

Under *R.C. 2317.02* there is no implied waiver of physician-patient privilege except that effected through the voluntary testifying of the patient himself, and a patient does not waive the privilege merely by answering questions as to treatment on cross-examination since such testimony is not "voluntary," within the purview of the statute: *Jenkins v. Metropolitan Life Ins. Co., 113 Ohio App. 163, 15 Ohio Op. 2d 387, 168 N.E.2d 625, 1960 Ohio App. LEXIS 582 (Ohio Ct. App., Hamilton County 1960)*, aff'd, *171 Ohio St. 557, 15 Ohio Op. 2d 14, 173 N.E.2d 122, 1961 Ohio LEXIS 689 (Ohio 1961)*.

By signing an instrument authorizing "any physician" to communicate to "bearer" any of his records pertaining to the illness of the decedent and at the same time authorizing the "bearer" to turn over to the insurer a copy of any records thus obtained, the decedent's widow expressly waived the privilege, and in her action on a policy insuring the decedent's life, the insurer was justified in calling as witnesses, physicians who had attended the decedent, and such witnesses could testify concerning the ailment or disability of which the patient had complained to them: *Jenkins v. Metropolitan Life Ins. Co., 113 Ohio App. 163, 15 Ohio Op. 2d 387, 168 N.E.2d 625, 1960 Ohio App. LEXIS 582 (Ohio Ct. App., Hamilton County 1960)*, aff'd, *171 Ohio St. 557, 15 Ohio Op. 2d 14, 173 N.E.2d 122, 1961 Ohio LEXIS 689 (Ohio 1961)*.

A person who voluntarily testifies, by deposition, as to his condition and treatment generally but does not testify as to his physician's findings upon examination and the diagnosis of his condition, waives the patient-physician privilege attaching thereto, whether such findings and diagnosis are within such person's knowledge or not; and such physician can be required to answer inquiries relating thereto: *In re Roberto, 106 Ohio App. 303, 7 Ohio Op. 2d 63, 151 N.E.2d 37, 79 Ohio Law Abs. 1, 1958 Ohio App. LEXIS 804 (Ohio Ct. App., Cuyahoga County 1958)*.

Under R.C. 2317.02, where a plaintiff seeking damages for personal injuries testifies fully as to his physical condition and mentions a physician who treated him and the treatment administered, there is a waiver with respect thereto, and such physician may testify: 103 Ohio App. 385, 2 Ohio Op. 2d 411, 145 N.E.2d 467.

A person testifying for his own benefit as to his injuries and communications made by him to his physician and the physician's treatment and advice to him in a deposition hearing instituted by him for the purpose of perpetuating his testimony in his personal injury suit, thereby waives the privilege against the physician's testimony as to the same matters already disclosed by him, and in such case the physician may be compelled to testify by deposition at the instance of the defendant, on the same subject as provided by R.C. 2317.02: In re Petition of Loewenthal, 101 Ohio App. 355, 1 Ohio Op. 2d 302, 134 N.E.2d 158, 1956 Ohio App. LEXIS 706 (Ohio Ct. App., Cuyahoga County 1956).

In an action by a widow to recover compensation under the workmen's compensation act for the death of her husband resulting from injuries sustained by him in the course of his employment, the testimony of a physician who attended decedent in his illness resulting from such injuries, as to knowledge and information gained by such physician in his professional capacity, relating to decedent's physical condition, may be admitted in evidence where the widow waives the statutory physician-patient privilege; and objection of the industrial commission to the waiver of such privilege is properly overruled: 131 Ohio St. 140, 5 Ohio Op. 505, 2 N.E.2d 248.

Where the insured voluntarily testifies as to physicians having examined him, it is error to refuse testimony of such physicians offered by the insurer, as examination of the insured's body is a communication to his physician, and the insured in testifying waived his privilege of the communication secured to him by this section: Metropolitan Life Ins. Co. v. McKim, 54 Ohio App. 66, 7 Ohio Op. 390, 6 N.E.2d 9, 6 N.E. 9, 22 Ohio Law Abs. 618, 1935 Ohio App. LEXIS 352 (Ohio Ct. App., Licking County 1935).

A waiver in an application for insurance of the right to object to the testimony of physicians is not against public policy and binds all beneficiaries; and the insurer may require the testimony of physicians to show fraud: New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N.E. 176, 5 Ohio Law Abs. 380, 1927 Ohio LEXIS 279 (Ohio 1927).

—Wrongful death

The specific mention in R.C. 2317.02(B) of the right of a surviving spouse or administratrix to waive the deceased patient's physician-patient privilege, and its inclusion in the general evidentiary chapter of the Ohio Revised Code along with the legislature's failure to exempt wrongful death actions specifically, as it does medical malpractice actions from the scope of the statute indicates the applicability of R.C. 2317.02 to wrongful death actions: *Urseth v. City of Dayton, 653 F. Supp. 1057 (S.D. 1986)*.

Police records

One having custody and control of the records (chief of police) of a police department made in the detection and prevention of crime, is not generally privileged from disclosing the same in taking of depositions in a civil action: In re Story, 159 Ohio St. 144, 50 Ohio Op. 116, 111 N.E.2d 385, 1953 Ohio LEXIS 553 (Ohio 1953).

Privileged communications

Information and documents sought by the former wife in her motion to compel did not fall within any of the enumerated privileged communications and, while the information sought may have been considered a "trade secret", the husband did not claim that the information was subject to trade secret protection. In any event, although confidential, trade secret information was not absolutely privileged and the husband could have sought a protective order but did not do so. Gauthier v. Gauthier, 2019-Ohio-4397, 2019 Ohio App. LEXIS 4471 (Ohio Ct. App., Warren County 2019), dismissed, *2020-Ohio-1256, 158 Ohio St. 3d 1456, 142 N.E.3d 677, 2020 Ohio LEXIS 840 (Ohio 2020)*.

Trial court did not abuse its discretion when it denied an attorney's request to review the trial case file of a former partner's counsel without limitation because the attorney offered nothing more than the remote possibility that examination of the client file could lead to information supporting his motion for costs; because an objective standard applied, the partner's knowledge or understanding was not highly relevant pursuant to Civ.R. 26(B)(3). *Schiff v. Dickson, 2013-Ohio-5253, 4 N.E.3d 433, 2013 Ohio App. LEXIS 5462 (Ohio Ct. App., Cuyahoga County 2013)*.

Privileged records generally

Trial court erred in ordering the production of the incident reports as it correctly found that the skin assessments contained in Exhibits A-31 through A-34 were not covered by the peer-review privilege because the affidavits of the Medical and Executive Directors failed to state that the documents were prepared for or even reviewed by the Quality Assurance Committee at their facility. *Sexton v. Healthcare Facility Mgmt. LLC, 2022-Ohio-963, 2022 Ohio App. LEXIS 857 (Ohio Ct. App., Montgomery County)*, different results reached on reconsid., *2022-Ohio-2376, 2022 Ohio App. LEXIS 2237 (Ohio Ct. App., Montgomery County 2022)*.

Motion to compel discovery was properly granted in a medical malpractice case because the privilege under *R.C. 2317.02(B)(1)* only protected communications; it did not protect time data that other jurisdictions had found to be non-privileged. Moreover, because the discovery order at issue did not involve the disclosure of the identities of any non-party patients nor any reasonable basis from which their identities could have been determined, it did not violate the Health Insurance Portability and Accountability Act. *Medina v. Medina Gen. Hosp., 2011-Ohio-3990, 2011 Ohio App. LEXIS 3336 (Ohio Ct. App., Cuyahoga County 2011)*.

When there is a dispute about whether records are privileged, and when a party reasonably asserts that records should remain privileged, a trial court must conduct an in camera inspection of the records to determine if they are discoverable: *Cargile v. Barrow, 2009-Ohio-371, 182 Ohio App. 3d 55, 911 N.E.2d 911, 2009 Ohio App. LEXIS 310 (Ohio Ct. App., Hamilton County 2009)*.

Probating will

Under *R.C. 2317.02* as in effect prior to 1-5-88, filing an application to probate the decedent's will did not waive the privilege as to the decedent's communications with his physician: *Hollis v. Finger, 69 Ohio App. 3d 286, 590 N.E.2d 784, 1990 Ohio App. LEXIS 4166 (Ohio Ct. App., Scioto County 1990)*.

Psychiatric/psychological records

Trial court erred in allowing discovery of the defendant's psychiatric/psychological records without conducting an in camera inspection in order to determine whether each record was covered by *R.C. 2317.02(B)* or (G) and whether the conditions for disclosure set out in the applicable subsection are met: *Thompson v. Chapman, 2008-Ohio-2282, 176 Ohio App. 3d 334, 891 N.E.2d 1247, 2008 Ohio App. LEXIS 1955 (Ohio Ct. App., Richland County 2008)*.

Psychiatrists

Sealed mental health record at issue contained communications between the instigator and his treating psychiatrists, and the record contained the instigator's diagnosed conditions, his psychiatrist's plan of treatment for him, and his prescribed medications; these communications were protected from disclosure under the statute, there was no exception to the privilege which applied to the records, and the instigator did not consent to a release of his

mental health record, and his mental health record was not subject to discovery. *Skorvanek v. Ohio Dep't of Rehab. & Corr., 2018-Ohio-3870, 2018 Ohio App. LEXIS 4198 (Ohio Ct. App., Franklin County 2018)*.

Admission of testimony of the mother's psychiatrist in violation of *R.C. 2317.02* and *4732.19* at the hearing on termination of parental rights was prejudicial: *In re Brown, 98 Ohio App. 3d 337, 648 N.E.2d 576, 1994 Ohio App. LEXIS 4984 (Ohio Ct. App., Marion County 1994)*.

The employee waived the privilege under *R.C. 2317.02(B)* in a wrongful discharge action to the extent that testimony of his psychiatrist was necessary to establish that he was handicapped and required medical attention: *Hayes v. Cleveland Pneumatic Co., 92 Ohio App. 3d 36, 634 N.E.2d 228, 1993 Ohio App. LEXIS 4843 (Ohio Ct. App., Cuyahoga County 1993)*, dismissed, *69 Ohio St. 3d 1415, 630 N.E.2d 376, 1994 Ohio LEXIS 837 (Ohio 1994)*.

Psychologists

Trial court did not err in applying the statutory exception to the psychologist-client privilege because the evaluation was conducted pursuant to a court-ordered case plan and was relevant to the dependency proceeding. The trial court further found that the statute specifically mentioned the statute addressing juvenile court case plans and "dependency, neglect or abuse," indicating that the legislature intended that statute to apply to juvenile court proceedings. *In re I.T., 2016-Ohio-555, 2016 Ohio App. LEXIS 482 (Ohio Ct. App., Summit County 2016)*.

When a member of a parish sued the church's education director for various tort claims and subpoenaed both the person and records of the director's former psychologist, claiming that the director placed the director's mental health in issue when the director sought a civil stalking protection order against the member stating that the member caused the director mental distress, the subpoena was properly quashed because both the psychologist's testimony and the records were privileged, under *R.C. 2317.02* and *4732.19*, the member did not demonstrate any exception overcoming the privilege, and the trial court could reasonably find that any bearing the director's mental health might have on the director's civil stalking protection order petition was too remote from the member's claims to justify overcoming the privilege. *Hiddens v. Leibold, 2007-Ohio-6688, 2007 Ohio App. LEXIS 5877 (Ohio Ct. App., Montgomery County 2007)*.

Trial court did not err in denying defendant's motion to suppress. The psychologist's evaluation was an evaluation and/or assessment and was part of a court-ordered case plan. Therefore, the psychologist-client privilege did not attach to the psychologist's evaluation and she was permitted to testify. *State v. Rader, 2007-Ohio-1136, 2007 Ohio App. LEXIS 1027 (Ohio Ct. App., Richland County 2007)*.

Under *R.C. 4732.19* and *R.C. 2317.02(B)*, the testimony of the psychologist who conducted the mother's evaluation for the permanent custody proceeding was admissible as part of the case plan journalized under *R.C. 2151.412*. *In re Morales/Mendez Children, 2006-Ohio-6403, 2006 Ohio App. LEXIS 6349 (Ohio Ct. App., Stark County 2006)*.

In light of *R.C. 2317.02(B)(1)*, as amended, and *4732.19*, counsel's failure to object to a doctor's testimony in a termination of parental rights proceeding did not constitute ineffective assistance of counsel where the doctor's report stated that there should be great caution in any consideration of placing any child with the mother and that the mother's prognosis was poor; counsel's failure to object did not fall below an objective standard of reasonable representation and was not violative of any essential duties to the mother. *In re Fell, 2005-Ohio-5790, 2005 Ohio App. LEXIS 5216 (Ohio Ct. App., Guernsey County 2005)*.

The communications were not privileged pursuant to *R.C. 4732.19* and *2317.02(B)* where the psychologist was not licensed: *State v. Wood, 141 Ohio App. 3d 634, 752 N.E.2d 990, 2001 Ohio App. LEXIS 1192 (Ohio Ct. App., Greene County 2001)*.

Removal of executor

Although refusing to waive the physician-patient privilege may be a basis for removing an executor, it is error to remove him without holding a hearing: *In re Estate of Russolillo, 69 Ohio App. 3d 448, 590 N.E.2d 1324, 1990 Ohio App. LEXIS 4117 (Ohio Ct. App., Franklin County 1990)*.

Sanity of client, generally

The testimony of a physician as to a deceased patient's sanity, based solely upon his general observation of the patient, does not constitute a privileged communication within the meaning of this section; the same rule applies to an attorney's testimony as to his deceased client: *Heiselmann v. Franks, 48 Ohio App. 536, 2 Ohio Op. 123, 194 N.E. 604, 18 Ohio Law Abs. 553, 1934 Ohio App. LEXIS 314 (Ohio Ct. App., Hamilton County 1934)*.

Scope

—Insurance matters

Trial court erred by ordering the disclosure of an insurer's attorney-client communications because the disputed emails were in the files of the insurer's attorneys rather than the insurer's claims file and, as such, the emails were not discoverable; the exception in subsection (A)(2) of this statute did not apply. *Bausman v. Am. Family Ins. Group, 2016-Ohio-836, 60 N.E.3d 772, 2016 Ohio App. LEXIS 744 (Ohio Ct. App., Montgomery County 2016)*.

—Applicability

Records relied on by an expert witness and by the trial court in determining whether appellant should continue in his commitment, originally imposed when he was found not guilty of a crime by reason of insanity, did not fall under the privilege afforded by this statute. *State v. Rohrer, 2015-Ohio-5333, 54 N.E.3d 654, 2015 Ohio App. LEXIS 5156 (Ohio Ct. App., Ross County 2015)*.

In defendant's criminal trial, there was no error in the admission of certain hearsay statements contained in a hospital report because the report was not obtained in violation of the doctor-patient privilege, as it was released via a prior court order, and it was only used for credibility purposes on cross-examination. *State v. Pace, 2015-Ohio-2884, 2015 Ohio App. LEXIS 2792 (Ohio Ct. App., Morgan County 2015)*.

Social worker's records

Trial court erred in failing to analyze the claim that the records of the licensed social worker in the case, which defendants in a medical malpractice suit sought to discover, were privileged under the provisions relating to mental health professionals. Nothing in the record or in the challenged order indicated that the trial court applied the provisions of *R.C. 2317.02(G)(1)* in assessing whether the patient's pastoral counseling records were properly discoverable. *Hoyt v. Mercy St. Vincent Med. Ctr., 2013-Ohio-320, 988 N.E.2d 650, 2013 Ohio App. LEXIS 245 (Ohio Ct. App., Lucas County 2013)*.

Strict construction generally

The provisions of *R.C. 2317.02* are in derogation of the common law and should be strictly construed; it does not anticipate and should not be extended to included prior statements made by witness and reduced to writing, so as to enable the holder thereof to claim privilege: *Arnovitz v. Wozar, 9 Ohio App. 2d 16, 38 Ohio Op. 2d 27, 222 N.E.2d 660, 1964 Ohio App. LEXIS 419 (Ohio Ct. App., Montgomery County 1964)*.

Waiver

Two exclusive means by which privileged communications can be waived are (1) express consent of the client; and (2) when the client voluntarily reveals the substance of the attorney-client communications in a nonprivileged context. *Ohio v. Verbanac, 2022-Ohio-3743, 2022 Ohio App. LEXIS 3529 (Ohio Ct. App., Cuyahoga County 2022)*.

Record did not contain any evidence indicating that the client gave express consent to waive the attorney-client privilege under *R.C. 2317.02(A)(1)* or voluntarily revealed the substance of his one-on-one communications with counsel; the trial court's order compelled counsel to testify as to any statement by any person, and this was error because it included the conversation between the two where the record did not indicate that the attorney-client privilege was waived. *Ohio v. Verbanac, 2022-Ohio-3743, 2022 Ohio App. LEXIS 3529 (Ohio Ct. App., Cuyahoga County 2022)*.

Trial court improperly applied the physician-patient privilege with respect to defendant's April 26, 2017 appointment, and her statements and reactions upon learning of her pregnancy were not protected by the physician-patient privilege; applying the privilege to defendant's statements and reactions did not further the purposes of the physician-patient privilege above the interest of the public in detecting crimes in order to protect society. *State v. Richardson, 2018-Ohio-4254, 121 N.E.3d 730, 2018 Ohio App. LEXIS 4595 (Ohio Ct. App., Warren County 2018)*.

When plaintiff alleged that she had suffered mental and emotional trauma from her automobile accident, she had put her subsequent psychological treatment into play, and the trial court properly found that she had waived the patient-physician privilege as to her subsequent psychological records. *Miller v. Milano, 2014-Ohio-5539, 25 N.E.3d 458, 2014 Ohio App. LEXIS 5377 (Ohio Ct. App., Stark County 2014)*.

Trial court's order that a party was to disclose records generated as a result of counseling sessions was reversed and remanded because the record did not support a statutory exception to the claimed privilege, pursuant to *R.C. 2317.02*, as the record did not reveal the nature of the provider who was treating the party. The trial court based its finding of waiver upon its conclusion that the statutory privilege accorded to physician-patient communications under *R.C. 2317.02(B)* applied, subject to the statutory exceptions thereto; however, the appellate court was not able to determine that the records at issue were generated by a physician, as opposed to the party's contention that they were generated by a licensed counselor, to which a different statutory privilege, *R.C. 2317.02(G)*, with different exceptions applied. *McGregor v. McGregor, 2012-Ohio-3389, 2012 Ohio App. LEXIS 2979 (Ohio Ct. App., Clark County 2012)*.

Claimants could not bring an action against attorneys at a law firm for the unauthorized disclosure of the claimants' psychological reports which were disclosed in discovery because the reports became available for anyone to view as the claimants waived any right to assert privilege or bring an action against the attorneys for disclosing them. *Kodger v. Ducatman, 2012-Ohio-2517, 2012 Ohio App. LEXIS 2208 (Ohio Ct. App., Cuyahoga County 2012)*.

In a case filed against a counselor and his employer based on testimony that the counselor gave during a divorce case, a client's failure to invoke privilege constituted a waiver of such; the client knew that the counselor had been subpoenaed to testify, and the client did not object until questions regarding his individual therapy were raised. Since the trial court sustained those objections and struck the questions and answers from the record, any error that existed was harmless. *Medley v. Russell, 2009-Ohio-5667, 2009 Ohio App. LEXIS 4764 (Ohio Ct. App., Richland County 2009)*.

In a former employee's discrimination action under *42 U.S.C.S. § 1981*, Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., and *R.C. 4112.01* et seq., the former employer was entitled to compel production of the employee's medical records under *Fed. R. Civ. P. 37* because the employee placed her mental health at issue and

thus waived any physician-patient privilege under *Fed. R. Evid. 501* and under R.C. 2317.02 and 4732.19; further, the medical records pertaining to the employee's emotional distress were relevant under *Fed. R. Civ. P. 26(b)(1)*. *White v. Honda of Am. Mfg., 2008 U.S. Dist. LEXIS 106188 (S.D. Ohio Nov. 3, 2008)*.

Decedent's executors could not impliedly waive the decedent's attorney-client privilege because R.C. 2317.02(A) only allowed executors to expressly waive a decedent's attorney-client privilege. *Wallace v. McElwain, 2006-Ohio-5226, 2006 Ohio App. LEXIS 5205 (Ohio Ct. App., Jefferson County 2006)*.

Decedent's petition, under Civ.R. 27, to perpetuate his testimony, did not expressly or impliedly waive his attorney-client privilege, under R.C. 2317.02(A), because the petition did not place any of decedent's communications with his attorney in issue, so the decedent's niece and nephew were not entitled to depose the decedent's attorney regarding his representation of the decedent. *Wallace v. McElwain, 2006-Ohio-5226, 2006 Ohio App. LEXIS 5205 (Ohio Ct. App., Jefferson County 2006)*.

Attorney of a deceased client may not assert attorney-client privilege to justify refusal to answer questions of a grand jury where the surviving spouse of the attorney's client has waived the privilege in conformity with R.C. 2317.02(A) and the attorney has been ordered to testify by a court. *State v. Doe, 2004-Ohio-705, 101 Ohio St. 3d 170, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (Ohio)*, cert. denied, *543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6968 (U.S. 2004)*.

In the event of the death of a client, R.C. 2317.02(A) authorizes the surviving spouse of that client to waive the attorney-client privilege protecting communications between the deceased spouse and attorneys who had represented that deceased spouse. *State v. Doe, 2004-Ohio-705, 101 Ohio St. 3d 170, 803 N.E.2d 777, 2004 Ohio LEXIS 322 (Ohio)*, cert. denied, *543 U.S. 943, 125 S. Ct. 353, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6968 (U.S. 2004)*.

Where court-ordered treatment or services were ordered as part of a case plan journalized under R.C. 2151.41.2 and/or were necessary or relevant to the proceedings under R.C. 2151, a biological father's waiver of the statutory psychologist-client privilege was in effect when his psychologist testified; therefore, the trial court properly allowed the testimony because the communications were exempt under R.C. 2317.02(B)(1)(b), 4732.19. *In re Aristotle R., 2004-Ohio-217, 2004 Ohio App. LEXIS 189 (Ohio Ct. App., Sandusky County 2004)*.

—Not found

In an action against defendants for fraudulent conveyance, the trial court erred by determining that defendant husband voluntarily waived his attorney-client privilege because he objected to a question on cross-examination by invoking his attorney-client privilege and refused to answer. *Mancz v. McHenry, 2021-Ohio-82, 2021 Ohio App. LEXIS 73 (Ohio Ct. App., Greene County 2021)*.

Trial court did not abuse its discretion in ruling that defendant could not cross-examine an alleged coconspirator and State's witness as to his privileged statements because the witness's testimony at a suppression hearing was not a waiver of his attorney-client privilege; nothing in the record indicated that the witness waived his attorney-client privilege, either prior to making the statement in question or during his testimony at the suppression hearing. *State v. Brunson, 2020-Ohio-5078, 2020 Ohio App. LEXIS 3933 (Ohio Ct. App., Cuyahoga County 2020)*.

Trial court did not err in granting appellees' motions to quash the subpoenas and motion for a protective order because their counsel did not waive the attorney-client privilege by disclosing an otherwise privileged document during the sergeant's deposition. *Teodecki v. Litchfield Twp., 2015-Ohio-2309, 38 N.E.3d 355, 2015 Ohio App. LEXIS 2234 (Ohio Ct. App., Medina County 2015)*.

Opinion Notes

ATTORNEY GENERAL OPINIONS

A person may refuse to answer during a formal coroner's inquest under oath on the ground of privilege: 1975 Ohio Op. Att'y Gen. No. 011 (1975).

Subject to the exceptions set forth in R.C. 2317.02(G)(1)-(6), R.C. 2317.02(G) prohibits a Rehabilitation Services Commission employee, who is licensed as a professional counselor under R.C. 4757.07 and serves as a professional counselor of RSC clients, from testifying concerning a confidential communication made to him by an RSC client in the professional counselor-client relationship or his advice to his client. (1946 OAG No. 931, p.305, overruled.): 1987 Ohio Op. Att'y Gen. No. 005 (1987).

When records collected for the trauma system registry or the emergency medical services incidence reporting system pursuant to R.C. 4765.06 constitute a medical record, as defined at R.C. 149.43(A)(3), or are confidential, pursuant to the physician-patient privilege of R.C. 2317.02(B), or some other provision of state or federal law, such records do not become public records and the state board of emergency medical services is not required to disclose such records to the public under R.C. 149.43(B) or R.C. 4765.06. Additionally, in utilizing such non-public records that have been collected in the trauma system registry or emergency medical services incidence reporting system under R.C. 4765.06, the board is required to maintain the confidentiality of any patient-identifying information contained therein: 1996 Ohio Op. Att'y Gen. No. 005 (1996).

Information on a run sheet created and maintained by a county emergency medical services organization that documents medication or other treatment administered to a patient by an EMS unit, diagnostic procedures performed by an EMS unit, or the vital signs and other indicia of the patient's condition or diagnosis, and is relied upon by a physician for diagnostic or treatment purposes, is a communication covered by the physician-patient testimonial privilege of R.C. 2317.02(B), and thus is confidential information, the release of which is prohibited by law for purposes of R.C. 149.43(A)(1)(v). (1996 OAG No. 96-005 and 1999 OAG No. 99-006, approved and followed.) If a physician authorizes an emergency medical technician (EMT) to administer a drug or perform other emergency medical services, documentation of the physician's authorization and administration of the treatment or procedure by the EMS unit may also fall within the physician-patient testimonial privilege: OAG No. 2001-041 (2001).

If a claimant for workers' compensation voluntarily and knowingly signs an application form that includes a statement to the effect that the claimant waives all provisions of law forbidding any physician from disclosing information about claimant, a regional board of review has the power, pursuant to R.C. 4123.51.8, to compel the claimant to authorize the employer's counsel to obtain the records of the claimant's attending physician, to the extent that such records are pertinent to identify the cause of the particular injury or occupational disease which forms the basis for the claim: 1979 Ohio Op. Att'y Gen. No. 047 (1979).

Any information contained in a workmen's compensation claim file which was gained through communication or observation by a physician from a claimant who has contacted him for treatment or for diagnosis looking toward treatment would generally be subject to the patient-physician privilege under R.C. 2317.02(A) and may not be released except upon the authorization of the patient-claimant. However, the privilege attached to such information is waived if such information was obtained and placed in the claim file pursuant to a written medical waiver voluntarily signed by the claimant or if the claimant voluntarily testifies or introduces otherwise privileged information at a public hearing. Where the claimant has waived the patient-physician privilege, then pursuant to R.C. 4123.88 a member of the industrial commission, the employer or the administrator of the bureau of workmen's compensation may authorize anyone to examine such medical records which may be contained in the claim file: 1975 Ohio Op. Att'y Gen. No. 062 (1975).

Research References & Practice Aids

Cross-References to Related Sections

Application for interception warrant, *RC § 2933.53*.

Instructions to officers, *RC § 2933.58*.

Oral approval for an interception, *RC § 2933.57*.

Attorney-client privilege—

Client defined; application of attorney-client privilege to dissolved corporation or association, *RC § 2317.021*.

Election commission or panel considered client of full-time attorney hired for representation, *RC § 3517.157*.

Insurance fraud, *RC § 2913.47*.

Party caucuses, *RC § 101.301*.

Patient care incident or risk management report, *RC § 2305.252*.

Required report by attorneys of suspected child abuse; exceptions, *RC § 2151.421*.

Cases in which a party shall not testify, *RC § 2317.03*.

Husband-wife communication rule not applicable in prostitution cases, *RC § 2907.26*.

Mediation communication; disclosure, *RC § 2317.023*.

Pharmacist privilege not to interfere with criminal investigations, *RC § 4729.19*.

Physician-patient privilege—

Duty of physician and others to report serious physical harm believed to have resulted from violent offense, *RC § 2921.22*.

Nursing, rest, community alternative home and adult care facilities patient records, *RC § 2317.422*.

Psychologist and client; privileged communications, *RC § 4732.19*.

Request to health care provider for results of alcohol or drug tests for use in criminal proceeding, *RC § 2317.022*.

Required report by physicians of suspected child abuse; exceptions, *RC § 2151.421*.

State medical board proceedings; applicability of physician-patient privilege, *RC §§ 4730.26*, *4731.22*.

Statement of physician required for school employee's sick leave not waiver of privilege, *RC § 3319.141*.

Telecommunications relay service; privileged nature of assisted communications, *RC § 4931.35*.

Ohio Rules

General rule of privileges, EvR 501.

Physical and mental examination of persons, Civ.R. 35.

Pretrial procedure, Civ.R. 16.

Ohio Administrative Code

Bureau of workers' compensation —

Health partnership program (HPP): confidentiality of records. **OWCH:** *OAC 4123-6-15*.

State board of psychology—

Rules of professional conduct pertaining to confidential communications and physician-patient privilege. *OAC 4732-17-01*.

Practice Manuals and Treatises

Ohio Transaction Guide: Family Law & Forms § 6.34 Medical Records and Communications

Anderson's Ohio Civil Practice with Forms § 74.04 Hospital Records

Anderson's Ohio Civil Practice with Forms § 163.08 Waiver of Privilege

Practice Guides

Anderson's Ohio Probate Practice and Procedure § 6.08 Special evidentiary issues

Anderson's Ohio Probate Practice and Procedure § 27.09 Special evidentiary issues

Practice Checklists

Report of Child Abuse or Neglect, Ohio Transaction Guide: Family Law & Forms § 4.112

Checklist: Opposing Discovery on Privilege Grounds, 1-2-2 Ohio Litigation Checklists § 2.06

Practice Forms

Authorization for Release of Information in Medical Records, Ohio Transaction Guide: Family Law & Forms § 6.220

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MA Equip. Leasing I, LLC v. Tilton

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

October 9, 2012, Rendered

Nos. 12AP-564 and 12AP-586

Reporter
980 N.E.2d 1072 *; 2012 Ohio App. LEXIS 4102 **; 2012-Ohio-4668; 2012 WL 4788359

MA Equipment Leasing I, LLC et al., Plaintiffs-Appellees, v. Lynn Tilton et al., Defendants-Appellants.

Subsequent History: Stay granted by *MA Equip. Leasing I, L.L.C. v. Tilton, 133 Ohio St. 3d 1416, 2012-Ohio-4758, 976 N.E.2d 908, 2012 Ohio LEXIS 2479 (Oct. 15, 2012)*

Discretionary appeal not allowed by *Ma Equip. Leasing I, L.L.C. v. Tilton, 134 Ohio St. 3d 1467, 2013-Ohio-553, 983 N.E.2d 367, 2013 Ohio LEXIS 483 (Feb. 20, 2013)*

Later proceeding at *Ma Equip. Leasing I LLC v. Tilton, 2013 Ohio Misc. LEXIS 2562 (Ohio C.P., Aug. 1, 2013)*

Prior History: [**1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 09CVH-08-12912).

MA Equip. Leasing I LLC v. Tilton, 2010 U.S. Dist. LEXIS 165986 (S.D. Ohio, Aug. 19, 2010)

Disposition: Motion to strike granted; judgment affirmed.

Core Terms

attorney-client, trial court, communications, appellants', affiliate, subsidiary, entities, leases, confidential, privileged, joint client, discovery, legal interest, joint-client, courts, waived, question of law, community of interest, common interest, assigned error, community-of-interest, physician-patient, disclosure, cases, disclosure rule, de novo, transactions, heightened, sharing, joint representation

Case Summary

Procedural Posture

Appellee lessors sued appellants, the corporate affiliates and principals of a lessee, in the Franklin County Court of Common Pleas (Ohio), for tort claims. The affiliates and principals filed a motion for a protective order as to the lessors' discovery requests. The lessors filed a motion to compel discovery. The court denied the motion for a protective order and granted the cross-motion to compel. The affiliates and the principals appealed.

Overview

The lessors leased equipment and real property to a lessee, which was involved with the corporate affiliates. In some cases corporate principals held positions with the lessee and the affiliates. The corporate affiliates and the corporate principals asserted the attorney-client privilege regarding communications involving the lessee's legal counsel. On appeal, the court found that the trial court substantively applied the proper standard of proof regarding the attorney-client privilege, under *R.C. 2317.02(A)*, and that any error as a result of the trial court's mention of a heightened burden regarding the corporate affiliates' and the principals' assertion of the privilege was harmless. Furthermore, the trial court did not abuse its discretion by finding that no attorney-client relationship existed between the corporate affiliates and the principals and the lessee's counsel. Finally, any error in regard to the trial court finding that the corporate principals were not associated with the lessee had no effect on the trial court's judgment and was harmless.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] Standards of Review, Abuse of Discretion

Trial courts possess broad discretion over the discovery process. Appellate courts, therefore, generally review a trial court's decision regarding a discovery matter only for an abuse of discretion. The abuse of discretion standard, however, is inappropriate for reviewing a judgment based upon a question of law, including an erroneous interpretation of the law. Whether information sought in discovery is confidential and privileged is a question of law that is reviewed de novo.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > Scope of Protection

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] Standards of Review, Abuse of Discretion

Ohio courts do not review all issues surrounding privilege de novo. For example, the determination of whether materials are protected by the attorney work-product privilege and the determination of the good-cause exception to that privilege are characterized, not as questions of law, but as discretionary determinations to be made by a trial court. Such discretionary decisions are reviewable only under an abuse of discretion standard.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Legislation > Interpretation

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] Standards of Review, Abuse of Discretion

Not all issues surrounding an assertion of privilege are subject to de novo review. Rather, the appropriate standard ultimately depends upon whether an appellate court is reviewing a question of law or a question of fact. Interpretation and application of statutory language, to determine whether specific information is confidential and privileged, is a question of law that an appellate court must review de novo. An assertion of privilege, however, may also require review of factual questions. With respect to questions of fact, an appellate court must determine whether the trial court abused its discretion.

Evidence > Privileges > Attorney-Client Privilege > Elements

Evidence > Privileges > Attorney-Client Privilege > Scope

HN4[] Attorney-Client Privilege, Elements

The attorney-client privilege in Ohio is governed by R.C. 2317.02(A) and, in cases not addressed there, by common law. R.C. 2317.02(A) provides that an attorney shall generally not testify concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client. While the statute precludes an attorney from testifying about confidential communications, the common-law privilege reaches far beyond a proscription against testimonial speech and protects against any dissemination of information obtained in the confidential relationship. The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients

and thereby promote broader public interests in the observance of law and administration of justice.

Evidence > Privileges > Attorney-Client Privilege > Elements

Evidence > Privileges > Attorney-Client Privilege > Scope

Evidence > Privileges > Attorney-Client Privilege > Waiver

HN5 **Attorney-Client Privilege, Elements**

There is no material difference between Ohio's attorney-client privilege and the federal attorney-client privilege. Under the privilege, (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. Because a client's voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege, voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter.

Evidence > Burdens of Proof > Allocation

Evidence > Privileges > Attorney-Client Privilege > Elements

HN6 **Burdens of Proof, Allocation**

The burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege. The party seeking to exclude testimony under this privilege bears the burden to show (1) that an attorney-client relationship existed; and (2) that confidential communications took place within the context of that relationship.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > Acts Through Agents

Evidence > Privileges > Attorney-Client Privilege > Elements

Evidence > Privileges > Attorney-Client Privilege > Scope

HN7 **Powers, Acts Through Agents**

Application of the attorney-client privilege in the corporate context must be determined on a case-by-case basis. The attorney-client privilege applies to pertinent communications between attorneys and their corporate clients, just as between attorneys and their individual clients. R.C. 2317.021(A). Because a corporation can only communicate through its employees or agents, however, complications often arise where the client is a corporation.

Evidence > Privileges > Attorney-Client Privilege > Scope

Evidence > Privileges > Attorney-Client Privilege > Waiver

HN8 **Privileges, Attorney-Client Privilege**

While a client's disclosure of confidential information to third parties normally precipitates a waiver of the attorney-client privilege, courts often apply exceptions to the disclosure rule when communications are shared with a corporate parent, subsidiary, or affiliate.

Evidence > Privileges > Attorney-Client Privilege > Scope

Evidence > Privileges > Attorney-Client Privilege > Waiver

HN9 **Privileges, Attorney-Client Privilege**

The following three rationales are most frequently stated for not construing the sharing of communications within a corporate family as a waiver of the attorney-client privilege: (1) the members of the corporate family comprise a single client; (2) the members of the corporate family are joint clients; and (3) the members of the corporate family are part of a shared community of interest. The co-client (or joint-client) rationale applies when multiple clients hire the same counsel to represent them on a matter of common interest, and the community-of-interest (or common-interest) rationale

applies when clients with separate attorneys share otherwise privileged information to coordinate their legal activities. The joint-client and community-of-interest rationales are not privileges in and of themselves; they are exceptions to the rule that disclosure of privileged communications to third parties constitutes a waiver of attorney-client privilege. Those rationales presuppose the existence of an otherwise valid privilege.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Evidence > Privileges > Attorney-Client Privilege > Scope

HN10[] **Existence, Distinct & Separate Legal Entity**

Affiliated, but separate, corporate entities do not comprise a single client for purposes of attorney-client privilege. Although courts have treated parent corporations and their wholly owned subsidiaries as a single entity in other contexts, those decisions are context-specific and tailored to the statutes or common law causes of action they interpret. In the privilege context, however, treating members of a corporate family as one client fails to respect the corporate form and the bedrock principle of corporate law that courts must respect entity separateness unless doing so would work inordinate inequity.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN11[] **Existence, Distinct & Separate Legal Entity**

With the benefits realized by creating separate corporate entities comes the responsibility to treat the various corporations as separate entities. Absent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Evidence > Privileges > Attorney-Client Privilege > Scope

HN12[] **Existence, Distinct & Separate Legal Entity**

The community-of-interest privilege regarding attorney-client communications only comes into play when parties are represented by separate counsel, which often is not the case for parents and subsidiaries. Moreover, the community-of-interest privilege only applies when those separate attorneys disclose information to one another, not when parties communicate directly. Finally, it assumes too much to think that members of a corporate family necessarily have a substantially similar legal interest (as they must for the community-of-interest privilege to apply) in all of each other's communications. Thus, holding that parents and subsidiaries may freely share documents without implicating the disclosure rule because of a deemed community of interest stretches the community-of-interest privilege too far.

Evidence > Privileges > Attorney-Client Privilege > Scope

Evidence > Privileges > Attorney-Client Privilege > Waiver

HN13[] **Privileges, Attorney-Client Privilege**

The joint-client (or co-client) rationale for the attorney-client privilege may exist when multiple clients engage common attorneys to represent them on a matter of interest to them all. When the joint-client rationale applies, the attorney-client privilege protects confidential communications between the joint clients and their common attorneys from compelled disclosure to persons outside the joint representation. Privilege in the co-client context is limited by the extent of the legal matter of common interest between the clients. The joint client doctrine overcomes what would otherwise constitute a waiver of confidentiality when communications are shared between two clients.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct

& Separate Legal Entity

Evidence > Privileges > Attorney-Client Privilege > Scope

HN14 **Existence, Distinct & Separate Legal Entity**

It was important to consider how the disclosure rule affects the sharing of information among members of a corporate group because parent companies often centralize the provision of legal services to their entire corporate group in one inhouse legal department. Where inhouse legal departments serve entire corporate groups, a prohibition against intra-group sharing would wreak havoc on corporate counsel offices. Accordingly, treating members of a corporate family as joint clients reflects both the separateness of each entity and the reality that they are all represented by the same inhouse counsel.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN15 **Privileges, Attorney-Client Privilege**

Joint representation is distinguishable from situations where a lawyer represents one client, but another person with allied interests cooperates with the lawyer and client. Further, joint representation does not necessarily exist when clients of the same lawyer share common interests. A joint-client representation begins when the co-clients convey their desire for representation and the lawyer consents.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Evidence > Privileges > Attorney-Client Privilege > Scope

HN16 **Existence, Distinct & Separate Legal Entity**

Courts almost universally hold that intra-group information sharing does not implicate the disclosure rule. However, parent and subsidiary companies are not in a community of interest as a matter of law. It assumes too much to think that members of a corporate family necessarily have a substantially similar legal interest in all of each other's communications. Similarly, courts should not assume, as a matter of law, that members of a corporate family have a sufficient common legal interest to constitute joint clients.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Evidence > Privileges > Attorney-Client Privilege > Scope

HN17 **Existence, Distinct & Separate Legal Entity**

The majority-and more sensible-view is that even in the parent-subsidiary context a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Evidence > Privileges > Attorney-Client Privilege > Scope

HN18 **Existence, Distinct & Separate Legal Entity**

Corporate affiliates are not joint clients of an attorney as a matter of law. Corporate affiliation does not, as a matter of law, establish either a community of interest or that the affiliates have a substantially similar legal interest.

Counsel: Hahn Loeser & Parks LLP, Marc J. Kessler, John F. Marsh, and Phillip G. Eckenrode, for appellees.

Brune & Richard LLP, Hillary Richard, and David Elbaum; Jones Day, J. Kevin Cogan, Chad A. Readler, and Daniel N. Jabe, for appellants.

Judges: FRENCH, J. KLATT and DORRIAN, JJ., concur.

Opinion by: FRENCH

Opinion

[*1074] (ACCELERATED CALENDAR)

DECISION

FRENCH, J.

P1 Defendants-appellants, Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners Management Group, LLC, Patriarch Partners XIV, LLC, LD Investments, LLC, John Harrington, and Zohar II 2005-1, Limited (collectively, "appellants"), [*1075] appeal the judgment of the Franklin County Court of Common Pleas, which denied their motion for a protective order and granted a motion to compel filed by plaintiffs-appellees, MA Equipment Leasing I, LLC and MA 265 North Hamilton Road LLC (collectively, "appellees"). For the following reasons, we affirm.

I. BACKGROUND

P2 Appellee MA Equipment Leasing I, LLC is a private investment firm engaged in the business of leasing industrial equipment, and appellee MA 265 North Hamilton Road LLC is a private real estate investment [**2] firm that specializes in leasing industrial real estate. In February 2005, appellees entered into transactions with Oasis Corporation ("Oasis"), a financially distressed company, and through these transactions, appellees bought from Oasis and leased back certain real estate and equipment. In August 2005, appellees, Oasis, Wachovia (Oasis's secured lender), and appellant Zohar II 2005-1, Limited ("Zohar II"), entered into a series of transactions pursuant to Article 9 of the Uniform Commercial Code. As part of those transactions, Zohar II formed Zohar Waterworks, LLC ("Waterworks"), which acquired Oasis's assets and entered into equipment and real estate leases with appellees. The terms of those leases prohibited Waterworks from removing the leased equipment without appellees' written consent. Waterworks is not a party to this litigation.

P3 The corporate structures and relationships between appellants form a key basis for appellants' arguments on appeal. According to appellants, Zohar II is an investment fund, structured as a special purpose entity known as a collateralized loan obligation. Zohar II wholly owned Waterworks and was also a secured lender of Waterworks. Appellants state [**3] that Zohar II had no officers or employees and that it delegated full investment authority to its collateral manager, Patriarch Partners XIV, LLC ("Patriarch XIV"), an affiliate of Patriarch Partners, LLC ("Patriarch Partners"). Patriarch Partners Management Group, LLC ("Patriarch Management"), provides management and operational consulting services to portfolio companies held by Zohar II and other Patriarch-affiliated entities. LD Investments, LLC ("LD Investments"), is the sole parent of Patriarch Partners. At all relevant times, Lynn Tilton ("Tilton") was the CEO of Patriarch Partners, the sole member of LD Investments, and the manager of Patriarch XIV, Patriarch Management, and Waterworks. John Harrington ("Harrington") is the managing director of Patriarch Management and, at various times, served as interim CEO of Waterworks.

P4 In connection with the 2005 Article 9 transactions, Patriarch Partners retained the law firm now known as Richards, Kibbe & Orbe LLP ("RKO") to provide legal advice to Patriarch Partners and its affiliates, including Zohar II. Waterworks, however, retained Jenner & Block LLP ("Jenner") as its separate counsel in connection with the 2005 transactions, including [**4] its negotiation and execution of the leases with appellees.

P5 In 2007, appellees commenced litigation against Waterworks in the Franklin County Court of Common Pleas for breaches of the equipment and real estate leases between appellees and Waterworks. As part of that litigation, appellees sought a temporary restraining order to prohibit Waterworks from removing leased equipment to Mexico without appellees' consent. In connection with that action, Waterworks retained the law firms of McCarthy, Lebit, Crystal & Liffman, LPA, and Kemp, Schaeffer & Rowe, LPA. When appellees [*1076] served a subpoena on Patriarch Partners, Patriarch Partners retained the law firm of Brune & Richard LLP to respond. Appellees contend that appellants aggressively delayed the 2007 litigation in order to perfect security interests in Waterworks before the trial court could issue a judgment. Appellees allege that appellants' interests perfected in March 2009, approximately two months before the trial court entered judgment in appellees' favor.

P6 In April 2009, prior to any judgment in the 2007 litigation, Waterworks filed for bankruptcy. In connection with the bankruptcy proceedings, Waterworks retained the law firm [**5] of Morris, Nichols, Arsht & Tunnell LLP. Waterworks' secured creditors, including Zohar II and possibly other appellants, were represented by the Jones Day law firm.

7 Appellees filed this action against appellants on August 25, 2009, alleging claims of fraud, tortious interference with contract, and civil conspiracy.[1] Appellees also sought to set aside appellants' corporate forms and to proceed against appellants directly for breach of contract. Appellees subsequently amended their complaint to plead additional claims for negligent representation and abuse of process. On July 14, 2011, the trial court dismissed appellees' claims of fraud and negligent representation, after which appellees filed a Fourth Amended Complaint containing an amended fraud claim.

P8 On August 19, 2011, appellants filed a motion for a protective order with respect to appellees' discovery requests, which appellants claim seek privileged communications with Jenner and RKO. In particular, appellants sought protection from appellees' requests for "[a]ny and all documents and communications with Jenner and RKO concerning the Oasis Leases and/or [**6] the Building Leases and the Equipment Lease" and for "[a]ny and all documents and communications (internal or external), including any communications with any Defendant, Jenner, RKO and/or * * * Waterworks, concerning the decision to move or transfer, and the implantation of any move/transfer/transportation of * * * Waterworks' operations and/or equipment (in whole or part) to Mexico or elsewhere." Appellants also sought a protective order with respect to appellees' request for unredacted copies of emails described in a privilege log that Patriarch Partners produced during the 2007 litigation. In addition to responding to appellants' motion, appellees filed a cross-motion to compel discovery. Appellees argued that appellants had no attorney-client relationship with any counsel retained by Waterworks and, alternately, that any privilege had been waived.

P9 On June 28, 2012, the trial court denied appellants' motion for a protective order and granted appellees' cross-motion to compel. The court found that Waterworks was a separate company from appellants and held that, to claim an attorney-client relationship with Waterworks' counsel, appellants "must show that [Waterworks'] counsel was [**7] performing work for both entities and that they shared a common interest." The court found, however, that Waterworks and appellants retained separate attorneys to represent their interests at all relevant times. The court also found compelling appellees' arguments that appellants' interests were not similar to Waterworks' interests, and may even have been adverse at times. Therefore, the court determined that appellants were not entitled to assert the attorney-client privilege to withhold communications with Waterworks' counsel. The court held [*1077] that appellants "were not clients of * * * Waterworks' counsel, nor are [appellants] considered a common client with counsel for * * * Waterworks."

P10 Appellants appealed the June 28, 2012 judgment. On July 5, 2012, the trial court ordered a stay pending appeal and modified its June 28, 2012 judgment to provide that the compelled discovery was to be produced for "attorney eyes only" and to order that depositions at which the compelled discovery was used were to be filed under seal for in camera review. Appellants filed a second notice of appeal from the trial court's July 5, 2012 judgment; appellants' appeals have been consolidated.

II. ASSIGNMENTS [**8] OF ERROR

P11 Appellants presently assign the following as error:

> [I.] The trial court erred by imposing a "heightened" burden of proof on Appellants to establish their claim that documents are protected under the attorney-client privilege and/or the attorney work product doctrine.
>
> [II.] The trial court erred when it held that Appellant Lynn Tilton was not a member of the Board of Managers of Zohar Waterworks, LLC ("Waterworks").
>
> [III.] The trial court erred by overlooking the undisputed affiliation of Appellant John Harrington with Waterworks.
>
> [IV.] The trial court erred by finding that communications among counsel for Waterworks and representatives of its parent and affiliates were not protected by the attorney-client privilege and/or the attorney work product doctrine.

III. STANDARD OF REVIEW

P12 Before addressing the merits of this appeal, we must first determine the appropriate standard of review to employ. Appellants contend that we must apply a de novo standard, whereas appellees maintain we must review the trial court's judgment under the deferential, abuse of discretion standard.

P13 *HN1*[↑] Trial courts possess broad discretion over

[1] Appellees' original complaint did not name Patriarch XIV as a defendant.

the discovery process. State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register, 116 Ohio St.3d 88, 2007 Ohio 5542, ¶ 18, 876 N.E.2d 913. [**9] Appellate courts, therefore, generally review a trial court's decision regarding a discovery matter only for an abuse of discretion. Mauzy v. Kelly Servs., Inc., 75 Ohio St.3d 578, 592, 1996 Ohio 265, 664 N.E.2d 1272 (1996); State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children & Family Servs., 110 Ohio St. 3d 343, 2006 Ohio 4574, ¶ 9, 853 N.E.2d 657. The abuse of discretion standard, however, is inappropriate for reviewing a judgment based upon a question of law, including an erroneous interpretation of the law. Med. Mut. of Ohio v. Schlotterer,122 Ohio St. 3d 181, 2009 Ohio 2496, ¶ 13, 909 N.E.2d 1237. As relevant here, the Supreme Court of Ohio has held that whether information sought in discovery is confidential and privileged "is a question of law that is reviewed de novo." *Id. See also* Ward v. Summa Health Sys., 128 Ohio St. 3d 212, 2010 Ohio 6275, ¶ 13, 943 N.E.2d 514 ("if the discovery issue involves an alleged privilege, * * * it is a question of law that must be reviewed de novo").

P14 *Schlotterer* involved a physician's assertion of the physician-patient privilege in opposition to a health insurer's request for patient medical records in its action against the physician for, inter alia, fraud and breach of contract. The parties did not dispute the existence [**10] of physician-patient relationships or that the physician-patient privilege would ordinarily shield [*1078] the requested records from disclosure. Rather, the issue was whether contractual consent provisions executed by each of the patients satisfied the requirements for validly waiving the privilege. The Supreme Court concluded that the patients validly consented to the release of their medical information to their insurer, and that the statutory consent exception to the physician-patient privilege applied. As it based its determination on statutory and contractual interpretation, both of which are questions of law, the Supreme Court utilized de novo review.

P15 In *Ward*, a plaintiff contracted hepatitis B during his stay at Summa Health System ("Summa") for a heart-valve replacement and subsequently commenced a malpractice action against Summa and others. The trial court issued a protective order, based on physician-patient privilege, to shield the plaintiff's surgeon from testifying about the surgeon's own medical information, including whether he had hepatitis B. Applying a de novo standard, the Supreme Court examined the scope and purpose of the statutory physician-patient privilege and [**11] concluded that the statute "does not protect a person from having to disclose his or her own medical information when that information is relevant to the subject matter involved in a pending civil action." *Id. at ¶ 27*. Like *Schlotterer, Ward* did not involve a dispute over the existence of a physician-patient relationship, but concerned only the application of statutory language to determine whether specific information was privileged.

P16 Despite the broad language in *Schlotterer* and *Ward*, **HN2**[⬆] Ohio courts do not review all issues surrounding privilege de novo. For example, the Supreme Court has characterized the determination of whether materials are protected by the attorney work-product privilege and the determination of the good-cause exception to that privilege, not as questions of law, but as "discretionary determinations to be made by the trial court." State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo, 6 Ohio St.3d 270, 271, 6 Ohio B. 335, 452 N.E.2d 1314 (1983). The Eighth District recently relied on *Guzzo* to hold that such discretionary decisions are reviewable only under an abuse of discretion standard. *See* Sherwin-Williams Co. v. Motley Rice LLC, 8th Dist. No. 96927, 2012 Ohio 809, ¶ 34. Neither [**12] Schlotterer nor Ward suggests an intention by the Supreme Court to overrule *Guzzo* and other Ohio case law applying a more deferential standard of review to questions of fact surrounding a claim of privilege.

P17 We acknowledge that this court has previously stated that we review discovery orders involving questions of privilege de novo. *See* Mason v. Booker, 185 Ohio App.3d 19, 2009 Ohio 6198, ¶ 16, 922 N.E.2d 1036 (10th Dist.), citing Ward v. Johnson's Indus. Caterers, Inc., 10th Dist. No. 97APE11-1531, 1998 Ohio App. LEXIS 2841 (June 25, 1998); Scott Elliott Smith Co., L.P.A. v. Carasalina, L.L.C., 192 Ohio App. 3d 794, 2011 Ohio 1602, ¶ 14, 950 N.E.2d 624 (10th Dist.) (emphasizing that whether specific information is confidential and privileged is a question of law). Like Schlotterer, the analysis in Mason and Johnson's involved interpretation and application of a statutory exception to the physician-patient privilege. At issue in those cases was the statutory exception that a physician may be compelled to testify or submit to discovery in a civil action filed by a patient against the physician with respect to communications between the physician and patient "that related causally or historically to physical or mental injuries that are relevant [**13] to issues" in the action. R.C. 2317.02(B)(3)(a) (formerly R.C. 2317.02(B)(2)). Thus, this court stated [*1079] that *Johnson's* "turn[ed] on the proper interpretation of what are 'causally or historically' related medical records as

such terms are used" in the statute. Statutory interpretation is a question of law, subject to de novo appellate review. *Aubry v. Univ. of Toledo Med. Ctr., 10th Dist. No. 11AP-509, 2012 Ohio 1313, ¶ 10*, citing *State v. Banks, 10th Dist. No. 11AP-69, 2011 Ohio 4252, ¶ 13*.

P18 Upon review of the relevant case law, we conclude that ***HN3***[⬆] not all issues surrounding an assertion of privilege are subject to de novo review. Rather, the appropriate standard ultimately depends upon whether an appellate court is reviewing a question of law or a question of fact. Consistent with the foregoing cases, we agree that interpretation and application of statutory language, to determine whether specific information is confidential and privileged, is a question of law that we must review de novo. *See also Flynn v. Univ. Hosp., Inc., 172 Ohio App. 3d 775, 2007 Ohio 4468, ¶ 4, 876 N.E.2d 1300 (1st Dist.)* ("because the trial court's discovery order involved the *application or construction of statutory law* regarding [**14] privilege, we review the order de novo"). (Emphasis added.) An assertion of privilege, however, may also require review of factual questions. For example, in this case, the trial court based its determination of the privilege issue upon its finding that there was no attorney-client relationship between appellants and Waterworks' counsel, a factual matter. *See Frericks-Rich v. Zingarelli, 94 Ohio App.3d 357, 360, 640 N.E.2d 905 (10th Dist.1994)* (question of fact as to whether or not an attorney-client relationship existed precluded summary judgment). With respect to questions of fact, an appellate court must determine whether the trial court abused its discretion. *See, e.g., Harding v. Conrad, 121 Ohio App.3d 598, 600, 700 N.E.2d 639 (10th Dist.1997)*. Accordingly, we review the trial court's determination of factual issues, including the existence of an attorney-client relationship between appellants and the counsel retained by Waterworks, for an abuse of discretion. To the extent it becomes necessary, however, to review the construction and application of the statutory privilege to particular information, we will utilize a de novo standard.

IV. DISCUSSION

A. Attorney-client privilege

P19 ***HN4***[⬆] The attorney-client privilege [**15] in Ohio is governed by *R.C. 2317.02(A)* and, in cases not addressed there, by common law. *State ex rel. Leslie v. Ohio Hous. Fin. Agency, 105 Ohio St. 3d 261, 2005 Ohio 1508, ¶ 18, 824 N.E.2d 990*. *R.C. 2317.02(A)* provides that an attorney shall generally not testify "concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client." While the statute precludes an attorney from *testifying* about confidential communications, the common-law privilege "'reaches far beyond a proscription against testimonial speech [and] protects against any dissemination of information obtained in the confidential relationship.'" *Leslie at ¶ 26*, quoting *Am. Motors Corp. v. Huffstutler, 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (1991)*. The purpose of the attorney-client privilege "'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *Leslie at ¶ 20*, quoting *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*.

P20 ***HN5***[⬆] There is no material difference between Ohio's attorney-client privilege and the federal attorney-client [*1080] privilege. *Guy v. United Healthcare Corp., 154 F.R.D. 172, 177 (S.D.Ohio 1993), fn.3*; [**16] *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc., S.D.Ohio No. 2:07-CV-116, 2012 U.S. Dist. LEXIS 121830 (Aug. 28, 2012)*. Under the privilege, "'(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.'" *Leslie at ¶ 21*, quoting *Reed v. Baxter, 134 F.3d 351, 355-56 (6th Cir.1998)*. Because a client's voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege, voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter. *Hollingsworth v. Time Warner Cable, 157 Ohio App.3d 539, 2004 Ohio 3130, ¶ 65, 812 N.E.2d 976 (1st Dist.)*, citing *Mid-Am. Natl. Bank & Trust Co. v. Cincinnati Ins. Co., 74 Ohio App. 3d 481, 599 N.E.2d 699 (6th Dist.1991)*, and *United States v. Skeddle, 989 F.Supp. 905, 908 (N.D.Ohio 1997)*. *See also In re Teleglobe Communications Corp. v. BCE Inc., 493 F.3d 345, 361 (3d Cir.2007)* ("Disclosing a communication to a [**17] third party unquestionably waives the privilege.").

B. First Assignment of Error

P21 Appellants' first assignment of error states that the

trial court erroneously required appellants to meet a "heightened" burden of proof regarding their assertion of privilege. The trial court stated, "[t]he *heightened burden* 'to show that testimony or documents are confidential or privileged is on the party seeking to exclude the material.'" (Emphasis added.) (Judgment Entry at 5, quoting *Grace v. Mastruserio, 182 Ohio App.3d 243, 249, 2007 Ohio 3942, 912 N.E.2d 608 (1st Dist.)*.) The trial court was correct that ***HN6***[⬆] the burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege. *See Waldmann v. Waldmann, 48 Ohio St.2d 176, 178, 358 N.E.2d 521 (1976)*, citing *Ex parte Martin, 141 Ohio St. 87, 103, 47 N.E.2d 388 (1943)*; *Yosemite Invest., Inc. v. Floyd Bell, Inc., 943 F.Supp. 882, 884 (S.D.Ohio 1996)*, citing *In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451 (6th Cir.1983)* (party asserting the attorney-client privilege must establish its right or standing to do so). "The party seeking to exclude testimony under this privilege bears the burden to show (1) that an attorney-client [**18] relationship existed and (2) that confidential communications took place within the context of that relationship." *Flynn at ¶ 13*. Appellants do not contest their burden; they contest only the characterization of that burden as "heightened." Appellees respond that, despite its use of the word "heightened," the trial court applied the proper standard of proof. We agree.

P22 After stating that appellants bore the burden to show that requested discovery was confidential and privileged, the trial court stated that appellants must present persuasive evidence that Tilton was an officer of Waterworks. The court also stated that, because Waterworks was a separate company from appellants' corporate structure, appellants were required to demonstrate that they were common clients of Waterworks' attorneys, by showing that Waterworks' counsel performed work for appellants and that appellants and Waterworks shared a common interest. The trial court ultimately determined that appellants were not clients, either individually or jointly, of Waterworks' counsel and were, therefore, not entitled to assert the attorney-client privilege. [*1081] Despite its use of the word "heightened," the trial court's judgment [**19] contains no indication that the trial court required more of appellants than that they establish the applicability of the attorney-client privilege. Accordingly, we conclude that the trial court substantively applied the proper standard of proof and that any error as a result of the trial court's mention of a "heightened burden" is harmless. We, therefore, overrule appellants' first assignment of error.

C. Fourth Assignment of Error

P23 We now turn to appellants' fourth assignment of error, by which they argue that the trial court erred by finding that communications between Waterworks' attorneys and appellants' representatives are not privileged. Appellants broadly maintain that, where corporate parents, subsidiaries, and/or affiliates are under common ownership or control, the attorney-client privilege attaches to intra-group communications with counsel, based on the entities' unity of interest. Although courts frequently apply the attorney-client privilege in circumstances involving corporate parents, subsidiaries, and/or affiliates, the relevant case law suggests limitations not allowed by the broad rule appellants propose.

P24 ***HN7***[⬆] Application of the attorney-client privilege in the corporate [**20] context must be determined on a case-by-case basis. *Upjohn at 396*. The attorney-client privilege applies to pertinent communications between attorneys and their corporate clients, just as between attorneys and their individual clients. *Leslie at ¶ 22*, citing *Upjohn* and *Am. Motors Corp.*; *R.C. 2317.021(A)*. Because a corporation can only communicate through its employees or agents, however, complications often arise where the client is a corporation. *See Upjohn*; *Shaffer v. OhioHealth Corp., 10th Dist. No. 03AP-102, 2004 Ohio 63, ¶ 10*. In *Upjohn*, the United States Supreme Court considered whose communications with corporate attorneys are entitled to protection and rejected a limitation of the privilege only to communications by employees in a position to control corporate action upon the advice of counsel. The court noted that middle-level and lower-level employees can embroil the corporation in legal difficulties and that those employees would naturally have relevant information needed by counsel to advise the corporation adequately. The court also stated that a corporate attorney's advice is often more significant to those employees who put the corporation's policies into effect.

P25 [**21] The complications recognized in *Upjohn* are compounded in scenarios that involve corporate parents, subsidiaries, and/or affiliates. One source of confusion is the effect that sharing otherwise confidential information amongst members of a corporate family has on attorney-client privilege. ***HN8***[⬆] While a client's disclosure of confidential information to third parties normally precipitates a waiver of the attorney-client privilege, courts often apply exceptions to the disclosure rule when communications

are shared with a corporate parent, subsidiary or affiliate. In *Teleglobe*, upon which both appellants and appellees rely, the Third Circuit discussed various principles regarding attorney-client privilege in this context. Noting the "conceptual muddle" created by courts' varying rationales for avoiding the disclosure rule, the Third Circuit identified ***HN9***[⬆] the following three rationales, most frequently stated for not construing the sharing of communications within a corporate family as a waiver of the attorney-client privilege: (1) the members of the corporate family comprise a single client; (2) the members [*1082] of the corporate family are joint clients; and (3) the members of the corporate family [**22] are part of a shared community of interest. *Id. at 369-70*.

P26 The Third Circuit focused primarily on the "oft-confused" co-client (or joint-client) rationale, "which applies when multiple clients hire the same counsel to represent them on a matter of common interest," and the community-of-interest (or common-interest) rationale, which applies "when clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities." *Id. at 359*. The joint-client and community-of-interest rationales are not privileges in and of themselves; they are exceptions to the rule that disclosure of privileged communications to third parties constitutes a waiver of attorney-client privilege. *See FSP Stallion 1, LLC v. Luce, D.Nev. No. 2:08-cv-01155-PMP-PAL, 2010 U.S. Dist. LEXIS 110617 (Sept. 30, 2010)*. Those rationales presuppose the existence of an otherwise valid privilege. *Id*. Of the three stated rationales, the Third Circuit found that only the joint-client rationale withstood scrutiny.

P27 The Third Circuit first rejected the rationale that ***HN10***[⬆] affiliated, but separate, corporate entities comprise a single client for purposes of attorney-client privilege. Although courts have treated parent [**23] corporations and their wholly owned subsidiaries as a single entity in other contexts, the court held that those decisions are context-specific and tailored to the statutes or common law causes of action they interpret. *See, e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (treating the coordinated activity of a parent and its wholly owned subsidiary "as that of a single enterprise" for purposes of the Sherman Act because they "have a complete unity of interest," common objectives, and a single corporate consciousness). In the privilege context, however, the Third Circuit held that "treating members of a corporate family as one client fails to respect the corporate form" and the "bedrock principle of corporate law * * * that courts must respect entity separateness unless doing so would work inordinate inequity." *Teleglobe at 371*.

P28 A company realizes benefits, including shielding itself from liability, by spreading corporate activities between separate, subsidiary corporations. *See id*. Indeed, appellants have consistently asserted that they cannot be held individually liable for Waterworks' debts or obligations and that appellees may not pierce appellants' [**24] corporate veils with respect to Waterworks' liabilities. ***HN11***[⬆] With the benefits realized by creating separate corporate entities "comes the responsibility to treat the various corporations as separate entities." *Id*. The *Teleglobe* court held that, "absent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client." *Id. at 372*. *See also Hoffman-La Roche, Inc. v. Roxane Laboratories, Inc., D.N.J. No. 09-6335 (WJM), 2011 U.S. Dist. LEXIS 50404 (May 11, 2011)* (finding no reason to treat affiliate companies as one entity for privilege purposes where the company asserting the privilege had insisted that the entities were separate).

P29 The Third Circuit also declined to apply a community-of-interest rationale, which "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." *Id. at 364*. The court explained as follows:

> [T]he ***HN12***[⬆] community-of-interest privilege only comes into play when parties are represented by separate counsel, which often is not the case for parents and [*1083] subsidiaries. * * * Moreover, the community-of-interest [**25] privilege only applies when those separate attorneys disclose information to one another, not when parties communicate directly. * * * Finally, it assumes too much to think that members of a corporate family necessarily have a substantially similar *legal* interest (as they must for the community-of-interest privilege to apply * * *) in *all* of each other's communications. Thus, holding that parents and subsidiaries may freely share documents without implicating the disclosure rule because of a deemed community of interest stretches, we believe, the community-of-interest privilege too far.

(Citations omitted.) (Emphasis sic.) *Id. at 372*.

P30 The final rationale, which withstood the Third

Circuit's scrutiny, is ***HN13*** the joint-client (or co-client) rationale, which may exist when multiple clients engage common attorneys to represent them on a matter of interest to them all. When the joint-client rationale applies, the attorney-client privilege protects confidential communications between the joint clients and their common attorneys from compelled disclosure to persons outside the joint representation. *Id. at 363*. Privilege in the co-client context is limited "by 'the extent of the legal matter [**26] of common interest'" between the clients. (Citation omitted.) *Id*. "The joint client doctrine overcomes what would otherwise constitute a waiver of confidentiality when communications are shared between two clients." *FSP Stallion 1*, citing *In re Regents of the Univ. of California, 101 F.3d 1386, 1389 (Fed.Cir.1996)*.

P31 In *Teleglobe, at 369*, the Third Circuit recognized that ***HN14*** it was important to consider how the disclosure rule affects the sharing of information among members of a corporate group "[b]ecause parent companies often centralize the provision of legal services to [their] entire corporate group in one in-house legal department." The court acknowledged that, where in-house legal departments serve entire corporate groups, as in that case, a prohibition against intra-group sharing "would wreak havoc on corporate counsel offices." *Id*. Accordingly, the Third Circuit reasoned that treating members of a corporate family as joint clients "reflects both the separateness of each entity *and the reality that they are all represented by the same in-house counsel*." (Emphasis added.) *Id. at 372*.

P32 We now turn to the trial court's application of these principles to the facts of this case.

P33 [**27] Appellants argue that the trial court erroneously treated principles of corporate separateness as inconsistent with the allowance of privileged sharing within a corporate family. We agree that an assertion of corporate separateness may be consistent with the allowance of privileged, intra-group sharing of communications in some instances. The trial court did not treat them as wholly inconsistent, however, and we discern no error by the trial court with respect to its treatment of corporate separateness. The trial court impliedly rejected any suggestion that appellants and Waterworks constitute a single client when it held that appellants could invoke the attorney-client privilege only by demonstrating that they were joint-clients with Waterworks. The court found that Waterworks operated as a separate company, apart from appellants' corporate structure, and quoted *Teleglobe's* statement that courts should generally not treat separate corporate entities as a single client in the context of attorney-client privilege. The trial court did not, however, treat appellants' assertion of Waterworks' [*1084] corporate separateness as determinative of the privilege question.

P34 Just as the Third Circuit [**28] did in *Teleglobe*, the trial court determined that the corporate separateness precluded treating appellants and Waterworks as a single client. The *Teleglobe* court, however, recognized that allowing privileged disclosure between joint clients reflects and respects the clients' corporate separateness. In concert with the Third Circuit's recognition, the trial court expressly acknowledged that appellants would be entitled to raise the attorney-client privilege upon a demonstration they were joint clients with Waterworks. Accordingly, we reject appellants' argument that the trial court's discussion of corporate separateness was inconsistent with *Teleglobe*. Moreover, while we agree with the trial court that appellants and Waterworks do not constitute a single client, we also agree that appellants are not precluded from establishing a joint-client relationship with Waterworks, so as to assert the attorney-client privilege.

P35 Nevertheless, the trial court went on to find that appellants failed to establish that they were joint clients of Waterworks' attorneys. ***HN15*** Joint representation is distinguishable from situations where a lawyer represents one client, but another person with allied interests [**29] cooperates with the lawyer and client. *Id. at 362*. Further, joint representation does not necessarily exist when clients of the same lawyer share common interests. *Id*. A joint-client representation begins when the co-clients convey their desire for representation and the lawyer consents. *Id*. Unlike the vast majority of cases that treat parent, subsidiary, and/or affiliate entities as joint clients as a matter of course, appellants and Waterworks were neither jointly represented by in-house counsel nor jointly represented by common outside counsel. It is undisputed that appellants did not request representation from or retain, as their own counsel, Jenner, RKO or other attorneys retained by Waterworks. The trial court expressly found that, at all relevant times, separate attorneys represented appellants and Waterworks. In fact, appellants admit that they and Waterworks had separate counsel in connection with the August 2005 transactions and the Waterworks bankruptcy, and that Patriarch Partners retained separate counsel in the 2007 litigation, at least for the purpose of responding to appellees' subpoena. The court further found that appellants and Waterworks did not share common

interests [**30] and, to the contrary, sometimes had adverse interests.

P36 Appellants flatly argue that communications between counsel and corporate affiliates under common ownership or control are privileged and maintain that the trial court based its decision "on a flawed legal rule that incorrectly limited the ability of corporate parents to engage in privileged communications with outside counsel for a subsidiary." (Appellants' Brief at 17.) Appellants' arguments are circular and blur the distinction between the single-client, joint-client, and community-of-interest rationales for evading application of the disclosure rule. On one hand, appellants argue that they "have established *joint client* relationships" with Waterworks. (Emphasis added.) (Defendants' Reply Memorandum in Support of their Motion for a Protective Order at 5-6.) On the other hand, appellants' only basis for claiming a joint-client relationship is their argument that parent, subsidiary, and affiliate corporations under common ownership or control are essentially one client or, at least, part of a community of [*1085] interest as a matter of law.[2]

P37 Appellants focus our attention on language in *Teleglobe* that ***HN16***[⬆] "courts almost universally hold that intra-group information sharing does not implicate the disclosure rule." *Id. at 369*. *Teleglobe* explained, however, that parent and subsidiary companies are not in a community of interest as a matter of law. *Id. at 378*. "[I]t assumes too much to think that members of a corporate family necessarily have a substantially similar *legal* interest * * * in *all* of each other's communications." (Emphasis sic.) *Id. at 372*. Similarly, courts should not assume, as a matter of law, that members of a corporate family have a sufficient common legal interest to constitute joint clients. *See id. at 366* (stating that legal interests of co-clients must be more strictly aligned than clients' interest in a community of interest).

P38 In support of their position, appellants cite cases in which courts have stated that a corporate [**32] "client" encompasses both parent and affiliate companies. *See Crabb v. KFC Natl. Mgt. Co., 6th Cir. No. 91-5474, 1992 U.S. App. LEXIS 38268 (Jan. 6, 1992)*, quoting *United States v. Am. Tel. & Tel. Co., 86 F.R.D. 603, 616 (D.D.C.1979)* ("*AT&T*"). The *AT&T* court stated, at 616, that "[t]he cases clearly hold that a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations." Nevertheless, it went on to acknowledge as follows:

> The cases in which the issue has arisen as to the identity of the client also involved facts in which the two related corporations had a substantial identity of legal interest in the matter in controversy. In such circumstances, notwithstanding that the corporations were distinct, *the representation by the attorney was common or joint representation* and hence the communications among them were still covered by the attorney-client privilege.

(Emphasis added.) *Id*. Thus, despite its broad statement regarding the identity of a corporate client, the court recognized that the relevant cases involved joint representation of distinct corporations with a substantial identity of legal interests.

P39 In *Crabb*, [**33] KFC asserted the attorney-client privilege with respect to a memorandum drafted by its in-house legal department. There was no dispute that the communication reflected in the memorandum was between KFC and its in-house counsel or that the attorney-client privilege, at least initially, attached to the communication. The question was whether KFC waived its privilege by delivering the memorandum to a management employee of a corporate affiliate. The Sixth Circuit held that KFC did not waive the privilege and stated that "attorney-client privilege is not waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations." Similarly, in *Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D.Ind.1985)*, the issue was whether Carrier waived its attorney-client privilege with respect to communications between Carrier and its attorney and between Carrier's attorney and Carrier's insurer when Carrier disclosed those communications to a sister subsidiary company. As in *Crabb, Roberts* involved a corporate client's assertion [*1086] of attorney-client privilege with respect to communications that, absent waiver, [**34] were undisputedly privileged. The *Roberts* court stated the issue as "whether two companies can avoid [the] general [disclosure] rule governing communications to a third party by virtue of their relationship as sister subsidiaries." *Id. at 687*.

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[2] Appellants have not asserted the community-of-interest rationale, as described in *Teleglobe*, [**31] which would apply only to communications between appellants' separate counsel and Waterworks' counsel. Appellants have not identified communications between counsel, but, rather, assert the attorney-client privilege with respect to their own communications with Waterworks' counsel.

P40 The issues in *Crabb* and *Roberts* are distinguishable from this case. The question here is not whether a client waived its right to assert attorney-client privilege by disclosing a communication to a third party, and the trial court did not address the issue of waiver. Waterworks did not raise the privilege, nor were the disputed communications between Waterworks and its attorneys; instead, appellants raised the privilege with respect to their own communications with Waterworks' counsel. The question here is whether appellants were clients of Waterworks' attorneys or whether their relationship to Waterworks nevertheless allows them to assert the attorney-client privilege. To demonstrate the availability of the attorney-client privilege as joint clients, the trial court stated that appellants were required to show that Waterworks' counsel performed work for both Waterworks and appellants and that appellants and Waterworks shared a common interest. [**35] *See Teleglobe at 379* (**HN17**[↑] "The majority-and more sensible-view is that even in the parent-subsidiary context a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest."). Appellants failed to point to any evidence that Waterworks' counsel performed work on appellants' behalf.

P41 The trial court also held that appellants failed to establish that they and Waterworks had substantially similar legal interests. Appellants argue that they and Waterworks had substantially similar legal interests because of their common ownership and control, based on Tilton's ownership and/or management of all of the Patriarch entities and Zohar II. Because the trial court appropriately found that Waterworks' counsel did not also perform legal work for appellants, the second prong of the joint-client test set forth by the trial court—that appellants and Waterworks shared a common interest—is irrelevant. Nevertheless, we discern no error in the trial court's conclusion that appellants' interests were sometimes adverse to Waterworks' interests. **HN18**[↑] Corporate affiliates are not joint clients as a matter of law. As stated above, corporate [**36] affiliation does not, as a matter of law, establish either a community of interest or that the affiliates have a substantially similar legal interest. *See id. at 372*. Even were we to agree with appellants that Waterworks, as a wholly owned subsidiary of Zohar II, had a complete community of interest with Zohar II, the community of interest would not extend to the other appellants. Nowhere have appellants attempted to distinguish between actions on behalf of Zohar II from actions on behalf of the other appellants. Appellants do not dispute the trial court's factual findings that weigh against a finding of similar legal interests. Specifically, they do not contest that they held Waterworks in default of its obligations to appellants, cut off financing to Waterworks, and required Waterworks to waive its legal claims against appellants as a condition for additional financing. Moreover, in Waterworks' bankruptcy proceedings, Zohar II asserted its adverse interest as a secured creditor of Waterworks. Based on those findings, the trial court could reasonably conclude that Waterworks' interests substantially differed from appellants' interests.

P42 Upon review, we conclude that the trial court [**37] did not abuse its discretion [*1087] by finding no attorney-client relationship between appellants and Waterworks' counsel. Accordingly, we overrule appellants' fourth assignment of error.

D. Second and Third Assignments of Error

P43 In their second and third assignments of error, appellants argue that the trial court erred by holding that Tilton was not a member of Waterworks' board of managers and by overlooking Harrington's undisputed affiliation with Waterworks. They maintain that the trial court overlooked Tilton's unrebutted affidavit, the Waterworks LLC Agreement, and filings from the Waterworks bankruptcy that identified Tilton as the sole member of Waterworks' board of managers. With respect to Harrington, appellants maintain that the trial court ignored appellees' own allegation, confirmed by Tilton, that Harrington served as an interim CEO of Waterworks. Appellants contend that both Tilton and Harrington were, therefore, part of the corporate "client."

P44 We agree with appellants that the record contains undisputed evidence of Tilton's membership on Waterworks' board of managers and of Harrington's service as Waterworks' interim CEO. As appellees note, however, those facts are irrelevant [**38] to appellants' argument—that appellants and Waterworks were joint clients—and to the trial court's ultimate holding—that they were not. To the extent appellants argue that Tilton and Harrington were entitled to act as Waterworks for the purpose of asserting Waterworks' attorney-client privilege, appellants' counsel conceded, at oral argument, that Waterworks itself has not asserted the privilege, a concession supported by the record. For these reasons, we conclude that any error in this regard had no effect on the trial court's judgment and was harmless. Accordingly, we overrule appellants' second and third assignments of error.

V. MOTION TO STRIKE

P45 Appellants moved this court to strike certain materials appended to appellees' brief. To the extent these materials were not part of the trial court record, we grant appellants' motion. Our ruling on appellants' motion has no bearing on the outcome of this matter.

VI. CONCLUSION

P46 We grant appellants' motion to strike, to the extent noted. Having overruled each of appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motion to strike granted; *judgment affirmed*.

KLATT and DORRIAN, JJ., concur. [**39]

Clapp v. Mueller Elec. Co.

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

August 25, 2005, Date of Announcement of Decision

NO. 85447

Reporter
162 Ohio App. 3d 810 *; 2005-Ohio-4410 **; 835 N.E.2d 757 ***; 2005 Ohio App. LEXIS 3990 ****

HARRY S. CLAPP, Plaintiff-Appellee v. MUELLER ELECTRIC CO., ET AL., Defendants-Appellants

Prior History: [****1] CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. CV-465617.

Disposition: AFFIRMED.

Core Terms

unjust enrichment, trial court, accounting firm, terminated, hired, appellants', hotels, value of a service, trained, directed verdict motion, severance pay, bookkeeping, personnel, defense counsel, assigned error, communications, implementing, accounting, conferred, spent

Case Summary

Procedural Posture
Plaintiff former chief financial officer (CFO) of defendant electric company sued defendants, the electric company, a hotel, and their owner, for breach of contract, unjust enrichment, and promissory estoppel. The claim for promissory estoppel was dismissed by the CFO. Defendants' motions for a directed verdict were denied. Defendants appealed from a judgment entered by the Common Pleas Court (Ohio), on a jury verdict, for the CFO for $ 115,000.

Overview
Defendants argued that the CFO was improperly allowed to testify as to the value of his services. The appellate court held that the CFO did not have to be qualified as an expert to testify to the value of his services. The CFO testified only as to the value of his own services. Further, any error was harmless as the verdict was less than the range of estimated costs for fixing the accounting problems at the hotel. The directed verdict motions were properly denied as reasonable minds could find that the CFO performed a benefit for the hotel. The CFO spent about 30 hours per week designing and implementing a new accounting system at the hotel. He supervised, hired, and trained personnel for the hotel and he wrote off amounts that it was not cost effective to find. The verdict was not against the manifest weight of the evidence based on the unjust enrichment claim. Finally, the CFO's counsel was properly allowed to question a company employee, who had changed her testimony, as to whether she had had communications with defense counsel. The attorney-client privilege protected the content of the communications, not the fact that there were such communications.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN1[] **Standards of Review, Abuse of Discretion**

The admission or exclusion of evidence rests within the sound discretion of the trial court. In order to find an abuse of that discretion, the appellate court must find that the trial court's decision to admit or exclude the evidence was arbitrary, unreasonable, or unconscionable and not merely an error of judgment.

Evidence > ... > Testimony > Lay Witnesses > General Overview

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN2[] Testimony, Lay Witnesses

A witness need not be qualified as an expert to testify regarding the value of his own services. The value of services requires a familiarity with the subject and does not require the qualification of a witness designated as an expert.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] Trials, Judgment as Matter of Law

According to *Ohio R. Civ. P. 50(A)(4)*, a motion for directed verdict is granted if, after construing the evidence most strongly in favor of the party against whom the motion is directed, reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party. The "reasonable minds" test mandated by *Rule 50(A)(4)* requires the trial court to discern only whether there exists any evidence of substantive probative value that favors the position of the nonmoving party. *Rule 50(A)(4)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4[] Standards of Review, De Novo Review

A motion for directed verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence. Where the appellate court is presented with a question of law, it applies a de novo standard of review.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN5[] Types of Contracts, Quasi Contracts

Generally speaking, a claim for unjust enrichment lies whenever a benefit is conferred by a plaintiff upon a defendant with knowledge by the defendant of the benefit and retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. Civil liability may be imposed where one party retains a benefit from another's labors. This implied obligation (i.e., quasi contract) is derived from the equitable principle based on the moral obligation to make restitution which rests upon a person who has received a benefit which, if retained by him, would result in inequity and injustice. In order to prevent such unjust enrichment, the law implies a promise to pay a reasonable amount for services in the absence of a specific contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN6[] Types of Contracts, Quasi Contracts

In order to recover under a theory of unjust enrichment, a plaintiff must demonstrate: (1) a benefit conferred by the plaintiff upon the defendant; (2) knowledge by the defendant of such benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment.

Civil Procedure > Appeals > Standards of Review > General Overview

HN7[] Appeals, Standards of Review

Judgments that are supported by some competent credible evidence going to all the essential elements of the case will not be reversed by the reviewing court as being against the manifest weight of the evidence.

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN8 **Privileges, Attorney-Client Privilege**

Generally, communications between an attorney and his or her client are privileged. Ohio Rev. Code Ann. § 2317.02(A).

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN9 **Privileges, Attorney-Client Privilege**

See Ohio Rev. Code Ann. § 2317.02(A).

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN10 **Privileges, Attorney-Client Privilege**

The attorney-client privilege protects and prevents the disclosure of communications between a company's attorney and that company's employees.

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN11 **Privileges, Attorney-Client Privilege**

It is the contents of the communications between a company's attorneys and the company's employees that are privileged under the attorney-client privilege; not the mere fact that a communication took place.

Counsel: For Plaintiff-Appellee: Timothy A. Shimko, Cleveland, OH.

For Defendants-Appellants: Jonathan T. Hyman, Andrew A. Kabat, Reminger & Reminger Co., L.P.A., Cleveland, OH.

Judges: CHRISTINE T. McMONAGLE, JUDGE. FRANK D. CELEBREZZE, JR., P.J., and MARY EILEEN KILBANE, J., CONCUR.

Opinion by: CHRISTINE T. McMONAGLE

Opinion

[*813] [***759] JOURNAL ENTRY AND OPINION

CHRISTINE T. McMONAGLE, J.:

[**P1] Plaintiff-appellee, Harry S. Clapp, is the former Chief Financial Officer [***760] ("CFO") of defendant-appellant, Mueller Electric Co. ("Mueller Electric" or "Mueller"). After his employment was terminated, Clapp sued defendants-appellants Mueller Electric, Brighton Manor Corp. ("Brighton Manor"), and E. Scott Emerson (the owner of both companies) for monies owed him as a result of services he provided to Mueller and Brighton Manor for which he was not paid. Clapp's complaint asserted claims for breach of contract, unjust enrichment, and promissory estoppel; he subsequently dismissed the promissory estoppel claim.

[**P2] Clapp, a Certified Public Accountant ("CPA"), testified at trial that he was hired as Mueller's [****2] CFO in November 1996 at an annual salary of $ 65,000. In November 1997, Emerson terminated Mueller's Chief Executive Officer ("CEO") and asked Clapp to perform the CEO duties, in addition to his duties as CFO, while Emerson searched for a permanent CEO. Contemporaneous with his appointment as CEO, Clapp received a raise and a bonus. In November 1998, after his annual performance review, Emerson increased Clapp's salary to $ 78,000 per year and gave him a 30% bonus. In November 1999, Emerson again reviewed Clapp's performance, increased his salary to $ 95,000 per year, and gave him a 30% bonus. From the time he was hired by Mueller until December 1999, Clapp performed work only for Mueller.

[**P3] Sometime in 1997 or 1998, Emerson terminated the controller of Brighton Manor, which owns and operates four hotels in northern Ohio, and hired an accounting firm to oversee the financial operations of the hotels. In late 1999, however, Emerson became aware that the accounting firm had been having difficulty handling the bookkeeping and accounting functions of Brighton Manor. Emerson approached Clapp and asked him to review the books and bookkeeping procedures and advise him of the extent [****3] of the problems.

[**P4] Over a two-week period in January 2000, Clapp familiarized himself with the operation of Brighton Manor. He learned that no bank reconciliations had been performed for any of the four hotels owned and operated by Brighton Manor for the previous 18 months.

He also discovered that the controllers working at the various hotels were not properly trained or experienced, and that there were not proper bookkeeping procedures in place at any of the four hotels. In short, according to Clapp, "there was a complete collapse of the accounting system."

[**P5] Clapp reported to Emerson that Brighton Manor's books were $ 800,000 out of balance. He further advised Emerson that to bring the books in balance, hundreds of thousands of transactions had to be traced, but the task would be very complicated because all of the transactions from the four hotels were intermingled [*814] in one joint bank account. Clapp further advised Emerson that accounting procedures would have to be designed and implemented and the accounting staff at the hotels would need to be trained or replaced.

[**P6] Clapp and Emerson then discussed various options to solve the problems. Clapp advised [****4] Emerson that he could either hire an outside accounting firm to create a new accounting system and train new personnel at each of the four hotels at a cost of approximately $ 200,000. Clapp advised Emerson that his other option was to hire an experienced CFO for Brighton Manor, at an approximate salary of $ 125,000.

[**P7] Instead, in February 2000, Emerson approached Clapp and asked him if he would "be interested in taking on this task and coming into this organization and fixing these problems?" Clapp testified that [***761] he told Emerson that taking on the additional duties at Brighton Manor would involve a lot more work, and asked him what he would be compensated for these substantial extra duties. According to Clapp, Emerson told him:

[**P8] "Harry, if you get this, if you come in and do what you tell me you can do, if you fix this problem, I will--if you handle the books of Brighton for me and do what you tell me you can do, I will pay you fairly."

[**P9] From February 2000 until he was terminated in May 2001, Clapp continued to perform his CEO and CFO duties at Mueller Electric, and, additionally, he worked as CFO at Brighton Manor. Clapp testified that in addition to [****5] his normal hours at Mueller Electric, he spent an average of 30 hours per week in the evenings and on weekends designing and implementing a new accounting and bookkeeping system for Brighton Manor. Further, he hired and trained personnel to operate the new system and supervised the individuals who were working at balancing the books. Clapp initially gave Emerson frequent updates regarding his progress, but after Emerson told him that he was not interested in Clapp's schedule, he gave Emerson less frequent updates.

[**P10] By February 2001, Clapp had completed the task of balancing Brighton Manor's books and implementing a new bookkeeping system. When he approached Emerson regarding the promised payment, however, Emerson told Clapp that he would pay him only after an outside accounting firm reviewed the procedures that Clapp had put into place and "signed off on it." After the accounting firm completed its audit and signed off on Clapp's work, Clapp again approached Emerson regarding payment. This time Emerson told Clapp that he wanted an outside consultant by the name of Ala Deen to review Clapp's work.

[**P11] Although Clapp correctly surmised that Emerson had actually hired [****6] Deen to replace him at Brighton Manor, Clapp advised and trained Deen regarding the procedures he had spent the past year implementing.

[**P12] [*815] On May 1, 2001, after Clapp had completed Deen's training, Emerson advised Clapp that he was terminated effective immediately. In light of Clapp's senior position at Mueller, however, Emerson asked Clapp to report on various issues and strategies, including the company's union, insurance, and vendor contracts, and the company's decision to move its Cleveland operation to China. Because his employment had been terminated, Clapp informed Emerson that he wanted severance pay in exchange for the reports. Clapp testified:

[**P13] "Well, at this point, I had been burned a couple times. I was finally waking up a little bit. And I said: Look it, let's talk about a severance package first.

[**P14] "So we started talking about a severance package. And I very clearly, right up front, I said: Look it, I'm looking for a six-month package. *** The bottom line is, I said: Scott, I expect a six-month. Is that what we're talking about? He nodded his head. That's where we left it at."

[**P15] Thereafter, Clapp spent several days developing [****7] a list of key issues regarding Mueller Electric. He then met with Emerson for several hours regarding the report. At the conclusion of the meeting, Clapp asked Emerson about his severance package. Emerson "hemmed and hawed," and then told Clapp that he had not yet had time for his lawyers to draw up the agreement but that it would be forthcoming.

[**P16] [***762] Over the next several days, Clapp called Emerson several times. He did not speak with Emerson directly but left several messages for him on his voicemail. Emerson did not return the messages, but then several days later, he called Clapp and, in an angry tone, accused him of unspecified wrongdoing and told him that he would not be paid for his work at Brighton Manor and would not be receiving any severance pay.

[**P17] Emerson testified for the defense that he gave Clapp the responsibility of fixing the problems at Brighton Manor because Clapp had "gotten things working very smoothly at Mueller" and Emerson believed Clapp had time to take on other responsibilities. According to Emerson, he and Clapp never had any discussions regarding additional compensation for Clapp's work at Brighton Manor.

[**P18] Emerson testified [****8] that Clapp initially told him that the books at Brighton Manor were several hundred thousand dollars out of balance, and he was surprised to learn from Clapp in December 2000 that the books were actually $ 800,000 out of balance, after Clapp had been working on the project for nearly a year. Emerson testified further that he told Clapp that he wanted him to "roll up his sleeves" and get the books balanced and the cash accounts reconciled by the year-end close.

[**P19] [*816] According to Emerson, he told Clapp that he "would think about it and get back to him" when Clapp asked him about a severance payment and he denied nodding his head in agreement when Clapp stated that he was entitled to six months severance pay. Emerson testified that he talked about "open issues" at Mueller Electric with Clapp after he was terminated, but could not recall receiving a memo from Clapp about those issues.

[**P20] Upon cross-examination, Emerson testified that, upon learning of the enormity of the accounting problems at Brighton Manor, he knew that he would need to hire either an outside accounting firm or a CFO to fix the problems but, instead, he asked Clapp to do the work. Emerson testified [****9] further that he was upset when he learned after Clapp was terminated that Clapp had written off approximately $ 72,000 to balance the books at Brighton Manor. Emerson admitted, however, that during his deposition, he had testified that Clapp had written off approximately $ 35,000 to balance the books. Emerson further admitted that the outside accounting firm that reviewed Clapp's finished work at Brighton Manor had no criticisms regarding his work. Emerson also admitted that he had lied when he told Clapp that Deen was an outside consultant at Brighton Manor when, in fact, Emerson had already hired him as the new CFO for the company. Finally, Emerson testified that he decided not to pay Clapp any severance pay after he learned from Judith Little, his assistant, on May 2, 2001, that Clapp had loaned her company money, in violation of company policy.

[**P21] John Phillips, a former controller for Mueller Electric, testified that he and Little helped reconcile the books at Brighton Manor. According to Phillips, Clapp supervised the project, and only got involved in the actual reconciliation work after December 2000, when it was determined that the books were approximately $ 800,000 [****10] out of balance. Phillips testified that he worked on the Brighton Manor project approximately two days per month.

[**P22] Little, called on cross-examination by the plaintiff, testified that she first told Emerson in February 2002, after Clapp filed his lawsuit and nearly a year after his termination, that Clapp had authorized [***763] a personal loan to her from the company. Little emphatically denied telling Emerson about the loan in May 2001, when Clapp was terminated.

[**P23] On the next day of trial, defense counsel called Little on direct examination. Little then suddenly changed her testimony regarding when she first told Emerson that Clapp had authorized a company loan to her. Little testified that she actually told Emerson about the company loan in May 2001, when she became involved in preparing Mueller Electric's response to a document entitled "Request for Information" from the Ohio Department of Job and [*817] Family Services regarding Clapp's request for unemployment compensation. Little noted that the document was mailed to Mueller on May 22, 2001.

[**P24] In light of this dramatic and unexplained change in testimony, upon cross-examination, appellee's counsel asked Little [****11] whether she had discussed the document, Clapp's personnel file, or her testimony with defense counsel between the time of her previous testimony and her altered testimony. Little responded "no" to each question. When appellee's counsel then asked, "well, what did you discuss with these lawyers," the trial court sustained defense counsel's objection.

[**P25] The trial court denied defense counsel's motions for a directed verdict, both at the conclusion of appellee's case-in-chief and at the conclusion of all the

evidence. The jury returned a general verdict in favor of Clapp, awarding him $ 115,000. This appeal followed.

CLAPP'S TESTIMONY REGARDING THE VALUE OF HIS SERVICES

[**P26] Clapp testified on direct examination that he had been a CPA for over 15 years. He testified further that in light of his experience working with and reviewing the bills from public accounting firms over the past 20 years, he was aware of what the hourly rate for a licensed CPA with 15 years of experience was. Clapp then opined that the value of his services as a licensed CPA was anywhere from $ 125 to $ 175 per hour, and that, calculating his rate at $ 150 per hour, the value of the services he [****12] had provided to Brighton Manor was $ 232,000.

[**P27] In their first assignment of error, appellants argue that the trial court committed reversible error in allowing Clapp to testify, over their objection, to the value of his services because he was not qualified as an expert witness.

[**P28] ***HN1***[] The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage (1987), 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343*. In order to find an abuse of that discretion, we must find that the trial court's decision to admit or exclude the evidence was arbitrary, unreasonable, or unconscionable and not merely an error of judgment. *State v. Xie (1992), 62 Ohio St.3d 521, 584 N.E.2d 715*.

[**P29] ***HN2***[] A witness need not be qualified as an expert to testify regarding the value of his own services. In *Mid-States Development Co. v. Celotex Corp. (Aug. 29, 1983), Montgomery App. No. CA 7469, 1983 Ohio App. LEXIS 14060*, for example, a witness testified regarding the reasonable value of services rendered for repair and replacement of a roof. Appellant objected that the testimony was improper because the witness had not been qualified as an expert. In affirming the trial court's ruling that [****13] the witness need not be an expert to testify as to the value of services he had provided, the Second District stated, "Value of services requires [*818] a familiarity with the subject and does not require, as implied here, the [***764] qualification of a witness designated as an expert." Id.

[**P30] Similarly, in *Rose v. Brandewie (1950), 60 Ohio Law Abs. 260, 101 N.E.2d 219*, the court held that witnesses not qualified as experts properly testified regarding the value of board, lodging and laundry services provided to defendant's decedent. The court noted that knowledge of the value of the services rendered did not depend on professional or special skill that would qualify the witnesses as experts, but could be had and testified to by persons who had gained their knowledge through experience and observation. See, also *Frank v. Frank (1930), 9 Ohio Law Abs. 486* (plaintiff not required to be qualified as an expert to testify regarding the value of the services he provided on defendant's farm).

[**P31] There is no question that, in this case, Clapp had sufficient experience to testify regarding the value of services he rendered as CFO to Brighton Manor. The testimony at trial demonstrated [****14] that Clapp had been a CPA involved in accounting and financial work for many years, that he had performed such services at Mueller Electric for nearly five years, and that he performed similar services at Brighton Manor. Thus, Clapp clearly was familiar with the services rendered.

[**P32] Appellants contend that Clapp's testimony was improper, however, because he actually gave expert testimony without being qualified as an expert or submitting an expert report. They assert that because Clapp testified that the hourly rate for a CPA with 15 years of experience, like him, is anywhere from $ 125 to $ 175 per hour, he actually testified regarding the market rate for his services, which is a subject for expert testimony. We disagree.

[**P33] The record reflects that Clapp testified that in light of his extensive experience, *his services* as a CPA were worth anywhere from $ 125 to $ 175 per hour. Although he testified that he knew what the hourly rate of a licensed CPA in Ohio with 15 years of experience was, he did not testify as to what that rate was because appellants' counsel objected to his answer. Thus, Clapp testified as to his own value, not the market value for every [****15] CPA with 15 years of experience.

[**P34] Moreover, even if the admission of Clapp's testimony regarding the value of his services were in error, we would find any error to be harmless. Emerson testified that Clapp advised him it would cost approximately $ 200,000 for an outside accounting firm to fix the problems at Brighton Manor, or $ 125,000 for a CFO to do the work. The jury returned a verdict of $ 115,000, below this range. Accordingly, Clapp's testimony that the value of the services he rendered to Brighton Manor was $ 232,000 does not appear to have influenced the jury.

[**P35] [*819] Because the trial court did not abuse its discretion in allowing Clapp to testify regarding the value of his services, appellants' first assignment of error is overruled.

APPELLANTS' MOTIONS FOR DIRECTED VERDICT

[**P36] In their second assignment of error, appellants contend that the trial court erred in denying their motions for directed verdict.

[**P37] ***HN3***[⬆] According to *Civ.R. 50(A)(4)*, a motion for directed verdict is granted if, after construing the evidence most strongly in favor of the party against whom the motion is directed, "reasonable minds could come to but one conclusion [****16] upon the evidence submitted and that conclusion is adverse to such party." The "reasonable minds" test mandated by *Civ.R. 50(A)(4)* requires the court to discern only whether [***765] there exists any evidence of substantive probative value that favors the position of the nonmoving party. *Civ.R. 50(A)(4)*; *Ruta v. Breckenridge-Remy Co. (1982), 69 Ohio St.2d 66, 69, 430 N.E.2d 935*.

[**P38] ***HN4***[⬆] "A motion for directed verdict *** does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus*. See, also, *Wagner v. Roche Laboratories (1996), 77 Ohio St. 3d 116, 124, 1996 Ohio 85, 671 N.E.2d 252*. Because we are presented with a question of law, we apply a de novo standard of review. *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co., 95 Ohio St. 3d 512, 2002 Ohio 2842, at P4, 769 N.E.2d 835*.

[**P39] Appellants argue that both of Clapp's claims were deficient, for various reasons. They contend there was insufficient evidence to support Clapp's breach of contract claim because Emerson's statement that he would pay Clapp "fairly" [****17] for his work at Brighton Manor fails to establish the contract price, one of the essential elements of a claim for breach of contract. Likewise, they claim there was insufficient evidence to support Clapp's claim for severance pay because a nod of the head is insufficient to establish an agreement, and, even if it were sufficient, Emerson's nod of the head indicated only an agreement to make an agreement in the future regarding Clapp's severance, which appellants claim is unenforceable under these circumstances. Finally, they argue that Clapp's claim for unjust enrichment fails because he did not confer any benefit on Brighton Manor.

[**P40] We address Clapp's unjust enrichment claim first. This court set forth a synopsis of the law of unjust enrichment in *Donovan v. Omega World Travel, Inc. (Oct. 5, 1995), Cuyahoga App. No. 68251, 1995 Ohio App. LEXIS 4448*:

[**P41] [*820] ***HN5***[⬆] "Generally speaking, a claim for unjust enrichment lies whenever a benefit is conferred by a plaintiff upon a defendant with knowledge by the defendant of the benefit and retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *** Civil liability may be imposed where one party [****18] retains a benefit from another's labors. This implied obligation (i.e., quasi contract) is derived from the equitable principle 'based on the moral obligation to make restitution which rests upon a person who has received a benefit which, if retained by him, would result in inequity and injustice. In order to prevent such unjust enrichment, the law implies a promise to pay a reasonable amount for services in the absence of a specific contract." (Citations omitted).

[**P42] ***HN6***[⬆] In order to recover under a theory of unjust enrichment, a plaintiff must demonstrate: 1) a benefit conferred by the plaintiff upon the defendant; 2) knowledge by the defendant of such benefit; and 3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Guardian Technology v. Chelm Properties, 2002 Ohio 4893, Cuyahoga App. No. 80166 (Sept. 19, 2002)*, citing *Hambleton v. R.G. Barry Corp. (1984), 12 Ohio St.3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298*.

[**P43] Appellants contend there is no evidence that Clapp conferred a benefit on Brighton Manor. They argue that "instead of rolling up his own sleeves, and putting pencil to paper" to perform the actual bank reconciliations, [****19] he delegated those responsibilities to two subordinates. They further contend that Clapp did not [***766] tell Emerson until December 2000 that the books were $ 800,000 out of balance, after the Brighton Manor project had been ongoing for nearly one year. Finally, they contend that Clapp did not confer any benefit on Brighton Manor because he wrote off $ 165,394.27 in 2001 to bring the accounts into balance. Accordingly, they assert, there was no evidence to justify a payment to Clapp.

[**P44] Appellants conveniently ignore Clapp's

testimony, however. Clapp testified that he told Emerson in January 2000, after he had spent several weeks investigating Brighton Manor's operation, that the accounting system at Brighton Manor was in shambles and the books were $ 800,000 out of balance. He further testified that in addition to his normal work hours at Mueller Electric, from January 2000 to May 2001, he spent an average of 30 hours per week designing and implementing a new accounting and bookkeeping system at Brighton Manor. Clapp admitted that he delegated much of the "grunt work" associated with the bank reconciliations to his subordinates, but testified that he supervised those personnel [****20] and, further, that he hired and trained personnel at each of the four hotels to operate the new system. Clapp further admitted that he wrote off some monies to bring the books into balance, but testified that the [*821] write-offs were based on his professional judgment that it was not cost effective to spend more time searching for the lost dollars. Appellants also ignore Emerson's own testimony that the independent accounting firm which reviewed Clapp's work upon its completion raised no concerns about the processes he had put into place or the books themselves.

[**P45] Construing this evidence in a light most favorable to Clapp, as required by Civ.R. 50(A)(4), it is apparent that reasonable minds could conclude there was evidence of substantive probative value that Clapp conferred a benefit upon Brighton Manor. Accordingly, the trial court properly denied appellants' motion for a directed verdict regarding Clapp's unjust enrichment claim.

[**P46] As part of this assignment of error, appellants also contend that the verdict was against the weight of the evidence. HN7[⬆] Judgments that are supported by some competent credible evidence going to all the essential elements of the case will [****21] not be reversed by the reviewing court as being against the manifest weight of the evidence. Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273.

[**P47] With respect to Clapp's unjust enrichment claim, we note that, for the reasons discussed above, there was sufficient evidence that Clapp conferred a benefit on Brighton Manor. In addition, there was evidence that Emerson asked Clapp to perform the services at Brighton Manor and, thus, that he knew of the benefit being conferred. Finally, there was evidence that Emerson promised to pay Clapp "fairly" for the services he performed at Brighton Manor, and, therefore, the jury could have reasonably concluded that it would be unjust for Emerson to retain that benefit without paying for it. Each element of Clapp's unjust enrichment claim was supported by competent credible evidence, and, therefore, the jury verdict in favor of Clapp on this claim was not against the manifest weight of the evidence.

[**P48] Because the jury rendered a general verdict, without any interrogatories, we are not able to discern from the record whether the jury found in favor of Clapp on his breach of contract claim, unjust enrichment [****22] claim, or both. However, because there was sufficient evidence to support the jury's verdict in favor of Clapp regarding his unjust enrichment claim for [***767] the services he rendered at Brighton Manor, and the verdict was not against the manifest weight of the evidence, we need not address appellants' arguments regarding Clapp's breach of contract claim or his claims for severance pay.

[**P49] Appellants' second assignment of error is therefore overruled.

ATTORNEY-CLIENT PRIVILEGE

[**P50] In their third assignment of error, appellants argue that the trial court committed reversible error in allowing Clapp's counsel to question Little, [*822] upon her change in testimony regarding when she first told Emerson that Clapp had loaned her company money, as to whether she had discussed Clapp's personnel file, the "Request for Information" letter from the Ohio Department of Job and Family Services, or her testimony with defense counsel between the time of her previous testimony and the time of her altered testimony. Appellants contend that because Little was their employee, any conversations she had with defense counsel were protected by attorney-client privilege.

[**P51] HN8[⬆] Generally, communications [****23] between an attorney and his or her client are privileged. See R.C. 2317.02(A). The term "client," as used in R.C. 2317.02(A), includes:

[**P52] HN9[⬆] "A person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him in his professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent, employee, or other representative, with such attorney."

[**P53] In *Upjohn Co. v. United States (1981), 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677*, the United States Supreme Court addressed the attorney-client privilege as it applies to a corporate client and determined that ***HN10***[⬆] the attorney-client privilege protects and prevents the disclosure of communications between a company's attorney and that company's employees.

[**P54] Appellants argue that in light of *Upjohn* and its progeny, any conversations between Little and defense counsel were privileged, and, therefore, the "trial court lacked the authority to compel Ms. Little to waive her employer's privilege and answer those [****24] questions."

[**P55] ***HN11***[⬆] It is the *contents* of the communications that are privileged, however; not the mere fact that a communication took place. *Upjohn, supra.* Thus, the trial court properly allowed Clapp's counsel to inquire as to whether or not there had been any opportunity by appellants' counsel to influence Little's testimony, which had clearly undergone a radical transformation over night. However, when appellee's counsel sought to inquire regarding the contents of any communications between Little and appellants' counsel, the trial court properly sustained counsel's objection. Accordingly, we find no error.

[**P56] Appellants' third assignment of error is therefore overruled.

Affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

CHRISTINE T. McMONAGLE

JUDGE

FRANK D. CELEBREZZE, JR., P.J., and MARY EILEEN [****25] KILBANE, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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Randall v. Cantwell Mach. Co.

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

June 27, 2013, Rendered

No. 12AP-786

Reporter
2013-Ohio-2744 *; 2013 Ohio App. LEXIS 2771 **; 2013 WL 3341201

Michael A. Randall, Plaintiff-Appellant, v. Cantwell Machinery Co. et al., Defendants-Appellees.

Prior History: [**1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 11CVD-9996).

Disposition: Judgment affirmed in part, reversed in part, and cause remanded.

Core Terms

trial court, records, discovery, protective order, medical record, workers' compensation, assigned error, subpoenas, provisional remedy, plaintiff-appellant's, physician-patient, privileged, injuries, unaltered, causally, trial court's decision, trial court's order, final order, sanctions, medical provider, motion to compel, motion for sanctions, privilege claim, final judgment, defendant-appellee, orders

Case Summary

Procedural Posture
Plaintiff workers' compensation claimant filed a motion to quash and/or for a protective order. Plaintiff also requested sanctions. Defendant Ohio Bureau of Workers' Compensation filed a motion to compel plaintiff to sign an unaltered medical release. The Franklin County Court of Common Pleas (Ohio) denied plaintiff's motion and request and granted defendant's motion. Plaintiff appealed.

Overview

The court held that the portions of the trial court's order granting defendant's motion to compel plaintiff to sign a medical release and denying plaintiff's motion for a protective order were final orders under R.C. 2505.02 because they related to privileged matters. Next, defendant conceded that plaintiff's medical records might include communications regarding conditions unrelated to the workers' compensation claim. Thus, the trial court did not err by granting defendant's motion to compel the unaltered medical release, but it did err by not granting plaintiff a protective order under Civ.R. 26(C) or implementing some other measure, such as an in camera review, to determine whether certain records were protected under the physician-patient privilege of R.C. 2317.02(B). Finally, the portion of the trial court's order denying plaintiff's motion for discovery sanctions was not a final order under R.C. 2505.02(B) because the lack of an immediate appeal did not foreclose appropriate relief in the future and because plaintiff might still obtain a meaningful remedy through an appeal following final judgment.

Outcome
The court held that the trial court erred in not granting a protective order. It affirmed the trial court's order compelling plaintiff to sign an unaltered medical release. It dismissed plaintiff's appeal from the order denying its request for sanctions as not ripe for review. It remanded the matter to the trial court for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Discovery & Disclosure > General Overview

HN1[] **Appellate Jurisdiction, Final Judgment Rule**

Generally, discovery orders are not final and appealable.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN2 **Appellate Jurisdiction, Final Judgment Rule**

A trial court order is final and appealable if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). Appellate courts use a two-step analysis to determine whether an order is final and appealable. First, the court determines if the order is final within the requirements of R.C. 2505.02. Second, the court determines whether Civ.R. 54(B) applies and, if so, whether the order being appealed contains a certification that there is no just reason for delay.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

HN3 **Appellate Jurisdiction, Final Judgment Rule**

R.C. 2505.02(B)(4) provides that an order is a final order when it grants or denies a "provisional remedy" and in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy, and when the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all claims in the action. A "provisional remedy" is defined as a proceeding ancillary to an action, including "discovery of privileged matter." R.C. 2505.02(A)(3). An order requiring the release of privileged or confidential information in discovery determines the action with respect to a provisional remedy and prevents the appealing party from obtaining an effective remedy following final judgment because the privileged information has already been released. In this situation, the proverbial bell cannot be unrung. Therefore, such orders are appealable. Likewise, an order denying a protective order is final and appealable when it relates to the discovery of privileged matters.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN4 **Entry of Judgments, Multiple Claims & Parties**

A provisional remedy is a remedy other than a claim for relief. Therefore, an order granting or denying a provisional remedy is not subject to the requirements of Civ.R. 54(B).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5 **Standards of Review, Abuse of Discretion**

Trial courts possess broad discretion in regulating discovery, and appellate courts generally review a trial court's decision regarding discovery issues for abuse of discretion. However, with respect to a privilege claim, the appropriate standard of review depends on whether the privilege claim presents a question of law or a question of fact. When it is necessary to interpret and apply statutory language to determine whether certain information is confidential and privileged, a de novo standard applies. When a claim of privilege requires review of factual questions, such as whether an attorney-client relationship existed, an abuse-of-discretion standard applies.

Evidence > Privileges > Doctor-Patient Privilege > General Overview

Workers' Compensation & SSDI > ... > Evidence > Admissibility of Evidence > Medical Evidence

Evidence > Privileges > Doctor-Patient

Privilege > Waiver

HN6 **Privileges, Doctor-Patient Privilege**

The physician-patient privilege is governed by R.C. 2317.02(B). Generally, that statute provides that a physician may not testify concerning a communication made by a patient to the physician or the physician's advice to the patient. R.C. 2317.02(B)(1). However, the statute also provides exceptions where the general privilege does not apply. If an individual files a workers' compensation claim under R.C. Chapter 4123, a physician may be compelled to testify or submit to discovery regarding communications that related causally or historically to physical or mental injuries that are relevant to issues in that claim. R.C. 2317.02(B)(3)(a). Thus, under the statute, filing a workers' compensation claim waives the physician-patient privilege as to any communication, including a medical record, that relates causally or historically to the injuries at issue in that claim.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

HN7 **Standards of Review, Abuse of Discretion**

Ohio law generally provides for a broad scope of discovery, allowing parties to obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of an action. However, under Civ.R. 26(C), a trial court may limit discovery through the issuance of protective orders. The rule provides that a protective order may be granted for good cause shown. Civ.R. 26(C). An appellate court reviews a trial court's denial of a protective order under an abuse-of-discretion standard. Whether a protective order is necessary remains a determination within the sound discretion of the trial court. An abuse of discretion occurs where a trial court's decision is unreasonable, arbitrary or unconscionable.

Evidence > Privileges > Doctor-Patient Privilege > General Overview

HN8 **Privileges, Doctor-Patient Privilege**

The trial court is in the best position to determine the most appropriate method to protect privileged records in a particular case, but the court may not ignore the need to preserve the statutory physician-patient privilege.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN9 **Appellate Jurisdiction, Final Judgment Rule**

In part, R.C. 2505.02(B)(2) provides that an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment is a final order. A "special proceeding" is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). Because workers' compensation did not exist at common law or in equity prior to 1853 and was established by special legislation, it falls within the definition of a special proceeding. A "substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect. R.C. 2505.02(A)(1). An order that affects a substantial right is an order that, if not immediately appealable, would foreclose appropriate relief in the future.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN10 **Appellate Jurisdiction, Final Judgment Rule**

The granting of sanctions accompanying a discovery order is not final and appealable.

Counsel: Mark A. Adams, LLC, and Mark A. Adams, for

appellant.

Michael DeWine, Attorney General, and LaTawnda N. Moore, for appellee Administrator, Bureau of Workers' Compensation.

Judges: DORRIAN, J. TYACK and BROWN, JJ., concur.

Opinion by: DORRIAN

Opinion

(REGULAR CALENDAR)

DECISION

DORRIAN, J.

[*P1] Plaintiff-appellant, Michael A. Randall ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas denying his motion to quash and/or for a protective order and granting a motion filed by defendant-appellee Ohio Bureau of Workers' Compensation ("appellee") to compel appellant to sign an unaltered medical release. Because we conclude that the trial court erred by not granting appellant's proposed protective order or implementing other measures to protect records potentially subject to the physician-patient privilege, we affirm in part and reverse in part.

[*P2] Appellant suffered an industrial accident and sustained injuries to his neck and shoulder while employed by defendant-appellee Cantwell Machinery Co. ("Cantwell") in 2009. Appellant filed a workers' compensation claim, [**2] which was allowed for the condition of left shoulder sprain. The claim was subsequently allowed for additional conditions of left infraspinatus tear, left rotator cuff tear, left supraspinatus tear, left biceps tendinitis, and neck sprain. In 2011, appellant requested that additional allowances be granted for degenerative disc disease at C5-6 and C6-7, disc herniation at C5-6 and C-67, foraminal stenosis at C5-6 and C6-7, spinal canal stenosis at C5-6, and spinal stenosis at C6-7. A district hearing officer for the Industrial Commission of Ohio ("commission") initially disallowed these additional allowances, but a staff hearing officer reversed that decision and granted all additional allowances except foraminal stenosis at C5-6 and C6-7. The commission refused appellant's appeal from the staff hearing officer's decision. Appellant then appealed to the Franklin County Court of Common Pleas, naming Cantwell and appellee as defendants.[1]

[*P3] After filing an answer to appellant's complaint, appellee served subpoenas on ten medical providers, requesting complete certified [**3] medical records for appellant. Appellant filed a motion to quash the subpoenas and for a protective order. Appellant also sought sanctions against appellee, arguing that appellee misrepresented the scope of the authorization for release of medical records that appellant agreed to by submitting a first report of injury form to file his claim. Appellee subsequently withdrew the subpoenas. Appellee later filed a motion to compel appellant to sign an unaltered copy of a medical release authorizing the release of any and all medical reports, records, files, and information pertaining to appellant. After conducting a status conference with the parties, the trial court issued orders addressing various pending discovery motions. The trial court denied appellant's motion to quash and/or for a protective order and request for sanctions. The trial court granted appellee's motion to compel appellant to provide an unaltered medical release.

[*P4] Appellant appeals from the trial court's decision, assigning three errors for this court's review:

> **ASSIGNMENT OF ERROR NO. 1**
>
> In this workers' compensation case, the trial court erred by ordering plaintiff-appellant to produce an unlimited, unrestricted global [**4] release of all medical records relating to plaintiff-appellant, including statutorily privileged irrelevant medical records, even though the only body part at issue in the case involves plaintiff-appellant's neck.
>
> **ASSIGNMENT OF ERROR NO. 2**
>
> In this workers' compensation case, the trial court erred by denying plaintiff-appellant's motion for a protective order that would allow defendant-appellee to obtain all medical records but which placed reasonable restrictions on the use and disclosure of those records on defendant-appellee.
>
> **ASSIGNMENT OF ERROR NO. 3**
>
> In this workers' compensation case, the trial court erred in denying plaintiff-appellant's motion for sanctions where defendant-appellee's counsel subpoenaed all of plaintiff-appellant's medical

[1] As appellee notes in its brief, Cantwell is nominally an appellee in this matter but did not participate in this appeal.

> records and misrepresented the scope of the an [sic] initial authorization signed by plaintiff-appellant as defendant appellee's conduct was in direct contradiction of plaintiff-appellant's consent.

[*P5] In appellant's first assignment of error, he asserts that the trial court erred by granting appellee's motion to compel him to grant an unaltered medical release authorizing the release of all medical reports, records, files, and information related [**5] to him. In his second assignment of error, appellant argues that the trial court erred by denying his motion for a protective order. We conclude that these two assignments of error are interrelated because they address appellant's claims of privilege and the measures taken to identify and protect any privileged documents; we will address these assignments of error together.

[*P6] ***HN1***[⬆] Generally, discovery orders are not final and appealable. *Concheck v. Concheck, 10th Dist. No. 07AP-896, 2008 Ohio 2569, ¶ 8*. Therefore, we begin by considering whether the trial court's decision constitutes a final, appealable order. ***HN2***[⬆] A trial court order is final and appealable if it meets the requirements of *R.C. 2505.02* and, if applicable, *Civ.R. 54(B)*. *Eng'g Excellence, Inc. v. Northland Assocs., L.L.C., 10th Dist. No. 10AP-402, 2010 Ohio 6535, ¶ 10*. Appellate courts use a two-step analysis to determine whether an order is final and appealable. *Id. at ¶ 11*. First, the court determines if the order is final within the requirements of *R.C. 2505.02*. Second, the court determines whether *Civ.R. 54(B)* applies and, if so, whether the order being appealed contains a certification that there is no just reason for delay. [**6] *Id*.

[*P7] ***HN3***[⬆] *R.C. 2505.02(B)(4)* provides that an order is a final order when it grants or denies a "provisional remedy" and in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy, and when the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all claims in the action. A "provisional remedy" is defined as a proceeding ancillary to an action, including "discovery of privileged matter." *R.C. 2505.02(A)(3)*. An order requiring the release of privileged or confidential information in discovery determines the action with respect to a provisional remedy and prevents the appealing party from obtaining an effective remedy following final judgment because the privileged information has already been released. In this situation, the proverbial bell cannot be unrung. Therefore, such orders are appealable. *Hope Academy Broadway Campus v. White Hat Mgt., L.L.C., 10th Dist No. 12AP-116, 2013 Ohio 911, ¶ 18*; *Mason v. Booker, 185 Ohio App.3d 19, 2009 Ohio 6198, ¶ 11, 922 N.E.2d 1036*. Likewise, an order denying a protective order is final and [**7] appealable when it relates to the discovery of privileged matters. *Covington v. The MetroHealth Sys., 150 Ohio App.3d 558, 2002 Ohio 6629, ¶ 20, 782 N.E.2d 624 (10th Dist.)*. Accordingly, we conclude that the portions of the trial court's order granting appellee's motion to compel appellant to sign a medical release and denying appellant's motion for a protective order constitute final orders.

[*P8] After determining that these portions of the trial court's decision constitute final orders under *R.C. 2505.02*, we next consider whether *Civ.R. 54(B)* applies. It does not. ***HN4***[⬆] "A provisional remedy is a remedy other than a claim for relief. Therefore, an order granting or denying a provisional remedy is not subject to the requirements of *Civ.R. 54(B)*." *State ex rel. Butler Cty. Children Servs. Bd. v. Sage, 95 Ohio St.3d 23, 25, 2002 Ohio 1494, 764 N.E.2d 1027 (2002)*. Therefore, we conclude that, to the extent that the decision orders appellant to grant an unaltered medical release that could lead to the production of privileged information and denies a protective order related to that information, it is a final, appealable order.

[*P9] ***HN5***[⬆] Trial courts possess broad discretion in regulating discovery, and appellate courts generally review a trial court's [**8] decision regarding discovery issues for abuse of discretion. *MA Equip. Leasing I, L.L.C. v. Tilton, 10th Dist. No. 12AP-564, 2012 Ohio 4668, ¶ 13, 980 N.E.2d 1072*. However, with respect to a privilege claim, the appropriate standard of review depends on whether the privilege claim presents a question of law or a question of fact. *Id. at ¶ 18*. When it is necessary to interpret and apply statutory language to determine whether certain information is confidential and privileged, a de novo standard applies. *Id*. When a claim of privilege requires review of factual questions, such as whether an attorney-client relationship existed, an abuse-of-discretion standard applies. *Id*. In this case, the issue presented is whether the records appellee sought in discovery were within the statutory physician-patient privilege created by *R.C. 2317.02(B)*. Therefore, we apply a de novo standard of review to appellant's privilege claim.

[*P10] ***HN6***[⬆] The physician-patient privilege is governed by *R.C. 2317.02(B)*. *Mason at ¶ 14*. Generally, that statute provides that a physician may not testify

concerning a communication made by a patient to the physician or the physician's advice to the patient. R.C. 2317.02(B)(1). However, the statute [**9] also provides exceptions where the general privilege does not apply. If an individual files a workers' compensation claim under Chapter 4123 of the Revised Code, a physician may be compelled to testify or submit to discovery regarding communications that "related causally or historically to physical or mental injuries that are relevant to issues" in that claim. R.C. 2317.02(B)(3)(a). Thus, under the statute, filing a workers' compensation claim waives the physician-patient privilege as to any communication, including a medical record, that relates causally or historically to the injuries at issue in that claim. Mason at ¶ 14.

[*P11] HN7[↑] Ohio law generally provides for a broad scope of discovery, allowing parties to obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of an action. Hope Academy at ¶ 24. However, under Civ.R. 26(C), a trial court may limit discovery through the issuance of protective orders. The rule provides that a protective order may be granted "for good cause shown." Civ.R. 26(C). We review a trial court's denial of a protective order under an abuse-of-discretion standard. *See* Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 2009 Ohio 2496, ¶ 23, 909 N.E.2d 1237 [**10] ("Whether a protective order is necessary remains a determination within the sound discretion of the trial court."). An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).

[*P12] In this case, appellee issued subpoenas to several medical providers requesting copies of appellant's complete medical records. Appellee indicated that these subpoenas were issued to medical providers identified by appellant in response to appellee's interrogatories as having treated or examined him for injuries related to his claim or to medical providers identified in appellant's workers' compensation claim file. Presumably, the records possessed by medical providers who treated appellant only for the injuries that gave rise to his workers' compensation claim would be causally and historically related to issues in the claim. However, appellee also subpoenaed records from Dr. Maurice Mast, whom appellant identified in response to appellee's interrogatories as his family care physician since 1993. In its brief, appellee conceded that Dr. Mast may have treated appellant for unrelated conditions, but argues that [**11] it is entitled to Dr. Mast's entire file on appellant because he previously treated appellant for shoulder problems that may be causally and historically related to the workers' compensation claim. Although appellee subsequently withdrew its initial subpoenas, some of the medical providers had already responded. Under the trial court's order compelling appellant to grant an unaltered medical release, appellee will be able to obtain the same records sought under its initial subpoenas.

[*P13] Appellant concedes that, by filing a workers' compensation claim, he has waived the physician-patient privilege with respect to records that are causally or historically related to the injuries giving rise to that claim. However, appellant argues that, under the unaltered medical release the trial court ordered, appellee will be able to obtain additional records that are not causally or historically related to the injuries giving rise to the workers' compensation claim. In addition to seeking to quash the subpoenas, appellant proposed a protective order under which he would agree to sign the medical authorization. Under the proposed protective order, the parties would seek to reach agreement on which documents [**12] were subject to physician-patient privilege or otherwise not subject to discovery. If the parties were unable to agree on a particular document, appellant would submit his objections to the court for an in camera inspection and determination of whether the privilege applied. The trial court denied appellant's request for a protective order.

[*P14] In determining this appeal, we are guided by our prior decision in Mason. That case involved a discovery dispute about medical records in a personal injury lawsuit. Mason at ¶ 2-3. The defendant sought certain medical records that the plaintiff claimed were privileged and irrelevant to the complaint. Id. at ¶ 3. The defendant filed a motion to compel the plaintiff to grant releases authorizing the release of her medical records and the trial court granted the motion to compel. Id. at ¶ 3-4. On appeal, the plaintiff argued that the trial court erred by granting the motion to compel production of all medical records and by failing to conduct an in camera inspection of the records to determine which records were causally or historically related to the claimed injuries. Id. at ¶ 8. The defendant claimed that the plaintiff never requested an in camera [**13] inspection, but this court concluded that the plaintiff informally requested that the trial court inspect at least some of the records and the trial court refused. Id. at ¶ 19. Although acknowledging that there are many methods for obtaining medical records and determining their relevance, and that trial courts have broad authority to

determine the most appropriate method to protect privileged medical records, the court concluded that "[a] trial court may not, however, simply ignore the requirements of R.C. 2317.02(B)." Id. at ¶ 22. This court reversed the trial court's order and remanded the case back to the trial court to address the plaintiff's privilege claims. Id. at ¶ 23.

[*P15] In this case, as in Mason, appellant asserts that some of the records appellee seeks in discovery may be protected by the physician-patient privilege. As noted above, appellee concedes that the records sought from Dr. Mast may include communications regarding unrelated conditions. Under these circumstances, the trial court should take measures to ensure that privileged medical records are protected from disclosure. We conclude that the trial court did not err by granting appellee's motion to compel the unaltered [**14] medical release, but that it was also necessary to protect any privileged medical records that might be produced under that release. Accordingly, we conclude that the trial court erred by not granting appellant's protective order or implementing some other measure, such as an in camera review, to determine whether certain records were privileged. As in *Mason*, we recognize that **HN8**[↑] the trial court is in the best position to determine the most appropriate method to protect privileged records in a particular case, but the court may not ignore the need to preserve the statutory physician-patient privilege. Because we do not have the medical records before us, we express no opinion as to whether any of the records appellee may obtain pursuant to the release are or are not historically or causally related to appellant's claimed injuries, nor whether appellant's privilege claims are reasonable. On remand, the trial court should implement appropriate measures to determine whether any of the records are covered by the physician-patient privilege and how to protect any records that are subject to that privilege.

[*P16] Accordingly, we overrule appellant's first assignment of error and sustain appellant's [**15] second assignment of error.

[*P17] In appellant's third assignment of error, he asserts that the trial court erred by denying his motion for sanctions. Once again, we begin by considering whether this portion of the trial court's decision constitutes a final, appealable order.

[*P18] **HN9**[↑] In relevant part, R.C. 2505.02(B)(2) provides that "[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment" is a final order. A "special proceeding" is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). Because workers' compensation did not exist at common law or in equity prior to 1853 and was established by special legislation, it falls within the definition of a special proceeding. Myers v. Toledo, 110 Ohio St.3d 218, 2006 Ohio 4353, ¶ 15, 852 N.E.2d 1176. A "'[s]ubstantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). An order that affects a substantial right is an order that, if not immediately [**16] appealable, would foreclose appropriate relief in the future. Hillman v. Kosnik, 10th Dist. No. 05AP-122, 2005 Ohio 4679, ¶ 20, citing Bell v. Mt. Sinai Med. Ctr., 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). Because this case involves a special proceeding, the portion of the trial court's order denying appellant's motion for sanctions could constitute a final order under R.C. 2505.02(B)(2) if it affected a substantial right.

[*P19] As explained above, the trial court's decision could also constitute a final order under R.C. 2505.02(B)(4) if it granted or denied a provisional remedy and prevented a judgment in favor of appellant with respect to the provisional remedy, and if appellant would not be afforded a meaningful or effective remedy through an appeal following final judgment. The issue of whether sanctions should be imposed on appellee for alleged misconduct in the discovery process is one that can be determined as part of an appeal following a final judgment. If the trial court erred and sanctions were warranted, an appellate court could remedy the error and order the trial court to impose sanctions. Therefore, the portion of the trial court's order denying appellant's motion for sanctions was not [**17] a final order under R.C. 2505.02(B) because the lack of an immediate appeal does not foreclose appropriate relief in the future and because appellant may still obtain a meaningful remedy through an appeal following final judgment. *See, e.g.*, Longo v. Bender, 11th Dist. No. 2006-G-2699, 2006 Ohio 2239, ¶ 4 (**HN10**[↑] "The granting of sanctions accompanying a discovery order is not final and appealable."); Chuparkoff v. Farmers Ins. of Columbus, Inc., 9th Dist. No. Civ.A. 22083, 2004 Ohio 7185, ¶ 15 ("[A] denial of sanctions accompanying a discovery order is not final and appealable.").

[*P20] Accordingly, appellant's third assignment of error is not ripe for review because the portion of the

trial court's order denying his motion for sanctions is not a final, appealable order.

[*P21] For the foregoing reasons, we overrule appellant's first assignment of error, sustain appellant's second assignment of error, and dismiss appellant's third assignment of error as not ripe for review. We affirm in part and reverse in part the decision of the Franklin County Court of Common Pleas, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment affirmed [**18] in part, reversed in part, and cause remanded*.

TYACK and BROWN, JJ., concur
