

IN THE SUPREME COURT OF OHIO

KENNETH C. HAGEMAN,	:	Case No. 2007-0376
	:	
Appellant,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
vs.	:	Eighth Appellate District
	:	
SOUTHWEST GENERAL HEATH	:	Court of Appeals
CENTER, et al.,	:	Case No. CA 06 87826
	:	
Appellees.	:	
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, KENNETH C. HAGEMAN

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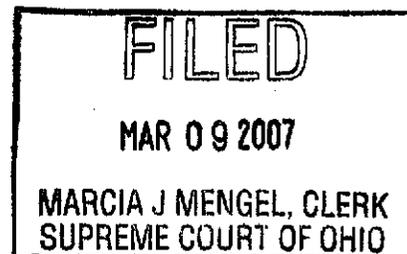
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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST.

This case presents two critical issues involving the preservation of the doctor-patient privilege in one of its most sensitive areas, mental health: (1) whether a waiver of the doctor-patient privilege extends to a civil domestic violence action brought under R.C. 3113.31 and; (2) whether an executed written authorization from the patient is required for the lawful release of medical records requested by a Civ. R. 45 subpoena, regardless of whether there is a statutory or common law waiver of the doctor-patient privilege.

In the instant case, the Court of Appeals failed to recognize a distinction between a divorce action and a civil domestic violence hearing. The Court of Appeals ruled that, there being a waiver of the privilege in a divorce action where custody of a minor child is at issue, the waiver extended for the purposes of a civil domestic violence hearing. The Court of Appeals further ruled that by requesting a letter from his psychiatrist for use in a custody proceeding, an individual has waived the doctor-patient privilege for the purposes of a civil domestic violence hearing. Finally, the Court of Appeals ruled that the psychiatrist's release of the mental health records was justified, notwithstanding the absence of a signed written authorization, as required by the psychiatrist's employer's own written privacy regulations.

The lower court's ruling is troubling for two reasons. First, it fails to clearly define or limit the scope of a waiver of the doctor-patient privilege. Second, in the existence of a waiver of that privilege, the lower court has failed to recognize *any* requirements for governing the release of the medical records.

The issues presented in this case are of greater interest in that the records involved were mental health records. Appellant submits that, while the disclosure of any medical records must

be made with caution, the disclosure of mental health records must only be made under the highest level of scrutiny. The release of these records can stigmatize the patient. The unauthorized release of these records can destroy the patient's trust in his mental healthcare provider, and the profession as a whole. There are many mental health disorders that can be diagnosed and treated successfully, allowing individuals plagued with such an illness to lead a normal life. Society as a whole has a great interest in assuring that these individuals seek and obtain treatment for these disorders. The Court of Appeals ruling creates uncertainty as to the privileged nature of the records that result from mental health treatment and, under what circumstances they can be disclosed to third parties. That ruling will deter individuals suffering from mental health disorders from seeking and obtaining treatment for their illnesses for fear that their records will not be held in confidence and may be released without the patient's knowledge. Individuals suffering from mental health disorders are likely to deny their illness and refuse to seek treatment in fear of being labeled by society. The Court of Appeals ruling will only act to discourage people from seeking treatment for mental health disorders.

While there is authority supporting a waiver of the doctor-patient privilege in a divorce proceeding where the custody of a minor child is at issue, the Court of Appeals failed to recognize the distinction between such a custody dispute and a civil domestic violence hearing pursuant to R.C. 3113.31. The distinction is a great one that must be upheld. That distinction boils down to *choice*. One voluntarily pursues custody of a minor child in a divorce proceeding. However, one is not voluntarily named a respondent in a civil domestic violence hearing. In a divorce proceeding, a person can choose to protect the privacy of his mental health records and choose to forego a claim for custody. One does not have the same choice in a civil domestic violence matter, where one is in the position of defending oneself from the allegation of domestic

violence. Furthermore, as a civil domestic violence hearing is based upon the allegation of an underlying criminal act, the respondent in such a hearing could raise the Fifth Amendment privilege against self-incrimination. The lower court's ruling circumvents this constitutional privilege by allowing the disclosure of communications between the respondent and his psychiatrist to third parties without the patient's knowledge.

Finally, the Court of Appeals, in finding a waiver of the privilege, failed to require a signed written release prior to the disclosure of the mental health records. This dealt a crippling blow to the doctrine of doctor-patient privilege. By eliminating the requirement of a written release, the Court of Appeals opened a Pandora's Box. All guidance for the determination of there being a waiver has been eliminated. A release signed by the patient manifests that patient's consent to the release of his or her records. It also manifests the patient's knowledge that the records are being released and to whom. A court can compel a patient to sign a release, thereby determining the existence of a waiver of the privilege. In this case, there was no release. A third party requested the records. The psychiatrist disclosed the records. No written release was signed authorizing the psychiatrist's release of the records. No judge determined that a waiver existed prior to the release of the records.

A requirement of a written release will assure that the decision as to whether a waiver exists will be entrusted to those best suited to make it. If the patient is unwilling to execute a release, a court with jurisdiction can hear the facts, apply the law and, if warranted, exercise its power to compel the execution of a written release. This is a simple procedure that will act to protect the doctor-patient privilege while eliminating unauthorized requests for, and disclosures of, sensitive medical information. Requiring a written release is certainly a reasonable safeguard.

STATEMENT OF THE CASE AND FACTS

From January 10, 2003 through July 23, 2003, Appellant, Kenneth C. Hageman, was a psychiatric patient at the Oaktree Behavioral Health Clinic at Southwest General Hospital. Mr. Hageman was treated by Appellee, Dr. Thomas J. Thysseril, M.D. During the course of Mr. Hageman's treatment, Dr. Thysseril obtained sensitive psychiatric information regarding Mr. Hageman's health, which information was recorded by Dr. Thysseril as notes in Mr. Hageman's file. Dr. Thysseril's notes were in the form of Behavioral Health Assessment (BHA) forms.

On February 19, 2003, Mr. Hageman's wife, Appellee, Janice Galehouse-Hageman, through her attorney, Appellant, Barbara Belovich, filed a divorce complaint in the Cuyahoga County Court of Common Pleas, being Case No. DR-03-291086. Mr. Hageman, proceeding *pro se*, filed his Answer and Counterclaim on March 26, 2003.¹ On July 9, 2003, Galehouse-Hageman filed a Petition for Domestic Violence Civil Protection Order, alleging that Mr. Hageman injured her wrists by running them over with his vehicle.² On September 3, 2003, the Domestic Relations Court scheduled a trial on Galehouse-Hageman's Petition for Domestic Violence Protective Order only.

Sometime between October 10, 2003 and October 14, 2003, without a signed written authorization from Mr. Hageman, Belovich caused a Trial Subpoena to be issued to Dr. Thysseril. The Subpoena included a *Duces Tecum* for Mr. Hageman's medical records and was never served to Mr. Hageman or his attorney. On October 14, 2003, Dr. Thysseril delivered Mr. Hageman's medical records to Belovich via facsimile without Mr. Hageman's knowledge or authorization.

¹ Mr. Hageman subsequently retained counsel.

² Mr. Hageman was acquitted by a jury of all criminal charges arising from Galehouse-Hageman's claims.

On October 12, 2004, Mr. Hageman filed his Complaint in the Cuyahoga County Court of Common Pleas, alleging that Dr. Thysseril, Oaktree and Southwest disclosed, without privilege or authority, his non-public medical information, which was learned during the course of Mr. Hageman's psychiatric treatment with Dr. Thysseril. The Complaint further alleged that Belovich and Galehouse-Hageman improperly induced the disclosure and subsequently distributed the sensitive medical records to third parties.

All of the Defendants filed motions for summary judgment, which motions were granted by the Trial Court on February 3, 2006. The Trial Court did not issue any findings upon which it based its decision to dispose of the case summarily. On February 28, 2006, Mr. Hageman appealed to the Eighth District Court of Appeals. The Court of Appeals affirmed in-part and reversed in part the judgment of the Court of Common Pleas. In doing so, the Court of Appeals ruled that all defendants were entitled to summary judgment except Barbara Belovich. Barbara Belovich has appealed that decision to this Court.

The Court of Appeals erred in ruling that Mr. Hageman had waived the doctor-patient privilege for the purposes of the civil domestic violence hearing and failing to distinguish between a divorce proceeding and a civil domestic violence proceeding. The Court of Appeals also erred in ruling that Mr. Hageman's request of a letter from his psychiatrist for the purposes of his custody dispute acted as waiver of the privilege for the purposes of a civil domestic violence proceeding. Finally, the Court of Appeals erred by failing to require a written release for the disclosure of Mr. Hageman's mental health records.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: A waiver of the doctor-patient
privilege does not extend to a civil domestic violence
proceeding held pursuant to R.C. 3113.31.**

Initially, in this case, it is undisputed that Mr. Hageman's mental health records were subpoenaed by Belovich for the purposes of the R.C. 3113.31 civil domestic violence proceeding. Notwithstanding any waiver that may be found to exist in the context of a divorce proceeding, there is no waiver of the doctor-patient privilege for purposes of a proceeding under R.C. 3113.31. The reasoning for a waiver of the doctor-patient privilege is that, when determining the custody of a minor child, the mental health of the parents is placed squarely at issue.

This is the reasoning applied by the Court of Appeals in reaching its ruling in this case. However, R.C. 3113.31 specifically prohibits an allocation of parental rights via a civil domestic violence hearing. R.C. 3113.31(E)(1)(d) provides that the Court in a civil domestic violence hearing may "temporarily allocate parental rights and responsibilities for the care of, or establish temporary parenting time rights with regard to, minor children, if no other court has determined, or is determining, the allocation for parental rights and responsibilities for the minor children or parenting time rights." In the instant case, it is undisputed that a divorce action was pending at the time of the civil domestic violence hearing. The divorce action had established parental rights and responsibilities. Accordingly and pursuant to R.C. 3113.31(E)(1)(d), the magistrate in the civil domestic violence hearing could not determine custody of the minor child. As there was no determination of parental rights in the civil domestic violence proceeding, there could be no

waiver of the doctor-patient privilege. The only issue in the civil domestic violence hearing was whether an act of domestic violence had occurred. R.C. 3113.31 governs civil domestic violence hearings. R.C. §3113.31(E)(4)(d) allows a court to issue a protection order if:

After a full hearing at which the respondent presents evidence in support of the request for a protection order and the petitioner is afforded an opportunity to defend against that evidence, **the court determines that the petitioner has committed an act of domestic violence** or has violated a temporary protection order issued pursuant to section 2919.26 of the Revised Code, that both the petitioner and the respondent acted primarily as aggressors, and that neither the petitioner nor the respondent acted primarily in self-defense.

[Emphasis Added]

Nowhere in §3113.31 does a provision for the examination of the respondent's mental health exist.

The Court of Appeals did not recognize the distinction between the divorce action, where child custody was at issue, and the civil domestic violence hearing, where child custody was not being determined and, pursuant to R.C. 3113.31(E)(1)(d), could not be determined. Notwithstanding Appellees' arguments that the divorce and civil domestic violence proceedings were one and the same, the distinction between the two is significant. The lower court found that Appellant "waived" the doctor-patient privilege. This, by definition, would presume that Appellee did some affirmative, voluntary act. In a divorce proceeding, that voluntary act would be pursuing a claim for custody. However, there is no voluntary act attributable to Appellee in being named the respondent in a hearing under R.C. 3113.31. Appellee could have waived his claim for custody in the divorce action, thereby eliminating the need to review his mental health records. Appellee had no such choice in the civil domestic violence hearing, where Appellee was in the position of defending himself against allegations of domestic violence. Certainly,

Appellant has a Fifth Amendment right against self-incrimination. Appellant could not be forced to testify at the civil domestic violence trial. Nor could his mental health records be subpoenaed for use at that hearing.

The reasoning is that in a custody dispute, in which Appellant is participating voluntarily, Appellant could be deemed to have voluntarily waived his doctor-patient privilege. This certainly should not be the case in a proceeding under R.C. 3113.31 where Appellant was an involuntary participant and where child custody was not at issue.

The Court of Appeals also ruled that Mr. Hageman waived the doctor-patient privilege when he asked Dr. Thysseril to author a letter detailing his treatment to the domestic relations court. Again, there is no dispute that the letter was for the purposes of the divorce proceeding. However, the Court of Appeals ruled that this letter, which consisted of four typewritten lines, acted as a complete waiver of the doctor-patient privilege. That letter was not submitted to the domestic relations court by Dr. Thysseril. Rather, it was given to Mr. Hageman. Furthermore, the Court of Appeals, at page 9, paragraph 2 of its Judgment, states that "It is important to note that at the time appellant authorized the release of his medical information to the domestic relations court, his counsel was present." This is simply not true. There was absolutely no evidence in the record that Mr. Hageman's attorney was present when Mr. Hageman requested that Dr. Thysseril author the letter. Even if Mr. Hageman had counsel present, it would be immaterial as the letter was limited to the divorce action. In essence, the Court of Appeals viewed the letter as creating a waiver but failed to define *any* limit to that waiver. If that letter constituted a waiver of the doctor-patient privilege, the waiver should have been limited to the divorce action and no further. This is contrary to the Court of Appeals' own finding that "even if

a use or disclosure of [personal health information] is permitted,³ covered entities must make reasonable efforts to disclose only the minimum necessary to achieve the purpose for which it is being used or disclosed.” *Herman v. Kratche*, 2006-Ohio-5938 at ¶29. Here, the lower court failed to apply this principal and limit the doctor-patient waiver to the divorce proceeding only.

It may be convenient to find that as both the divorce and civil domestic violence actions shared the same case number and were in the same court were one and the same action. They were not. In fact, each could have existed without the other. Moreover, this case involves the disclosure of sensitive mental health records. These records, above all others, must be afforded the utmost protection when it comes to disclosure. Any doubt must be resolved in favor of protecting those records and limiting their release for the limited purposes allowed by statute and common law. This is the only policy that protects the doctor-patient privilege, assures the free flow of information between mental health patients and their doctors and protects the integrity of the psychiatric profession.

Proposition of Law No. II: An executed written authorization from the patient is required for the lawful release of medical records requested by a Civ. R. 45 subpoena, regardless of whether there is a statutory or common law waiver of the doctor-patient privilege.

Having determined that Mr. Hageman waived the doctor-patient privilege for the purposes of the divorce action, the Court of Appeals failed to require a written and signed release prior to the release of Mr. Hageman’s mental health records by Dr. Thysseril. The Court of

³ Under the Health Insurance portability and Accountability Act of 1996, 42 U.S.C.S. §1320d-1 et seq.

Appeals' decision does not address the lack of a written release signed by Mr. Hageman. However, this issue was raised on appeal.

Appellant maintains that there was no waiver of the doctor-patient privilege for the purposes of the R.C. 3113.31 civil domestic violence proceeding. However, assuming that there was a waiver, the Court of Appeals further erred in failing to require a written authorization for the release of Mr. Hageman's mental health records, for which Belovich issued a Civ. R. 45 subpoena. Civ. R. 45(F) provides:

(F) Privileges. Nothing in this rule shall be construed to authorize a party to obtain information protected by any privilege recognized by law, or to authorize any person to disclose such information.

Accordingly, the subpoena in and of itself does not override the doctor-patient privilege.

Appellees may argue that, in light of a waiver of the doctor-patient privilege, requiring a written authorization is unnecessary. Nothing could be further from the truth. The requirement of a written authorization insures that the request for (and release of) the medical records is lawful. Mr. Hageman could have chosen to sign a release for his medical records. Absent that, the Court could have compelled Mr. Hageman to sign an authorization. Either way, there would either be a voluntary waiver of the doctor-patient privilege or a judicial determination that the privilege had been waived.

Absent a requirement that a third party present an executed written authorization, one is left to wonder who would decide whether there is a waiver of the privilege. Certainly, the third party seeking the release of the information cannot determine that there is waiver. Nor can the doctor⁴. Either one may form an opinion as to whether or not there should be a waiver but

⁴ Appellees will argue that Dr. Thysseril released the records out of concern for the safety of Mr. Hageman's minor daughter. However, Dr. Thysseril testified at deposition that the only reason he released the records is that he

ultimately only a court can decide this question. This is especially so in the context of sensitive mental health records.

The instant case is a perfect example for implementing this proposition of law. The events that gave rise to Appellant's claims occurred in October 2003. Mr. Hageman's Complaint was filed on October 12, 2004. This case was heard by the Eight District Court of Appeals on November 22, 2006. Now, in March 2007, nearly three and one half years later, this case is being appealed to this Honorable Court. The requirement of an executed written release would have resulted in the determination of these issues by the domestic relations court over three years ago. Waiver of the doctor-patient privilege, including limitations thereto, would have been decided by the Court prior to any records being released. In the context of releasing sensitive mental health records, it is best to be sure that the release is lawful. Therefore, in the absence of a voluntary authorization, a court should decide whether to compel the execution of an authorization. A failure to uphold this policy will deal a crippling blow to those in need of psychiatric treatment as well as the psychiatric profession.

Whether or not the waiver of the doctor-patient privilege extended to the civil domestic violence hearing, it was inappropriate for Belovich to solicit, and for Dr. Thysseril to release, Mr. Hageman's mental health records without a written authorization. In fact, as argued by Appellant in the Court of Appeals, it was the written policy of Appellees Southwest General Health Center, Oaktree Physicians, Inc. and Dr. Thysseril to require a written release or Court

received a subpoena from Appellee, Belovich. Furthermore, the record reflects that Dr. Thysseril did not contact the police, which would be more consistent with an argument that the release was made to protect others. Furthermore, the record is abundantly clear that the domestic relations court had protective orders in place prior to the disclosure by Dr. Thysseril. Finally, the Court of Appeals did not accept Dr. Thysseril's claim in reaching its decision.

Order⁵ prior to releasing mental health records. Appellees may argue that requiring a trial court to compel the execution of a release in every case would result in an unnecessary burden. However, any burden created is far outweighed by the public interest in protecting mental health records from unlawful disclosure. Absent the patient's written authorization, only a court should be entrusted with the decision as to whether such records should be released to a third party. Here, the Court of Appeals relied on its ruling in *Gill v. Gill*, Cuyahoga App. No. 81463, 2003-Ohio-180, which directly addressed the waiver of the doctor-patient privilege in child custody proceedings. In that case, the Court of Appeals held that a parent could be *compelled to sign an authorization* for the release of his medical records.

Furthermore, requiring the execution of a written authorization, whether voluntarily or through court order, acts to give the patient notice that the records are being released and to whom. The patient can then seek to limit their use or circulation. In the instant case, Mr. Hageman's mental health records were used in neither the divorce action nor the civil domestic violence hearing. They were, however, given by Belovich to the Cuyahoga County Assistant Prosecutor, who attempted to use them in the criminal prosecution of Mr. Hageman. The Court of Appeals, at page 4 of its Judgment, noted that "Appellant filed no objection to the production of his mental records, nor did he seek to exclude the records from the proceedings." Initially, the records were never introduced in the proceedings. Furthermore, the subpoena was never served upon Appellant or his attorney, which would have allowed Appellant to move to quash the subpoena. This, again, is where the requirement of a written authorization would have placed Appellant on notice that his mental health records would be released to a third party. Finally, the

⁵ Dr. Thysseril testified that he erroneously believed the subpoena to be a "court order." Notwithstanding Dr. Thysseril's access to the legal department at Southwest General Health Center, this claim is unconvincing. There is no excuse for such an error to be made in the release of such sensitive mental health records. Nor is there any authority recognizing this type of mistake as a defense.

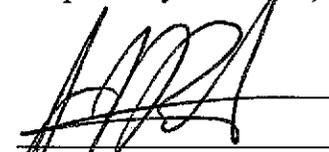
Court of Appeals' reasoning goes against its own ruling in *Herman v. Kratche*, 2006-Ohio-5938 that "the tortious conduct of an unprivileged disclosure occurs the moment the nonpublic medical information is disclosed to an unauthorized third-party." *Id.* at ¶23. Therefore, Appellant's cause of action arose the moment Dr. Thysseril disclosed the mental health records to Belovich.

In light of the Court of Appeals' ruling, there is uncertainty as to the procedure for obtaining the release of medical records. This ruling is detrimental to those who require treatment for mental health disorders. They cannot be sure their records will not be disclosed without their knowledge or consent. It is detrimental to the psychiatrist who must now guess as to whether or not to disclose, balancing the doctor-patient privilege against the fear of contempt proceedings. It is detrimental to the courts, which will have to decide whether a waiver existed after the fact, when the patient sues for the disclosure of the records. The Court of Appeals' ruling results in an "act first, ask questions later" policy that must be remedied.

CONCLUSION

For the reasons set forth hereinabove, this case involves matters of public and great general interest. The appellant, Kenneth C. Hageman, respectfully requests that this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of this Notice of Appeal of Appellant, Kenneth C. Hageman, was sent by ordinary U.S. mail, postage prepaid, this 9th day of March 2007 to:

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JAN 16 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87826

KENNETH C. HAGEMAN

PLAINTIFF-APPELLANT

vs.

SOUTHWEST GENERAL HEALTH
CENTER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545116

BEFORE: Celebrezze, P.J., Cooney, J., and Corrigan, J.

RELEASED: December 21, 2006

JOURNALIZED:

JAN 16 2007
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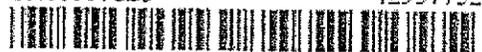
FILED IN _____ JOURNALIZED
PER APP. R. 22(E)

JAN 16 2007

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

DEC 21 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY JEF DEP.

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).

NOTICE TO COUNSEL
FOR ALL COURT FEES TAKEN

FRANK D. CELEBREZZE, JR., P.J.:

Appellant, Kenneth Hageman, appeals the trial court's decision granting summary judgment in favor of appellees. After a thorough review of the arguments and for the reasons set forth below, we affirm.

On October 12, 2004, appellant filed a civil complaint against Oak Tree Physicians Inc. ("Oak Tree"); Oak Tree's employee, Thomas J. Thysseril, M.D.; Southwest General Health Center ("Southwest"); Barbara A. Belovich Esq.; and appellant's ex-wife, Janice Galehouse-Hageman ("Galehouse"). The complaint alleged that Dr. Thysseril and Oak Tree improperly authorized the release of his medical records during the course of his divorce proceedings. In addition, appellant argued that Galehouse and Belovich disclosed his medical records to third parties without his permission.

Appellant and Galehouse were parties to a domestic relations case, and Belovich served as legal counsel for Galehouse.

On April 12, 2005, the trial court ordered appellant to provide expert reports by August 15, 2005 and scheduled trial for February 13, 2006. Dr. Thysseril and Oak Tree responded by filing a joint motion for summary judgment. Shortly thereafter, motions for summary judgment were also filed by Southwest, Galehouse, Belovich and Boules, and appellant filed a motion for summary judgment in response to Belovich's counterclaim.

On February 3, 2006, the trial court granted the motions for summary judgment of Dr. Thysseril, Oak Tree, Southwest, Belovich and Galehouse. Appellant timely appealed.

The incident that gave rise to the present case began on January 10, 2003, when appellant received psychiatric treatment from Dr. Thysseril. During that initial appointment, Dr. Thysseril diagnosed appellant as having bipolar disorder and documented that he had homicidal thoughts toward his wife. Galehouse was present during that initial appointment. At the time appellant began psychiatric treatment, he and Galehouse were living in the same home with their young daughter.

On February 19, 2003, Galehouse filed for divorce against Hageman. Because of her husband's erratic and threatening behavior, Galehouse also requested a restraining order, which was granted by the trial court. On March 26, 2003, appellant filed a pro se answer and counterclaim to Galehouse's complaint. In the counterclaim, appellant sought legal custody of their minor child.

On July 4, 2003, appellant and Galehouse had an altercation at their home during which appellant ran over Galehouse with his truck, breaking her wrists. The altercation occurred while their daughter was present. As a result

of this incident, appellant was charged with aggravated vehicular assault. A jury found him not guilty on March 9, 2004.

Because of the July 4th incident, Galehouse sought a domestic violence civil protection order on July 9, 2003, which the domestic relations court granted. In that order, the court gave Galehouse temporary residential legal custody of the couple's minor child and suspended appellant's contact and visitation rights. The court scheduled the matter for a full hearing on July 17, 2003; however, it was continued until October 17, 2003.

On July 21, 2003, appellant retained legal counsel, and Boulas entered his first appearance on behalf of appellant. Knowing that appellant was currently receiving psychiatric treatment, Boulas determined that a positive prognosis from Dr. Thysseril was essential to appellant's case. On July 23, 2003, appellant and Boulas met with Dr. Thysseril. During their meeting, appellant requested that Dr. Thysseril author a report indicating that appellant's prognosis was good, as long as he continued with treatment, recommendations and follow-up visits. The report was submitted to the trial court on July 29, 2003.

In preparation for the civil protection order hearing, Belovich issued a trial subpoena ordering Dr. Thysseril to appear with appellant's psychiatric records for use during the hearing. Thysseril contacted Belovich and informed her that, because of scheduling conflicts, he would not be able to appear. Belovich

requested that, in lieu of appearing at the hearing, Dr. Thysseril send her a copy of appellant's psychiatric medical records. Appellant filed no objection to the production of his medical records, nor did he seek to exclude the records from the proceedings.

Prior to the civil protection hearing, the parties had stipulated to an agreed order of protection, which was adopted by the domestic relations court. Soon after, the parties entered into a separation agreement and agreed that Galehouse would be the residential parent, and appellant would have visitation with his daughter for 60 days out of the year, supervised by either his father or brother. In addition, appellant agreed to continue psychiatric treatment and further agreed that he would only be permitted unsupervised visitation with his daughter when the guardian ad litem determined that he was fully complying with his treatment plan.

Less than one month later, appellant filed a complaint in the common pleas court alleging unauthorized disclosure of medical records. In his complaint, he argued that his psychiatric records that were at issue during his domestic relations matter were unlawfully released to the prosecution during his domestic violence case. After the parties filed numerous cross motions for summary judgment, the common pleas court granted summary judgment in favor of the defendants named in appellant's complaint.

Appellant brings this appeal asserting four assignments of error.¹ Because the assignments of error are substantially interrelated, they will be addressed together.

At the crux of appellant's appeal is his argument that the trial court erred when it granted summary judgment in favor of the appellees. More specifically, he asserts that because he did not waive his doctor-patient privilege, genuine issues of material fact exist to be litigated, making summary judgment improper in this instance.

"Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex*

¹Appellant's four assignments of error are included in Appendix A of this Opinion.

Corp. v. Catrett (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, “*** the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party’s claim.” *Id.* at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The nonmoving party must set forth “specific facts” by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id.*

This court reviews the lower court’s granting of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). “The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***.

[T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

Appellant's first, second and fourth assignments of error assert that the trial court erred when it granted summary judgment in favor of Dr. Thysseril, Oak Tree, Southwest, and Galehouse. The record indicates that appellant waived his doctor-patient privilege with respect to his divorce action. In addition, the facts of this case strongly suggest that the court's interest in protecting the safety of appellant's minor child far outweighed his patient confidentiality.

This court's holding in *Gill v. Gill*, Cuyahoga App. No. 81463, 2003-Ohio-180, directly addresses the doctor-patient privilege and how it is impacted by child custody proceedings. *Gill* states:

"Under this statute, the filing of any civil action by a patient waives the physician-patient privilege as to any communication that relates causally or historically to the physical or mental injuries put at issue by such civil action. Whenever custody of children is in dispute, the party seeking custodial authority subjects him or herself to extensive investigation of all factors relevant to the permanent custody award. Of major importance, as stated in R.C. 3109.04

(F)(1)(e). is the mental and physical health of not only the child, but also the parents. R.C. 3109.04 places the mental conditions of all family members squarely in issue.

"We have also held that a party seeking custody of a child in a divorce action makes his or her mental and physical condition an issue to be considered by the court in awarding custody and that the physician-patient privilege does not apply."

Additionally, the Ohio Supreme Court's judgment in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d 395, addresses countervailing interests versus patient confidentiality during court proceedings. *Biddle* provides in pertinent part:

"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.

"In the absence of prior authorization, a physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest that outweighs the patient's interest in confidentiality."

Appellant waived his doctor-patient privilege when he authorized his physician to submit a report detailing his treatment to the domestic relations court and when he filed an action seeking child custody. Appellant's hearing directly involved the care and custody of his minor child. Knowing that the trial court's determination regarding custody would strongly hinge upon the state of his mental health, appellant authorized his physician to submit a report to the trial court detailing his condition, treatment, and prognosis.

It is important to note that at the time appellant authorized the release of his medical information to the domestic relations court, his counsel was present. Appellant's authorization waived the doctor-patient privilege. Additionally, as held in *Gill*, when an individual requests child custody, his mental health is directly at issue, which waives the doctor-patient privilege as well. It is clear from appellant's actions that he effectively waived his doctor-patient privilege.

In addition, appellant's interests in confidentiality are far outweighed by the concerns surrounding the care of his daughter. Appellant suffers from bipolar disorder, yet was requesting custody of his minor child. In order for the domestic relations court to make an effective decision regarding appellant's ability to adequately care for his child, it was necessary for the court to evaluate his medical information and prognosis. Similarly, it was important for opposing

counsel, as well as the guardian ad litem, to have access to the medical reports in order to make the most informed decisions regarding custody and visitation.

It is clear that no genuine issue of material fact remained to litigate at trial. Not only did appellant effectively waive his doctor-patient privilege, but the facts strongly indicate that the safety of his daughter far outweighed his confidentiality as a patient. Accordingly, the trial court did not abuse its discretion when it granted summary judgment in favor of Dr. Thysseril, Oak Tree, Southwest, and Galehouse. Appellant's first, second and fourth assignments of error are overruled.

With respect to appellant's third assignment of error, this court agrees with his argument that the trial court erred in awarding summary judgment in favor of attorney Barbara Belovich. Belovich represented Galehouse in the divorce action. While their divorce action was pending, appellant and Galehouse were involved in an alleged domestic violence matter that was prosecuted in the Cuyahoga County Court of Common Pleas. During that case, Belovich forwarded information regarding appellant's psychiatric condition to the prosecution. Appellant waived disclosure of his mental health information in the divorce action; however, he did not assert the same waiver with respect to the domestic violence matter. Although this information could have aided the

prosecution's case, it was the duty of the prosecution to conduct proper discovery in order to gain access to it.

Belovich overstepped her bounds as Galehouse's divorce attorney when she disseminated information regarding appellant's psychiatric condition to the prosecution in the domestic violence matter. On the basis of her actions, it is clear that a genuine issue of material fact remains to be litigated at trial. Accordingly, the trial court erred when it awarded summary judgment in favor of Belovich, and we find merit in appellant's third assignment of error.

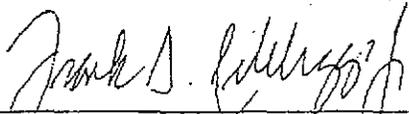
Judgment affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.



FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., CONCURS (WITH SEPARATE OPINION);
MICHAEL J. CORRIGAN, J.*, CONCURS IN PART AND DISSENTS IN PART
(WITH SEPARATE OPINION).

(*SITTING BY ASSIGNMENT: JUDGE MICHAEL J. CORRIGAN,
RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.)

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COLLEEN CONWAY COONEY, J., CONCURRING:

I concur with the majority opinion and write separately to make the essential point that the records were never submitted to the domestic relations court nor admitted into evidence before that court. Therefore, I disagree with the dissent's conclusion that they became public records, available to anyone.

MICHAEL J. CORRIGAN, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the affirmation of the first, second and fourth assignments of error. I disagree with the reversal of the third assignment of error. Having concluded that Hageman waived the disclosure of his mental health records for purposes of the domestic relations action, it cannot consistently be asserted that Hageman still retained a right of privacy for any subsequent litigation. After the records were requested pursuant to a subpoena, Hageman took no action to quash the subpoena or otherwise limit the use of the information. Moreover, having divulged the records, Hageman took no action to have them sealed or otherwise subjected to a confidentiality order. Since that information became a public record, anyone could have access to it, including the state. So it makes no difference whether Belovich willingly forwarded that information to the state or the state demanded it by subpoena. Pandora's box had been opened.

APPENDIX A

Appellant's four assignments of error:

I. The trial court abused its discretion and committed prejudicial error in granting defendant-Appellee Thomas J. Thysseril and Oak Tree Physicians, Inc.'s motion for summary judgment.

II. The trial court abused its discretion and committed prejudicial error in granting defendant-Appellee Southwest General Health Center's motion for summary judgment.

III. The trial court abused its discretion and committed prejudicial error in granting defendant-Appellee Barbara A. Belovich's motion for summary judgment.

IV. The trial court abused its discretion and committed prejudicial error in granting defendant Appellee Janice Galehouse-Hageman's motion for summary judgment.