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APPELLANT'S PROPOSED PROPOSITIONS OF LAW

Proposition of Law No. I

A party to a lawsuit does not waive the medical privilege with respect to the discovery or use of privileged medical records even when those records were previously produced in discovery in a separate lawsuit.

Proposition of Law No. II

Ohio residents have a Constitutional and statutory right to have their medical privilege maintained by Courts in Ohio.

Proposition of Law No. III

Appellate Districts should not treat a litigant's medical privilege differently, in the face of this Court's pronouncement in *Hageman v. S.W. Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153.

I. Statement of Why This Case is Not of Public or Great General Interest and Does Not Involve a Constitutional Question or a Conflict Between Appellate Districts

This matter involves a routine, albeit interlocutory, appeal of a patently ordinary and unremarkable ruling on a discovery motion arising from a motor vehicle accident lawsuit. Appellant, Danielle Laurence, seeks to preclude discovery of “privileged” statements contained in her medical record, by other parties, although she admits voluntarily waiving this same physician-patient privilege, for the purposes of closely related litigation.

Specifically, Ms. Laurence is attempting to preclude the discovery of her medical records, based on her claim that she previously only waived her medical records privilege for the purpose of related litigation, and that this same medical records privilege was preserved, in whole, for the purpose of this litigation, involving the same motor vehicle accident as the lawsuit in which Ms. Laurence previously waived this privilege.

Ms. Laurence does not dispute that she put these records and statements into evidence during prior litigation. Discovery was provided, including these exact same medical records and statements to medical providers in the context of the related lawsuit, which arose out of the exact same motor vehicle accident. The only difference between the two lawsuits at issue is that the initial lawsuit was initiated by Ms. Laurence, whereas this lawsuit was initiated by someone else involved in the same accident.

The court of appeals addressed this interlocutory appeal on its merits, holding as follows:

According to R.C. 2317.02(B)(1)(a)(iii), the privilege is waived if the patient filed a civil action. Laurence asserts that, since this action is not the one she herself filed, if the trial court order stands, she will be required to waive her privilege beyond the extent to which she intended. *Bogart [v. Blakely]*, 2d Dist. No. 2010 CA 13, 2010-Ohio-4526], ¶ 29. In addressing that same assertion, the court in *Menda v. Springfield Radiologists*, 136 Ohio App.3d 656, 737 N.E.2d 590 (2d Dist.2000) made the following pertinent observations:

“We disagree with [defendant’s] conclusion that the legislature could not have intended for a waiver of physician-patient privilege in one case to operate, *at least in some situations*, as a waiver in another case. The plain language of R.C. 2317.02(B) sets forth that the physician-patient privilege does not apply if the patient files a medical claim or ‘any other type of civil action’ which *puts the mental or physical condition about which he saw the physician at issue*. This is precisely what [defendant] did when he filed suit previously. The language of the statute does not limit the waiver to use of the information only in the patient’s case. Moreover, the privacy concern which seems to have been central to the legislature’s creation of the privilege is not compelling in a situation such as this one where [defendant] *has already revealed* his * * * health problems by filing a claim for [personal injury].” (Emphasis added.)

The above analysis is hardly groundbreaking, nor does it deviate from established jurisprudence on this issue. The court of appeals below did not say that a waiver for one purpose is a waiver for all purposes, nor did it attempt to limit the privilege which attaches to medical records and statements. In fact, the court of appeals said quite the opposite, i.e., that the prior waiver by Ms. Laurence was applicable to this lawsuit only because the circumstances of this lawsuit and the prior lawsuit were essentially identical.

In her Memorandum in Support of Jurisdiction, Ms. Laurence asserts that a party to a lawsuit does not waive privilege attaching to medical records, even when those records were previously voluntarily produced in discovery in closely related litigation. See Proposition of Law No. 1. Although that proposition may be true in some instances,

it is not automatically true in all instances. Per Ms. Laurence's rationale, a waiver of the privilege in the first filed suit would no longer be operative where the same suit was refiled per Civ.R. 41(A)(1)(a). Additionally, if two lawsuits were pending simultaneously arising out of the same accident, litigants could pick and choose which case for which they would assent to waiver and which they would not.

Ms. Laurence also raises the issue of whether Ohio residents have a constitutional or statutory right to have their medical privilege maintained by courts in Ohio. This alleged "central issue" is in fact a red herring, as there is no dispute that Ms. Laurence voluntarily waived her "constitutional and statutory right" to maintain her medical privilege, by means of filing a lawsuit seeking compensation for injuries. The issue herein is not the existence of such a right, but the waiver of such a right. Nobody has ever denied the existence of constitutional and statutory protections of medical records. The present question is merely the scope of a knowing and voluntary waiver of such privilege.

Finally, Ms. Laurence claims there is a conflict between appellate districts concerning the waiver of physician-patient privilege. This contention is misplaced for several reasons. The claim of an inter-district conflict advanced by Ms. Laurence, that is a conflict between the Eighth and Second Districts, is premised on the question of the continued viability of Second District decision of *Menda v. Springfield Radiologists*, supra. Yet, even if *Menda* had been overruled by *Hageman v. S.W. General*, 119 Ohio St. 3d 185, 2008-Ohio-3343, such a fact would be of little consequence to this issue. The "conflict" asserted is actually between this Court and the Second District, (i.e.) did *Hageman* overrule *Menda*. This is not really a conflict at all, nor is it a conflict between

districts. Most importantly, the appellate court's analysis would have been identical under either a *Menda* analysis of a *Hageman* analysis.

In *Hageman*, this Court determined that an attorney may be held liable for unauthorized disclosure of medical information relating to an opposing party that was obtained through litigation. Furthermore, the *Hageman* decision recognized the tort of breach of confidentiality related to medical information. *Id.* at 11. Additionally, the "unintended use" of medical records addressed by the *Hageman* decision involved sharing of information disclosed during domestic relation custody, with a prosecutor pursuing criminal proceedings. *Id.* at ¶16.

Simply, there is no issue of wrongful use or wrongful disclosure in the present case. The medical records at issue have already been used in litigation concerning the exact same accident, and there is no allegation the records are sought to be used improperly, for purposes of coercion or embarrassment in the present matter. All of the parties to this litigation should be able to rely on the same evidence, both in affirmatively proving their own claims, and, as well as the parties. Thus, the continued viability of *Menda* in light of *Hageman* is irrelevant.

No important public policy is implicated by this appeal. No constitutional right has been abridged. No conflict exists and none has been certified. Accordingly, this Court should decline to exercise its discretionary jurisdiction.

II. Statement of The Case and Facts

On October 30, 2009, co-appellees, Todd L. Leopold and Linda Leopold, filed a civil action against Ace Doran Hauling and Rigging Company, Ace Doran Brokerage Company and Steven H. Stillwagon (collectively referred to herein as "Ace Doran") for bodily injuries Mr. Leopold allegedly sustained as a result of a multiple car accident that

occurred on March 6, 2008. On February 18, 2010, the Leopolds filed an amended complaint asserting, among other things, a claim against Danielle R. Laurence for her alleged negligence in causing the accident giving rise to plaintiffs' claim.

Prior to plaintiffs' filing of the amended complaint asserting a cause of action against Danielle Laurence, Ms. Laurence had filed her own claim for personal injuries arising out of the same March 6, 2008 accident. See *Laurence v. Stillwagon*, Cuyahoga County Court of Common Pleas Case No. CV 08-676218. Ms. Laurence sued Steven Stillwagon and Ace Doran Hauling alleging those defendants were liable for her injuries. During the course of Ms. Laurence's litigation, she voluntarily produced her medical records. Contained within the medical records were statements made by Ms. Laurence to emergency room personnel who treated her immediately after the accident that she had "*hit a car in front of her and then was hit from behind by a semi.*"

During the course of Ms. Laurence's deposition in her own personal injury action, she did not deny making the above-referenced statement to emergency room personnel. Deposition of Danielle Laurence, March 13, 2009, p. 41-42. In the underlying case filed by the Leopolds, however, Ms. Laurence attempted to dispute that her vehicle initially collided with Mr. Leopold's vehicle prior to being struck by the Ace Doran truck. Deposition of Danielle Laurence, August 20, 2010, p. 24, 26, 29.

In an effort to preclude the impeachment of Ms. Laurence with her prior inconsistent statements made to medical personnel and her prior deposition testimony, her attorneys sought a protective order from the trial court precluding Ace Doran or any party "from utilizing the medical records of Danielle Laurence for any purpose, including at any deposition of any party or witness, in any motions for judgment on the pleadings, at trial or in any other proceeding * * *."

In support of her Motion for Protective Order, Ms. Laurence argued that, because her statement concerning the fact that she struck Mr. Leopold's vehicle before being struck by an Ace Doran truck were made to medical personnel and because they were contained within her emergency room records, those records were privileged pursuant to R.C. § 2317.02(B)(1). Ace Doran responded to this Motion for Protective Order by arguing that Ms. Laurence failed to set forth a sufficient basis for the issuance of a protective order under Civ. R. 26(C). Substantively, Ace Doran argued that Ms. Laurence had previously voluntarily produced her medical records, where it benefitted her own affirmative claims, and that these records had already been utilized by Ace Doran in a separate lawsuit arising out of the same motor vehicle accident. Ace Doran asserted that the records were no longer privileged and that Ms. Laurence could not hide behind a physician-privilege to protect prior inconsistent statements and admissions against interest made to medical personnel. Finally, Ace Doran raised the issue concerning whether Ms. Laurence's motion for protective order was premature and whether she was really seeking a motion in limine preventing utilization of the records at trial. The trial court considered the arguments and, on August 15, 2011, issued an order denying Ms. Laurence's motion for protective order. On September 9, 2011, Ms. Laurence filed an interlocutory appeal of the trial court's refusal to grant her Motion for Protective Order to the Eight District Court of Appeals.

The Eighth District affirmed the ruling of the trial court, in its entirety, in a decision released and journalized on February 9, 2012. This appeal was then commenced on March 15, 2012.

III. Law and Argument

A. Response to Proposition of Law No. I

A party to a lawsuit does not waive the medical privilege with respect to the discovery or use of privileged medical records even when those records were previously produced in discovery in a separate lawsuit.

In support of her First Proposition of Law, Ms. Lawrence provides a recitation of boilerplate law. This case law is not contrary to the challenged holding below, nor does it provide the basis for this Court to exercise its discretionary jurisdiction.

Ms. Lawrence also argues that the waiver of her physician-patient privilege below was the product of “judicial waiver.” This rhetorical argument misses the point that the medical records waiver was of Ms. Lawrence’s own choosing and volition. The issue is not the waiver of a privilege, but rather whether Ms. Lawrence’s opportunistic retraction of her waiver should be countenanced. No important public policy concerns were implicated by Ms. Lawrence’s voluntary waiver of such privilege. Essentially, Ms. Lawrence is saying that this privilege should be recognized in the context of her own personal injury lawsuit, but not for the purposes of adjudicating Mr. Leopold’s lawsuit seeking compensation for medical injuries arising out of the exact same motor vehicle accident.

It is self-evident that the two-tier standard proposed by Ms. Lawrence as a proposition of law to this Court, would lead to incongruent results and would promote selective privilege waiver, as well as selective and unfair use of medical records. Plainly, such a policy, if adopted by this Court, would stymie the public’s interests in judicial efficiency and the fair and consistent application of the rules of civil procedure.

The lower courts each correctly refused to permit Ms. Laurence to hide behind the “cloak of confidentiality” in order to evade her prior inconsistent statements and admissions against interest. To have held otherwise would have unreasonably prejudiced Ace Doran and would have resulted in multiple versions of the facts, while also permitting Ms. Laurence to create the illusion that only one version of the facts exists. The medical records unequivocally demonstrated that Ms. Laurence told emergency room personnel that “she hit a car in front of her and then was hit from behind by a semi.” Now, in this appeal, Ms. Laurence seeks to deviate from her prior statement in order to avoid liability in the action to which she is now a defendant. In the prior personal injury action to which Ms. Laurence was the plaintiff, she testified in deposition that:

Q. As you sit here today is it fair to say that you cannot dispute the factual scenario that is set forth in the motor vehicle accident section of the report of the Metro Health Medical Center which indicates that you hit a car in front of you and then you were hit from behind by a semi?

A. I would like to say that I have never been in an accident before and I had no idea what I was saying when I was saying it. I’m sure I had some kind of indication. I said I hit a car in front of me because that’s what I saw. Physically the last thing I saw was hitting a car in front of me. When I got out of my car they ripped the door open to get me out of the car and there was a semi in my trunk.

(Deposition of Danielle Laurence, 3/13/2009, at pp. 41-42.).

Subsequently, in the second lawsuit, because Ms. Laurence is alleged to have caused the accident, her deposition testimony changed:

Q. And, in fairness, when you were giving the hospital your best recollection of what happened, you told the hospital that you hit a car in front of you and then you were hit from behind by a semi, correct?

A. Yes.

Q. And indeed that may very well have been the sequence of events on March 6th of 2008. Would you agree?

A. I would disagree.

Q. And your recollection as of today as to how the accident happened would not suggest that you set in motion potentially a chain reaction accident; correct?

A. That is correct.

(Deposition of Danielle Laurence, 8/20/2010, at pp. 24, 26, 29,.)

Ms. Laurence's responsive testimony clearly exhibited contradictory statements and admissions against interests that are appropriate avenues of inquiry at trial. Thus, both lower courts properly determined that Ms. Laurence should not be permitted to assert that the medical records were privileged in order to prevent counsel from seeking the truth. Importantly, it is not the production of actual medical records to which Ms.

Laurence objects, but rather the use of statements she made concerning the accident. Viewed in this light, Ms. Laurence's public policy arguments are even less compelling.

Ohio law clearly provides that under the physician-patient privilege, "a treating physician is prohibited from disclosing matters disclosed by the patient to the physician during consultations regarding treatment or diagnosis of the patient." *Huzjak v. United States* (N.D. Ohio 1987), 118 F.R.D. 61, 63. Here, the statement in the medical record that "she hit a car in front of her and then was hit from behind by a semi" is not a matter regarding treatment or diagnosis, and thus, the physician-patient privilege arguably did not apply. Allowing Ms. Laurence to assert a privilege under these circumstances would in no way "create an atmosphere of confidentiality, which theoretically will encourage the patient to be completely candid with his or her physician, thus enabling more complete treatment," which is what the physician-patient privilege seeks to provide. *Ward v. Summa Health Sys.* (2010), 128 Ohio St.3d 212, 217. Instead, the privilege would allow her to potentially mislead the jury with contradictory statements, which without the use of the medical records, would never be exposed.

Civ. R. 26(C) provides that, for good cause shown, a protective order should be made to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." Civ. R. 26(C). *Koval v. General Motors Corp.* (C.P. 1990), 62 Ohio Misc.2d 694, 697 (to demonstrate good cause, the requesting party must show that "disclosure of allegedly confidential information will work a clearly defined injury" to the requesting party); *Mellino Consulting, Inc. v. Synchronous Mgmt. Sarasota*, 8th Dist. No. 87894, 2007-Ohio-541 (trial court erred in granting a protective order under Civ. R. 26(C) based only on the finding that the motion was unopposed, as a grant of such a motion

was to be based on a showing of "good cause," which was not made). The decisions of both lower courts were straightforward applications of Civ.R. 26.

In this case, Ms. Laurence did not even attempt to demonstrate good cause that the utilization of the medical records would present any such annoyance, embarrassment, oppression, or undue burden or expense that the Civ. R. 26 specifically seeks to avoid. To the contrary, no such effect would result by utilizing these same exact medical records that had been used in her prior personal injury action and that she had previously ordered. Furthermore, in the present case, experts had already relied upon the statements in the medical records at issue, in comparison with her deposition testimony, for purposes of trying to determine how the accident occurred. It was Ms. Laurence who initially put the medical records at issue, and it would be illogical to assert that annoyance, embarrassment, oppression, or undue burden or expense would somehow now exist even though it did not exist in a prior action involving the same accident and many of the same parties.

Moreover, had Ms. Laurence presented evidence or argument establishing these factors, her broad request to preclude the utilization of her medical records "for any purpose, including at any deposition of any party or witness, in any motions for judgment on the pleadings, at trial or in any other proceeding" was far too overreaching. (Emphasis added). Under Civ. R. 26(C), this Court has the discretionary power to order:

- (2) that the discovery may be had only on specified terms and conditions ***;
- (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters ***.

Thus, Civ. R. 26(C) does not require a trial court to grant a complete bar to the use of this discovery. Rather, a trial court has broad discretions in determining whether to limit the terms of discovery to permit the liberal exchange of information that Civ. R. 26 intended. The court of appeals recognized the trial court's proper exercise of discretion in its own Opinion. These sorts of rulings and appellate review of such rulings simply are not matters of important public policy.

B. Response to Proposition of Law No. II

Ohio residents have a Constitutional and statutory right to have their medical privilege maintained by Courts in Ohio.

This proposition of law is merely a legal truism, which proposition was recognized and appreciated by both lower courts. Nobody is suggesting that there is no physician-patient privilege, or medical records privilege in Ohio, only that such privilege either does not apply to these facts or has been waived in this case. Appellees do not dispute that Ohio residents "have a Constitutional and statutory right to have their "medical privilege" maintained by courts in Ohio." Thus, this proposition of law is simply irrelevant to the question of whether this Court should exercise its discretionary jurisdiction to hear this appeal.

C. Response to Proposition of Law No. III

Appellate Districts should not treat a litigant's medical privilege differently, in the face of this Court's pronouncement in *Hageman v. S.W. Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153.

Appellees generally agree that inter-district conflicts are undesirable and should be resolved if possible. Yet, this appeal presents no such conflict and certainly not a compelling or clear cut conflict which would necessitate this Court's intervention.

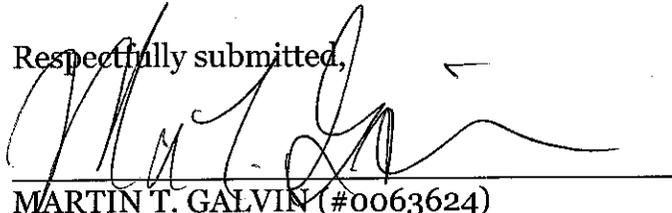
Appellant did not file a Motion to Certify Conflict, and none has been certified. The purported conflict raised in this Assignment of Error simply does not exist. All districts throughout the state seem to agree that 1) medical records are privileged, 2) that the privilege may be waived by certain actions taken by the person protected by such privilege, and 3) that the extent of such waiver is determined by a case by case determination, such as the determination utilized by the trial court and appellate court below. The issue of whether this Court's decision in *Hageman* overruled the Second District's *Menda* decision is simply not tantamount to a conflict. Nor does it present a public policy rationale for this Court to exercise its discretionary jurisdiction to hear an appeal coming from the Eighth District.

It bears repeating that Ms. Laurence sought to use Ohio's privileged status of medical records and statements made to medical provider, not as shield, as is generally the case in such matters, but as a sword. That is Ms. Laurence sought to use this privilege, which she readily admits to having voluntarily waived, as a means by which she could prevent impeachment concerning deposition testimony that was patently inconsistent with her previous sworn statements. Indeed, Ms. Laurence is unconcerned with issues of production of any medical record at all. Her sole concern is white-washing prior statements she made which shed important light on the causation of the accident. None of the case law cited by Ms. Laurence suggests that such considerations are not relevant to determining the scope and extent of the voluntary waiver of the privilege which attaches to medical records in Ohio.

IV. Conclusion

Because this case does not present issues of important public policy or of general interest, nor a constitutional question, this Court should decline to exercise its discretionary jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Opposition to Jurisdiction* was sent by regular U.S. mail on this 13th day of April, 2012 to:

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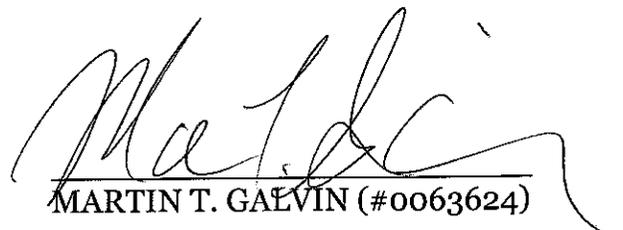
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