

## Protecting Patients from Disclosure of Mental Health Issues

One issue in Pennsylvania that will just not go away relates to a party's mental health records and to what extent they may be disclosed and utilized as evidence. A good example of a very thorough going analysis can be found in *Tavella-Zirilli v. Ratner Cos., L.C.*, 266 A.3d 696 (Pa. Super. December 8, 2021)(Stevens, President Judge Emeritus).

A lawsuit was brought by Karen Tavella-Zirilli for scalp damage due to hair treatment she had. The defenses included contentions that the Plaintiff had mental health problems previously that specifically related to scalp, skin and hair damage. The client had received mental health treatment from a psychologist.

The trial court ordered that a special master perform an *in camera* review of the Plaintiff's mental health records. Plaintiffs appealed. As a preliminary matter, the Superior Court determined that the matter was appealable as a collateral order.

The Plaintiff, Ms. Tavella-Zirilli, was a voluntary outpatient. The protections afforded by the Mental Health Procedures Act ("MHPA"), 50 P.S. §7101 -§7503 therefore did not apply, because the MHPA only applies to involuntary treatment, whether inpatient or outpatient and voluntary inpatient treatment. *Id.* §7103. The Court also cited *Gormley v. Edgar*, 995 A.2d 1197 (Pa. Super. 2010), holding that voluntary outpatient mental health treatment records are not encompassed within the protection of the MHPA.

However, since Ms. Tavella-Zirilli communicated private thoughts to her therapist for the purpose of treatment, the psychiatric/psychologist patient privilege is implicated. See 42 Pa. C. S. §5944. Section 5944 protects records reflecting the patient's thoughts from disclosure, including *in camera* review. Under *Farrell v. Regola*, 150 A. 3d 87 (Pa. Super. 2016), what is protected is the "confidential communications made and information given by the client to the psychotherapist in the course of treatment..." but not "the psychotherapist's own opinion, observations, diagnosis, or treatment alternatives." *Id.* at 97-98.

The Court also examined *Octave ex rel Octave v. Walker*, 103 A.3d 1255 (Pa. 2014), as to whether there was an implicit waiver of the statutory privilege by filing the claim. *Octave* addressed the statutory privilege set forth in the Mental Health Procedure Act (MHPA), not the psychologist-patient privilege. The *Gormley* court, on the other hand, analyzed the waiver of the psychiatrist/psychologist-patient privilege in the context of § 5944, holding that plaintiff waived that privilege in a personal injury action where she directly placed her mental condition at issue when she alleged that she suffered from anxiety as a result of a motor vehicle accident. The rationale in *Gormley* was that "[i]t would clearly be unfair for a party to seek recovery for anxiety if that mental health issue predated the accident." *Gormley, supra*, at 1206.

Here, it was found by the *Tavella-Zirilli* Court that the trial court erred in concluding that the MHPA was applicable and that Tavella-Zirilli implicitly waived her privilege under that statute. The party's reliance on *Octave* is also inapposite since *Octave* turned on § 7111 of the MHPA, which is inapplicable. *Gormley* likewise rejected the plaintiff's privacy argument rooted in the MHPA because the confidentiality provision in section 7111 of the MHPA was inapplicable to that plaintiff.

With respect to the psychiatrist/psychologist-patient privilege, however, the Superior Court recognized that a fine line existed between mental health information, and information regarding the impact of a mental health condition on the Plaintiff's skin, scalp and hair. The trial court was correct to note that general averments of shock, mental anguish and humiliation do not place a party's mental condition at issue or result in waiver of the psychiatrist/psychologist-patient privilege, citing *Gormley*. Therefore, the general averments in the complaint do not result in a waiver of the privilege. Although evidence of a condition affecting skin, scalp or hair is relevant to liability, in this case it does not vitiate Tavella-Zirilli's expectation of confidentiality in her mental health records. Judge Stevens, writing for the panel, explained that it is not Tavella-Zirilli's mental health that is an issue, but rather it is any condition, physical or mental, that could have caused or affected injuries to Ms. Tavella-Zirilli's skin, scalp or hair. The Zirillis did not consent to disclosure of her mental health records and they objected to same. Appellees/defendants have shown a need for records of diagnosis, treatment and observations involving an interplay between Ms. Tavella-Zirilli's skin, scalp and hair and her mental health, but they have not shown a need for records of her privileged communication about that interplay and she has not put those communications at issue by bringing the action.

Therefore, what is relevant are records showing a treatment provider believes that Tavella-Zirilli's skin, scalp or hair injuries caused by her mental health and when those injuries occurred, not Ms. Tavella-Zirilli's innermost thoughts about her mental health, regardless of whether those communications are about her skin, scalp or hair. She did not waive the psychiatrist/psychologist-patient privilege by commencing this suit.

Accordingly, the trial court's order was overbroad. The trial court also failed to impose safeguards with respect to the *in camera* review to prevent disclosure outside of litigation, such as a protective order or confidentiality agreement. Without such a restriction on the use of the mental health records and information, protection of Tavella-Zirilli's expectation of confidentiality is inadequate.

The case was remanded so that the trial court would grant a protective order for the Tavella-Zirillis to provide only the records of the plaintiff's mental health treatment with the psychologist concerning diagnosis, treatment or observation of a mental health condition affecting the skin, scalp or hair. The appellate court also ordered that any communication by Ms. Tavella-Zirilli with the psychologist be redacted and that the protective order restrict disclosure of such records and any information obtained from them outside this personal injury action.

The takeaway bullet points are as follows:

- Plaintiff Tavella-Zirilli sued hairdresser in connection with injuries she received to her scalp and hair from treatment.
- Tavella-Zirilli had been to a psychologist previously in connection with a mental health condition and medications that allegedly cause skin and scalp issues.
- Zirilli objected to producing her mental health records based upon the Mental Health Procedures Act, 50 P.S. §7101 -§7503, and the psychiatrist/psychologist-patient privilege, 42 Pa. C. S. §5944.
- The trial court ordered *in camera* review of the records.
- The matter is appealable as an interlocutory question.
- Plaintiff was a voluntary outpatient.
- Plaintiff's mental health records are outside the scope of the MHPA and are not protected from disclosure under the statute. See *Gormley v. Edgar*, 995 A.2d 1197 (Pa. Super. 2010).
- Under the psychiatrist/psychologist-patient privilege, 42 Pa. C.S.. § 5944, a patient's confidential communications are privileged, but opinions, observations, diagnosis or treatment alternatives provided at the psychological visits are not protected by the psychiatrist/psychologist-patient privilege. See *Farrell v. Regola*, 150 A.3d 87 (2016).
- Where Plaintiff communicated her private thoughts to her therapist for the purpose of treatment, § 5944 protects records reflecting her thoughts from disclosure, including *in camera* review.
- There was no explicit waiver of statutory privilege under § 5944.
- *Octave ex rel. Octave v. Walker*, 103 A.2d 1255 (2014) did recognize a limited exception for finding implicit waiver where defendant was seeking mental health information about a deceased plaintiff that was unavailable through other means.
- *Gormley* held that there is a waiver of psychiatrist/psychologist-patient privilege under § 5944 where a plaintiff waived the privilege in a personal injury action when she directly places her mental condition at issue by alleging she suffered anxiety as a result of a motor vehicle accident.
- The lower court erred in concluding that the MHPA was applicable or that there was waiver under that statute.
- The parties and the court were wrong in placing reliance on *Octave* because it turned on § 7111 of the MHPA, which is inapplicable in this situation, which involved voluntary outpatient treatment.
- General averments of shock, mental anguish and humiliation do not place a party's mental condition at issue or result in a waiver of the psychiatrist/psychologist-patient privilege under *Gormley*.
- Tavella-Zirilli's general averments of loss of life's pleasures, mental anguish, embarrassment and emotional distress do not result in a waiver of the privilege.
- Evidence of a condition affecting the skin, scalp or hair is relevant to liability.
- It is not Tavella-Zirilli's mental health that is at issue, rather it is any condition, physical or mental, that could have caused or affected the injuries to the skin, scalp or hair.

- Defendants have shown a need for records of diagnosis, treatment and observations involving interplay between plaintiff's the skin, scalp and hair and her mental health, but have not shown a need for records of plaintiff's privileged communication about that interplay and plaintiff did not put those communications at issue by bringing this action.
- Records showing that a treatment provider believes plaintiff's skin, scalp or hair injuries were caused by her mental health and when those injuries occurred is something that could be disclosed but not the plaintiff's innermost thoughts about her mental health, regardless of whether those communications are about her skin, scalp or hair.
- The court cannot direct *in camera* review without protection against disclosure through a protective order or confidentiality agreement.
- Plaintiff did not waive psychiatrist/psychologist-patient privilege by commencing this suit.

The case was remanded for the trial court to tailor its order to provide for production of only the records of mental health treatment by the psychologist/therapist which concerned diagnosis, treatment or observation of a mental health condition affecting the skin, scalp or hair, with any communications by the plaintiff redacted, and to grant an appropriate protective order guarding against disclosure of information outside the personal injury action.

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