No. 123152

IN THE
SUPREME COURT OF ILLINOIS

SCARLETT PALM,	)	
	)	
Plaintiff-Appellant,	)	On Appeal from the Illinois Appellate Court,
	)	Third District, Case No. 3-13-0087
v.	)	17
	)	There Heard on Appeal from the Circuit Court
RUBEN HOLOCKER,	)	of the Tenth Judicial Circuit, Marshall County,
	)	Illinois, Case No. 16 L 5
Defendant-Appellee,	)	
	)	Hon. Thomas A. Keith and
and	)	Hon. Michael P. McCuskey,
	)	*Judges Presiding*
KARL BAYER,	)	
	)	
Contemnor-Appellee.	)	

BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Ruben Holocker hit Scarlett Palm with his truck as she walked across a street in Lacon, Illinois. Scarlett brought this action against Ruben to recover damages for her injuries. In response to written discovery, Ruben revealed he requires physician approval to drive, had lost that approval once, and his license was suspended as a result. Ruben refused to answer interrogatories about his physician, his medical condition, or why he lost approval to drive. The trial court ordered Ruben answer, but his counsel refused and was held in contempt. Ruben's counsel appealed the discovery order and the contempt sanction. The Appellate Court reversed, holding (1) the litigation exception to the physician-patient privilege is inapplicable unless a defendant raises an affirmative defense based on a medical condition and (2) the reason for Ruben's driving is irrelevant.

Scarlett's Petition for Leave to Appeal was allowed on March 21, 2018. Scarlett timely filed a Notice of Election to file an additional brief on April 2, 2018. No questions are raised on the pleadings.

ISSUES PRESENTED

1. Does the statutory physician-patient privilege allow a defendant to conceal a relevant medical condition from discovery?

2. Did the Appellate Court erroneously interpret the litigation exception to the statutory physician-patient privilege as only applying when a defendant raises an affirmative defense based on a medical condition?

3. Is a driver's medical condition that may impair the ability to drive irrelevant in a claim against that driver?

STATEMENT OF JURISDICTION

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The Appellate Court, Third District, published its opinion on December 11, 2017. *Palm v. Holocker*, 2017 IL App (3d) 170087; (A9).[1] Appellant timely filed a Petition for Leave to Appeal with this Court on January 12, 2018. On March 21, 2018, this Court allowed the Petition for Leave to Appeal. (A19)

[1] Citations to A reference the appendix. Citations to C reference the record on appeal. Citations to R reference the hearing transcripts.

STANDARD OF REVIEW

An order compelling discovery allegedly protected by a statutory privilege is reviewed *de novo*. *Klaine v. Southern Illinois Hosp. Services*, 2016 IL 118217, ¶13. The interpretation of a statute is a question of law subject to *de novo* review. *Brunton v. Kruger*, 2015 IL 117663, ¶24.

STATUTE INVOLVED

735 ILCS 5/8-802 (Public Act 99-78 (eff. July 20, 2015)). Physician and patient.

Physician and patient. No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only … (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue …. [2]

[2] The full text of the statute appears in the appendix at page A1.

STATEMENT OF FACTS

I. Ruben Holocker hits Scarlett Palm with his truck.

During the day of October 18, 2014, Scarlett Palm walked on the sidewalk along Ida Street in Lacon, Illinois. (C1) At the intersection of Ida and 5th Street, Scarlett entered the crossing area to walk south across 5th Street. (C1) Stop signs at the intersection control the traffic coming from Ida. (C1)

While Scarlett was crossing the street, Ruben Holocker drove his truck north on Ida toward the intersection. (C1) Without stopping at the stop sign, Ruben turned left onto 5th Street, hitting Scarlett with his truck as she walked through the crossing area. (C2) Scarlett suffered personal injuries. (C2)

A few weeks after Ruben hit Scarlett, someone claiming to know Ruben told Scarlett that Ruben was legally blind and did not report other collisions he was involved in out of fear he would lose his driving privileges. (R6) Scarlett filed suit against Ruben on April 25, 2016. (C1)

Ruben admitted his vehicle made "contact" with Scarlett, but denied all allegations of negligence. (C13) Ruben alleged in an affirmative defense that Scarlett was drunk or on drugs when he hit her with his truck and her alleged intoxication was the sole proximate cause of her injuries. (C15)

II. Ruben admits he requires physician approval to drive.

Scarlett served Ruben with the standard "Motor Vehicle Interrogatories to Defendants" contained in the comments to Supreme Court Rule 213.[3] (C41; A2) The interrogatories request information about past driver's license status, such as suspensions,

[3] Effective January 1, 2018, the Supreme Court relocated the standard interrogatories from the Rule comments to a new forms appendix.

revocations, and physician approval to drive. (C42-43; A2-4) The interrogatories also ask for the name, address, and dates of treatment from any health care professional performing any eye examinations in the past five years and any medical examinations in the past ten years. (C43; A4)

In response to the interrogatories, Ruben admitted he required a physician's report to drive for "diabetic reasons." (C43; A4) Ruben also admitted that his license was suspended once when his doctor "failed to sign medical authorization." (C43; A4)

III. Ruben refuses to answer interrogatories about his medical condition.

Ruben objected to the interrogatories requesting eye and medical examination information. (C43; A4) Ruben provided the same objection to both interrogatories: "The Defendant objects to the question as it violates HIPPA [*sic*], doctor-patient privilege, and the Defendant has not placed his medical condition at issue in this matter." (C43; A4)

IV. The trial court orders Ruben answer the interrogatories.

On September 20, 2016, the Honorable Judge Michael P. McCuskey heard Scarlett's Motion to Compel answers to the interrogatories. (R1) Judge McCuskey granted the Motion, ordering Ruben answer the interrogatories, directing the Illinois Secretary of State to comply with a subpoena issued by Scarlett, (C58) and entering a HIPAA order. (C55)

Ruben still refused to answer. Scarlett filed a Motion requesting sanctions or other relief (C73) that was heard by the Honorable Judge Thomas A. Keith on February 7, 2017. (R13) Scarlett's counsel revealed he sent a subpoena to the Marshall County sheriff's department, discovering Ruben had been involved in "seven or eight different collisions" prior to hitting Scarlett. (R24) The Marshall County clerk also had records of

a dozen traffic citations against Ruben in the past two decades. (R24) Scarlett's counsel argued that based on the public information of Ruben's driving record, the facts of the collision, and Ruben's discovery answers, Scarlett needed to know "does he have three optometrists who are occasionally clearing him to drive at different times or giving whatever report has to be given," and "what other doctors does he have that might have provided him criticism or not of his limitations in his ability to drive." (R24-25)

Judge Keith found the discovery sought by Scarlett was relevant: "I don't want any fishing expeditions. But what I have here … is a response that says that there are some, or at least intimates there are some driving restrictions or at least some concerns based on diabetes. We have the allegation that we have a turn and I didn't see you. … So it does raise the issue of whether or not sight is a question here." (R27) Judge Keith held Scarlett's counsel "has got a legitimate reasonable cause to believe that there could be some sight problems here that could have been related to this accident, and he's got a right to look for that. He can't go on a fishing expedition, but he certainly can look for it based on what I know here today." (R28) Judge Keith found that Ruben having a driver's license at the time "doesn't make any difference about peripheral vision. He is making a turn. And if his vision is restricted, that's relevant to this case." (R29)

Scarlett's Motion was granted. (C103) Ruben's counsel was held in contempt for refusing to comply with the discovery order, (C105) and a daily fine was imposed until the discovery was answered. (C107) Ruben and his counsel appealed. (C110)

V. The Appellate Court reverses the discovery order.

On December 11, 2017, the Appellate Court, Third District, entered an Opinion reversing the trial court. *Palm v. Holocker*, 2017 IL App (3d) 170087; (A9). The Opinion

held Exception (4) to the physician-patient privilege statute, which states the privilege does not apply in any action brought by or against the patient in which the patient's mental or physical condition is an issue, only applies when "defendants affirmatively place their health at issue when they utilize a physical or mental condition to defend the case." *Id.* at ¶25; (A16). The Opinion also held Ruben's medical condition has "no bearing on his liability. Holocker's driving, not the reason for his driving, is at issue; he either drove negligently or he did not." *Id.* at ¶26; (A16).

On March 21, 2018, this Court allowed Scarlett's Petition for Leave to Appeal. (A19)

ARGUMENT

I. INTRODUCTION.

In 2015, there were 313,316 automobile crashes in Illinois. 91,675 people were injured in those crashes. 998 died.[4] Not all these crashes were accidental. Some of the drivers involved drove drunk. Some took drugs impairing their ability to see, react, or stay awake. Others drove with known, unmanaged medical conditions making them unsafe drivers. Does Illinois law allow these dangerous drivers to conceal the physical condition causing their criminal, reckless, or negligent driving by claiming the physician-patient privilege?

The answer is no. Exception (4) to the physician-patient privilege statute states the privilege is inapplicable in any litigation involving a patient-litigant if the patient's physical or mental condition is an issue. Illinois courts have consistently applied this exception to stop dangerous drivers from weaponizing the privilege and turning it against their own victims, hiding their intoxication or other unsafe condition from the people they hurt and our criminal justice system.

But the Appellate Court's Opinion would allow just that. By holding the physician-patient privilege prevents the disclosure of any physical condition unless the defendant first raises an affirmative defense based on that condition, the Opinion allows dangerous drivers to conceal their intoxication, doctor's orders, or other medical conditions from the People and the injured. Ruben Holocker, who requires physician approval to drive for an unknown medical reason, lost that approval, had his license

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[4] The most-recent annual data available. Illinois Department of Transportation, 2015 Illinois Crash Facts and Statistics (May 2017), p. 9; http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Resources/Safety/Crash-Reports/crash-facts/2015%20Crash%20Facts%20with%20cover.pdf

suspended, drove into a pedestrian in broad daylight, been in at least seven prior documented collisions, and may be legally blind, has been allowed by the Opinion to conceal his condition from Scarlett Palm, the person he ran down with his truck. The Opinion does not stop there, further holding Ruben's medical condition is not even relevant to this litigation, claiming that "the driving" is the only relevant consideration in an automobile accident, and "the reason for the driving," whatever it may be, is irrelevant.

The Appellate Court is wrong. The plain and ordinary meaning of the physician-patient privilege statute prevents patient-litigants from concealing relevant physical and mental conditions in all proceedings, and a driver's physical ability to safely operate a vehicle is relevant to any automobile crash. The overwhelming majority of decisions interpreting the privilege have held the same. Yet the Opinion goes out of its way to ignore those decisions, instead relying on faulty statutory interpretation and dubious precedent to fundamentally alter the privilege with a carve out, for defendants only, who are now allowed to do exactly what the statute says they cannot—hide relevant physical and mental conditions from prosecutors and injured plaintiffs. The Opinion's reasoning is flawed, its holding illogical, and will make Illinois a more dangerous place. This Court must reverse.

II. EXCEPTION (4) OF THE PHYSICIAN-PATIENT PRIVILEGE STATUTE MUST BE APPLIED AS WRITTEN.

This is a statutory interpretation case, and the first step in any statutory interpretation case is examining the language of the statute. In this case, it is the only step. The statute's plain and ordinary meaning applies, as Illinois cases have consistently

held. That ordinary meaning demands the privilege yield in any case in which a physical or mental condition is "an issue."

A. The plain text of the statute excepts a patient-litigant's physical condition from the privilege when the condition is an issue.

The primary rule of statutory interpretation is to ascertain and give effect to the legislature's intent, and the best indication of that intent is the plain language of the statute. *Illinois Graphics v. Nickum*, 159 Ill.2d 469, 479 (1994). If the legislature's intent can be determined from the plain text, that language must be given effect without resorting to extrinsic aids of statutory construction. *Id.*

The physician-patient privilege provides that no physician is permitted to disclose any information "acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient…." 735 ILCS 5/8-802. There are, however, fourteen different exceptions. 735 ILCS 5/8-802(1) - 802(14). The exception relevant to this case is Exception (4), which makes the privilege inapplicable "in all actions brought by or against the patient … wherein the patient's physical or mental condition is an issue…." 735 ILCS 5/8-802(4).

Reading Exception (4) is the only statutory interpretation needed in this case. The exception could not be plainer and the intent of the legislature is clear—if the patient is a party to the litigation, and their physical condition is an issue in that litigation, the privilege does not apply. Nothing in Exception (4) is vague. Nothing is ambiguous. Everyone, from seasoned jurists to nonprofessionals, knows what the legislature means by "an issue," requiring no definition beyond the common usage of that phrase: "an issue" is something relevant or pertinent to the matter at hand.

That ordinary meaning is its basic definition. Unlike the Opinion, Black's Law Dictionary does not define "issue" as when "defendants affirmatively place their health at issue when they utilize a physical or mental condition to defend the case." *Palm*, 2017 IL App (3d) 170087, ¶25; (A16). Rather, an "issue" is a "point in dispute between two or more parties." Black's Law Dictionary (10th ed. 2014). A "dispute" is a "conflict or controversy, esp. one that has given rise to a particular lawsuit." Black's Law Dictionary (10th ed. 2014). A "controversy" is a "justiciable dispute." Black's Law Dictionary (10th ed. 2014). Therefore, the plain language of Exception (4) states a party's physical or mental condition is not privileged when the condition is a point in a justiciable dispute. Irrelevant matters are not points in a justiciable dispute, because something "irrelevant" "will not affect the court's decision." Black's Law Dictionary (10th ed. 2014). Relevant matters are points in a justiciable dispute, because "relevance" is the "relation or pertinence to the *issue* at hand" and "relevant" means "tending to prove or disprove a matter in *issue*." Black's Law Dictionary (10th ed. 2014) (emphasis added).

This ordinary meaning of "an issue" is what the legislature intended when it wrote the statute—a relevant physical condition is not protected by the privilege if the patient is a party to the litigation. No further analysis or extrinsic aids are necessary to understand the legislature's intent. The Opinion should have applied Exception (4) as written and this Court should as well. The plain and ordinary meaning of the statute is the only meaning warranted by its text.

B. Illinois case law overwhelmingly applies Exception (4) as written.

The Appellate Court has overwhelmingly applied Exception (4) by that plain and ordinary meaning. See *People v. Beck*, 2017 IL App (4th) 160654, ¶135-138 (post-crash

medical records in DUI action); *People v. Botsis*, 388 Ill.App.3d 422, 435 (1st Dist. 2009) (doctor's instructions not to drive in reckless homicide action); *People v. Popeck*, 385 Ill.App.3d 806, 809-810 (4th Dist. 2008) (non-blood draw medical records in DUI action); *In re Anders*, 304 Ill.App.3d 117, 123 (2nd Dist. 1999) (mental health records in Sexually Violent Persons Commitment Act proceeding); *People v. Nohren*, 283 Ill.App.3d 753, 762 (4th Dist. 1996) (blood draw medical records in DUI action); *People v. Wilber*, 279 Ill.App.3d 462, 468 (4th Dist. 1996) (statement to paramedics that defendant "had 6 to 8 beers prior to the collision" in reckless homicide action); *People v. Krause*, 273 Ill.App.3d 59 (3rd Dist. 1995) (statement to paramedics in aggravated DUI action); *Galindo v. Riddell, Inc.*, 107 Ill.App.3d 139, 148 (3rd Dist. 1982) (injured plaintiff's medical records in product liability action). In contrast to these decisions, the Opinion could locate only two cases holding otherwise, both of which pre-date cases cited here from the same appellate district. See Section III.B., *infra*. The overwhelming majority of cases in Illinois apply Exception (4) as written.

How Exception (4) applies to a medical condition impairing the ability to drive was already addressed in *People v. Botsis*, 388 Ill.App.3d 422 (1st Dist. 2009). In *Botsis*, the defendant lost consciousness while driving, causing a crash that killed one person and injured another. *Botsis*, 388 Ill.App.3d at 425. The People charged the defendant with reckless homicide, offering the defendant's medical history of losing consciousness and his physicians' instructions that he not drive as evidence of recklessness. *Id.* at 426-28. The defendant raised the physician-patient privilege, claiming the statute protected his medical history from disclosure, including the condition causing his loss of consciousness and the instructions not to drive. *Id.* at 434. The Appellate Court, First District, rejected

this argument, citing Exception (4): "Defendant lost consciousness at some point before the crash. Because his physical and mental condition during the crash is relevant in determining the issue of recklessness, the privilege exception applied to defendant's disclosures to the paramedics on the scene, [his doctors], as well as to his related medical records." *Id.* at 435.

The plain language of the statute was examined in *People v. Krause*, 273 Ill.App.3d 59 (3rd Dist. 1995). In *Krause*, the trial court granted the defendant's motion *in limine* to exclude statements he made to paramedics regarding his alcohol consumption, citing the privilege. *Krause*, 273 Ill.App.3d at 60-61. The trial court held the defendant's "health" was not an issue in the case, but the Appellate Court disagreed: "the exception plainly refers to the patient's mental and physical 'condition,' which is irrefutably an element of the offense and an issue…." *Id.* at 62. The court also held, based on the language of the statute, that Exception (4) "must be construed as extending to 'all actions,' criminal, civil or administrative." *Id.* at 63.

These cases all support the statute's plain and ordinary meaning. *Botsis* and *Krause* also establish two important points for this case in particular: (1) a medical condition that impairs the ability drive is a "physical condition" within the meaning of the statute, and (2) the condition's relevance to an element of the charge makes the condition "an issue." The only question that remains for the instant case is if Ruben Holocker's condition is "an issue" for Exception (4) to apply. The answer to that question lies in basic principles of negligence.

C. Ruben's physical condition is "an issue" as used in Exception (4) because any impairment changes his duty of care.

Scarlett's complaint alleges Ruben was negligent. (C1-2) To succeed, Scarlett must plead and prove the elements of negligence: (1) that Ruben owed her a duty of care, (2) that he breached that duty, and (3) that the breach was the proximate cause of her injuries. *State Farm Fire and Casualty Company v. Welbourne*, 2017 IL App (3d) 160231, ¶15. The duty of care is to act as an ordinarily careful or reasonably prudent person under the same circumstances. *Id.*

Those "same circumstances" include the allegedly negligent actor's physical condition. The Restatement explains: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." Restatement (Second) of Torts § 283C (1965). As such, illnesses or physical disabilities are "treated merely as part of the 'circumstances' under which a reasonable man must act. Thus the standard of conduct for a blind man becomes that of a reasonable man who is blind." Restatement (Second) of Torts § 283C, comment *a* (1965). Notably, known risks create higher duties: "an automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent in driving at all." Restatement (Second) of Torts § 283C, comment *c* (1965). This section's reasoning has been cited favorably in Illinois. See *Borus v. Yellow Cab Co.*, 52 Ill.App.3d 194, 201 (1st Dist. 1977).

Whatever the "diabetic reasons" are that necessitate a physician giving a report on Ruben's ability to drive, be it diabetic retinopathy harming his vision or some other

complication, that condition is an issue in this litigation. The duty Ruben owed to Scarlett is an element of negligence, and the scope of that duty depends on what a reasonable person with the same condition would do under the circumstances. If Ruben is blind, his conduct must be judged by that of a reasonable blind person. As the Restatement comments show, Ruben could very well be negligent by driving at all. Ruben's physical condition is relevant and "an issue" to establish the duty of care.

If Ruben is in fact blind or driving against doctor's orders, his driving is beyond negligence; it is willful and wanton conduct. As an aggravated form of negligence, proving willful and wanton conduct requires all of the elements of negligence plus proof of either a deliberate intent to harm or an indifference to or conscious disregard for the safety of others. *In re Estate of Stewart*, 2016 IL App (2d) 151117, ¶72. If Scarlett seeks leave to amend her complaint to allege willful and wanton conduct, Ruben's condition is an issue to prove his disregard for the safety of others by driving while blind.

Ruben's physical condition is an issue because it defines the standard of care he has a duty to maintain. Ruben answered the Complaint and denied he was negligent, (C13) so his standard of care is in dispute and "an issue" in the ordinary sense, the legal sense, and the sense intended by the legislature in Exception (4). The trial court correctly compelled Ruben to answer discovery about his physical condition because it is "an issue."

This Court should hold the same. This is the result demanded by the plain language of Exception (4): Ruben is a party and his condition is an issue. The Opinion must be reversed.

III. THE OPINION VIOLATES NUMEROUS PRINCIPLES OF STATUTORY INTERPRETATION AND RELIES ON ERRONEOUS CASE LAW TO REWRITE EXCEPTION (4).

In spite of the plain language of the statute and at least eight different cases all applying Exception (4) as written, the Appellate Court rewrote the statute. According to the Opinion, "an issue" does not mean what everyone knows it to mean by its ordinary meaning or dictionary definition. Instead, the Opinion claims "an issue" actually means when "defendants affirmatively place their health at issue when they utilize a physical or mental condition to defend the case." *Palm*, 2017 IL App (3d) 170087, ¶25; (A16).

The Opinion is wrong. The Opinion tramples this Court's rules of statutory interpretation, and then turns to old, flawed, and misapplied cases to support a holding that every other case on this matter has rejected.

A. The Opinion violates no less than twelve different principles of statutory interpretation.

Getting from the plain meaning of "an issue" to the Opinion's meaning is only possible if the rules of statutory interpretation no longer exist. The sheer number of this Court's rules the Opinion breaks, ignores, or misapplies in its quest to rewrite the statute is astounding. Any one of the following principles of statutory construction is good reason to apply the statute as written—and there are twelve of them. A dozen different times, the Opinion chose not to follow well-established principles of this Court so it could ignore the legislature's intent and rewrite Exception (4).

1. The Opinion never examined the plain language of the statute.

The best indication of the legislature's intent is the language of the statute and that language should be given its ordinary meaning. *Illinois Graphics*, 159 Ill.2d at 479 (1994). The plain and ordinary meaning of "an issue" is all that needs to be established

in this case and the first thing the Opinion should have examined. Yet the Opinion not once discusses the ordinary meaning of "an issue" or any other words in the statute.

2. The Opinion never found the statute vague or ambiguous.

A statute is only ambiguous when it is capable of more than one reasonable interpretation. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶11. The best indication of the legislature's intent is the ordinary meaning of the statute, and when a statute "is clear and unambiguous, this court is not at liberty to read into it exceptions, limitations, or conditions that the legislature did not express...." *People v. Laubscher*, 183 Ill.2d 330, 337 (1998). In other words, the Opinion cannot interpret the statute beyond its ordinary meaning unless it can reasonably be interpreted multiple ways. Yet the Opinion never finds the statute vague or capable of multiple interpretations, instead launching immediately into rewriting the legislature's intent.

3. The Opinion searches the statute for an incorrect hidden meaning.

When a statute is not vague or ambiguous, the Court should not "search for any subtle or not readily apparent intention of the legislature." *Id.* Yet the Opinion does just that, ignoring the meaning of the words the legislature chose to substitute its own meaning instead. The Opinion reads a hidden meaning into Exception (4) that is contrary to the plain language of the statute.

The hidden meaning the Opinion divined from the basic language of the statute was that the legislature always intended Exception (4) to have the unstated "affirmatively placed in issue" exception to the exception. According to the Opinion, Exception (4) would mean nothing more than relevant evidence is admissible and irrelevant evidence is

inadmissible without this new requirement, and therefore the statute was always absurd without it. *Palm*, 2017 IL App (3d) 170087, ¶22; (A15).

The statute has never worked that way. Exception (4) applies if two requirements are met: (1) the patient is a party to the litigation, and (2) the patient's physical or mental condition is an issue in the litigation. The balance struck by the legislature between privacy and truth comes from the first requirement: Exception (4) only applies to parties, and the privilege protects the records of non-parties no matter how relevant they are. See *People ex rel. Dept. of Professional Regulation v. Manos*, 202 Ill.2d 563, 577-78 (2002); *Defilippis v. Gardner*, 368 Ill.App.3d 1092, 1095-96 (2nd Dist. 2006); *In re D.H. ex rel. Powell*, 319 Ill.App.3d 771, 774-76 (1st Dist. 2001); *Reagan v. Searcy*, 323 Ill.App.3d 393, 396 (5th Dist. 2001); *Parkson v. Central DuPage Hospital*, 105 Ill.App.3d 850, 855 (1st Dist. 1982). In all these cases, the privilege excluded relevant evidence because Exception (4) does not apply to non-parties.

Undeterred by these decisions, the Opinion claims that if "the legislature meant section 8-802(4) to except all relevant medical information from the privilege's scope, it would have simply stated the privilege does not apply in any litigation…." *Palm*, 2017 IL App (3d) 170087, ¶22; (A15). This is just not true. The legislature obviously did not mean to except all relevant information, because Exception (4) only applies to party litigants. The Opinion failed to realize the privilege still applies to relevant evidence when the patient is not a party to the litigation. Curiously, the Opinion cites this Court's decision in *Manos* a few sentences before arguing Exception (4) works in a way that reading *Manos* reveals is obviously not true. See *Id.* at ¶21-22; (A14-15).

The legislative balance struck by Exception (4) is neither "absurd" nor "impractical" as the Opinion intimates. *Id.* at ¶22; (A15). The statute protects a patient's privacy if the patient is not a party to the litigation, but the search for truth and justice overcomes the privilege when the patient is a party to the litigation and the condition is relevant. The statute has never meant relevant evidence is admissible and irrelevant evidence is not. The Opinion's justification for finding a hidden meaning in the statute is wrong.

4. The Opinion expands a privilege in derogation of the common law.

The physician-patient privilege is in derogation of the common law, where no such privilege exists. *Manos*, 202 Ill.2d at 570 (2002). Courts cannot construe statutes in derogation of the common law "beyond what the words of the statute expresses or beyond what is necessarily implied from what is expressed." *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 69 (2004). "Illinois courts have limited all manner of statutes in derogation of the common law to their express language, in order to effect the least—rather than the most—change in the common law." *Id.*

Yet the Opinion expands the statute well beyond its express language. By further restricting Exception (4), the Opinion has construed a statutory privilege that was already in derogation of the common law to be far more expansive.

5. The Opinion renders part of the statute superfluous.

"Each word, clause, and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous." *In re Detention of Lieberman*, 201 Ill.2d 300, 308 (2002). Yet the Opinion strips the phrase "an issue" of its reasonable meaning and then renders it superfluous. Under the Opinion, whether a condition is "an

issue" is no longer part of Exception (4), instead replacing it entirely with the "affirmatively placed in issue" requirement. The Opinion has rendered the actual language used by the legislature meaningless.

6. The Opinion construes the statute against common law rights.

A statute in derogation of the common law must be "strictly construed in favor of the persons sought to be subjected to [its] operation." *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶12. The person subjected to the statute in this case is Scarlett, who seeks evidence available to her at common law. Yet the Opinion construed the statute against her, placing an additional roadblock between her and her common law rights.

7. The Opinion expands an evidentiary privilege.

The physician-patient privilege is an evidentiary privilege. Evidentiary privileges block the fact-finding role of justice by excluding relevant evidence, and such privileges are not favored and must be narrowly construed. *People v. Sevedo*, 2017 IL App (1st) 152541, ¶21. Yet the Opinion greatly expands the privilege by limiting one of its crucial exceptions.

8. The Opinion defines one phrase with a different phrase.

The only real statutory interpretation performed in the Opinion was its attempt to define the phrase "an issue." The Opinion relied on the committee comments to Supreme Court Rule 215(d) to define the phrase, which states a trial court may order an impartial medical exam when "conflicting medical testimony, reports or other documentation has been offered as proof and the party's mental or physical condition is thereby placed in

issue…." Ill. S. Ct. R. 215(d) (eff. March 28, 2011).[5] The comments state that "[m]ere allegations are insufficient to place a party's mental or physical condition 'in issue.'" *Id.*, Committee Comments (adopted Mar. 28, 2011). The Opinion then concludes "in issue" does not mean "relevant." *Palm*, 2017 IL App (3d) 170087, ¶23; (A15-16).

Even when two statutes share identical definitions, "there can be critical differences in context, or limiting language elsewhere in one statute, that qualifies the term in question." *People ex rel. Illinois Dept. of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶29 (the phrase "public utility" is not "literally consonant" with "public utility company"). Yet in this instance, not only do the phrases not share identical definitions, they are not even the same words—the statute refers to "an issue" while the Rule refers to when a "condition is thereby placed in issue…." Even outside of their vastly different contexts, these two phrases are not the same, so what "in issue" means has no bearing on "an issue."

9. The Opinion takes comparative language out of context.

This Court warns against transplanting definitions from one source to another because the context of usage matters. *Id.* Yet that is exactly what the Opinion did with no examination of context. The Rule comment the Opinion seizes on is referencing the need for documentary evidence to justify an impartial medical examination, because the Rule requires conflicting "testimony, reports or other documentation…." Ill. S. Ct. R. 215(d) (eff. March 28, 2011). The reason the comment says allegations are not enough is because the Rule demands more than allegation. Thus, the comment describes the type of evidence necessary to meet the requirement for a very specific procedural rule to apply.

[5] The Rule was amended effective January 1, 2018 after the Opinion was issued. The amendment made no substantive changes.

The comment is not a definition of "in issue," let alone a definition of "an issue," but a reference to the Rule's documentary evidence requirement.

If the Opinion considered the entire context, it would have determined that an examination can only be ordered when it will "materially aid in the just determination of the case…." *Id.* The only type of examination that will materially aid the determination of the case is a relevant one examining a relevant medical condition, which could only be a condition that is "an issue." Just as the only condition that could be "an issue" for Exception (4) is a relevant one, the only condition that could be subject to medical examination in the Rule is a relevant one. The Opinion would have an easier time arguing the Rule supports Exception (4)'s meaning of "an issue" as something relevant, yet it chose the more tenuous route of taking the committee comment out of context and ignoring the rest of the Rule.

10. The Opinion relies on a Rule that has no bearing on the statute.

In any event, a court-ordered medical examination under Rule 215(d) is never subject to the physician-patient privilege. *Doe v. Weinzweig*, 2015 IL App (1st) 133424, ¶32. Yet the Opinion uses the language of the Rule to interpret the statute, despite the Rule never being subject to the privilege.

11. The Opinion utilizes an extrinsic aid the legislature did not draft.

When a statute is ambiguous, the court may "resort to extrinsic aids of statutory construction to determine the legislature's intent, which include consideration of the statute's purpose, necessity for the law and policy concerns that led to its passage." *People v. Boyce*, 2015 IL 117108, ¶22. Yet the extrinsic aid used by the Opinion is a Supreme Court Rule committee comment, which is none of those things. The legislature

did not draft the Supreme Court Rule committee comments, and the policy concerns for the privilege will never be found there. The legislature's policy cannot be found in something the legislature did not create.

12. The Opinion violates public policy.

Statutes are expressions of Illinois public policy. *Independent Trust Corp. v. Kansas Bankers Sur. Co.*, 2011 IL App (1st) 093294, ¶25. Courts must be wary against installing their own notions of policy under the guise of statutory interpretation. *Weingart v. Department of Labor*, 122 Ill.2d 1, 15 (1988). If a question of law must be based, in whole or in part, on public policy, the court does not make such policy. *Clark v. Children's Memorial Hosp.*, 2011 IL 108656, ¶79. Rather, the court discerns the public policy of Illinois as expressed by its constitution, statutes, and long-standing case law. *Id.*

Since the Opinion deemed it necessary to turn to extrinsic aids, it should have turned to the ones that would actually reveal the public policy behind the statute. The statute is a balancing act, and the "privilege and the relevant exceptions thereto (#2, 3, and 4) reflect a sound public policy which respects both society's desire for privacy and its desire to see that the truth is reached in civil disputes." *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 603 (1st Dist. 1986). The legislature struck that balance by excepting the privilege from litigation in which (1) the patient is a party and (2) the patient's condition is an issue. If the patient is not a party, the condition is privileged. If litigation is not occurring, the condition is privileged. If the condition is not relevant, the condition is privileged. But otherwise, and in order to reach society's goal that our courts be arbiters of justice based on truth and not on formulaic games of evidentiary hide-the-ball, the exception applies.

Even a cursory examination of Illinois public policy shows the legislature would have never intended what the Opinion has done. Illinois has entire bodies of law devoted to criminalizing dangerous driving. See the Illinois Motor Vehicle Code, 625 ILCS 5/1-100 *et seq*. The Opinion has thrown an untold number of those laws into jeopardy, as those crimes may become impossible to prove against defendants wielding the Opinion's new privilege.

Furthermore, because "the public has a compelling interest in safe roads, a driver's expectations of privacy are significantly diminished." *People v. Jung*, 192 Ill.2d 1, 5 (2000). Driving is a privilege, not a right. *Id.* "Given that life, limb and property are seriously threatened by drunken driving and given the all too common reality that a driver involved in a motor vehicle accident may be intoxicated, waiver of a driver's privacy interest in his blood or urine test results" is reasonable. *Id.* (rejecting constitutional privacy challenge to blood and urine tests performed after motor vehicle accidents).

The policy of this state is undeniably to protect the public from dangerous drivers by preventing them from raising specious privacy concerns as an excuse to hide their culpability for injuring or killing someone. The Opinion destroys half of the legislature's policy concerns by elevating privacy over justice on such a scale as to let reckless drivers bury the truth and go free. The legislature intended otherwise.

There is no logical path through the rules of statutory construction to reach the Opinion's holding. The list of errors made by the Opinion is staggering: (1) the plain language of the text is ignored, (2) with no finding the language is vague or ambiguous, (3) to find a hidden meaning in the statute, (4) rendering the actual text meaningless, (5) to expand an evidentiary privilege, (6) in derogation of the common law, (7) construed

against common law rights, (8) based on interpreting language that does not appear in the statute, (9) from a Supreme Court Rule committee comment the legislature did not draft, (10) that has no bearing on the statute, (11) was taken out of context, and (12) is contrary to the public policy of Illinois. Only by each of these violations of statutory interpretation—any one of which is good reason to follow the statute as written—can the Opinion reach its conclusion. As a result, the Opinion repeatedly misconstrued the statute. This Court must reverse and apply Exception (4) as written.

B. The two cases relied on by the Opinion are no longer good law and were never well-reasoned.

After razing the rules of statutory construction, the Opinion sought case law to support its holding but could find only two, cherry-picking these two decisions while ignoring at least eight cases holding otherwise. These two cases are no longer good law, and were never well-reasoned. Recent decisions from the same districts have abrogated them, and both rely on a solitary legal source—a single sentence from one case, taken wildly out of context, while ignoring that same case's specific support of Exception (4).

1. *Kraima* and *Pritchard* have been abrogated by more-recent case law.

The Opinion cites *Kraima v. Ausman*, 365 Ill.App.3d 530 (1st Dist. 2006) for the proposition that for Exception (4) to apply, the defendant, "not plaintiff, must have affirmatively placed his physical condition in issue." *Kraima*, 365 Ill.App.3d at 536. *Kraima* cites *Pritchard v. SwedishAmerican Hospital*, 191 Ill.App.3d 388, 404 (2nd Dist. 1989) as the source of this proposition.

Neither case is still good law, with more-recent cases from the same districts abrogating them. The First District rejected the *Kraima* reasoning when it decided *Botsis* three years later, holding the defendant's physical condition was an issue based on the

elements of the charge of reckless homicide against him. *Botsis*, 388 Ill.App.3d at 435. The Second District did the same to *Pritchard* when it ruled in *Anders*, holding the Sexually Violent Person's Commitment Act made the respondent's mental condition an issue. *Anders,* 304 Ill.App.3d at 123.

Botsis and *Anders* do not apply the "affirmatively placed in issue" rationale, and neither do any of the other cases applying Exception (4). The Opinion chose to follow *Kraima* and *Pritchard* despite both the more-recent cases and the vast majority of cases on the subject holding the opposite. *Kraima* and *Pritchard* have miniscule precedential value in light of the other, newer decisions on Exception (4). That the Opinion offers these two cases to support its holding without even a citation to the cases incongruous with it (let alone discussing or distinguishing them) is highly unusual.

2. *Kraima* and *Pritchard* were wrongly decided.

Just like the Opinion, neither *Kraima* nor *Pritchard* discuss the actual language of the statute when holding a statutory privilege in derogation of the common law should expand beyond its text. Ignoring the statutory language directly at odds with the "affirmatively placed in issue" "requirement" led these two cases to abuse the same rules of statutory interpretation as the Opinion, and were wrongly decided as a result.

Reviewing these cases reveals the purported genesis of the "affirmatively placed in issue" requirement is a solitary sentence taken out of context from one case. The Opinion cites *Kraima, Kraima* cites *Pritchard*, and *Pritchard* cites the source of the "affirmatively placed in issue" requirement as *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581 (1st Dist. 1986). *Pritchard*, 191 Ill.App.3d at 404.

But *Petrillo* says something far different. The issue in *Petrillo* was the legislature's position on "whether defense counsel should be permitted to engage in *ex parte* conferences with a plaintiff's treating physicians." *Petrillo*, 148 Ill.App. 3d at 602. The court believed the "legislature's position on this subject can be gleaned from an analysis of the physician-patient privilege statute." *Id.* at 602. The "gleaning" occurred by analyzing the privilege from a plaintiff's perspective. *Id.* at 603. The court first noted the privilege "is not absolute and the statute, accordingly, contains several exceptions wherein the legislature deemed that the protection afforded by the physician-patient privilege ought give way to the public's desire to ascertain the truth." *Id.* The court then used, "for example," what occurs "when an individual files suit and places his mental or physical condition at issue," holding this is implicit consent to a waiver of the plaintiff's privilege. *Id.*

Somehow missed by *Kraima*, *Pritchard*, and the Opinion, is the next paragraph of *Petrillo*: "[t]he privilege and the relevant exceptions thereto (#2, 3 and 4) reflect a sound public policy which respects both society's desire for privacy and its desire to see that the truth is reached in civil disputes." *Id.* *Petrillo* favorably cites Exception (4) as written, and Exception (4) contains nothing even suggesting an "affirmatively placed in issue" requirement.

Kraima and *Pritchard* ignore this sentence, and instead read only the next one, where *Petrillo* says that of "key importance" was "the legislature's determination that it be the patient who, by affirmative conduct, (the filing of a lawsuit) consents to the disclosure of his previously confidential medical information." *Id.* This language, however, is part of the continued example of how a plaintiff waives the privilege by filing

suit. *Petrillo* ultimately rejected the claim that this waiver gave defense counsel an absolute right to *ex parte* conversations with the plaintiff's physicians: "[w]e are unwilling to accept the proposition that the legislature intended the consensual waiver of the physician patient privilege (*See*, Ill.Rev.Stat. 1983, ch. 110, par. 8-802(4)) to apply to anything more than the information necessary to ascertain the truth." *Id.* at 603.

Petrillo never intended what *Kraima*, *Pritchard*, or the Opinion have done. *Petrillo* repeatedly defends both Exception (4) and "society's interest in ascertaining the truth in civil lawsuits." *Id.* at 604. In fact, one of the defendant's arguments was that barring *ex parte* conferences "is tantamount to standing in the way of ascertaining the truth," but this was rejected: "A rule barring *ex parte* conferences … does not stand in the way of discovering the truth; it merely regulates the discovery process…." *Id.* at 606. The court held that "no 'truth' is kept out of court, for the treating physician, as we stated above, is free to testify as to his opinions and conclusions regarding the mental and physical condition placed at issue in the plaintiff's lawsuit." *Id.* at 606.

Nothing in *Petrillo* argues or suggests that Exception (4) be interpreted in some manner other than its ordinary meaning. In fact, society's desire that no truth be kept out of court would be destroyed if Exception (4) were interpreted as the Opinion does, so *Petrillo* cannot support the Opinion, *Kraima*, or *Pritchard*. All *Petrillo* says applicable to Exception (4) is that any investigation into relevant medical conditions in litigation must be done through formal discovery procedures in that litigation, not *ex parte*. A "waiver" of the privilege as discussed in *Petrillo* is not even an issue—Exception (4) means there is not a privilege to waive because the privilege simply does not apply in this situation.

Kraima, *Pritchard*, and the Opinion by extension have misread *Petrillo*. *Petrillo* never intended anyone use the physician-patient privilege as a weapon to keep the truth hidden, because allowing that would destroy the legislature's balance between privacy and justice. The problem with the "affirmatively placed in issue" version of Exception (4) is obvious—defendants would simply never "affirmatively" place relevant physical conditions harmful to their defense "in issue," thus destroying the balance struck by the statute. *Kraima* and *Pritchard* use a misreading of *Petrillo* and grossly incorrect statutory interpretation to reach a decision *Petrillo* would never allow. Destroying society's interest in ascertaining the truth in civil suits is not the holding of *Petrillo*, and *Kraima* and *Pritchard* were wrongly decided as a result. The Opinion relied on faulty case law, and must be reversed.

IV. THE OPINION'S HOLDING IS DANGEROUS AND ILLOGICAL.

The path the Opinion took to reach the "affirmatively placed in issue" holding is wrong and warrants reversal for its improper statutory interpretation and incorrectly analyzed case law. But the holding is far worse than the suspect legal reasoning that led to it. The Opinion is both dangerous and illogical, putting Illinois citizens at risk of greater harm and placing Illinois courts in a position to struggle with the holding's inescapable consequences.

A. The Opinion will increase the risk of death and injury in Illinois.

The Opinion believes only Ruben's driving is relevant, and "the reason for [his] driving" is irrelevant. *Palm*, 2017 IL App (3d) 170087, ¶26; (A16). This proposition is not just wrong, it is dangerous. Affirming this finding would radically alter entire statutes and bodies of law designed to protect Illinois citizens.

If "the reason for the driving" is irrelevant, drunk driving is no longer a crime. Driving against a doctor's orders is no longer a crime. Driving while blind is no longer reckless. These drivers are now just poor drivers, because only "the driving" matters. What was once drunk or reckless driving is now a basic traffic violation, because the "reason for the driving" no longer matters. If a drunk driver makes it home safely, he must go unpunished. In fact, by the Opinion's logic, if a police officer were to watch someone have ten drinks and get behind the wheel, the officer is powerless to act. Only "the driving" matters, and the drunk driver must be given a chance to drive safely because he has not yet committed any crime to make "the driving" matter.

In reality, the public policy of Illinois is to criminally punish these drivers as a means to reduce this behavior before death and injuries occur. See the Illinois Vehicle Code, 625 ILCS 5/1-100, *et seq*. As such, Illinois rightfully punishes this conduct before the accident occurs, because the accident cannot be undone. The sad reality is more people will drive drunk or recklessly if the only legal risk they face is an improper lane usage ticket because "the reason" for their dangerous driving is privileged. Without the specter of significant fines, loss of driving privileges, and jail time, some number of individuals will choose to put everyone else at risk and drive in a dangerous state.

Illinois will be a more dangerous place if the Opinion guts our traffic safety laws. If only "the driving" is an issue, and no one can discover a defendant's physical condition, the defendant in *Botsis* walks away from a reckless homicide he irrefutably caused because the People can never prove it was anything but an accident. See *Botsis*, 388 Ill.App.3d. at 426-28. The *Botsis* defendant would be back on the road driving against his doctor's orders, putting all Illinois drivers at risk. If someone is drunk, blind,

or at risk of uncontrolled seizures, they should not be operating a large machine capable of killing, paralyzing, or maiming anyone unlucky enough to be in their path. Illinois citizens bear a substantial risk of accidental injury merely by driving at all, and to compound it by cloaking knowingly dangerous driving in privilege violates the public policy of Illinois to protect its citizens from these drivers.

B. The Opinion allows defendants to affirmatively place a plaintiff's condition in issue, but not the reverse.

The Opinion seizes on the fact that plaintiffs like Scarlett open the door to revealing medical information by filing suit because they chose to file suit. The Opinion is fine with Ruben being allowed to explore every nick, bruise, and cold Scarlett has ever suffered on the off chance it may somehow mitigate the injuries Ruben inflicted on her, because she "affirmatively" filed suit. But the Opinion ignored that Ruben did something "affirmative" himself: filing an inflammatory affirmative defense in which he actually blames Scarlett for him hitting her with his truck. Ruben claims Scarlett was drunk or on drugs when he hit her, and sought discovery against her to try to prove those claims. (C15-16)

Why Scarlett can be subjected to discovery based on "affirmative" matter pled against her but Ruben cannot is not discussed in the Opinion because it is indefensible and illogical. Scarlett was neither drunk nor on drugs when Ruben injured her, but Ruben alleges she was, and the absurdity of the Opinion's holding becomes obvious if, for the sake of argument, Scarlett is in such a hypothetical situation. If Scarlett told a paramedic she was drunk or high on drugs when Ruben ran her over, under the Opinion's logic, this information has to be privileged—Ruben "affirmatively" placed Scarlett's hypothetical intoxication "at issue" by filing an affirmative defense. See *D.C. v. S.A.*, 178

Ill.2d 551, 564-65 (1997) (holding defendant affirmatively raised plaintiff's negligence through allegation of comparative negligence). Ruben bears the burden of proof on his affirmative defense and Scarlett did not choose to have his affirmative matter pled back against her.

If Scarlett were intoxicated, and Ruben's affirmative defense is the only thing placing that intoxication "in issue," the only logically consistent result from the Opinion would be to bar Ruben from discovering anything Scarlett told the hypothetical paramedics. If a "plaintiff cannot waive someone else's privilege by merely … making certain allegations," *Palm*, 2017 IL App (3d) 170087, ¶24; (A16), then a defendant must be unable to do the same by merely making certain allegations. Otherwise, defendants alone get the benefit of the statute and the Opinion's "affirmatively placed in issue" requirement despite the statute plainly applying to all actions "brought by or against the patient …." 735 ILCS 5/8-802(4). The Opinion prevents plaintiffs from discovering proof of negligence because the defendant did not choose to be sued, yet allows the same defendants to discover proof of a plaintiff's negligence via an affirmative defense that plaintiffs did not choose to be sued over. Ruben could be driving while legally blind and no one would ever know, but he could seek discovery into any medical condition he alleges in an affirmative defense.

This is absurd, unjust, and unconscionable. According to the Opinion, a drunk driver could kill a deaf child in a cross walk and the only evidence presented to a jury would be the drunk blaming the deafness of the child. What the Opinion has done is unbalance the availability of the truth, giving defendants a powerful new tool to escape

conviction and liability by hiding their condition from discovery, while the People and the injured are left without a remedy.

Still, applying the Opinion to a defendant's affirmative defenses is just as absurd as applying it to a plaintiff's complaint. If Scarlett had told paramedics she was high or drunk when she entered the intersection, Ruben should be allowed to discover that information because it goes to contributory negligence and Scarlett's own fault if she were unable to see Ruben coming. That is certainly "an issue." Under the Opinion's logic, however, that conversation must be off limits because Ruben's claim of Scarlett's negligence is not one "affirmatively placed in issue" by Scarlett. This situation is just as unfair as the one before the Court, yet it is the result the Opinion demands, and further evidence the Opinion was wrongly decided.

C. No other privacy-based privilege places privacy above the safety of others.

According to the Opinion, so long as the defendant driver does not "affirmatively" raise their condition, that condition will never be revealed. Make no mistake, this will be the default scenario. A defendant will never affirmatively raise voluntary intoxication or knowing impairment as a defense to a car crash, opening themselves to enhanced charges or damages, when the other option is claiming it was merely an "accident." If Ruben's options to defend this case are telling the jury he (A) did not see Scarlett and it was an accident, or (B) could not see Scarlett because he is driving while blind, he is choosing (A) every time to avoid willful and wanton conduct damages. No one will ever know who is driving with a dangerous medical condition if the Opinion stands, and these drivers will go right back to driving.

By never revealing a defendant's dangerous condition unless the defendant chooses, the Opinion has created something entirely new in Illinois—a privacy privilege that weighs privacy more than the safety of innocent third parties. Much stronger privileges do not dare reach this far. Attorneys in Illinois "shall" violate attorney-client privilege and reveal information to the extent the attorney "reasonably believes necessary to prevent reasonably certain death or substantial bodily harm." Ill. R. Prof'l Conduct R. 1.6(c) (eff. Jan. 1, 2016). Therapists may violate the Mental Health and Developmental Disabilities Confidentiality Act when there is a risk of serious physical injury to others. 740 ILCS 110/11(ii), (viii).

If Ruben tells his attorney in confidence he is driving despite being blind, the attorney is obligated to call the police to prevent reasonably certain injury from a blind person driving. But per the Opinion, if Ruben tells a physician he is driving despite being blind, the physician is powerless to say anything. Even if Ruben is in court facing reckless homicide charges after killing someone with his vehicle, the physician cannot say a word unless Ruben "affirmatively" reveals his condition. But he never would.

The Opinion's new version of the privilege is absurd and unconscionable. The legislature did not pass the privilege to help defendants escape liability and continue to place others in danger when the exceptions are all designed to prevent that from happening.

D. The Opinion is a solution in search of a problem.

The Opinion claims that if plaintiffs are able to get defendants' medical records, plaintiffs would use this information to "leverage settlement," and defendants would be "compelled to settle to avoid disclosing certain health conditions, procedures, or

treatments that have nothing to do with their liability." *Palm*, 2017 IL App (3d) 170087, ¶28; (A14). The Opinion has invented a problem to provide its own solution. Parties have been getting these records for decades prior to the Opinion without any such issue because the trial courts already have the tools to manage this "problem."

Trial courts "must be allowed to exercise their sound discretion over the course and conduct of the pretrial discovery process." *Vision Point of Sale, Inc. v. Haas*, 226 Ill.2d 334, 345 (2007). This discretion encompasses many solutions to the supposed "problem" raised by the Opinion—protective orders, HIPAA orders, *in camera* reviews, and motions *in limine*, just to name a few. No competent legal counsel would allow anyone to "leverage settlement" on an irrelevant medical condition that will never come into evidence. Irrelevant conditions are not even included in Exception Four, because irrelevant matters are never "an issue."

This is not, and has never been, a problem. The trial courts are already fully equipped to manage these routine evidentiary issues without the Opinion allowing the guilty to go free and the injured to have no recourse. The bigger problem, and one the Opinion is strangely not at all concerned about, is defendants "leveraging settlement" over plaintiffs and prosecutors by being allowed to hide their reckless driving from the jury.

E. Fundamental fairness and substantial justice would demand the Opinion's version of the privilege yield every time it was raised.

Even if the Opinion were correct that the privilege applied, the interests of justice so obviously favor Scarlett that upholding the privilege would be a grave injustice. In *D.C. v. S.A.*, 178 Ill.2d 551 (1997), a plaintiff-pedestrian filed suit for injuries he sustained when he was hit by a car. *D.C.*, 178 Ill.2d at 555. The defendant alleged the

plaintiff was the sole proximate cause of the crash, and discovered a letter from the plaintiff's psychiatrist to the plaintiff's attorney revealing the plaintiff might have been attempting suicide at the time of the accident. *Id.* The plaintiff claimed his medical records were privileged according to the therapist-recipient privilege, and the appellate court agreed, holding a plaintiff cannot waive his privilege without affirmatively raising the condition as an element of his claim. *Id.* at 558. There was one dissent to the appellate court's ruling that argued the privilege "was being unfairly utilized by plaintiff in this case as a sword to the detriment of defendants." *Id.*

This Court agreed with the dissent and reversed. The Court first noted that no privilege is absolute, and in the proper circumstances, a privilege must yield to justice and fundamental fairness. *Id.* at 568-69. The information the defendant sought had "the potential to absolve defendants from any liability," and the interests of justice demanded the Court "tip the balance in favor of disclosure and truth." *Id.* at 569. This Court held that the interests of fundamental fairness and substantial justice outweighed the privilege, which was being used to "prevent disclosure of relevant, probative, admissible, and not unduly prejudicial evidence that has the potential to negate the claim plaintiff asserted against defendants and absolve them of liability." *Id.*

Scarlett does not believe the Court needs to reach an analysis of fundamental fairness to reverse the Opinion because Exception (4) means the privilege is not applicable at all in this case. Nevertheless, substantial justice and fundamental fairness would demand the privilege yield, just as it did in *D.C.* Allowing Ruben to drive while blind, run down Scarlett with his car, and then hide his condition, all while asserting affirmative matter alleging Scarlett is the cause of her injuries, is just *D.C.* with the

defendant and plaintiff swapped. Ruben's medical records would likely completely absolve Scarlett of the affirmative matter Ruben has pled against her, revealing that Ruben's denial of negligence and his attempts to paint Scarlett as the sole proximate cause of her injuries were a farce.

Allowing Ruben to abuse the privilege to hide proof of his negligence from his victim, at the same time he blames her for the injuries she sustained when he admittedly hit her with his truck, is unjust and unconscionable. If the Opinion stands, this Court is inviting fundamental fairness challenges in every case a defendant invokes the "affirmatively placed in issue" requirement to hide their criminal, reckless, and negligent driving, and those challenges would be well-taken. Defendants should not be allowed to use a privilege designed for candor between a doctor and patient to escape criminal charges or leave their injured victims without recourse.

V. CONCLUSION.

The legislature never intended the physician-patient privilege to be a weapon for dangerous drivers to wield against their own victims. The legislature never intended to give dangerous drivers unilateral control over whether or not the truth of their actions is brought to light so they may be brought to justice. The legislature never intended to leave the People and the injured with no recourse against dangerous drivers who choose to hide all proof of their negligent, reckless, or criminal conduct. But the Opinion allows all of this. The Opinion is wrong.

For the foregoing reasons, Scarlett Palm prays the Court reverse the Appellate Court's Opinion, affirm the discovery orders of the trial court compelling Ruben Holocker to answer discovery regarding his medical condition, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 40 pages.

Christopher H. Sokn

CERTIFICATE OF FILING/SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

I, Christopher H. Sokn, an attorney, certify that on April 25, 2018 I caused to be filed the foregoing **BRIEF OF PLAINTIFF-APPELLANT** with the Supreme Court of Illinois through the Odyssey E-Filing System.

I, Christopher H. Sokn, an attorney, further certify that on April 25, 2018 I caused the foregoing **BRIEF OF PLAINTIFF-APPELLANT** to be served on the parties through the Odyssey E-Filing System. In addition, I further certify that on April 25, 2018 I caused the foregoing document to be emailed to all primary and secondary email addresses of the persons named below:

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No. 123152

IN THE
SUPREME COURT OF ILLINOIS

SCARLETT PALM,	)	
	)	
Plaintiff-Appellant,	)	On Appeal from the Illinois Appellate Court,
	)	Third District, Case No. 3-13-0087
v.	)	
	)	There Heard on Appeal from the Circuit Court
RUBEN HOLOCKER,	)	of the Tenth Judicial Circuit, Marshall County,
	)	Illinois, Case No. 16 L 5
Defendant-Appellee,	)	
	)	Hon. Thomas A. Keith and
and	)	Hon. Michael P. McCuskey,
	)	*Judges Presiding*
KARL BAYER,	)	
	)	
Contemnor-Appellee.	)	

APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT

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INDEX TO APPENDIX

(735 ILCS 5/8-802) (from Ch. 110, par. 8-802)

Sec. 8-802. Physician and patient. No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, or as authorized by Section 8-2001.5, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either first degree murder by abortion, attempted abortion or abortion, (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act, (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment, (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code, (10) in prosecutions where written results of blood alcohol tests are admissible under Section 5-11a of the Boat Registration and Safety Act, (11) in criminal actions arising from the filing of a report of suspected terrorist offense in compliance with Section 29D-10(p)(7) of the Criminal Code of 2012, (12) upon the issuance of a subpoena pursuant to Section 38 of the Medical Practice Act of 1987; the issuance of a subpoena pursuant to Section 25.1 of the Illinois Dental Practice Act; the issuance of a subpoena pursuant to Section 22 of the Nursing Home Administrators Licensing and Disciplinary Act; or the issuance of a subpoena pursuant to Section 25.5 of the Workers' Compensation Act, (13) upon the issuance of a grand jury subpoena pursuant to Article 112 of the Code of Criminal Procedure of 1963, or (14) to or through a health information exchange, as that term is defined in Section 2 of the Mental Health and Developmental Disabilities Confidentiality Act, in accordance with State or federal law.

Upon disclosure under item (13) of this Section, in any criminal action where the charge is domestic battery, aggravated domestic battery, or an offense under Article 11 of the Criminal Code of 2012 or where the patient is under the age of 18 years or upon the request of the patient, the State's Attorney shall petition the court for a protective order pursuant to Supreme Court Rule 415.

In the event of a conflict between the application of this Section and the Mental Health and Developmental Disabilities Confidentiality Act to a specific situation, the provisions of the Mental Health and Developmental Disabilities Confidentiality Act shall control.

(Source: P.A. 98-954, eff. 1-1-15; 98-1046, eff. 1-1-15; 99-78, eff. 7-20-15.)

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
MARSHALL COUNTY

SCARLETT PALM,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16 L 5
	)	
RUBEN HOLOCKER,	)	
	)	
Defendant.	)	

Defendant's Answers To:

INTERROGATORIES TO DEFENDANT RUBEN HOLOCKER

NOW COMES Plaintiff, SCARLETT PALMM, by and through her attorney, PHILIP M. O'DONNELL of KINGERY DURREE WAKEMAN & O'DONNELL, ASSOC., and hereby requests Defendant, CHARLES D. KLESCEWSKI, to deliver sworn answers to the following Interrogatories to the offices of Kingery Durree Wakeman & O'Donnell, Assoc., 416 Main Street, Suite 915, Commerce Building, Peoria, Illinois, within twenty-eight (28) days of receipt thereof, pursuant to Supreme Court Rule 213:

1. State the full name of the Defendant answering, as well as your current residence address, date of birth, marital status, driver's license number and issuing state, and social security number, and, if different, give the full name, as well as the current residence address, date of birth, marital status, driver's license number and issuing state, and social security number of the individual signing these Answers.

ANSWER: Ruben Holocker, P.O. Box 92, Lacon, IL 61540, [redacted]-63, Single, [redacted]-3001 IL, ***-**-1974.

2. State the full name and current residence address of each person who witnessed or claims to have witnessed the occurrence that is the subject of this suit.

ANSWER: The parties to the this litigation.

3. State the full name and current residence address of each person not named in Interrogatory No. 2, above, who was present and/or claims to have been present at the scene immediately before, at the time of, and/or immediately after the occurrence.

ANSWER: Mike Hulse, 5810 Galena Road, Peoria, IL 61614
Richard Weers, 686 CR 137 SE, Lacon, IL 61540
Angie Davis, 704 N High, Lacon, IL 61540
Mike Davis, 724 Wilmon Street, Chillicothe, IL

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ANSWER: No.

12. Have you ever been convicted of a misdemeanor involving dishonest, false statement or a felony? If so, state the nature thereof, the date of the conviction, and the court and the caption in which the conviction occurred. For the purpose of this Interrogatory, a plea of guilty shall be considered as a conviction.

ANSWER: No.

13. Had you consumed any drugs or medication within 24 hours immediately prior to the occurrence? If so, state the names and addresses of those from whom it was obtained, where it was used, the particular kind and amount of drug or medication so used by you, and the names and current residence addresses of all persons known by you to have knowledge concerning the use of said drug or medication.

ANSWER: No.

14. Were you employed on the date of the occurrence? If so, state the name and address of your employer, and the date of employment or termination, if applicable. If you answer is in the affirmative, state the position, title and nature of your occupational responsibilities with respect to your employment.

ANSWER: No.

15. What was the purpose and/or use for which the vehicle was being operated at the time of the occurrence?

ANSWER: Leisurely driving.

16. State the names and addresses of all persons who have knowledge of the purpose for which the vehicle was being used at the time of the occurrence.

ANSWER: No one besides myself.

17. State the name and address of the registered owner of each vehicle involved in the occurrence.

ANSWER: I was the owner of the only vehicle involved in this incident.

18. Have you ever had your driver's license suspended or revoked? If so, state whether it was suspended or revoked, the date it was suspended or revoked, the reason for the

suspension or revocation, the period of time for which it was suspended or revoked, and the state that issued the license.

ANSWER: Suspended once on account of administrative error when Dr. Nau failed to sign medical authorization.

19. Do you have or have you had any restrictions on your driver's license? If so, state the nature of the restriction(s).

ANSWER: No.

20. Do you have any medical and/or physical condition which required a physician's report and/or letter of approval in order to drive? If so, state the nature of the medical and/or physical condition, the physician or other health care professional who issued the letter and/or report, and the names and addresses of any physician or other health care professional who treated you for this condition prior to the occurrence.

ANSWER: Yes, diabetic reasons, Dr. Christopher Nau, 4th street, Chillicothe, IL 274-4336.

21. State the name and address of any physician, ophthalmologist, optician or other health care professional who performed any eye examination of you within the last five (5) years, and the dates of each such examination.

ANSWER: The Defendant objects to the question as it violates HIPPA, doctor-patient privilege, and the Defendant has not placed his medical condition at issue in this matter.

22. State the name and address of any physician or other health care professional who examined and/or treated you within the last ten (10) years, and the reason for such examination and/or treatment.

ANSWER: The Defendant objects to the question as it violates HIPPA, doctor-patient privilege, and the Defendant has not placed his medical condition at issue in this matter.

23. List the names and addresses of all other persons (other than yourself and persons heretofore listed) who have knowledge of the facts of the occurrence and/or of the injuries and damages claimed to have resulted therefrom.

ANSWER: None other than those listed above.

24. Please state the name and current address of each **LAY WITNESS** as identified and defined in Illinois Supreme Court Rule 213(f), and with respect to each witness, provide the following:

(a) The subject matter on which the witness will testify;

(b) The lay opinion testimony each witness is expected to offer; and

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(c) The factual bases on which each witness relies for those lay opinions.

ANSWER: Parties will testify to the facts immediately before, during and after the subject accident. Defendant will testify as to all conversations between the parties.

25. Please state the name and current address of each **INDEPENDENT EXPERT WITNESS** as identified and defined in Illinois Supreme Court Rule 213(f), and with respect to each witness, provide the following: Defendant reserves the right to seasonably update response with proper notice to all parties.

(a) The subject matter on which the witness will testify;

(b) The opinions and/or conclusions of each witness, and the factual bases therefore;

(c) The qualification for each identified witness; and

(d) Identify by date, each report prepared for this case by the witness identified in response to this Interrogatory.

ANSWER: Unknown at this time, the Defendant reserves the right to seasonably update response with proper notice to all parties.

26. Please state the name and current address of each **CONTROLLED EXPERT WITNESS** as identified and defined in Illinois Supreme Court Rule 213(f), and with respect to each witness, provide the following:

(a) The subject matter on which the witness will testify;

(b) The opinions and/or conclusions of each witness, and the factual bases therefore;

(c) The qualification for each identified witness; and

(d) Identify by date, each report prepared for this case by the witness identified in response to this Interrogatory.

ANSWER: Unknown at this time, the Defendant reserves the right to seasonably update response with proper notice to all parties.

27. Identify any statements, information and/or documents known to you and requested by any of the foregoing Interrogatories which you claim to be work product or subject to any common law or statutory privilege, and with respect to each Interrogatory, specify the legal basis for the claim as required by Illinois Supreme Court Rule 201(n).

C- [illegible]

ANSWER: None at this time, investigation continues.

SCARLETT PALM, Plaintiff,

By: _____
Philip M. O'Donnell

Philip M. O'Donnell
KINGERY DURREE WAKEMAN
& O'DONNELL, ASSOC.
416 Main Street
Commerce Bank Building, Suite 915
Peoria, IL 61602-1166
Phone: (309) 676-3612
Fax: (309) 676-1329
Email: pmodonnell@kdwolaw.com

ATTESTATION

STATE OF ILLINOIS)
) SS.
COUNTY OF Marshall)

RUBEN HOLOCKER, being first duly sworn on oath, deposes and states that he is the Defendant in the above-captioned matter; that he has read the foregoing documents, and the Answers to Interrogatories and Response to Request for Production herein and they are true, correct and complete to the best of his knowledge and belief.

Ruben Holocker
RUBEN HOLOCKER

Subscribed and sworn to before me this 29 day of July, 2016.

Erin Lynn Olson
Notary Public

ERIN LYNN OLSON
"OFFICIAL SEAL"
My Commission Expires
March 26, 2020

C- 0

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing DEFENDANT'S ANSWERS TO INTERROGATORIES upon the below-listed attorney of record, by electronic transmission sent before 5:00 p.m. on August 1, 2016.

Philip M. O'Donnell
KINGERY, DURREE, WAKEMAN &
O'DONNELL ASSOC.
416 Main Street, Suite 915
Peoria, IL 61602-1166
pmodonnell@kdwolaw.com

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

JoAnn Paxton

Karl E. Bayer
COMPTON LAW GROUP
85 Market Street
Elgin, IL 60123
847-742-6100
kbayer@comptonlawgroup.net
jpaxton@comptonlawgroup.net

C-

2017 IL App (3d) 170087

Opinion filed December 11, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

SCARLETT PALM,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Marshall County, Illinois.
	)	
v.	)	
	)	Appeal No. 3-17-0087
RUBEN HOLOCKER,	)	Circuit No. 16-L-5
	)	
Defendant	)	
	)	
(Karl Bayer,	)	
	)	Honorable Thomas A. Keith,
Contemnor-Appellant).	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Justices O'Brien and Wright concurred with the judgment and opinion.

OPINION

¶ 1 Scarlett Palm filed a personal injury lawsuit against Ruben Holocker on June 22, 2016. Contemnor, Karl Bayer, represented Holocker. Contemnor invited civil contempt to challenge the circuit court's discovery order that compelled Holocker to answer written discovery. He argues that Holocker's statutory physician-patient privilege (735 ILCS 5/8-802 (West 2016)) protects his private medical information from discovery unless he affirmatively places his physical or mental health at issue. Palm counters that the physician-patient privilege does not apply in civil cases where the defendant's physical or mental health is relevant to the case; the

statute does not require the defendant-patient to affirmatively place his or her health at issue. We agree with contemnor. We reverse the circuit court's discovery order and vacate its contempt order.

¶ 2 BACKGROUND

¶ 3 Palm's complaint alleged that on October 18, 2014, Holocker struck Palm, a pedestrian, with his vehicle at a crosswalk in Lacon. Palm alleged that Holocker failed to keep a proper lookout, failed to stop at a stop sign, and failed to yield the right-of-way to a pedestrian.

¶ 4 Holocker's answer admitted that his vehicle struck Palm; however, he denied liability. He filed an affirmative defense, which claimed that Palm improperly crossed the street, failed to keep a proper lookout, and was under the influence of drugs or alcohol when she crossed the street. Holocker further alleged that Palm's negligence rendered her 50% or more at fault for her injuries. Palm denied Holocker's allegations.

¶ 5 During initial discovery, Palm sent Holocker the motor vehicle interrogatories provided in the appendix to Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007). Interrogatory No. 20 of the Motor Vehicle Interrogatories to Defendants asks:

> "20. Do you have any medical and/or physical condition which required a physician's report and/or letter of approval in order to drive? If so, state the nature of the medical and/or physical condition, the physician or other health care professional who issued the letter and/or report, and the names and addresses of any physician or other health care professional who treated you for this condition prior to the occurrence." Ill. S. Ct. R. 213, Appendix.

¶ 6 In response, Holocker disclosed that he needed a letter of approval for "diabetic reasons." He also disclosed the physician who writes his letters, Dr. Nau, and admitted the Secretary of State once suspended his license when Dr. Nau "failed to sign [a] medical authorization."

¶ 7 Holocker objected to the two ensuing interrogatories. They requested Holocker to:

> "21. State the name and address of any physician, ophthalmologist, optician or other health care professional who performed any eye examination of you within the last five years and the dates of each such examination.
>
> 22. State the name and address of any physician or other health care professional who examined and/or treated you within the last 10 years and the reason for such examination and/or treatment." Ill. S. Ct. R. 213, Appendix.

¶ 8 Holocker's objections claimed that these interrogatories "violate[ ] HIPAA, doctor-patient privilege, and the Defendant has not placed his medical condition at issue in this matter."

¶ 9 Palm filed a motion to compel Holocker's responses. At the hearing on September 20, 2016, Palm's counsel argued that Holocker's abilities to see and drive "are at issue in this case because he drove his vehicle into a pedestrian." Contemnor argued that Holocker's physician-patient privilege protects his private health information, regardless of its relevance, unless he affirmatively places his health at issue. Alternatively, contemnor stipulated that Holocker possessed a valid license when the collision occurred; his medical condition was irrelevant because the Secretary of State legally permitted him to drive. The court granted Palm's motion and ordered Holocker to answer the interrogatories. Over contemnor's objection, the court also entered a Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C.

§ 1320d *et seq.* (2012)) order that applied to both Palm and Holocker. Palm's counsel sent Dr. Nau and the Secretary of State subpoenas requesting Holocker's medical records pursuant to the HIPAA order.

¶ 10 Despite the court's order, Holocker refused to respond to Palm's interrogatories. Contemnor informed Palm's counsel that he was "simply protecting [his client's] important natural right to privacy." Palm filed a motion requesting sanctions. She asked the court to strike Holocker's denial of liability, enter a default judgment, and award attorney fees.

¶ 11 At the hearing on January 4, 2017, contemnor again argued that Holocker's privilege protects his medical information regardless of its relevance to the case. Alternatively, he argued that fact issues, such as whether Holocker looked in Palm's direction before the collision, precluded any determination as to the relevance of Holocker's vision or other medical conditions. Palm again argued that Holocker's health and vision were relevant to the case. Her counsel cited Marshall County public records showing Holocker had "seven or eight" prior collisions and received "a dozen traffic citations *** in the last 20 years."

¶ 12 The court found that Palm had "legitimate reasonable cause to believe that there could be some sight problems here that could have been related to this accident, and [she's] got a right to look for that." The court held Holocker's counsel in civil contempt. The contempt order imposed a $5-per-day fine until contemnor purged his contempt by submitting Holocker's interrogatory responses to Palm's counsel. This appeal ensued.

¶ 13 ANALYSIS

¶ 14 Contemnor appeals the court's civil contempt order pursuant Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016). Rule 304(b)(5) makes contempt orders appealable without a special finding. Although discovery orders are not ordinarily appealable, litigants may test the

correctness of a discovery order through contempt proceedings. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). In such cases, "[r]eview of the contempt finding necessarily requires review of the order upon which it is based." *Id.* (citing *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 189 (1991)).

¶ 15 The discovery and contempt orders at issue address the two interrogatories to which Holocker objected. However, neither party's brief addressed whether the interrogatories seek privileged information. Both parties briefed and argued whether the privilege applies at all in this case, not whether the privilege specifically applies to the two interrogatories. Palm intended to obtain Holocker's medical records from medical providers he disclosed in his responses. If the privilege applies, the interrogatories are pointless; Palm may not obtain Holocker's medical records regardless of who treated him or when he received treatment.

¶ 16 We are dutifully cognizant of our supreme court's expectation that appellate courts observe judicial restraint. See *People v. White*, 2011 IL 109689, ¶ 153. However, if we limit our review to the two interrogatories in this case, our decision would resolve nothing. The issues would not change, and the parties would simply raise the same arguments in a second appeal after contemnor sought a protective order or other injunctive relief to protect Holocker's medical records from Palm's subpoenas (see Ill. S. Ct. R. 307(a)(1) (eff. Jan. 1, 2016); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214 (2000); *Bush v. Catholic Diocese of Peoria*, 351 Ill. App. 3d 588 (2004)). In the interest of efficiently administering justice, we address the ultimate dispute raised in the parties' briefs. We hold that under section 8-802(4), defendants maintain their physician-patient privilege until they waive it by affirmatively placing their health at issue.

¶ 17 I. Discovery Order

¶ 18 The parties dispute whether the statutory physician-patient privilege (735 ILCS 5/8-802 (West 2016)) applies to this case. Normally, discovery orders are not reversed absent a manifest abuse of discretion; however, "the applicability of a statutory evidentiary privilege, and any exceptions thereto, are matters of law subject to *de novo* review." *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). Contemnor waived Holocker's HIPAA objection by failing to address the issue in his brief. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 19 The physician-patient privilege protects patients' medical records from disclosure without their consent. 735 ILCS 5/8-802 (West 2016). Patients' medical records contain "information regarding diagnosis, examinations, tests, or treatment rendered." *Pritchard v. SwedishAmerican Hospital*, 191 Ill. App. 3d 388, 403 (1989). Medical care providers acquire and record this information because it is necessary to enable the provider to serve or treat the patient. See *id.* at 404. Thus, patients' medical records are privileged unless a statutory exception applies. See 735 ILCS 5/8-802 (West 2016).

¶ 20 The privilege is subject to 14 enumerated exceptions. The exception at issue, section 8-802(4), states the privilege is inapplicable "in all actions brought by or against the patient *** wherein the patient's physical or mental condition is an issue." 735 ILCS 5/8-802(4) (West 2016). Palm contends that "an issue" means "relevant to the case." Further, Palm argues that we must construe the privilege as narrowly as possible because it did not exist at common law. Contemnor counters that a plaintiff cannot force a defendant to disclose privileged medical information, regardless of its relevance, simply by pleading allegations that implicate the defendant's health.

¶ 21 Our supreme court has held that the privilege's purposes are to "encourage free disclosure between a doctor and a patient and to protect the patient from embarrassment and

invasion of privacy that disclosure would entail." *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 575 (2002). The privilege illustrates a "legislative balancing between relationships that society feels should be fostered through the shield of confidentiality and the interests served by disclosure of the information." *Id.* at 575-76.

¶ 22 When we interpret statutes, even " 'statutes in derogation of the common law,' " we must observe the statute's legislative purpose and construe it "in such a way as to avoid 'impractical or absurd results.' " *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶¶ 19, 21. The privilege's purposes indicate that "an issue" in section 8-802(4) does not mean "relevant." If it did, the privilege would not be a "legislative balancing" between confidentiality and "the interests served by disclosure of information." Disclosing irrelevant information serves no interest. If the legislature meant section 8-802(4) to except all relevant medical information from the privilege's scope, it would have simply stated the privilege does not apply in any litigation—irrelevant evidence is neither subject to disclosure nor admissible regardless of its subject matter. See Ill. R. Evid. 701 (eff. Jan. 1, 2011); Ill. S. Ct. R. 201(b) (eff. July 30, 2014); R. 412 (eff. Mar. 1, 2001)

¶ 23 Similar to section 8-802(4)'s requirement that the defendant's physical or mental condition be "an issue" for the exception to apply (735 ILCS 5/8-802(4) (West 2016)), Illinois Supreme Court Rule 215(d)(1) (eff. Mar. 28, 2011) requires that a party's "mental or physical condition" be "placed in issue" before a court may order a physical or mental examination. Rule 215's latest committee comments state: "Paragraph (d) provides that a trial court may order impartial medical examinations only where the parties have presented conflicting medical testimony, reports or other such documentation which places a party's mental or physical condition 'in issue' ***. *Mere allegations are insufficient to place a party's mental or physical*

condition 'in issue.' " (Emphasis added.) Ill. S. Ct. R. 215(d), Committee Comments (adopted Mar. 28, 2011). This language implies that "in issue" does not mean "relevant."

¶ 24 We agree with contemnor that section 8-802(4) applies only where a defendant affirmatively presents evidence that places his or her health at issue. Neither the nature of a plaintiff's cause of action nor factual allegations in a plaintiff's complaint waive a defendant's physician-patient privilege. See *Kraima v. Ausman*, 365 Ill. App. 3d 530, 536 (2006) ("In order for [section 8-802(4)] to apply, the patient *** not plaintiff, must have affirmatively placed his physical condition in issue."); *Pritchard*, 191 Ill. App. 3d at 405. A plaintiff cannot waive someone else's privilege by merely filing a lawsuit or making certain allegations.

¶ 25 Under section 8-802(4), defendants affirmatively place their health at issue when they utilize a physical or mental condition to defend the case. Two examples are where a defendant cites a health condition to dispute a plaintiff's factual allegations (*Doe v. Weinzweig*, 2015 IL App (1st) 133424-B) or where a defendant files an affirmative defense that claims a sudden, unforeseeable health condition caused the allegedly tortious conduct (*Burns v. Grezeka*, 155 Ill. App. 3d 294 (1987)). In either example, the plaintiff has the right to test the claim's merit by obtaining the defendant's medical records, just as defendants have the right to contest plaintiffs' personal injury claims by obtaining their medical records.

¶ 26 Absent Holocker affirmatively placing his health at issue, we see no compelling reason to vitiate his privilege. His medical records have no bearing on his liability. Holocker's driving, not the reason for his driving, is at issue; he either drove negligently or he did not. If Holocker possessed a valid license and operated his vehicle as a reasonably prudent person would, then he is not liable for Palm's injuries regardless of his health or vision. If Holocker drove negligently

and proximately caused Palm's injuries, then he is liable. He has not asserted a defense or any other affirmative matter that attributes his driving to a health condition.

¶ 27 In arguing that Holocker's health and vision is relevant in this case, Palm points to his driving record, which indicates he participated in several prior accidents and received prior traffic citations. Holocker's driving record, if admissible, stands on its own. The fact that he caused prior accidents or received citations has no bearing on his health or vision in this case. Palm's focus on Holocker's health or vision is a red herring that averts attention from the liability issue—whether he operated his vehicle negligently when this collision occurred.

¶ 28 Along that same line, Palm's interpretation of section 8-802(4) permits plaintiffs to leverage settlement based on the contents of a defendant's medical records rather than his or her potential liability. If plaintiffs could waive defendants' privilege simply by filing a lawsuit or making certain allegations, some defendants might feel compelled to settle to avoid disclosing certain health conditions, procedures, or treatments that have nothing to do with their liability. We do not believe the legislature intended section 8-802(4) to permit such unwarranted invasions of privacy. Under Palm's interpretation, we cannot imagine any automobile accident case in which a plaintiff could not argue that a defendant's negligent driving might be related to a vision or other health related problem, thereby requiring disclosure of defendant's medical records.

¶ 29 The parties agree that Holocker has not affirmatively placed his health at issue in this case. Therefore, section 8-802(4)'s exception does not apply in this case. Palm has not argued that Holocker's interrogatory responses are relevant standing alone. Because we hold that Holocker's privilege protects his medical records, his responses are not likely to lead to discoverable information. We reverse the circuit court's discovery order. On remand, the court

shall order Palm's counsel to promptly relinquish possession of Holocker's medical records from all sources in a manner the court deems sufficient to protect his privacy.

¶ 30 II. Civil Contempt Order

¶ 31 Inviting civil contempt is a proper means to test the validity of a court's discovery order (*Norskog*, 197 Ill. 2d at 69); therefore, it is appropriate to vacate the contempt order on appeal if the contemnor's challenge is a "good-faith effort to secure an interpretation of an issue without direct precedent." *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 57. Contemnor invited contempt in good faith. We vacate the circuit court's contempt order.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we reverse the judgment of the circuit court of Marshall County, vacate the contempt sanction against contemnor, and remand the case for further proceedings consistent with this opinion.

¶ 34 Reversed in part and vacated in part; cause remanded.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
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Christopher Helge Sokn
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FIRST DISTRICT OFFICE
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TDD: (312) 793-6185

March 21, 2018

In re: Scarlett Palm, Appellant, v. Ruben Holocker (Karl Bayer, Appellee). Appeal, Appellate Court, Third District. 123152

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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