2016 IL App (2d) 150014-U
No. 2-15-0014
Order filed February 10, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

N.M.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff,	)	
	)	
v.	)	No. 13-L-422
	)	
RYAN VOLGMANN, V&S MIDWEST CARRIERS CORP., and D.M.,	)	
	)	
	)	
Defendants-Appellees	)	Honorable
	)	Jorge L. Ortiz,
(Lori S. Yokoyama, Contemnor-Appellant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order requiring plaintiff to appear for a supplemental discovery deposition was affirmed and the finding of "friendly contempt" against plaintiff's attorney was vacated.

¶ 2 Plaintiff, N.M., filed this personal injury lawsuit against defendants—Ryan Volgmann, V&S Midwest Carriers Corp. (V&S), and D.M.—arising out of a January 2012 motor vehicle accident. In addition to her physical injuries, plaintiff contends that she developed conversion disorder and posttraumatic stress disorder (PTSD) as a result of the accident. Invoking the

protections of the Mental Health and Developmental Disabilities Confidentiality Act (Act) (740 ILCS 110/1 *et seq.* (West 2014)), plaintiff objected to the disclosure in discovery of her pre-accident mental health records and communications. Following an *in camera* inspection of plaintiff's medical records, the trial court ruled that plaintiff's mental health information was discoverable. Plaintiff subsequently refused to answer certain questions at her discovery deposition relating to the events described in those records. The court ordered plaintiff to appear for a supplemental deposition to answer two certified questions and reasonable follow-up questions. Plaintiff's attorney, Lori S. Yokoyama, informed the court that she would not produce her client for another deposition and was held in "friendly contempt." Yokoyama appeals from that contempt order and also attempts to appeal several other discovery rulings. For the reasons that follow, we affirm the order requiring plaintiff to appear for a supplemental deposition to answer the certified questions and we vacate the finding of contempt.

¶ 3 I. BACKGROUND

¶ 4 (A) Motor Vehicle Accident and Claimed Injuries

¶ 5 In her complaint, plaintiff alleged that on January 20, 2012, both Volgmann, who was an agent of V&S, and D.M. were driving northbound on Interstate 94 when they lost control of their respective vehicles and collided. Plaintiff was a passenger in D.M.'s vehicle. She alleged that she "sustained injuries of a personal, psychological, and pecuniary nature." The psychological component of plaintiff's injuries is conversion disorder and PTSD.

¶ 6 More specifically, following the accident, plaintiff purportedly developed problems with balance and involuntary movement that could not be linked to a neurological dysfunction. For example, she described to Dr. Lin Lu, her post-accident psychiatrist, "losing control of her body" and having "to lean on something to support herself" when she encountered certain triggers.

Such triggers included strong light, computer screen lights, car horns, TV, and "getting too close to other people." Plaintiff also complained to Dr. Lu of being afraid of driving, not sleeping well, and experiencing severe dizziness. Plaintiff described similar symptoms to Philip Kirschbaum, a licensed clinical social worker with whom she treated after the accident. Dr. Lu causally related plaintiff's conversion disorder and PTSD to the accident. Kirschbaum, however, was unable to "separate the impact" of the accident on plaintiff from the loss of her grandchild, which had apparently occurred in 2001. Kirschbaum opined that plaintiff's symptoms were caused by both of those traumas. He believed that she "would have benefited from some psychotherapeutic treatment" before the accident due to the loss of her grandchild.

¶ 7 At the time of their discovery depositions, Dr. Lu and Kirschbaum were unaware that plaintiff had received medical treatment in April 2010 following an apparent suicide attempt. Dr. Lu and Kirschbaum were not specifically confronted at their depositions with information about plaintiff's 2010 incident. Instead, they were asked hypothetical questions about the significance to them of a patient's prior mental health treatment and suicide attempts. They acknowledged that it generally would be significant or important for them to know if a patient had prior mental health treatment or suicide attempts.

¶ 8 (B) Revelation of Apparent Suicide Attempt in 2010

¶ 9 In the course of discovery, before they had the benefit of Dr. Lu's and Kirschbaum's deposition testimony, defendants Volgmann and V&S issued subpoenas for records to plaintiff's various medical providers. Among the documents that defendants received from one particular provider in response to a subpoena were plaintiff's emergency room records from Advocate Condell Medical Center from April 14-15, 2010. According to those records, although plaintiff's physical injuries were rather minor, she had presented to the hospital with what was described as

a stab wound to the abdomen. The records indicated that plaintiff was to follow up with "Dr. Inkoma" (this was apparently an attempt to phonetically spell the name of Dr. Nandkumar, plaintiff's primary care physician). One hospital record from those dates indicated that plaintiff was diagnosed with adjustment order; other records indicated a diagnosis of a suicide attempt.

¶ 10 Plaintiff followed up with her primary care physician, Dr. Premalatha Nandkumar, on April 16, 2010. The notes pertaining to that visit are hand-written and are difficult to decipher. However, in her deposition, plaintiff testified that Dr. Nandkumar told her that "everything is fine" and that she could "just go home." Apart from the hospitalization in April 2010 and the follow-up visit with Dr. Nandkumar, plaintiff apparently did not receive mental health treatment prior to the motor vehicle accident.

¶ 11 (C) Initial Discovery Motions and *In Camera* Review of Records

¶ 12 After the April 2010 incident came to light, the parties filed numerous motions pertaining to the discoverability of plaintiff's pre-accident mental health information. We will summarize only those motions and arguments that are specifically necessary for an understanding of the issues on appeal.

¶ 13 Volgmann and V&S first filed a "motion to compel and for *in camera* examination." D.M. subsequently joined in that motion. Defendants contended that plaintiff had introduced her mental condition as an element of her claim. They requested that plaintiff execute a release for all mental health records and that the court conduct an *in camera* review of all of plaintiff's mental health records.

¶ 14 In her response to that motion, plaintiff emphasized that she had "been clear all along that it was her intention and desire to authorize only the disclosure of her medical and mental health records that are relevant to the claims and issues of her complaint." According to plaintiff, the

medical office that produced the April 2010 records to defendants had done so without authorization and in violation of the Act. Plaintiff also disputed the relevance of her mental health history, arguing that her "only claims of a psychological nature are damages arising from two specific psychological injuries caused by the motor vehicle accident." Plaintiff insisted that she did not waive "any and all rights to privacy and therapist-patient privilege with regard to her mental health treatment history" merely by claiming these specific psychological injuries.

¶ 15 The trial court granted defendants' motion to compel, finding that plaintiff had "clearly placed her mental health in issue." The court also found that the April 2010 records "were not surreptitiously or improperly obtained" and that the court would have to "make a determination as to the relevance and probative value" of plaintiff's mental health records in accordance with the Act. The court ordered all of plaintiff's mental health records to be submitted for an *in camera* inspection.

¶ 16 Pursuant to the court's order, Volgmann and V&S issued subpoenas for mental health records to plaintiff's various medical providers that were returnable to the court. On May 28, 2014, the court entered an order that provided as follows:

> "(1) The court, having completed an *in camera* inspection, finds plaintiff's mental health information is discoverable and satisfies the factors of the [Act]; copies of all records tendered to the parties in open court; (2) defendants are permitted to disclose said records to consultants and experts; (3) defendant may serve supplemental discovery to plaintiff regarding referral to 'Dr. Inkoma'[1] or other physicians in or about April 2010."

The record on appeal does not contain a transcript of the May 28, 2014, proceedings.

¶ 17 (D) Objections at Plaintiff's Deposition and the Contempt Order

[1] As explained above, this apparently meant Dr. Nandkumar.

¶ 18 Plaintiff subsequently appeared for a discovery deposition and testified through an interpreter. When asked how she had injured her belly in April 2010, plaintiff responded that she did not want to answer the question. That question was certified. Defense counsel subsequently asked her whether she was referred to a psychiatrist in April 2010, and she explained that she saw only her own doctor, Dr. Nandkumar. She said that she told Dr. Nandkumar about the circumstances of the April 2010 hospitalization, and Dr. Nandkumar responded that everything was fine and that she could go home. However, when counsel asked plaintiff what she had told Dr. Nandkumar about that incident and hospitalization, plaintiff responded that she did not want to answer the question. That question was certified. According to plaintiff, after she visited with Dr. Nandkumar, she did not receive any mental health treatment again before the motor vehicle accident.

¶ 19 Volgmann and V&S filed a motion to strike and dismiss the complaint pursuant to Supreme Court Rule 219(c) (eff. July 1, 2002) based on plaintiff's refusal to answer the certified questions. D.M. subsequently joined in that motion. Defendants argued that the court had "already determined this information is a proper subject of discovery because plaintiff *** has affirmatively placed her mental health at issue." Defendants requested dismissal of the complaint or, alternatively, for plaintiff "to appear for a continued deposition and answer the certified questions and all questions which reasonably flow from them."

¶ 20 In plaintiff's response to the motion to strike and dismiss the complaint, she argued that she had not violated any court order. She noted that the May 28, 2014, court order permitted defendants to disclose her prior mental health records to "consultants and experts." According to plaintiff, nothing in that order compelled her "to disclose or repeat conversations she had with her primary care physician regarding the pre-occurrence incident." Nor had defendants retained

a consultant or expert to "sufficiently relate any pre-occurrence incident and corresponding treatment undergone by Plaintiff to her post-occurrence injuries and treatment." Additionally, she argued, defendants already possessed her medical records and had not established a need for her testimony or shown that it would be relevant. Plaintiff insisted that defendants merely wanted to go on a "fishing expedition."

¶ 21 On December 4, 2014, the court held a hearing on defendants' motion to strike and dismiss the complaint. The court reiterated that plaintiff had "clearly placed her mental health in issue" and expressed its concern that she was using the Act as a sword. The court clarified its May 28, 2014, order to the extent that it "may have been deficient or not clear in some way." The court noted that it had previously reviewed the records with respect to the April 2010 incident *in camera* and found them to be relevant, probative, and "otherwise clearly admissible for purposes of probing the credibility or assessing the credibility of the plaintiff." The court also determined that the records "go to the credibility of [plaintiff's] treaters' opinions as to causation" and that "other satisfactory evidence is not available regarding the facts sought to be established by such evidence."

¶ 22 The court declined to dismiss the complaint as a sanction, but it ordered plaintiff to answer the certified questions and "reasonable follow-up questions." The written order specified that plaintiff was to answer the "two certified questions and those questions related to the subject matter of her April 2010 mental health treatment and communications with Dr. Nandkumar." The court also allowed defendants to re-depose Dr. Lu and Kirschbaum "for a limited purpose of inquiring with respect to the April 2010 alleged incident and the records associated therewith." The court reserved ruling on attorney fees to be awarded with respect to defendants' Rule 219(c) motion.

¶ 23 Yokoyama requested to be held in "friendly contempt" to appeal the court's order. The court asked her several times about the basis for a contempt finding. Yokoyama eventually responded that she would instruct plaintiff not to appear for her continued deposition. The court held Yokoyama in contempt and fined her $500, stating that she could appeal the order requiring plaintiff to appear for a supplemental deposition. Yokoyama sought to include in the contempt order the ruling allowing defendants to re-depose Dr. Lu and Kirschbaum. The court clarified that that matter was separate from the finding of contempt, explaining that the court was "not going to allow willy-nilly interlocutory appeals of discovery orders." Subsequently, upon hearing that discovery would be stayed, Yokoyama asked to withdraw her request to be held in contempt, informing the court that she would produce plaintiff, over objection, for a deposition. The court denied that request.

¶ 24 On December 26, 2014, Yokoyama filed a notice of appeal. She purported to appeal from various aspects of the December 4, 2014, court order, including the ruling allowing defendants to re-depose Dr. Lu and Kirschbaum. She also purported to appeal from portions of the May 28, 2014, order.

¶ 25 II. ANALYSIS

¶ 26 (A) Request to Strike Defendants' Brief

¶ 27 As an initial matter, Yokoyama asks us to strike defendants' brief for containing a statement of facts, a nature-of-the-case section, and a procedural history that she contends are "replete with argument, accusation, and comment." We may strike a brief in whole or in part if it contains improprieties that are so severe as to hinder our review. See, *e.g.*, *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 9 (the appellant's brief violated numerous court rules and contained a statement of facts describing a case other than the one being appealed).

When a brief contains improper argumentation that does not interfere with the court's review, a proper remedy may be to disregard the offending statements. See *Cottrill v. Russell*, 253 Ill. App. 3d 934, 938 (1993). We do note that the preliminary sections of defendants' brief contain some improper argument. However, those improprieties do not hinder our review of the case. We will disregard the offending statements. We advise counsel to be mindful in the preparation of future briefs, and to comply with all appellate rules.

¶ 28 (B) Jurisdiction and Scope of Review

¶ 29 Before we address the merits of the appeal, we must clarify our jurisdiction and the scope of our review. See *In re Marriage of Alyassir*, 335 Ill. App. 3d 998, 999 (2003) (appellate court has independent duty to confirm its jurisdiction). Discovery rulings are not final orders, so they ordinarily cannot be appealed immediately. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). Yokoyama proposes in her jurisdictional statement that one source of our jurisdiction is section 10(b) of the Act, which provides, in relevant portion, that "[a]ny order to disclose or to not disclose shall be considered a final order for purposes of appeal and shall be subject to interlocutory appeal." 740 ILCS 110/10(b) (West 2014). That provision was held to be unconstitutional. See *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 213 (1994) ("To the extent that section 10(b) of the Mental Health and Developmental Disabilities Confidentiality Act [citation] attempts to provide for appeals from less than final judgments, it is therefore an unconstitutional infringement by the legislature upon the rulemaking power of this court."). Accordingly, section 10(b) of the Act is not the basis of our jurisdiction.

¶ 30 A party may, however, secure immediate review of a particular discovery order by refusing to comply with that order, being held in contempt, and filing a notice of appeal within 30 days. See Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010). When a party obtains appellate

jurisdiction in this manner, the reviewing court addresses the propriety of the specific discovery order that the party was held in contempt for violating. See *Reda*, 199 Ill. 2d at 54 ("When an individual appeals from a contempt sanction imposed for violating, or threatening to violate, a discovery order, the contempt finding is final and appealable and presents to the reviewing court the propriety of *that* discovery order." (emphasis added)).

¶ 31 Yokoyama purports to appeal from portions of the May 28, 2014, order even though she has no procedural mechanism for doing so. Significantly, she was *not* held in contempt for refusing to disclose plaintiff's mental health records to defendants. Indeed, the parties engaged in discovery for many months after plaintiff's mental health records were tendered to defendants in open court. Accordingly, the propriety of the May 28 order is an issue that is not before this court.

¶ 32 The same is true of the portion of the December 4, 2014, order allowing defendants to re-depose Dr. Lu and Kirschbaum. The trial court made it abundantly clear that Yokoyama was held in contempt only insofar as she refused to produce her client for a supplemental deposition. When Yokoyama inquired about including in the contempt order the rulings with respect to Dr. Lu and Kirschbaum, the court explained that those matters were not part of the contempt finding. Therefore, although Yokoyama's prayer for relief includes a request to "reverse the order allowing Defendants to interrogate Plaintiff's post-occurrence treaters regarding her pre-occurrence mental health records," that portion of the December 4, 2014, order is not before us.

¶ 33 The only issue on appeal is the propriety of the December 4, 2014, order requiring plaintiff to appear for a supplemental deposition to answer certain questions about the April 2010 incident. In many respects, Yokoyama's arguments as to why plaintiff should not have to answer questions about her mental health records are simply back-door attempts to appeal the

court's May 28, 2014, finding that plaintiff's mental health information is discoverable. If plaintiff's mental health information is indeed discoverable, it would seem that the ship has sailed and that defendants are now entitled to ask her questions about those matters, at least within the limits of the Supreme Court Rules pertaining to discovery. Of course, one proper method of discovery is taking the deposition of a party opponent. See Ill. S. Ct. R. 202 (eff. Jan. 1, 1996) ("Any party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action.").

¶ 34 Yokoyama seeks to avoid the notion that the ship has sailed by premising her appellate arguments on the assumptions that (1) the court's December 4, 2014, order expanded the scope of the May order and (2) apart from the findings it made following the *in camera* inspection of plaintiff's medical records, the court was required to make additional findings pursuant to the Act before ordering plaintiff to testify regarding the contents of her medical records. The problem with these assumptions is that the record on appeal does not contain a transcript of the May 28, 2014, proceedings, a bystander's report, or an agreed statement of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). As such, we are unable to determine whether the court's rulings in December 2014 were indeed different from its May 2014 rulings. Moreover, under these circumstances, we must presume that the trial court had a proper legal and factual basis when it found on May 28, 2014, that plaintiff's mental health information was subject to disclosure under the Act. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may

arise from the incompleteness of the record will be resolved against the appellant."). With this in mind, we now turn to Yokoyama's specific arguments on appeal.

¶ 35 (C) Yokoyama's Arguments

¶ 36 Yokoyama advances four reasons why she believes that the December 4, 2014, order requiring plaintiff to appear for a supplemental deposition was erroneous: (1) the trial court should have held an *in camera* inspection of plaintiff's testimony; (2) plaintiff's records can be "clearly admissible" within the meaning of section 10(a)(1) of the Act only if there is a medical opinion that her prior injury and mental health treatment are related to her present injuries; (3) "the trial court's 1.) finding that plaintiff's pre-occurrence mental health records satisfied the elements of the Act and 2.) order permitting redisclosure to defendant's [*sic*] 'consultants and experts,' collectively, does [*sic*] not permit the unlimited redisclosure of those records to witnesses and post-occurrence treaters"; and (4) the court erred in finding at the December 4 hearing that Dr. Nandkumar was not a "therapist" within the meaning of the Act. Additionally, on several occasions in her opening and reply briefs, Yokoyama suggests that plaintiff's supplemental deposition is unnecessary given that defendants already possess plaintiff's mental health records.

¶ 37 (1) *In Camera* Inspection of Plaintiff's Testimony

¶ 38 Yokoyama first argues that the trial court erroneously ordered plaintiff to testify regarding the April 2010 incident and her communications with Dr. Nandkumar without conducting an *in camera* investigation of the testimony and determining that the statutory requirements were satisfied. Essentially, Yokoyama contends that, although the trial court reviewed plaintiff's mental health records *in camera* and made the requisite findings as to the discoverability of the records, the court was required to conduct a separate *in camera* review of

plaintiff's testimony and make additional findings before ordering her to answer questions about the events described in those records.

¶ 39 Yokoyama's argument is subject to forfeiture because it is raised for the first time on appeal. *People v. Olsson*, 2015 IL App (2d) 140955, ¶ 26. The only reference that we found in the record pertaining to the trial court conducting a second *in camera* inspection was one sentence in the "introduction" section of plaintiff's response brief to defendants' motion to strike and dismiss the complaint: "The Court has neither conducted, nor have Defendants even requested, any *in camera* review of any testimony of [plaintiff] or anyone else regarding any aspect of the pre-occurrence incident." However, plaintiff's specific objections to answering questions about the events described in her medical records were that doing so exceeded the scope of the May 28, 2014, court order and that defendants had not established the relevance of or need for her testimony. When a litigant makes an objection on specific grounds, she forfeits all other grounds. *Olsson*, 2015 IL App (2d) 140955, ¶ 26.

¶ 40 We recognize that "forfeiture is a limitation on the parties, not the reviewing court." *In re Darius G.*, 406 Ill. App. 3d 727, 732 (2010). To that end, in appropriate cases, we have relaxed the forfeiture rule to "address a plain error affecting the fundamental fairness of a proceeding," "maintain a uniform body of precedent," and "reach a just result." *Darius G.*, 406 Ill. App. 3d at 732. Yokoyama has not cited, and our own research had not unearthed, any case where a court conducted a second *in camera* inspection before ordering a party to testify about the contents of records that the court had already reviewed. Nor has Yokoyama articulated any reason to overlook the forfeiture. Accordingly, we decline to do so.

¶ 41 (2) Necessity of a Medical Opinion that the April 2010 Injury and Treatment are Related to Plaintiff's Current Diagnoses

¶ 42 Yokoyama next argues that "the trial court erred in declaring plaintiff's pre-occurrence mental health care records to be 'clearly admissible' for production under the Act and for use in the examination of plaintiff and her treaters where there is no medical opinion that the pre-occurrence treatment/injury is related to the injury(s) claimed in the subsequent litigation." To the extent that Yokoyama takes issue with the court's May 28, 2014, findings regarding the discoverability of plaintiff's medical records, that matter is not properly before us, as explained above. However, to the extent that Yokoyama's argument pertains to the portion of the December 4, 2014, order requiring plaintiff to answer questions about the events described in those medical records, we will address the argument.

¶ 43 Section 10(a)(1) of the Act governs the disclosure of "records" and "communications" in civil litigation:

> "Records and communications may be disclosed in a civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense, if and only to the extent the court in which the proceedings have been brought, or, in the case of an administrative proceeding, the court to which an appeal or other action for review of an administrative determination may be taken, finds, after in camera examination of testimony or other evidence, that it is relevant, probative, not unduly prejudicial or inflammatory, *and otherwise clearly admissible*; that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm. Except in a criminal proceeding in which the

> recipient, who is accused in that proceeding, raises the defense of insanity, no record or communication between a therapist and a recipient shall be deemed relevant for purposes of this subsection, except the fact of treatment, the cost of services and the ultimate diagnosis unless the party seeking disclosure of the communication clearly establishes in the trial court a compelling need for its production. ***" (Emphasis added.) 740 ILCS 110/10(a)(1) (West 2014).

The Act defines "record," in pertinent part, as "any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided." 740 ILCS 110/2 (West 2014). "Communication" is defined, in relevant portion, as: "any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient." 740 ILCS 110/2 (West 2014).

¶ 44 Under this statutory framework, "a trial court must first determine as a matter of law whether a recipient might have introduced his mental condition as an element of his claim or defense so as to waive the therapist-recipient privilege recognized under the Act." *D.C. v. S.A.*, 178 Ill. 2d 551, 560 (1997). "A party may introduce his or her mental condition in several ways during the course of litigation, including, *e.g.*, in the pleadings, answers to written discovery, a deposition, in briefs or motions, in argument before the court, or by stipulation." *Reda*, 199 Ill. 2d at 61. "If this hurdle cannot be met, the information may not be admitted, regardless of whether the opposing party's claim or position would be advanced or facilitated by the disclosure of the information." *Norskog v. Pfiel*, 197 Ill. 2d 60, 80 (2001).

¶ 45 However, if a party has waived the privilege, "[d]isclosure may be had provided, and only to the extent," the court makes the secondary findings specified in the statute. *D.C.*, 178 Ill. 2d at 560. The inquiry as to these secondary factors "expressly includes a balancing of competing important interests and a consideration of some factual matters, the very sort of determination traditionally residing within the discretion of a trial court." *D.C.*, 178 Ill. 2d at 560; see also *Deprizio v. MacNeal Memorial Hospital Association*, 2014 IL App (1st) 123206, ¶ 37 (secondary findings under the Act are reviewed for abuse of discretion). " 'A trial court abuses its discretion when no reasonable person would agree with its decision.' " *Deprizio*, 2014 IL App (1st) 123206, ¶ 37 (quoting *In re M.P.*, 408 Ill. App. 3d 1070, 1073 (2011)).

¶ 46 Yokoyama does not dispute that plaintiff introduced her mental condition as an element of her claim so as to waive the privilege embodied in the Act. She concedes as much in her reply brief ("Appellees are correct to assert that Plaintiff affirmatively placed her mental condition at issue."). Instead, Yokoyama's argument is that the trial court could not make the required secondary finding that plaintiff's mental health information is "clearly admissible" under the Act in the absence of expert testimony establishing the relevance of that information. Yokoyama relies on *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49 (2000), a case that neither interpreted the Act nor involved a discovery dispute. In that case, our supreme court explained that evidence of a plaintiff's prior injury may potentially be used by a defendant at trial for three purposes: "(1) to negate causation; (2) to negate or reduce damages; or (3) as impeachment." *Voykin*, 192 Ill. 2d at 57. Examples of impeachment include questioning the plaintiff "with respect to his failure to disclose to his physician that he has previously suffered an injury to the same part of the body" or asking an expert "whether his opinion would change if the expert was aware of the plaintiff's prior injury." *Voykin*, 192 Ill. 2d at 58. Evidence of a prior injury is generally admissible only

if there is "expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence." *Voykin*, 192 Ill. 2d at 59. The exception to the requirement for expert testimony is when the trial court determines that a "lay person can readily appraise the relationship" between the plaintiff's prior and current injuries without expert assistance. *Voykin*, 192 Ill. 2d at 59.

¶ 47 *Voykin* specifies the circumstances under which evidence of a plaintiff's prior injury may be used by a defendant *at trial*. The present case is currently in the discovery stage. Ordinarily, parties are entitled to "full disclosure regarding any matter relevant to the subject matter involved in the pending action." Ill. S. Ct. R. 201(b)(1) (eff. July 30, 2014). "[T]he concept of relevance for discovery purposes encompasses not only what is admissible at trial, but also that which may lead to the discovery of admissible evidence." *Tomczak v. Ingalls Memorial Hospital*, 359 Ill. App. 3d 448, 456 (2005).

¶ 48 It would be extremely problematic to hold that a defendant may discover a plaintiff's mental health records or communications only if the defendant already has expert testimony linking the plaintiff's prior mental health treatment to her current injuries. In many, if not most cases, the party seeking disclosure does not know the substance of the records or communications at issue before the trial court conducts an *in camera* examination and makes the necessary findings under the statute. Indeed, that is the whole purpose of the *in camera* inspection. This raises an obvious problem: How can a party procure an expert to establish the relevance of the information sought without knowing what the records contain? Additionally, how can a party even be aware of the need to procure an expert when, as here, the opposing party intentionally limited its authorization for the release of such discoverable materials that were

fortuitously submitted in an attempt to comply with a subpoena? Reasonable discovery does not contemplate such a sublime level of prescience.

¶ 49 More than 45 years ago, the appellate court emphasized that " '[a] party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition.' " *Tylitzki v. Triple X Service, Inc.*, 126 Ill. App. 2d 144, 151 (1970) (quoting *Koump v. Smith*, 250 N.E. 2d 857, 861 (Ct. App. N.Y. 1969)). Interpreting the phrase "clearly admissible" in section 10(a)(1) of the Act to require a defendant to identify an expert to establish relevance, before the defendant even knows the substance of the records or communications at issue, could allow a plaintiff to do exactly what *Tylitzki* cautioned against. See *Nelson v. Artley*, 2015 IL 118058, ¶ 27 ("In construing a statute, we presume that the legislature did not intend absurd, inconvenient, or unjust results [citation], and we will not, absent the clearest reasons, interpret a law in a way that would yield such results.").

¶ 50 Nevertheless, while we note the problematic implications of Yokoyama's argument, we need not decide whether *Voykin* generally requires a medical opinion establishing relevance before mental health information is subject to disclosure pursuant to the Act. As we explain, even assuming the validity of Yokoyama's premise, there is indeed expert evidence in the present case establishing the relevance of plaintiff's April 2010 incident and the related medical treatment.

¶ 51 Volgmann and V&S disclosed Dr. Lu and Kirschbaum as independent expert witnesses pursuant to Supreme Court Rule 213(f)(2) (eff. Jan. 1, 2007). In their depositions, those witnesses established the relevance of plaintiff's pre-motor-vehicle-accident mental health

history. Specifically, Dr. Lu testified that she asked plaintiff "whether she had received any inpatient treatment in the past, and the answer was no." According to Dr. Lu, plaintiff also denied having attempted suicide. In response to hypothetical follow-up questions from defense counsel, Dr. Lu acknowledged that a patient's treatment history is relevant and that it would be important for her to know about a patient's past suicide attempts.

¶ 52 Similarly, Kirschbaum testified that he did not believe that plaintiff had "ever received any kind of mental health treatment any time before the accident." In response to hypothetical follow-up questions, he testified that discovering whether a patient had prior mental health treatment might be significant and might alter the treatment. Kirschbaum also testified that, generally speaking, it is significant if a patient has a history of self-mutilation or suicide attempts, because he "might be more alert to those symptoms, more concerned about those symptoms." Furthermore, Kirschbaum linked plaintiff's present diagnoses and symptoms, in part, to the loss of her grandchild in 2001, long before the motor vehicle accident. To that end, he said that plaintiff "would have benefited from some psychotherapeutic treatment" before the accident due to the loss of her grandchild.

¶ 53 *Voykin* established the general rule that "the defendant must introduce expert evidence demonstrating why the [plaintiff's] prior injury is relevant to causation, damages, or some other issue of consequence." *Voykin*, 192 Ill. 2d at 59. Dr. Lu and Kirschbaum were not aware of the full extent of plaintiff's mental health history or her apparent suicide attempt, but the clear implication of their testimony was that such information would be or could be relevant to them. Additionally, Kirschbaum specifically testified that plaintiff would have benefitted from mental health treatment before the motor vehicle accident. Under these circumstances, to the extent that *Voykin* actually supports Yokoyama's argument that a litigant's mental health information can be

"clearly admissible" within the meaning of section 10(a)(1) of the Act only if there is expert testimony establishing the relevance of that evidence, such requirement is satisfied in the present case.

¶ 54 (3) "Unlimited Redisclosure" of Records

¶ 55 Yokoyama next argues that "the trial court's 1.) finding that plaintiff's pre-occurrence mental health records satisfied the elements of the Act and 2.) order permitting redisclosure to defendant's [*sic*] 'consultants and experts,' collectively, does [*sic*] not permit the unlimited redisclosure of those records to witnesses and post-occurrence treaters." Specifically, she emphasizes that the May 28, 2014, court order did not expressly authorize "[u]sing the records to interrogate the Plaintiff or any other witness." She proposes that "[a]ny order allowing the records or information to be re-disclosed to anyone other than those specified in the court order is a violation of the Act, and beyond the scope of the May 28, 2014 order."

¶ 56 This argument rests on the assumption that the court's December 4, 2014, order expanded the scope of the May 28 order. The trial court apparently disagreed. By finding that there was a discovery violation, the court necessarily determined that plaintiff failed to comply with the May 28 order when she refused to answer questions during her deposition. See *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 26 (Supreme Court Rule 219 "addresses the consequences of a party's refusing or failing to comply with rules or court orders regarding discovery."). The record on appeal contains neither a transcript of the May 28, 2014, proceedings nor an acceptable substitute. Accordingly, we have no way of determining whether the December order expanded the scope of the court's earlier rulings.

¶ 57 Moreover, Yokoyama's arguments about "unlimited disclosure" are simply irrelevant to the issue presently before the court. This appeal concerns only the propriety of requiring

plaintiff to appear for a supplemental deposition to answer two certified questions and reasonable follow-up questions. We need not comment on Yokoyama's fear that "there is nothing stopping Defendants from interrogating [other pre-occurrence treaters and non-medical witnesses] regarding Plaintiff's pre-occurrence mental health treatment." That matter goes well beyond the contempt order that we are reviewing.

¶ 58 (4) Whether Dr. Nandkumar is a "Therapist" under the Act

¶ 59 According to Yokoyama, the trial court erroneously "found that since [Dr. Nandkumar] is an internist and not a psychiatrist, the Act does not apply." In support of her argument, she directs our attention to several comments that the court made at the December 4, 2014, hearing.

¶ 60 The Act defines "therapist" broadly as "a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so." 740 ILCS 110/2 (West 2014). Under this definition, statements made to a physician can be privileged even if that physician "is not a psychiatrist or psychologist." *People v. Robert P.*, 354 Ill. App. 3d 1051, 1060 (2005).

¶ 61 Assuming that the trial court actually made a "finding" on December 4, 2014, that Dr. Nandkumar was not a "therapist" under the Act, this is not a basis for reversing the order requiring plaintiff to appear for a supplemental deposition. The court reviewed Dr. Nandkumar's records *in camera* on May 28, 2014, and specifically found that they were subject to disclosure under the Act. Accordingly, any misconception at a subsequent hearing as to whether a primary care physician could be a "therapist" under the Act was entirely harmless.

¶ 62 (5) Necessity of Plaintiff's Supplemental Deposition in Light of the

Fact that Defendants Already Possess her Mental Health Records

¶ 63 On several occasions in her opening and reply briefs, Yokoyama suggests that plaintiff's supplemental deposition is unnecessary given that defendants already possess plaintiff's mental health records. To the extent that this could be construed as a separate argument from the ones that we have already rejected, once again, we cannot address it due to the insufficiency of the record. The trial court apparently believed that its rulings on May 28, 2014, required plaintiff to answer certain questions about the April 2010 incident. Without a transcript of the May 28 proceedings or an acceptable substitute, we are not in a position to say that the court's findings constituted an abuse of discretion. See *Deprizio*, 2014 IL App (1st) 123206, ¶ 37 (the trial court's secondary findings under the Act are reviewed for abuse of discretion); *Foutch*, 99 Ill. 2d at 391-92 (in the absence of a sufficiently complete record to support a claim of error, we presume that the trial court's order conformed with the law and had a sufficient factual basis).

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, we affirm the trial court's order requiring plaintiff to appear for a supplemental deposition and answer the certified and related questions. We hold that Yokoyama acted in good faith to test the validity of the discovery order, so we vacate the finding of contempt.

¶ 66 Affirmed in part and vacated in part.