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Alcon v. Spicer

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SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER CO 80203 Colorado State Judicial Building 2 East 14th Ave., 4th Floor Denver, CO 80203	FILED IN THE SUPREME COURT MAR 2 2 2005 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Petitioner: GLORIA GINA ALCON v. **Respondent:** RONALD RAY SPICER	
Original Proceeding Under C.A.R. 21 DISTRICT COURT, COUNTY OF PUEBLO, STATE OF COLORADO CASE NUMBER: 03CV1613, DIVISION D	Case Number 04-SA-347
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AMICUS CURIAE BRIEF OF THE COLORADO TRIAL LAWYERS ASSOCIATION IN SUPPORT OF UPHOLDING THE PHYSICIAN-PATIENT PRIVILEGE

COMES NOW the Colorado Trial Lawyers Association and pursuant to this Court's Novermber 10, 2004 RULE TO SHOW CAUSE issued under the provisions of C.A.R. 21, SUBMITS the following amicus curiae brief as follows:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Colorado Rules of Civil Procedure

Colorado Statutes

Federal Statutes

STATEMENT OF FACTUAL BACKGROUND

For the purposes of this brief, the Colorado Trial Lawyers Associations does not restate the Plaintiff-Petitioner's statement of the case, course of proceedings, and disposition in the trial Court, and accepts those statements as made by the Petitioner-Alcon as its own.

ISSUE

IS THE PHYSICIAN-PATIENT PRIVILEGE TO ALL MEDICAL INFORMATION WAIVED BY THE FILING OF A PERSONAL INJURY SUIT CLAIMING GENERIC DAMAGES?

ARGUMENT

I. COLORADO HAS CLEARLY MANDATED THAT THE PHYSICIAN-PATIENT PRIVILEGE IS ONLY WAIVED WITH RESPECT TO THE CONDITION COMPLAINED OF IN THE INJURY LAWSUIT.

The argument that the physician-patient privilege in lifetime personal medical information is impliedly waived in every personal injury case forms the basis of Respondent's position in the matter *sub judice*. This argument flies squarely in the face of the well-established and often repeated Colorado law of physician-patient privilege.

As an organization of attorneys who represent plaintiffs in claims for personal injury resulting from civil wrongs, the Colorado Trial Lawyers Association ("CTLA") and its members confront every day the issue of providing full and fair discovery while protecting genuine private and privileged information. Frequently the issue can become sterile by simply labeling the issue "general health" records. The reality is that in today's society our Colorado community of citizens have lives that contain highly personal, potentially embarrassing, and extremely private medical care and treatment. The scope of the release of these privileged communications should

be minimized when the Court, as it will here, addresses how and to what extent this information is to be discovered by opposing litigants backed by one of the most economically powerful industries in America -- the insurance industry.

To preface the Court's consideration of the individual dispute before it between Mrs. Gloria Alcon, the Plaintiff-Petitioner, and Mr. Ronald Spicer, the Defendant-Respondent, the Court must not loose sight of the reality of non-litigation related medical care.

The People of Colorado every day are treated for matters that now have become the object of unlimited discovery requests. Even when the lawsuit is for claims as simple as a neck sprain or a herniated cervical disc, the discovery demands stretch to encompass treatment records and information about real life matters which can include impotency, birth control, abortion, childhood diseases, sexually transmitted diseases, vaginal and penile warts, infertility, hemorrhoids, rectal, bowel, and colon diseases, family emotional problems, alcohol or drug dependency, incontinences and bladder diseases, prostate problems, infectious diseases, immune deficiencies, pre-natal care, cancer care, PMS and bleeding problems, kidney problems, ulcers, sinus and allergic problems, cosmetic surgery, breast reduction and augmentation, digestive problems, eye and vision treatment, family counseling, parenting assistance, vasectomies, menopause, reproductive reconstruction, hysterectomies, and diabetes. These are a sampling of the real life matters that are all of concern when a defense requests "all prior medical care."

It must be within this real world framework that the Defendant-Respondent's demand for "lifetime medical records" must be judged. The focus cannot only be on what records there are in this case. When deciding the scope of the waiver of the physician-patient privilege, the Court must consider the broad scope of private and confidential treatment Americans receive in every day life.

The Respondent-Defendant Spicer and the amicus briefs of Colorado Defense Lawyers Association (CDLA) and COPIC Insurance Company maintain, in effect, that by filing any injury lawsuit, the injured party has waived all physician-patient privileges with respect to "all prior medical care." This is actually not a new position, but it is a claim that has been regularly rejected by Colorado Appellate Courts. The clear goal of this type of overly broad and unreasonable discovery tactic is simple. It is not a search for truth, fairness, or a balanced adversarial discovery system. It is a trial strategy and tactic used to unreasonably "chill" the desire of individual plaintiffs to legitimately litigate disputed claims. Over the course of time, these types of tactics have been called "Rambo" or "hardball," but have always had a single common identifying marker -- that marker is that the tactic is designed to intimidate the opponent.

The demand for lifetime, unlimited, and unchecked medical records is simply an extension of these tactics designed to emotionally intimidate potential and actual litigants who are accessing our civil justice system to seek redress for injuries caused by civil wrongs.

The most frequently referred to Colorado case addressing this issue is Samms v. District Court, 908 P.2d 520 (Colo. 1995) in which the Colorado Supreme Court expressly rejected precisely the present position of the defense. It was clearly established that after filing a personal injury lawsuit, the physician-patient privilege remains and attaches to any and all records outside the confines of the "conditions complained of" in the particular lawsuit and furthermore, that the plaintiff's counsel had a duty to defend that privilege. Id. at 524-526.

In Samms, supra, the Supreme Court considered whether a trial court should authorize a defense counsel, in a medical negligence claim, to conduct interviews of the plaintiff's treating physicians. The heart of the issue was succinctly stated as follows:

> **The scope of any implied waiver necessarily depends on the nature of the claim asserted by the patient**, and physicians as well as attorneys and judges may at times find the task of delineating the scope of a waiver to be problematical. (Emphasis added.) Id. 529.

The Court made it clear that the implied waiver would **not** extend to all other medical care and treatment. In fact, the Court explained that the specific scope or limit of the implied waiver had to be determined by agreement of counsel or by order of the trial court before any attorney-physician conference could take place. Justice Kirshbaun, speaking for the Court, explained:

> As we have indicated, the patient and the physician must be informed specifically of the scope of the plaintiff's waiver of the physician-patient privilege prior to any informal interviews of the physician, whether by agreement of the parties or by court order. **In the absence of such specificity, neither the interviewing attorney nor the physician will be able to ascertain what matters remain subject to the plaintiff's physician-patient privilege and therefore may not be discussed.** (Emphasis added.)

In Samms, the Supreme Court analyzed Clark v. District Court, 668 P.2d 3 (Colo. 1983) in order to emphasize that the implied waiver of a plaintiff in a personal injury case was not absolute, and that, although the waiver might in some cases extend to all matters discussed, in other situations some or all of the discussions will remain subject to the privilege. The Court explained:

> [A] plaintiff in a personal injury case impliedly waives the physician-patient privilege with respect to matters known to the physician that are relevant in determining the cause and extent of injuries which form the basis for a claim for relief. We also concluded, however, that **such plaintiff does not impliedly waive the physician-patient privilege with respect to all his or her personal medical matters.** Id. We thus recognized in Clark that the extent to which a plaintiff waives the physician-patient privilege by seeking judicial determination of the cause and extent of personal injuries will necessarily depend upon the particular circumstances of the case. While the waiver in some situations might extend to all matters discussed by the plaintiff with a physician, in other situations some or all of such discussions will remain subject to privilege. (Emphasis added.)

The conclusion in Samms, supra, established the standard for informal physician interviews including the requirement that the defense counsel must provide reasonable notice to the plaintiff's counsel to "...enable plaintiff to take appropriate steps to ensure that the interviews are **limited to matters not subject to the plaintiff's physician-patient privilege**." Id. 526 (Emphasis added.)

Obviously, Colorado protects a plaintiff's non-related records by statutory privilege. C.R.S. § 13-90-107(1)(d) sets forth the physician-patient privilege as follows:

> (1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined in the following cases:
>
> * * *
>
> (d) A physician...shall not be examined without the consent of his patient as to any information acquired in attending the patient....

Further, the Colorado Legislature has expressed its compelling interest in protection of medical records by providing criminal penalties for improperly obtaining medical records as set forth in C.R.S. § 18-4-412:

> Theft of medical records or medical information - penalty. (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

Further still, the United States Congress sought to separately protect patient health information in the Health Insurance and Portability and Accountability Act of 1996 (HIPPA), Pub. Law No. 104-191, 110 Stat. 1936, "The principal purpose of HIPPA and the 2003 amendment is to **safeguard individually identifiable health information**. (Emphasis added.) United States ex rel. Pogue v. Diabetes Treatment Centers of America, No. Civ. 99-3298, 2004 W.L 2009416 (D.D.C. May 17, 2004). Health information was defined to include, "...any

information whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider...; and (2) relates to the post, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual." Law v. Zuckerman, 307 F.Supp. 2d 705, 708 (D.Md. 2004) (quoting 45 C.F.R. § 160.103). See also 42 U.S.C. § 1320d(4).

Once the physician-patient privilege attaches, it prohibits not only testimonial disclosures in court but also pre-trial discovery of information within the scope of the privilege. Clark v. District Court, 668 P.2d 3 (Colo. 1983). Further, the physician-patient privilege is not a qualified or conditional privilege and therefore a disputed claim of privilege cannot be resolved by balancing a party's need to obtain the privileged information with the privilege holder's interest in preserving the protected confidentiality. The only basis for authorizing a disclosure of the confidential and privileged information is an express or implied waiver. Clark, Id., at 9.

The defense of a personal injury claim cannot expand the scope of the injured party's implied waiver by arguing "relevancy to their defense." The fact that the Petitioner here has filed a personal injury auto claim for neck, back, and shoulder injuries does not lead to the conclusion that her entire medical history is "up for grabs." Such a conclusion would eviscerate any meaningful physician-patient privilege for every personal injury plaintiff.

The Court's decision in Johnson v. Trujillo, 977 P.2d 152 (Colo. 1999), illustrates this point in a case where the defense sought prior marriage counseling and psychiatrist records when the plaintiff claimed generic mental anguish damages resulting from a motor vehicle collision. The defendants were not entitled to these extraneous records even though they may have been relevant. The Court explained that, "This does not appear to be too high a cost for the public and

private benefits of the privileges that the General Assembly sought to obtain by creating the privileges in the first place. Indeed, we are convinced that to hold otherwise would degrade the privileges and undermine the public policy of preserving the confidences that they were designed to implement."

There is absolutely no Colorado case law that has ever held that a statutory privilege can be impliedly waived on the basis that the privileged records "may somehow be relevant." The privilege is designed to avoid just that argument. The simplest analogy of this concept is the application of the attorney-client privilege - when it could likely be horrendously relevant to know what a defendant told his lawyer as to how the motor vehicle collision occurred, but regardless, those statements are not discoverable because they are privileged. Privileged matters are not discoverable regardless of potential "relevance."

The problem that keeps reoccurring in personal injury litigation is how do the rules provide for the protection of the privilege and also provide for fair discovery. The Defendant-Respondent's misuse of the discovery rules in this case presently before the Court has lead directly to this controversy. A close analysis of the source of the dispute reveals that the Respondent did not ever request the contested records. In the defense's Rule 34, Request For Production, no request for records was ever made. Rather, the Defendant chose to manipulate the production rules in an effort to obtain blank medical record releases signed by the Plaintiff.

II. THE COLORADO RULES OF CIVIL PROCEDURE DO NOT AUTOHROIZE A DEFNEDNAT IN A PERSONAL INJURY LAWSUIT TO COMPEL A PLAINTIFF TO PROVIDE AUTHORIZATIONS FOR RELEASE OF MEDICAL INFORMAITON

The Colorado Rules of Civil Procedure provide for a fair means of obtaining discovery by ensuring that every method of discovery operates within the adversarial structure of the

Colorado Civil Justice System. Every method of obtaining information within the Colorado Rules of Civil Procedure provides for the opportunity to assert and protect claims of privilege and rejects ex parte access to a party's own records. The Respondent in this case chose not to follow the Rules for production of documents and instead made demands for a series of blank, unrestricted, and unlimited releases which essentially act as an ex parte method of document accumulation. Nowhere in the Respondent's briefing does he justify his failure to use the Colorado Rules. This tactic placed the trial court in the difficult position of deciding if records should be released, without having a specific request and a resulting privilege log.

Clearly, every rule and accepted procedure available to obtain medical information in Colorado has required that the party whose records are being requested should be positioned to protect his privileges prior to release. If a Rule 34, C.R.C.P. request for production of documents would have been made, the records requested could have been obtained, reviewed for non-waived privilege and either released to the requesting party or be made subject to a specific privilege log. If the Defendant chose to contest that privilege log, the trial court had a simple, straightforward, efficient way to hear both sides of the issue before release and make its decision on discoverability.

Alternatively, the Respondent could have properly used Rule 45(b) C.R.C.P., and scheduled a discovery deposition with an appropriate subpoena duces tecum. This procedure also allows the opposing party to obtain records in the possession of third parties but preserves the notice safeguards so that the plaintiff can be available and protect those records that are privileged and not subject to an implied waiver. Again, this process, if properly used, and if the parties adhere to the ethical mandates of Formal Opinion No. 86 of the Ethics Opinions of the Coronado Bar Association, and the notice requirements of the Rules, allows for a simple and

direct method to protect privileged documents and to identify any specific documents contested. The Respondent, again, chose to deviate from the rule and attempted to obtain the records ex parte. That practice cannot be justified.

Simply stated, nowhere in the Colorado Rules of Civil Procedure is an ex parte scheme of discovery authorized as a proper method of discovery which may be compelled under Rule 37.

III. GENERIC CLAIMS FOR PERSONAL INJURY DO NOT ACT AS A COMPLETE WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE

Plaintiffs in personal injury litigation regularly face a defense that is funded by large and powerful insurance companies. These companies exert their power by aggressive and, some would say, abusive discovery tactics. Rule 16, C.R.C.P., was modified, in part, to control discovery abuses. In the case *sub judice*, the Plaintiff has made generic claims of loss of enjoyment of life, pain suffering and mental anguish, inconvenience, loss of essential services, health care expenses, loss of earnings, and permanency, all arising out of a motor vehicle collision and claimed neck, back, and shoulder injuries with depression. The defense claims that this generic claim waives the physician-patient privilege for **all** other health care records. Justice Bender, delivering the Court's opinion in In Re Weil v. Dillon Companies, Inc., ___ P.3d ___ (04 SA 356, January 24, 2005), explained the principles that must be applied by the trial court when considering the discovery of health care records, the application of the physician-patient privilege, and its waiver. The Court explained that C.R.S. § 13-90-107, "vests the patient with the power to prevent a treating physician from disclosing information obtained in the course of treatment." The Court continued and reiterated the principles established in Colorado to analyze when such records are discoverable. These principles and the holding in Weil, supra, address the same arguments of the Respondent and of the amicus briefs of the Colorado Defense Lawyers

Association and COPIC Insurance Company. The Court stated these controlling principles as follows:

> **A party seeking to overcome this privilege bears the burden of establishing waiver.** Johnson, 977 P.2d at 155. **A plaintiff does not impliedly waive this privilege "merely by seeking damages under a generic claim of mental suffering which is incidental to the physical injuries underlying the suit."** Hoffman, 87 P.3d at 863. Rather, waiver of the physician-patient privilege occurs when 'the privilege holder has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense." Clark 668 P.2d at 10. See also Hoffman, 87 P.3d at 863; and Johnson, 977 P.2d at 155. (Emphasis added.)

It is clear that the burden of demonstrating that questioned information is covered by the physician-patient privilege rests on the party asserting the privilege. Belle Bonfils v. District Court, 763 P.2d 1003 (Colo. 1988). It is equally clear that all medical treatment records in the case *sub judice* are subject to the physician-patient privilege. Dr. Aschenbrener was Mrs. Alcon's general health care provider. Thus, the privilege attached to all of her records. Accordingly, "the only basis for authorizing a disclosure of the confidential information is by express or implied waiver." Hoffman v. Brookfied Republic, Inc., 87 P.3d 858 (Colo. 2004).

In this regard, Weil, supra, clarified, contrary to Respondent's arguments, that generic claims (such as the Plaintiff's claims, here, for loss of enjoyment of life, inconvenience, lost essential services, and permanent residuals) do not result in a complete waiver of the physician-patient privilege. And, further, that the burden to establish a waiver of the privilege to a particular record is placed upon the defense.

Succinctly stated, even though prior medical treatment may have some relevance in understanding the Plaintiff's current health and treatment, unless the prior care involves **the same parts of the Plaintiff's body** and are connected to the "conditions complained of", they remain privileged and non-discoverable. As this Court explained, "Although arguably these

injuries may have some relevance in understanding Weil's current claims 'relevance alone cannot be the test.'" Weil, supra.

CONCLUSION

Wholesale investigation into every aspect of a personal injury plaintiff's medical history should not be condoned when specific discrete injuries are alleged. Mrs. Alcon's neck, back, and shoulder injuries and the ordinary complications associated with them are the "conditions complained of" in this underlying suit. Her prior general care and treatment are not part of the complaints placed at issue in her claim and the Respondent's efforts to search through these private, personal, and privileged matters are an improper attempt to invade her privacy and emotionally intimidate her. The problem generated in this case originates from the Defendant-Respondent's failure to properly use the Colorado discovery rules. By seeking ex parte "blank releases" the defense has placed the trial court in an unenviable position of having to decide what discovery should be allowed before the defense has even made a proper demand and before the Plaintiff's privilege can be properly protected. The rule issued in this matter should be made absolute and the trial court prohibited from ordering the discovery of the Plaintiff's privileged records.

Respectfully submitted this 3rd day of March, 2005.

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CERTIFICATE OF SERVICE

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