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Reutter v. Weber

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SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue, Fourth Floor
Denver, Colorado 80203

Original Proceeding
District Court, Pueblo County
Case No. 04-CV-53
Honorable David A. Cole, Presiding Judge

IN RE THE MATTER OF:

DUANE REUTTER and PATTY REUTTER,

Petitioners,

vs.

KEVIN WEBER, M.D., MATTHEW SUMPTER, M.D., and PUEBLO CARDIOLOGY ASSOCIATES, P.C.

Respondents.

▲ COURT USE ONLY ▲

Case No. 06 SA 79

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BRIEF OF AMICUS CURIAE COLORADO DEFENSE LAWYERS' ASSOCIATION

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QUESTION ADDRESSED BY AMICUS

Does the notice requirement of *Samms v. District Court* apply to *ex parte* interviews by defense counsel with a physician who has been sued by a patient after the patient has dismissed the suit against that physician, where § 13-90-107(1)(d)(I), C.R.S. expressly provides that the physician-patient privilege does not apply to a physician who is sued by the patient?

SUMMARY RESPONSE OF AMICUS CURIAE

No. Once a physician has been sued by a patient for malpractice, the statutory physician-patient privilege no longer exists between that patient and that physician, even if the malpractice suit is subsequently dismissed. Because there is no remaining physician-patient privilege to be protected, defense counsel are free to interview and meet with a physician who was formerly a defendant concerning the care and treatment provided to the plaintiff without giving advance notice of the meeting to the plaintiff or his counsel.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Colorado Defense Lawyers Association (CDLA) is an organization of attorneys whose members' practices are devoted primarily to the defense of civil cases, including the defense of professionals such as attorneys and physicians against claims of professional malpractice.

This original proceeding presents an issue of particular concern to the clients of CDLA members who are involved in personal injury litigation. The rule

announced in *Samms v. District Court*, 908 P.2d 520 (Colo. 1995), which allows defense counsel to meet with and interview a plaintiff's treating physician informally on an *ex parte* basis so long as advance notice of the meeting is given to plaintiff's counsel, has worked well for the past ten years. CDLA and its members are concerned that any change to make the requirements for such *ex parte* interviews more restrictive will not only impair their ability to adequately defend their clients, but will also result in unfair gamesmanship by plaintiffs' counsel that is contrary to the spirit of cooperation and full disclosure that the Rules of Civil Procedure seek to foster.

For these reasons, Amicus CDLA respectfully requests this Court to discharge the rule to show cause.

ARGUMENT OF AMICUS CURIAE

Pursuant to § 13-90-107(1)(d)(I), C.R.S., the notice requirement of *Samms v. District Court* does not apply to a physician who has been sued by a patient, even after the patient has dismissed his suit against that physician.

In this original proceeding, Petitioners ask this Court to revisit its holding in *Samms v. District Court*, 908 P.2d 520 (Colo. 1995), which concluded that the rules of discovery permit a defense attorney to conduct informal interviews with physicians who have treated the plaintiff in the absence of the plaintiff or the plaintiff's attorney, and that trial courts may authorize such informal interviews. *Samms*, 908 P.2d at 526. The Court in *Samms* further concluded that "such informal questioning must be confined to matters that are not subject to a physician-patient privilege and that the plaintiff must be given reasonable notice of any proposed informal interview," so as

to afford a plaintiff or the plaintiff's attorney "an opportunity to attend any scheduled interview," as well as to "take other appropriate steps to ensure that interviews are limited to matters not subject to the plaintiff's physician-patient privilege, such as to inform the physician of the plaintiff's belief that certain information known to the physician remains subject to the physician-patient privilege or to seek appropriate protective orders from the trial court." *Id.*

Following *Samms*, it has become the practice of defense counsel in personal injury cases who wish to interview a plaintiff's treating physician to give notice of the proposed interview to plaintiff's counsel. The decision whether or not to attend is left to plaintiff's counsel. In some cases, counsel will attend the interview but in many cases they do not.

Samms has governed *ex parte* communications between defense counsel and treating physicians for more than ten years now, and, in the eyes of the civil defense bar, has worked well in balancing the right of the defendant to discover information necessary to the defense while at the same time protecting any residual privileged information. The concerns on which objections to such interviews were based, such as the concern that an attorney representing a party adverse to the patient might attempt to improperly influence the physician's trial testimony, or the concern that a treating physician may inadvertently disclose information regarding a patient's medical condition which is not relevant to issues in the case or for which the privilege has not been waived, *see Samms*, 908 P.2d at 529, have for the most part proved

unfounded. One reason for this is that the Court in *Samms* gave trial courts considerable discretion to resolve such issues and to issue such protective orders as may be necessary under the circumstances of the case. *See Samms*, 908 P.2d at 531 (Kourlis, J., concurring) ("If a party or his or her non-party physician witness seeks protective orders prohibiting or limiting ex parte contact, the trial court is uniquely able to evaluate the competing interests and enter appropriate orders.").

Samms dealt only with *nonparty* treating physicians. *See id.*, 908 P.2d at 524. Nothing in *Samms* even remotely suggests that its requirement that defense counsel give notice to opposing counsel prior to interviewing a nonparty treating physician should also apply to a physician who is a defendant in the case. In the instant case, however, Petitioners seek to use the holding in *Samms* to prevent defense counsel from having *ex parte* contacts with at least one physician who was formerly a defendant in the case, Craig Shapiro, M.D.

Ignoring Dr. Shapiro's status as a former defendant in this case, Petitioners contend that because he was a treating physician, the *Samms* requirement of prior notice and an opportunity to attend should apply to any *ex parte* meeting between defense counsel and Dr. Shapiro. Petitioners argue that even though Dr. Shapiro was originally named as a defendant in the case, the physician-patient privilege has not been waived because he is no longer a party to the case, and is thus a nonparty treating physician to whom the notice requirement of *Samms* applies. As Petitioners endeavored to explain in opposing Respondents' request for *ex parte* interviews, "the

physician-patient privilege remains intact with regard to Dr. Shapiro. Although he was initially named as a complaint filed in this action, he was effectively dismissed based upon the filing on an amended complaint before he was served. Accordingly he is not subject to any lawsuit with regard to Plaintiff's care. Therefore, the physician-patient privilege is in force."

These arguments all depend on the fiction that the physician-patient privilege continues to exist after the physician has been sued by the patient for malpractice. Under § 13-90-107(1)(d)(I), C.R.S., however, the protections accorded to "any information acquired [by a physician] in attending the patient which was necessary to enable him to prescribe or act for the patient" shall not apply to a physician "who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's . . . care or treatment of such patient."

This is not an "implied" waiver of the physician-patient privilege. It is not even a "waiver." Section 13-90-107(1)(d)(I) "expressly provides that the physician-patient privilege shall not apply in certain situations, such as a suit for malpractice . . . ." *Johnson v. Trujillo*, 977 P.2d 152, 159 (Colo. 1999). There is a presumption that the word "shall" when used in a statute is mandatory; that presumption applies even in the negative–to wit: § 13-90-107(1)(d), C.R.S. "shall not apply to . . . [a] physician . . . who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or

connected with the physician's . . . care or treatment of such patient." *See Riley v. People*, 104 P.3d 218, 221 (Colo. 2004). This express exception to the statutory physician-patient privilege has been called "unmistakable." *Colorado State Bd. of Accountancy v. Raisch*, 931 P.2d 498, 500 (Colo. App. 1996), *aff'd*, 960 P.2d 102 (Colo. 1998).

In other words, under § 13-90-107(1)(d)(I), where the physician has been sued by the patient, no physician-patient privilege exists with respect to information acquired by the physician in attending the patient which was necessary to enable him to prescribe or act for the patient. The statute makes no exception for physicians who were sued in an initial complaint and then later dismissed in an amended complaint, and its use of the past tense ("sued") makes clear that it does not require there to be an ongoing or presently existing suit against the physician for the privilege not to apply. Nor is there any statute which purports to restore or resurrect the privilege after the patient's suit against the physician has been dropped. Tellingly, Petitioners have failed to distinguish or even acknowledge § 13-90-107(1)(d)(I) in their Petition.

The statutory physician-patient privilege is purely a creation of the legislature, and did not exist at common law, under which confidential information disclosed to a physician was afforded no evidentiary privilege. *People v. Deadmond*, 683 P.2d 763, 769 (Colo. 1984). Section 13-90-107(1)(d) was adopted for the purpose of encouraging patients to fully disclose medically relevant information to their physicians by reducing the possibility of humiliation or embarrassment through subsequent pub-

lic disclosure of such information by the physician. *Id.* Because the physician-patient privilege is statutory and in derogation of common law, *Community Hosp. Ass'n v. District Court*, 570 P.2d 243, 244 (Colo. 1977), it should be construed strictly and narrowly, and not liberally in favor of the privilege. *People v. Covington,* 19 P.3d 15, 19 (Colo. 2001); *People v. Marquez*, 692 P.2d 1089, 1095 (Colo. 1984). The burden of establishing the applicability of the privilege rests upon the party claiming that privilege. *Marquez*, 692 P.2d at 1095.

This Court has recognized that "in many instances injustice can be caused by application of the privilege." *Community Hosp. Ass'n*, 570 P.2d at 244. Unfortunately, instead of being used as a shield against "the possibility of humiliation or embarrassment through subsequent public disclosure of such information by the physician," the physician-patient privilege is often used in litigation as a sword by unscrupulous plaintiffs and their counsel to prevent opposing parties from discovering weaknesses in their case.

Petitioners' conduct in dismissing claims against Dr. Shapiro in an attempt to reinstate the physician-patient privilege with respect to him is illustrative of the kind of gamesmanship that some members of the plaintiffs' bar have chosen to engage in rather than adhere to *Samms* and the spirit of informal discovery it sought to foster. Petitioners' position that defense counsel cannot have *ex parte* contact with Dr. Shapiro has no basis in law, yet they continue to insist that *Samms* applies to Dr. Shapiro and precludes any *ex parte* meetings." The only conceivable reason for

taking this position is to make discovery more difficult and more expensive for the defense. But, as this Court recognized in *Samms*, 908 P.2d at 526, "Informal methods of discovery not only effectuate the goals of the discovery process but tend to reduce litigation costs and simplify the flow of information."

> A rule permitting informal communications between a defense attorney and a plaintiff's treating physician promotes the discovery process by assuring that both parties have access to an informal, efficient, and cost-effective method for discovering facts relevant to the proceedings. A contrary rule would encourage resort to expensive and time-consuming formal discovery methods when such methods could be avoided. [Citations omitted].

Id. Requiring parties to resort to formal discovery, such as depositions, when informal discovery would suffice also gives opposing counsel more opportunities for further gamesmanship. *E.g.*, *Liscio v. Pinson*, 83 P.3d 1149, 1156-57 (Colo. App. 2003).

As shown above, once a physician has been sued by a patient for malpractice, the privilege no longer exists with respect to communications made by the patient to that physician under the "unmistakable" express exception of § 13-90-107(1)(d)(I). There is no statute that revives or restores the privilege, even if the suit against the physician is ultimately settled or dismissed, and for this Court to create such an exception to § 13-90-107(1)(d)(I) would be impermissible judicial legislation. *See Colorado Dept. of Revenue v. Cray Computer Corp.*, 18 P.3d 1277, 1283 (Colo. 2001); *Golden Animal Hosp. v. Horton*, 897 P.2d 833, 836 (Colo. 1995) ("For the court to infer an implied exception is tantamount to judicial legislation.").

Although there may be additional reasons why the physician-patient privilege does not exist with respect to Dr. Shapiro, such as his status as a consulting physician under § 13-90-107(1)(d)(II), C.R.S., there is no need to reach such issues, which are beyond the scope of this Brief. The unmistakable intent of § 13-90-107(1)(d)(I) is to eliminate the physician-patient privilege between a patient and a physician whom that patient has sued for malpractice.

For these reasons, the Court should discharge the rule to show cause with regard to the trial court's order allowing defense counsel to have *ex parte* contact with former defendant Dr. Shapiro. As the trial court correctly ruled, the *Samms* notice requirement has no application to Dr. Shapiro because he was named as a party defendant in the case, and is therefore not the kind of nonparty treating physician to whom the *Samms* notice requirement applies. Under § 13-90-107(1)(d)(I), there is no longer any remaining physician-patient privilege to protect. A holding from this Court that the privilege no longer exists once a physician has been sued will not only discourage the kind of unfair tactics involved here, but will also encourage plaintiffs and their counsel to think more carefully about the parties they name as defendants.

CONCLUSION

For the foregoing reasons, the rule to show cause should be DISCHARGED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH C.A.R. 32(a)(3)

As required by C.A.R. 32(a)(3), I certify that this Brief is proportionally spaced and contains 2,345 words. I relied on my word processor to obtain the count and it is Word Perfect 12.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

John R. Mann, #16088
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CERTIFICATE OF MAILING

The undersigned certifies that on this 17th day of May, 2006, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE** was mailed in the U.S. mail, postage prepaid, and addressed as follows:

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