6-2-2006

Reutter v. Weber

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding from the Pueblo County District Court, Civil Action Number 2004 CV 53

In Re:

Plaintiffs/Petitioner:
DUANE REUTTER and PATTY REUTTER

Defendants/Respondents:
KEVIN WEBER, M.D.
MATTHEW SUMPTER, M.D. and
PUEBLO CARDIOLOGY ASSOCIATES, P.C.

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AMICUS CURIAE BRIEF OF THE UNIVERSITY OF COLORADO

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Statement of Interest

The Regents of the University of Colorado govern the University of Colorado system. *Colo. Const. Article IX, §12.* The University of Colorado system consists of three campuses – the University of Colorado at Boulder, the University of Colorado at Denver and Health Sciences Center, and the University of Colorado at Colorado Springs.

The University's interest in this case arises primarily because it operates a medical school, nursing schools, and medical clinics. More than 1,500 faculty in five schools, including nurses, dentists, pharmacists, physicians, and other allied health care professionals contribute as the University fulfills its missions of providing education and clinical care.

Medical education is unique in the amount of clinical experience that health care providers receive while in training. For example, after completing medical school, physicians undertake several years of graduate training in specific medical specialties. Training occurs in accredited hospitals and clinics where residents work under the supervision of physicians who are experts in their chosen specialties.[1]

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[1] See *American Medical Association,* Physician Education, Licensure and Certification at www.ama-assn.org/aps/physcred.html.

The attending physicians do not provide passive supervision to the residents assigned to them. To the contrary, the Accreditation Council for Graduate Medical Education oversees residency training programs throughout the United States.[2] The ACGME requires that all resident care "must be supervised by qualified faculty" and that "residents must be provided with rapid, reliable, systems for communicating with supervising faculty."[3]

For example, in internal medicine residencies, a physician's evaluation of a resident:

> [S]hould be based on close observation of residents performing specific tasks of patient management, such as the interview and physical examination, choice of diagnostic studies, formulation of differential diagnosis or problem lists, development of plans for short-term and long-term medical management, communication of treatment plans, invasive procedures, and (when on inpatient services) discharge planning.[4]

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[2] *See American Council for Graduate Medical Education*, Home Page at www.acgme.org/acWebsite/home/home.asp.

[3] *See American Council for Graduate Medical Education*, Common Program Requirements at www.acgme.org/acWebsite/dutyHours/dh_dutyHoursCommonPR.pdf.

[4] *See American Council for Graduate Medical Education*, Program Requirements for Residency Education in Internal Medicine at http://www.acgme.org/acWebsite/downloads/RRC_progReq/140pr703_u704.pdf. (emphasis added)

Similarly, for surgical residencies, the ACGME requires the attending physicians to ensure that the resident's educational experience offers "practice-based learning and improvement that involves the investigation and evaluation of care for their patients, the appraisal and assimilation of scientific evidence, and improvements in patient care."[5] The ACGME mandates a close relationship between the attending surgeon and the resident because "operative skill is essential and can be acquired only through personal experience and training."[6]

Despite the fact that resident education is collaborative, trial courts have applied the *Samms* requirements to sanction a defense lawyer who met with residents that assisted an attending physician with the medical care giving rise to the lawsuit. For example, in *Brown v. Lane*, a patient was admitted to a labor and delivery unit where a third-year obstetric resident took her medical history. After the baby was delivered, the attending physician and two residents surgically repaired a birth injury. The

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[5] *See American Council for Graduate Medical Education*, Program Requirements for Residency Education in Surgery at http://www.acgme.org/acWebsite/downloads/RRC_progReq/440pr1105.pdf (emphasis added).

[6] *See American Council for Graduate Medical Education*, Program Requirements for Residency Education in Surgery at http://www.acgme.org/acWebsite/downloads/RRC_progReq/440pr1105.pdf (emphasis added).

residents assisted the attending physician during the operation and held instruments, but did not provide any care that was separate from the attending physician's direct control and supervision. Nonetheless, after the patient's family brought suit against the attending physician, but not the residents, the trial court determined that *Samms* would not allow *ex parte* interview with the residents because they "provided actual care and treatment and were not simply consultants" to the attending physician.[7]

Although *Brown v. Lane* is not before the Court, it highlights the problems with the Reutters' artificial distinction between "treating physicians" and "consulting physicians." Because the Court's determination of the Reutters' Rule 21 Petition will affect the manner in which the University is able to defend claims arising from its medical residency programs, the University respectfully requests that the Court consider its discussion on the scope of the "consulting physician" exception to the physician-patient privilege.

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[7] *See Exhibit A, Order on Motion for Protective Order and Award of Sanctions* in *Brown v. Lane*, 2002 CV before the Denver County District Court.

Discussion

I. The Physician-Patient Privilege Does Not Apply to Consulting Physicians

An effective training environment requires a direct relationship between attending physicians and residents. There can be little dispute that a patient's interests are served when physicians-in-training have the ability to freely consult with more experienced physicians without the possibility of being accused of violating a statutory privilege. The General Assembly recognized the propriety of these consultations when it statutorily excluded communications between "consulting physicians" from the scope of the physician-patient privilege.

The Reutters' argument misconstrues the Court's requirements stemming from *Samms v. District Court*, 908 P.2d 520 (Colo. 1996), which found that defense counsel must provide notice before they conduct *ex parte* interviews of a patient's prior or subsequent treating physicians. *Samms* is grounded in a concern that notice will prevent treating physicians from inadvertently disclosing privileged information. A necessary prerequisite for *Samms* to apply, therefore, is a privileged communication.

In Colorado, a statute creates the physician-patient privilege. Because statutory privileges contravene the fundamental principle that the public has a right to every man's evidence, the Court strictly construes the scope of the privilege against the patient and accepts it only to the extent that a statute protects a particular communication. *People v. Agado*, 964 P.2d 565, 568 (Colo. App. 1998). As a result, a patient's statements to a doctor are not automatically privileged, but are protected only if they meet all of the statutory requirements. *Nelson v. Grissom*, 382 P.2d 991, 993 (Colo. 1963).

The physician-patient privilege is codified at *C.R.S. §13-90-107(1)(d)*, which states:

> A physician, surgeon, or registered professional nurse duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient . . .

Significantly, however, the physician-patient privilege is not absolute, and *C.R.S. §13-90-107(1)(d)* "shall not apply to" either:

> A physician, surgeon, or registered professional nurse 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 or nurse's care or treatment of such patient; or

C.R.S. §13-90-107(1)(d)(I) (emphasis added); or

> A physician, surgeon, or registered professional nurse who was in consultation with the physician, surgeon or registered nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises.

C.R.S. §13-90-107(1)(d)(II) (emphasis added).

Read together, these two provisions exclude two types of communications from the physician-patient privilege: (1) any communications between a physician and the patient who has sued her; and (2) any communications between a patient and a physician who was in consultation with the physician being sued on the case out of which the suit arises.

Both exceptions are entirely consistent with *Samms* and the Court's cases recognizing that a patient cannot bring suit and then claim that communications essential to the suit are privileged. *See Johnson v. Trujillo,* 977 P.2d 152, 157 (Colo. 1999) (stating that "it is not human, natural, or understandable to claim protection from exposure by asserting a privilege for communications to doctors at the same time when the patient is parading before the public the mental or physical condition as to which he consulted the doctor by bringing an action for damages arising from the same condition").

The Reutters' argument that "treating physicians" are not "consulting physicians" implies that a physician must be one to the exclusion of the other. It misses the mark because the statute does not ask whether a physician provided some form of care and treatment. Instead, the statute asks whether a physician was "in consultation with the physician . . . being sued . . . on the case out of which said suit arises." *C.R.S. §13-90-107(1)(d)(II).* Where a lawsuit arises from an integrated course of medical care, it follows that all of the physicians involved in that course of care should be considered "consulting physicians."

No Colorado case has considered the scope of the "consulting physician" exception to the physician-patient privilege. In the absence of any binding precedent, the University respectfully refers the Court to medical dictionaries that define the terms "consultant" and "consultation" in terms that physicians and laypersons alike can understand. *See People v. Thoro Products Company, Inc.*, 70 P.3d 1188, 1194 (Colo. 2003) (stating that "we have frequently looked to the dictionary to ascertain the meaning of undefined words in a statute").

> **Consultant**: A physician or surgeon who does not take actual charge of a patient, but acts in an advisory capacity to the patient's primary physician.[8]
>
> **Consultation**: A meeting of two or more health professionals to discuss the diagnosis, prognosis, and treatment of a particular case.[9]
>
> **Consultation**: In a specific patient, diagnosis and proposed treatment by two or more health care workers at one time.[10]

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8 *Stedman's Medical Dictionary* at Page 182 (2001)

9 *Stedman's Medical Dictionary* at Page 182 (2001)

10 *Taber's Cyclopedic Medical Dictionary* at Page 439 (1993)

Contrary to the Reutters' misstatement that "the term consultant refers to a physician to physician relationship in which a treating physician consults a non-treating physician about a case or a particular aspect of case," none of these definitions constrain the "consulting physician" to a role where she has no interaction with the patient. Instead, a "consulting physician" is someone who worked with the defendant in diagnosing and treating the patient.

The Reutters' argument assumes that the "consulting physician" exception cannot not apply if the consultant interacted with the patient, but this reading nullifies *C.R.S. §13-90-107(1)(d)(II). See People v. Russell,* 703 P.2d 620, 622 (Colo. App. 1985) (stating that courts should avoid a statutory construction that nullifies a statutory provision or renders its provisions mere surplussage). Unless the consulting physician received otherwise confidential communications from a patient, there would be nothing to protect. When the General Assembly created the consulting physician exception, it simply recognized that many physicians may participate in the course of care giving rise to a lawsuit.

II. *Samms v. District Court Should Not Apply to Physicians Whose Only Care and Treatment of the Patient was During the Course of Events Giving Rise to Litigation*

The Reutters argue that *Samms v. District Court* applies to defense counsel's interviews with any treating physician. They believe that *Samms* requires that plaintiff's counsel be given notice of any informal interview and an opportunity to attend.

The University respectfully contends that the Reutters read *Samms* too broadly. Its requirements should not apply when a defendant's counsel interviews a physician who interacted with a patient only during the course of treatment giving rise to litigation. *Samms* arose under circumstances where defense counsel's interviews with treating physicians might elicit information that remained subject to a residual physician-patient privilege. In the circumstances presented here, however, the Court should determine that *Samms* does not apply because communications between physicians acting in consultation are not privileged.

A. Analysis of *Samms v. District Court*

In *Samms,* a patient brought suit after an emergency room physician treated her for complaints of abdominal pain, which the physician diagnosed as peptic acid disease with reflux. *Samms,* 908 P.2d at 523. Long after being discharged from the emergency room, Mrs. Samms learned that she actually suffered a heart attack when she visited the emergency room and sued the emergency room physician for failing to render a correct diagnosis. *Samms,* 908 P.2d at 523. During the course of discovery, the emergency room physician's attorney wanted to conduct *ex parte* interviews with nineteen different physicians who provided unrelated care and treatment to Mrs. Samms, and the Court exercised its jurisdiction to determine whether these interviews were permissible. *Samms,* 908 P.2d at 523-24.

Ultimately, the Court determined that *ex parte* interviews are appropriate only where the patient waived the physician-patient privilege for her communications with a particular physician by bringing a personal injury claim. Significantly, the Court did not prohibit all *ex parte* interviews because "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 of a claim for relief." *Samms,* 908 P.2d at 525-26. Allowing those interviews when no privilege exists is consistent with the Court's finding that "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." *Samms,* 908 P.2d at 526.

At the same time, a patient's filing of a lawsuit is not a wholesale waiver of the physician-patient privilege, particularly where an *ex parte* disclose privileged communications that were not waived. *See e.g. Johnson,* 977 P.2d at 158-159 (Colo. 1999) (determining that a plaintiff does not necessarily waive the physician-patient privilege by making generic claims for mental suffering damages incident to physical injuries). Consequently, the Court cautioned that defense counsel's "informal questioning must be confined to matters that are not subject to a physician-patient privilege." *Samms,* 908 P.2d at 526.

To protect against the possibility that an *ex parte* interview would extend beyond the patient's waiver of the physician-patient privilege, the Court required defense counsel to give "reasonable notice of any proposed informal interview." *Samms,* 908 P.2d at 526. It reasoned that such notice will enable a patient to take appropriate steps to "ensure that the interviews are limited to matters not subject to the plaintiff's physician-patient privilege." *Samms,* 908 P.2d at 526. In appropriate circumstances, the patient could inform the physician that certain information remains subject to the physician-patient privilege or seek a protective order from the trial court. *Samms,* 908 P.2d at 526.

B. *Samms v. District Court* Should Not Apply to Interviews with Physicians Who Participated in the Care and Treatment that Becomes the Subject of a Lawsuit

Samms clearly applies in circumstances where defense counsel interviews physicians who were involved in medical care beyond the treatment giving rise to the plaintiff's claim, such as the nineteen interviews of Mrs. Samms' prior and subsequent treating physicians. By filing suit, Mrs. Samms waived 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." *Samms,* 908 P.2d at 525 (emphasis added). Although *Samms* permits discovery of the nature and extent of personal injuries, it protects physician-patient communications that do not have any logical or legal relationship to the events that form the basis of the patient's claims.

Samms cannot apply when physicians concurrently treat a patient for the same medical condition that becomes the subject of a lawsuit. Even though only one of the physicians might be sued, all of the physicians' communications arise from the same course of medical care that forms the basis of the plaintiff's claim for relief. Under the Court's clear holdings, "when the privilege holder pleads a physical or mental condition as the basis of a claim . . ., the only reasonable conclusion is that he thereby impliedly waives any claim of confidentiality respecting that same condition." *Clark v. District Court,* 759 P.2d 3, 10 (Colo. 1983) (emphasis added). Stated another way, when a patient uses her physical or mental conditions to seek judicial relief, her claims are "irreconcilable with a claim of confidentiality." *Clark,* 668 P.2d at 10.

III. *Alcon v. Spicer Provides a Framework for Determining When Ex Parte Communications May Occur.*

Applying *Samms* to a course of medical treatment for which there can be no claim of privilege – either because the patient has waived the privilege or the consulting physician exception to the privilege applies – undermines *ex parte* interviews as "an informal, efficient, and cost-effective method for discovering facts relevant to the proceedings." *Samms,* 908 P.2d at 524. Instead, it allows plaintiffs to use the physician-patient privilege as a sword, rather than a shield, and forces defendants to resort to formal discovery. *Clark,* 668 P.2d at 10.

In *Alcon v. Spicer,* 113 P.2d 735 (Colo. 1995), the Court affirmed that a personal injury plaintiff waives physician-patient privilege for all communications relating to the cause and extent of the injuries she claims to have sustained as a result of the defendant's negligence. *Alcon,* 113 P.2d at 737. In doing so, it reinforced its previous holdings that some aspects of a patient's medical care might remain subject to a residual privilege because they do not bear directly upon the nature and extent of the damages for which the plaintiff seeks an award of damages.

At the same time, however, the Court reminded litigants that the patient bears the burden of establishing any residual privilege. *Alcon*, 113 P.3d at 739. Thus, once a plaintiff files a personal injury lawsuit and injects her physical condition into the lawsuit, she must submit a privilege log defining any medical information she wishes to shield from discovery as subject to a residual privilege. *Alcon*, 113 P.3d at 739. Without this information, the plaintiff becomes the sole arbiter of determining the relevancy of her medical history, which could give rise to abuse.

Although *Alcon* focused on requests for potentially privileged medical records, its holding is equally applicable to verbal communications. In fact, the plaintiff must describe the materials she withholds in a privilege log with sufficient detail so that the opposing party and the trial court can assess the claim of privilege "as to each withheld communication." *Alcon*, 113 P.3d at 742 (emphasis added). Consequently, where a plaintiff believes that *ex parte* communication with a physician is inappropriate because of a residual privilege, she should list that physician in the privilege log and provide sufficient information to allow the trial court to determine whether a residual privilege exists.

Reconciling *Samms* and *Alcon* in this manner balances both the physician-patient privilege and the goals underlying the Colorado Rules of Civil Procedure, which are intended to secure the "just, speedy and inexpensive determination of every action." *C.R.C.P. 1(a).* Informal discovery should not serve as a means of invading truly privileged communications, but the Court need not extend *Samms'* protections based upon an artificial distinction between "treating physicians" and "consulting physicians."

Dated this 15 day of May, 2006:

OFFICE OF UNIVERSITY COUNSEL

Patrick T. O'Rourke, #26195

BUDMAN MASTIN & HERSHEY, LLC
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Certificate of Service

I certify that a true and correct copy of the foregoing was served upon the following by United States mail on this 15th day of May, 2006:

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DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	
Plaintiffs: **WILLIAM H. BROWN, JR.; WILLIAM H. BROWN, III; CAMERON L. BROWN; and SALLY ALLEN EASTER, M.D., and JEFFREY M. BROWN, M.D.,** as co-personal representatives of the Estate of **JAMI E. BROWN** Defendants: **LARA MARIE LANE, M.D.; DANNY EICHER, M.D.; CONSULTANTS IN OBSTETRICS AND GYNECOLOGY, P.C.,** a Colorado corporation; **BRADLEY HAAS, M.D.; Colorado ANESTHESIA CONSULTANTS, P.C.,** a Colorado corporation; and **HCA-HEALTHONE, LLC,** d/b/a Rose Medical Center, a Colorado limited liability corporation	▲ COURT USE ONLY ▲ Case Number: **02 CV 5219** **Courtroom 18**

ORDER ON MOTION FOR PROTECTIVE ORDER AND AWARD OF SANCTIONS

THIS MATTER is before the Court on plaintiffs' motion for a protective order and an award of sanctions concerning defense counsel's ex parte interviews of two physicians, Dr. Klein and Dr. Kenefick. These physicians were involved in the care of the decedent and were interviewed, on an ex parte basis and without notice of plaintiffs' counsel, by counsel for defendant Lara Marie Lane, M.D.

Plaintiffs' motion is premised on the requirement established by the Colorado Supreme Court in Samms v. District Court, 908 P.2d 520 (Colo. 1995). I read Samms as applying to any interview by defense counsel with a treating physician for a plaintiff. Samms requires that plaintiffs' counsel be given reasonable notice of any proposed informal interview and an opportunity to attend. The reason for the Samms' notice requirement is primarily to guard against disclosure by the physician of information protected by the physician-patient privilege. A secondary reason is to guard against any attempt by defense counsel to improperly influence the physician's trial testimony. The notice requirement applies whether or not there has been a waiver, express or implied, of the physician-patient privilege.

EXHIBIT A

There is no doubt that Drs. Klein and Kenefick were treating physicians of Jami Brown, the decedent. They provided actual care and treatment and were not simply "consultants" to Dr. Lane. Therefore, Ms. Brown's communications with Drs. Klein and Kenefick were protected by the physician-patient privilege. Of course, that privilege did not preclude open communications among all three doctors about Ms. Brown's care.

Dr. Lane's counsel's failure to give plaintiffs' counsel notice of their informal interviews of Drs. Klein and Kenefick violated the notice rule established by Samms. In this case, that violation appears to be of little consequence as far as the physician-patient privilege is concerned because the only treatment these physicians provided was in connection with the medical care that gives rise to this lawsuit. Plaintiffs' filing of the lawsuit constitutes a waiver of the physician-patient privilege with respect to matters concerning this course of care. See Clark v. District Court, 668 P.2d 3 (Colo. 1983); C.R.S. 13-90-107(1)(d)(I) and (II). However, a defense counsel is not permitted under Samms to make a unilateral determination that no privilege applies and ignore the Samms notice requirement. Further, even if the privilege has been waived, these physicians may still have been subject to the improper influence concern which is a secondary reason for the Samms' rule.

Plaintiffs' motion for protective order is granted. Defendants shall not seek or conduct any meetings or interviews with any non-party treating physicians of Jami Brown without complying strictly with the requirements set forth in Samms v. District Court. Plaintiffs' motion for sanctions is granted in part. Within ten days from the date of this order, Dr. Lane's counsel are directed to produce to plaintiffs' counsel copies of all notes and memoranda reflecting or relating to their ex parte communications with Dr. Klein and Dr. Kenefick. I decline to order that plaintiffs may take the depositions of defendants' counsel concerning these interviews. Within ten days, Dr. Lane's counsel are ordered to reimburse plaintiffs' counsel $750 towards the attorney's fees and costs incurred by plaintiffs in connection with this motion. These are reasonable and appropriate sanctions for defense counsel's unilateral decision to ignore the prophylactic rule established by Samms. A simple telephone call would have avoided this entire dispute. 6/2/03 6/2/03

SO ORDERED.

Dated this 23rd day of May, 2003.

BY THE COURT:

Joseph E. Meyer III
District Court Judge

cc: Baine Kerr, Attorney for Plaintiffs
Robert Ruddy, Attorney for Dr. Lane
Joseph Jaudon, Attorney for Dr. Eicher