5-14-1983

Clark v. District Court, Second Judicial Dist.

SUPREME COURT, STATE OF COLORADO

Case No. 83SA182

ORIGINAL PROCEEDING
PETITION FOR RELIEF PURSUANT TO C.A.R. 21

PETITIONER'S REPLY BRIEF

Petitioner: CLARK, Stephan D.

vs.

Respondents: DISTRICT COURT, Second Judicial District, City and County of Denver; SPARR, Daniel B., one of the judges thereof; ESTATES OF SAILAS.

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Are the medical records of a defendant in a civil action privileged and protected from discovery when the defendant has not placed his physical and mental condition in issue?

II. SUMMARY OF ARGUMENT

Defendant Clark's privileged communications with physicians, psychologists, social workers, etc. are protected by statute and any basis for breach of that privilege is controlled by the provisions of the applicable statutes. Defendant Clark has done nothing in the underlying civil action to waive his privilege, one of the statutory exceptions), and Plaintiffs' arguments do not fall within any of the other statutory exceptions to the privilege.

III. ARGUMENT

It should be noted preliminarily that reference is made throughout this brief to Defendant Clark's statutory "privilege or similar phrase. This refers to certain state and federal statutes protecting medical and medically-related relationships and communications. Those statutes are specifically named and cited in petitioner's opening brief as well as this reply brief. For convenience in this brief, the statutes will at times be referred to generically and collectively as "the privilege," "physician-patient privilege," etc.

Respondents' Answer Brief makes essentially two arguments. The first is that Defendant Clark's physical and mental condition is in issue, therefore justifying discovery. The second argument is that successful assertion of the physician-patient privilege will foreclose the plaintiffs' claim. Defendant Clark will discuss these arguments in order.

A. Defendant Clark did not place his condition in issue and therefore did not waive his privilege.

The thrust of the first argument by Respondents is not completely clear. Respondents have phrased the issue as being whether Defendant Clark's physical and mental condition is "in issue," thereby justifying discovery. Respondents have, however, misperceived

the significance of the "in issue" requirement. This requirement relates to the concept of waiver, not relevancy.

By saying Defendant Clark's physical and mental condition is "in issue," plaintiffs are merely using different words to say that the condition of Defendant Clark is relevant to the issues raised by plaintiffs' claims for relief. Relevancy, of course, is a fundamental criterion for discoverability; but this begs the question, since Defendant Clark is not objecting to disclosure on the grounds of relevancy, but rather on the grounds of privilege, an independent criterion for discovery.

Furthermore, respondents' statement that a defendant's physical and mental condition is "in issue," does not address the question of which party placed the condition in issue. The determination of such question is essential to a determination of the issue before this Court, because this discovery question is governed by considerations of statutory privilege which, in turn, is governed by whether that privilege has been waived. Since waiver can be effectuated only by the person claiming the privilege, there can be a waiver only if Defendant Clark's physical and mental condition has been placed in issue by Defendant Clark. Plaintiff Estates of Sailas cannot, by asserting claims for relief which raise the issue of Defendant Clark's condition, waive his privilege for him.

Respondents further argue that Defendant Clark did affirmatively waive his privilege when, in his answer to the plaintiffs' amended complaint, he denied allegations relating to his physical and mental condition. They claim that a mere denial of a complaint's allegations is sufficiant affirmative action to be deemed a waiver, and quote from Kelley v. Holmes, 28 Colo. App. 79, 470 P.2d 590 (1970) in support of their argument. However, the very quotation cited by respondents states that a mere denial of the allegations regarding physical and mental condition is not a waiver of the privilege. (See page 4 of answer brief). A waiver occurs only when a party raises his physical or mental condition by affirmative claim or affirmative defense. Kelley, supra at p. 84. A denial of a complaint's allegations is not an affirmative defense, as respondents mistakenly assert.

There is another reason why a mere denial of a complaint's allegations does not rise to a waiver of the privilege. To be valid, a waiver must be voluntary. There must be a clear intent to forgo the privilege. Franco vs. District Court, 641 P.2d 922, 931 (Colo. 1982). Denial of a complaint's allegations cannot be deemed a voluntary act of waiver; otherwise, a defendant would be placed in the untenable position of either admitting the allegations of the complaint or waiving his privilege.

Waiver of the statutory privileges such as the physician-patient privilege are governed by the provisions of the statutes, which contain specifically enumerated exceptions to the privilege. Although the wording of the individual statutes vary, waiver and consent are uniformly listed in the privilege statutes as one of the exceptions to the privilege. As stated above, Defendant Clark has not placed his condition in issue and therefore has not waived his privilege under the statutes. And, as stated below, none of the other statutory exceptions to the privilege apply to this case.

B. Plaintiffs' arguments for breach of the privilege do not fall within any other statutory exception to the privilege.

Plaintiff Estates of Sailas argues that Defendant Clark should not be allowed to exercise his physician-patient privilege, because it would prevent plaintiffs from proving their claim. (We suspect plaintiffs are being too hard on themselves and their ability to marshal evidence on Defendant Clark's condition without the medical records. Plaintiffs surely are not conceding, for the record, to a dismissal of their claim for lack of evidence if the physician-patient privilege is upheld.) Nevertheless, we shall assume as much for the purpose of this argument.

Plaintiff Estates of Sailas, then, are in effect saying that they cannot prove their case if they can't breach Defendant Clark's physician-patient privilege. They further state it would be unfair for the privilege to be invoked to deny their claim. This argument assumes by implication that the plaintiffs have a meritorious claim against defendants--that once they have the information they seek, they will prove their case. Thus, the argument further implies,

since the plaintiffs can win their case against defendants with the information, it would be unfair to deprive them of that result by withholding the information.

This argument is flawed for several reasons. First, it is analogous to an "end justifies the means" argument, with all that implies. Second, it injects an additional issue into the resolution process--that of the concept of the merit of the claim. Thus under this theory, in order to resolve this discovery issue, two threshold issues must first be resolved: (a) whether the plaintiffs' claim is, indeed, a meritorious one; (b) whether it would be "fair" or "equitable" to deny the claim by upholding the privilege.

Further, because plaintiffs feel they have a meritorious claim and it would therefore be unfair to foreclose it, they must advocate the argument that there should be no privilege in the face of a meritorious claim. Under this line of reasoning, since the filing of a meritorious claim against a defendant strips away a defendant's privilege, a frivolous lawsuit would not strip the protection away. Under this reasoning, then, one is protected by the privilege only if one is being sued frivolously---a curious result indeed.

Are such privilege limitations and exceptions as those advocated by respondents actually in the applicable Colorado privilege statutes? A thorough review of those privilege statutes (physician, 1973 CRS 13-90-107(d); psychologist, 1973 CRS 13-90-107(g); social worker, 1973 CRS 12-63.5-115) fails to disclose any support for plaintiffs' contention

Colorado's Physician-Patient Privilege Statute (1973 CRS 13-90-107(d)) functions, as stated by this Court, "as an encouragement and a protection for the person who seeks treatment." People vs. Taylor, Colo. , 618 P.2d 1127 at 1140 (1980). The Colorado legislature recognized certain relationships "in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness..." 1973 CRS 13-90-107(1).

There are a number of statutorily stated exceptions to the privilege. Some are common to all of the statutes: (a) the patient gives his consent; (b) the patient sues the doctor, psychologist, social worker, etc.; (c) when certain approved medical committees inspect the

records. Some are unique to the particular statute in question. However, in none of the statutes is there an exception based upon a meritorious claim being pursued against the patient.

The privilege statutes contain no such exception for good reason. Such an "equity exception" would be so vague and overbroad as to virtually destroy the privilege itself. If such an exception is to be carved out of the privilege, the proper forum should be the legislature, not this Court.

Respondents' Answer Brief cites Community Hospital Association vs. District Court, 194 Colo. 98, 570 P.2d 243 (1977) for the proposition that "the Colorado courts have allowed privileged information to be released where claimant had no other method for proving his case" (p. 6 of Answer Brief). A careful review of this case fails to support that statement. There is nothing in the opinion to suggest that such an issue was even raised by any of the parties, let alone decided by the case.

The issue in Community Hospital Association, supra, was whether the privilege statute would be improperly circumvented by disclosure of the hospital records of patients whose identities would remain anonymous. This Court held that the purpose of Colorado's physician-patient privilege statute was to encourage full disclosure to doctors and to prevent the patient from being humiliated and embarrassed by disclosure of information about the patient. This Court held that the purpose of the statute was achieved by the conditions imposed by the trial court for release of the hospital records, conditions which guaranteed patient anonymity. This Court quoted with approval authority from other jurisdictions indicating that if the disclosure does not reveal the patient's identity, it does not violate the privilege.

The Respondents' answer brief also states that this Court noted in Community Hospital Assn., supra, that the trial court adequately protected the patients' privilege by imposing "conditions" on the release of the information which allowed, "in a broad sense," only relevant information to be utilized at the trial (pp 6-7 of the answer brief). Such conditions would be met in the case at bar, argue the respondents, by allowing the trial

court to review Defendant Clark's medical records for relevancy before releasing the information. (This is always an independent condition for discovery. In addition, as mentioned elsewhere in this brief, relevancy begs the question of privilege.) What the answer brief does not mention, however, is that the conditions approved by this Court in the Community Hospital Association case, were conditions which guaranteed anonymity of the patient. Respondents are clearly not requesting the condition of anonymity in the case at bar.

Respondents' Answer Brief further argues that the physician-patient privilege should not be absolute and a balancing approach should be used to allow disclosure, and relies heavily upon the following cases in support of this proposition: Lora vs. Board of Education, 74 F.R.D. 565(E.D.N.Y. 1977); and United States vs. Hopper, 440 F.Supp. 1208(D.C. Ill. 1977). A careful reading of both cases, however, reveals that neither case can be relied upon to support the plaintiffs' argument.

Lora, supra, involved a suit against the New York City school system by students placed, in an allegedly discriminatory manner, in special schools for emotionally disturbed children. The plaintiffs sought 50 randomly selected diagnostic and referral files of students being evaluated for placement. Names and identifying data were not requested by the plaintiffs. Defendant school board objected to any disclosure, even with names and identifying data deleted. The federal court's decision to allow disclosure was greatly influenced by the fact that anonymity of the individual students was to be preserved. The court also noted that no statutory privilege was involved, and further noted from the evidence that the students and parents would have given the school system the same information for the records being requested even if they had been told it would not be privileged (p. 576).

Hopper, supra, arose out of a probation revocation hearing on a felony conviction for heroin distribution. As a condition of probation, the federal court had ordered Mr. Hopper to enroll in a hospital drug abuse program. After a routine urinalysis was found to be positive for morphine, the prosecutor subpoenaed Hop-

per's records from the hospital drug program. Hopper moved to quash the subpoena, asserting a common law non-statutory privilege.

Stating at the outset that "it is significant that Mr. Hopper is a probationer" and thus under the federal court's continuing jurisdiction, the court ordered the records produced, observing that "probation is unquestionably a matter of grace rather than right." (p. 1209). The federal court noted that it clearly has broad latitude in imposing conditions of probation, that Mr. Hopper's probation was conditioned upon successful participation in a drug abuse program, and that the court could have at the outset imposed an added condition that Mr. Hopper make his medical records available to his probation officer.

The crux of the case, explained the court, was whether the Federal Drug Abuse Statute can limit a court's supervisory authority over one of its probationers. The court's decision to require disclosure was clearly affected by the fact that its supervisory authority over a probationer encompasses not only such things as requiring involuntary participation in a drug abuse program, but also disclosure to the probation officer of the probationer's records generated by the drug abuse program.

Respondents' Answer Brief states at page 9 that Hopper, supra, considered certain criteria in determining whether medical records were to be released. The answer brief does not mention that the court stated that these criteria were to be considered when "a prosecutorial agency seeks disclosure of patient records" (p. 1210), a clear reference to the limited scope of the case. Although applying a balancing test, the court noted the interests to be balanced were somewhat different "because this case involves a probationer under the continuing jurisdiction of this Court," stating further that otherwise the effectiveness of its continuing supervisory authority over probationers would be "seriously hampered" (p. 1211).

Finally, and most significantly, the Hopper case is self-limiting in scope. In so many words, the opinion expressly limited and circumscribed the effect of its ruling to apply only to those cases where participation in drug abuse programs is ordered by the court (p. 1211).

There is no common thread running through the Lora and Hopper cases favoring plaintiffs' argument for production of records in the case at bar. In Lora, the critical factor was the anonymity of the persons themselves. This factor has already been recognized in Colorado (see Community Hospital Association vs. District Court, supra), but has no applicability to the facts of the case at bar. In Hopper, the critical factor was the court's supervisory authority over probationers, with the case limited in scope to cases where participation in drug abuse programs are ordered by the court. Further, neither case sheds any light upon nor interprets in any way Colorado's physician-patient and related privilege statutes.

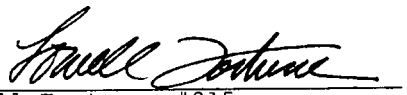
CONCLUSION

The determination of whether there is a waiver or exception to the statutory privileges invoked by Defendant Clark is governed by the provisions of those statutes. The statutory exception of consent or waiver is not applicable here, since Defendant Clark did not place his physical or mental condition in issue. Contrary to respondents' contention, no "equity" or "meritorious claim" exceptions are found in the privilege statutes. If such exceptions are to be created, they should be created by legislative rather than judicial action.

The trial court order compelling production of Defendant Clark's medical records should be reversed.

Respectfully submitted,

FORTUNE & LAWRITSON, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 1983, a true and correct copy of this ANSWER BRIEF was placed in the U.S. mail, postage prepaid and addressed to the following:

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