

IN THE SUPREME COURT OF MISSOURI

STATE ex. rel. WILLIAM A. STINSON,)
)
) Case No. SC 90364
)
vs.)
)
THE HONORABLE TED HOUSE,)
)
) Respondent.

**APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY,
MISSOURI
THE HONORABLE TED HOUSE, CIRCUIT JUDGE
CASE NO. 0511-CV05544
EASTERN DISTRICT COURT OF APPEALS NO. ED92283**

BRIEF OF RELATOR WILLIAM A. STINSON

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TABLE OF CONTENTS

TABLE OF CONTENTS 0

Table Of Authorities..... 2

Jurisdictional Statement..... 3

Statement of Facts 3

Point Relied On 4

Argument..... 5

I. Relator is entitled to an order prohibiting Respondent from enforcing the July 13, 2009 court order requiring execution of medical authorizations, thereby providing his confidential medical records to Plaintiff, because these records are protected by the physician-patient privilege, and the Relator has not placed his medical condition at issue or otherwise waived the privilege, in that a trial court which threatens to order discovery of medical records entitled to the physician patient privilege acts without jurisdiction or in excess of jurisdiction. 5

Standard of Review 5

Analysis 6

Conclusion..... 10

CERTIFICATE OF COMPLIANCE 12

CERTIFICATE OF SERVICE..... 13

APPENDIX.....Bound Separately

Table of Authorities

Cases

<i>Rodriguez v. Suzuki Motor Corp.</i> , 996 S.W.2d 47, 63 (Mo.1999).....	3
<i>State ex rel. Faith Hospital v. Enright</i> , 706 S.W.2d 852, 855 (Mo. banc 1986).....	3
<i>State ex rel. Hayter v. Griffin</i> , 785 S.W.2d 590 (Mo.App. W.D. 1990)	3, 7
<i>State exrel Jones v. Syler</i> , 936 S.W.2d 805, 807 (Mo. banc 1997).....	3, 4
<i>State ex rel. Marianist Province of the U.S. v. Ross</i> , 258 S.W.3d 809, 810 (Mo.banc 2008).	4
<i>State ex rel. White Family P'ship v. Roldan</i> , 271 S.W.3d 569, 572 (Mo. banc 2008).	4

Statutes

Sec. 490.160(5), RSMo. 1994	3
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Other Authorities

See MAI 20.01 generally.....	8
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Constitutional Provisions

Mo. Const. Art. V., Sec. 4.1.	2
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Jurisdictional Statement

This action is a Petition for a Writ of Prohibition involving the question of whether a court order requiring the Relator to sign a medical authorization releasing his medical, psychiatric and or psychological records for care or treatment related to alcohol and/or substance abuse violates his physician-patient privilege. This Court has the authority to “issue and determine original remedial writs.” Mo. Const. Art. V., Sec. 4.1.

Statement of Facts

Relator is one of four defendants in a wrongful death action. (Seventh Amended Petition-Wrongful Death, Appendix pg. A6). Relator objected to Plaintiff, Shauna Young, f/k/a Intervenor Shauna McDonald’s, Request for Production of Documents requesting execution of an authorization form to disclose records regarding medical and psychological care, treatment and evaluation provided by any health care provider from January 1, 1990 through the present date. (Defendant William A. Stinson’s Objections to Intervenor Shauna McDonald’s First Request for Production of Documents Directed to Defendant William Stinson, Appendix pg. A3). On July 13, 2009, the trial court overruled the Relator’s objection and entered an order requiring him to execute the medical records authorization. (Trial Court Order Dated July 13, 2009, Appendix pg. A5). The Relator filed a Writ of Prohibition in the Missouri Court of Appeals, Eastern

District which was denied on August 19, 2009. (Missouri Court of Appeals, Eastern District Order Dated August 19, 2009, Appendix, pg. A34).

Point Relied On

Relator is entitled to an order prohibiting Respondent from enforcing the July 13, 2009 court order requiring execution of medical authorizations, thereby providing his confidential medical records to Plaintiff, because these records are protected by the physician-patient privilege, and the Relator has not placed his medical condition at issue or otherwise waived the privilege, in that a trial court which threatens to order discovery of medical records entitled to the physician patient privilege acts without jurisdiction or in excess of jurisdiction.

Rodriguez v. Suzuki Motor Corp. 996 S.W.2d 47, 63 (Mo.1999)

State ex rel. Faith Hospital v. Enright, 706 S.W.2d 852, 855 (Mo. banc 1986)

State ex rel. Hayter v. Griffin, 785 S.W.2d 590 (Mo.App. W.D. 1990)

State ex rel. Jones v. Syler, 936 S.W.2d 805, 807 (Mo. banc 1997)

Sec. 490.160(5), RSMo. 1994

Argument

I. Relator is entitled to an order prohibiting Respondent from enforcing the July 13, 2009 court order requiring execution of medical authorizations, thereby providing his confidential medical records to Plaintiff, because these records are protected by the physician-patient privilege, and the Relator has not placed his medical condition at issue or otherwise waived the privilege, in that a trial court which threatens to order discovery of medical records entitled to the physician patient privilege acts without jurisdiction or in excess of jurisdiction.

Standard of Review

A writ of prohibition is appropriate in this case because it involves the production of materials protected by the physician patient-privilege. “Filing a petition for a writ of prohibition is an appropriate procedure when a party has been directed to produce material that is privileged.” *State ex rel. Boone Retirement Ctr., Inc. v. Hamilton*, 946 S.W.2d 740, 741 (Mo. banc 1997). The Relator is requesting an order prohibiting Respondent from acting in excess of its jurisdiction by ordering the release of privileged records. “Prohibition is an original remedial writ brought to confine a lower court to the proper exercise of its jurisdiction.” *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008). “Prohibition is a discretionary writ that only issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power.” *State ex rel. Marianist Province of the U.S. v. Ross*, 258 S.W.3d 809, 810 (Mo.banc 2008).

Analysis

Respondent has ordered the Relator to sign a release authorizing the disclosure of his medical records to the Plaintiff. The physician-patient privilege extends to hospital and medical records. *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. banc 1997). To invoke the privilege the Relator must show that the information sought by the Plaintiff was necessary to his treatment. Sec. 490.160(5), RSMo. 1994. Plaintiff's discovery request asks for "all medical and psychological care, treatment and evaluation... from January 1, 1990 to the present date." (Exhibit A ¶ 3). This request, by its terms, is seeking access to information used to evaluate and treat the Relator. Therefore, the information sought by the Plaintiff is privileged and the Plaintiff has no legal right to access the records.

"Under well-established case law, the privilege is not absolute. It may be waived in a variety of ways, and the most common cases involve plaintiffs who voluntarily place their medical condition in issue by filing a petition alleging they suffered physical or mental injuries. A party may also "impliedly waive the privilege through an act showing a clear, unequivocal purpose to divulge the confidential information." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 63 (Mo.1999)(internal citations omitted). Relator has not waived his privilege and, therefore, Respondent's order violates the Relator's physician-patient privilege.

The *Rodriguez* case is directly on point. In that case Kathryn Rodriguez and Deborah Dubis were involved in an automobile accident that occurred shortly after the two women left a Missouri winery. Ms. Rodriguez was injured in the accident and brought a products liability claim against the manufacturer, Suzuki Motor Corp. Suzuki filed a cross claim against Ms. Dubis, the driver of the vehicle, and alleged that Ms. Dubis contributed to the accident by driving the vehicle while intoxicated. Ms. Dubis denied the allegation and did not plead any facts that placed her medical condition at issue. Suzuki then filed a discovery request asking for the medical records relating to the blood alcohol tests taken as part of Ms. Dubis' treatment after the accident. In denying the request, the Court said, "a denial of an allegation cannot constitute a waiver of the physician-patient privilege because to do so would force the patient to choose between suffering judgment by default or waiving the physician-patient privilege. Forcing that choice would be illogical and unacceptable." *Id.*

Suzuki made the argument that Ms. Dubis waived the privilege. In support of their argument, first, Suzuki pointed to Ms. Dubis' rebuttal testimony that when she left the winery, she did not feel lightheaded, nor was she slurring her speech or having difficulty walking, seeing or driving. Second, they asserted she waived the privilege by answering questions about her drinking while under cross examination. Third, they contended that Ms. Dubis' lawyer waived the privilege by questioning other witnesses about the intoxication issue. The Court stated Suzuki's three arguments were "without merit" and she did not impliedly waive the privilege by showing a clear and unequivocal purpose to divulge the confidential information. In support of its decision the court said, "For the

same reason that Dubis does not waive the privilege by filing an answer denying the allegations in Suzuki's cross-petition that she was intoxicated, she does not waive the privilege by introducing non-medical evidence at trial. Furthermore, the responses to questions on cross-examination that required her to divulge information about her intoxication are considered "extorted" and, therefore, involuntary." *Id.* at 63-64.

The petition in this case alleges that Relator has a medical condition and that his Mother and Father (Co-Defendants) knew or should have known about that condition and prevented the Relator from operating the automobile involved in this accident. Similar to *Rodriguez*, the Relator has denied the allegations as they relate to him and has not pleaded any facts to place his medical condition at issue. Just as Ms. Dubis' denial of Suzuki's allegations did not waive her privilege, Relator's denial of the Plaintiff's allegations do not constitute a waiver of his physician-patient privilege.

Relator has not taken any affirmative steps to impliedly waive the privilege. First, he has not introduced any medical testimony or evidence to rebut the Plaintiff's allegations. Second, he has objected to every request for the release of his medical records. Third, Relator has not voluntarily turned over any information regarding his medical condition. Therefore he has not waived the physician-patient privilege.

The Court of Appeals, Western District issued a writ of prohibition in a case similar to this case. In *State ex rel. Hayter v. Griffin*, the plaintiff filed a wrongful death action arising out of a fatal traffic accident. 785 S.W.2d 590 (Mo.App. W.D. 1990). The plaintiff named the surviving driver, Mr. Hayter, and his employer, Custom Feeders, Inc., as defendants. *Id.* The petition alleged that defendant Hayter suffered from diabetes

which caused him to lose consciousness immediately before the accident and collide with the plaintiff's vehicle. Both defendant's answered the petition and denied the allegations. The trial court entered an order compelling the production of defendant Hayter's medical records requiring him to sign an authorization granting the plaintiff access to his hospital and medical records.

The defendants petitioned the court for a writ of prohibition and cited the physician-patient privilege in support of their petition. The plaintiff alleged the defendant Hayter's responsive pleadings, deposition answers and disclosure of the records to his employer constituted a waiver of the privilege. In its opinion, the appellate court stated the privilege applied and it had not been waived by the defendants. (This brief only addresses the responsive pleading argument because the other two alleged waivers do not apply to this case.)

Defendant Hayter's general denial of the petition did not constitute a waiver. The plaintiff's petition alleged that the medical condition was the cause of the accident. (Causation is an element of a wrongful death action¹). By denying the allegation, defendant Hayter simply put the plaintiff on notice that he would be forced to prove the medical condition. If a general denial of a plaintiff's allegation constituted a waiver, a defendant "would be forced to a choice between suffering judgment by default or waiving his physician-patient privilege. Forcing that choice would be illogical and unacceptable." *Id.* at 593.

¹ See MAI 20.01 generally.

This case mirrors *State ex rel. Hayter*. The plaintiff has alleged that Relator has a medical condition of which the Co-Defendants were aware. (The Co-Defendants' knowledge of the medical condition is an element of negligent entrustment²). The Relator's general denial of his medical condition did not waive his physician-patient privilege. He simply put the Plaintiff on notice that she would be required to prove that medical condition at trial.

Conclusion

The records sought by the Plaintiff are protected by the physician-patient privilege. The Relator has not waived that privilege and, as such, is entitled to its protection. The Respondent acted without jurisdiction or in excess of its jurisdiction by ordering the Relator to sign a medical records authorization disclosing his records to the Plaintiff. Therefore, a writ of prohibition is appropriate, the preliminary writ should be made absolute and the Respondent should be prevented from compelling the Relator to sign the medical records authorization.

² See Respondent's Suggestions in Opposition to Relator's Petition for Writ of Prohibition, page 4.

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CERTIFICATE OF COMPLIANCE

As required by Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using Microsoft Word, is proportionally spaced, and contains 2438 words. Also, pursuant to Missouri Supreme Court Rule 84.06, accompanying this brief is a CD containing full text of this brief. Undersigned counsel further states that a copy of the diskette has been provided to opposing counsel, that the diskette has been scanned for viruses and that the diskette is virus-free.

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.

THEODORE G. PASHOS #32594

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this _____ day of _____, 2009 to: Stephen M. Glassman, The Glassman Law Firm, P.C., 231 South Bemiston, Suite 710, Clayton, Missouri 63105, attorney for the Plaintiff Shauna M Young; Ann P. Hagan, Hagan, Hamlett & Maxwell, L.L.C., 210 East Love, Mexico, Missouri 65265, attorney for William B Stinson, Janice Stinson and WILLIAM STINSON & SONS CO DBA W C SELECT AUTO CENTER , Defendants. The Honorable Ted House, Circuit Court Judge, Division 1, St. Charles County Court, Judicial Circuit 11, 300 N. Second Street, St. Charles, Missouri 63301

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