

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**

REPLY BRIEF OF RELATOR WILLIAM A. STINSON

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Argument

1. Respondent's brief fails to address the point relied on contained in the Relator's brief and, instead, attempts to redirect the Court's attention to the relevance of the information.

Relator, William A. Stinson, asserts that his medical records are privileged under Missouri law. Respondent argues that the requested information is relevant to the Plaintiff's ability to prove her claim of negligent entrustment against the Co-Defendants. Specifically, Respondent states that, "There is no question but that this information is not only relevant, but vital to Plaintiff's cause of action against Co-Defendants." *Respondent's brief* page 6. The physician-patient privilege does not contain an exception allowing disclosure of medical records to Plaintiff's who "really" need the information in order to prove their case.

There are a number of statutory exceptions to the physician-patient privilege including but not limited to:

1. 578.353 R.S.Mo., which allows health care professionals to report gun shot wounds to law enforcement.
2. 210.140 R.S.Mo., which allows for the reporting of child abuse or neglect.
3. 565.188 R.S.Mo., which allows for the reporting of elder abuse or neglect.
4. 632.425 R.S.Mo., which waives the physician-privilege in civil detention proceedings.

5. 431.062 R.S.Mo., provides for a waiver of the privilege so a physician or surgeon may advise a minor's parent(s) or conservator of care given or treatment needed.

None of the five exceptions apply to this case. Further, Relator has not found and Respondent has not provided a single case to support the Plaintiff's claim of entitlement to these medical records. As such, Respondent appears to be arguing for this Court to add a relevance exception to the physician-patient privilege when claim of privilege will shield the Relator's Co-Defendants from liability. Even if the Respondent's relevance argument is correct, "[t]he fact remains, however, that the privilege is set by statute, and any change to the scope of the privilege is solely a legislative prerogative." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 64 (Mo. 1999).

Respondent's argument goes on to list the Relator's driving history. The introduction of the Relator's driving history and related exhibits is nothing more than a red herring. The Relator's driving history is not legally relevant to whether the Relator's medical information is protected by the physician-patient privilege. Respondent's brief does not provide any legal authority to show that numerous driving convictions constitute a waiver of the physician-patient privilege.

2. Respondent's public policy argument is without merit because it is not supported by Missouri law.

The physician-patient privilege was created by statute. "The statute is, of course, intended to inspire confidence in the patient and to encourage him to make full disclosure to the physician as to his symptoms and condition." *Metropolitan Life Insurance Co. v. Ryan*, 172 S.W.2d 269, 272 (Mo.App. 1943). "The purpose of the physician/patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between the patient and the physician, free of fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information." *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. 2006).

Respondent argues that the information is not protected by the privilege because the information would not be used against the Relator. That same argument was rejected by this Court in *State of Missouri ex rel. Benoit v. Randall*. 431 S.W.2d 107 (Mo. 1968). In that case, the trial court ordered Relators, who were doctors, to allow the Plaintiff to examine the hospital records of some of their patients. Plaintiff intended to use the records against the Relators and the information contained in the records was not to be used against the patients. In issuing its order, the Court said the patients whose records were at issue were "entitled to protection from humiliation, embarrassment and disgrace." *Id.* at 110.

This case is similar to *State of Missouri ex rel. Benoit*. The information contained in the Relator's personal medical file does not lose its embarrassing qualities simply

because it will be used against his Co-Defendants. The same is true for his privacy concerns. The Relator has an interest in keeping his records private and Plaintiff's offer to use them only against the Co-Defendants fails to protect that privacy.

Plaintiff's proposed use of the medical records does not prevent the possible embarrassment or invasion of the Relator's privacy. Allowing them to be used against the Co-defendants is sure to have a chilling effect on physician-patient communication. Patients who fear disclosure of their records to future litigants, without their permission, will withhold information from their doctors. This will make it difficult, if not impossible, for a treating physician to provide complete and appropriate medical treatment. As the court said in *State ex rel. Dean*, the purpose of the physician patient privilege is to encourage open communication between patients and their physicians so the physicians can provide complete and appropriate medical treatment. *Id.*

3. The physician-patient privilege is covered by 491.060(5) R.S.Mo.

Respondent asks this Court to strike all reference to the privilege statute. Relator's original brief contains a typographical error citing the controlling statute as 490.160(5) R.S.Mo. The controlling statute is 491.060(5) R.S.Mo. not 490.160(5) R.S.Mo. A copy of the correct statute has been submitted to the Court with this reply brief. Respondent has not been prejudiced, nor has he claimed to be prejudiced, by the inadvertent error and omission. Absent prejudice to respondent, a court order striking all references to 491.060(5) R.S.Mo. is an unduly harsh remedy for an innocent mistake.

It is important to note that 337.540 R.S.Mo. creates a privilege for communication between professional counselors and their patients. Given the nature of the records sought here, this statute may also apply.

Conclusion

Relator's medical records are protected by the physician patient privilege. Respondent has not provided any facts to show a waiver of the privilege. Additionally, Missouri law does not contain an exception to the physician-patient privilege that supports Plaintiff's claim of entitlement to these medical records.

Respondent's public policy argument is not supported by Missouri law. Respondent has not provided a single statute or case to support the Order requiring the disclosure of Relator's medical records.

The preliminary prohibition order should be made absolute.

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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 1,364 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.

/s/ _____

THEODORE G. PASHOS #32594

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 22nd day of January, 2010 to: Stephen M. Glassman, The Glassman Law Firm, P.C., 231 South Bemiston, Suite 710, Clayton, Missouri 63105, attorney for the Palintiff 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, and Respondent The Honorable Ted House, Circuit Court Judge, Division 1, St. Charles County Court, Judicial Circuit 11, 300 N. Second Street, St. Charles, Missouri 63301.

/s/ _____

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