

CASE NO. SC 96219

IN THE SUPREME COURT OF MISSOURI

RONALD FENNEWALD, AS BROTHER OF THOMAS FENNEWALD, DECEASED,
Relator,

v.

HON. PATRICIA S. JOYCE,
Respondent.

BRIEF OF *AMICUS CURIAE*
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS
IN SUPPORT OF RELATOR

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Circuit Judge
Case No. 16AC-CC00256
Western District Court of Appeals No. WD80433

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INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit, professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens. For over fifty years, MATA lawyers have worked to advance the interests and protect the rights of individuals across our State. In doing so, MATA's membership strives to promote the administration of justice, preserve the adversary system, and ensure those citizens of our State with a just cause will be afforded access to our courts.

Whether a party to litigation can be ordered to provide opposing counsel with an unfettered medical authorization is an important question. The answer to such question affects the vast majority, if not all, of the people who are currently accessing or would seek to access Missouri's civil justice system. Accordingly, this issue is of considerable interest to MATA and its members.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Relator to file this brief. MATA sent a request for consent for the filing of this brief to counsel for the Respondent, on June 28, 2017; however, counsel for the Respondent has not consented to the filing of this Brief. Therefore, MATA is seeking an Order from this Court pursuant to Rule 84.05(f)(3) granting leave to file this *Amicus Curiae* brief. See Motion of Missouri Association of Trial Attorneys for Leave to File Brief as *Amicus Curiae* in Support of Relator.

JURISDICTIONAL STATEMENT

MATA hereby adopts the Jurisdictional Statement of Relator.

STATEMENT OF FACTS

MATA hereby adopts the Statement of Facts of Relator.

ARGUMENT AND AUTHORITY

I. Requiring Unlimited Disclosure of a Party's Medical Information Creates the Immediate Danger of Irreparable Damage to Litigation and Discourages Access to the Judicial System.

The disclosure of a party's privileged medical information, not otherwise discoverable, pursuant to an unrestricted order or blank medical authorization "will cause severe and irreparable damage that cannot be repaired on appeal." *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407 (Mo. Banc 1996), *see also State ex rel. Boone Retirement Ctr., Inc. v. Hamilton*, 946 S.W.2d 740, 741 (Mo. banc 1977).

In addition to irreparable damage, the ramifications of ordering the near unlimited disclosure of medical records are costly to all participants of litigation. Countless judicial resources may be exhausted as parties dispute the admissibility of otherwise undiscoverable, irrelevant medical information. Furthermore, parties may incur additional costs as they are forced to react to likely prejudicial, irrelevant and otherwise undiscoverable medical information. Restrictions on medical authorizations and orders requiring the disclosure of medical information prevent the above issues and promote judicial and financial efficiency.

Moreover, orders requiring the unlimited disclosure of medical records may begin to discourage access to the judicial system. Should a potential plaintiff know that all of his/her medical history (regardless of relevancy to the case at hand) may be subject to scrutiny during litigation, he/she may be discouraged from seeking justice. Such possibility must be taken seriously as all Missourians have the right to pursue justice through the judicial system.

II. Requiring Unlimited Disclosure of a Party's Medical Information is Contrary to Longstanding Missouri Law.

In Missouri, it is well established that a limited release of health care information is essential in avoiding potential harms. As such, Missouri case law on the issue is abundant and acknowledges the need to limit the scope of medical authorizations. *See State ex re. Proctor v. Messina*, 320 S.W.3d 145 (2010); *State ex rel. Collins v. Roldan*, 289 S.W.3d 780 (2009); *State ex rel. Jones v. Syler*, 936 S.W.2d 805 (Mo. Banc 1997); *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995). Such case law clearly outlines the characteristics which would render a medical authorization overly broad or otherwise inappropriate.

Medical records sought through discovery are subject to the physician-patient privilege under R.S.Mo. §491.060(5). *Stat ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995). However, such privilege is considered to be waived once the matter of plaintiffs' physical condition is at issue under the pleadings. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. 2006). Any waiver of a plaintiff's physician-

patient privilege extends only to those records which have bearing on the physical condition(s) at issue. *Id.*

Missouri courts have offered additional guidance in regard to tailoring medical authorizations to the pleadings. Both this Court and the Missouri Western District Court of Appeals have stated that just because a plaintiff's pleadings are extremely broad, "does not mean that it automatically extends to every doctor or hospital record a party has had from birth regardless of the bearing or lack of bearing, as may be, on the matters in issue. *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 12 (Mo.App. W.D. 2000)(citing *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. Banc 1997)).

Additionally, Missouri case law sets forth specific requirements that medical authorization must meet to avoid being overly broad. In addition to being tailored to the pleadings, a medical authorization must be confined to specific providers and a specific time frame. *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 12 (Mo.App. W.D. 2000); *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. Banc 1997).

As seen above, Missouri law is clear on the scope of medical authorizations in discovery. Such case law clearly defines the characteristics of an overly broad medical authorization and is applicable to Respondent's January 26, 2017 Order granting defendant in the case below nearly unlimited access¹ to Decedent's medical records. Therefore, Respondent's January 26, 2017 Order inconsistent with Missouri law.

¹ Respondent's January 26, 2017 Order requires "**any healthcare provider, employer, or other entity processing records of decedent**" to disclose protected records and/or

CONCLUSION

For the reasons stated above, the Court should make its preliminary writ permanent.

Respectfully submitted,

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medical information in any form dating from August 1, 1987, to present. Subject Order is not limited to specific providers, nor does it contemplate any limitation other than disallowing the disclosure of records older than thirty years.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 1442 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing
was mailed on this 30th day of June, 2017, to:

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