

IN THE SUPREME COURT OF MISSOURI

Appeal Number SC96219

RONALD FENNEWALD, AS BROTHER OF THOMAS FENNEWALD, DECEASED,

Relator,

v.

HONORABLE PATRICIA S. JOYCE, PRESIDING JUDGE OF
THE CIRCUIT COURT OF COLE COUNTY, MISSOURI,

Respondent.

BRIEF OF *AMICUS CURIAE*
MISSOURI ORGANIZATION OF DEFENSE LAWYERS
IN SUPPORT OF RESPONDENT

Appeal from the Circuit Court of Cole County, Missouri
Honorable Patricia S. Joyce, Circuit Judge
Cause Number 16AC-CC00256
Missouri Court of Appeals, Western District -- Appeal Number WD80433

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INTEREST OF AMICUS CURIAE

The Missouri Organization of Defense Lawyers (“MODL”) is a private, voluntary association of Missouri attorneys dedicated to promoting improvements to the administration of justice and optimizing the quality of the services the legal profession renders to society. To that end, MODL members work to advance and exchange legal information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL’s membership devote a substantial amount of their professional time to representing individual, municipal, and corporate defendants in civil litigation. As an organization composed entirely of Missouri attorneys, MODL promotes the establishment of fair and predictable laws affecting tort litigation that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

In this case, MODL supports the position of Respondent and the defendants in the wrongful death action that a defendant is entitled to seek medical records beyond the specific body part affected by the alleged negligence, where the decedent had a history of medically relevant and significant co-morbidities. MODL further asserts its broader position that a plaintiff who places his medical or physical condition at issue cannot claim privilege to preclude defendants from obtaining relevant medical records; that defendants being sued for bodily injuries or death must be afforded access to relevant medical records so they can present the best defenses possible; and that, as the trial court is in the best position to determine what medical records are relevant to the defenses in the case and to

craft appropriate limitations on any discovery of such records, the trial court's determination is entitled to broad discretion.

CONSENT OF PARTIES

MODL has received consent from counsel for Respondent/Defendants to file this brief. Counsel for MODL sent a request for consent to the filing of the amicus brief to Relator's counsel on July 18, 2017, but Relator's counsel has not consented. Accordingly, MODL has filed, contemporaneously with this brief, a motion for leave to file the amicus brief pursuant to Missouri Supreme Court Rule 84.05(f)(3).

JURISDICTIONAL STATEMENT

MODL hereby adopts the Jurisdictional Statement of Relator, as set forth in his brief.

STATEMENT OF FACTS

MODL hereby adopts the Statement of Facts of Respondent/Defendants set forth in their brief to this Court.

ARGUMENT

1. Disclosures of medical information that are specifically tailored to the theories of standard of care and causation are consistent with Missouri law when plaintiffs place their medical condition at issue.

Since this Court's decision in *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo.banc 1968), Missouri courts have held that a plaintiff who places her physical condition at issue by means of pleadings filed in a lawsuit, waives the patient-physician privilege set forth in RSMo § 491.060(5) so far as information from doctors or other health providers are concerned. Citing *McNutt*, this Court held in *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 674 (Mo.banc 1993) ("Brandt II"), that a plaintiff waives the patient-physician privilege in personal injury or medical malpractice cases once there is an issue joined concerning the plaintiff's medical condition.

Two years later, in *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo.banc 1995), the Court clarified the rule cited above by stating that defendants were not entitled to any and all medical records, "but only those medical records that relate to the physical conditions at issue under the pleadings." The Court asserted that medical authorizations must be tailored to the pleadings, on a case-by-case basis. *Id.* As the medical authorizations at issue in *Stecher* were not tied in to the particular injuries pleaded in the plaintiff's case, did not set forth any time limits, did not designate any health care providers, or otherwise set any limits whatsoever, such authorizations were deemed impermissibly broad. *Id.* at 465.

Two years after its decision in *Stecher*, a divided Court again addressed the issue of the proper scope of medical authorizations in personal injury actions in *State ex rel. Jones v. Syler*, 936 S.W.2d 805 (Mo.banc 1997). According to the Court, “[u]nless special circumstances can be shown, the language of defendant’s requested authorization should track plaintiff’s allegation of injury in the petition.” *Id.* at 807. While the Court described the defendants’ authorization form in that case as “limitless,” the plaintiff’s petition was “equally limitless” with respect to the injuries alleged, and thereby invited the defendants’ broadly worded authorization due to the language of her petition. *Id.* at 808.

However, the Court found in *Jones* that the defendants’ authorization lacked both time limits and designations of the health care providers to whom the authorizations were directed, and, in these two respects, were overbroad. *Id.* Essentially, under the holding in *Jones*, a medical authorization may be overly broad if it is not tailored to the plaintiff’s pleadings, contains no time limitation, and is not addressed to a specific health care provider. *Id.*

The dissent in *Jones* agreed with the majority’s holding that medical authorizations must be limited to the injuries claimed in the plaintiff pleadings, but disagreed with the time and provider limits endorsed by the majority. *Id.* at 810. According to the dissent, such limitations were not consistent with a discovery process designed to unearth previous injuries to the body parts that the plaintiff claims were caused by the defendant’s negligence, particularly so when the defendant seeks to learn whether the plaintiff suffered or claimed an injury of sufficient magnitude to require medical treatment of those same body parts prior to the event at issue in the plaintiff’s suit. *Id.* “Such information is highly

relevant to the defendant's case – if not on the issue of negligence then certainly on the question of the extent of the defendant's contribution to the plaintiff's averred damages.”

Id.

Subsequent decisions in which this Court, or the various Courts of Appeals, held that the defendant's medical authorizations, subpoenas *duces tecum*, or interrogatories were overly broad, all involved discovery requests that exceeded the parameters of the plaintiff's pleadings because they were either not limited in time, or not tailored to the physical conditions at issue in the pleadings.

State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (Mo.App.W.D. 2000): the trial court's order that the defendants were entitled to “any and all medical records and billing records in Heartland's possession concerning [plaintiff] with respect to any illness or injury, medical history, . . .” were not tailored to the specific injuries alleged in the medical malpractice petition (injuries to heart, lung and kidneys from ruptured appendix sepsis), and therefore exceeded the parameters of the plaintiff's pleadings and attendant waiver of patient-physician privilege;

State ex rel. Brown v. Dickerson, 136 S.W.3d 539 (2004): interrogatories asking whether the plaintiff had purchased or used any medicine within five years preceding date of occurrence, and whether the plaintiff had ever had any serious illness, sickness or disease, any surgeries, or been hospitalized either prior to or subsequent to incident referred to in the petition, were “virtually limitless” and not properly limited in time and tailored to the physical conditions alleged in the plaintiff's petition (to wit, head and neck injuries, including skull fracture);

State ex rel. Camillo v. Beck, 423 S.W.3d 795 (Mo.App.E.D. 2013): as the defendant’s medical authorization contained no limit on the scope of disclosure of patient information, that is, only disclosures relevant to the issue being tried, said authorization was overly broad.

Conversely, this Court found that the trial court had *not* abused its discretion in denying the plaintiff’s motions for protective order and to quash subpoenas *duces tecum* directed to the plaintiff’s medical providers, even though said subpoenas were *not* limited in time, where the plaintiff’s pleadings – including the amended petition -- were “as broad as the subpoenas.” *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 342-343 (Mo.banc 1998).

More recently, this Court addressed how the requirements of the federal Health Insurance Portability and Accountability Act (“HIPAA”) interact with Missouri’s discovery rules. This Court held that the trial court has no authority to issue a purported HIPAA order advising the plaintiff’s non-party physicians that they may participate in informal discovery via *ex parte* communications. *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 157 (Mo.banc 2010). Under this holding, plaintiffs can preclude *ex parte* communications between defense counsel and the treating physicians; therefore, unless the plaintiff agrees to provide a HIPAA-compliant medical authorization, defense counsel is limited to formal discovery methods, such as depositions, to obtain records from the treating physicians. *See id.*

In summary, Missouri courts allow for broadly-worded medical authorizations, subpoenas *duces tecum*, interrogatories, and other requests for medical records as permitted

under Missouri's rules of discovery, as long as such requests relate to the injuries to which the plaintiff waived privilege, that is, the injuries alleged in the plaintiff's petition.

2. It is essential that defendants be authorized to obtain all relevant medical records in lawsuits alleging bodily injury or death, particularly when such records may relate to other possible contributing factors to the plaintiff's injury or the decedent's death, such as a history of medically significant co-morbidities.

MODL submits that this Court's determination of whether the defendants in the immediate case can obtain the medical records sought will have statewide ramifications with respect to the scope of the patient-physician privilege, and waiver of the same. It is essential that, in medical malpractice actions seeking to recover for bodily injuries, lost chance of recovery or survival, or (as in this case) wrongful death – or, for that matter, in all actions where the plaintiff seeks damages for bodily or personal injury or death, whether said actions relate to products liability, motor vehicle accidents, premises liability, or negligence generally -- defendants be permitted access to pertinent medical records, to the extent such access does not violate the plaintiff's patient-physician privilege.

As a general matter, a defendant being sued in Missouri is at the mercy of the plaintiff who brings the suit. Under Missouri's statutes of limitation, the plaintiff has at least two years -- and on the majority of claims, up to five years -- before having to file suit. The plaintiff has several years to investigate the facts, obtain all records and other documents, meet with witnesses, and consult with experts before initiating legal action. The plaintiff also determines the parameters of the litigation by what she alleges in the petition, which identify and define the issues before the court. By contrast, in most cases a defendant who has been sued may have no opportunity to obtain and review documents or meet with and interview witnesses prior to suit.

The plaintiff's advantage is particularly acute with respect to the production of medical records. The plaintiff (or the decedent's representative) generally has no obstacles in obtaining his or her own records relating to the plaintiff's injuries. However, as detailed in the section above, the patient-physician privilege severely limits the defendant's access to the same records. Such access has become even more limited in light of this Court's holding in *Proctor*, 320 S.W.3d at 157, which effectively precludes defendants from utilizing *ex parte* communications (i.e., medical authorizations) to obtain records from the plaintiff's treating physicians, unless the plaintiff consents to the same.

Despite the disadvantages described herein, defendants are entitled to obtain medical records through the rules of discovery set forth in Rules 56 through 61. *Proctor*, 320 S.W.3d at 157. As stated in Rule 56.01(b)(1), "Parties may obtain discovery regarding any matter, not privileged, that is *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party" [emphasis added].

The mere fact that medical records are relevant does not make them discoverable, if the person whose records are sought did not place her medical condition in issue or took other steps to waive the patient-physician privilege. *State ex rel. Stinson v. House*, 316 S.W.3d 915, 919 (Mo.banc 2010). However, where the plaintiff has placed her medical condition directly at issue, any privilege regarding medical records bearing on the plaintiff's physical condition prior to and at the time of his death is waived. *Brandt II*, 856 S.W.2d at 674.

The courts should not limit the defendants' discovery to only those medical records that pertain to what the plaintiff alleges caused her injury. Such a limitation would enable a plaintiff to carefully draft her petition to omit other possible causes of her injury, thereby using the patient-physician privilege strategically as both a shield, to exclude unfavorable evidence, and a dagger, to admit favorable evidence. *See Brandt II*, 856 S.W.2d at 672. As noted above, the plaintiff has the power to set the parameters of the litigation by means of the allegations set forth in the petition, which identify and define the issues before the court. It would be unfair to allow a plaintiff to assert injuries, thereby placing her medical condition at issue, but then preclude the defendant from obtaining records that may bear on alternative causes of such injuries, simply because the plaintiff did not plead such causes in her petition.

Under Missouri law, medical authorizations or subpoenas *duces tecum* must be tailored to the injuries alleged in the petition. *See Stecher*, 912 S.W.2d at 464; *Crowden*, 970 S.W.2d at 342-343. As a general matter, pleadings are broadly construed. "Averments in a pleading should be given a liberal construction and accorded those favorable inferences fairly deducible from the facts stated." *Conduff v. Stone*, 968 SW.2d 200, 205 (Mo.App.S.D. 1998).

The courts should determine what injuries are alleged – allowing the pleadings their broadest interpretation – and deem the plaintiff's patient-physician privilege waived with respect to those injuries. Medical authorizations, interrogatories, requests for production, subpoenas *duces tecum*, and all other methods of discovering records provided in

Missouri's civil rules should be tailored to the injury alleged in the petition, as opposed to what the plaintiff alleged *caused* that injury.

For example, in the immediate case, the relator alleges, *inter alia*, that but for the defendants' negligence, the decedent would not have died and would not have developed preventable colon cancer or metastatic cancer. Defendants should be allowed to obtain any medical records that may relate to the cause of the decedent's death, including records concerning the decedent's pre-existing co-morbidities.

A medical negligence / wrongful death case requires different elements than a "garden variety" tort, such as a broken arm in a car wreck. To make a submissible case, a plaintiff must show: (1) the doctors failed to meet a required medical standard of care, (2) the doctor's acts or omissions were performed negligently; and (3) the doctor's acts or omissions caused the decedent's death. *Sundermeyer v. SSM Regional Health Services*, 271 S.W.3d 552, 554 (Mo.banc 2008). Regarding causation in a wrongful death action, a plaintiff must prove that, "but for" the defendant's actions or omissions, the patient would not have died. *Watson v. Tenet Healthsystem SL, Inc.*, 304 S.W.3d 236, 240 (Mo.App.E.D. 2009). "In a medical malpractice case, where proof of causation requires a certain degree of expertise, the plaintiff must present expert testimony to establish causation" and such testimony must be given to a "reasonable degree of medical certainty." *Id.* In short, the reason why plaintiff's decedent died is the lynchpin of a medical negligence / wrongful death case. Unless defense experts have access to all medical records which address health conditions which could have caused or contributed to death, they can have no meaningful review of plaintiff's medical condition at all.

When the alleged injury is death, and causation is at issue, any privilege regarding any possible contributing factors to the decedent's death should be deemed waived,¹ and the defendant should be permitted to obtain medical records relating to, among other things, any medically significant pre-existing co-morbidities that may have caused or contributed to cause the decedent's death. In other words, the defendant is entitled to seek, through discovery, any medical records that may pertain to the decedent's physical condition prior to and at the time of death. To hold otherwise would deprive the defendant of his only means to obtain information that may be relevant and admissible at trial.

In sum, MODL urges the Court to hold that (1) defendants are authorized to obtain medical records to the extent such authority does not infringe on the plaintiff's patient-physician privilege, (2) such privilege is waived to the extent of the injuries alleged in the plaintiff's petition, and (3) the defendant may obtain all medical records that relate to the injury alleged in the petition, and in particular to any possible causes of the injury other than the cause alleged by plaintiff in the petition. MODL submits that such a holding will strike the appropriate balance between protecting the plaintiff's patient-physician privilege, and allowing the defendant to obtain records essential to his defense.

¹ The patient-physician privilege survives the patient's death, but those who represent the patient after his death, such as his personal representative, may waive the privilege. *Leritz v. Koehr*, 844 S.W.2d 583, 584 (Mo.App.E.D. 1993).

WHEREFORE, MODL respectfully submits that the defendants be allowed to obtain all medical records pursuant to the Respondent's order, which is specifically tailored to the broad theories of standard of care and causation in this case.

3. The trial court should be afforded broad discretion in determining the appropriate disclosure of a plaintiff's medical information.

The Court should defer to the trial court's order authorizing the release of medical records. "Trial courts have broad discretion in administering rules of discovery, which this Court will not disturb absent an abuse of discretion." *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo.banc 1998). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court, and so arbitrary and unreasonable as to shock the sense of justice. *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 11 (Mo.App.W.D. 2000).

The trial court is in the best position to determine what medical records are relevant to the defenses in the case, and to craft appropriate limitations on any discovery of such records. As such, the trial court's determination regarding the extent of the plaintiff's privilege should be afforded to broad discretion.

The trial court did not abuse its discretion here. Causation and the appropriate standard of care are at issue. As such, the defendants are entitled to obtain, through discovery, any medical records which may show alternative explanations or causes of the decedent's death, or that may be predictive of life expectancy.

Certainly, in medical malpractice / wrongful death actions such as the one at issue here, the trial court is within its discretion to allow the discovery of medical records which may show alternative explanations of causes of death. While such discovery may go beyond what is necessary in a "garden variety tort," a wrongful death action, by its very

nature, similarly goes beyond that and necessitates additional disclosure of medical records.

The trial court had the opportunity to interact with the parties' counsel and monitor their disputes regarding discovery. The trial court heard the arguments regarding the defendants' request for medical records, and crafted the appropriate order requiring the production of such records. The trial court is in the best position to balance the plaintiff's privilege against the defendant's entitlement to discovery and determine the most appropriate course of action.

Contrary to the assertion in the amicus brief filed by the Missouri Association of Trial Attorneys ("MATA"), the trial court's order authorizing the release of medical records is not "unlimited." The order is limited to a specific time frame, and to a specific class of health care providers, to wit, those who possess records relating to "medically significant injury or illness suffered by [the decedent] during said time that is called into issue by the allegations set forth in [the relator]'s wrongful death action" In other words, Respondent's order is specifically tailored to the broad theories of standard of care and causation in this case. Respondent did not abuse its discretion in entering this order.

Further, the plaintiff has additional remedies if medical records are ordered disclosed over his objection: he can request a protective order, request *in camera* review, or, if necessary, move *in limine* to preclude the admission of such records at trial.

In sum, MODL respectfully submits that the Court should defer to the trial court's determination on issues of privilege and disclosure of medical records in the absence of a clear abuse of discretion, which is not present in the immediate case.

CONCLUSION

MODL submits that plaintiffs who place their medical or physical condition at issue through the allegations in their petition cannot claim privilege to preclude defendants from obtaining medical records relating to the injuries pleaded; that defendants being sued for bodily injuries or death must be afforded access to relevant medical records so they can present the best defenses possible; and that the trial court is in the best position to determine what medical records are relevant to the defenses in the case and to craft appropriate limitations on any discovery of such records.

For the foregoing reasons, Amicus Curiae Missouri Organization of Defense Lawyers respectfully suggests that the Court quash its preliminary writ.

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06, the undersigned certifies that the foregoing Brief of *Amicus Curiae* Missouri Organization of Defense Lawyers includes the information required by Rule 55.03; complies with the limitations contained in Rule 84.06(b); and was prepared using Microsoft Word in 13-point font, is proportionately spaced, and contains 5,317 words.

/s/ Stephen J. Barber

Stephen J. Barber, 41341

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served by means of this Court's electronic filing system this July 20, 2017 on the following persons:

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The undersigned further certifies that a copy of the foregoing was served by means of United States mail this July 21, 2017 on the Respondent herein, the Honorable Patricia S. Joyce, Presiding Judge, Circuit Court of Cole County, 301 East High Street, Jefferson City, MO 65101.

/s/ Stephen J. Barber
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