

Summary of SC90610, *State ex rel. Bobbie Jean Proctor and Vincent Proctor v. The Honorable Edith L. Messina, Circuit Judge, Sixteenth Judicial Circuit, Jackson County, Missouri*

Writ proceeding originating in the Jackson County circuit court, Judge Edith L. Messina
Argued and submitted May 19, 2010; opinion issued Aug. 31, 2010

Attorneys: The Proctors were represented by Hans H. van Zanten and Michael T. Yonke of Yonke & Pottenger LLC in Kansas City, (816) 221-6000; and the health care defendants/respondents were represented by Sean T. McGrevey and Scott M. Adam of Adam & McDonald PA in Overland Park, Kan., (913) 647-0670, and Jana V. Richards and Maureen M. Brady of Sanders, Conkright & Warren LLP in Overland Park, (913) 234-6199.

Several entities filed briefs as friends of the Court: the American College of Radiology, Missouri Radiological Society, Missouri Dental Association, Missouri Healthcare Association and Delmar Gardens North Operating LLC were represented by Harvey M. Tettlebaum and Robert L. Hess II of Husch Blackwell LLP in Jefferson City, (573) 635-9118; the Missouri Organization of Defense Lawyers was represented by Robert W. Cotter and Matthew W. Geary of Dysart, Taylor, Lay, Cotter & McMonigle PC in Kansas City, (816) 931-2700; the Missouri Hospital Association was represented by R. Kent Sellers of Lathrop & Gage LLP in Kansas City, (816) 292-2000; and the Missouri Association of Trial Attorneys was represented by Leland F. Dempsey and Ashley F. Baird of Dempsey & Kingsland PC in Kansas City, (816) 421-6868.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: In a case of first impression, plaintiffs in an underlying medical negligence suit ask the Supreme Court of Missouri to determine whether HIPAA preempts a trial court's purported formal order directing non-party medical providers that they may engage in informal ex parte communications with attorneys for the defendant health care providers about their treatment of a patient without the patient's express authorization. In a unanimous opinion written by Judge Zel M. Fischer, the Supreme Court of Missouri makes permanent its writ prohibiting the trial court from issuing such an order. HIPAA does not preempt Missouri law on this subject, but neither HIPAA nor Missouri rules of procedure nor Missouri case law permit a trial court to disclose a patient's protected health care information during the course of informal ex parte meetings with defense counsel. The trial court exceeded its jurisdiction in issuing the order.

Facts: Bobbie Jean and Vincent Proctor sued the Kansas City Heart Group PC, Dr. Timothy L. Blackburn and St. Joseph Medical Center for medical negligence during a March 2004 surgery. In January 2009, Blackburn and the heart group moved for a formal court order specifically authorizing ex parte communications with Bobbie Jean's treating physicians and other health care providers. The next month, St. Joseph sought a similar order. Following oral arguments, the trial court in July 2009 issued its purported formal order sustaining the motions and "authorizing" Bobbie Jean's non-party medical providers to engage in informal ex parte communications with attorneys representing the defendant medical providers, although the purported "order" specifically advises any of the non-medical providers presented with the

“order” that they are free to ignore it as it relates to ex parte communications with the parties and their attorneys if they had not received Bobbie Jean’s authorization to engage in such communications. The “order” also did not limit the scope of disclosures to matters that would be calculated to lead to admissible evidence. The Proctors seek this Court’s writ prohibiting the trial court from taking any action but to vacate the order.

WRIT MADE PERMANENT.

Court en banc holds: The trial court exceeded its authority by issuing a purported formal order directed to non-party medical providers and essentially giving those providers an advisory opinion about the trial court’s understanding of the law about informal ex parte communications.

The issue of whether the federal health insurance portability and accountability act (HIPAA) preempts Missouri law is an issue of first impression in Missouri courts. Under article VI, clause 2 of the United States Constitution – the supremacy clause – state laws that conflict with federal laws are preempted and have no effect. The United States Supreme Court has held that federal law will preempt state law only when it is the clear and manifest purpose of Congress to do so. In HIPAA, Congress included an express preemption clause declaring that HIPAA “shall supersede any contrary provision of [s]tate law.” Pursuant to HIPAA’s directive, the federal secretary of health and human services promulgated 45 C.F.R. section 160.103, which prohibits health care providers from disclosing “protected health information,” whether “oral or recorded in any form or medium,” unless medical providers comply with a narrow list of exceptions the secretary itemizes separately in the regulatory scheme. The regulations draw no distinction between formal and informal disclosures and, instead, broadly prohibit all disclosures in the absence of a specifically enumerated exception. By its terms, HIPAA prohibits physicians from engaging in an ex parte oral disclosure of a patient’s protected health information unless an express exception applies.

For a state law to be preempted by HIPAA, however, the state law and HIPAA provisions must be “contrary” under the “impossibility test” such that any action taken by a covered entity – either to disclose the protected health information or not to disclose it – would violate either state law or HIPAA. As to the issue of ex parte communications, HIPAA does not preempt Missouri law. In *Brandt v. Pelican*, 856 S.W.2d 658, 663 (Mo. banc 1993) (*Brandt I*), this Court did not create an affirmative right for attorneys to engage in voluntary and informal ex parte communication with a plaintiff’s physician but instead merely confirmed that, at that time, there was no state or federal law that prohibited such informal communications. In *Brandt I*, the issue was whether voluntary and informal communications between defense counsel and the plaintiff’s treating physician, without the plaintiff’s consent, were prohibited during discovery. The Court concluded there was nothing in section 491.060(5), RSMo Supp. 1992 – Missouri’s physician-patient testimonial privilege statute – that expressly prohibited informal and voluntary ex parte communications with the plaintiff’s physician. There also is nothing in the statute that affirmatively authorizes such communications. In *Brandt I*, the Court reaffirmed its previous holding in *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 Mo. banc 1989), that a plaintiff cannot be compelled to execute a medical consent authorizing his treating physicians to engage in ex parte communications with the defendant and that the plaintiff’s treating physician could not be compelled to engage in informal ex parte discussions with the defense. In *Brandt v. Med.*

Def. Assocs., 856 S.W.2d 667 (Mo. banc 1993) (*Brandt II*), the Court concluded that once a patient-physician privilege waiver occurs in the filing of a personal injury lawsuit in which the plaintiff's medical condition is placed at issue, the plaintiff has waived both the physician's testimonial privilege and the physician's fiduciary duty of confidentiality, including voluntary ex parte communications with the plaintiff's treating physician. In *Brandt II*, this Court reiterated its warning that nothing in either *Brandt* opinion creates any right to compel the plaintiff or his treating physicians to authorize or participate in ex parte communications with defense counsel.

Exceptions to HIPAA's general prohibition against disclosure under 45 C.F.R. section 502(a) include permission to disclose protected health information pursuant to and in compliance with a valid authorization under 45 C.F.R. section 164.508 and as permitted and in compliance with 45 C.F.R. section 164.512 or 164.514(e), (f) or (g). Here, however, Bobbie Jean Proctor did not issue an authorization under regulatory section 164.508(a)(1). Instead, the trial court purported to issue an order authorizing her non-party medical providers to engage in ex parte communications with defense counsel because the court believed its purported order fell under the regulatory exceptions for disclosures permitted under 45 C.F.R. section 164.512(e). Under this regulation, HIPAA authorizes disclosure in the course of a judicial or administrative proceeding in response to a court order or, in certain circumstances, in response to a subpoena or discovery request that is not accompanied by an order. The plain and ordinary language of this regulation, however, does not authorize the disclosure of protected health information during a meeting in which an attorney has ex parte communications with a physician without the patient's express authorization. The disclosure contemplated by this exception must be under the court's supervisory authority either through discovery or through other formal court procedures. Missouri's civil procedure rules do not give the trial court authority over an order directing or authorizing a physician to engage in ex parte communications. Therefore, a Missouri trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via ex parte communications. The treating physician in this case can comply with HIPAA by not giving an ex parte interview without a patient authorization and also comply with Missouri common law by choosing not to grant the ex parte interview.