IN THE SUPREME COURT OF THE STATE OF OREGON

BILL BARRIER and LEE ANN BARRIER, as individuals
and as husband and wife,
Plaintiffs-Relators,

v.

DOUGLAS BEAMAN MD, PC; DOUGLAS BEAMAN, MD
and SUMMIT ORTHOPEDICS, LLP,
Defendants-Adverse Parties.

Multnomah County Circuit Court
140404994

S063974

OPENING BRIEF of PLAINTIFFS-RELATORS

Proceeding in Mandamus from the Order of the Multnomah County Circuit Court, Honorable Youlee Yim You, Judge,
and Honorable Leslie G. Bottomly, Judge.

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STATEMENT OF THE CASE

A. Nature of the Action.

This is an original proceeding in mandamus to challenge the order of the circuit court granting defendants' Motion to Allow Depositions. Plaintiff asks that the challenged order be vacated and the motion be ordered denied.

B. Nature of Appellate Jurisdiction.

This court has original jurisdiction pursuant to Article VII (Amended), Section 2 of the Oregon Constitution.

C. Question Presented.

Does the plaintiff's required participation in a discovery deposition pursuant to notice constitute a "voluntary disclosure" waiving the physician -patient privilege?

D. Summary of the Argument.

Plaintiff's participation in a discovery deposition pursuant to notice is required. Such participation does not constitute a "voluntary disclosure" waiving the physician-patient privilege under ORS 40.280 (OEC 511). The pretrial discovery deposition of plaintiff is not "voluntary." ORCP 46D. The holder of the privilege is not "offering any person as a witness" triggering a waiver under ORS 40.280 (OEC 511).

E. Statement of Facts.

There are no disputed facts with regard to this proceeding.

Plaintiff[1] filed suit alleging negligence against defendants arising out of his medical treatment. ER 1-4. Pursuant to a Request for Production he provided defendants with his medical records as required by ORCP 36, 43 and 44. SER 16-22, 23.

Plaintiff has not taken the deposition of the defendant or any other medical provider. ER 7.

Defendants served a Notice of Deposition on plaintiff requiring plaintiff to submit to a videotaped and recorded deposition at the time and place specified. The notice was served pursuant to ORCP 39C(1). ER 26.[2]

Plaintiff gave the discovery deposition as required by the notice. ER 17. He answered the questions of defendants regarding his medical care. ER 6, 32, SER 1-15.

Following the deposition defendants sought the depositions of 17

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[1] "Plaintiff" refers to Bill Barrier, the patient and the holder of the physician-patient privilege.

[2] Defendants point out that Counsel for both sides cooperated in determining a time and place for the deposition. Defendants do not suggest that this cooperation constituted a waiver. See Defendants-Adverse Parties' Memorandum in Opposition to Plaintiffs' Petition at 3.

physicians who treated plaintiff. Plaintiff objected based on the physician-patient privilege and defendants filed a Motion to Allow Depositions. ER 5-14. The court granted the motion. ER 33.

ASSIGNMENT OF ERROR

The trial court erred when it granted the motion, based on a waiver of the physician-patient privilege, holding:

> "Here, plaintiff voluntarily produced himself for a deposition during which he discussed the details of his medical care without objection. Accordingly, he has waived the physician-patient privilege with respect to his medical condition. Defendants' motion to allow depositions of plaintiff's treating medical providers is therefore granted." ER 33.

A. Preservation of Error.

Defendants moved to allow the depositions of physicians, contending that the physician-patient privilege was waived through voluntary disclosure. ER 5-14.

Plaintiff objected, contending that participation in a discovery deposition does not constitute voluntary disclosure. ER 19-22.

B. Standard of Review.

No questions of fact are presented. All parties agree that plaintiff gave a discovery deposition pursuant to notice, that he answered questions proffered by the defendants regarding his medical care and that

he did so without objection.

The question of whether that is a voluntary disclosure is a question of law.

ARGUMENT

A. Introduction.

All parties agree that a plaintiff does not waive the physician-patient privilege by filing an action for personal injuries. ORS 40.280 (OEC 511)*;* *Nielson v. Bryson*, 257 Or 179, 477 P2d 714 (1970). This rule is equally applicable in a medical malpractice case. *State ex rel. Grimm v. Ashmanskas,* 298 Or 206, 690 P2d 1063 (1984).

ORS 40.280 (OEC 511) provides in relevant part:

> "A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. *Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence.* * * *. *Voluntary disclosure does occur*, *as to* * * * *physicians in the case of a physical condition upon the holder's offering of any person as a witness who testifies as to the condition."* [Emphasis added.]

Waiver occurs upon "voluntary disclosure" by the holder of the privilege. In the case of testimony, "voluntary disclosure" occurs when the holder "offers" a person as a witness.

It is plaintiff's position that plaintiff does not waive his privilege when he is required to give a pretrial discovery deposition. This position is supported by a plain reading of the statute, by Supreme Court precedent of over 50 years and by well reasoned decisions from other jurisdictions.

The trial court held otherwise.[3]

B. Statutory Construction of ORS 40.280.

Using the accepted rules of statutory construction, *Portland Gen. Elec. Co. v. Bureau of Labor & Indus*., 317 Or 606, 610–612, 859 P2d 1143 (1993) as modified by *State v. Gaines*, 346 Or 160, 171–173, 206 P3d 1042 (2009), yields the conclusion that a compelled discovery deposition does not constitute a waiver.

1. Text.

With regard to evidentiary privileges there must be a "waiver." In *Petersen v. Palmateer*, 172 Or App 537, 542, 19 P3d 364, 367 (2001), *rev den*, 332 Or 326 (2001), in the context of attorney-client privilege, the court

[3] As submitted below, another judge of the Multnomah County Circuit Court has ruled contrary to the ruling in this case. ER 28.

noted:

> "It is axiomatic that 'waiver' is the intentional relinquishment of a known right. *Alderman v. Davidson*, 326 Or 508, 513, 954 P2d 779 (1998)."

The foundation of the waiver rule is that the disclosure must be "voluntary." "Voluntary" is defined as:

> "1. Proceeding from the will: produced in or by an act of choice. 2. performed, made or given of one's own free will." *Webster's Third New International Dictionary*, unabridged ed, 1993.

Closely related is the requirement of the statute that waiver occurs when the holder of the privilege "offers any person" as a witness to the physical condition. "Offer" is defined:

> "2. To present for acceptance or rejection: hold out: tender: proffer." *Webster's Third*.

As discussed in more detail below, a pretrial discovery deposition of a party is not "voluntary." And the party does not "offer" himself or herself as a witness. ORCP 46D sets out draconian consequences for the plaintiff who fails to attend his or her own deposition including the striking of allegations, the establishment of facts or the dismissal of the case and the allowance of attorney fees and costs. The consequences of failure to

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comply with a pretrial discovery deposition notice under ORCP 46D[4] clearly show that such deposition testimony is not "voluntary."

2. Prior construction.

(a) Construction of Prior Statute; ORS 44.040 (repealed).

It is presumed that when the legislature enacted ORS 40.280 it was aware of the Supreme Court's decisions. *State v. Clevenger,* 297 Or 234,

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[4] ORCP 46D provides:

> "**Failure of party to attend own deposition or to respond to request for production or inspection.**
>
> If a party * * * fails to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, * * * the court where the action is pending on motion may make any order in regard to the failure as is just including, but not limited to, any action authorized under paragraphs B(2)(a)[establishment of facts], B(2)(b)[designated matters], and B(2)(c)[strike, stay or dismissal] of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C."

244, 683 P2d 1360 (1984). This context includes prior versions of the same statute. *Jones v. General Motors Corp.*, 325 Or 404, 411-412, 939 P2d 608 (1997); *State ex rel. Penn v. Norblad,* 323 Or 464, 467, 918 P2d 426 (1996).

The predecessor to ORS 20.280 is ORS 44.040 (repealed by 1981 Or Laws, ch 892, § 98).

ORS 44.040(2) (repealed) provided:

> "If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a * * * physician or surgeon * * * on the same subject."

ORS 40.280 provides in relevant part:

> "Voluntary disclosure does occur, as to * * * physicians in the case of a physical condition upon the holder's offering of any person as a witness who testifies as to the condition."

As can be seen by a comparison, in either statute waiver occurs when a person "offers" a witness.[5]

In *Reynolds Metals Co. v. Yturbide,* 258 F2d 321, 334 (9th Cir, 1958), *cert den*, 358 US 840 (1958) the defendant sought the depositions of two doctors, arguing that plaintiff had waived the privilege by answering

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[5] Although ORS 44.280 is broader in that it covers "any person"rather than "himself," the triggering event is the party's act in "offering" that person.

interrogatories and submitting to depositions. The trial court, applying Oregon law, held that the privilege was not waived by answering the interrogatories without objection or by answering deposition questions. The court approved the district court's analysis of Oregon law:

> "'That is to say, the district court held it is the law of Oregon that (in) merely answering a question from her opponent which she might have avoided, (she) still remains the appellant's witness and does not constitute an offering of herself as a witness.
>
> Appellant cites no Oregon case that holds to the contrary and our careful search discloses none.
>
> * * *
>
> We think for the reasons thus stated it must be said that at the time of the ruling complained of (made on August 16, 1955), prior to the commencement of the trial (which began August 25, 1955), the court was not in error in holding that at the time the proposed depositions were noticed these plaintiffs had not offered themselves as witnesses within the meaning of the Oregon statute."

The *Reynolds Metals* decision was followed by this court in *Nielson v. Bryson,* 257 Or 179, 183, 477 P2d 714 (1970). The court interpreted the phrase "offers himself as a witness" as contained in ORS 44.040(2)

(repealed) to exclude testimony in a compelled discovery deposition.[6] The court stated:

> "A person 'offer(s) himself as a witness' by the act of voluntarily offering testimony as a witness either on trial or on deposition, rather than by the act of either filing an action for personal injuries or verifying a written complaint in such an action. *Neither does a person 'offer himself as a witness' when called involuntarily to testify on trial or on deposition. Reynolds Metals Company v. Yturbide*, 258 F2d 321 (CA 9, 1958), affirming *Martin v. Reynolds Metals Company*, 135 F Supp 379 (D Or, 1952)." [Emphasis added.]

At the time of the passage of ORS 40.280 this court and the federal court had determined that "offer himself as a witness" as used in the waiver statute did not include involuntary testimony at a pretrial deposition. Continued use of that term indicates that the legislature did not intend to change the long standing definition adopted in *Nielson* and *Reynolds Metals.*

(b) Construction of ORS 40.280.

In *State ex rel. Grimm v. Ashmanskas,* 298 Or 206, 690 P2d 1063 (1984) the court conducted a comprehensive review of the waiver provision applicable to the physician-patient privilege. The court noted that the

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[6] The defendants below acknowledged that although *Nielson* dealt with the former version of the waiver statute, "the court's reasoning remains apropos." ER 11.

waiver provision first appeared in 1862 and was limited to one who "offers himself as a witness." General Laws of Oregon § 703 (Deady & Lane,1862). 298 Or at 209, note 1. When the patient took the discovery deposition of one physician the patient waived the physician-patient privilege with regard to other physicians. The court noted the exception to this rule occurs when the patient takes a perpetuation deposition. In that limited situation the waiver occurs when the deposition is offered rather than when it is taken.

The court was careful to limit its holding to a voluntary perpetuation deposition taken by the holder of the privilege. The court distinguished the involuntary discovery deposition and reaffirmed the holdings of *Nielson* and *Reynolds Metals* and, at 214, note 3, stated:

> "We do not believe the legislature intended waiver to occur when a plaintiff in a personal injury or malpractice case is required by the opponent to submit to a pretrial discovery deposition, because in that situation the holder of the privilege is not voluntarily offering his or her confidential communications or personal condition to the public. See, *Nielson v. Bryson*, 257 Or 179, 183, 477 P2d 714, 716 (1970); *Reynolds Metals Co. v. Yturbide*, 258 F2d 321, 334 (9th Cir), *cert den*, 358 US 840, 79 S Ct 66, 3 L Ed 2d 76 (1958); Annot., *Pretrial Testimony or Disclosure on Discovery by Party to Personal Injury Action As to Nature of Injuries of Treatment As Waiver of Physician-Patient Privilege*, 25 ALR3d 1401 (1969)."

Grimm was the last case to interpret the physician-patient waiver provision of ORS 40.280. That interpretation has continued for over 30 years.[7] As defendants concede, it has been followed by the bar. ER 10. Had that interpretation been wrong the legislature had many opportunities to change it.

Defendant suggests that the interpretation in *Grimm* was *dicta*. The reference was necessary to properly limit the court's holding. The court made clear that its holding was limited to depositions *initiated* by the holder of the privilege. Its discussion of the perpetuation deposition and the compelled discovery deposition were necessary to limit the court's holding.[8]

Defendants argued below that the language in ORS 40.280 dealing with perpetuation depositions somehow changes the longstanding interpretation of the waiver statute. That language provides:

> "Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a

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[7] The legislature has amended ORS 40.280 since *Grimm.* 2003 Or Laws, ch 259, §1 (dealing with news media). There has been no amendment addressing the issue raised in *Grimm* or its predecessors.

[8] Even if it was *dicta*, it was good *dicta*. *Stover v. United States*, 332 F2d 204 (9th Cir, 1964), *cert den*, 379 U.S. 922 (1964) (pointing out that the court can follow well reasoned *dicta*). This would seem particularly true when the "*dicta*" was merely a reiteration of prior Oregon case law.

> deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence."

It is clear that the "exception" for perpetuation depositions refers to timing. It is the one situation where the holder of the privilege does voluntarily take the testimony. The rule makes clear that the holder does not "offer" that testimony thus triggering a waiver until that testimony is offered at trial. That is the precise point made by the court in *Grimm*, 296 Or at 214 and note 3.

The above quoted language is "a special rule that applies to perpetuation depositions" and has the effect of delaying the waiver until the testimony is offered. *State ex rel. Oregon Health Scis. Univ. v. Haas,* 325 Or 492, 511-12, 942 P2d 261 (1997).

3. This Court is Not Free to Adopt a "Favored Policy" of Pretrial Discovery.

In the trial court defendants argued that "favored policy" included full pretrial discovery unimpeded by privilege. Defendants cite *Nielson,* 257 Or at 182, for the proposition that it is "favored policy" to encourage or require the pretrial discovery of all relevant evidence. ER 8. Defendants omitted the court's conclusion that it did not have the authority to adopt such "favored policy." "Such proposals, however, are directly contrary to the clear provisions of ORS 44.040(2)." 257 Or at 184.

In *Woosley v. Dunning,* 268 Or 233, 244, 520 P2d 340, 345 (1974), as in the instant case, the defendant urged *Wigmore*'s approach to the waiver of privileged communications. The court said:

> "Defendant refers to *Wigmore* as the one whose 'scalpel cuts deepest' in criticism of the public policy protecting privileged communications. We may or may not agree with *Wigmore* in that respect. Yet *Wigmore* himself not only recognized that the public policy protecting various privileged communications is one based upon legislative statute, rather than upon common law." [Footnotes omitted].

The court also rejected defendant's suggestion that it overrule *Nielson* as to waiver:

> "Defendant asks us to overrule *Nielson*. Defendant, however, concedes that 'The source of the physician-patient privilege in the State of Oregon is ORS 44.040,' and says, quite properly, that in *Nielson* we held that because the privilege is solely a creature of statute (and was not recognized at common law) 'the specific provisions of ORS 44.040 must be changed, if at all, by the legislature rather than by the courts.' This, of course, would include any change of provisions relating to waiver of the privilege." [Footnote omitted.]

In the case of *Phipps v. Sasser*, 74 Wash 2d 439, 444, 445 P2d 624, 627 (1968) the Washington Supreme Court reaffirmed its holding in *Bond v. Independent Order of Foresters*, 69 Wash 2d 879, 421 P2d 351 (1966) that a plaintiff's required pretrial deposition in a personal injury case is not

a waiver of the physician-patient privilege.[9] The court was sympathetic to a more complete pretrial discovery procedure but held that that decision was not the court's to make:

> "The rule of privilege embodied in RCW 5.60.060(4) reflects the considered judgment of one branch of our tripartite-structured government, traditionally regarded as constitutionally separate, independent and equal. Such legislative judgments merit, even require, the exercise of judicial self-restraint of a very high order. It is our duty when confronted with a valid act such as this to give effect to the legislative intent embodied therein, refraining from substituting our judgment in the matter, whatever that may be, for that of the legislature." [Footnote omitted.]

Likewise, in *Avery v. Nelson*, 455 P2d 75, 77 (Okla, 1969) the court held that a plaintiff in a personal injury case does not waive her physician-patient privilege when she testifies in a pretrial deposition. The court first noted that it was sympathetic to the modern view to permit "full discovery":

> "While the court finds itself in complete accord with the views expressed in the preceding paragraph, we also find ourselves facing a statutory proviso regarding the waiver of the protection of the statute, which we believe is controlling, under the circumstances here."

The court went on to hold that the statute did not permit the adoption of

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[9] Unlike Oregon, in Washington the physician-patient privilege is waived by statute in a medical negligence case 90 days after filing. RCW 5.60.060(4)(b).

such a modern view:

> "We think that a waiver of the privilege statute to be effective must be voluntary. We hold that merely testifying in response to questions of opposing counsel on the occasion of the taking of the plaintiff's deposition as an aid to the defendant does not amount to voluntarily offering oneself as a witness."

In Oregon the rules on waiver are statutory. It is up to the legislature to change them.

C. Conclusion.

The interpretation of the waiver rule that the giving of a required pretrial discovery deposition does not constitute "offering a person as a witness" has been followed since the court's interpretation of ORS 44.040(2) in *Reynolds Metals* (1958) and *Nielson* (1970). Indeed, that is the only interpretation that gives meaning to the words of the statute. Subsequently the legislature repealed ORS 44.040 and replaced it with the current waiver rule, ORS 40.280 (OEC 511). 1981 Or Laws, ch 892, §98 (adopting OEC 511) and § 98 (repealing ORS 44.040). The current waiver rule utilized the same language and was interpreted in the same manner in *State ex rel. Grimm v. Ashmanskas,* 298 Or at 214, note 3. If the legislature had intended a different meaning to the statutory phrase it could have made its intention clear upon passage of ORS 40.280.

As the court stated in *Walther v. SAIF Corp*., 312 Or 147, 149, 817 P2d 292 (1991):

> "When this court interprets a statute, that interpretation becomes a part of the statute as if written into it at the time of its enactment. *State v. Clevenger*, 297 Or 234, 244, 683 P2d 1360 (1984)."

If the court got it wrong in *Reynolds Metals* or *Nielson* the legislature had many years to fix it. Instead the legislature adopted the same language in ORS 40.280 and the court interpreted it consistently with precedent.

CONCLUSION

Plaintiff did not waive his physician-patient privilege when he submitted to a compulsory pretrial discovery deposition. The trial court erred in holding to the contrary.

Dated this 9th day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,732 words.

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s/ *W. Eugene Hallman*
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Certificate of Filing and Service

I certify that on the 9th day of August, 2016, I filed the original **Opening Brief of Plaintiffs-Relators** with the State Court Administrator by Electronic Filing.

I further certify that on the same date I served a true and correct copy of this document upon the following by Electronic Filing (for registered Efilers) and by US Mail (for those not registered as Efilers):

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