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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 No. 140404994

Supreme Court No. S063974

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF

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

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I. INTRODUCTION

The Oregon Trial Lawyers Association ("OTLA") files this amicus brief in support of Plaintiffs-Relators Bill and Lee Ann Barrier. OTLA files this brief in support of the rule made clear by this Court's precedent: that a plaintiff's participation in a discovery deposition noticed by the adverse party does not amount to a waiver of the physician-patient privilege under ORS 40.280 (OEC 511).

Such a rule is compelled by the wording of the relevant statute, which provides that evidentiary privileges may be waived when the communication subject to the privilege is "voluntarily disclosed." The statute further provides that, in the context of a lawsuit, the physician-patient privilege is deemed to be "voluntarily disclosed" "upon the holder's offering of any person as a witness who testifies as to the [patient's physical] condition." OEC 511. Participation in a discovery deposition *noticed by an adverse party* does not constitute the plaintiff's "offering [herself] as a witness," and therefore does not constitute "voluntary disclosure." Accordingly, it is insufficient to constitute a waiver of the privilege. Indeed, in *State ex rel. Grimm v. Ashmanskas*, 298 Or 206, 213 n 3, 690 P2d 1063 (1984), this Court stated exactly that.

And because the rule is compelled by the wording of the statute, this Court is not free to depart from it in this case. Furthermore, policy considerations favor the rule, which encourages the disclosure of relevant

evidence, minimizes costs and potential delays associated with litigation, and, for good reason, is the settled practice among members of the Oregon State Bar. Defendants' arguments below are unpersuasive, and the rule they seek is likely to disserve all parties—both plaintiffs and defendants—in personal injury and medical negligence cases going forward.

II. STATEMENT OF FACTS

In this medical negligence case, Plaintiff Bill Barrier suffered injuries arising out of the medical treatment that Defendants provided. Defendants served Plaintiff with a formal Request for Production seeking all of Plaintiff's medical records, including records from his current primary care physician, records from "any podiatrist, orthopedist, orthopedic surgeon, neurologist, or neurosurgeon who treated him at any time," records from any hospital he has visited within the past ten years, and records from labs, EMTs, therapists, pharmacies, and more. As is required under Oregon law, Plaintiff provided the records that Defendants requested.[1]

Defendants then noticed Plaintiff for deposition, which he attended as required under law.[2] Consistent with the current practice in Oregon, Plaintiff

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[1] Defendants repeatedly argued below that Plaintiff "voluntarily" provided the medical records to defense counsel. *See, e.g.*, Motion to Allow Depositions at 6. That's not true. Oregon law required him to do so. *See* ORCP 44.

[2] Again, Defendants repeatedly argued below that Plaintiff "voluntarily" attended his own deposition. That's also not true. A plaintiff does not "voluntarily" participate in a deposition noticed by the adverse party. *See*

answered questions during that deposition pertaining to his medical care and treatment. Defendants now claim that Plaintiff's conduct, all of which was compelled by state law, amounted to a waiver of his physician-patient privilege. They argue that concerns of "fairness" are sufficient to require this Court to reverse course on decades of jurisprudence. This Court should decline to do so and issue the alternative writ of mandamus.

III. ARGUMENT

A. OEC 511 sets forth a specific rule governing waiver of the physician-patient privilege.

In Oregon, the physician-patient privilege, although a "creature of statute," *Nielson v. Bryson*, 257 Or 179, 182, 477 P2d 714 (1970), dates back to the time of statehood. *See* General Laws of Oregon § 702(4) (Deady & Lane 1862). In its contemporary form, the privilege allows a patient in a civil case "to refuse to disclose and to prevent any other person from disclosing confidential communications * * * made for the purposes of diagnosis or treatment of the patient's physical condition." ORS 40.235(2) (OEC 504-1).

Like other evidentiary privileges, the physician-patient privilege may be waived. OEC 511 explains that an evidentiary privilege is waived when the communication subject to the privilege is "voluntarily disclose[d]":

> "A person upon whom [the law] confer[s] a privilege against disclosure of the confidential matter or communication

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Phipps v. Sasser, 74 Wash 2d 439, 443, 445 P2d 624 (1968) (citing *Bond v. Independent Order of Foresters*, 69 Wash 2d 879, 421 P2d 351 (1966)).

> waives the privilege if the person * * * voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

ORS 40.280 (OEC 511) ("Waiver of privilege by voluntary disclosure"); *see also State ex rel. Ore. Health & Sciences Univ. v. Haas*, 325 Or 492, 498, 942 P2d 261 (1997) (so stating). As the commentary to OEC 511 states, voluntary disclosure "can occur in any situation, within or without the context of a lawsuit." *See* OEC 511(commentary of the Conference Committee) (1981).

Within the context of a lawsuit, however, the legislature, in enacting OEC 511, provided some guidance with respect to what constitutes "voluntary disclosure" of communications subject to certain forms of privilege. For instance, with respect to all forms of privilege, "voluntary disclosure" does not occur by the "mere commencement of litigation" or in a "deposition taken for the purpose of perpetuating testimony." OEC 511.[3]

Likewise, the statute provides that the physician-patient privilege may be "voluntarily disclosed," and therefore waived, through certain conduct within the context of a lawsuit. Specifically, the rule provides that "voluntary disclosure" of communications subject to the physician-patient privilege occurs

> "upon the holder's offering of any person as a witness who testifies as to the condition."

[3] Neither is at issue in this case, nor is the existence of those exceptions relevant to the question in this mandamus proceeding.

Thus, in a discovery deposition such as the one that occurred here, unless the holder of the privilege (*i.e.*, the patient)[4] "offers" herself or any other person[5] "as a witness who testifies as to the condition," the privilege remains intact. *See Reynolds Metals Co. v. Yturbide*, 258 F.2d 321, 334 (9th Cir. 1958) (en banc) (noting that the question of voluntary disclosure turns on whether the plaintiff-patients, who had participated in depositions and responded to interrogatories, "had * * * offered themselves as witnesses within the meaning of" OEC 511).

B. Participating in a deposition noticed by an adverse party does not waive the physician-patient privilege.

As explained above, Oregon law provides that, in the context of a lawsuit, a patient waives her physician-patient privilege by "offering * * * any person as a witness who testifies as to" that patient's physical condition. OEC 511. A patient "offers" a witness for testimony when she affirmatively "brings forward" or "presents" the witness for testimony. *See Webster's Third New Int'l Dictionary* 1566 (unabridged ed 2002) (defining "offer" as "to present"; "to bring or put forward for action or consideration"; "<~ed himself as a candidate for governor>"). Thus, where a plaintiff notices the deposition of a treating physician, she has effectively presented that physician as a testifying

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[4] *See* OEC 504-1(3).

[5] This Court has construed the word "any" to mean "all" or "every." *See Rose v. Port of Portland*, 82 Or 541, 566-67, 162 P 498 (1917), *overruled on other grounds by State ex rel. Heinig v. City of Milwaukie*, 231 Or 473, 373 P2d 680 (1962). Plaintiff is therefore included as "any person" under OEC 511.

witness. She is therefore deemed to have "intentionally offered * * * the testimony of [the] doctor," and has terminated the physician-patient privilege. *See State ex rel. Calley v. Olsen*, 271 Or 369, 381, 532 P2d 230 (1975) (so holding).

By contrast, when a patient participates in a deposition *at the direction of an adverse party*, she has not offered or presented any testifying witness within the meaning of OEC 511. Because the plaintiff *must* appear at a deposition for which she receives proper notice, *see* ORCP 46D (listing the consequences of failing to appear at a deposition after being served with proper notice, including dismissing the action and payment of attorneys' fees), and therefore does not voluntarily do so, she cannot be said to have offered herself as a testifying witness in a manner sufficient to constitute "voluntary disclosure," and therefore waiver, of the physician-patient privilege.

Nor does a plaintiff "offer" herself as a witness by answering questions, during that deposition, pertaining to her medical care or treatment. As explained above, unlike other evidentiary privileges, in order to waive the physician-patient privilege during litigation, a patient must "offe[r] * * * any person as a witness [to] testifies as to" the patient's physical condition. OEC 511. Again, because a plaintiff *must* participate in a properly noticed deposition, *see* ORCP 46D, any testimony that the patient provides in response

to the adverse party's questions cannot be deemed to be a "voluntary disclosure" within the meaning of OEC 511.

That rule is compelled by the wording of OEC 511, and this Court is not free to depart from it in this case. *See Woosley v. Dunning*, 268 Or 233, 247, 520 P2d 340 (1974) (so stating). The rule is also consistent with earlier decisions of this Court. In *Calley*, for instance, the Court explained that the relevant question is whether the plaintiff "offer[ed herself] as a witness," 271 Or at 375, and went on to hold that a plaintiff "offers" her treating physician as a witness when she notices the deposition of that treating physician, *id.* at 381. In *Grimm*, 298 Or at 214, the Court affirmed that the *Calley* rule, which arose in a personal injury case, applies equally to medical negligence cases. And perhaps most importantly, in *Grimm*, the Court addressed the very question before it now:

> "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."

Grimm, 298 Or at 213 n 3.[6] Even if, as Defendants suggest, the Court's conclusion in this respect was dictum, it still carries persuasive force.

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[6] Likewise, in *Leaco Enterprises, Inc. v. General Electric Co.*, Judge Frye, applying Oregon law, held that "[*Grimm*, *Reynolds*, and *State v. Schier*, 47 Or App 1075, 615 P2d 1147 (1980)] show that under Oregon law a plaintiff does not waive a privilege merely by filing a lawsuit *or*

See Halperin v. Pitts, 352 Or 482, 494, 287 P3d 1069 (2012). This is particularly true where the dictum has guided universal practice in Oregon since *Grimm* was decided over 30 years ago.

C. Policy, to the extent relevant, favors Plaintiff's rule.

Defendants argued below that the " 'favored policy' of pretrial discovery of all relevant evidence" compels the conclusion that Plaintiff waived his physician-patient privilege by participating in the deposition noticed by Defendants. *See* Defs. Motion to Allow Depositions at 7. Even if that "favored policy" were relevant to this Court's analysis (and it is not, *see Woosley*, 268 Or at 247), for a number of reasons, that "favored policy" should not guide the Court to the rule that Defendants seek.

The rule that Defendants seek is unlikely to serve the purpose of expanding pretrial discovery to "all relevant evidence." Quite to the contrary, the rule likely will have the opposite effect—because it creates a substantial disincentive for plaintiffs to cooperate in discovery depositions, Defendants' rule is likely to reduce, not to expand, the amount of relevant evidence made available to defendants pretrial. In future cases, plaintiffs will decline to answer any questions pertaining to the plaintiff's medical care or treatment. *See* ORCP 39D(3)(c) (permitting a deponent to decline to answer a question "to preserve a

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even by testimony which is not '*voluntary*.' " 1989 WL 35861 at *3 (D Or Apr 6, 1989) (emphasis added).

privilege"). That practice, in turn, could increase the likelihood of discovery disputes, increasing the burden on the courts and potentially creating additional delays in litigation. Discovery costs are also likely to increase. And, as Defendants' here acknowledge, the practice is contrary to the current practice of the members of the Oregon State Bar. Defendants' proposed rule will upset the settled understanding held by attorneys throughout this state.

IV. CONCLUSION

For the foregoing reasons, this Court should adhere to its precedent, *see Grimm*, 298 Or at 213 n 3, and issue the alternative writ of mandamus.

DATED this 9th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,059 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required in ORAP 5.05(2)(d).

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 9, 2016, I filed the original of this **OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF** with the State Court Administrator in pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on August 9, 2016, I served a true and correct copy of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows if they are not already registered under the Oregon Appellate Court eFiling system:

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