IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON HEALTH AND SCIENCE UNIVERSITY,
a public corporation,

Plaintiff-Appellant, Respondent on Review,

v.

OREGONIAN PUBLISHING COMPANY, LLC,
a domestic limited liability company,

Defendant-Respondent, Petitioner on Review.

Supreme Court No. S064249
Court of Appeals No. A152961
Multnomah County Circuit Court Case No. 1112-16443

BRIEF OF AMICUS CURIAE OREGON MEDICAL ASSOCIATION ON BEHALF OF PLAINTIFF-RESPONDENT

Review of the Decision of the Court of Appeals
from Judgment of the Circuit Court for Multnomah County
Hon. Richard Maizels, Judge pro tempore

Opinion Filed: May 11, 2016
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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Oregon Medical Association (OMA) is a private, not-for-profit, professional association of physicians organized for the purpose of serving and supporting physicians in their efforts to improve the health of Oregonians. This is an action by Oregon Health and Science University (OHSU) seeking a declaration that patient information contained in tort claim notices is protected health information (PHI) and not disclosable. This case involves significant issues, including whether the media can compel a public hospital to disclose the names and dates of service of its patients pursuant to a public records request. Because the information sought is protected from intrusion by state and federal law, it is exempt from disclosure. There is no exception that permits The Oregonian to wade into the private lives and medical care of Oregonians without their consent or knowledge.

OMA appears in support of OHSU's arguments that the information sought is PHI, it is not subject to disclosure, and Oregon Public Records Law (OPRL) does not provide an avenue for the media to circumvent those protections. Specifically, OMA addresses the confidential nature of the information sought.

The Oregonian seeks patient information contained in tort claim notices alleging medical malpractice. Those notices are required as a prerequisite to filing suit against a public entity and must contain certain facts to allow the public body

to investigate. ORS 30.275. If a similar demand or complaining letter were sent to a private hospital, The Oregonian would have no avenue for obtaining the information. OPRL does not allow patient information held by public hospitals to receive less protection than that which is held by private hospitals or physicians. Beyond authorized disclosures, for example, those required for treatment, payment, and heath care operations, patients dictate whether and how their information is shared with strangers. 45 CFR § 164.502. The media, and other strangers, do not get to intrude without patient consent.

Notably, although The Oregonian is requesting disclosure in this case, OPRL, on which it relies, applies to "every person" and this request could have been made by *any* person or entity. ORS 192.420. A ruling by this Court allowing The Oregonian access to PHI presumably would allow *anyone* who makes a public records request the same access. This would create a significant hole in patient privacy protections. OMA addresses those important questions and the effect that allowing disclosure would have on patients throughout the state, including those who seek medical care at public hospitals in smaller communities.

THE FRAMEWORK

A. The responsibility to protect patient privacy.

Patient privacy is highly valued and protected by Oregon and federal law. Aside from authorized disclosures necessary for furthering patient care, it is

patients, not medical providers, who dictate with whom their medical information is shared. Medical providers, serving in private practice and public hospitals alike, owe a duty to patients not to disclose information learned during the course of their treatment. *Humphers v. First Interstate Bank*, 298 Or 706, 720, 696 P2d 527 (1985) (physicians are required to keep patient records confidential and have a duty not to disclose such records). Confidentiality is an integral part of the relationship between physician and patient. Often the most intimate aspects of a person's life are discussed during the course of medical care, matters that a person would not disclose in any other context, even with a spouse. Physicians have ethical and legal obligations to protect that expectation of privacy.

Physicians are also subject to myriad federal and state laws and regulations intended to prevent unauthorized use or disclosure of PHI. State and federal statutes broadly mandate that protected health information be kept confidential. ORS 192.553 embodies Oregon legislative policy that health information of individuals is to be protected from disclosure and adopts the federal regulations, the Privacy Rule, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") which are in addition to the rights and obligations provided by state law. 42 USC §1320d-1320d-9 and 45 CFR parts 160 and 164; ORS 192.553 to 192.581. Neither HIPAA nor Oregon law distinguishes between public and private medical

providers; the law applies equally to all covered entities. 45 CFR § 160.103 (defining "covered entity"). Demonstrating the seriousness of unlawful uses or disclosures, HIPAA mandates criminal and civil sanctions for violators and that patients be notified of breaches of unsecured information. 42 USC § 1320d-5 and 6; 45 CFR §§ 164.400-414.

In addition to those broad protections afforded patients, state law also provides a robust evidentiary privilege that gives an additional layer of confidentiality. The physician-patient privilege is described as follows:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family."

OEC 504-1(2). The physician-patient privilege applies to all records and oral or written communications made in the course of the physician-patient relationship. *Nielson v. Bryson*, 257 Or 179, 184-85, 477 P2d 714 (1970). The rationale and purpose of the privilege "is to encourage patients to disclose freely all matters which may aid in the diagnosis and treatment of disease and injury" and it is "necessary to secure the patient from disclosure in court of potentially embarrassing private details concerning health and bodily condition." *State ex rel*

Grimm v. Ashmanskas, 298 Or 206, 209, 690 P2d 1063 (1984). It is clear the purpose of the privilege is to enhance patient care.

The privilege can only be waived if the patient "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." OEC 511. The only exception is that medical records are subject to discovery in civil litigation by an opposing party if they are a plaintiff's own medical records relating to injuries for which recovery is sought. ORCP 44 C. In the context of civil litigation, re-disclosure of PHI is not permitted and protective orders are commonplace to ensure as much. Here, there is no restriction on what The Oregonian could do with the information if it is allowed to acquire it.

Viewing the body of law protecting patient privacy and the duties imposed on physicians, the presumption is one of nondisclosure. Protecting the privacy of Oregonians is paramount to ensure optimum patient care, which requires candid communication between patient and doctor. This policy serves all patients. OPRL does not allow for disclosure of patient information and it should not be used as a trump card to obtain PHI of Oregonians who are treated at public hospitals by ignoring the state and federal protections afforded all patients.

Patient privacy cannot be dictated by where the patient seeks treatment. There is no lesser expectation of privacy by patients seeking care at public versus private hospitals, nor should patients be required to factor in the risk to privacy by

seeking treatment at OHSU or other public hospitals. For example, as part of the state's comprehensive trauma system, Oregon has two Level I trauma system hospitals: Legacy Emanuel Medical Center and OHSU. *See* ORS 431A.050 *et seq*; OAR 333-205-0040(2). A patient needing that high level of care is transported by ground or air ambulance or Life Flight to one or the other of these primary trauma centers based on trauma system protocols and trauma patient volume. Patients typically do not choose. It cannot be the rule that the trauma patient taken to OHSU has a lesser privacy protection than the patient taken to Legacy Emanuel.

Consider also that many physicians have private practices while maintaining privileges at the public and private hospitals where they also provide care. What if a patient sees a surgeon in her office for a pre-operative appointment and then has surgery at OHSU or another public hospital a few days later? Both the physician and hospital maintain a chart of the patient's care. The physician is prohibited from sharing the patient's identity with the media. Does that prohibition change because of the physical location of her surgery such that OHSU and rural public hospitals are required to provide information exchanged between patient and surgeon that the surgeon is prohibited from disclosing? Analogies make evident that the double standard that would result from this rule of disclosure is unworkable in practice and simply makes no sense.

B. The information sought by The Oregonian is protected health information.

The Oregonian seeks disclosure of patient names, the date of the alleged tort (*i.e.*, the date of medical care) and the name of the patient's attorney, all without any restriction on what they can do with the information. Like any medical provider protecting its patients' privacy, OHSU is not permitted to disclose information identifying its patients in this manner. The Oregonian can no more ask for a copy of a patient's medical chart that it can ask a physician to identify her patients by name and date of treatment.

Medical providers are required to comply with HIPAA, which provides a federal floor for protection of patient privacy. 45 CFR § 160.203. HIPAA guards against the unauthorized use or disclosure of "protected health information" (PHI). That phrase in turn is defined as "individually identifiable health information" which means:

> "information that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

> (i) That identifies the individual; or
>
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual."

45 CFR § 160.103 (definitions). The term "health information" within the above definition is further defined:

> "Health information means any information, including genetic information, whether oral or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual."

Id. This definition explicitly includes information created or received by a health care provider, school or university, both of which pertain to OHSU.

Subject to limited exceptions, PHI cannot be disclosed without authorization by the patient. 45 CFR § 164.508(a); 45 CFR § 164.512 (disclosures permitted without authorization). It is difficult to imagine an identifier more acutely capable of identifying a patient than his or her name. A patient's attorney's name is a close second when investigative reporting will result in a call to the attorney about a patient's care. The inquiry cannot be made

without a connection to the patient's identity, PHI, the very information that covered entities are prohibited from disclosing.

Physicians are not permitted to disclose their patients' names to anyone that asks, including the media. Indeed, physicians are required to give their patients notice of all the ways they will or will not disclose their PHI in compliance with HIPAA's Privacy Rule. 45 CFR § 164.520. Called "Notice of Privacy Practices," this informs what a patient expects the provider to do with their PHI. *See* e.g., www.ohsu.edu/xd/about/services/integrity/ips/npp.utm. Of course, patients are not told that if the media makes an inquiry the physician can disclose information in response because no such disclosure is permitted. Rather, only if a person asks for a patient by name can they be told whether the patient is in the hospital, and only if the patient agrees. 45 CFR § 164.510(a). The patient has the right to restrict who gets information about them, even the simple fact of whether the patient is in the hospital. *Id*.

A person who believes he or she has suffered an injury arising out of an alleged tort of a public entity must send a tort claim notice detailing the ways in which the person alleges they were harmed as a condition precedent to filing a lawsuit. ORS 30.275. For patients of public hospitals, the patient must send a tort claim notice to the hospital detailing his or her care and the alleged tort. ORS 30.275(4)(b) (requiring a "description of the time, place and circumstances

giving rise to the claim"); *Orr v. City of Eugene*, 151 Or App 541, 543, 950 P2d 397 (1997) (proper tort claim notice is a condition precedent to the existence of a claim). The information contained in those notices is protected, privileged, and not disclosable without consent of the patient. The Oregonian wants access to the identity of an untold number of patients who assert, at least preliminarily, that they have suffered injuries arising from medical malpractice.

Tort claim notices are not publicly filed complaints where a different set of protections apply and a waiver of the physician-patient privilege eventually occurs. Rather, these are pre-litigation letters memorializing a patient's grievance with his or her medical care. Although some patients eventually file lawsuits, many never do, and thus they never waive their physician-patient privilege such that others in litigation can view the related medical records for purposes of a lawsuit.

Requiring the disclosure The Oregonian seeks would have a chilling effect on patient grievances, contrary to statute and the interest of patient care. Tort claim notices may be initiated for a variety of reasons, including: (1) to facilitate a candid conversation among patient and provider; (2) to alert the medical provider to an internal issue the patient feels is important; (3) to begin discussion about what happened during a medical event and to better understand it; and (4) because a patient may feel they have been injured and should be compensated. The notice

process provides opportunity for early resolution of potential claims when appropriate. Equally important, it allows candid conversations about medical treatment to take place within protected communications, an interest Oregon law strongly protects, for example by the peer review and related statutes. ORS 41.675; *see also* ORS 41.685 (relating to emergency medical services quality assurance).[1] Those interests would be subverted and chilled by permitting the media, or *anyone* who files a public records request, access to this information.

Notably, a patient can choose to fulfill the notice requirement by commencing an action during the time provided for notice. ORS 30.275(3)(c). Most do not. The patient has control over whether and when they make their concern and medical treatment public. Until a lawsuit is filed, a patient is choosing to maintain their privacy on whatever issues are raised in the tort claim notice. The Oregonian is not entitled to substitute its curiosity for the right of individual patients to make this decision.

Patients have an expectation of privacy. They are told that their physicians are only providing information to other covered entities for treatment, payment, or healthcare operations. 45 CFR § 164.502. Those authorized disclosures are considered necessary to the functioning of the medical system and patient care.

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[1] The Oregon Legislature continues to affirm the policy of protecting patient privacy, for example, with the requirement that communications within the newly enacted Early Dispute Resolution program are confidential. Or Laws, ch 5, § 3 (2013).

Those disclosures are made to other covered entities or business associates who bear the responsibility to maintain confidentiality. *See generally, id*. Disclosure to the media would carry no similar protection against re-disclosure and advances no similar purpose of aiding patient care.

The Court of Appeals assumed, correctly, that this information is PHI. *OHSU v. Oregonian Publishing Company, LLC*, 278 Or App 189, 201, 373 P3d 1253 (2016). Information that confirms an individual was a patient at OHSU on a particular date and that such person was upset by the care and that they raised concerns about the care reveals information that is protected. Combining the name and date of service makes it quite clear who the patient is and when they were treated, defeating confidentiality. That is, it is information created or received by the medical provider, that "identifies the individual" and "[r]elates to * * * the provision of health care." 45 CFR § 164.103. The Court should reject any argument to the contrary.

Again, save for those authorized disclosures – *e.g.*, those made for treatment, payment, or health care operations--a patient gets to determine who learns what about their medical care and condition. Suggesting The Oregonian can make that decision for a patient, without their knowledge or consent, is contrary to law. It undermines physicians' responsibilities to their patients and will adversely affect patient care. A patient may not have told anyone that they

sought care, or limited the reasons why and the information shared, as is their prerogative. They may, for example, have every reason to keep matters of reproductive choice or treatment for addiction private from even family members. OPRL does not allow the broad-sweeping exception to patient privacy that The Oregonian seeks. Patients expect their information to remain private. State and federal law embody and enforce that expectation. Physicians must act accordingly, and the media is not granted a right to know via OPRL.

C. Allowing disclosure would have significant adverse consequences that would contravene the policy of protecting patient privacy.

Allowing access to the protected information of patients on the basis that they received care at a public rather than private hospital is an onerous classification. The impact of such a ruling would affect not just OHSU's patients, but also those Oregonians who receive medical care at local public hospitals in rural areas that are also subject to the Oregon Tort Claims Act. ORS 192.410(3) (including special districts as public bodies under OPRL). Oregon's public hospital districts play a vital role in providing access to medical care. Public health districts are taxpayer owned public entities located in rural communities where the next-nearest option is typically a long drive away. In Oregon there are 28 health districts. *See* "Oregon Health Districts Supporting Hospitals, Clinics or Both" Oregon Office of Rural Health (available at:

www.ohsu.edu/xd/outreach/oregon-rural-health/data/publications/upload/health-district-map.jpg). They provide critical patient care, including emergency medical services, labor and delivery, and outpatient and inpatient care. They face unique challenges compared to their urban peers. Smaller institutions have greater difficulty in recruiting physicians and often have fewer specialities available. They are also less likely to have the resources to challenge public records requests such as this one directed at OHSU.

The risk to patient privacy that would occur by allowing The Oregonian, or anyone else who files a public records request, to access patient names may be even greater when applied to patients of smaller community hospitals. Requiring the disclosure of the names of complaining patients by a local public hospital in a rural area would present a greater risk of identifying the patient and greater deprivation of patient privacy. Physicians employed in smaller communities must be ever vigilant in protecting patient privacy given the relative ease of identifying to whom it pertains based on demographics and the small populations served. There is no basis for a rule that disadvantages those patients by reducing their privacy because they were treated at a public hospital. Ultimately, circumventing the privacy of patients will have a chilling effect on candid communication between patients and physicians and hurt patient care.

D. OHSU's position is consistent with the federal agency's interpretation of HIPAA.

Patient privacy is paramount and OHSU's position is consistent with that premise of HIPAA. The Office for Civil Rights (OCR) is the federal agency with the responsibility of protecting privacy through enforcement of HIPAA. OCR's interpretation of the "required by law" provision in HIPAA that patient privacy prevails over state public records law in the absence of mandatory disclosure provisions is consistent with OHSU's position.[2] *See* 45 CFR § 164.512(a)(1); 164.103 (defining "required by law"). That interpretation is entitled to substantial deference by this Court. *Hagan v. Gemstate Manufacturing, Inc.*, 328 Or 535, 545, 982 P2d 1108 (1999) (an Oregon court interpreting a federal regulation must apply the federal interpretive methodology); s*ee Auer v. Robbins*, 519 US 905, 117 S Ct 905, 137 L Ed 2d (1997) (agency interpretations of its own regulations are controlling unless plainly erroneous).

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[2] OCR provides an instructive example of how its interpretation operates:

> "For example, if a state public records law includes an exemption that affords a state agency discretion not to disclose medical information where such a disclosure would constitute a clearly unwarranted invasion of personal privacy, the disclosure of such records is not required by the public records, and therefore is not permissible under §164.512(a)."

OCR, HHS, *Answer to State Public Records Law Question* (August 24, 2004) (available at http://www.hhs.gov/hipaa/for-professionals/faq/506/how-does-the-hipaa-rule-relate-to-freedom-of-information-laws/index.html).

There is no provision of Oregon law that affirmatively allows disclosure of PHI in the context sought by The Oregonian. Rather HIPAA and ORS 192.553-192.581, prohibit such disclosure. OPRL cannot overcome those obstacles to disclosure in this case where there is no mandatory statutory obligation requiring disclosure. Patient privacy protections are not overridden by public records laws.

CONCLUSION

The OMA joins OHSU is requesting the court reverse the Court of Appeals because the information sought is PHI and protected from public disclosure.

DATED this 21st day of December 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum complies with the word count limitation for briefs pursuant to ORAP 5.05(2)(b); the word count is 4444 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(2)(d)(ii).

In addition, I certify that this document was converted into a searchable PDF format from the original Word document for electronic filing and was scanned for viruses.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing BRIEF OF AMICUS CURIAE OREGON MEDICAL ASSOCIATION ON BEHALF OF PLAINTIFF-RESPONDENT on the following attorneys on the date indicated below:

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On the same date I filed the foregoing BRIEF OF AMICUS CURIAE OREGON MEDICAL ASSOCIATION ON BEHALF OF PLAINTIFF-RESPONDENT with the State Court Administrator, Appellate Records Section by means of the appellate court e-filing system.

DATED this 21st day of December 2016.

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