IN THE SUPREME COURT OF THE STATE OF OREGON

BILL BARRIER and LEE ANN BARRIER, as individuals and as husband and wife,	Supreme Court No. S063974
Plaintiffs-Relators,	Multnomah County Circuit Court Case No. 140404994
v.	**MANDAMUS PROCEEDING**
DOUGLAS BEAMAN MD, PC, DOUGLAS BEAMAN, MD, and SUMMIT ORTHOPEDICS, LLP,	
Defendants-Adverse Parties.	

DEFENDANTS-ADVERSE PARTIES' RESPONSE IN OPPOSITION TO PLAINTIFFS' OPENING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD

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(continued on next page)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants-adverse parties ("defendants") continue to rely upon the arguments set forth in their memorandum in opposition to plaintiffs-relators' Petition for Alternative Writ of Mandamus but supply the following additional response to plaintiffs' opening brief.

STATEMENT OF THE CASE

Defendants accept plaintiffs' statement of the Nature of the Action and the Nature of Appellate Jurisdiction.

I. Question Presented.

Defendants do not accept plaintiffs' statement of the question presented. The proper question presented is: Whether plaintiff's disclosure, without objection, of information regarding his medical condition during a discovery deposition waived the physician-patient privilege as to that condition, allowing discovery depositions of plaintiff's subsequent treating doctors.

II. Summary of Argument.

A party who voluntarily discloses privileged communications at a discovery deposition waives the privilege for the subject matter of the communication. That is what occurred in this case – plaintiff voluntarily disclosed information that he later claimed was privileged, and the trial court ruled that plaintiff had waived the privilege through the voluntary disclosure. There is nothing extraordinary about the fact pattern before the Court, and there

is no special waiver rule for communications covered by the physician-patient privilege.

Plaintiffs' petition focuses entirely on plaintiff's compelled attendance at his deposition, while ignoring his voluntary disclosure of the communication itself. Plaintiffs ask the Court to announce a special rule of non-waiver, even where a party voluntarily discloses privileged information at a discovery deposition, without seeking a protective order and without objecting based on privilege. Such a rule is contrary to the plain language of OEC 511, which provides for waiver of the physician-patient privilege by voluntary disclosure or consent to disclosure of information during discovery, with the sole exception being in the case of a *perpetuation* deposition.

Plaintiffs' proposed rule is also contrary to OEC 512, which provides that evidence of the disclosure of privileged matter is inadmissible against the holder of a privilege if the disclosure is made "without opportunity to claim the privilege." Plaintiffs do not argue that they had no "opportunity to claim the privilege" at the deposition. Nor can they – it is common for a party to object to a question based on privilege. If the parties dispute that the privilege applies, then the issue is resolved by a court. But if there is disclosure without an objection, OEC 511 and 512 state that the privilege is waived.

Finally, plaintiffs' proposed rule is unfair to the medical community and defendants in general. If adopted, it would represent yet another step away

from the "search for truth" that should be the hallmark of any just system for resolving civil disputes. Plaintiffs in medical malpractice case often try to gain a tactical advantage by refusing to allow discovery into the basic elements of a claim until trial itself. The rules allow parties to hide their expert opinions in this manner, and plaintiffs now ask the Court to allow them to hide the facts. The rules do not support this tactic, and it is impossible to hypothesize a rational justification for it.

This Court should deny plaintiffs' petition and allow the trial court's order permitting the discovery depositions of plaintiff's subsequent treating medical providers to stand.

III. **Statement of Relevant Facts.**

Defendants rely upon the following undisputed facts, in addition to those set forth by plaintiffs.

Plaintiffs allege that as a result of defendants' medical care in June 2012, plaintiff suffered "severe and permanent injury to his right foot and ankle leaving him unable to use his foot and suffering constant pain and numbness." (ER 2-3). Plaintiffs further allege that plaintiff "has required follow up care and surgeries and suffered additional injuries to his head and back as a result of a fall related to his disability including a concussion and herniated discs" that will allegedly require future medical care and cause additional disability. (ER 3). Plaintiffs seek economic damages of $900,000 for past and future medical

expenses and lost earning capacity, and non-economic damages of $1.3 million. (*Id.*).

In June 2014, defendants requested production of plaintiff's medical records, including records relating to treatment he received subsequent to defendants' care. (SER 16-22). In response, plaintiffs provided significant medical records to defense counsel. (SER 23).

In February 2015, defendants arranged with plaintiffs' counsel for a time and place for plaintiff's video-taped deposition, and then followed up with a notice of videotaped depositions of plaintiff for March 23, 2015.[1] (ER 25-26). Plaintiff appeared for deposition without objection and without seeking a protective order to limit his testimony. (SER 1). During his deposition, plaintiff discussed the details of his medical care and subsequent treatment, again without objection. (ER 6, 33; SER 1-15).

Following plaintiff's deposition, defendants requested discovery depositions of plaintiff's subsequent treating medical providers. (ER 18). Plaintiffs objected, asserting the physician-patient privilege, which provides:

> "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 purpose of diagnosis treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the

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[1] This arrangement was consistent with Oregon practice, whereby counsel determine a mutually agreeable time and date, after which a notice of deposition is sent pursuant to ORCP 39 C(4).

> diagnosis or treatment under the direction of the physician, including members of the patient's family."

OEC 504-1(2). Defendants moved the trial court for an order allowing them to take these discovery depositions. (ER 5).

Judge Youlee Yim You granted defendants' motion, ruling that plaintiff had waived the physician-patient privilege under OEC 511. Judge You explained:

> "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).

IV. **Standard of Review.**

Whether plaintiff waived the physician-patient privilege presented a preliminary question of fact to be determined by the trial court under OEC 104(1). *See State ex rel. OHSU v. Haas*, 325 Or 492, 497-98, 942 P2d 261 (1997) (stating this rule with regard to lawyer-client privilege). On review for errors of law, this Court views the record in a manner consistent with the trial court's ruling under OEC 104(1), and assumes that the trial court found facts consistent with its final conclusion. *Id.* at 498.

Because the trial court found that the privilege had been waived and allowed discovery depositions of plaintiff's subsequent treating doctors, this

Court looks to the record in the light most favorable to the order of disclosure. *See State ex rel. Ware v. Hieber*, 267 Or 124, 127-28, 515 P2d 721 (1973) (in a mandamus proceeding, when the facts are in dispute, this court accepts reasonable factual inferences that the trial court could have made). To the extent waiver in this context is deemed a factual inquiry, the trial court's determination on that issue should be accepted.

ARGUMENT

I. Plaintiff Waived the Privilege in the Manner Provided for by OEC 511.

OEC 511 provides in pertinent 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 * * * while holder of the privilege voluntarily discloses or consents to the 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).

OEC 511 is not ambiguous – it states that a privilege is waived when a privileged communication is voluntarily disclosed. While it also states that voluntary disclosure of the physician patient privilege occurs "upon the holder's

offering of any person as a witness who testifies as to the condition," the rule does not state that it is the only way in which confidential communications can be voluntarily disclosed. The legislative commentary to OEC 511 summarizes the intent of the waiver rule: "Briefly a privilege is lost when the reason for it ceases to apply." As this court noted in *State ex rel. Grimm v. Ashmanskas*, 298 Or 206, 213, 690 P2d 1063 (1984), the commentary

> "[p]icks up the language of the commentary to the proposed Federal Rule of Evidence 511: The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by [the holder's] own act destroys this confidentiality."

298 Or at 210 (emphasis added; brackets in original and citations omitted). Importantly, the *Grimm* court recognized that "there is no legislative text and no policy reason to justify restriction of waiver of the privilege once the patient is parading before the public the mental or physical condition as to which he or she consulted the doctor * * *." *Id.* at 212.

Plaintiff did just that in the present case. Plaintiffs alleged that defendants' medical care caused plaintiff extensive physical damage, which has required subsequent treatment by 17 medical providers, and will require future medical care resulting in damages of over $2 million. (ER 3). Plaintiffs have cooperated with defendants during discovery of the facts that support these allegations, and have disclosed the details of the 17 subsequent medical

treatments. Plaintiffs had no choice but to cooperate in discovery because these facts are relevant to plaintiffs' allegations of negligence, causation and damages. If plaintiffs intend to seek a judgment against defendants based on the purported truth of these allegations, plaintiffs must disclose these facts in this litigation. They do not contend otherwise.

This is why plaintiff testified in detail about the 17 subsequent medical procedures at his deposition. Plaintiffs did not object based on physician patient privilege, likely because they recognize that such facts must be disclosed in this litigation if plaintiffs wish to recover. That testimony, made without objection, is a voluntary waiver of the privilege for the subject matter of the disclosure under the plain language of OEC 511. Simply put, plaintiff "voluntarily disclose[d] or consent[ed] to the disclosure" of the communications. There is nothing remarkable about this case.

II. **Plaintiff's Waiver Was Voluntary.**

Plaintiffs do not quibble with the trial court's conclusion that they disclosed confidential communications. Nor do they contend that the requested depositions are beyond the scope of their waiver. Their sole argument is that their waiver was not "voluntary" because plaintiff did not voluntarily participate in his discovery deposition. (Plaintiff's Op. Br. p 1).

As an initial matter, the undisputed facts demonstrate otherwise. Plaintiff agreed to attend the deposition; the notice was simply a formality. (ER 25).

More importantly, it does not matter whether plaintiff's attendance was voluntary – the issue is his subsequent disclosure of what he later contended was confidential, privileged information.

Even assuming that the physician patient privilege applied at the time of plaintiff's discovery deposition, plaintiffs could have objected to any question based on privilege, or could have sought a protective order under ORCP 36. These are common ways of limiting testimony at a deposition. *See* ORCP 46 D (instructing that a party is not excused from giving a deposition "on the ground that the discovery sought is objectionable unless the party failing to act applied for a protective order as provided by Rule 36 C"); ORCP 41 C(2) (instructing that errors of any kind in the taking of a deposition or in the form, competence, relevancy or materiality of questions or the answers, or the conduct of the parties are "waived" if not timely objected to "at the taking of the deposition").

That the waiver was voluntary is confirmed by OEC 512, which states that evidence of a "disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was * * * [m]ade without opportunity to claim the privilege." (Emphasis added). The comments to OEC 512 explain that the rule is meant to further clarify the nature of a "voluntary" disclosure under Rule 511: "Rule 511, immediately preceding, gives voluntary disclosure the effect of a waiver, while the present rule covers the effect of a disclosure made under compulsion or without opportunity to claim the privilege."

OEC 511 and 512, read together, establish that the disclosure of a confidential communication waives privilege for the subject matter of the communication if there was an opportunity to claim the privilege, but the deponent chose not to take advantage of that opportunity. In such a case, the disclosure is "admissible against the holder of the privilege" because it was waived. Plaintiffs cannot contend that plaintiff lacked the "opportunity" to assert the privilege in this case.

In short, that plaintiff had to attend his discovery deposition is irrelevant to the Court's analysis. What is relevant is that, during the deposition, plaintiff voluntarily disclosed what he now contends is privileged information, without objection. He had ample opportunity to assert his physician-patient privilege, but chose not to claim the privilege. Under OEC 511, he has waived the privilege as to the subject matter of those communications.

III. Application of the Correct Rule—OEC 511—Supports the Trial Court's Order.

Plaintiffs claim that *Grimm* supports their view of waiver. It does not. In *Grimm*, this Court discussed the limitation of the statutorily created physician-patient privilege and the legislative intent of OEC 511 "in following its basic premise that the privilege should be terminated when the holder by his own act destroys confidentiality * * *." 298 Or at 212. The question in *Grimm* was whether a plaintiff's voluntary act of deposing a defendant treating physician in

a medical malpractice action constituted a waiver of the physician-patient privilege with respect to other treating physicians under OEC 511. *Id.* at 208. This Court held that it did. *Id.* at 212.

Relevant to the issue here, the *Grimm* court examined pertinent legislative history and discussed the limitations of the statutorily created physician-patient privilege, including recognizing that "[t]he validity of the privilege has been questioned by most of the leading evidence authorities in this country." *Id.* With regard to the 1981 enactment of OEC 511, this Court explained: "With this long-standing skepticism about the establishment of a wide-ranging physician-patient privilege in mind, the Oregon legislature adopted (effective Jan. 1, 1982) OEC 504-1, to be applicable to civil trials only and provided a specific waiver section in OEC 511." 298 Or at 209.

Plaintiffs focus on footnote 3 in *Grimm*, which states

> "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 hold of the privilege is not voluntarily offering his or her confidential communications or personal condition to the public."

298 Or at 208, n. 3.

This footnote is *dicta*. The question of the effect of a compelled discovery deposition was not before the court. Moreover, it does not address

the specific issue in this case, which concerns voluntary disclosure at a discovery deposition.

In *Grimm*, the plaintiff had already deposed the defendant provider. 298 Or at 208. The sole issue before the Court was whether, in so doing, the plaintiff had waived the physician-patient privilege with respect to other treating providers concerning the same condition. *Id.* The Court held that he had. *Id.* at 214. The question of whether waiver of the physician-patient privilege occurs when a plaintiff in a medical malpractice case testifies without objection to his or her condition at a discovery deposition that he has agreed to attend, was not at issue.

Plaintiffs argue that the *Grimm* footnote was "necessary to properly limit the court's holding" (Opening Brief of Plaintiffs-Relators, p 1), but that is not true. If given the interpretation urged by plaintiffs, the footnote actually would conflict with everything else in the body of the opinion. The Court, after discussing the legislative history of the physician-patient privilege at length, stated: "The legislature, after evaluating when waiver should occur, provided that the waiver of the physician-patient privilege may occur during discovery and provided one exception (a perpetuation deposition) which is not applicable in this case." 298 Or at 213 (emphasis added).

The footnote in question follows the-above quoted language. Plaintiffs' interpretation of the footnote directly contradicts this quote, which states that

there is one exception to the waiver rule, and that is for a perpetuation deposition. Plaintiffs' interpretation of the *dicta* in the footnote would read another exception into the rule – for disclosures at discovery depositions – which was not included by the legislature. Such an addition may not be made by this Court. ORS 174.010 (in construing a statute, court cannot insert what has been omitted).

IV. Plaintiff Relies Upon Outdated Cases Interpreting a Repealed Statute.

Plaintiffs also cite the holdings in *Reynolds Metals Co. v. Yturbide*, 258 F2d 321 (9th Cir. 1958) and *Nielson v. Bryson*, 257 Or 179, 182, 184, 477 P2d 714 (1970), two cases predating the passage of OEC 511, and interpreting *former* ORS 44.040(1)(d) and *former* ORS 44.040(2), both of which have been repealed.

Former ORS 44.040(1)(d) provided:

> "A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

Former ORS 44.040(2) 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."

In *Reynolds*, the Ninth Circuit ruled that the plaintiff had not "offered herself" as a witness for purposes of *former* ORS 44.040(2) by answering

deposition questions or responding to interrogatories. 258 F2d at 334. In *Nielson*, this court cited *Reynolds* for the proposition that a person does not offer himself as a witness when called involuntarily to testify on trial or on deposition. 257 Or at 183. The court held that "in the absence of an intentional and expressed consent, the privilege created by *former* ORS 44.040(1)(d) * * * can only be terminated in the manner provided by the terms of *former* ORS 44.040(2)." *Id.* at 184.

Both *Reynolds* and *Nielson* turned on the "offers himself as a witness" language of *former* ORS 44.040(2). That repealed statute did not contain the new and significantly broader language of OEC 511, providing for waiver when the party holding the privilege "voluntarily discloses or consents to the disclosure of any significant part of the matter or communication." It is this language upon which defendants rely here.[2] Because this language was not part of the statute pursuant to which *Reynolds* and *Nielson* were decided, these cases are not instructive.

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[2]Plaintiffs argue that if the court got it wrong in *Reynolds* or *Nielson*, "the legislature had many years to fix it," and continues, "instead the legislature adopted the same language in ORS 40.280 [OEC 511] * * *." (Opening Brief of Plaintiffs-Relators, p 17). In fact, not only did the legislature add the language relied upon by defendants here, it also changed "offers himself as a witness" to "offering of any person as a witness" in OEC 511. Thus, the current waiver rule does not utilize the same language as *former* ORS 44.040(2) even with regard to offering a witness.

For the above reasons, plaintiffs are simply incorrect in asserting that the waiver rule they propose is supported by Supreme Court precedent of over 50 years. (Plaintiff's Op. Br., p 5.). Indeed, the broader reach of OEC 511 is made clear by the legislative commentary to the rule, which explains that while mere commencement of litigation does not constitute disclosure, "[t]hereafter, however, waiver can occur during discovery * * *" and not just at trial on direct or cross examination. *Id. (*citing McCormick § 93).

V. The Physician-Patient Privilege Must Be Strictly Construed.

There is no dispute that plaintiff was the holder of a privilege of nondisclosure of confidential communications between himself and his physicians. OEC 504-1 (set forth above). Oregon law is clear, however, that this statutorily created privilege is contrary to the "favored policy" of pretrial discovery of all relevant evidence and is "in derogation of the common law and should be strictly construed." *Nielson* (citing 8 Wigmore, Evidence (3d Ed) §§ 2380 and 2380a); *see also State ex rel. Calley v. Olsen*, 271 Or 369, 381, 532 P2d 230 (1975) (same). Further, OEC 102 instructs that all evidentiary rules "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Accordingly, the physician-patient privilege is not absolute and should be construed strictly and with the aim of ascertaining the truth.

OEC 511 provides just one exception to the principle that waiver can occur during discovery: "*** in the case of a deposition taken for the purpose of perpetuating testimony * * *." OEC 511. Plaintiff's deposition here was a discovery deposition, so this exception does not apply.[3]

Pursuant to the classic legal principle "*inclusio unius est exclusio alterius*" (inclusion of one is to exclude the others), if the legislature found reason to enumerate one exception, then it is only reasonable to infer that no others were intended. *Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382, 8 P3d 200 (2000) (applying rule to interpretation of ORCP 21). Because there is no exception for discovery depositions, the rule must be read as allowing for waiver during such depositions. To read the rule otherwise would be to add an exception that does not appear in the rule, something that this Court may not do. ORS 174.010 ("In the construction of a statute, the office of the judge is simply

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[3]As this court has recognized, a perpetuation deposition is different from a discovery deposition:

> Discovery depositions usually are just that, to discover evidence with open-ended questions of a witness or an adverse party. In contrast, a deposition to perpetuate testimony is arranged by the litigants when it becomes known that a witness will be unavailable to testify at trial.

Grimm, 298 Or at 211-12.

to ascertain and declare what is, in terms of in substance, contained therein, and not to insert what has been omitted, or omit what has been inserted.")

The cases plaintiffs cite do not support a contrary reading of OEC 511. To begin, the *Nielson* court's conclusion that it did not have the authority to adopt the "favored policy" was in the context of the court's interpretation of *former* ORS 44.040(2). The only other Oregon case plaintiffs cite, *Woosley v. Dunning*, 268 Or 233 520 P2d 340 (1974), also predates the passage of OEC 511.

Plaintiffs cite two cases from other jurisdictions, Washington and Oklahoma, which are likewise not on point. *Phipps v. Sasser*, 74 Wash 2d 439, 445 P2d 624 (1968); *Avery v. Nelson*, 455 P2d 75 (OK 1969). Both cases were decided in the context of privilege statutes wholly unlike Oregon's. In Washington, as plaintiffs correctly note, the physician-patient privilege is waived by statute in medical negligence cases 90 days after filing. RCW 5.60.060(4)(b). In Oklahoma, the statute in effect when *Avery* was decided provided for waiver if the patient "offer[ed] himself as a witness," but did not include any language about "voluntary disclosure" or the offering "of any person as a witness who testifies as to the condition."

The Court should be especially reluctant to read into OEC 511 language that is not there, particularly given the unfairness that would ensue. Plaintiffs' attorneys have made a strategic decision not to depose defendant Dr. Beaman in

an attempt to prevent defendants from deposing plaintiff's subsequent treating providers. Plaintiffs' argument that the privilege is not waived here, if accepted, would not only be contrary to the language of OEC 511, but would leave defendants unable to prepare an adequate defense on the basic facts underlying plaintiffs' claim, and at a serious disadvantage at trial.

Medical records alone do not provide defendants pretrial access to the reasoning behind the decisions made and ensuing medical care provided by plaintiff's subsequent treating providers. A medical record is not like a contract; the "four corners" rule does not apply to a written summary of an office visit, procedure, or radiological interpretation. Further, given the lack of medical training, a plaintiff can only discuss his or her lay understanding of the care and treatment provided, and is free to testify as to any discussion held with treating providers and statements supposedly made, whether in whole or in part, that are not contained in the medical records. With only the medical records and plaintiff's deposition testimony, defendants are left without the means to prepare an adequate defense.

Especially in a case such as this, where the sheer number of providers involved makes the subpoena of all of plaintiff's subsequent treating providers to testify at trial impractical, if not impossible, fundamental fairness requires defendants to be allowed to conduct pretrial depositions, in order to winnow the number of witnesses and focus the issues for trial.

CONCLUSION

For all the above-stated reasons, the trial court correctly found that the facts supported a waiver of the physician-patient privilege pursuant to OEC 511, and plaintiffs' Request for Alternate Writ of Mandamus should be denied.

Respectfully submitted this 8th day of September, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 8th day of September, 2016, I filed the original - ADVERSE PARTIES' RESPONSE IN OPPOSITION TO PLAINTIFFS' OPENING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD with the State Court Administrator by Electronic Filing.

I further certify that on the same day, I caused the foregoing be served upon the following counsel of record by electronic filing:

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DATED the 8th day of September 2016.

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