Filed 3/2/17 Kidane v. Chiu CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AWET KIDANE, as Director of the Department of Consumer Affairs, etc., Plaintiff and Respondent, v. JOHN C. CHIU, M.D., Defendant and Appellant; KIMBERLY KIRCHMEYER, as Executive Director of the Medical Board of California, etc., Real Party in Interest and Respondent.	B275802 (Los Angeles County Super. Ct. No. BS160687)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Hooper, Lundy & Bookman and Linda Randlett Kollar for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gloria L. Castro, Assistant Attorney General, Matthew Davis and Steve Diehl, Deputy Attorneys General, for Plaintiff and Respondent Awet Kidane, as Director of the Department of Consumer Affairs, etc. and Real Party in Interest and Respondent Kimberly Kirchmeyer, as Executive Director of the Medical Board of California, etc.

An insurance company defending a personal injury suit alerted the Medical Board of California (the Board) to potential irregularities in the treatment that appellant John C. Chiu, a neurosurgeon, had provided for the plaintiff in that lawsuit. A Board investigator requested that Chiu send copies of the patient's medical records, but neither Chiu nor his patient consented to the release of the records. The insurance company sent uncertified copies of the records to the Board, and a Board physician reviewed them and concluded further investigation was warranted. The Board then subpoenaed certified records from Chiu. Chiu appeals from the trial court's order requiring him to produce the records. He contends that the production of the records would constitute an unreasonable search or seizure under the Fourth Amendment to the United States Constitution, and would violate his patient's right to privacy under article I, section 1 of the California Constitution. He also contends that the Board failed to produce sufficient evidence to establish good cause for the disclosure, and that the court erred in not granting his request to submit additional briefing regarding a case the Board cited in its reply brief to the trial court. We affirm.

FACTS AND PROCEEDINGS BELOW

In September 2013, T.S. filed a lawsuit for injuries he suffered in a 2011 truck accident. T.S. had previously received treatment for his injuries from a different physician, but in October 2013, he went to Chiu, a neurosurgeon, for further treatment.

In October 2014, a paralegal for the Golden Hawk Insurance Company (Golden Hawk), which represented the defendant in the suit, filed a complaint with the Board requesting that the Board investigate Chiu with respect to his care and treatment of T.S. The Board initiated an investigation, but could not obtain from T.S. a release of his medical records. In June 2015, a paralegal at the law firm representing Golden Hawk sent the Board's investigator an uncertified copy of the medical records. A physician who worked for the Board reviewed these records and concluded that there were indications that Chiu had violated several standards of care while treating T.S. Because the records were not certified and were potentially incomplete, however, the physician could not determine conclusively whether Chiu had failed to meet the standard of care in treating T.S.

Following the physician's report, the Board's investigator sent letters to T.S. and to his attorney informing them that the Board intended to subpoena the certified records. The attorney responded with a letter informing the investigator that T.S. refused to cooperate with the investigation. The investigator served a subpoena duces tecum on Chiu, demanding that he produce the complete records of his treatment of T.S. Chiu refused to comply and demanded that the subpoena be withdrawn.

The Board filed a petition requesting that the trial court compel compliance with the subpoena. Chiu opposed the petition and filed a declaration with the court claiming that he had never released T.S.'s records to Golden Hawk or its attorneys. Along with its reply, the Board filed a declaration from a paralegal for a law firm representing Golden Hawk, affirming that she had received T.S.'s medical records from a document management company that her firm had engaged to subpoena documents from Chiu, and that she had forwarded the records to the Board.

The trial court issued an order directing Chiu to comply with the subpoena and produce the records to the Board.

DISCUSSION

Chiu raises several contentions on appeal. He claims that the Board's investigator violated T.S.'s rights under the Fourth Amendment to the United States Constitution by obtaining a copy of T.S.'s medical records without T.S.'s consent and without seeking a subpoena. He also contends that the trial court erred when it directed him to comply with the subpoena because, he claims, T.S.'s substantial privacy interest outweighs the Board's interest in obtaining the subpoena. Finally, Chiu contends that the trial court erred by refusing to allow him to submit additional briefing to respond to matters the Board first raised in its reply brief. We affirm.

I. Alleged Fourth Amendment Violation

Chiu contends that the People violated T.S.'s right under the Fourth Amendment to freedom from unreasonable searches and seizures by contacting the law firm representing Golden Hawk to obtain a copy of T.S.'s medical records without first obtaining a subpoena or allowing for an opportunity for review before a neutral decision maker. We need not decide whether Chiu may raise a Fourth Amendment claim on behalf of T.S. because in this case,

Chiu has failed to show that the Board obtained its copy of the records as a consequence of governmental action.

The Fourth Amendment protection from unreasonable searches and seizures "proscrib[es] only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " (*United States v. Jacobsen* (1984) 466 U.S. 109, 113.) Here, the record does not show that the Board's investigator took action to search or seize the medical records. In his declaration, the Board investigator stated, "On or about June 18, 2015, I received an uncertified and potentially incomplete copy of patient T.S.'s medical records from the attorney defending the civil suit filed by patient T.S." The investigator did not state that he requested that the law firm send him the records. A paralegal for Golden Hawk's law firm declared as follows: "On or about June 17, 2015, [an attorney at the law firm named] Kate Martin forwarded to me a request that I send records from Dr. Chiu and related facilities, regarding patient T.S., to" the investigator. The paralegal did not state who initially made the request that Martin forwarded to her, and we have seen nothing in the record suggesting that it was the Board's investigator who made the request.[1]

[1] In his reply brief, Chiu claims that it is "undisputed" that "the investigator contacted [the law firm representing Golden Hawk] to obtain the patient records," but he cites a paragraph of the investigator's declaration in which the investigator states that, at an earlier point, he contacted the law firm in order to obtain the defense expert's report, not T.S.'s medical records.

II. Good Cause for the Subpoena

Chiu contends that the trial court erred by ordering compliance with the subpoena on the grounds that T.S.'s right to privacy outweighs the state's interest in obtaining the records, and that the Board lacked good cause for the subpoena. We are not persuaded.

A. Balancing Test

Chiu argues, and we agree, that the right to privacy contained in article I, section 1 of the California Constitution applies to T.S.'s medical records.[2] As the court explained in *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669 (*Gherardini*), "[t]he matters disclosed to the physician arise in most sensitive areas often difficult to reveal even to the doctor. . . . The reasonable expectation that such personal matters will remain with the physician are no less in a patient-physician relationship than between the patient and psychotherapist." (*Id.* at p. 679.)

This is not the end of the inquiry, however. As both Chiu and the Board acknowledge, the right to privacy under article I, section 1 is not absolute, and must be balanced against the state's interest in obtaining information. The two sides disagree, however, as to the nature of the interest the Board must show in order to overcome a patient's right to privacy. Chiu argues that the Board must show a "compelling state interest." (*Gherardini*, *supra*, 93 Cal.App.3d at p. 680.) Under this standard, the state may obtain

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[2] Chiu does not contend that the physician-patient privilege (Evid. Code, § 994) protects the records from disclosure. Under section 2225 of the Business and Professions Code, laws "making a communication between a physician and surgeon . . . and his or her patients a privileged communication . . . shall not apply to investigations or proceedings" conducted by the Board. (*Id.*, subd. (a).) In turn, the Board and its employees are required to keep patient information confidential. (*Ibid.*)

private information only if there is no less intrusive alternative means available to achieve its ends. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1148 (*Wood*).) The Board argues that the case law Chiu cites is no longer valid in light of our Supreme Court's decision in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*). In that case, the Court held that the compelling interest standard does not apply in every case involving the right to privacy. (*Id.* at pp. 34-35.) Instead, the Court held that "[t]he diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.' " (*Id.* at p. 37.) In performing this balancing test, courts should consider the extent to which an invasion of privacy "furthers legitimate and important competing interests." (*Id.* at p. 38.) They should also take into account whether the party seeking private information can "demonstrat[e] the availability and use of protective measures, safeguards, and alternatives . . . that would minimize the intrusion on privacy interests." (*Ibid.*)

We need not decide which standard applies because even under the stricter compelling interest standard, the Board met the requirement. Every case that has considered the matter has concluded that "the state has a compelling interest in ensuring that the medical care provided by Board certified doctors conforms to the standard of care." (*Fett v. Medical Bd. Of California* (2016) 245 Cal.App.4th 211, 225 (*Fett*); accord *Gherardini*, *supra*, 93 Cal.App.3d at p. 679 ["the State of California has a most legitimate interest in the quality of health and medical care received by its citizens"]; *Wood*, *supra*, 166 Cal.App.3d at pp. 1147-1148 ["The governmental interest in determining if improper prescription of Schedule II drugs has occurred is manifest."].) Moreover, Chiu does not propose a less invasive alternative means by which the Board could investigate whether

he met the applicable standards of care in treating T.S., and we cannot conceive of any. The trial court did not err when it concluded that "there is a compelling interest in the . . . Board discharging its duty to protect the public generally—to do that, it must have access to records of individual patients."

B. Good Cause

Yet the Board's interest in achieving the goal of ensuring that medical practitioners produce adequate medical care is not sufficient on its own to justify an intrusion into a patient's medical records. (*Bearman v. Superior Court* (2004) 117 Cal.App.4th 463, 471 (*Bearman*).) In addition, the Board must make a showing of good cause for access to the records. (*Gherardini*, *supra*, 93 Cal.App.3d at p. 681.) The concept of good cause " 'calls for a factual exposition of a reasonable ground for the sought order.' [Citation.] 'Good cause' which must be shown 'should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent right of an adversary.' " (*Ibid.*)

In practice, this means that the Board must produce "competent evidence" supporting its allegations that a physician may have broken the law or violated standards of care. (*Bearman*, *supra*, 117 Cal.App.4th at p. 469.) "The [B]oard must demonstrate that the particular records it seeks are 'relevant and material to the [B]oard's inquiry.' " (*Wood*, *supra*, 166 Cal.App.3d at p. 1149.) When the Board fails to produce evidence to justify its claims that a physician has acted improperly, courts have rejected its efforts to subpoena private medical data. (E.g., *Gherardini*, *supra*, 93 Cal.App.3d at pp. 681-682; *Wood*, *supra*, 166 Cal.App.3d at pp. 1149-1150; *Bearman*, *supra*, 117 Cal.App.4th at pp. 471-472.)

On the other hand, when the Board has produced specific evidence to support its claims, courts have found good cause for the production of documents. Thus, in *Whitney v. Montegut* (2014) 222 Cal.App.4th 906, the Court of Appeal upheld the trial court's order compelling a doctor to comply with the Board's subpoena for medical records from several patients. (*Id.* at p. 921.) The Board presented evidence from a state database showing irregularities in the doctor's prescriptions. (*Id.* at p. 920.) The Board's consultant "identified large quantities of one controlled substance prescribed to one patient. He described patients receiving the same prescription on the same day and obtaining the same quantity at two different pharmacies. Multiple family members were receiving the same medication and refilling before the due date." (*Ibid.*)

In *Fett*, *supra*, 245 Cal.App.4th 211, the Court of Appeal also upheld the trial court's order compelling compliance with the Board's subpoena. (*Id.* at p. 213.) In that case, an investigator for a medical payments clearinghouse filed a complaint with the Board alleging that a physician had been submitting bills for services not performed, and falsifying or altering documents. (*Id.* at p. 214.) The representative sent to the Board supporting documentation, including incomplete patient files that the physician had sent to an insurer. (*Ibid.*) After reviewing these records, the Board's consultant concluded that the physician may have departed from the standard of care in several respects, and the Board subpoenaed complete records for the patients in question from the physician. (*Id.* at pp. 214-215.) The court held that substantial evidence supported the trial court's finding of good cause for the subpoena, noting that "the declaration and complaint set forth detailed facts to support the charge of negligence. In addition, the relevance and materiality of the medical records are described in detail." (*Id.* at p. 221.)

Here, just as in *Fett*, a physician working as a consultant for the Board reviewed uncertified records provided by a third party and determined that they warranted further investigation to determine whether a physician had violated the standard of care. As in *Fett*, the Board's consultant provided a thorough explanation of the potential violations, and the trial court did not serve as a " ' "rubber stamp" ' " of the Board, but released an opinion analyzing the competing interests at issue. (*Fett*, *supra*, 245 Cal.App.4th at p. 219.)

Chiu argues that there was no good cause for the subpoena because the Board's consultant relied on medical records that were uncertified and therefore inadmissible in court. (See Evid. Code, § 1271.) He points out that in *Wood*, the court specified that the Board "must provide *competent* evidence that permits the trial court to make an independent finding of good cause." (*Wood*, *supra*, 166 Cal.App.3d at p. 1149, italics added.) We are not persuaded. In this case, the competent evidence supporting the trial court's finding came from the consultant's declaration. Chiu does not challenge the consultant's qualifications to testify as an expert regarding the standard of care, and an expert may rely on inadmissible hearsay in forming his conclusions. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.) The consultant noted that the records he reviewed were uncertified and potentially incomplete, and as a result, he concluded only that there were indications that Chiu violated the standard of care in treating T.S., and that further investigation was required.

"The question of whether the Board established good cause to intrude on the patients' privacy rights is reviewed under the substantial evidence standard." (*Fett*, *supra*, 245 Cal.App.4th at p. 216.) Under that deferential standard, we conclude that there was sufficient evidence supporting the trial court's finding of good cause.

III. Trial Court's Refusal to Allow Additional Briefing

After the Board filed its petition to enforce the subpoena, but before Chiu filed his opposition, the Court of Appeal released its opinion in *Fett*, *supra*, 245 Cal.App.4th 211. Chiu did not address *Fett* in his opposition. In its reply brief, the Board argued that *Fett* supported its position that an expert opinion based on uncertified medical records may be sufficient to establish good cause to compel the production of medical records pursuant to an investigative subpoena. At oral argument, Chiu's attorney requested permission to brief the court regarding this issue. The trial court denied the request.

Chiu contends that the court erred when it denied his request. We need not decide whether the trial court's decision not to allow Chiu to submit a supplemental brief was error because Chiu has not demonstrated that he suffered prejudice as a result. In its opinion, the trial court explicitly stated that it "need not rely on [*Fett*] as authority for this ruling." Furthermore, Chiu has had ample opportunity to distinguish *Fett* in his appellate briefs, but he has been unable to show how *Fett* does not support the Board's position here.[3] There is no reason to believe the result would be different if he had had an opportunity to respond to the Board's arguments before the trial court. Chiu's claim fails.

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[3] In any case, Chiu is not well positioned to complain about a lack of notice regarding *Fett*. The Court of Appeal's opinion in that case was released two months before Chiu filed his opposition to the Board's petition here. *Fett* addresses issues very similar to those present in this case, and Chiu's attorney also represented the physician in *Fett*. It could not have been a surprise to Chiu that the Board would cite *Fett* in its reply brief and at oral argument.

DISPOSITION

The judgment of the trial court is affirmed. Respondents shall be awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.