MED MAL EXPERT WITNESS ISSUE REVIEW: UPDATE AND TIPS

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Expert Testimony: Colorado

CRE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony: Federal Rules

FRE 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if *the proponent demonstrates to the court that it is more likely than not that**:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.
- *(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.**

*Text effective December 1, 2023, absent contrary Congressional action.

Medical Malpractice Expert Qualifications: C.R.S. § 13-64-401

- No person shall be qualified to testify as an expert witness concerning issues of negligence in any medical malpractice action or proceeding against a physician unless he
  - not only is a licensed physician but
  - can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience in the evaluation, diagnosis, and treatment of the disease or injury which is the subject matter of the action or proceeding against the physician defendant, he was substantially familiar with applicable standards of care and practice as they relate to the act or omission which is the subject of the claim on the date of the incident.
- The court shall not permit an expert in one medical subspecialty to testify against a physician in another medical subspecialty unless, in addition to such a showing of substantial familiarity, there is a showing that the standards of care and practice in the two fields are similar. The limitations in this section shall not apply to expert witnesses testifying as to the degree or permanency of medical or physical impairment.

Certificate of Review: C.R.S § 13-20-602

- In every action for damages based upon the alleged professional negligence of a licensed professional, the plaintiff shall file with the court a certificate of review for each licensed professional named as a party within sixty days after the service of the complaint.
- In the event of failure to file a certificate of review the defense may move the court for an order requiring filing of such a certificate.
- The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim.

Certificate of Review: C.R.S § 13-20-602

A certificate of review shall declare:

- (I) That the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and
- (II) That the professional who has been consulted has reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant to the allegations of negligent conduct and, based on the review of such facts, has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification within the meaning of section 13-17-102(4).

Certificate of Review: District Court Orders

- *Lasala v. Millard*: COR required for physician breach of fiduciary duty claim

- *Bruns v. Thomas*: excusable neglect for failure to file COR

Expert Disclosures

- Rule 26(a)(2)(A)

A party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 *(of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.)**

**Colorado-specific Language*

Retained Experts

F.R.C.P. 26(a)(2)(B) and C.R.C.P. 26(a)(2)(B)(I)

A witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony.

Non-Retained Experts

A party or witness who may be called to provide expert testimony but is not retained or specially employed to provide expert testimony in this case.

Retained vs Non-Retained

- "A non-retained expert may only discuss his or her opinions that were formed during their participation in the underlying events already disclosed in the case."
  - *Church on the Move, Inc. v. Bhd. Mut. Ins. Co.*, 2019 WL 4671398 *2 (D.N.M. September 25, 2019) (citing *Skarda v. Johnson & Johnson*, 2014 WL 12792345 * 3 (D. N. M. June 30, 2014)).
- If the expert's proposed testimony includes information solely about his or her treatment of the patient, the treating physician may be designated under Rule 26(a)(2)(A) and need not provide a formal report. If the expert's proposed testimony goes beyond information learned during the patient's treatment, and he or she plans to offer an expert opinion on a matter outside his or her treatment of the patient, he or she must disclose a report under Rule 26(a)(2)(B).
  - *Moore v. Univ. of Kan.*, 2016 U.S. Dist. LEXIS 42673 (D. Kan. March 30, 2016).

Retained vs Non-Retained

- When a witness' testimony is limited to his observations, diagnosis and treatment of a patient, the physician "is testifying about what he saw and did and why he did it, even though the physician's treatment and his testimony about that treatment are based on his specialized knowledge and training." Under these circumstances, no Rule 26(a)(2)(B) report is necessary.
- However, when a witness forms an opinion because there is a lawsuit, such as when he or she is asked to review the records of another health care provider in order to formulate his or her own opinion on the appropriateness of care, the witness is considered "retained or employed" under Rule 26(a)(2)(B) and must file a written report accordingly.
  - *Carbaugh v. Home Depot U.S.A., Inc.*, Civil Action No. 13-cv-02848-REB-MEH, 2014 WL 3543714, *2 (D. Colo. July 16, 2014) (M.J. Hegarty) (citations omitted)

Retained Experts: Required Disclosures

- Complete statement of all opinions to be expressed and the basis and reasons therefor;
- Facts or data considered by the witness in forming the opinions;
- Any exhibits to be used to summarize or support the opinions;
- The qualifications of the witness, including a list of all publications authored by the witness within the past ten years;
- The fee agreement or statement of compensation for the study, preparation and testimony;
- List of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
- *References to literature that may be used during the witness's testimony**
- *Itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial**

**Colorado-specific requirements*

Retained Experts: District Court Orders

Remedies for failure to disclose

- *Svendsen v. Robinson*, 94 P.3d 1204 (Colo. App. 2004)

  v.

- *Trattler v. Citron,* 182 P.3d 674 (Colo. 2008)

Retained Experts: Fees

C.R.C.P. 26(b)(4)(C) and F.R.C.P. 26(b)(4)(E)

- Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent deposition; and with respect to discovery obtained from an expert who was retained but will not be called at trial, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining the expert's facts and opinions from the expert.

Retained Experts: Fees

- Language Proposed by Plaintiff's Counsel:
  - Pursuant to C.R.C.P. 16 (b)(11), the trial court is responsible for managing costs in this matter. If any expert charges an opposing party an hourly fee exceeding $500.00/hour for deposition time, the retaining party is responsible for the payment of any amount that exceeds $500.00/hour for the first four hours of deposition time. After the first four hours of deposition time, the party taking the deposition is responsible for the expert's normal hourly deposition rate without further court intervention. The parties agree that they will request that their respective experts agree to accept $500.00/hour for time in deposition for the first four hours of a deposition.
- Seen this in two cases, and have had one court reject it, and one court adopt it in part, Judge Zenisek in Jefferson County:
  - "The Court adopts Plaintiff's proposed cap of expert witness fees for deposition, but at $1,000 per hour. Thus, the limitation is that for the first four hours of deposition time for any retained expert, the charge to the deposing party is limited to a maximum of $1,000 per hour. After four hours, the full billing rate may be charged."

U.S.D.C. District Cort Orders on Motions to Reduce Expert Fees

- *Grady v. Jefferson County Bd of County Coms*
- *Marcelli v. Ace American Ins. Co.*
- *Schlenker v. City of Arvada*

Non-retained Experts: Required Disclosures

Colorado

- A complete description of all opinions to be expressed and the basis and reasons therefor;
- A list of the qualifications of the witness; and
- Copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

Federal

- The subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- A summary of the facts and opinions to which the witness is expected to testify.

Non-retained Experts in Practice

- CMO Language
  - *Hansen v. Pruett*: CMO language re non-retained expert disclosures
  - *Gebhardt v. Hardy*: CMO language re non-retained expert disclosures
- Timing of challenge to sufficiency of endorsement
  - Motion to Strike pretrial?
  - Objection at trial for failure to disclose/beyond scope of endorsement?

Non-retained Experts: District Court Orders

- *Scholl v. Pateder:* causation opinions by treaters
- *Buchalla v. Snappy Nails:* causation opinions by treaters
- *Hobbs v. Viking Ins.:* treater opinions limited to records
- *MacCagnan v. CHI:* cross endorsement of treater
- *Graybeal v. Givan:* records reviewed by treater
- *Mulhall v. Cool River:* reference to treatment records is not sufficient
- *Salazar v. State Farm:* opinions not necessary for treatment
- *Heyman v. Cooper:* cannot compel treaters to express opinions

More District Court Orders:

- *Blatchley v. Cunningham*
- *Carmody v. Mikesell*
- *Garcia v. Gardner*
- *Garcia v. Zinis*
- *Jackson v. HCA*
- *Leach v. Miles*
- *Palgut v. Exempla*
- *Shinkle v. Waggener*
- *Vasaune v. Sovndal*

Treating Providers and Physician-Patient Privilege

C.R.S. § 13-90-107(1)(d)

- (d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:
  - (I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;
  - (II) A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

Samms v. District Court, 908 P.2d 520 (Colo. 1995)

- A patient who initiates a civil action and alleges a physical or mental condition as the basis for a claim of damages injects that issue into the case, and impliedly waives the physician-patient privilege with respect to that medical condition.
- Informal methods of discovery, such as personal interviews, effectuate the goals of the discovery process, reduce litigation costs, and simplify the flow of information
- Rules of discovery permit a defense attorney to conduct informal interviews in the absence of a plaintiff or the plaintiff's attorney with physicians who have treated the plaintiff.

Samms, continued.

- Questioning must be confined to matters that are not subject to a physician-patient privilege.
- Plaintiff must be given reasonable notice of any proposed informal interview.
  - Notice will afford plaintiff an opportunity to attend any scheduled interview.
  - Notice will also enable plaintiff to take appropriate steps to ensure interviews are limited to matters not subject to the physician-patient privilege,
    - such as to inform the physician of the plaintiff's belief that certain information known to the physician remains subject to the physician-patient privilege
    - or to seek appropriate protective orders from the trial court.
- Although a physician may refuse to participate in informal interviews, a plaintiff may not instruct treating physician not to participate in such interviews solely for the purpose of preventing the disclosure of non-privileged information.

Reutter v. Weber, 179 P.3d 977 (Colo. 2007)

- The statutory privilege does not apply to a medical provider "who was in consultation with a physician, surgeon, or registered professional nurse being sued ... on the case out of which said suit arises." § 13–90–107(1)(d)(II)
- Medical providers are "in consultation with" one another if they collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment.

Reutter, continued.

- Samms did not create a blanket rule that a plaintiff is always entitled to attend an interview of a non-party medical provider.
- Instead, it held that the trial court should take appropriate measures to protect against the divulgement of residually privileged information, and that allowing the plaintiff to attend the interview is the preferred measure where there is a high risk that residually privileged information will be divulged.
- By implication, where the risk is low, Court is not required to allow Plaintiff to be present at interview

Bailey v. Hermacinski, 413 P.3d 157 (Colo. 2018)

- An implied waiver covers only the extent and context of the condition and the subsequent damages that form the basis of the claim for relief; it does not amount to a general disclosure of the patient's entire relationship with the physician in question.
- Court that finds implied waiver must still take steps to
  - (1) protect against inadvertent discovery of residually privileged information held by the non-party treaters, and
  - (2) ensure that the non-party medical providers are not subject to undue influence in the course of those ex parte interviews.
- Factors regarding the unified course of treatment
  - exchange of medical records
  - discussion of diagnoses or treatment options

Ex Parte Meetings Per *Samms/Reutter/Bailey*

- CMO Language
- Meetings/records/standard of care opinions
- District court orders
  - *Duran v. Corenman* Order
  - *Howard v. Solano* Order
  - *Church-Garza v. Arnold* Order
  - *Scheirman v. Picerno* Order
- Interference by Plaintiff's counsel
  - Fenoglio letter

Timing of Expert Discovery

C.R.C.P. 26(b)(4)(A)

- Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.
- *Liscio v. Pinson*, 83 P.3d 1149, 1157 (Colo. App. 2003)
  - absent endorsement as expert, treating physician could not relate opinion about facts of which he had no personal knowledge.
  - Objection to a treating physician being asked expert opinion questions prior to expert disclosures is a valid objection.
    - (arguably dicta)

413 P.3d 157
Supreme Court of Colorado.

In re Kelley BAILEY and Michael Bailey, Plaintiffs
v.
Mark HERMACINSKI, M.D.; Leslie Ahlmeyer, M.D.; Mary Bowman, M.D.; and Yampa Valley Medical Center, a non-profit corporation, Defendants.

Supreme Court Case No. 17SA20
|
March 5, 2018

Synopsis

Background: Patient and her husband brought medical malpractice action against physicians in connection with the allegedly negligent performance of a hysterectomy procedure, a bowel perforation when attempting to relieve accumulated fluid from procedure, and emergency surgery to repair perforation. The District Court, Routt County, No. 16cv30089, Thomas W. Ossola, J., entered order approving physicians' request for ex parte interviews with a number of non-party treating medical providers. Patient and husband filed original action petition requesting the Supreme Court to vacate order.

The Supreme Court, Rice, C.J., held that non-party treating medical providers were not in consultation with physicians within the meaning of the consultation exception to the physician-patient privilege, and thus patient's communications with non-party providers were privileged unless patient consented to their disclosure.

Vacated and remanded.

Procedural Posture(s): Original Jurisdiction.

***158** *Original Proceeding Pursuant to C.A.R. 21*, Routt County District Court Case No. 16CV30089, Honorable Thomas W. Ossola, Judge

Attorneys and Law Firms

Attorneys for Plaintiffs: Schoenwald & Thompson LLC, Julia Thompson, Denver, Colorado

Attorneys for Defendants: Jaudon & Avery LLP, David H. Yun, Jared R. Ellis, Denver, Colorado

Attorneys for Amicus Curiae Colorado Defense Lawyers Association: Ruebel & Quillen, LLC, Jeffrey Clay Ruebel, Casey A. Quillen, Westminster, Colorado

Attorneys for Amicus Curiae Colorado Medical Society: Conklin Cardone & Rutberg, PC, John L. Conklin Amy K. Cardone Denver, Colorado

Attorneys for Amicus Curiae Colorado Trial Lawyers Association: Cross & Bennett, L.L.C., Joseph F. Bennett, Colorado Springs, Colorado

Attorneys for Amicus Curiae COPIC Insurance Company: Kittredge LLC, Daniel D. Domenico, Denver, Colorado

Attorneys for Amicus Curiae Regents of the University of Colorado: Office of University Counsel, Patrick T. O'Rourke, Denver, Colorado

En Banc

Opinion

CHIEF JUSTICE RICE delivered the Opinion of the Court.

***159** ¶ 1 In this original proceeding, we consider the scope of the physician–patient privilege in a medical-malpractice action. Section 13-90-107(1)(d), C.R.S. (2017), prohibits certain medical providers from revealing, in testimony or otherwise, information about a patient gathered in the course of treating that patient. That prohibition, however, is not unlimited. Section 13-90-107(1)(d)(I), for instance, states that when a patient sues their medical provider, information "arising out of or connected with" that provider's treatment of the patient is not protected by the physician–patient privilege. And section 13-90-107(1)(d)(II) deems information held by a non-party medical provider who was "in consultation with" a defendant as similarly outside the protection of the physician–patient privilege.

¶ 2 In this case, Defendants sought ex parte interviews with a number of non-party medical providers. Thus, this dispute, as presented to us, does not implicate the physician–patient relationship between Kelley Bailey ("Bailey") and Defendants, meaning section 107(1)(d)(I) is inapplicable. Instead, the issue here is whether the non-party medical providers were "in consultation with" Defendants such that section 107(1)(d)(II) removed that typically privileged

information from the protection of the physician–patient privilege. We hold that the non-party medical providers were not in consultation with Defendants for the purposes of section 107(1)(d)(II). However, we remand this case to the trial court for consideration of whether Plaintiffs Kelley and Michael Bailey ("the Baileys") impliedly waived the physician–patient privilege for the non-party medical providers. On remand, if the trial court concludes that the Baileys did waive that privilege, it should reconsider whether there is any risk that (1) ex parte interviews with the non-party medical providers would inadvertently reveal residually privileged information, or (2) Defendants would exert undue influence on the non-party medical providers in the course of any ex parte interviews.

I. Facts and Procedural History

¶ 3 In March 2014, Bailey underwent a hysterectomy performed by Doctor Ellis. In July 2014, Bailey visited Defendant Yampa Valley Medical Center ("Yampa") reporting abdominal pain. A CT scan revealed accumulated fluid that medical professionals at Yampa believed to be related to the March 2014 surgery. Bailey then underwent surgery performed by Defendants Doctor Ahlmeyer and Doctor Hermacinski. The Yampa doctors removed Bailey's appendix, several adhesions from the hysterectomy, and her right ovary due to a ruptured ovarian cyst.

¶ 4 Two days after Bailey was discharged from Yampa, Doctor Ellis referred her to Craig Memorial Hospital ("Craig") after she reported abdominal pain, nausea, vomiting, and chills. Doctors at Craig determined that Bailey was suffering from a perforated bowel. Bailey then underwent emergency surgery at Craig to repair the perforation. Bailey remained there for nearly a month and went through a number of abdominal washouts as a result of the perforation, and she has received repeated follow-up care from a number of doctors at Craig ("the Craig treaters"). About a month after her release from Craig, Bailey went to a third hospital, St. Mary's Medical Center, due to significant nausea and vomiting. There, she was treated by two doctors ("the St. Mary's treaters").

¶ 5 In 2016, the Baileys sued Doctor Ahlmeyer, Doctor Hermacinski, Doctor Bowman, and Yampa ("Defendants") alleging that their negligence led to significant harm and subsequent medical expenses.

¶ 6 During discovery, Yampa produced hundreds of pages of Bailey's medical records covering her July 2014 treatment. For their part, as relevant here, the Baileys produced portions of Bailey's medical records from the care she received at Craig Memorial Hospital, St. Mary's Medical Center, and the offices of two other doctors. However, the Baileys withheld portions of those records, claiming that the information withheld was not relevant to the issues in this lawsuit and therefore remained protected by the physician–patient privilege. The Baileys submitted ***160** privilege logs indicating what information they withheld. Defendants did not object to the privilege logs before the trial court; however, they requested ex parte interviews with a number of medical providers who treated Bailey, including four Yampa doctors, the Craig treaters, and the St. Mary's treaters. The Baileys did not object to Defendants' request to interview the Yampa doctors, except that any interview with Doctor Thompson be limited to certain topics. However, the Baileys did object to Defendants' request to conduct ex parte interviews of the Craig and St. Mary's treaters.

¶ 7 In a two-page order, the trial court approved Defendants' request for ex parte interviews with the Craig and St. Mary's treaters, finding that those treaters were "engaged in a unified course of treatment in that they were only treating [Bailey] for complaints and conditions arising out of the original alleged acts of negligence." As a result, the trial court continued, the Craig and St. Mary's treaters were "in consultation with" Defendants "sufficient to give rise to a waiver of the physician–patient privilege." The court also concluded that there was "little to no risk" of the existence of residually privileged information being disclosed as a result of the ex parte interviews. Finally, the court stated that it was "unconvinced that there is a significant risk of undue influence on the subsequent treating physicians by ex parte interviews with defense counsel." The Baileys then petitioned this court under C.A.R. 21 asking us to vacate the trial court's order granting the requested ex parte interviews with the Craig and St. Mary's treaters. [1] We issued a rule to show cause. We now make the rule absolute and remand for further proceedings consistent with this opinion.

II. Standard of Review

¶ 8 Relief from a trial court's discovery order under C.A.R. 21 is appropriate only where "the normal appellate process would prove inadequate." In Re P.W. v. Children's Hosp., 2016 CO 6, ¶ 12, 364 P.3d 891, 895 (quoting Warden

v. Exempla, Inc., 2012 CO 74, ¶ 16, 291 P.3d 30, 34). "When a trial court's order involves records which a party claims are protected by a statutory privilege, as here, an immediate review is appropriate because the damage that could result from disclosure would occur regardless of the ultimate outcome on appeal from a final judgment." Ortega v. Colorado Permanente Group, P.C., 265 P.3d 444, 447 (Colo. 2011) (citing Clark v. Dist. Court, 668 P.2d 3, 7 (Colo. 1983)). Therefore, we now invoke our original jurisdiction under C.A.R. 21 to review the trial court's order to protect from the possible irreparable harm that would occur from an unwarranted disclosure of Bailey's medical information. In reviewing a discovery ruling under C.A.R. 21, we review a trial court's decision for an abuse of discretion. Id. (citing Cardenas v. Jerath, 180 P.3d 415, 420 (Colo. 2008)).

III. Analysis

¶ 9 C.R.C.P. 26 governs the general rules of discovery in a civil proceeding. The rules outlined in C.R.C.P. 26 are intended to eliminate surprise at trial, enable the parties to discover relevant evidence, and promote the settlement of cases in an efficient manner. Cardenas, 180 P.3d at 420. C.R.C.P. 26(b)(1) establishes a broad scope for discovery, allowing discovery of "any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case." In this case, we are required to consider the primary narrowing element of that rule: privileged matter.

¶ 10 In a brief order, the trial court concluded that the Baileys could not assert the physician–patient privilege with regard to the non-party Craig and St. Mary's treaters because those treaters were "in consultation with" Defendants such that the privilege was removed under section 107(1)(d)(II). [2] We disagree. ***161** Relying on our decision in Reutter v. Weber, 179 P.3d 977 (Colo. 2007), we hold that section 107(1)(d)(II) did not remove Bailey's communications with the Craig and St. Mary's treaters from the protection of the physician–patient privilege. However, it is possible that the Baileys impliedly waived their claim of physician–patient privilege under the implied waiver doctrine. Accordingly, we vacate the trial court's order allowing ex parte interviews with the Craig and St. Mary's treaters, and we remand this matter to the trial court to consider whether the Baileys impliedly waived the physician–patient privilege for those treaters. On remand, if the trial court concludes that the Baileys did impliedly waive their physician–patient privilege with regard to the Craig and St. Mary's treaters and is still inclined to permit ex parte interviews of those treaters, the trial court should reevaluate whether it needs to take any measures to (1) protect residually privileged information held by those treaters and (2) ensure that Defendants do not exert undue influence over those treaters during the ex parte interviews.

A. The Consultation Exception to the Physician–Patient Privilege

¶ 11 In granting Defendants' request to conduct ex parte interviews with the Craig and St. Mary's treaters, the trial court concluded that those treaters were "in consultation with" Defendants because the Craig and St. Mary's treaters were engaged in a "uniform course of treatment" with Defendants. [3] If the Craig and St. Mary's treaters were in consultation with Defendants, then, under section 107(1)(d)(II), Bailey's communications with them would not be protected by the physician–patient privilege. We addressed this precise statutory provision in Reutter, 179 P.3d at 978–79, which the Baileys and various amici curiae now urge us to rework. We decline that invitation and instead conclude that, under the framework established in Reutter, the Craig and St. Mary's treaters were not in consultation with Defendants for the purposes of section 107(1)(d)(II). As a result, all of Bailey's communications with those non-party medical providers are privileged, unless Bailey consented to their disclosure.

¶ 12 The proponent of a claim of privilege bears the burden of establishing that the privilege applies. Alcon v. Spicer, 113 P.3d 735, 739 (Colo. 2005). Consequently, because section 107(1)(d)(II) excepts normally privileged information from the scope of the statutory physician–patient privilege, the proponent of a claim of privilege must establish that the exception itself is inapplicable. Reutter, 179 P.3d at 981.

¶ 13 In Reutter, we considered the meaning of the phrase "in consultation with" in section 107(1)(d)(II) for the first time. Id. We rejected the narrow reading proposed by the plaintiffs in that case, which would have had us read the term to include medical providers who only offer advice, but not those who both offer advice and treat the plaintiff–patient. Id. That said, we did not read section 107(1)(d)(II) to be so broad as to include all future medical providers of a plaintiff. See id. Instead, we determined that section 107(1)(d)(II) recognizes that medicine is not practiced alone but is, in many cases, practiced in a collaborative fashion with

other practitioners. Id. ("While one physician might be the primary medical provider, other medical providers typically play a role in the patient's treatment."). As a result, we held that a non-party medical provider is in consultation with the defendant medical provider for the purposes of section 107(1)(d)(II) if the party and non-party providers "collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment." Id. Applying that standard, we concluded that the non-party medical providers were in consultation with the defendant medical providers because of the particularly integrated care that the plaintiff received from both the defendant and non-party medical ***162** providers. See id. at 981–82. Specifically, we noted that the non-party medical providers were employed by the same facility as the defendant medical providers, and that all care was provided over just a few days while the plaintiff was being treated at that single facility. Id. at 979.

¶ 14 Here, the trial court concluded that the Craig and St. Mary's treaters were engaged in a uniform course of treatment of Bailey along with Defendants—and were therefore "in consultation with" them—because the Craig and St. Mary's treaters had provided treatment only "for complaints and conditions arising out of the original alleged acts of negligence." However, that conclusion misstates the inquiry. Instead, as we outlined in Reutter, a non-party medical provider is in consultation with a defendant medical provider when they provide care "collectively and collaboratively." Id. at 981.

¶ 15 In this case, the Craig and St. Mary's treaters provided no collective or collaborative care with Defendants. There was no exchange of medical records. There was no discussion of diagnoses or treatment options. In fact, there appears to have been no communication between the Defendant and non-party medical providers whatsoever. On these facts, we cannot conclude that the non-party medical providers acted in such a collective and collaborative way as to be considered in consultation with the Defendant medical providers. We hold that the Craig and St. Mary's treaters were not in consultation with Defendants and, as a result, Bailey's communications with the Craig and St. Mary's treaters are privileged unless she consented to their disclosure. Consequently, the trial court abused its discretion when it authorized Defendants to conduct ex parte interviews with the Craig and St. Mary's treaters on the grounds that section 107(1)(d)(II) rendered Bailey's communications with those treaters outside the protections of the physician–patient privilege.

B. Implied Waiver

¶ 16 Although we conclude that the Craig and St. Mary's treaters were not in consultation with Defendants, therefore making section 107(1)(d)(II) inapplicable, the Baileys may still have impliedly waived the protection of the physician–patient privilege as it pertains to information relevant to the Baileys' claimed medical malpractice.

¶ 17 Before reaching our discussion of implied waiver, however, we briefly clarify our decision in Ortega. In Ortega, we stated in a footnote that "cases that arise in the medical malpractice context invoke section 107(1)(d)(I)'s statutory exception to the physician–patient privilege rather than the implied waiver doctrine." 265 P.3d at 448 n.1. That statement does not control our decision today. Ortega primarily involved the application of section 107(1)(d)(I) in the context of a dispute regarding the information held by a defendant medical provider. 265 P.3d at 446–47. In this case, however, the dispute arises with regard to non-party medical providers and the relationship those non-party medical providers had with Bailey. Therefore, notwithstanding our decision in Ortega, a plaintiff may still impliedly waive the physician–patient privilege as it applies to information held by a non-party medical provider.

¶ 18 More broadly, a patient may consent to the disclosure of information normally protected by the physician–patient privilege. Clark, 668 P.2d at 8. We have held that consent may be given explicitly, but also implicitly through an implied waiver of the privilege. Samms v. Dist. Court, 908 P.2d 520, 524 (Colo. 1995) (citing Clark, 668 P.2d at 10) ("[I]mplied waiver constitutes consent for purposes of section 13-90-107(1)(d)."). The implied waiver doctrine is rooted in the notion that a party who puts their medical or physical condition at issue in a lawsuit cannot then shield the information related to that condition from discovery. Specifically, "a plaintiff in a personal injury case impliedly waives the physician–patient privilege with respect to matters known to the physician that are relevant in determining the cause and extent of injuries which form the basis for a claim for relief." Id. at 525 (citing Clark, 668 P.2d at 10). Because an implied waiver determination necessarily depends on the nature and extent of a particular and unique mental or physical condition, we have repeatedly recognized that such a determination will vary on a case-by-case basis. E.g., ***163** id. Importantly, an implied waiver covers only the extent and context of the condition and the subsequent damages that

form the basis of the claim for relief; it does not amount to a general disclosure of the patient's entire relationship with the physician in question. Alcon, 113 P.3d at 739.

¶ 19 As stated previously, the party asserting protection from a privilege bears the burden of establishing the applicability of that privilege. Id. However, in the implied waiver context, once the privilege has been established, the party arguing for a finding of implied waiver must carry the burden of showing that waiver. Id.

¶ 20 Here, Defendants assert that the trial court's statement that the non-party medical providers had "only treat[ed] [Bailey] for complaints and conditions arising out of the original alleged acts of negligence" amounted to a finding of implied waiver. However, that statement is couched in the trial court's conclusion that the Craig and St. Mary's treaters were engaged in a "unified course of treatment" with Defendants; thus, the trial court's decision rested on section 107(1)(d)(II), not implied waiver. Because it is unclear from the record before us whether the Baileys impliedly waived their physician–patient privilege with regard to the Craig and St. Mary's treaters, we remand this case to the trial court for a determination of that issue.

¶ 21 On remand, if the trial court finds that the Baileys did impliedly waive the physician–patient privilege, the trial court should, prior to granting Defendants' request for ex parte interviews, determine whether it needs to institute any measures to (1) protect against inadvertent discovery of residually privileged information held by the Craig and St. Mary's treaters, and (2) ensure that the non-party medical providers are not subject to undue influence in the course of those ex parte interviews.

IV. Conclusion

¶ 22 Because the Craig and St. Mary's treaters were not in consultation with Defendants, the trial court abused its discretion in concluding under section 107(1)(d)(II) that Bailey's communications with those treaters were not protected by the physician–patient privilege. However, the trial court should consider on remand whether the Baileys waived that privilege under the implied waiver doctrine. If the trial court finds that the Baileys did impliedly waive their physician–patient privilege as it pertains to the Craig and St. Mary's treaters, the trial court should also reconsider whether there is a risk of residually privileged information being disclosed during the ex parte interviews and whether the Craig and St. Mary's treaters could be subject to undue influence during those ex parte interviews. Accordingly, we make our rule to show cause absolute and remand this case to the trial court for further proceedings consistent with this opinion.

JUSTICE HART does not participate.

All Citations

413 P.3d 157, 2018 CO 14

Footnotes

1 As stated above, Defendants did not object before the trial court to the Baileys' use of privilege logs to protect the alleged residually privileged information held by the Craig and St. Mary's treaters, nor did the trial court make any ruling regarding the sufficiency or deficiency of those privilege logs. Therefore, the only issue before us is the validity of the trial court's order granting Defendants' request for ex parte interviews with the Craig and St. Mary's treaters.

2 Section 13-90-107(1)(d)(I) is clearly not applicable to the Craig and St. Mary's treaters as none of those medical providers are defendants in this matter.

3 The trial court order seems to straddle the divide between founding its conclusion on the statutory exception to the physician–patient privilege in section 107(1)(d)(II) and the implied waiver doctrine. However, we view the order as an application of section 107(1)(d)(II), not the implied waiver doctrine.

End of Document

JODY BLATCHLEY, and DELFINA BLATCHLEY, Plaintiffs,

v.

RICHARD CUNNINGHAM, M.D., PETER JANES, M.D., TODD WILLIAM PETERS, M.D., MATTHEW CAIN, PA-C, TIMOTHY SMITH, PA-C, CAMERON YOUNGBLOOD, PA-C, ST. ANTHONY SUMMIT MEDICAL CENTER, and VAIL-SUMMIT ORTHOPAEDICS, P.C., Defendants.

Civil Action No. 15-cv-00460-WYD-NYW

United States District Court, D. Colorado

September 24, 2015

ORDER

NINA Y. WANG UNITED STATES MAGISTRATE JUDGE.

This matter is before the court on Defendants' Motion to Conduct *Ex Parte* Interviews With Plaintiff's Medical Providers and Request for Expedited Ruling (the "Motion"). [#83, filed September 10, 2015]. The matter was referred to this Magistrate Judge pursuant to the Order Referring Case dated March 5, 2015 [#4] and the memorandum dated September 10, 2015 [#83]. For the reasons stated below, the Motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiffs Jody and Delfina Blatchley filed their Complaint on March 4, 2015, asserting eleven tort-based claims for negligence, vicarious liability, respondeat superior, and loss of consortium[1] arising out of a March 5, 2013 snowboarding accident involving Jody Blatchley ("Mr. Blatchley") at Keystone Resort in Summit County, Colorado. [#1 at ¶¶ 18, 120-123, 125-129, 131-134, 136-140, 142-146, 148-151, 153-157, 159-163, 165-169, 171-175, 177-178]. Mr. Blatchley underwent surgery soon after the accident and subsequently developed compartment syndrome in his left leg.[2] *See, e.g.* [#1 at ¶¶ 23, 68-70]. Plaintiffs allege that Defendants were negligent in the care of Mr. Blatchley by failing to properly monitor, evaluate, and treat him with respect to the compartment syndrome, which has left Plaintiff with nerve pain and decreased function of his left leg. *See generally* [#1; #62 at 3].

The following reflects the sequence of care received by Mr. Blatchley, as set out in Defendants' instant Motion, which is not refuted by Plaintiffs' Response. *Compare* [#83] *with* [#89]. Mr. Blatchley was initially examined by Dr. Claude L. Lavallee at St. Anthony Keystone Medical Clinic, where x-rays of Mr. Blatchley's right ankle indicated a comminuted calcaneal fracture and x-rays of his left knee indicated a comminuted fracture of the tibial plateau. [#1 at ¶ 19; #83 at 2]. These x-rays were interpreted by radiologist Dr. Craig Stewart. [#83 at 2]. Plaintiff was thereafter transferred to Defendant St. Anthony Summit Medical Center, where he was evaluated by emergency room physician Dr. Mark Doucett. Dr. Doucett ordered a CT of Plaintiff's lower right extremity, which showed a severely comminuted, depressed and displaced calcaneal fracture. [#83 at 3]. Radiologists Dr. Christopher Leoni and Dr. Craig Stewart interpreted these x-rays. [*Id.*] Defendant Richard Cunningham, M.D. evaluated Plaintiff at this time, along with Dr. Doucette, and Defendant Cunningham operated on Mr. Blatchley's left tibial fracture during the evening of March 5, 2013. [*Id.*] Fluoroscopic imaging was performed during the surgery and interpreted by radiologist Dr. Charles Norton. [*Id.*] Anesthesiologist Dr. Anthony Brocato administered anesthesia care to the Plaintiff. [*Id.*]

Following surgery, Defendant Cunningham contacted his partner, Dr. John Elton, a specialist in foot and ankle injuries, to treat Mr. Blatchley's right calcaneus fracture. On March 7, 2013, Dr. Elton performed an open reduction internal fixation of the right calcaneus fracture. [#83 at 3]. Anesthesiologists Dr. Brocato and Dr. Robert Engelhart provided anesthesia care during that surgery. [*Id.*]

Following his March 5, 2013 surgery, Mr. Blatchley's injuries were evaluated and treated by physician's assistants ("PA") employed by Defendant Cunningham and Dr. Elton's medical practice, Defendant Vail-Summit Orthopaedics, P.C. [#83 at 3]. Mary Bryan and Brian Davis were two PAs who treated Plaintiff. [*Id.*]

On March 10, 2013, Mr. Blatchley underwent additional radiographic studies, including an x-ray of his left knee, which were interpreted by radiologist Dr. Robert Liebold. [#83 at 4]. A March 29, 2013 x-ray of Plaintiff's knee was interpreted by radiologist Dr. Steven Ross. [*Id.*]

On March 11, 2013, Defendant Peter Janes operated on Plaintiff as to the diagnosis of compartment syndrome of the left leg. [#83 at 4]. Anesthesiologist Dr. Kathleen Jenkins provided anesthesia care during that surgery. [*Id.*] At that time, tissue was removed from Mr. Blatchley's leg and sent to pathologist Dr. Stephen Worth for evaluation. [*Id.*] Defendant Janes performed a debridement on March 13, 2013, after which tissue was sent to and evaluated by pathologist Dr. Mary Kenny-Moynihan. [*Id.*]

Between the March 5, 2013 surgery performed by Defendant Cunningham and the March 11, 2013 surgery performed by Defendant Janes, Plaintiff was cared for and evaluated by a number of nurses who were employed by Defendant St. Anthony Summit Medical Center. [#83 at 4]. On April 15, 2013, Mr. Blatchley was transferred to a rehabilitation facility in his home country of New Zealand, where the injuries to his left leg and right heel were managed by Dr. Mark Clatworthy, Dr. Robert Orec, and Dr. Mike Anderson. [*Id.* at 4-5].

Defendants filed the pending Motion on September 10, 2015, seeking leave to conduct *ex parte* interviews with medical providers whom Defendants "consulted with, " and whom Defendants argue pose "essentially" no risk of divulging residually privileged information. [#83 at 5]. Defendants also request an expedited ruling by the court in advance of Plaintiffs' depositions that are scheduled for September 29 and 30, 2015. Defendants identify the following providers whom they seek to interview:

Emergency Department physicians: Dr. Lavallee and Dr. Doucette Anesthesiologists: Dr. Brocato, Dr. Engelhart, and Dr. Jenkins Radiologists: Dr. Stewart, Dr. Leoni, Dr. Leibold, Dr. Norton, and Dr. Ross Pathologists: Dr. Worth and Dr. Kenny-Moynihan Employees of Defendant Vail Summit Orthopaedics: Dr. Elton, PA Bryan, and PA Davis Nurses at Defendant St. Anthony Summit Medical CDated: Renei Bohrer, Ashley Allen, Steve Plante, Annadane Dayton, Della Crone, Tara Styck, Doris Welch, Karen Boardley, Jacqueline Benavides, Jennifer Yoakum, and Katherine Conkle New Zealand Treating physicians: Dr. Clatworthy, Dr. Orec, and Dr. Anderson

On September 15, 2015, to accommodate the request for an expedited ruling, this court ordered Plaintiffs to file a response by September 18, 2015, and directed that no reply would be permitted without leave of court. [#87]. Plaintiffs filed a timely Response. [#89].

ANALYSIS

Under Colorado law, communications between physicians and their patients are generally privileged. "Protecting these communications from disclosure promotes 'effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation' that could result from divulging her medical information." *Reutter v. Weber*, 179 P.3d 977, 980 (Colo. 2007) (quoting *Alcon v. Spicer,* 113 P.3d 735, 738 (Colo. 2005)). To "encourage confidence and to preserve it inviolate, " Colorado Revised Statute section 13-90-107(1)(d) prohibits a physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of Colorado or any other state from serving as a witness "as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, " without the consent of that patient. Two exceptions to this rule are relevant to the instant Motion. First, the privilege does not prevent a medical provider who is sued for malpractice from disclosing confidential medical information concerning the subject matter of the plaintiff's lawsuit. Colo. Rev. Stat. § 13-90-107(1)(d)(i). Second, the statutory privilege does not apply to a "physician, surgeon, or registered professional nurse who was in consultation with a physician,

surgeon, or registered professional nurse being sued . . . on the case out of which the said suit arises." Colo. Rev. Stat. 13-90-107(1)(d)(ii). Plaintiffs bear the burden of establishing applicability of the physician-patient privilege (*Alcon*, 113 P.3d at 739), and "[i]ssues arising in the course of pretrial discovery are committed to the discretion of the trial court." *Reutter*, 179 P.3d at 984 (citation omitted).

I. New Zealand Treating Physicians

Plaintiffs argue the court should deny Defendants' request to conduct *ex parte* meetings with Drs. Clatworthy, Orec, and Anderson because these physicians are not consulting physicians within the meaning of the statute. [#89 at 3]. [law] The court agrees. In *Reutter*, "consultation" was defined to include "both the sued provider and those who acted in consultation with her." 179 P.3d 981. In other words, the statutory exception applies to the medical providers who played "a role in the patient's treatment" in the sense of lending advice, knowledge, and special skills to the defendant physician in the course of action that constitutes the malpractice claim. *Id.* The exception does not extend to physicians "acting independently and successively on the same injury or illness…" *Id.* (quoting *Brown v. Guiter,* 256 Iowa 671 (1964)). *See also Hogue v. Massa,* 80 S.D. 319 (1963) (distinguishing between consultation that occurred during the time the defendant doctor ministered to patient and consultation that occurs after the patient has been treated those doctors).

There is no indication that the New Zealand physicians ever discussed Plaintiff's condition with Defendants, or were otherwise involved in his treatment immediately following the March 5, 2013 accident. On this basis alone the Motion is denied as to the New Zealand physicians. In addition, the Parties do not address, and therefore the court only notes that it is uncertain of, the applicability of the Colorado physician-patient privilege to care undertaken in an entirely different sovereign nation or whether such *ex parte* communications would be permissible under New Zealand law.

II. United States Physicians and Medical Providers

As to the remaining physicians and medical providers ("American Providers"), Plaintiffs do not argue that these professionals were not "in consultation with" Defendants Cunningham or Janes, or that they otherwise fall outside of the exception found in section 13-90-107(1)(d)(ii). Instead, Plaintiffs argue that the requested *ex parte* meetings will result in "great unfairness, " and encourage the court to consider the purposes of pretrial discovery, including (1) eliminating surprise at trial; (2) discovering all relevant evidence; (3) simplifying the issues; and (4) promoting the expeditious settlement of cases. [#89 at 4-5 (citing *Camp Bird Colorado Inc. v. Bd. of County Comm'rs*, 215 P.3d 1277, 1291 (Colo.App. 2009)].

As a preliminary matter, I find that the statutory exception contained in section 13-90-107(1)(d)(ii) applies to the information relevant to this lawsuit that the American Providers acquired while treating Mr. Blatchley. Unlike the New Zealand physicians, the American Providers attended to and/or helped Defendants treat Plaintiff between his leg and foot surgery on March 5, 2013 and compartment syndrome surgery on March 11, 2013 as part of a unified course of treatment. *See Reutter*, 179 P.3d at 981 (recognizing that a "unified course of treatment" contemplates multiple medical providers working collectively and collaboratively to care for a patient). Drs. Lavallee and Doucette were responsible for the initial evaluation of Plaintiff's injuries on March 5, 2013. Drs. Stewart, Leoni, Leibold, Norton, and Ross are radiologists who reviewed and interpreted Plaintiff's x-rays. Drs. Brocato, Engelhart, and Jenkins administered anesthesia care for Plaintiff during his two surgeries. Drs. Worth and Kenny-Moynihan assessed Plaintiff's tissues during this time. Finally, Dr. Elton, PA Bryan, PA Davis, Renei Bohrer, Ashley Allen, Steve Plante, Annadane Dayton, Della Crone, Tara Styck, Doris Welch, Karen Boardley, Jacqueline Benavides, Jennifer Yoakum and Katherine Conkle observed and cared for Plaintiff at various points between

March 6 and March 11, 2013. In finding that section 13-90-107(1)(d)(ii) applies to the information obtained by these individuals, I decline to consider Defendants' arguments regarding waiver.

Next, Plaintiffs argue that the *ex parte* meetings could result in inadvertent disclosure of Mr. Blatchley's residually privileged health information. [#89 at 8-9]. Plaintiffs are correct that the court should guard against the disclosure of residually privileged information, and should allow the plaintiff to attend interviews with medical providers if there is a high risk that residually privileged information will be divulged. *See Reutter*, 179 P.3d at 982; *see also Samms v. District Court*, 908 P.2d 520 (Colo. 1995). However, no such risk is present here. Despite Plaintiffs' assertion to the contrary, the four-page, eight-entry privilege log for Mr. Blatchley's Rule 26(a)(1) initial disclosures attached to their Response does not support the assertion that the American Providers possess residually privileged information or are likely to divulge same. [#89-2]. It appears that only four pages could potentially contain any residual health information. [*Id.*] More likely, Mr. Blatchley gave limited medical history (as suggested by the descriptions in the privilege logs) that does not pose a significant risk.

The conclusion that the medical care providers likely do not have significant residual health information is supported by the fact that the Blatchleys are residents of New Zealand and Mr. Blatchley was visiting Keystone Resort in his capacity as Coach of the New Zealand Olympic Snowboard Team. [#1 at ¶¶ 6-7, 17]. As in *Reutter*, the American Providers were "'in consultation with' each other in a unified course of treatment-a course of treatment that forms the basis of the malpractice action." 179 P.3d at 982. The *Reutter* court observed that in such a situation, "the risk that residually privileged information will be divulged is relatively low"; as opposed to in *Samms* where twenty medical providers administered separate treatments over what appeared to have been a significant period of time, and that court recognized the plaintiff's interest in protecting "privileged information that was not relevant to the malpractice action." *Id.* at 983 (citing *Samms*, 908 P.2d at 525-26).

Finally, the court disagrees that allowing *ex parte* meetings would frustrate the purpose of pretrial discovery. Each of the factors cited by Plaintiffs is promoted by allowing Defendants to meet with the American Providers. Plaintiffs cite *Samms* for the proposition that informal communications between a defense attorney and non-party physicians may promote the purposes of pre-trial discovery only where the court "assur[es] that both parties have access to an informal, efficient, and cost-effective method for discovering facts relevant to the proceedings." [#89 at 5 (quoting *Samms,* 908 P.2d at 526)]. However, for reasons addressed above, *Samms* is distinguishable from this case with respect to the privileged information at issue, and Plaintiffs cite no other case law to support that the court is responsible for facilitating equal, informal access to witnesses.

Furthermore, with the exception of radiologists Drs. Leoni, Stewart, Norton, and Liebold, and pathologists Drs. Worth and Kenny-Moynihan, the American Providers were employed by Defendants St. Anthony Summit Medical Center and/or Vail-Summit Orthopaedics at all times relevant to the Complaint. [*See* #89 at 2]. It is reasonable to believe that counsel for St. Anthony's Medical Center and Vail Orthopaedics may represent these additional health care providers in any upcoming deposition. Requiring all communications between such employees and counsel for the organizations to include Plaintiffs or requiring all of these medical providers to obtain separate counsel simply to have protected communications is onerous, and does not facilitate efficient or cost-effective methods of discovery.

Finally, such a requirement is not only impractical but in contravention of Rule 1 of the Federal Rules of Civil Procedure, which requires the court and all parties to construe and administer such rules to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. The Federal Rules of Civil Procedure neither preclude *ex parte*

interviews with these additional medical care providers nor require that such interviews be held only in the presence of Plaintiff's counsel. The conclusion reached in this Order does not alter the position the Parties would have held under any other circumstance, and the matter is before the court only as a result of the question regarding residually privileged health information. Nothing prevents Plaintiffs from seeking to depose these individuals; and indeed, Plaintiffs represent they have taken such steps with respect to "several of these nurses, " but without success. [#89 at 6].

To the extent Plaintiffs contend their efforts to engage in discovery with the American Providers have been thwarted by Defendants, or otherwise argue they are prejudiced by the occurrence of the requested meetings, Plaintiffs should squarely raise that issue to the court through the informal dispute process, and if it remains unresolved, through a formal discovery motion-not through the back door on this instant motion.

Accordingly, IT IS ORDERED that the Motion [#83] is GRANTED IN PART and DENIED IN PART. BY THE COURT:

Notes:

[1] At all times relevant to the Complaint Jody and Delfina Blatchley were married and living together as husband and wife. [#1 at ¶ 177].

[2] "Compartment syndrome occurs when pressure builds up inside an enclosed space in the body and usually results from swelling after an injury. The pressure impedes the flow of blood to and from affected tissues." [#83 at 4].

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Plaintiffs: THEDA K. BRUNS vs. Defendants: WILLIAM MATTHEW M. THOMAS, M.D., SARAH CALVERT, M.D., and ALL UNKNOWN JOHN DOES and JANE DOES, jointly and severally	**▲COURT USE ONLY▲** Case Number: 11CV1336 Courtroom: 215
ORDER **Re: Defendants' Motion to Dismiss**	

THIS MATTER is before me on Defendants Sarah Calvert, M.D.'s and William Matthew M. Thomas, M.D.'s Motion to Dismiss (Motion to Dismiss),[1] filed on April 29, 2011, and Plaintiff's Motion for Extension of Time to Respond to the Motion to Dismiss and Motion for Extension of Time to Provide Certificate for Review (Motion for Extensions), filed on May 17, 2011. Having reviewed the pleadings and relevant authority, I **GRANT** the Motion to Dismiss and **DENY** the Motion for Extensions.

I. Background

In her complaint, Plaintiff alleges Defendants Thomas and Calvert negligently treated her during and after surgery on September 11, 2009, and she suffered damages. Plaintiff filed her complaint on February 23, 2011 and served Defendants Thomas and Calvert on March 1, 2011. Defendants move to dismiss Plaintiff's claims for failure to file a certificate of review within the statutory deadline. Plaintiff requests an extension of time to file the certificate of review.

II. Analysis

Under C.R.S. §§ 13-20-601 and 602, any plaintiff filing an action against a licensed professional, where expert testimony would be necessary to establish a prima facie case of negligence, must file a certificate of review within 60 days after service of the complaint. The certificate of review must be executed by the plaintiff's attorney and declare:

> (1) that the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and (2) that the professional who has been consulted . .

[1] The original motion to dismiss was filed by Exempla Saint Joseph Hospital, who, along with Colorado Permanente Medical Group, P.C., was subsequently dismissed as a defendant. The remaining named defendants both joined in the motion to dismiss, and therefore I review it as their motion.

. : (a) has reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant to the allegations of the negligent conduct and, based on the review of such facts, has concluded that the filing of the claim . . . does not lack substantial justification within the meaning of subsection 13-17-102(4).

C.R.S. § 13-20-602(3)(a). A court may allow the plaintiff more than 60 days to file the certificate, if the court determines a longer period is necessary for good cause shown. However, "failure to file a certificate of review in accordance with [the statute] shall result in the dismissal of the complaint. . . ." C.R.S. § 13-20-602(4).

Plaintiff requests 60 additional days to file a proper certificate of review, or based on the certificate filed on June 17, 2011, I infer that Plaintiff alternatively requests an additional 45 days.[2] "If a certificate of review is untimely, the trial court must determine whether there is good cause to excuse the late filing." *RMB Services, Inc. v. Truhlar*, 151 P.3d 673, 676 (Colo. App. 2006). "To determine whether good cause exists, the trial court must consider (1) whether the neglect causing the late filing was excusable, (2) whether the moving party has alleged a meritorious claim or defense, and (3) whether permitting the late filing would be consistent with equitable considerations, including any prejudice to the nonmoving party." *Id.* "The trial court may decline to accept a late certificate if the plaintiff fails to satisfy any of these criteria. However, the court must consider all three criteria because evidence relating to one factor might shed light on another." *Id.* I consider these three factors now.

First, I find that Plaintiff has not demonstrated excusable neglect. Excusable neglect is a "somewhat elastic concept." *Goodman Assoc., LLC v. WP Mountain Properties, LLC*, 222 P.3d 310, 319 (Colo. 2010). However, the Colorado Supreme Court has described it as involving "unforeseen circumstances which would cause a reasonably prudent person to overlook a required act in the performance of some responsibility." *Id.* In *Goodman*, when analyzing whether excusable neglect existed to set aside a default judgment, the court explained that "[e]ven if not willful or in bad faith, carelessness and neglect due to poor office procedures and an apparently overwhelming workload do not justify the failure to respond to the complaint." *Id.* at 322. The court also cited to similar facts that did not amount to excusable neglect—"losing summons and complaint amid voluminous amounts of documents served," and "misplacement of process papers during an office move." *Id.*

In this case, Plaintiff explains that because he was in trial when the complaint was filed, neither he nor his temporary secretary marked the calendar, and therefore he missed the 60-day deadline. Although this seems to have been an honest mistake, I find that it does not amount to excusable neglect. Similar to the facts in *Goodman*, Plaintiff's mistake is more properly characterized as carelessness "due to an apparently overwhelming workload."

Second, with only the facts as alleged in the complaint and the attorney's evaluation of the medical records (as stated in the late certificate of review) to consider, I can only speculate as

[2] The pleadings suggest that the certificate of review was due on or before April 25, 2011. However, based on the date of service, I calculate the due date to have been May 2, 2011, which makes the certificate filed on June 17, 2011, 45 days late.

to the actual merit or viability of the claim. I am not a medical professional, let alone one who has expertise in the area of the alleged conduct. I do not know whether the complications alleged, however tragic and seemingly unlikely absent negligence they may be, violate the standard of care in this context. Furthermore, I reject the application of *res ipsa loquitur* for three reasons. First, if the alleged negligence were as evident as the application of that doctrine would suggest, presumably there would be little difficulty in quickly obtaining an opinion from a person with expertise in the area that negligence occurred, or at least that such an allegation would not lack substantial justification. Second, application of *res ipsa loquitur* would essentially nullify the certificate of review process. Third, and perhaps most significantly, counsel cites no authority, nor have I found any, to suggest that a theory of *res ipsa loquitur* somehow absolves a plaintiff of the responsibility to comply with C.R.S. §§ 13-20-601 and 602.

Third, I find that permitting the late filing would not be consistent with equitable considerations, even considering any prejudice to Plaintiff—the nonmoving party. Plaintiff has had ample time to gather and submit the information required by C.R.S. § 13-20-601 and 602. However, the certificate of review that Plaintiff did file, 45 days after the deadline, provides only the attorney's evaluation of the records and a summary of the doctor's reports. It describes the injury and states that Dr. Vaughn came forward to correct the error, but does not state that any doctor has reviewed the materials for purposes of this litigation, or found them to be relevant to the allegations of negligent conduct. In other cases, courts have found a late certificate acceptable, because the required information had already been gathered and simply not filed by mistake. *See e.g., Hane v. Tubman*, 899 P.2d 332, 335 (Colo. App. 1995). Here, that is not the case. Therefore the second and third factors shed no helpful light on the first—the fact that Plaintiff's failure to file the certificate is not justified by excusable neglect.

Accordingly, I find that no good cause has been shown to allow for the untimely filed certificate of review. Nor has good cause been shown to allow any further extension for filing another certificate of review.

III. Conclusion

Therefore, Plaintiff's Motion for Extensions is **DENIED**, and pursuant to C.R.S. § 13-20-602(4), Defendants' Motion to Dismiss is **GRANTED**. Additionally, now that no named defendants remain, I find no legal basis to keep the case active based on the reference in the case caption to "all unknown John Does and Jane Does." The case is hereby dismissed.

SO ORDERED this 24th day of June 2011.

BY THE COURT:

William W. Hood, III
District Court Judge

District Court, County of Boulder, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-4746	
Plaintiff: KELLYANN BUCHALLA v. Defendant: SNAPPY NAILS 19 INC et al	DATE FILED: May 13, 2016 CASE NUMBER: 2015CV30519 **▲ COURT USE ONLY ▲**
Attorney for Plaintiff: Matthew Laird; Brian Pushchak *Attorney for Defendant*: Debra Sutton; Sandy Eloranto	Case Number: 2015CV30519 Division: 3 Courtroom: T

MINUTE ORDER REGARDING EXPERT DISCLOSURE DISPUTE

On May 11, 2016, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

COURT REPORTER: FTR

APPEARANCES: Brian Pushchak and Matthew Laird appear on behalf of Plaintiff.
Sandy Eloranto appears on behalf of Defendant.

COURT ORDERS/ACTIONS: This matter comes before the Court for a hearing regarding Plaintiff's expert disclosures. The oral findings made on the record are incorporated herein, and the Court finds as follows:

Plaintiff filed an Opposed Motion for Extension of Time to File Designation of Expert Witnesses on May 3, 2016. In accordance with the May 4 Procedural Order, Defendants filed a Response on May 9, 2016. Counsel advance argument regarding the issues in dispute.

Based on the argument at today's hearing and the Court's review of the Motion, Response, exhibits, file, and pertinent legal authorities, the Court issues the following ruling:

This dispute highlights the tension between competing policies. On the one hand, the Rules of Civil Procedure, including deadlines, should be applied and enforced strictly to ensure the speedy and inexpensive resolution of cases. On the other hand, cases should be decided on their merits, and trial courts should strike late disclosed evidence only if there is material prejudice to the other party under C.R.C.P. 37(c) and controlling case law.

This dispute started with Plaintiff's Motion for an Extension of Time to File Expert Disclosures, filed after Plaintiff's expert disclosure deadline had passed. Defendant opposes the request due both to the 17-day delay and the sufficiency of the expert disclosures. Both parties base their arguments on C.R.C.P. 37(c). If the Court denies the Motion, it would prevent Plaintiff from calling any expert witnesses at trial. The denial of the Motion would be the functional equivalent of

precluding the testimony of the expert witnesses under C.R.C.P. 37(c). *Cook v. Fernandez-Rocha*, 168 P.3d 505, 506 (Colo. 2007). The dispute will therefore be analyzed under the C.R.C.P. 37(c) framework.

The pre-amendment Rules of Civil Procedure apply because this action was filed before July 1, 2015.

The Court first finds that the expert disclosures constitute late disclosed evidence. First, they were served 17 days late. The disclosures were due on April 11, 2016, and they were served on April 28, 2016. Second, the disclosures are insufficient because, through the C.R.C.P. 26(a)(2)(B)(II) disclosures, Plaintiff's treating healthcare providers rendered causation opinions not included within the medical records.

The Court is unaware, and counsel have not identified, any binding Colorado appellate authority addressing the issue of whether the disclosure of causation opinions by treating healthcare providers transforms the providers into retained expert witnesses when the causation opinion is not included within the medical records. In the absence of such authority, the Court takes guidance from *Scholl v. Pateder*, 2011 WL 2473284, *4 (D. Colo. June 22, 2011) (Defendant's Response, Exhibit J). In *Scholl*, citing federal precedent, U.S. Magistrate Judge Mix concluded that a treating provider whose information or opinions were developed for trial, such as causation opinions not included within the treatment records, is required to comply with the retained expert disclosure requirements under F.R.C.P. 26(a)(2)(B). In *Scholl*, the subject opinions from the non-retained experts were stricken for non-compliance with disclosure requirements, in part, because the party had disclosed four retained experts to testify.

Here, causation is hotly disputed. Because causation opinions are not included within the subject treatment records, and were developed because of this litigation, the Court concludes that treating providers who will render causation opinions, including Dr. Jachimiak and Dr. Yakel, must comply with the C.R.C.P. 26(a)(2)(B)(I) requirements for retained expert witnesses. The information required by this subsection, including a signed report or summary, the basis and reasons for the opinions, an identification of the information relied on to support the opinions, and the witness's testimonial history and c.v. will help to ensure that Defendants have sufficient information to evaluate the providers' opinions, prepare for cross examination, assess bias and prejudice, and evaluate whether the providers have sufficient expertise to render the causation opinions.

The Court therefore applies the 6-part test from case law. *See Todd v. Bear Valley Village Apartments*, 980 P.2d 973 (Colo. 1999); *Warden v. Exempla, Inc.*, 291 P.3d 30, 2012 CO 74; *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008). The proximity to the trial date is a key factor. *Warden*, ¶ 34. Here, the trial date is still more than 90 days away. First, the disclosures are very important to Plaintiff's case. Causation is a key issue in this case. If the Court strikes the portion of the disclosures including the causation opinions, Plaintiff will be unable to present her full case to

the jury. Second, there is no substantial justification for the late disclosures. A calendaring error through oversight of counsel is not substantial justification. There is more substantial justification for the failure to comply with subsection (B)(I)'s disclosure requirements, due to the absence of binding appellate authority. Third, there is no material prejudice to Defendants if the retained expert disclosure information is provided and certain deadlines are extended. The subject disclosures were served only 17 days late. With certain curative measures, Defendants will not be materially harmed by the late disclosure. Fourth, a trial continuance is not readily available. There is no other reason to continue the trial date, and the trial date is 15 months after the filing date. Fifth, given that more than 90 days remain before trial, the late disclosures will not disrupt trial. Sixth, there is no evidence of bad faith on Plaintiff's part.

On balance, application of the 6-part test tilts against striking the causation opinion portions of the expert disclosures. Plaintiff shall, however supplement her expert disclosures by May 25, 2016. For any provider who will render a causation opinion, Plaintiff must provide complete expert disclosures under C.R.C.P. 26(a)(2)(B)(I). Defendants have an extension until June 22, 2016 to complete their expert disclosures. The expert disclosures that Defendants served on May 9 are not responsive to Plaintiff's expert disclosures, therefore, Defendants can supplement their disclosures to respond to Plaintiff's supplemental expert disclosures. The rebuttal expert disclosures shall be served by July 6, 2016. The expert deposition deadline is extended to July 11, 2016.

The presumptive C.R.C.P. 56 motion deadline is May 16. Due to the extensions for the expert disclosures, the C.R.C.P. 56 motion deadline is extended to June 6, 2016. The response timeframe to any such motions is shortened to 14 days, and the reply timeframe is shortened to 7 days. The C.R.E. 702/Shreck motion deadline is extended to June 20, 2016. The response timeframe to any such motions is shortened to 14 days, and the reply timeframe is 7 days.

In another issue raised through the briefing and at hearing, Defendants contend that Plaintiff has failed to produce complete medical records regarding the subject right toe. In particular, there are missing CT/MRI imaging records from a 2007-08 procedure, and missing post-op records. Plaintiff's counsel states that they requested these records, but the records were not produced by the providers and may no longer exist. Defendants seek a release for such records, and Plaintiff objects. The Court directs Plaintiff's counsel to renew the request for the subject medical records, in writing, by May 13, 2016, and to copy Defendants' counsel on the request. If the records are produced by the providers, Plaintiff may review the records for privilege. If there is an undue delay in obtaining the records, the Court will consider requiring Plaintiff to execute releases for such records. Because the records relate to the same body part in issue here, they are relevant to the claims and defenses in this litigation.

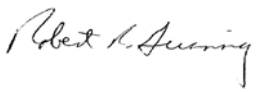
On question of clarification, if Defendants believe there is a factual and legal basis to designate non-parties at fault following production of the supplemental expert disclosures,

Defendants may file a motion for leave to designate non-parties at fault. Such a motion would likely be decided by Division 3.

This Order is issued in a proceeding for which no consent is necessary under CRM 6(c)(1)(E); therefore, any appeal must be taken in accordance with CRM 7(a).

DATED: May 13, 2016
NUNC PRO TUNC: May 11, 2016
No consent necessary, C.R.M. 7(a).

BY THE COURT:



Robert R. Gunning
District Court Magistrate

2014 WL 3543714
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Yolanda CARBAUGH, Plaintiff,
v.
HOME DEPOT U.S.A., INC., Defendant.

Civil Action No. 13–cv–02848–REB–MEH
|
Signed July 16, 2014

Attorneys and Law Firms

Alanson Higbie, Jr., Melat, Pressman & Higbie, LLP, Colorado Springs, CO, for Plaintiff.

Arthur Kittredge Smith, III, Law Offices of Arthur K. Smith, P.C., Allen, TX, for Defendant.

ORDER ON MOTION TO STRIKE DISCLOSURES

Michael E. Hegarty, United States Magistrate Judge.

***1** Before the Court is Defendant's Motion to Strike Plaintiff's Expert Disclosures *[filed May 30, 2014; docket # 23]*. The matter is referred to this Court for disposition. (Docket # 24.) The motion is fully briefed, and oral argument would not assist the Court in its adjudication of the motion. For the reasons that follow, the Court **grants in part and denies in part** the Defendant's motion.

I. Background

In this lawsuit, Plaintiff, Yolanda Carbaugh ("Carbaugh"), alleges that Defendant Home Depot USA, Inc. ("Home Depot"), was negligent and violated the Colorado Premises Liability Act by allowing a sign to come loose and hit her in the forehead above her left eye when she visited the store on May 30, 2011. *See generally* Complaint, docket # 4 at 3–4. The impact allegedly caused trauma, a contusion and other injuries to Carbaugh. *Id.*

On April 11, 2014, Carbaugh served an expert disclosure statement in this matter identifying nine expert witnesses. Docket # 23–1. When Home Depot objected that the number of experts exceeding that order in the Scheduling Order, Carbaugh served a renewed expert disclosure statement on April 24, 2014 disclosing five witnesses as "non-retained" experts: (1) John Tyler, M.D., a physician; (2) Thomas A. Wilson, O.D., an optometrist; (3) Anthony Ricci, Ph.D., a psychologist; (4) Kristin Perry, a speech language pathologist; and (4) Jeffrey Amsden, D.C., a chiropractor. *See* docket # 23–3. For each expert witness, Carbaugh listed a summary of the witness' testimony. *See id.* In the present motion, Home Depot argues that the substance of the witnesses' reports exceeds the scope of non-retained expert testimony and, thus, each witness is required to comply with the full reporting requirements of Fed.R.Civ.P. 26(a)(2)(B). Alternatively, Home Depot contends that, if the Court finds the witnesses are subject to Fed.R.Civ.P. 26(a)(2)(C), the information provided by Plaintiff is insufficient. Home Depot concludes that, because Carbaugh has failed to comply with Rule 26(a)(2)(B) or Rule 26(a)(2)(C) requirements for each of her expert witnesses, the disclosures should be stricken pursuant to Fed.R.Civ.P. 37(c)(1).

Carbaugh counters that all five expert witnesses are treating physicians or health care providers and, as such, they are not required to submit reports pursuant to Rule 26(a)(2)(B). Response, docket # 25 at 3. Alternatively, Carbaugh argues that she submitted to Home Depot reports by Tyler, Ricci and Wilson with her medical records in October 2013, and that she relies on her disclosures and the medical records by Perry and Amsden for their testimony. *Id.* at 4–5. Carbaugh contends that, because of these disclosures in October 2013, Home Depot has not, and cannot, demonstrate prejudice. *Id.* at 5.

Home Depot replies that the reports by Tyler, Ricci and Wilson demonstrate they were prepared at the request of Carbaugh's counsel and, thus, prepared for litigation rather than formed as a necessary part of Carbaugh's treatment. Home Depot also asserts that, while true the reports were provided in October 2013 with Carbaugh's initial disclosures, they were part of 30,000 pages of documents and Carbaugh never distinguished them nor referred Home Depot to them, even after Home Depot's counsel attempted to confer regarding the present motion. In addition, Carbaugh did not attach the reports to her expert disclosures. Home Depot also contends that, even if the Court were to find Carbaugh's physicians subject only to Rule 26(a)(2)(C), the reports do not comply with the rule since Carbaugh failed to provide a summary of the facts and opinions to which each expert is expected to testify. Finally, Home Depot argues it has been prejudiced since the rebuttal expert designation deadline has passed and it has insufficient information by which to determine whether to rebut Carbaugh's expert opinions.

***2** The Court is now fully advised and finds as follows.

II. Analysis

Home Depot brings its motion pursuant to Rule 37(c), which states in pertinent part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed.R.Civ.P. 37(c)(1). "The imposition of sanctions for abuse of discovery under Fed.R.Civ.P. 37 is a matter within the discretion of the trial court." *Orjias v. Stevenson,* 31 F.3d 995, 1005 (10th Cir.), *cert. denied,* 513 U.S. 1000 (1994). A district court abuses its discretion "if the exclusion of testimony results in fundamental unfairness in the trial of the case." *Id.* (citing *Smith v. Ford Motor Co.,* 626 F.2d 784, 794 (10th Cir.1980)).

Rule 26(a)(2)(A) requires a party to "disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Depending upon the nature of the witness, a party may also need to disclose additional information. Fed.R.Civ.P. 26(a)(2)(B) provides in part that if "the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony," the disclosure must be supplemented by a written report containing

1. a complete statement of all opinions the witness will express and the basis and reasons for them;
2. the facts or data considered by the witness in forming them;
3. any exhibits that will be used to summarize or support them;
4. the witness' qualifications, including a list of all publications authored in the previous 10 years;
5. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
6. a statement of the compensation to be paid for the study and testimony in the case.

For all other "expert" witnesses, parties are required to disclose only "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705 and (ii) a summary of the facts and opinions to which the witness is expected to testify." Fed.R.Civ.P. 26(a)(2)(C).

The purpose of expert disclosures is "to eliminate surprise and provide opposing counsel with enough information ... to prepare efficiently for deposition, any pretrial motions and trial." *Cook v. Rockwell Int'l Corp.,* 580 F.Supp.2d 1071, 1121–22 (D.Colo.2006).

The Court notes at the outset that Rule 26(a)(2) addresses only the sufficiency of the disclosure. Compliance with Rule 26(a)(2) does not resolve whether witnesses are qualified under Fed.R.Evid. 702 or whether their testimony is admissible at trial. Home Depot's motion was brought pursuant to Rule 26(a)(2) and Rule 37(c)(1), and the Court will limit its analysis accordingly.

This Court has traditionally employed a burden-shifting procedure for determining whether the requirements of Rule 26(a)(2) have been satisfied. *Morris v. Wells Fargo Bank, N.A.,* No. 09–cv–02160–CMA–KMT, 2010 WL 2501078, at *2 (D. Colo. June 17, 2010) (unpublished) ("[I]t is clear that some showing must be made to distinguish an expert witness not required to file a report under Rule 26(a)(2)(B) from the vast majority of cases where experts are required to provide a report."). The party moving to strike the witness bears the initial burden of showing that the disclosing party failed to produce a written report under Rule 26(a)(2)(B). *Id.* The burden then shifts to the disclosing party to demonstrate that the witness is not retained or specially employed and, thus, no report was required. *Id.* Because the rule was amended following *Morris* to require a non-retained expert to provide the subject matter and a summary of facts and opinions to which the expert is expected to testify, the standard has changed somewhat to require the movant to show that the disclosing party failed to meet all requirements of Rule 26(a)(2)(B), and the disclosing party must then demonstrate that

the expert is not retained or specially employed so that the requirements of Rule 26(a)(2)(B) do not apply.

***3** Ordinarily, physicians providing a party with medical treatment are designated as non-retained and, thus, are exempt from the report requirement. *Trejo v. Franklin,* No. 04–cv–02523–REB, 2007 WL 2221433, at *1 (D.Colo. July 30, 2007) (unpublished) ("In general, treating physicians do not come within the purview of [the Rule 26(a)(2)(B)] requirement."). "[T]heir testimony is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial." *Id.* (quoting *Baker v. Taco Bell Corp.,* 163 F.R.D. 348, 349 (D.Colo.1995)). "The same rationale extends to treating physician opinions regarding causation and prognosis based on examination and treatment of the patient." *Id.* In addition, because treating physicians presumably keep medical records documenting their observations, findings, and treatment regimes, a written report usually would be unnecessary. *See Scholl v. Pateder,* No. 09–cv–02959–PAB–KLM, 2011 WL 2473284, at *3 (D. Colo. June 22, 2011) (unpublished).

Although a witness' records as a treating physician may, in some instances, obviate the need for a report, "[i]t is the substance of the expert's testimony, not the status of the expert, which will dictate whether a Rule 26(a)(2)(B) report will be required." *Trejo,* 2007 WL 2221433 at *2 (quoting *Harvey v. United States of America,* No. 04–cv–00188–WYD–CBS, 2005 WL 3164236, at *8 (D.Colo. Nov. 28, 2005) (unpublished)). When a witness' testimony is limited to his observations, diagnosis and treatment of a patient, the physician "is testifying about what he saw and did and why he did it, even though the physician's treatment and his testimony about that treatment are based on his specialized knowledge and training." *Krischel v. Hennessy,* 533 F.Supp.2d 790, 795 (N.D.Ill.2008). Under these circumstances, no Rule 26(a)(2)(B) report is necessary. *Id.* However, when a witness forms an opinion because there is a lawsuit, such as when he or she is asked to review the records of another health care provider in order to formulate his or her own opinion on the appropriateness of care, the witness is considered "retained or employed" under Rule 26(a)(2)(B) and must file a written report accordingly. *Id.; see also Trejo,* 2007 WL 2221433 at *1–*2 (citing *Wreath v. United States,* 161 F.R.D. 448, 450 (D.Kan.1995)).

Again, Home Depot contends that Carbaugh's expert witnesses are subject to Rule 26(a)(2)(B) and should produce reports and, alternatively, the information provided by Carbaugh for each witness is insufficient under Rule 26(a)(2)(C). Accordingly, the Court will determine first whether any of the identified "non-retained" experts should be subject to the requirements of Rule 26(a)(2)(B) and, if so, whether Carbaugh's failure to fully comply with the rule's requirements is substantially justified or harmless. Second, if any witnesses are subject to Rule 26(a)(2)(C), the Court will determine whether the submitted information is sufficient.

A. *Retained vs. Non–Retained*

Here, the Court finds that Home Depot has met its initial burden of showing that Carbaugh's "non-retained" witnesses failed to comply with all requirements set forth in Rule 26(a)(2)(B) by demonstrating that each of the identified "non-retained" experts failed to provide reports containing (but not limited to) their qualifications, exhibits they will use to summarize or support their opinions, a list of previous testimonial experience, and a statement of compensation. Carbaugh does not contend otherwise, but asserts that these experts fall properly under Rule 26(a)(2)(C). Thus, the Court shifts its analysis to whether Carbaugh has demonstrated that her disclosed witnesses are properly designated as non-retained. Carbaugh relies on the information submitted in her expert designations, as well as applicable medical records, including reports by certain providers, submitted to Home Depot in October 2013. The Court will address each witness in turn.

1. John Tyler, M.D.

***4** According to Carbaugh's designation, Dr. Tyler is board certified in the field of Physical Medicine and Rehabilitation and treated the Plaintiff following her injury on May 30, 2011. Dr. Tyler will testify as to his examination, test results, treatment and patient consultations with Carbaugh, as well as that Carbaugh "probably" has neck pain, headaches, and superior medial periscapular pain. Docket # 23–3 at 3. The Court finds these descriptions proper for a non-retained treating physician. However, Dr. Tyler also intends to provide opinions as to the causation and prognosis of Carbaugh's alleged injuries, as well as comments regarding the findings of other doctors. *Id.* at 3–4. In fact, in response to a request from Carbaugh's attorney, Dr. Tyler provided information and opinions concerning the cause of Carbaugh's alleged injuries and her prognosis. April 11, 2013 Letter from Dr. Tyler to Alan Higbie, Esq., docket # 25–3 at 2–4. The Court concludes

these latter findings and opinions, to the extent they rely (even in part) on the findings of other physicians, trigger the requirements of Rule 26(a)(2)(B). *See Goodman v. Staples the Office Superstore, LLC,* 644 F.3d 817, 826 (9th Cir.2011) (expert falls outside the scope of treating physician when, to form an opinion, expert reviews information provided by party's attorney that was not reviewed during course of treatment).

Carbaugh argues that the April 11, 2013 letter properly constitutes a report pursuant to Rule 26(a)(2)(B). However, as set forth above, the letter does not contain Dr. Tyler's qualifications, exhibits he will use to summarize or support his opinions, a list of previous testimonial experience, and a statement of compensation. Moreover, Carbaugh does not contest Home Depot's assertions that she failed to distinguish the report as an expert report, to attach a copy of the report to the expert disclosure, and to refer Home Depot to the report upon its attempt to confer regarding expert designations. The Court finds this conduct in contravention of Fed.R.Civ.P. 1 and 26 and this Court's local rules.

The Court concludes that Carbaugh did not comply with Rule 26(a)(2)(B)'s requirements as to Dr. Tyler's opinions formed upon the findings of other doctors, and pursuant to Rule 37(c)(1), the Court must determine whether Carbaugh's failure is substantially justified or harmless. In *Jacobsen v. Deseret Book Co.,* 287 F.3d 936 (10th Cir.2002), the Tenth Circuit noted that "Rule 37(c) permits a district court to refuse to strike expert reports and allow expert testimony even when the expert report violates Rule 26(a) if the violation is justified or harmless." *Id.* at 952. In determining whether a violation is harmless, a trial court must consider the following:

> (1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness.

Id. at 953.

In this case, discovery ended July 15, 2014, the trial preparation conference before Judge Blackburn is scheduled for November 21, 2014, and trial is scheduled to commence on December 15, 2014. Furthermore, the deadline to file Rule 702 motions challenging expert testimony passed on July 2, 2014. Thus, to the extent Judge Blackburn determines to keep the listed deadlines and conference dates, the prejudice to Home Depot in allowing Dr. Tyler to opine as a retained expert without required disclosures is evident. Currently, there is no indication that the trial preparation conference or trial dates will change; therefore, the parties' ability to cure is limited. Introducing Dr. Tyler's retained expert testimony at trial likely would be disruptive considering that Rule 702 challenges would be made at that time. Finally, the Court perceives no bad faith or willfulness on the part of Home Depot in this matter. Carbaugh's violation is neither justified nor harmless.

However, the Court finds that the combination of Dr. Tyler's report and the information set forth in the expert designation meet the requirements of Fed.R.Civ.P. 26(a)(2)(C) for the subject matter of the testimony, as well as a summary of facts and opinions to which Dr. Tyler may testify.

***5** Therefore, the Court will strike, and Carbaugh may not use at trial, the following opinions and comments by Dr. Tyler as stated in the expert designation and formed because of the lawsuit or based upon the findings of any other physician [1]: (1) any information contained in Paragraph 2 (docket # 23–3 at 3) beginning, "Further, Dr. Tyler would testify these diagnoses, conditions and injuries are a direct and proximate cause ..."; (2) any information contained in Paragraph 3 beginning, "Dr. Tyler may also testify that his diagnosis of neck pain ... is permanent ..."; (3) any information contained in Paragraph 4 beginning, "He will testify to his impressions of Ms. Carbaugh's pain and discomfort ..."; (4) opinions or information concerning other doctors' opinions or reports in Paragraph 2 (docket # 23–3 at 4) beginning, "Dr. Tyler may also testify to other doctors [sic] opinions ..."; (5) opinions concerning causation in Paragraph 3 beginning, "He will give testimony regarding his opinions ..."; and (6) opinions concerning "requirements for future care, impairments and disabilities" in Paragraph 4. Carbaugh may elicit testimony from Dr. Tyler limited to "his observations, diagnosis and treatment of a patient," in that "the physician is testifying about what he saw and did and why he did it." Accordingly, Home Depot's motion is granted in part and denied in part as to Dr. Tyler.

2. Thomas A. Wilson, O.D.

According to his April 29, 2013 report addressed to Plaintiff's counsel, Dr. Wilson is an optometrist who began treating Carbaugh on August 21, 2012. *See* docket # 25–3 at 21–22. Carbaugh initially complained to Dr. Wilson of "visual symptoms [that] occurred after the accident and she reports that they did not occur before the incident." *Id.* Dr. Wilson describes in his report his examination and treatment of Carbaugh since August 2012. *Id.* The Court finds the description generally proper testimony for a non-retained treating physician. However, in response to Carbaugh's counsel's specific questions, likely in anticipation of her lawsuit filed 10 days later (*see* docket # 4), Dr. Wilson also opines as to causation, prognosis, and future treatment. *Id.* These latter opinions and findings trigger the requirements of Rule 26(a)(2)(B), and, as set forth above, it is undisputed that Carbaugh failed to meet the rule's requirements as to Dr. Wilson. For the same reasons listed for Dr. Tyler, Carbaugh's failure in this regard is neither substantially justified nor harmless; however, the Court finds Dr. Wilson's combined report and expert designation satisfy the Rule 26(a)(2)(C) requirements.

Therefore, the Court will strike, and Carbaugh may not use at trial, the following opinions and comments as stated by Dr. Wilson in the expert designation and formed because of the lawsuit or based upon the findings of any other physician: (1) any information contained in Paragraph 3 (docket # 23–3 at 5) beginning, "Further, Dr. Wilson would testify these diagnoses, conditions and injuries are a direct and proximate result ..."; (2) any information contained in Paragraph 5 beginning, "Dr. Tyler may also testify that his diagnosis of superficial punctate keratitis ... is permanent ..."; (3) opinions concerning causation in Paragraph 2 (docket # 23–3 at 6) beginning, "He will give testimony regarding his opinions ..."; and (4) opinions concerning "requirements for future care, impairments and disabilities" in Paragraph 3. This order does not preclude Dr. Wilson from testifying as to what he saw, what he did and why he did it. Accordingly, the Home Depot's motion is granted in part and denied in part as to Dr. Wilson.

3. Anthony M. Ricci, Ph.D.

According to his February 7, 2012 report, Dr. Ricci is a psychologist who had seen and treated Carbaugh following her injury. *See* docket # 25–3 at 5–13. Carbaugh reported to Dr. Ricci that she "was hit in the head at Home Depot on Woodman on May 30, 2011 by a big sign. I got dizzy and sick to my stomach." *Id.* at 5. Dr. Ricci first saw Carbaugh on November 15, 2011. Dr. Ricci describes his observations, diagnosis and treatment of Carbaugh. Dr. Ricci also comments about the findings of other doctors; however, it is unclear whether he relied on these findings for his own diagnoses. It also appears that Dr. Ricci assumes, without opining, Carbaugh's injuries were caused by the May 30, 2011 incident at Home Depot; as set forth above, Dr. Ricci is not permitted to opine about causation in this case because of the lawsuit or based upon other providers' findings. Notably, there is no indication that Dr. Ricci's review was requested by any party or that the report itself was prepared in anticipation of trial; in fact, the report was addressed only to Dr. Tyler. Thus, it appears that Dr. Ricci's opinions stemming from his review of the findings of other doctors (if any) were made during the course of his treatment of Carbaugh. Consequently, the Court finds the information contained in Dr. Ricci's February 7, 2012 report contains proper testimony for a non-retained treating physician.

***6** In a subsequent August 15, 2012 report to Dr. Tyler, Dr. Ricci provides a summary update of Carbaugh's reports and the information he has learned from her other health providers. *See* docket # 25–3 at 14–15. The Court finds the information contained in Dr. Ricci's August 15, 2012 report, excluding any assumptions or opinion(s) as to causation, contains proper testimony for a non-retained treating physician.

However, on June 18, 2013, Dr. Ricci addressed a letter to Carbaugh's counsel setting forth a "narrative report providing an opinion." Docket # 25–2 at 17–20. Dr. Ricci explains his review of other medical providers' notes and findings, then proffers opinions on causation and prognosis. *See Trejo,* 2007 WL 2221433 at *1 ("[treating physicians'] testimony is based upon their personal knowledge of the treatment of the patient and *not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial.")* (quoting *Baker v. Taco Bell Corp.,* 163 F.R.D. 348, 349 (D.Colo.1995)) (emphasis added). These opinions trigger the requirements of Rule 26(a)(2)(B); however, as with Dr. Tyler and Dr. Wilson, it is undisputed that Carbaugh failed to meet the rule's requirements as to Dr. Ricci. As set forth above, Carbaugh's failure in this regard is neither substantially justified nor harmless; however, the Court finds Dr. Ricci's combined reports and expert designation satisfy the Rule 26(a)(2)(C) requirements.

Therefore, the Court will strike, and Carbaugh may not use at trial, the following opinions and comments as stated by Dr. Ricci in the expert designation and formed because of the lawsuit or based upon the findings of any other provider: Dr. Ricci may not opine as to prognosis or causation to the extent these opinions were not formed during the course of his treatment of Carbaugh. That is, Dr. Ricci may testify concerning his observations, diagnosis and treatment of Carbaugh, including what he saw and did and why he did it; his opinions may not include any information he reviewed in preparing the June 13, 2012 report. Accordingly, Home Depot's motion is granted in part and denied in part as to Dr. Ricci.

4. Kristin Perry SLP and Jeffrey Amsden, D.C.

Carbaugh proffers no reports by Ms. Perry and Dr. Amsden, but "relies upon the disclosure of their records and billings" in both state and federal courts. Response, docket # 25 at 5. Nevertheless, Carbaugh offers these providers as experts pursuant to Fed.R.Civ.P. 26(a)(2) and asserts that they will opine as to prognosis, causation and future treatment. *See* docket # 23–3 at 7–9. Such opinions formed because of the lawsuit or based upon the findings of any other physician trigger the requirements of Rule 26(a)(2)(B); however, it is undisputed that Carbaugh failed to meet the rule's requirements as to Ms. Perry and Dr. Amsden. Again, Carbaugh's failure in this regard is neither substantially justified nor harmless.

Moreover, it is the obligation of neither this Court nor Home Depot to scour the medical records for information concerning Ms. Perry's and Dr. Amsden's observations, findings and treatment of Carbaugh. The Court finds that Carbaugh's expert designations of these providers, contain vague, boilerplate language and themselves are insufficient to meet the requirements of Fed.R.Civ.P. 26(a)(2)(C). Accordingly, Ms. Perry and Dr. Amsden may not opine as experts pursuant to Fed.R.Civ.P. 26(a)(2). Home Depot's motion is granted as to Ms. Perry and Dr. Amsden.

III. Conclusion

***7** For the reasons stated above, the Court finds that, to a certain extent, three identified witnesses, Drs. Tyler, Ricci and Wilson, are properly designated as non-retained treating physicians. However, according to their reports, each physician expects to proffer testimony as to certain opinions that trigger the requirements of Rule 26(a)(2)(B). It is undisputed that Carbaugh did not meet the rule's requirements; therefore, the Court will strike only the non-compliant opinion testimony of these witnesses.

With respect to the remaining two witnesses, Ms. Perry and Dr. Amsden, the Court finds Carbaugh failed to meet the requirements of Rules 26(a)(2)(B) and 26(a)(2)(C). Thus, the Court strikes Carbaugh's expert disclosures of Ms. Perry and Dr. Amsden and these witnesses may not testify as experts pursuant to Fed.R.Civ.P. 26(a)(2).

Accordingly, the Court **grants in part and denies in part** Defendant's Motion to Strike Plaintiff's Expert Disclosures *[filed May 30, 2014; docket # 23]* as set forth herein.

All Citations

Not Reported in Fed. Supp., 2014 WL 3543714

Footnotes

1 Pursuant to Rule 37(c)(1), a party who fails to identify a witness or provide information as required by Rule 26(a) or (e) may not use the witness or the information at trial. Fed.R.Civ.P. 37(c)(1). Here, Carbaugh has properly identified expert witnesses and summarized their expected testimony; however, Home Depot contends (and the Court agrees) that Carbaugh failed to provide the information required to offer retained expert testimony. Therefore, to the extent the Court concludes a witness intends to testify as a "retained expert" without satisfying Rule 26(a)(2)(B), the Court need only strike such testimony.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02603-PAB-NYW

CATHLEEN CARMODY,

Plaintiff,

v.

SHERIFF JASON MIKESELL, in his official capacity;
CORPORAL FRANK SCOFIELD, in his individual capacity; and
NURSE SUSAN CAMPBELL, in her individual capacity,

Defendants.

ORDER

Magistrate Judge Nina Y. Wang

This matter comes before the court Defendant's Motion for Leave to Conduct Ex Parte Interviews ("Motion for Ex Parte Interviews") [#76, filed on October 20, 2017] filed by Defendant Susan Campbell ("Defendant Campbell") pursuant to 28 U.S.C. § 636(b)(1); the Order Referring Case dated October 25, 2016 [#14], and the Memorandum dated October 20, 2017 [#77]. Having reviewed the Parties' briefing, the applicable case law, and entertained oral argument on these issues during the November 8, 2017 hearing, the court hereby **GRANTS IN PART and DENIES IN PART** Defendant Campbell's Motion for Ex Parte Interviews.

BACKGROUND

This case arises from an alleged "painful and debilitating back injury" sustained by Plaintiff Cathleen Carmody ("Plaintiff" or "Ms. Carmody") while detained at the Teller County Detention Center [#1; #38]. Ms. Carmody alleges in 1999, she sustained a hip injury while working as a nurse. [#38 at ¶ 24]. For fifteen years, she dealt with pain in her hip until she had a

total hip replacement surgery in September 2014. [*Id.*]. As part of her post-operative treatment plan, Ms. Carmody's health care providers instructed her to continue to use a walker until she no longer needed it for walking or balance. [*Id.* at ¶ 25].

Ms. Carmody was arrested On October 23, 2014, and detained at the Teller County Detention Center. [*Id.* at ¶ 26]. After she arrived at the detention center, Defendant Frank Scofield ("Defendant Scofield" or "Corporal Scofield") processed her for intake, but then confiscated her walker and told her that she was "going to have to do without [it]." [*Id.* at ¶¶ 27–31]. For the duration of her detention, Ms. Carmody was deprived the use of her walker, except during court appearances and attorney visits. [*Id.* at ¶ 33]. Otherwise, she was forced to hop on one leg to move around the facility. [*Id.* at ¶ 34].

On October 27, 2014, Ms. Carmody attempted to watch television in the dayroom of the detention center, but while attempting to sit down on a stool, lost her balance and landed on her back. [*Id.* at ¶¶ 36–37]. Ms. Carmody reported that she was having shooting pains in her back and needed an ambulance, but Defendant Campbell denied her request. [*Id.* at ¶¶ 39–40]. Plaintiff alleges that she was never taken for any medical examination and the Teller County Detention Center never provided any medical treatment of her back injury, except Tylenol. [*Id.* at ¶¶ 42–44].

After her release in November 2014, Ms. Carmody sought medical treatment, which has failed to relieve ongoing pain. Plaintiff alleges that, "[a]fter the unsuccessful steroid injection, [she] needed to take morphine to obtain any relief from her pain." [*Id.* at ¶ 52]. She further alleges that she "now needs to take morphine every day to obtain any relief from her back pain," but "[s]he would like to stop taking morphine because of its side effects." [*Id.* at ¶ 54]. She also alleges, "[d]ue to the constant, sever pain and the effect the pain has had on her life, [she] is

depressed all the time. Her daily life consists of trying to manage the pain or manage the side effects of the pain medication. She cannot sleep without pain medication but she hates the way the medication makes her feel." [*Id.* at ¶ 57]. She seeks actual economic losses, including consequential, compensatory, and punitive damages. [#52].

The Parties have proceeded through discovery and, as noted by Plaintiff, this court has considered a number of issues related to Ms. Carmody's medical records. [#67; #72]. The Parties have also sought, and received, extensions of time due to the collection and production of Ms. Carmody's medical records. *See e.g.*, [#60]. Discovery is set to close on December 29, 2017. [#65].

In the instant Motion, Defendant Campbell seeks to conduct ex parte interviews of three categories of health care providers. First, Defendant Campbell seeks to conduct ex parte interviews of Leslie O'Neal, LPN; Joe Moore, LPN; Chi Krantz, RN; and Linda Hewett, NP, who all worked at the Teller County Jail during Ms. Carmody's detention in October 2014. [#76 at 2]. All were medical staff and employees of Correctional Healthcare Companies, Inc.—a previous Defendant in this action. The second category of health care providers is Plaintiff's orthopaedic providers, David S. Matthews M.D. ("Dr. Matthews") and Robert Peterson, Jr. PA-C ("Mr. Peterson"). [*Id.* at 3]. Last, Defendants seek to conduct an ex parte interview of Dr. Francis Joseph, Ms. Carmody's primary care physician from December 2014 to October 2016. [*Id.*]. Plaintiff objects, arguing that the requests are overly broad and likely implicate confidential and irrelevant information; that three of the health care providers will be deposed and, therefore, ex parte interviews are not necessary; and that Defendants have failed to establish a "compelling need" for the ex parte interviews. [#83]. Plaintiff further contends that she should

be given adequate notice of any interviews with her health care providers, and an opportunity for her, or her counsel, to attend. [*Id.* at 6].

LEGAL STANDARDS

Rule 26(b)(1) of the Federal Rules of Civil Procedure defines the scope of permissible discovery in this action. Fed. R. Civ. P. 26(b)(1). The Rule permits discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. *Id.* In considering whether the discovery sought is proportional, the court weighs the importance of the discovery to the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.*

This scope for discovery does not include all information "reasonably calculated to lead to admissible evidence." The amendments to Rule 26 effective December 1, 2015, purposefully removed that phrase. *See In re Bard Filters Products Liability Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016). As explained by the *Bard* court, the Advisory Committee on the Federal Rules of Civil Procedure was concerned that the phrase had been used incorrectly by parties and courts to define the scope of discovery, which "might swallow any other limitation on the scope of discovery." *Id.* (citing Fed. R. Civ. P. 26 advisory committee's notes to 2015 amendment). The applicable test is whether the evidence sought is relevant to any party's claim or defense, and proportional to the needs of the case. *Id.* Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401.

The Federal Rules of Civil Procedure contemplate that parties are not limited to one method of discovery to ascertain relevant information. Fed. R. Civ. P. 26(d)(3). Nor do the Federal Rules of Civil Procedure specifically govern informal discovery. *See Matzke v. Merck & Co.*, 161 F.R.D. 106, 107 (D. Kan. 1994). Nevertheless, courts retain the discretion to enter protective orders where the court determines that there is good cause to prevent a party or person from annoyance, embarrassment, oppressions, or undue burden or expense. Fed. R. Civ. P. 26(c). Such an order may include one or more of the following limitations:

> (A) forbidding the disclosure or discovery;
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
>
> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
>
> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
>
> (E) designating the persons who may be present while the discovery is conducted;
>
> (F) requiring that a deposition be sealed and opened only on court order;
>
> (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
>
> (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed. R. Civ. P. 26(c)(1)(A)–(H).

ANALYSIS

Because this claim arises under federal law, this court looks to federal, rather than state, law in analyzing whether ex parte interviews of Plaintiff's health care providers is permitted. The Parties agree that there is no federal physician-patient privilege. [#76 at 4; #83 at 4]. There

can be no dispute that Plaintiff has injected her physical and mental condition into this case by asserting that Defendants' deprivation of her walker during her detention at the Teller County Detention Center caused her to injure her back, and that "[d]ue to the constant, severe pain and the effect the pain has had on her life, [she] is depressed all the time. Her daily life consists of trying to manage the pain or manage the side effects of the pain medication. She cannot sleep without pain medication but she hates the way the medication makes her feel." [#38 at ¶ 57]. In addition, there is no dispute that Ms. Carmody had a preexisting hip condition that caused her pain between 1999 and 2014 that she "dealt with." [*Id.* at ¶ 24]. Accordingly, Plaintiff has not only directly put any treatment (or lack thereof) that she received at Teller County Detention Center at issue, but she has also waived any applicable privacy rights as to medical information associated with any hip injury (preexisting or current); back injury (preexisting or current); complaints of pain; use and management of any pain medication (preexisting or current); psychological well-being; and physical limitations from 2009 to the present [#67 at 2]. *See Carbajal v. Warner*, No. 10–cv–02862–REB–KLM, 2013 WL 1129429, at *5 (D. Colo. Mar. 18, 2013).

Thus, this court finds that it is appropriate for Defendant Campbell to seek ex parte interviews with Leslie O'Neal, LPN; Joe Moore, LPN; Chi Krantz, RN; and Linda Hewett, NP, who all worked at the Teller County Jail during Ms. Carmody's detention in October 2014. Though it is not clear whether all of these individuals were directly involved with Plaintiff's treatment from October to November 2014, this court finds no reason to preclude Nurse Campbell from conducting ex parte interviews with her colleagues regarding their observations and/or treatment of the above-defined topics, so long as each of the individuals is provided a copy of this court's Order defining the appropriate areas of inquiry and is expressly informed

that his or her cooperation is entirely voluntary at the time the interview is requested. Indeed, as our sister courts within this Circuit have observed, "[w]itnesses, of course, may refuse to communicate ex parte and thus require the parties to resort to formal discovery procedures." *Lowen v. Via Christi Hosps. Wichita, Inc.*, No. 10-1201-RDR, 2010 WL 4739431, at *2 (D. Kan. Nov. 16, 2010) (citation and internal quotation marks omitted). With these requirements in place, this court finds no justification in requiring Defendant Campbell to include Plaintiff or Plaintiff's counsel in any interviews.

Ex parte interviews with Ms. Carmody's treating orthopaedic health care providers, Dr. Matthews and Mr. Peterson, raise an additional concern that such interviews could disrupt an existing physician-patient privilege. *See Hixson v. United States*, No. 09-CV-00495-MSK-MEH, 2009 WL 1976016, at *2 (D. Colo. July 8, 2009), *order clarified*, No. 09-CV-00495-MSK-MEH, 2009 WL 2358923 (D. Colo. July 30, 2009). But this court finds that the potential disruption caused by ex parte interviews is no more significant than the potential presented by Dr. Matthews and Mr. Peterson's upcoming depositions. And this court finds the reasoning of the Honorable Gerald L. Rushfeldt from the District of Kansas persuasive:

> To prohibit *ex parte* communications would allow one party unrestricted access to fact witnesses, while requiring the other party to use formal discovery that could be expensive, timely, and unnecessary.

Pratt v. Petelin, No. 09-2252- CM-GLR, 2010 WL 446474, at *7 (D. Kan. Feb. 4, 2010). There is no contention that Ms. Carmody or her counsel would be unable to speak with her orthopaedic providers without including Defendants or counsel for Defendants, and Plaintiff has not argued that either of these providers has been designated as an expert witness in this action that might implicate considerations or limitations under Rule 26(b) of the Federal Rules of Civil Procedure. Thus, this court finds that Defendant Campbell may pursue ex parte interviews with Ms. Carmody's orthopaedic providers. Again, these health care providers must be provided a copy of

this court's Order defining the appropriate areas of inquiry and must be expressly informed that his or her cooperation is entirely voluntary at the time the interview is requested.

Next, this court considers whether an ex parte interview of Dr. Joseph should be allowed. The Parties identified Dr. Joseph as Plaintiff's primary care physician from December 2014 to October 2016, and Defendant Campbell asserts that an emergency room record indicates that Ms. Carmody had a "pain contract" with Dr. Joseph. While the residual privilege issues arising under Colorado law are not formally applicable, this court finds that Dr. Joseph is more likely to have information regarding Ms. Carmody's health that is not relevant to her allegations raised by this action. Despite having her medical records, Defendant Campbell has made no particular showing that reflects what a "pain contract" refers to, or that Dr. Joseph has specific relevant information, e.g., that he treated her hip or back injury or provided mental health consultation. With these considerations in mind, this court finds that a formal deposition of Dr. Joseph is more appropriate than an ex parte interview.

Finally, to address any lingering privacy concerns cognizable under federal common law or the Health Insurance Portability and Accountability Act of 1996, this court specifically orders that all health information gathered by Defendant Campbell should be protected from dissemination, consistent with the requirements of the previously entered Protective Order. [#43].

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that:

(1) Defendant Campbell's Motion for Leave to Conduct Ex Parte Interviews [#76] is **GRANTED IN PART and DENIED IN PART;**

(2) Defendant Campbell may seek ex parte interviews on the following topics: any hip injury (preexisting or current); back injury (preexisting or current); complaints of pain; use and management of any pain medication (preexisting or current); psychological well-being; and physical limitations from 2007 to the present;

(3) Such ex parte interviews may be sought from and conducted with the following health care providers: Leslie O'Neal, LPN; Joe Moore, LPN; Chi Krantz, RN; Linda Hewett, NP; David S. Matthews, M.D.; and Robert Peterson, Jr. PA-C; and

(4) In conjunction with requesting any ex parte interviews, Defendant Campbell must provide each health care provider a copy of this Order and specifically advise the health care provider that his or her participation in an ex parte interview is entirely voluntary.

DATED: November 9, 2017

BY THE COURT:

s/ Nina Y. Wang
United States Magistrate Judge

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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO Court Address: 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff: HEIDI CHURCH-GARZA, INDIVIDUALLY AND AS SPOUSE OF DECEDENT DARRELL FITZGERALD GARZA **v.**	σ COURT USE ONLY σ
Defendants: JENNIFER W. ARNOLD, M.D., AND GARY A. MCKENNA, P.A.C.	Case Number: **05CV6022** Division: **206**

ORDER REGARDING DEFENDANTS' MOTION FOR LEAVE TO MEET *EX PARTE* WITH CERTAIN NON-PARTY HEALTH CARE PROVIDERS

This matter is before the Court on defendants' motion for leave to meet *ex parte* with certain non-party health care providers. Plaintiff objects to the motion. The Court has reviewed the parties' briefs, including all of the exhibits submitted, and is familiar with the pleadings previously filed in this case. Oral argument would not be of assistance to the Court.

I. BACKGROUND

This is a wrongful death medical malpractice action brought pursuant to Colo. Rev. Stat. Sec. 13-21-201 *et seq.*, arising out of defendants' alleged negligent conduct in providing medical care to Darrell Garza on December 9, 2003. Mr. Garza was 33 years old at the time of his death. Plaintiff, Heidi Church-Garza, as the wrongful death beneficiary, seeks emotional and economic damages allegedly suffered as a result of her husband's death.

On December 9, 2003, Mr. Garza presented to Orchard Family Practice complaining of a headache and a fever. Mr. Garza's medical chart also indicates that he was "starting to get delirious." While at Orchard Family Practice, Mr. Garza was seen and treated by defendants. He and his wife left the facility and returned home early in the afternoon of December 9.

At approximately 3:26 p.m. the same day, Ms. Garza called an ambulance for her husband. He was subsequently taken to the emergency room at Littleton Adventist Hospital, where he was diagnosed with bacterial meningitis.

While at Littleton Adventist Hospital, Mr. Garza received care and treatment from Dr. Coates, who was initially named a defendant in this action, Dr. Benish, a critical care doctor, Dr. McVicker, a neurosurgeon, Dr. Kumar, a neurologist, Dr. Williams, an infectious disease doctor, Drs. Parker and Baker, radiologists, and several nurses. According to the "history" section of one of the medical records from Littleton Adventist Hospital, Mr. Garza's wife reported that he "had become non-verbal" and was continuing to experience delirium.

Mr. Garza was subsequently transported to the emergency room at Swedish Medical Center, where he was apparently seen by Dr. O'Leary. He died in the early morning hours of December 10, 2003.

II. ANALYSIS AND CONCLUSIONS OF LAW

Defendants seek to meet *ex parte* with Dr. Coates, Dr. Benish, Dr. McVicker, Dr. Kumar, Dr. Williams, Dr. Parker, Dr. Baker, Dr. O'Leary, and various nurses at Littleton Adventist Hospital (hereafter collectively referred to as "the health care witnesses"). Reply at p. 1.[1] In

[1] In their initial brief, defendants included "the pathologists" at Littleton Adventist Hospital within the list of non-party health care providers they wish to interview *ex parte*. Because this request was abandoned in defendants' reply brief, *see* Reply at p. 1 and at p. 8, the Court does not address it in this Order.

support of their position, defendants rely on the Colorado Supreme Court's recent decision in *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007). Plaintiff disagrees with defendants' reading of *Reutter* and argues that this case is more analogous to the factual scenario presented in *Samms v. District Court*, 908 P.2d 520 (Colo. 1995). Based on her understanding of the holding in *Samms*, plaintiff asks the Court to deny defendants' request.

The Court is familiar with both *Reutter* and *Samms*. For the reasons stated in this Order, defendants' motion is granted in part and denied in part.

In *Reutter*, a medical malpractice action, the Colorado Supreme Court addressed two issues: 1) whether the trial court had erred in concluding that information relevant to the lawsuit acquired by non-party medical providers while treating Mr. Reutter was subject to the statutory exception to the physician-patient privilege set forth in C.R.S. § 13-90-107(1)(d)(II) (involving a medical provider "who was in consultation with" a physician, surgeon, or registered professional nurse being sued on the case out of which the lawsuit arises); and 2) having decided that the statutory exception to the physician-patient privilege in section 13-90-107(1)(d)(II) applied to the non-party medical providers in question, whether the trial court abused its discretion by refusing to require that the plaintiffs be permitted to attend defendants' interviews of such witnesses. *Reutter*, 179 P.3d at 980. Here, plaintiff does not contend that information relevant to the lawsuit acquired by the health care witnesses while treating Mr. Garza between December 9 and 10 of 2003 is subject to the physician-patient privilege. To the contrary, these medical witnesses' medical records have apparently been discovered and plaintiff has invited defendants to interview or depose them at their convenience. *See* Plaintiff's Brief at pp. 3-4. The only issue is whether defendants may interview these witnesses *ex parte*.

Plaintiff contends that, under *Reutter, ex parte* interviews are permissible only when a defendant "is 'in consultation with the non-party medical providers in a unified course of treatment.'" Response at p. 6. The Court disagrees with this narrow reading of *Reutter*.

The Court in *Reutter* rejected the argument that a plaintiff in a medical malpractice action has an absolute right to attend the defendant's interviews of non-party health care providers, in order to protect medical information not relevant to the malpractice action – namely, "residually privileged information." *Reutter*, 179 P.3d at 980. The Court clarified that "*Samms* did not create a blanket rule that a plaintiff is always entitled to attend an interview of a non-party medical provider." *Id.* Rather, *Samms* held "that the trial court should take appropriate measures to protect against the divulgement of residually privileged information, and that allowing the plaintiff to attend the interview is the preferred measure where there is a high risk that residually privileged information will be divulged." *Id.*

Thus, the key question under *Reutter* is whether there is a high risk that the non-party medical providers sought to be interviewed *ex parte* possess, and will divulge, residually privileged information. The *Reutter* Court concluded that where, as was the case there, such medical providers treated the plaintiff-patient "in consultation with" the defendants as part of a unified course of treatment which forms the basis of the malpractice suit, the risk is low that they will posses and divulge residually privileged information. *Id.*

Indeed, it was on this basis that the *Reutter* Court distinguished the circumstances involved in *Samms*. The Court spoke as follows:

> [U]nlike this case, *Samms* did not involve a plaintiff-patient who had been treated by medical providers "in consultation with" a sued provider in a unified course of treatment; rather, the plaintiff-patient there had been treated by twenty different physicians offering

> separate medical advice and administering separate courses of treatment . . . . We therefore had no opportunity in *Samms* to consider the "in consultation with" exception to the physician-patient privilege, nor did we consider the issue of residual privilege in such a situation.

Id. at 982 (citation to *Samms* omitted). In further contrasting the factual scenario presented in *Samms*, the Court explained that:

> *[I]n some instances, the waiver of the physician-patient privilege resulting from filing the medical malpractice action might cover virtually all that was discussed between a physician and patient. In other cases, it might cover only a small portion of what was discussed. In such instances, some or all of such discussions will remain subject to the privilege. The facts of Samms clearly fell within this latter category.* Indeed, in an order governing the interview procedures in the case, the trial court noted that the interviews might involve "a reasonable probability of disclosure of material which may be privileged . . . ." Under [such] circumstances, we concluded [in *Samms*] that a malpractice defendant must give notice to the plaintiff-patient that she intends to interview the non-party providers – notice that would afford a plaintiff or the plaintiff's attorney an opportunity to attend any scheduled interview in order to protect against the disclosure of residually privileged information.

Id. at 983 (emphasis added) (citations to *Samms* omitted).

The *Reutter* Court concluded that the facts before it did "not fall within the purview of *Samms,*" because the non-party medical witnesses who treated Mr. Reutter acted "in consultation with" the sued providers in administering a unified course of treatment. *Id.* Thus, unlike the non-party health care providers in *Samms*, these medical witnesses were not likely to possess residually privileged information. *Id.* The Court reasoned as follows:

> *As an initial matter, we note that when medical providers are "in consultation with" a sued provider in administering a unified course of treatment, and that course of treatment forms the basis of the malpractice action, the risk that residually privileged information will be divulged in an interview is much lower than in the Samms scenario, where twenty medical providers administered separate treatments over*

> *what appears to have been a significant period of time.* The facts of this case illustrate this point . . . .
>
> One of the [m]edical [w]itnesses . . . treated Mr. Reutter on one brief occasion and only for the purpose of intubating him. The remaining [m]edical [w]itnesses treated Mr. Reutter continually over a three-day period following his angiogram at [the hospital]. There is no evidence that these [m]edical [w]itnesses acquired any privileged information during this time that would be irrelevant to the malpractice action. Indeed, when pressed by the trial court below and by this court at oral argument, the Reutters were unable to provide any factual basis to support their claim that the [m]edical [w]itnesses had acquired residually privileged information when treating Mr. Reutter . . . . *Thus, the facts here fall within the category of cases . . . in which virtually all information obtained by medical providers is relevant to the malpractice action.*

Id. (emphasis added) (citation omitted).

Because *Reutter* involved non-party health care providers who treated Mr. Reutter in consultation with the defendants in a unified course of treatment, the Court's comments were not surprisingly made in that context. However, it does not follow that the Court's ruling was limited to that specific situation. Under *Reutter*, what this Court must assess in deciding whether to allow defendants' request to conduct *ex parte* interviews of the health care witnesses is the risk that such witnesses possess and will divulge residually privileged information.

The Court concludes that, as was the case in *Reutter*, here, there is a very low risk that the health care witnesses possess and will divulge residually privileged information. Although the health care witnesses did not treat Mr. Garza in consultation with defendants as part of a unified course of treatment, they treated Mr. Garza just hours after defendants saw him and for the very condition that forms the basis of this lawsuit. Thus, there is absolutely no evidence before the Court that these witnesses acquired any privileged information during this time that would be irrelevant to this action.

The Court realizes that defendants' request includes quite a few health care witnesses, but all of them appear to have acted in consultation with one another and as part of a unified course of treatment over a very short period of time (*i.e.*, less than 12 hours). Perhaps most importantly, plaintiff has not asserted, much less demonstrated, that, while treating Mr. Garza between December 9 and 10 of 2003, the health care witnesses acquired residually privileged information not relevant to this lawsuit. Even before defendants filed their motion, their counsel asked plaintiff's counsel to identify what residually privileged information the health care witnesses might possess. Plaintiff's counsel failed to identify any such information. The Court deems such silence as an admission by plaintiff that there is no factual basis to support a claim that the health care witnesses possess residually privileged information irrelevant to this action.

Plaintiff argues that Mr. Garza had been to Littleton Adventist Hospital on other occasions before December 9, 2003.[2] However, there is no evidence before the Court that Mr. Garza was seen by any of the health care witnesses during those visits. Thus, the risk of any residually privileged information being possessed and disclosed by one of these witnesses remains very low.

Accordingly, the motion is granted as to all of the health care witnesses identified by name. The Court is convinced that none of the health care witnesses identified by name possesses any residually privileged information. Defendants may therefore interview such witnesses *ex parte* without providing any additional notice to plaintiff.

The motion does not identify the nurses defendants wish to interview. It simply refers to "various nurses" at Littleton Adventist Hospital. Because plaintiff was treated at Littleton

Adventist Hospital before December 9, 2003, the Court is concerned that one of these "various nurses" may have cared for him before and may possess residually privileged information not relevant to this lawsuit. Thus, before defendants may interview any of the nurses *ex parte*, they must identify them by name. Plaintiff shall then have an opportunity to file an objection to the *ex parte* interview of any nurse she believes cared for or treated Mr. Garza prior to December 9, 2003 who may possess residually privileged information not relevant to this action.[3]

Dated this 27th day of May of 2008.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

[2] Plaintiff does not provide any details about Mr. Garza's prior visits to Littleton Adventist Hospital. For example, the Court has no information regarding when or for what condition Mr. Garza was previously treated at the hospital.
[3] As indicated, it appears to the Court that the medical records related to Mr. Garza's treatment at Littleton Adventist Hospital on December 9, 2003 have already been provided. Thus, defendants should be able to identify by name the nurses they are interested in interviewing *ex parte*.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
Magistrate Judge S. Kato Crews

Civil Action No. 1:19-cv-03220-SKC

DEBORAH DURAN,
individually and as Personal Representative of the
Estate of Gilbert Duran,

Plaintiff,

v.

DONALD CORENMAN, M.D., *et al.*

Defendants.

ORDER GRANTING JOINT MOTION FOR DISCOVERY
TO CONDUCT *EX PARTE* INTERVIEWS WITH
CERTAIN HEALTHCARE PROVIDERS OF GILBERT DURAN [#52]

This case arises out of the death of Gilbert Duran, Plaintiff Deborah Duran's husband, on February 23, 2019. Mr. Duran was diagnosed with melanotic schwannoma cancer in his sacral spine, which ultimately metastasized and resulted in Mr. Duran's death. [#1.][1] Plaintiff brings claims of medical negligence against Mr. Duran's various medical providers, alleging Defendants' delay in diagnosing and treating her husband's cancer resulted in the cancer spreading and was the proximate cause of his death. [*Id.* at ¶¶53-54, 58-59, 63-64, 69-70, 74-75, 80-81.]

[1] The Court uses "[#__]" to refer to docket entries in CM/ECF.

This matter is before the Court on Defendants' motion requesting *ex parte* interviews with Vincent Herlihy, M.D., Scott Raub, D.O., Mark Pitcher, D.C., Victor Villalobos, M.D., Ph.D., Michael Finn, M.D., Trystain Johnson, M.D., and Elizabeth Carpenter, M.D. (collectively the "Providers"), based on *Bailey v. Hermacinski*, 413 P.3d 157 (Colo. 2018) and *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007). [#52.] Each of these medical providers played a role in diagnosing Mr. Duran's cancer, treating him for his back pain (allegedly caused by the cancer), or treating him for his cancer diagnosis.

Defendants argue *ex parte* interviews are permissible in this case for three primary reasons: (1) Plaintiff waived the physician-patient privilege concerning the Providers by filing this lawsuit asserting claims of medical negligence resulting in death; (2) the Providers treated Mr. Duran solely for conditions that are at issue in this case; and (3) the risk any of the Providers possess residually privileged information is minimal. [*See generally* #52.] Plaintiff opposes the motion. [#53.] The Court has considered the Motion and related briefing, the case file, and the relevant law. No hearing is necessary. For the following reasons, the Motion is GRANTED.

Analysis

The Colorado General Assembly has carved out two exceptions to the physician-patient privilege. *See Reutter*, *supra*; *see also Samms v. District Court, Fourth Judicial Dist. of State of Colo.*, 908 P.2d 520 (Colo. 1995). Relevant here, "a plaintiff in a personal injury case impliedly waives the physician–patient privilege

with respect to matters known to the physician that are relevant in determining the cause and extent of injuries which form the basis for a claim for relief." *Samms*, 908 P.2d at 525.[2] Here, Plaintiff concedes the privilege is waived as "to the cause of and extent of [Mr. Duran's] medical condition related to the failure to diagnose and treat the mass which was subsequently diagnosed as a melanotic schwannoma." [#53 at p.5.] And Plaintiff acknowledges these practitioners provided care and treatment for Mr. Duran related to the claims and allegations in this lawsuit.[3] [#53 at p.5.] But Plaintiff argues: (1) the Providers are likely to have residually privileged health information; (2) there is a potential for bias or undue influence; and (3) allowing the *ex parte* interviews would not promote judicial efficiency and instead, Defendants should depose the Providers. Plaintiff also proposes (should the Court permit these interviews) various "safeguards" for the Court to implement.

1. Residually Privileged Materials

Plaintiff argues the Providers have information beyond that which is related to this case. Specifically, she contends the Providers have extensive knowledge of

[2] The second exception applies to medical providers who were "in consultation with" the defendants. Defendants do not contend any of the Providers worked in consultation with them.

[3] In her conferral letter, Plaintiff argued *ex parte* conversations with Dr. Pitcher, D.C., were inappropriate because Dr. Pitcher only treated Mr. Duran for his back pain. [#52-2 at p.2.] Plaintiff does not raise this specific argument in her Response, but the Court, nevertheless, concludes Dr. Pitcher's treatment is relevant to this action because the source, treatment, and diagnosis of Mr. Duran's back pain is central to the medical negligence claims.

Plaintiff's medical history, family history, and "other information." First, Defendants are correct that family history is not privileged. *See Hartmann v. Nordin*, 147 P.3d 43, 52–53 (Colo. 2006) ("In revealing their medical conditions . . . the close family members would each have waived their physician-patient privilege as to the information they disclosed."). Second, with respect to the "other" privileged information, Plaintiff has offered no specifics as to what this information is and instead conjectures these interviews may result in "full medical record disclosure." Without more, there is no basis to find a high risk of disclosure of privileged information. Rather, based on the focus of each Provider's treatment, it would appear the waiver of the physician-patient privilege covers virtually all of what would have been discussed between the Providers and Mr. Duran. Finally, Defendants have agreed to use only the redacted medical records in these interviews and the Court incorporates this assurance into its Order. Therefore, to the extent any information unrelated to the present case is in the medical records, the risk of disclosure is minimal.

2. Bias or Undue Influence

The Colorado Supreme Court, in *Samms*, recognized the presumption "that both attorneys and physicians will conduct themselves ethically." 908 P.2d at 528. Physicians have an obligation to tell the truth and attorneys may not seek irrelevant information. *Id.* Here, Plaintiff argues she should be given notice and an opportunity to attend these interviews because there is a risk of undue influence and bias.

Plaintiff contends there is a risk of bias because several of the Providers work with or are supervised by various Defendants. But apart from the fact of this association, Plaintiff has not offered any specific evidence that would suggest the potential for bias. Rather, she speculates these providers will be motivated to protect themselves and their supervisors. Speculation alone is not enough.

Plaintiff also argues Drs. Finn, Raub, and Villalobos have not responded to her Counsel's communications and argues these doctors' willingness to speak with Defense Counsel and not Plaintiff's Counsel suggests bias and undue influence. But Plaintiff does not know (or has not shared) why these doctors have not responded. It is just as possible they are simply busy medical professionals operating in a world beset by a global pandemic. The Court will not make presumptions of bias based solely on a failure to return Counsel's phone calls or emails. Furthermore, there is no guarantee any of these providers will agree to speak with Defense Counsel. *Samms*, 908 P.2d at 528 ("a treating physician may decline to participate in *ex parte* discussions with defense counsel."). And if the Providers will not speak with Plaintiff's Counsel, then the discovery tools provided by the Federal Rules of Civil Procedure are available.

3. Judicial Efficiency

Plaintiff also argues *ex parte* interviews would be inefficient, costly, and lead to discovery disputes, and that Defendants should depose the Providers instead. This, however, is directly contrary to prevailing law. *Id.* at 526 ("Personal interviews are

an accepted informal method of discovery. . . . A rule permitting informal communications between a defense attorney and a plaintiff's treating physician promotes the discovery process by assuring that both parties have access to an informal, efficient, and cost-effective method for discovering facts relevant to the proceedings . . . . A contrary rule would encourage resort to expensive and time-consuming formal discovery methods when such methods could be avoided.") (Citations omitted). The Court finds no justification for requiring Defendants to bear the cost of depositions if they may be avoided.

* * *

On this record, the Court finds Plaintiff has impliedly waived the physician-patient privilege as to the cause and extent of Mr. Duran's medical condition and the failure to diagnose and treat his terminal cancer. The Court also finds little potential for residually privileged information to be divulged in *ex parte* interviews of the Providers.

For these reasons, IT IS ORDERED Defendants may conduct *ex parte* interviews with Vincent Herlihy, M.D., Scott Raub, D.O., Mark Pitcher, D.C., Victor Villalobos, M.D., Ph.D., Michael Finn, M.D., Trystain Johnson, M.D., and Elizabeth Carpenter, M.D., without providing further notice to Plaintiff's Counsel or an opportunity to attend.[4]

[4] Defendants request this Court include a provision regarding any attempt on the part of Plaintiff's Counsel to interfere with Defendants' ability to conduct these interviews, such as communicating any objection to the Providers. Plaintiff's Counsel

IT IS FURTHER ORDERED in conducting these interviews Defendants and the Providers shall be limited to only the redacted version of Mr. Duran's medical records.[5]

DATED: May 14, 2021

BY THE COURT:

S. Kato Crews
U.S. Magistrate Judge

is an officer of the Court and the Court trusts Counsel to act in accordance with duties incumbent to the role. Therefore, the Court concludes such an Order is currently unnecessary.

[5] Defendants make passing reference to a document they would like Plaintiff to produce unredacted. [#56 at p.8.] This is raised for the first time in the Reply and must be addressed pursuant to the Court's practice standards regarding discovery disputes.

DENVER, COLORADO 80246

December 15, 2022

VIA CERTIFIED MAIL 7019 2280 0001 9265 9678
AND US MAIL

Dr. Amy Kay Fenoglio
UCHealth Broomfield Medical Center
875 W. 136th Street
Broomfield, CO 80023

Re:

Dear Dr. Fenoglio:

I am the attorney for your patient , who is currently pursuing legal action related to bilateral neurological injuries to her upper extremities, which occurred following a lengthy colo-rectal surgery in which her medical providers failed to adequately pad or reposition arms.

Counsel for the medical providers in that case have indicated that they would like to interview you without or her counsel being present.

Please be advised that has asked that you honor her HIPAA rights, and that you not meet with any third parties in relation to her medical condition without and/or her attorney also being present.

Thank you for your consideration in this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Gordon P. Gallagher, United States Magistrate Judge

Civil Case No. 20-CV-00278-DDD-GPG

LEONARDO GARCIA, by and through his Conservator, Baysore & Christian Fiduciary Services LLC,

Plaintiff,

v.

HEATHER GARDNER, M.D.,
MARK YOUNG, M.D.,
CHRISTY ROBERTS, RT,
ELLISSA REICHSTEIN, RN, and
HUMANA OF DELAWARE, INC. d/b/a VALLEY VIEW HOSPITAL AND MEDICAL CENTER, INC.,

Defendants.

ORDER GRANTING DEFENDANTS' JOINT MOTION FOR EQUAL EX PARTE ACCESS TO TREATING HEALTH CARE PROVIDERS

This matter comes before the Court on Defendants' joint motion (D. 30)[1], Plaintiff's response (D. 35), and Defendants' reply (D. 38). The motion has been referred to this Magistrate

[1] "(D. 30)" is an example of the stylistic convention used to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Order.

Judge. (D. 31).[2] The Court has reviewed the pending motion, response, reply, and all attachments. The Court has also considered the entire case file, the applicable law, and is sufficiently advised in the premises. Oral argument is not necessary. This Magistrate Judge GRANTS the motion for the reasons specifically set forth below.

I. FACTS

Plaintiff was born prematurely on October 13, 2017, at 23 weeks gestation in St. Mary's Hospital in Grand Junction, Colorado, and spent his first ten days in the neonatal intensive care unit. (D. 1, p. 4; D. 35, p. 3). On October 23, 2017, Plaintiff was transferred to Children's Hospital in Aurora, Colorado. (D. 35, p. 3). On January 27, 2018, Plaintiff was discharged. (D. 1, p. 4). On February 2, 2018, Plaintiff was admitted to Valley View Hospital in Glenwood Springs, Colorado, after exhibiting apnea and testing positive for rhino/enterovirus. (*Id.*; D. 35-3, p. 1). A decision was made to transport Plaintiff to Children's Hospital in Denver, Colorado, and Plaintiff was intubated in preparation for transport. (D. 1, p. 5). The first attempt at intubating Plaintiff was unsuccessful, however, the second intubation by the anesthesiologist with a 3.5-millimeter uncuffed endotracheal tube was successful and he was placed on a ventilator. (*Id.*; D. 35-3, p. 2). A blood gas analysis indicated that Plaintiff had developed respiratory acidosis and, due to loss of breath sounds, Plaintiff was extubated. (D. 1, p. 6; D. 35-3, p. 2). Plaintiff was later reintubated by the anesthesiologist with a 4.0-millimeter uncuffed endotracheal tube and transported to Denver. (D. 1, p. 6). Upon arrival at Children's Hospital, the 4.0-millimeter uncuffed endotracheal tube was removed and replaced with a 3.5-millimeter microcuff endotracheal tube. (*Id.*, p. 7).

[2] The Court's ruling on this matter is nondispositive as it does not remove any claim or defense from this case. Pursuant to 28 U.S.C. § 636 (b)(1)(A), "A judge of the court may reconsider any pretrial matter under subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." Any party may object to this nondispositive Order within fourteen (14) days. FED. R. CIV. P. 72(a).

On February 8, 2018, a laryngoscopy indicated glottic and subglottic edema. (*Id.*). On February 9, 2018, a bronchoscopy indicated that Plaintiff had stridor and airway obstruction in conjunction with subglottic injury. (*Id.*). Inpatient progress notes dated February 10, 2018, noted that Plaintiff "[c]ontinues to require intubation for airway stenting after traumatic intubation leading to glottic edema, subglottic airway with large mucosal erosion and exposed cartilage." (D. 35-2). On February 28, 2018, Plaintiff underwent a tracheostomy. (D. 1, p. 7). On March 5, 2018, Plaintiff underwent a laparoscopic-assisted gastronomy placement and, on March 22, 2018, a microlaryngoscopy, a bronchoscopy, a suspension laryngoscopy with balloon dilation and steroid application, and a silver nitrate cautery to stomal granulation tissue. (*Id.*). Plaintiff remained at Children's Hospital until he was transferred to UNC Medical Center in Chapel Hill, North Carolina in July 2018. (*Id.*, p. 8). Plaintiff remained at UNC through November 2018. (*Id.*). In June 2018, Plaintiff's physician noted that he will likely need airway reconstruction. (*Id.*).

Plaintiff filed a complaint on February 3, 2020, alleging that he suffered permanent injuries due to the intubation, which caused and will continue to cause, among other things: medical and therapy expenses, physical impairment, and physical disfigurement. (*Id.*). On April 14, 2020, Plaintiff submitted initial disclosures under Federal Rule of Civil Procedure 26(a)(1) listing 247 medical providers who either provided treatment to Plaintiff, may have information in conformity with the medical records, or may have information about communications about Plaintiff with other health care providers. (D. 38-2). Defendants in their instant motion seek ex parte access, in a matter that is equal to Plaintiff's counsel, to the 247 health care providers as identified within the chart appended to the motion. (D. 30-1, pp. 1-4).

II. LEGAL STANDARD

Because this case arises under diversity jurisdiction, this Court will not reach its own judgment regarding the substance of the common law, but merely "ascertain and apply the state law." *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665 (10th Cir. 2007) (quoting *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003)); *see also Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Colorado law recognizes a physician-patient privilege where, "[a] physician, surgeon, or registered professional nurse . . . shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient." Colo. Rev. Stat. Ann. § 13-90-107(1)(d).

But this privilege does not apply to medical professionals who are "sued by or on behalf of a patient" or "in consultation with a physician, surgeon, or registered professional nurse being sued." *Id.* § 13-90-107(1)(d)(I)-(II). Medical providers are "in consultation" with defendants "if the party and non-party providers 'collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment.'" *Bailey v. Hermacinski*, 413 P.3d 157, 161 (Colo. 2018) (quoting *Reutter v. Weber*, 179 P.3d 977, 981 (Colo. 2007)). The Colorado Supreme Court has also found that the privilege can be waived by: (1) an express waiver or an implied waiver that is supported by words or conduct or (2) putting medical conditions at issue in a lawsuit. *Id.* at 162; *Clark v. Dist. Court, Second Judicial Dist., City & Cty. of Denver*, 668 P.2d 3, 8-10 (Colo. 1983) ("When the privilege holder pleads a physical or mental condition as the basis of a claim or as an affirmative defense, the only reasonable conclusion is that he thereby impliedly waives any claim of confidentiality respecting that same condition.").

The claimant of the privilege bears the burden of establishing its applicability or that the exceptions under section 13-90-107(1)(d) are inapplicable. *Bailey*, 413 P.3d at 161, 163; *see also*

Alcon v. Spicer, 113 P.3d 735, 739 (Colo. 2005). If privilege is established, then "the party arguing for a finding of implied waiver must carry the burden of showing that waiver." *Bailey*, 413 P.3d at 163. And if waiver is established, then the burden shifts back to the proponent of the privilege to demonstrate that there is "a risk of residually privileged information being disclosed during the ex parte interviews." *Id.*; *see also Reutter*, 179 P.3d at 979.

If the Court determines that the privilege has been waived, the Court must then consider what measures, if any, need to be instituted to (1) "protect against inadvertent discovery of residually privileged information," and (2) "ensure that the non-party medical providers are not subject to undue influence in the course of those ex parte interviews." *Bailey*, 413 P.3d at 163. Additionally, the "implied waiver covers only the extent and context of the condition and the subsequent damages that form the basis of the claim for relief; it does not amount to a general disclosure of the patient's entire relationship with the physician in question." *Id.*

III. ANALYSIS

Defendants move this Court to permit counsel equal ex parte access to meet with Plaintiff's past and current treating health care providers regarding rendered care and treatment exclusive to the alleged injuries and damages. (D. 30). According to Defendants, the medical professionals were either in consultation or the patient-physician privilege has been waived. (*Id.*, pp. 6-7). The health care providers are identified by name, by location (i.e., the medical group or facility where care was provided), and, when applicable, by date of admission. (D. 30-1, pp. 1-4). Plaintiff opposes, arguing: (1) a de minimis amount of providers were 'in-consultation' with Defendants; (2) Defendants failed to meet the burden of proving an implied waiver of the privilege; and (3) under Federal Rule of Civil Procedure 26, the request to speak ex parte with 247 of the health

care providers is disproportional to the needs of the case as many of the providers listed did not treat Plaintiff for his alleged injuries. (D. 35, p. 2).

Plaintiff's arguments, however, are unavailing. Plaintiff alleges that he suffered grievously as a result of Defendants' actions and seeks damages for the medical expenses related to his multiple intubations. (D. 1, p. 8; D. 35, p. 10). But Plaintiff's own Rule 26 disclosures list hundreds of relevant medical providers whom Plaintiff claims have knowledge and information concerning Plaintiff's alleged injuries. (*See* D. 38-2). It is these disclosures which largely form the basis of Defendants' list of providers submitted for possible ex parte interviews. This Court will address each of Plaintiff's arguments inversely.

First, Rule 26 allows a party "to obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1). Defendants set forth a summary of the medical care provided to Plaintiff within their motion. (D. 30, pp. 2-6). Based on Plaintiff's disclosures, it appears that many health care providers have attended to Plaintiff and may have information that may be relevant to determining if Defendants are at fault and, if so, what percentage is attributable to Defendants' multiple intubations. The Defense requests ex parte access to the physicians, employees, and representatives from Valley View Hospital, Pediatric Partners of Glenwood, Children's Hospital Colorado, AirLife Denver, St. Mary's Hospital, UNC Hospital, UNC Capital Pediatric Knightdale, Carolina Air Care, WakeMed Raleigh Campus, and Aveanna Healthcare. (D. 38-2). Here, this Court does not find that a request to interview many of the medical professionals identified by Plaintiff as having knowledge and information concerning the care and treatment at issue in this case to be disproportional to the needs of the case.

Moreover, Plaintiff argues that only a small number of health care providers were in consultation with the Defendants. This Court, however, finds that a request to interview these individuals ex parte also fits within the parameters of proportionality. By its very nature, an ex parte interview is less formal, less expensive, and less time consuming than either an interview with counsel from both sides present or a deposition. While there are many health care providers listed, this Court expects that the parties will tailor the list of interviewees considerably to those that have had substantial involvement in this case. For those reasons, this Court does not find that Defendants' request disproportionate.

Next, this Court examines the meaning of "in consultation with" pursuant to section 107(1)(d). "[A] non-party medical provider is in consultation with the defendant medical provider for the purposes of section 107(1)(d)(II) if the party and non-party providers 'collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment.'" *Bailey*, 413 P.3d at 161 (quoting *Reutter*, 179 P.3d at 981). Specifically, this Court should examine whether "non-party medical providers were in consultation with the defendant medical providers" based on whether: (1) there was "particularly integrated care that the plaintiff received from both the defendant and non-party medical providers," (2) "the non-party medical providers were employed by the same facility as the defendant medical providers," and (3) "care was provided over just a few days while the plaintiff was being treated at that single facility." *Id.* at 161–62. Plaintiff concedes that five physicians from Valley View Medical Center were in consultation with the Defendants. (D. 35, p. 7). Defendants may have ex parte meetings with Brandy Drake, MD; David Brooks, MD; Ellen Brooks, MD; Christopher Bartlett, MD; and Jason DiCarlo, MD. (D. 30-1, p. 4).

Furthermore, Plaintiff concedes that Deborah Liptzin, MD; Stephanie Bourque, MD; and Sunah Hwang, MD from Children's Hospital Colorado treated Plaintiff on or the day after his traumatic intubation. (D. 35, p. 7). Defendant Gardner was Plaintiff's primary care physician and referred Plaintiff to The Children's Hospital, where he was transported via helicopter on February 2, 2018. Hwang, the receiving physician, listed Gardner as the referring physician, listed Bourque as the Neonatal-Perinatal Fellow, and documented the treatment history of Plaintiff at Valley View Hospital. (*See* D. 38-1, pp. 1-4). Hwang noted that Plaintiff was "admitted from [Emergency Department (ED)] to [Intensive Care Unit] due to apnea witnessed in ED, initially placed on [a continuous positive airway pressure machine (CPAP)] and then intubated and reintubated." (D. 38-1, p. 1). Hwang noted that there was a plan to "update referring team at Valley View Hospital in AM." (*Id.*, p. 4). Accordingly, Defendants may have ex parte meetings with these three physicians.

Finally, this Court will next analyze whether Plaintiff impliedly waived the physician-patient privilege for the remaining medical professionals. The Colorado Supreme Court has held that "consent may be given explicitly, but also implicitly through an implied waiver of the privilege." *Bailey*, 413 P.3d at 162 (citations omitted). The Colorado Supreme Court noted that:

> [t]he implied waiver doctrine is rooted in the notion that a party who puts their medical or physical condition at issue in a lawsuit cannot then shield the information related to that condition from discovery. Specifically, a plaintiff in a personal injury case impliedly waives the physician-patient privilege with respect to matters known to the physician that are relevant in determining the cause and extent of injuries which form the basis for a claim for relief. Because an implied waiver determination necessarily depends on the nature and extent of a particular and unique mental or physical condition, we have repeatedly recognized that such a determination will vary on a case-by-case basis. Importantly, an implied waiver covers only the extent and context of the condition and the subsequent damages that form the basis of the claim for relief; it does not amount to a general disclosure of the patient's entire relationship with the physician in question.

Id. at 162-63 (citations and internal quotation marks omitted). As noted above, the medical professionals at issue were identified in Plaintiff's initial Rule 26 disclosures. (*See* D. 38-2). Plaintiff alleged that each health care provider had knowledge and information pertaining to Plaintiff's care and treatment at issue in this case or the downstream effects resulting from the allegedly traumatic intubations.

This Court considers the Plaintiff's age when the alleged injury occurred, the medical complexities surrounding Plaintiff's birth at 23 weeks gestation, and the temporal scope of the treatment—essentially from birth to approximately 19 months of age (or adjusted age of approximately 12 months). Here, Plaintiff claims that the injuries, while initially localized to the larynx, have had a systemic effect on the entirety of the Plaintiff. To that end, Plaintiff identified hundreds of medical professionals who have knowledge and information pertaining to Plaintiff's care and treatment at issue in this case —and simultaneously impliedly waived the privilege as to those same individuals. And Plaintiff has not demonstrated to this Court that there is a risk of residually privileged information being disclosed during the ex parte interviews. This Court does not find it necessary to impose any restrictions to avoid undue influence as this Court expects that counsel will professionally conduct all interviews and limit the interviews to Plaintiff's condition and the subsequent damages that form the basis of the claim for relief.

IV. CONCLUSION

For the foregoing reasons, this Magistrate Judge GRANTS Defendants' motion. (D. 30).

Dated at Grand Junction, Colorado this October 15, 2020.

Gordon P. Gallagher
United States Magistrate Judge

DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601	 DATE FILED: March 16, 2012
ZECHARIAH RICARDO GARCIA and MARISSA MAYA GARCIA, minor children, by and through their mother and next best friend, DENISE GARCIA; and DENISE GARCIA, individually, Plaintiffs, v. **KOSTAS M. ZINIS; THOMAS DOTY; MOUNTAIN VIEW ORTHOPEDICS, P.C.; and DAVID A. LUCKS,** Defendants.	**COURT USE ONLY** Case Number: 10CV290 Division: C Courtroom: 506

ORDER

Defendants Kosta M. Zinis, D.O., and Mountain View Orthopedics, P.C. (collectively, "Defendants") filed a Motion for Leave to Conduct *Ex Parte* Interviews with certain health care providers of Juan J. Garcia, specifically Ann Thompson, R.N., Jennifer Gordon-Norby, MSPT, and Michael Bagley, D.O. on January 24, 2012. Plaintiffs filed a Response on February 14, 2012. A Reply was filed on February 22, 2012. The Court, being fully advised, finds and orders as follows:

Background to Motion

Plaintiffs allege Defendants negligently provided medical care and treatment to the decedent, Juan Garcia, between December 7, 2007 and February 21, 2008.

Specifically, Plaintiff alleges Dr. Zinis, an osteopathic physician specializing in orthopedic medicine, failed to properly treat Mr. Garcia for his developing Methicillan Resistant Staphylococcus Aureus ("MRSA") infection in his right shoulder, which allegedly developed as a result of exposure during an arthroscopic surgical procedure performed by Dr. Zinis on Mr. Garcia's right shoulder on December 7, 2007. Mr. Garcia passed away on February 21, 2008. Plaintiffs' allege Mr. Garcia died due to complications from the right shoulder MRSA infection. Defendants seek to conduct *ex parte* meetings with Ms. Thompson, Ms. Gordon-Norby, and Dr. Dagley without prior notice to Plaintiffs or their attorneys.

Brief Summary of the Parties' Arguments

Defendants

Ex parte meetings are appropriate with Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley for four reasons: (1) Plaintiffs waived any claim of privilege for medical care and treatment of the medical conditions at issue on this case; (2) Plaintiffs waived any privilege by producing the medical records from Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley and by not producing a privilege log claiming any of the medical records is residually privileged; (3) Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley were "in consultation" with Dr. Zinis; and (4) Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley do not possess any residually privileged information.

Plaintiffs

None of the healthcare providers sought to be interviewed *ex parte* are defendants in this case, nor can they be characterized as being in a unified course of care with Dr. Zinis and MVO. The sought *ex parte* interviews risk the divulgement of residually privileged information; thus, the most appropriate protection available to Plaintiffs is for their counsel to have the opportunity to

attend the interviews.

Issue

Should the Court permit *ex parte* meetings with Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley?

Principles of Law

C.R.S. § 13-90-107. Who may not testify without consent

d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:

(I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;

(II) A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

(III) A review of a physician's or registered professional nurse's services by any of the following….

Analysis

Plaintiffs are not objecting to Defendants interviewing Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley. The only issue is whether Defendants may interview these medical providers *ex parte*. In *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007) the Colorado Supreme Court analyzed when a trial court may permit *ex parte* meetings with medical witnesses.

First, the Colorado Supreme Court held that there are circumstances where the statutorily created physician-privilege does not exist. *Id.* at 980. Under C.R.S. § 13-90-107(1)(d)(I), the physician-privilege does not prevent a medical provider who is sued for malpractice from disclosing confidential medical information concerning the subject matter of the plaintiff's suit. *Id.* Under C.R.S. § 13-90-107(1)(d)(II), "the statutory privilege does not apply to a medical provider '*who was in consultation with* a physician, surgeon, or registered professional nurse being sued ... on the case out of which said suit arises.'" *Id.* at 981.

Next, the court analyzed its opinion in *Samms v. District Court*, 908 P.2d 520 (Colo. 1995). The court found that regardless of whether the statutorily created physician-privilege exists, a trial court may allow *ex parte* meetings with non-party medical providers when the risk that the non-party medical provider has "residually privileged" information is low. *Id.* at 979. "Residually-privileged" information is medical information not relevant to the malpractice action. *Id.* The court held:

> We disagree with the Reutters' argument that, under our decision in *Samms v. District Court*, 908 P.2d 520 (Colo.1995), they are entitled to attend the interviews in order to protect medical information not relevant to their malpractice action—that is, residually privileged information. *Samms* did not create a blanket rule that a plaintiff is always entitled to attend an interview of a non-party medical provider. Instead, it held that the trial court should take appropriate measures to protect against the divulgement of residually privileged information, and that allowing the plaintiff to attend the interview is the preferred measure where there is a high risk that residually privileged information will be divulged…Where, as here, the non-party medical providers do not possess residually privileged information, the trial court does not abuse its discretion by refusing to require that the plaintiff be permitted to attend the interviews of those non-party medical providers.

Id. at 979. The court noted that when the medical providers were "in consultation with" each other in a unified course of treatment—a course of treatment that forms the basis of the malpractice action, the risk that residually privileged information will be divulged is relatively low. *Id.* The court, however, did not state that the trial court must first find the statutorily created physician-privilege does not exist before analyzing whether counsel may interview the non-party medical providers *ex parte*.

Thus, the key question is whether there is a high risk that the non-party medical providers sought to be interviewed *ex parte* possess, and will divulge, residually privileged information. In coming to this conclusion, the trial court must "assess the risk that there is residually privileged information, taking into account not only the evidence offered by the plaintiff-patient, but also the circumstances of the plaintiff-patient's treatment and the likelihood that those circumstances could give rise to residually privileged information." *Id.*

Here, the risk that Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley have residually privileged information is low. It is undisputed that these medical providers only treated Mr. Garcia for the medical care at issue in this matter. Plaintiffs failed to provide a factual basis for the claim that Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley may have residually privileged information. Plaintiffs generically argue "Mr. Garcia had a medical history that covered the first 38 years of his life and was shared at least in part with his medical providers." (Resp. at 10.) Plaintiffs, however, failed to cite to any medical record or possible discussion with a health care provider showing evidence of any privileged information during his treatment that would be irrelevant to the malpractice action.

Furthermore, the risk that residually privileged information will be divulged is low because Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley were "in

consultation with" Defendants. "While one physician might be the primary medical provider, other medical providers typically play a role in the patient's treatment." *Id.* at 981. Medical providers are "in consultation with" one another if they "collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment." *Id.* "There is nothing in the meaning of 'consultation,' however, that excludes the taking of other actions. In other words, a medical provider who actually treats a patient can also consult with others who are providing treatment." *Id.*

Although Defendants did not provide evidence of specific conversations between the Defendants and Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley, the evidence suggests they were collectively assessing and providing a unified course of medical treatment for Mr. Garcia. Ms. Thompson was "in consultation" with Defendants Dr. Zinis and Dr. Lucks regarding the care and treatment of Mr. Garcia's MRSA infection. Dr. Zinis, in the course of on-going care, referred Mr. Garcia to the infectious disease physician, Defendant Dr. Lucks, for care and treatment of his MRSA infection. Dr. Lucks then referred Mr. Garcia to Saturday Home Health Partner Services ("SHHPS") to treat and clean the wound in his right shoulder by providing IV therapy, skilled nurse assessments of wounds, PICC line dressings and laboratory draws as ordered. Ms. Thompson was the registered nurse at SHHPS performing all of Mr. Garcia's care and treatment. (*See* Ex. O to Reply.) Ms. Thompson continued to see Mr. Garcia from December 21, 2007 through January 2, 2008, the time frame at issue in this case.

Once Mr. Garcia was discharged from SHHPS's care, Dr. Zinis referred Mr. Garcia to Hands on Physical Therapy, Inc., to treat Mr. Garcia's pain and lack of motion in his right shoulder resulting from the surgeries, where he was treated by Ms. Gordon-Norby. Ms. Gordon-Norby kept Dr. Zinis informed on her evaluation

of Mr. Garcia. (*See* Ex. R to Reply.) Finally, on February 20th and 21st, Dr. Bagley, who was likely filling in for Dr. Zinis, treated Mr. Garcia by ordering and interpreting an MRI of Mr. Garcia's right shoulder and incising and draining the fluid from Mr. Garcia's right shoulder. Ms. Thompson, Ms. Gordon-Norby, MSPT, and Dr. Bagley only treated Mr. Garcia for his right shoulder after referrals from the defendants and their care relates only to the care at issue in this lawsuit.

Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley were "in consultation with" the defendants such that the physician-patient privilege did not apply to information acquired by the non-party medical providers concerning the course of treatment that was the basis of Plaintiffs' claims. Because the risk that residually privileged information will be divulged is low, it is unnecessary for Defendants to provide Plaintiffs with notice of meetings with Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley and to afford Plaintiffs or their attorney an opportunity to attend any scheduled interview.

Order

Defendants Motion for *Ex Parte* Meetings is GRANTED. Defendants may therefore meet *ex parte* with Ms. Thompson, Ms. Gordon-Norby, and Dr. Bagley without further notice to Plaintiffs.

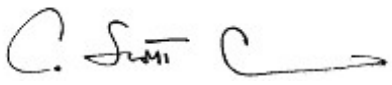
Dated this 16th day of March, 2012.

By the Court:

C. Scott Crabtree
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via LexisNexis (e-file) to all counsel of record and to all *pro se* parties this 16th day of March, 2012.



Court

DISTRICT COURT, COUNTY OF BOULDER STATE OF COLORADO 1777 6th Street Boulder, CO 80302	DATE FILED: July 17, 2023 4:30 PM FILING ID: 577F9B31B6935 CASE NUMBER: 2023CV30318
Plaintiff: SAMANTHA GEBHARDT **v.** **Defendant: DOUGLAS C. HARDY, DMD, MHS**	**COURT USE ONLY** Case Number: 2023CV30318 Division: 2
PROPOSED CASE MANAGEMENT ORDER	

Pursuant to C.R.C.P. 16(b), the parties herein jointly submit this proposed Case Management Order. Counsel for the parties have conferred in the development of the proposed Case Management Order and have reached agreement on the proposed provisions, as set forth below.

The case management conference is set for _____ at _____.

1. The "at issue date" is **June 22, 2023**.

2. Responsible attorney's name, address, phone number and email address:

Thomas J. Tomazin, #5941
Henry Miniter, #37412
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Attorneys for Plaintiff

3. The lead counsel for all parties met and conferred by telephone concerning this Proposed Order and each of the issues listed in Rule 16(b)(3)(A) through (E) on **June 13, 2023**.

4. Brief description of the case and identification of the issues to be tried (not more than one page, double-spaced, for each side):

Plaintiff: On May 20, 2021, Plaintiff Samantha Gebhardt presented to Douglas C. Hardy, DMD, MHS at Perfect Teeth in Boulder, Colorado for a distal wedge procedure to remove excess tissue covering Plaintiff's teeth. During the procedure, Dr. Hardy severed both Ms. Gebhardt's left and right lingual nerves causing permanent injury. These neurological injuries permanently impacted Ms. Gebhardt's ability to taste, impeding her ability to work as the Head Brewer at the Berthoud Brewing Company. Defendant's failure to take proper precautions to avoid severing the lingual nerves was a breach of the applicable standard of care and caused Ms. Gebhardt's injuries and damages.

Defendant: Douglas C. Hardy, DMD, MHS is a dentist licensed to practice in the State of Colorado. On May 20, 2021, Dr. Hardy performed bilateral distal wedge procedures on Plaintiff Samantha Gebhardt. Dr. Hardy acted reasonably and as other reasonable dentists with similar training would have to perform this procedure on Plaintiff based on her medical record, presentation, and the information otherwise provided to Dr. Hardy. Dr. Hardy denies that his care and treatment of Plaintiff at any time fell below applicable standards of care and denies that any negligent act or omission on his part was a proximate cause of Plaintiff's claimed injuries. Dr. Hardy fully incorporates each defense asserted in his Answer to Plaintiff's Complaint by reference herein.

5. The following motions have been filed and are unresolved: **N/A**

6. Brief assessment of each party's position on the application of the proportionality factors, including those listed in C.R.C.P. 26(b)(1):

The parties agree the discovery plan set forth in this order is proportional to (a) the needs of the case, (b) the importance of the issues at stake, (c) the amount in controversy; (d) the parties' access to relevant information; (e) the parties' resources; (f) and the importance of such discovery in resolving the issues. The parties agree that

the burden or expense of the discovery proposed in this order does not outweigh the likely benefit of such discovery.

7. The lead counsel for each party met and conferred concerning possible settlement. The prospects for settlement are:

The parties agree to engage in meaningful settlement discussions as soon as reasonably possible after necessary disclosures and discovery have occurred.

8. Deadlines for:

a. Amending or supplementing pleadings: (Not more than 105 days (15 weeks) from at issue date.) **October 5, 2023**

b. Joinder of additional parties: (Not more than 105 days (15) weeks from at issue date.) **October 5, 2023**

c. Identifying non-parties at fault: **August 1, 2023**

9. Dates of initial disclosures: **July 20, 2023**

Objections, if any, about their adequacy: The parties have discussed what they expect to receive and will bring any disputes to the Court, if needed, after further conferral.

10. If full disclosure of information under C.R.C.P. 26(a)(1)(C) was not made because of a party's inability to provide it, provide a brief statement of reasons for that party's inability and the expected timing of full disclosures and completion of discovery on damages: **N/A**

11. Proposed limitations on and modifications to the scope and types of discovery, consistent with the proportionality factors in C.R.C.P. 26(b)(1): **None**

a. Number of depositions per party: C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + both retained and non-retained experts per C.R.C.P. 26(b)(4)(A).

b. Number of interrogatories per party (C.R.C.P. 26(b)(2)(B) limit of 30): **30**

c. Number of requests for production of documents per party (C.R.C.P. 26(b)(2)(D) limit of 20): **20**

d. Number of requests for admission per party (C.R.C.P. 26(b)(2)(E) limit of 20): **20**

e. Any physical or mental examination per C.R.C.P. 35: Dr. Hardy may request a Rule 35 Independent Medical Examination, which shall be set cooperatively and without a motion.

f. Any limitations on awardable costs: Awardable costs may be recovered according to applicable Colorado law.

g. State the justifications for any modifications in the foregoing C.R.C.P. 26(b)(2) limitations: **N/A**

12. Number of experts, subjects for anticipated expert testimony, and whether experts will be under C.R.C.P. 26(a)(2)(B)(I) or (B)(II):

Plaintiff: Plaintiff anticipates endorsing retained expert witnesses in the following areas: Dentistry, oral and maxillofacial surgery, dentistry, periodontics, neurology, and lost earnings/economic damages. Plaintiff anticipates calling certain treating physicians as non-retained experts.

Defendant: Dr. Hardy anticipates three to four retained experts pursuant to C.R.C.P. 26(a)(2)(B)(I), including a dentist and/or oral and maxillofacial surgeon on the standard of care, medical experts (including, possibly, a neurologist) regarding medical causation, and an economist to opine on lost earnings. Dr. Hardy may retain any additional experts necessary to rebut Plaintiff's experts; endorse experts in any other field retained by Plaintiff; and/or endorse non-retained treating providers pursuant to C.R.C.P. 26(a)(2)(B)(I).

If more than one expert in any subject per side is anticipated, state the reasons why such expert is appropriate consistent with proportionality factors in C.R.C.P. 26(b)(1) and any differences among the positions of multiple parties on the same side: **N/A**

13. Proposed deadlines for expert witness disclosure if other than those in C.R.C.P. 26(a)(2):

a. production of expert reports:

i. Plaintiff/claimant: **126 days before trial**

ii. Defendant/opposing party: **98 days before trial**

iii. production of rebuttal expert reports: **77 days before trial**

b. production of expert witness files:

i. The parties will produce copies of their retained experts' files 7 days prior to the deposition of any expert, or 14 days after a request for an expert's file is made in writing after experts for all parties have been disclosed. The parties shall supplement expert files no later than 28 days before trial.

ii. The "file" includes, but is not limited to, notes, billing information, telephone notes, correspondence (other than protected communications between the party's attorney and expert witnesses, as defined by C.R.C.P. 26), articles, medical literature which the expert reviewed or relied upon and medical literature which will be used at trial and is known at the time of the deposition, sticky notes a/k/a post-it-notes, billing information to include any computerized billing records, any type of time logs, and any notes regarding time spent, copies of any chronologies supplied by counsel or created by the expert, any medical literature, text or articles supplied by counsel or referenced by the expert, and any materials, contracts, written agreements, bills, or other documentation regarding the expert's affiliation with any expert witness services, if applicable. Any records or depositions which have been reviewed need not be produced unless they contain written notations, highlighting, flagging or other markings made by the expert. These records and depositions shall be identified by list only unless the record is not one which has been made available to the parties, in which case it must be produced one week before the deposition.

c. Schreck or other expert motions: **70 days before trial**

State the reasons for any different dates from those in C.R.C.P. 26(a)(2)(C):

14. Oral Discovery Motions. The court does/does not require discovery motions to be presented orally, without written motions or briefs.

15. Electronically Stored Information. The parties do not anticipate needing to discover a significant amount of electronically stored information beyond medical records and audit trails, which are maintained electronically. If that should change, the parties will comply with the Court's ESI protocol.

16. Parties' best estimate as to when discovery can be completed: **49 days before trial date**.

Parties' best estimate of the length of the trial: **5 days**

Trial will commence on: _____

17. Other appropriate matters for consideration:

a. *Ex Parte* Conferences with Treating Physicians.

The parties and their counsel acknowledge their obligations to abide by Colorado law as set forth in *Samms v. District Court*, 908 P.2d. 520 (Colo. 1995), *Reutter v. Webber*, 179 P.3d. 977 (Colo. 2007), and *In re Bailey v. Hermacinski*, 413 P.3d 157 (Colo. 2018).

In medical malpractice cases, counsel for Defendants often seek to meet with the medical providers who provided medical care, but who are not named defendants in the lawsuit. The parties and their counsel acknowledge their obligations to abide by Colorado law, as set forth in *Samms v. District Court*, 908 P.2d 520 (Colo. 1995), *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007) and *In re Bailey v. Hermacinski*, 413 P.3d 157 (Colo. 2018).

Prior to scheduling any *ex parte* meeting with any treating health care provider who is not a party, Defendants shall provide notice to Plaintiffs of their intent to schedule a meeting pursuant to *Reutter* and/or *Bailey*. If Plaintiffs have a good faith basis under *Reutter* and/or *Bailey* to object to an *ex parte* meeting, they shall have seven (7) days from the date of the notice to object in writing to an *ex parte* meeting. In the event that Plaintiffs do submit a timely objection, Defendants shall not meet with the identified treater(s) without first obtaining a court order. Failure to timely provide notice of any objection shall result in waiver of such objection. With respect to any treating physician for whom an *ex parte* meeting is not permitted under *Reutter* and/or *Bailey* or by court order, Defendants shall also notify the Plaintiffs of the date and time of the meeting in order to give Plaintiffs' counsel the opportunity to be present at such meeting.

b. Non-retained experts:

As stated in C.R.C.P. 26(a)(2)(B)(II)(a), all non-retained expert witness disclosures "shall be made by a written report or statement that shall include a complete description of all opinions to be expressed and the basis and reasons therefore." This is required regardless of whether the non-retained expert's opinions are stated or referred to in medical treatment records. As stated in C.R.C.P. 26(a)(2)(B)(II)(c), "The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement." A simple incorporation of a treating provider's medical record entries will not meet this requirement unless the opinion and basis therefore are clearly stated in the record.

c. Deadlines landing on holidays:

Given that there is often confusion with respect to rolling deadlines forward versus back, any deadline that falls on a weekend or Court holiday will automatically be extended to the next business day.

DATED this 17th day of July 2023.

TOMAZIN LAW GROUP, LLP

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Attorney for Defendant Hardy

CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the foregoing, including any modifications made by the court, is and shall be the Case Management Order in this case.

Dated this ___ day of _____, 2023.

BY THE COURT:

_____
District Court Judge

249 F.R.D. 657
United States District Court, D. Colorado.

Dawn GRADY, Plaintiff,
v.
JEFFERSON COUNTY BOARD OF COUNTY COMMISSIONERS, Jefferson County Sheriff Ted Mink, in his individual and official capacities, Jefferson County Sheriff's Department Chief David Walcher, in his individual and official capacities, Deputy Jennifer Garnett, in her individual and official capacities, and Nurses Jane Does 1 and 2, Defendants.

Civil Action No. 07–cv–01191–WDM–KMT.
|
Feb. 25, 2008.

Synopsis

Background: Prisoner filed § 1983 action against county jail officials, alleging violation of constitutional right to adequate medical care and asserting state-law claims of failure to train/supervise, negligent training and supervision, medical malpractice/negligence, and outrageous conduct, after officials ordered prisoner to clean pod, despite her exemption from work activities due to her cauda equine syndrome, resulting paralysis below her hips due to her lumbar discs herniating into her spinal column. Defendants moved to reduce fee for prisoner's expert medical witness.

The United States District Court, Kathleen M. Tafoya, United States Magistrate Judge, held that expert's fee required reduction in unreasonable rate.

Motion granted.

Attorneys and Law Firms

***658** Mari Anne Newman, Darold W. Killmer, Sara J. Rich, Killmer, Lane & Newman, LLP, Denver, CO, for Plaintiff.

Writer Mott, James Lawrence Burgess, Jefferson County Attorney's Office, Golden, CO, for Defendants.

ORDER

KATHLEEN M. TAFOYA, United States Magistrate Judge.

This matter is before the Court on "Defendants' Motion to Reduce Fee for Plaintiff's Expert Witness, Richard Spiro, M.D." ("Motion" [Doc. No. 95, filed February 4, 2008]). The Court ordered expedited briefing on the issue on February 6, 2008 and the Plaintiff's Response was filed on February 12, 2008 ["Rsp." Doc. No. 98]. The Plaintiff filed a Reply on February 14, 2008. ["Reply" Doc. No. 100]

Defendant's Motion seeks a reduction in the hourly fee of $1,000.00 charged by Plaintiff's expert medical witness, Dr. Richard Spiro, for deposition testimony which occurred on February 18, 2008 in Pittsburgh, Pennsylvania pursuant to properly issued notice. (Motion, Exhibit A–1)

If a witness has been retained or specially employed to provide expert testimony, ***659** the retaining party must serve an expert report within the time frame set forth in Fed.R.Civ.P. 26(a)(2)(C). Whether or not a doctor has been retained, as long as they have been identified as a witness who will provide expert opinion testimony, pursuant to Rule 702, they may be deposed. Fed.R.Civ.P. 26(b)(4)(A). Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure provides that "the court shall require that the party seeking discovery pay the expert a *reasonable* fee for time spent in responding to discovery," unless manifest injustice would result. Fed.R.Civ.P. 26(b)(4)(C)(emphasis added). Although few published cases discuss what constitutes a "reasonable" expert fee, seven factors have emerged to guide in the determination of the reasonableness of a fee

> (1) the witness' area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Young v. Global 3, Inc., 2005 WL 1423594, *1 (D.Colo. May 26, 2005). *See U.S. Energy Corp. v. NUKEM, Inc.,* 163 F.R.D. 344, 345–46 (D.Colo.1995); *Mathis v. NYNEX,* 165 F.R.D. 23, 24–25 (E.D.N.Y.1996); *Jochims v. Isuzu Motors, Ltd.,* 141 F.R.D. 493, 496 (S.D.Iowa 1992). As a basic premise, the expert's fee should not be so high as to impair a party's access to necessary discovery or result in a windfall to the expert. *Young* at *1; *Mathis* at 24.

The plaintiff's expert witness, Dr. Richard Spiro, M.D., is a neurological surgeon located in Pittsburgh, Pennsylvania, the site of the deposition. (Motion, Exhibit A–2) Plaintiff has provided defendants with a fee schedule for Dr. Spiro wherein he purports to charge $2,000.00 per hour for deposition testimony (maximum total charge $6,000.00). (Motion, Exhibit A–3) Dr. Spiro has agreed to reduce his fee for the deposition in this case to $1,000.00 per hour. (Rsp. at 2, Exhibit 3 at ¶ 3) Dr. Spiro's charge per trial day is $6,000.00 and his fee for a telephone conversation is $1,000 per hour. (Motion, Exhibit A–3). It is not clear whether Dr. Spiro's charges differ for plaintiff verses defendant, however, logically a "trial day cost" would likely be borne by plaintiff who is calling the expert on her behalf, while a deposition expense would be borne by the defense. The experience of this case shows that fees charged by medical experts are negotiable and dependent upon the bargaining skills or power of the party retaining the expert initially, as well as the concomitant loss of negotiating power possessed by the opposing side.

In support of their claim that $1,000.00 per hour is not a reasonable fee as provided by the Rule, the defendants have submitted the curriculum vitae ("CV") of two Colorado orthopaedic surgeons, Dr. Anthony Dwyer and Dr. A. Stewart Levy, who were retained as defense experts in this case and who have been deposed. (Motion, Exhibits A–5 and A–6) Both Colorado surgeons charged $450.00 per hour for their deposition testimony. (Motion at 6)

The plaintiff does not dispute that the Colorado surgeons charged $450.00 per hour for deposition testimony while Dr. Spiro is demanding $1,000.00 per hour for the same service. (Rsp. at 4). However, plaintiff argues that the two Colorado neurosurgeons are situated differently from Dr. Spiro because both Dr. Levy and Dr. Dwyer were, at different isolated points, treating physicians of the plaintiff. (Rsp. at 5–6). The Defendants counter that they have designated and will call the two doctors primarily as experts and that factual testimony regarding any treatment of the plaintiff is a minor part of any testimony they will provide as experts. (Reply at 4)

Exhibit A–5 to the Motion is the sixteen page[1] CV of Dr. Anthony Dwyer. While mere length of a CV does not necessarily predict the value of its contents, Dr. Dwyer does have impressive credentials. He is licensed ***660** in six states and was a Fellow of the Royal College of Surgeons in Edinburgh, England and Australia. He has an extensive academic background, graduating from medical school in 1966 and is a professor at the Colorado Health Science Center as well as having been a clinical professor in New Orleans, Louisiana, and a lecturer in various locations around the world. Dr. Dwyer lists twenty-four different publications which he authored or co-authored, as well as eight book chapters. He also was a presenter at forty-four national gatherings and exhibits. Dr. Dwyer is a board member or member of a number of regional or national sub-specialty orthopaedic societies, including acting as a chairman of the North American Spine Society and also served on the Legal Issues Committee of that society.

Based on these credentials, Dr. Dwyer's published fee schedule indicates he will charge between $750–$1,000 per hour to appear for deposition testimony. (Rsp. Exhibit 7) The fee schedule also notes a charge of $600.00 per hour for telephonic legal consultation. In or about July, 2006, Dr. Dwyer charged the plaintiff's attorney $300.00 for telephone consultation for one-half hour, apparently based on the published fee schedule. (Rsp. at 4)

According to Exhibit A–6 of the Motion, Dr. A. Stewart Levy is the Chief of Neurosurgery at St. Anthony Central Hospital. Dr. Levy has a nine page CV indicating he is licensed in two states and has been a professor of surgery since 1997 at the Colorado Health Sciences Center. Dr. Levy boasts an outstanding academic record and graduated from medical school in 1990. He is on the board of directors for several committee posts and is a member of the Institutional Review Board for the Spinal Injury Foundation. He is currently Secretary of the Rocky Mountain Neurosurgical Society, having been Vice President in 2006–2007. He has presented at sixty-two lecture series, mostly on brain and spine injuries, many involving snowboarding and skiing accidents.

Based on his credentials, Dr. Levy's published fee schedule indicates he charges $1,000 per hour for deposition testimony and $1,000 per hour for legal consultation. (Rsp. Exhibit 6) On December 7, 2007, Dr. Levy quoted a price of $500 for

a one-half hour meeting with plaintiff's counsel, the full fee schedule rate. (Rsp. at 5) The plaintiff decided against the meeting on the basis of cost.

Plaintiff's expert witness, Dr. Richard Spiro, studied at Johns Hopkins and graduated first in his class from the University of South Alabama College of Medicine (1/64) in 1998, where he received several honors and awards and completed his neurosurgical residency in 2004. (Motion, Exhibit A–7) He has been a professor at the University of Pittsburgh Medical Center where he is the Chief, Spine Surgery. He is licensed in Pennsylvania and received his board certification in neurological surgery in 2006. He has authored five peer reviewed articles along with other doctors, and one book chapter. Additionally, he participated in three peer reviewed abstracts and has presented lectures on eight occasions, mostly in the area of tumor necrosis factor. Dr. Spiro, as noted earlier, has a published fee rate of $2,000 per hour for deposition testimony, but has agreed to charge the defendant's $1,000 per hour in this case. The defendants continue to argue that this reduced rate is excessive.

While all the medical professionals have impressive credentials, the two more senior Colorado orthopaedic surgeons have far more lengthy careers and credentials, especially in the area of the type of injuries to the plaintiff. There is simply no contest between Dr. Spiro and Drs. Levy and Dwyer when analyzing the seven factors relevant to the reasonable fee calculation: (1) the witness' area of expertise—all the neurosurgeons specialize in the area where plaintiff was most affected, but the Colorado doctors have far more experience in that specialty than Dr. Spiro; (2) the education and training required to provide the expert insight that is sought—all doctors have outstanding academic credentials, however the size and prominence of their schools and residencies differ; (3) the prevailing rates of other comparably respected available experts—the two Colorado doctors are charging $450 per hour for deposition testimony in this case, while the least experienced physician, Dr. Spiro, is charging $1,000 per hour. Further, even without the bargained for rate adjustments, ***661** the fee schedules of the three doctors indicate that Dr. Spiro is charging at least twice as much as the other two physicians who have more experience; (4) the nature, quality and complexity of the discovery responses provided—the parties have not addressed this issue and the record is therefore devoid of information upon which the court can make a comparison; (5) the fee actually being charged to the party who retained the expert—the plaintiff claims to have paid Dr. Spiro $3,500 in the case. (Rsp. at 6) Presumably this figure would include a records review for $3,000[2] but it is unclear what else may have been included in that fee; (6) fees traditionally charged by the expert on related matters—neither party has presented evidence on this point other than the three fee schedules referenced herein. On the fee schedules Dr. Spiro is charging more than twice as much for deposition testimony, a little less than twice the rate for Dr. Dwyer's telephone consultation and the same rate as telephone consultation with Dr. Levy, and for trial a flat $6,000 per day as compared to Dr. Levy at $1,250 per hour and Dr. Dwyer at $1,000 per hour, neither with a minimum number of hours; and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Although it is unknown what Dr. Spiro charges for an office visit, it is unlikely that he charges $1,000 per hour.[3] One court, examining the issue of reasonableness of expert witness fees stated

> [T]he Court recognizes that depositions of an adverse expert are, at times, stressful and, unfortunately, usually adversarial in nature. Moreover, depositions require better preparation and more thoughtful and precise answers by the deponent than a casual office visit with retaining counsel or a patient. Thus, the Court finds it reasonable to charge a *modestly* higher fee for a deposition taken by adverse counsel but not two or more times the cost for a medical/legal consultation.
>
> *Edin v. Paul Revere Life Ins. Co.* 188 F.R.D. 543, 547 (D.Ariz.1999)(emphasis added).

Defendants suggest that "a scheduled deposition prevents Dr. Spiro 'from performing surgery or continuing with [his] normal routine' " theoretically costing him money as payment for the foregone surgery. There is nothing in the record to support this sweeping assertion. To the contrary, the defendants set the deposition at 4:00 p.m. in order to avoid any conflict with Dr. Spiro's surgical duties and responsibilities. Dr. Spiro's own assistant confirmed that this setting would not conflict with Dr. Spiro's medical or surgical schedule. (Reply at 6)

Other courts addressing reasonableness of expert fees have reached varying results. *See, Hose v. Chicago and North Western Transportation Co.,* 154 F.R.D. 222, 227 (S.D.Iowa 1994) (reducing expert neurologist's fee from $800/hr, the doctor's usual hourly charge for neurological testing, to $400/hr, where expert was not a preeminent expert in his field,

did not possess knowledge or training unique from other neurologists, had his office in Papillion, Nebraska, and was the plaintiff's treating physician; comparable experts charged between $375 and $429 an hour); *Dominguez v. Syntex Labs., Inc.,* 149 F.R.D. 166, 170 (S.D.Ind.1993)(reducing fee from $800/hr to $341.50/hr for neurologist specializing in smell and taste disorders, where doctor charged other clients $800/hr for depositions but billed $94/hr for patient office visits, and other neurologists with similar qualifications charged between $120 and $300/hr for depositions); *Draper v. Red Devil, Inc.,* 114 F.R.D. 46, 48 (E.D.Ark.1987)(accepting electrical engineer's requested fee of ***662** $110 per hour as reasonable); *Anthony v. Abbott Labs.,* 106 F.R.D. 461, 465 (D.R.I.1985)(awarding physician $250 per hour as the "outermost periphery of the range of sustainable awards" where doctor was "one of only a handful of physicians" who had the qualifications and expertise to testify about causative effects of DES and in his last deposition had charged a "friendly" litigant $250 per hour for his time). Of course, the precise dollar amount of fees per hour discussed in terms of older cases are not particularly relevant to the dollar amount of reasonable fees charged in 2008. The parity principles set out in the seven categories of comparisons, however, remain viable and the cases are instructive in their quantitative analyses.

Against this backdrop, the court must assure that there is some reasonable relationship between the services rendered and the remuneration to which the expert is entitled. "Unless the courts patrol the battlefield to insure fairness, the circumstances invite extortionate fee setting." *U.S. Energy Corp.,* 163 F.R.D. at 346–47. In making those determinations, courts must not feel bound by an "agreement" which would result in a patently unreasonable fee. "[W]hile a party may contract with any expert it chooses, the court will not automatically tax the opposing party with any unreasonable fees charged by the expert." *Kernke v. Menninger Clinic, Inc.,* 2002 WL 334901, *1 (D.Kan.2002); *Young,* 2005 WL 1423594 at *2 (expert physician witness's fee of $1,200.00 per hour for deposition testimony grossly exorbitant; court reduced to reasonable fee of $500.00 per hour.)

This court finds that the deposition hourly rate of $2,000 per hour as set forth in Dr. Spiro's fee schedule is grossly excessive and comes near to being extortionate. More problematic, however, is the also steep fee of $1,000 per hour actually being charged by Dr. Spiro for his deposition testimony because both Colorado neurosurgeons list this as their own published fee for deposition testimony, even though neither is actually charging these rates. In spite of their reduction in rates for this case to the reasonable fee of $450 per hour for deposition testimony, however, both Colorado physicians either billed or quoted rates for consultation with plaintiff's counsel based upon their published fee schedules.

In spite of this, however, the court must not shirk its independent responsibility as gatekeeper against excessive windfall billing by medical experts appearing in federal court. *See Young,* 2005 WL 1423594 at *2. Based on the facts before the court, the court finds that a reasonable hourly rate for Dr. Spiro's deposition testimony is not more than $600 per hour. [4]

Accordingly, for the foregoing reasons, it is hereby ORDERED

Defendants' Motion to Reduce Fee for Plaintiff's Expert Witness, Richard Spiro, M.D. [Doc. No. 95] is GRANTED. Compensation provided to Dr. Spiro for his deposition testimony will be made consistent with this order.

All Citations

249 F.R.D. 657

Footnotes

1 The court notes that in several instances, the CV appears to be in question and answer format and several answers indicate Dr. Dwyer had no experience in the questioned area.

2 Dr. Spiro's fee schedule says the record review "assumes four hours." (Exhibit 95–4)

3 *Dobson v. Matrixx Initiatives, Inc.,* 2007 WL 842130, *2 (S.D.Fla.2007) reported an estimated salary range for a neurologist to be $171,000–$345,000. This court finds the approximated salaries of the universe

of neurologists to be too general to be of specific use when comparing one Pennsylvania neurosurgeon specifically to two Colorado neurosurgeons, all preparing to testify in the same case. However, it does support the inference that Dr. Spiro does not charge his neurosurgery patients $1,000 per hour, or for that matter, even $500 per hour. Based on a 40 hour work week (a debatable proposition from the start given statements in the Response about Dr. Spiro's work day), a $345,000 per year salary equates to roughly $166 per hour. The more hours above forty that a salaried employee works, the less the hourly rate.

4 The same amount actually charged to the plaintiff for legal consultation with defense expert Dr. Anthony Dwyer as noted *supra.*

2013 WL 3353539 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
Jefferson County

Francis GRAYBEAL and Della Grayeal, Plaintiffs,
v.
Samuel GIVAN, Defendant.

No. 2012CV2386.
March 21, 2013.

***1** Division: 9

Order Denying Defendant's Motion in Limine to Exclude Certain Evidence, Argument, Statements, and Questioning

Randall C. Arp, Judge.

THIS MATTER comes before the Court on Defendant's "Motion in Limine to Exclude Certain Evidence, Argument, Statements, and Questioning" filed on February 15, 2013, Plaintiff's filed a response on March 8, 2013 and Defendant replied March 15, 2013. Jury trial is scheduled for March 25, 2013.

Defendant's Liability Insurance

The first issue presented is whether Plaintiff's may ask prospective jurors if they have a relationship with defendant's insurance carrier.

"Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose ..." CRE 411, While the rule is a general bar to evidence of liability insurance, it provides exceptions.

While CRE 411 excludes evidence of whether a defendant has liability insurance, it is well established in Colorado that during voir dire counsel may ask whether prospective jurors are officers, directors, or policyholders of the defendant's insurance carrier *Smith v. Dist. Court In de For Fourth Judicial Dist.*, 907 P.2d 611, 612 (Colo. 1995) (citing *Kaltenbach v. Julesburg School District.* 43 Colo.App. 150, 603 P.2d 955 (1979); *Spitlane v. Wright*, 127 Colo. 580, 259 P.2d 1078 (1953); *Raint v.* Runs, 97 Colo. 19, 46 P.2d 740 (1.935)). *See also Tatasky v. Smith*, 242 P. 971, 973 (Colo. 1926').

"[A] side effect of asking the insurance question during voir dire might be that the jury, by implication. is informed that there is liability insurance involved." *Smith*, 907 P.2d at 612 (citing *Rains*, 4$ p,2d at 745). Despite that potential result, the insurance question "is admissible during voir dire because it tends to reveal possible interest or bias of a potential juror, which is relevant to the matter of the individual's fitness as a juror," *Rains*, 46 P.2d at 745. The purpose of voir dire is to enable counsel to select a fair and impartial Jury. *Edwards v. People*, 418 P.2d 174, 177 (1966),

For the reasons stated above, the Court finds that it is appropriate to ask prospective jurors Whether they are officers, directors, or policyholders of an insurance carrier, and therefore, DENIES Defendant's request. The Court will ask a general question of prospective jurors, as a whole, to prevent disclosing that Defendant has liability insurance. The Court will not name Defendant's insurance carrier, unless counsel want the question asked about a specific company. As counsel not only has the right to inquire if such a relationship exists, but also inquire into such a relationship, the Court will allow such inquiry to be made outside the

presence of the rest of the prospective jurors. *See Oglasby v. Conger*, 507 P.2d 883, 885 (Colo. App. 1972); *see also Mayer v. Sampson*, 402 P.2d 185 (Colo. 1965) (holding that counsel has the right to inquire into any prospective juror's relationship to the defendant's insurance company).

American Medical Association Permanent Impairment Rating

***2** The second issue presented is whether permanent impairment ratings are admissible in a persona) injury case.

Plaintiffs' primary treating physician, Perry L. Haney, M.D., assessed a "15% Total Whole-Petson Impairment" rating of Plaintiff Delia Graybeal and a "8% Total Whole-Person Impairment"' rating of Plaintiff Francis Graybeal, both based on the American Medical Associations (AMA) Guides to the Evaluation of Permanent Impairment. The AMA impairment ratings are used in worker's compensation claims to evaluate permanent impairment. C.R.S. § 8-42-101.

Defendant argues that AMA impairment ratings are not admissible because this is not a workers' compensation claim, and therefore the ratings are irrelevant. Defendant also argues that the evidence should be excluded under CRE 403 because of the danger of unfair prejudice, confusion of the issues, and misleading the jury

The Court acknowledges that other respected jurists have ruled that impairment rating are inadmissible, However, the parties do not cite, and the Court is unaware, of any binding Colorado authority that requires a court to exclude an AMA impairment rating from an expert's testimony at a personal injury trial,

CRE 401 stales, "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action mote probable or less probable than it would be without the evidence." CRE 402 states, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Colorado, by These rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado. Evidence which in not relevant is not admissible."

It is certainly relevant whether Plaintiff's were injured, the extent of the injuries, and whether the injuries are permanent. In personal injury oases, a plaintiff may recover damages for physical impairment. C.R.S. § 13-21-102.5. Plaintiffs' permanent impairment rating will assist the jury in determining the issue of permanent impairment and the extent of Plaintiffs' damages.

CRE 702 states, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Dr. Perry Haney, Plaintiffs' non-retained expert witness, relied, in part, On the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th revised Ed, AMA; Chicago, (1990) to assess the Plaintiffs injuries. The AMA Guides were used as a basis for Dr. Haney in making his expert opinions regarding the injuries sustained by the Plaintiffs.

Plaintiffs argue that the guidelines are extensively railed upon by physicians in the course of making diagnoses, evaluating health needs, prescribing treatment, and assessing permanent impairment and should be admitted as part of Dr. Haney's expert testimony, Plaintiff must lay sufficient foundation that the AMA guides are the type of information Which is reasonably relied upon by experts in Dr. Haney's field in forming opinions on the issue of permanent impairment. *See* CRE 703. Once a foundation has been laid, Dr. Haney may testify as to his opinion and the findings that support his opinion. However, the data he relied on, including the AMA Guides themselves, shall not be disclosed to the jury.

***3** Finally, Defendant argues that the impairment ratings should be excluded under CRE 403. That rule states, "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..."

The Court agrees with Denver District Court Judge Jackson statement that he "did not understand why intelligent jurors... are likely to be more confused by the AMA Guidelines than they are by other approaches to evaluating damages, particularly non-economic damages." The Court finds the probative value of the impairment rating is not outweighed by the danger of unfair prejudice or contusion of the issues. An impairment rating is no more or less confusing than other factors the jury may weigh when determining Plaintiffs' injuries, extent Of the damages, and extern of the impairment The ratings arc merely one tool that the fect finders can use in determining the existence and extent, if any, of the Plaintiffs' injuries. *See Music v. Hebb*, 744 So.2d 1169 (Pls. App. 1999).

For the reasons stated above, the Court DENIES Plaintiffs request to exclude the impairment ratings. However, Plaintiffs must (ay sufficient foundation regarding the impairment raring before 3uch evidence may be introduced at trial. If necessary, the Court will issue a limiting instruction to the jury.

Opinions of Treating Physicians

The last issue presented is whether the testimony of Plaintiffs" treating physicians should be limited to his or her observations, diagnosis, and treatment of Plaintiffs.

Defendant argues that opinions as to causation and prognosis should be excluded as none of these experts were properly disclosed as retained experts, nor have the actual opinions and bases of the opinions been disclosed.

Colorado law distinguishes between experts retained to provide expert testimony at trial and occupational exports, such as treating physicians, police officers, or others who might testify as experts but whose opinions are formed as part of their normal occupational duties. *Compare* C.R.C.P. 26(a)(2)(B)(I) *with* C.RC.P. 26(a)(2)(B)(II). The purpose of Rule 26(a)(2)'s expert disclosure requirements is to eliminate surprise and provide the opposing party with enough information regarding the experts opinions and methodology to prepare efficiently for trial, *See Garrigan v. Bowen*, 243 P.3d 231. 240 (Colo. 2010). "Experts specially retained to provide expert testimony must provide a complete statement of all Opinions and the basis and reasons therefor, including all information considered in forming that opinion. With respect to occupational experts, on the other hand, disclosure is more limited." *Gall ex rel. Gall v. Jamison* 44 P.3d 233, 235. at FN2 (Colo. 2002).

Treating physicians are within the scope of their non-retained expertise when their opinions are formed as part of their normal occupational duties, *Id.* Determining the cause of a patient's injuries and their prognosis after treatment is well within a physician's normal occupational duties. *See* Colorado Medical Society's Interprofessional Code, Section 4.9 (a report from a treating physician should generally include causation and prognosis, including. anticipated permanency and residual disability).

Plaintiffs' experts may testify as to the opinions which are disclosed in the medical records and come from the physician's treatment of Plaintiffs. These opinions were fully disclosed in Plaintiffs" C.R.C.P. 26(a)(2) expert disclosures. Experts may not testify as to opinions which have not been previously disclosed. Furthermore. Dr Haney may only refer to his review of records of other health care providers to the extant that he reviewed these records as part of treating Plaintiffs.

***4** For the reasons, stated above, the Court DENIES Defendant's Motion. **IT IS ORDERED** that: (1) evidence of Defendant's liability insurance is excluded, with the exception of the question the Court will ask during voir dire; (2) evidence of Plaintiffs' permanent impairment ratings is admissible; and (3) expert testimony regarding causation and prognosis is admissible.

DONE AND SIGNED: March 21, 2013.

BY THE COURT:

<<signature>>

RANDALL CARP

District Court Judge

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. TEJON, COLORADO SPRINGS, CO, 80903	DATE FILED: April 19, 2023 2:52 PM CASE NUMBER: 2022CV31126
Plaintiff(s) BETH HANSEN v. **Defendant(s)** NICOLAS PRUETT DDS et al.	⚠ **COURT USE ONLY** ⚠ Case Number: 2022CV31126 Division: 21 Courtroom:

Order:Third Amended Proposed Order - Case Management

The motion/proposed order attached hereto: GRANTED WITH AMENDMENTS.

The court adopts Defendant's proposal about non-retained expert disclosures. As stated in C.R.C.P. 26(a)(2)(B)(II)(a), all non-retained expert witness disclosures "shall be made by a written report or statement that shall include a complete description of all opinions to be expressed and the basis and reasons therefore." This is required regardless of whether the non-retained expert's opinions are stated or referred to in medical treatment records. As stated in C.R.C.P. 26(a)(2)(B)(II)(c), "The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement."

Issue Date: 4/19/2023

MICHAEL P MCHENRY
District Court Judge

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S. Tejon Colorado Springs, CO 80903	
Plaintiff: BETH HANSEN v. **Defendant(s)**: NICOLAS PRUETT DDS et al.	**▲COURT USE ONLY▲**
	Case Number: 2022CV31126 Div.: 21
THIRD AMENDED PROPOSED CASE MANAGEMENT ORDER	

There was a Status Conference held on April 11, 2023.

1. The "at issue date" is 8/5/2022.

2. Responsible attorney's name, address, phone number and email address:
Brian Caplan, #45129
Help in Colorado
ROSS ZIEV, P.C.
6795 E. Tennessee Avenue, #210
Denver, CO 80224
Telephone: (303) 351-2567
e-mail: brian@helpincolorado.com

3. The lead counsel for each party, Brian Caplan, Esq. for Plaintiff, Theodore Hosna, Esq. for Defendant John Goodman DDS, and Scott Nixon, Esq. for Defendant Nicolas Pruett DDS. Counsel met and conferred by telephone concerning this Proposed Order and each of the issues listed in Rule 16(b)(3)(A) through (E) on October 19, 2022, and subsequently by follow up email.

4. Brief description of the case and identification of the issues to be tried (not more than one page, double-spaced, for each side):

Plaintiff:

On or about June 29, 2020, Defendants installed 2 crowns in Plaintiff's mouth. Over the next several weeks, during a total of 5 additional office visits, Defendants attempted to adjust Plaintiff's teeth/bite to make the crowns more comfortable. Defendants repeatedly took X-rays of Plaintiff's mouth and (incorrectly) told her that the crowns looked "good." The crowns were not "good." In September of 2020, Plaintiff was still in pain and informed Defendants that her bite was still "off,"

that she could not chew food on the left side of her mouth, and that she was experiencing more and more dental pain associated with their work. At that time, in September of 2020, Defendants adjusted (shaved down) 4 of Plaintiff's surrounding molars in an attempt to rectify their errors and omissions and alleviate her pain. After Defendants negligently shaved down her molars, Plaintiff's pain increased significantly. Plaintiff began to experience significant jaw pain and headaches which progressed to migraines. None of the work Defendants did helped the Plaintiff. Instead, her pain and discomfort grew worse and worse over the weeks following the crown installations, and even more so after the Defendants shaved down her healthy teeth. Eventually, on September 14, 2020, Plaintiff reported to Dr. Benjamin Patterson at Mountain Springs Advanced Dental. At that point, Dr. Patterson performed X-rays of the offending crowns. Radiographs immediately revealed that one of the crowns (the crown on tooth #19) was not fully seated and there were open margins. This is the first time that Plaintiff learned that one of her crowns was not properly seated by Defendants. Defendants failed to seat one of her crowns properly and failed to discover that fact and/or failed to inform Plaintiff of their mistakes at any time during their multiple attempts to adjust her bite. The placement of the crown at tooth #19 was substandard dental care because it was not fully seated, leaving a higher presentation of the crown and a void between her tooth and the crown where bacteria could flourish. Plaintiff has brought claims of Medical Negligence of Defendants Nicolas Pruett, DDS, and John Goodman, DDS.

Defendants:

Defendant Nicolas Pruett, DDS, avers that he is a licensed Dentist with the State of Colorado, and that he provided dental care for Plaintiff as indicated in his records. With regard to allegations in the Complaint, Dr. Pruett specifically avers that he performed only a single small adjustment to the buccal cusp tip of tooth #18 for Plaintiff, with her fully informed consent, on September 3, 2020, and denies he adjusted or removed any other tooth structures at any time. Defendant Dr. Pruett denies that he was negligent and states that his care and treatment of Plaintiff was entirely appropriate. Defendant Dr. Pruett denies that any alleged negligence on his part caused or contributed to Plaintiff's alleged injuries, damages, or losses, and further disputes the nature and extent of Plaintiff's claimed damages. Defendant Dr. Pruett asserts the denials and defenses set forth in his Answer to Plaintiff's Complaint, and reserves the right to amend his defenses as appropriate.

Defendant John Goodman, DDS, denies Plaintiff's claims and allegations. Dr. Goodman maintains that he was not negligent, and that none of his conduct regarding the care and treatment of Beth Hansen caused or contributed to cause Plaintiff's injury or damages in this case. Rather, Dr. Goodman maintains that his conduct was appropriate and consistent with his duties and denies that any alleged act or omission on his part caused or contributed to Plaintiff's injuries, damages, or losses. Dr. Goodman also asserts the denials and defenses set forth in his Answer to Plaintiff's Complaint, and it reserves the right to amend his defenses as appropriate.

5. The following motions have been filed and are unresolved: N/A.

6. Brief assessment of each party's position on the application of the proportionality factors, including those listed in C.R.C.P. 26(b)(1): The parties agree that the presumptive limitations contained in C.R.C.P. 26(b)(2) are adequate, with the exception of the proposed modification in paragraph 11., below, to allow Defendants to take the depositions of Plaintiff's treating health care

providers, without limitation. Defendants believe this modification is required due to the fact that during the brief 18 months since last seeing the defendant dentists for the care and treatment at issue, Plaintiff has seen and been evaluated by no less than fifteen (15) separate health care providers, including prosthodontists, a neurologist, an orofacial pain specialist, a TMJ specialist, a chiropractor, an acupuncturist, a physical medicine and rehabilitation specialist, a dental sleep medicine specialist, and others. All of these providers were seen for the specific purpose of evaluating, diagnosing and treating the injuries Plaintiff is claiming in this case. Defendants anticipate that many of these providers will be disclosed by Plaintiff as non-retained or "treating" experts under Rule 26. Regardless of whether these providers are endorsed by Plaintiff, they possess relevant information regarding Plaintiff's claims in the case and Defendants can only obtain that information through discovery which is limited to either *ex parte* meetings (discussed below in paragraph 17) or depositions, in view of the privileges that may attach to their testimony.

7. The lead counsel for each party met and conferred concerning possible settlement. The prospects for settlement are unknown at this time: the parties intend to mediate claims following some discovery and will participate in private mediation no later than 60 days prior to trial.

8. Deadlines for:

a. Amending or supplementing pleadings: 11/18/2022.

b. Joinder of additional parties: 11/18/2022.

c. Identifying non-parties at fault: The parties agree that defendants shall be allowed to designate non-parties at fault no later than January 20, 2023. This additional time is required due to the need to obtain and evaluate initial disclosures and discovery to learn of the identities, roles, and potential fault of others.

9. Dates of initial disclosures: The parties produced their Initial Disclosures on 9/16/2022.

Objections, if any, about their adequacy: None at this time.

10. If full disclosure of information under C.R.C.P. 26(a)(1)(C) was not made because of a party's inability to provide it, provide a brief statement of reasons for that party's inability and the expected timing of full disclosures and completion of discovery on damages: N/A.

11. Proposed limitations on and modifications to the scope and types of discovery, consistent with the proportionality factors in C.R.C.P. 26(b)(1):

Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + retained experts + treating health care providers per C.R.C.P. 26(b)(4)(A)): The parties agree the limitation on depositions are expanded to include treating health care providers as well as retained expert witnesses. Otherwise, presumptive limits.

Number of interrogatories per party (C.R.C.P. 26(b)(2)(B) limit of 30): 30.

Number of requests for production of documents per party (C.R.C.P. 26(b)(2)(D) limit of 20): 20.

Number of requests for admission per party (C.R.C.P. 26(b)(2)(E) limit of 20): 20.

Any physical or mental examination per C.R.C.P. 35: Defendants may request a Rule 35 examination, and Plaintiff reserves the right to request that any Rule 35 exam be audio or video recorded and that any paperwork to be filled out is submitted to Plaintiff's counsel at least one (1) week prior to the exam. Defendants object to these conditions. If the parties cannot resolve any dispute regarding a Rule 35 examination request, court intervention may be required.

Any limitations on awardable costs: Per Colorado law.

State the justifications for any modifications in the foregoing C.R.C.P. 26(b)(2) limitations: Stated above, where applicable only to the number of depositions.

12. Number of experts, subjects for anticipated expert testimony, and whether experts will be under C.R.C.P. 26(a)(2)(B)(I) or (B)(II):

Plaintiff: Plaintiff anticipates calling non-retained medical experts in the following areas: dentistry, pain management, orthodontics, ENT, chiropractic, sleep medicine, Primary Care, neurology, and prosthodontics. Plaintiff anticipates retaining experts to address permanent impairment, and dental experts to address causation and standard of care.

Defendant Dr. Nicolas Pruett anticipates endorsing retained expert witnesses in the areas of general dentistry and/or prosthodontics and any area of specialty in with Plaintiff endorses an expert on the issues of liability or causation against him, in rebuttal. Defendant Dr. Pruett may also call any of Plaintiff's treating healthcare providers to express expert opinions in accordance with the information contained in their medical and/or dental records, reports, and any supplemental expert endorsement.

Defendant Dr. Goodman anticipates endorsing a retained experts in the field of dentistry and other fields to be determined. He may also retain an expert in prosthodontists depending on the course of discovery and the need to rebut the experts disclosed by plaintiff. Dr. Goodman further anticipates several of plaintiff's treating health care providers may be called as non-retained experts consistent with C.R.C.P. 26(a)(2)(B)(II). Given the early stages of discovery, it is not possible to give an accurate estimate as to the number of experts that will be required.

If more than one expert in any subject per side is anticipated, state the reasons why such expert is appropriate consistent with proportionality factors in C.R.C.P. 26(b)(1) and any differences among the positions of multiple parties on the same side: Defendants submit they should not be

limited to a single expert jointly to address the claims against them even though the issues overlap to some limited extent. Each Defendant dentist provided care and treatment to Plaintiff at a different time and in a different manner. Further, they are represented by different counsel, and each is entitled to assert a defense, including expert testimony on the standard of care, that is individualized to the scope of the claim asserted against them and the treatment they provided. Defendants will work together cooperatively to combine experts, if possible, endorsed to address issues that are common to them in the case, such as the nature and scope of the injuries, damages, and losses being claimed.

The parties agree that for retained experts, the experts' opinions and the bases for those opinions may be disclosed by reference to their reports without repeating their opinions and the bases for those opinions in the disclosure statement. The parties also agree it is sufficient to reference an expert's CV instead of requiring the expert to repeat their qualifications in their report or the disclosure statement.

PLAINTIFF PROPOSES: All non-retained expert witness records or disclosures must include "a complete description of all opinions to be expressed and the basis and reasons therefore." If the non-retained expert reports / records do not comply with C.R.C.P. 26(a)(2)(B)(II), counsel will make specific opinions clear through written disclosures.

DEFENDANTS PROPOSE: As stated in C.R.C.P. 26(a)(2)(B)(II)(a), all non-retained expert witness disclosures "shall be made by a written report or statement that shall include a complete description of all opinions to be expressed and the basis and reasons therefore." This is required regardless of whether the non-retained expert's opinions are stated or referred to in medical treatment records. As stated in C.R.C.P. 26(a)(2)(B)(II)(c), "The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement."

13. Proposed deadlines for expert witness disclosure if other than those in C.R.C.P. 26(a)(2):

a. production of expert reports:

i. **Plaintiff/claimant: May 1, 2023**

ii. **Defendant/opposing party: May 30, 2023**

b. **production of rebuttal expert reports: June 20, 2023**

c. production of expert witness files: Within 14 days of a request following the disclosure.

State the reasons for any different dates from those in C.R.C.P. 26(a)(2)(C): In a medical/dental malpractice case such as this, disclosure of final opinions of the experts is critical to defining the specific nature of the claims and defenses to be decided in the case. Allowing extra time to consider opinions, endorse experts, disclose rebuttal opinions, and conduct depositions will be helpful to the parties and be beneficial to the ordered consideration and resolution of disputed issues, by trial or otherwise. In addition, accelerating the default deadlines for disclosure of

experts will allow additional time to complete discovery following disclosure of the final rebuttal experts of Plaintiff.

14. Oral Discovery Motions. The parties will comply with the Court's rules on oral discovery motions.

15. Electronically Stored Information. The following is a brief report concerning their agreements or positions on search terms to be used, if any, and relating to the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs: The parties do not anticipate needing to discover a significant amount of electronically stored information.

16. Parties' best estimate as to when discovery can be completed: 49 days before trial

17. Other appropriate matters for consideration:

The parties agree to inclusion of the following provisions in this Order:

Order of Proof:

Plaintiffs will disclose their anticipated designation of order of proof at least 10 calendar days prior to trial, and Defendants will disclose their designation of order of proof at least 7 calendar days prior to trial. If any party needs to alter the order of proof after designation, the party will immediately send an *e-mail* to all counsel

***Ex parte Reutter* meetings with doctors:**

Defendants will comply with *Bailey v. Hermacinski*, 413 P.3d 157 (Colo. 2018), and *Reutter v. Weber*, 179 P.3d 970 (Colo. 2007) with regard to requests for *ex parte* meetings with Plaintiff's treating healthcare providers. Defendants request that Plaintiff evaluate and object in writing to any request from Defendant for any *ex parte* meetings within seven (7) days of receiving the request. If Plaintiff does not respond or object in writing to a request from Defendants for an *ex parte* meeting within seven (7) days from the date of receiving the request, then any objection to the requested *ex parte* meeting is waived, and Defendants shall be allowed to proceed with the *ex parte* meeting.

DATED: April 18, 2023

Approved as to form:

/s/ Brian Caplan, Esq.
Brian Caplan, Esq.
Help In Colorado
Attorney for Plaintiff

/s/ Theodore C. Hosna, Esq.
Theodore C. Hosna, Esq.
Sharuzi Law Group Ltd
Attorney for Defendant John Goodman DDS

/s/ *Scott S. Nixon*
Scott S. Nixon, Esq.
Lauren E. Kuhn, Esq.
Hall Booth Smith, P.C.
Attorneys for Nicolas Pruett DDS

CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the foregoing, including any modifications made by the court, is and shall be the Case Management Order in this case.

DATED: _____ BY THE COURT

_____
District Court Judge

GRANTED 'ovant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

DISTRICT COURT, COUNTY OF DENVER, COLORADO 2nd Judicial District 1437 Bannock Street Denver, Colorado 80202	**Larry J. Naves** **District Court Judge** DATE OF ORDER INDICATED ON ATTACHMENT ▲ COURT USE ONLY ▲
Plaintiff: JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor vs. **Defendants:** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a/ PARTNERS IN WOMEN:S HEALTH, P.C., JUANITA SASSER, R.N. and HCA-HEALTHONE, LLC d/b/a/ ROSE MEDICAL CENTER	Case Number: 05CV4567 Courtroom: 6

ORDER GRANTING DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D.

THE COURT, having considered the Motion of defendants, Theodore Cooper, M.D. and Drs. Cooper and Aptekar, P.C. d/b/a Partners in Women's Health, P.C. for protective orders to enforce the limitations of Colo.R.Civ.P. 26(b)(4)(A) during the deposition of Alison Mall, M.D., and being fully advised in the premises, hereby finds as follows:

1. Colo.R.Civ.P. 26(b)(4)(A) precludes the taking of depositions of experts prior to the filing of Rule 26(b)(2) expert disclosures. In this case, expert disclosures are not due until March and April 2007, respectively. Rule 26(b)(4)(A) specifically permits the Court to determine the scope of a deposition of a prospective expert.

2. Dr. Mall is a treating physician who has not been named as a defendant, directly or otherwise, in this case.

3. During her deposition on January 30, 2007, Dr. Mall may be questioned about her involvement with Mrs. Heyman's care and treatment during her prenatal care at Partners in Women's Health and during the time between admission to Rose Medical Center on June 16, 2003 when Dr. Mall was on call up to 6:00 a.m. on June 17, 2003 when Dr. Mall went off call. To the extent that Dr. Mall has any personal knowledge of or has had discussions with others about the events occurring after she went off call, questioning of her about such personal knowledge or discussions would be appropriate.

4. To the extent that Dr. Mall has no personal knowledge of, has not had discussions with others about, or reviewed records regarding, the ensuing 10 ½ hours after she went off-call, any such questioning of Dr. Mall about the care provided during the 10 ½ hours up to the delivery of the minor plaintiff would represent expert testimony, as it would be testimony which is not derived as an actor or from personal knowledge, but instead would be testimony based on Dr. Mall's general knowledge as a physician and obstetrician. Dr. Mall has not been endorsed as an expert, and Rule 26(b)(4)(A) precludes deposing Dr. Mall as to expert testimony or opinions at this time. *Liscio v. Pinson*, 83 P.3d 1149 (Colo.App. 2003); *Patel v. Gayes*, 984 F.3d 214, 217 (7th Cir. 1993)(absent endorsement of expert, treating physician could not relate opinion about facts of which he had no personal knowledge.). *See also Young v. United States*, 181 F.R.D. 344, 346 (W.D. Tx. 1997); *Mason v. Robinson*, 340 N.W.2d 236 (Iowa 1983)(physician who had statistical data about surgery performed on the decedent could not be forced to render expert opinion about whether defendant adhered to standard of care in performing the surgery); *Commonwealth v. Vitello*, 367 Mass. 224, 327 N.E.2d 819, 827 (1975)(a "party may not by summons compel the involuntary testimony of an expert witness solely for the expertise he may bring to the trial, and in the absence of any personal knowledge on his part related to the issues. . . .")

5. Defendants' Motion is hereby GRANTED. Plaintiffs' counsel is hereby limited to questioning Dr. Mall regarding those matters relating to her care and treatment of Mrs. Heyman during her prenatal care and during the initial portion of her hospitalization up to 6:00 a.m. on June 17, 2003 when Dr. Mall was on-call, as well as to the extent Dr. Mall has any personal knowledge of, has spoken with others about, or has reviewed records regarding events occurring after her treatment ended. Plaintiffs' counsel is prohibited from any questioning of Dr. Mall as to events about which she has no personal knowledge, including seeking opinions about or standard-of-care testimony about fetal monitor tracings, any care provided by Dr. Cooper or the labor nurse, or any treatment rendered to Mrs. Heyman after 6:00 a.m. when Dr. Mall was no longer on call.

Dated this _____ day of January, 2007.

BY THE COURT:

_____
Larry J. Naves
Chief District Court Judge

Court: CO Denver County District Court 2nd JD

Judge: Naves, Larry J

File & Serve reviewed Transaction ID: 13360010

Current date: 1/26/2007

Case number: 2005CV4567

Case name: HEYMAN, JENNIFER et al vs. COOPER, THEODORE MD et al

/s/ Judge Larry J Naves

DISTRICT COURT, COUNTY OF DENVER, COLORADO 2nd Judicial District 1437 Bannock Street Denver, Colorado 80202	▲ COURT USE ONLY ▲
Plaintiff: JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor vs. **Defendants:** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a/ PARTNERS IN WOMEN:S HEALTH, P.C., JUANITA SASSER, R.N. and HCA-HEALTHONE, LLC d/b/a/ ROSE MEDICAL CENTER	Case Number: 05CV4567 Courtroom: 6
Attorneys for Defendants Cooper and Drs. Cooper & Aptekar, P.C. d/b/a/ Partners In Womens Health, P.C. Name: Edward D. Bronfin, Atty. Reg. No. 11170 Address: Kennedy Childs & Fogg, P.C. 1050 Seventeenth Street, Suite 2500 Denver, CO 80265 Phone Number: 303-825-2700 Fax Number: 303-825-0434 E-Mail Address: edb@kcfpc.com	

DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S SUPPLEMENT TO REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D. AND REQUEST FOR EXPEDITED TELEPHONE HEARING

COME NOW the defendants, Theodore Cooper, M.D. and Drs. Cooper and Aptekar, P.C. d/b/a Partners in Women's Health, P.C., by their attorneys, Kennedy, Childs & Fogg, P.C., and respectfully submit the following supplement to their reply in support of their Motion, pursuant to Colo.R.Civ.P. 26(c), for an Order enforcing the limitations of Colo.R.Civ.P. 26(b)(4)(A) during the deposition of Alison Mall, M.D. and specifically, precluding plaintiffs' counsel from questioning Dr. Mall (a non-defendant, treating physician) about expert and standard-of-care opinions relating to medical care in which she was not personally involved.

Defendants also respectfully request, if possible with the Court's docket and schedule, an expedited telephone hearing on this Motion.

1. On January 25, 2007 at 2:39 p.m., defendants' counsel received plaintiffs' Response. **(Exhibit A)** Although the Response is dated January 23, 2007, it was apparently not e-filed through LexisNexis until January 25, 2007. This was an untimely Response and should not be considered by the Court.

2. In the event that the Court elects to consider plaintiffs' Response, defendants respectfully submit the following supplemental points for the Court's consideration.

3. Plaintiffs distinguish between experts who are "actor-viewers" or those who personally witnessed an event, compared to those who have no personal knowledge of the expert opinions which are being elicited. Defendant agrees and it is precisely this distinction which applies to Dr. Mall.

a. To the extent Dr. Mall is asked questions about her own care, the time when she was involved in Mrs. Heyman's care or other matters about which she has personal knowledge, such questioning is not prohibited by Colo.R.Civ.P. 26(b)(4)(A). Defendants have never suggested to the contrary.

b. The issue, however, is whether Dr. Mall may properly be asked expert, opinion questions about care provided by other defendants after Dr. Mall was no longer involved or on call, and during the 10 ½ hours which elapsed after Dr. Cooper came on call and the delivery of the minor plaintiff. Plaintiffs fail to make this distinction. Colorado case law clearly holds that such testimony – which would not be "actor-viewer" or personal witness testimony -- *is* expert testimony subject to Rule 26(b)(4)(A). That is precisely the ruling in *Liscio v. Pinson*, 83 P.3d 1149, 1157 (Colo.App. 2003) and the case cited by the *Lisco* court, *Patel v. Gayes*, 984 F.2d 214, 217 (7th Cir. 1993).

4. Dr. Mall was identified in Rule 26 disclosures as a person who may have knowledge about her own involvement in Mrs. Heyman's prenatal care and the initial course of the pregnancy – and, again, defendants have no objection to Dr. Mall being appropriately questioned about these aspects of her personal involvement in the care. The issue is whether she can properly be questioned as an expert about care in which she was not involved, did not participate and has no personal knowledge at this time, questioning which would be expert testimony.

5. Colo.R.Civ.P. 26(b)(4)(A) provides:

> A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties *or ordered by the court*, **no discovery, including depositions, concerning *either* the identity *or the opinions* of experts shall be conducted until after the disclosures required by**

subsection (a)(2) of this Rule.

(Emphasis added) The distinction suggested by plaintiff that this does not apply to a witness who has some personal knowledge is not supported by any case law; rather, the Rule provides that expert opinions (*i.e.*, opinions formed by one who was not a "actor-viewer" or personal witness) may not be the subject of discovery until expert disclosures have been made – which has not yet occurred in this case.

6. Plaintiffs argue that there is not good cause for a protective order because the line of proposed questioning does not involve annoyance, embarrassment, oppression, undue burden, or expense. Good grounds exist to enforce the Rules of Civil Procedure. Plaintiffs clearly intend not to abide by the limitations of Rule 26(b)(4)(A) and its requirement that such testimony may only occur with a court order, and that constitutes a proper basis for a motion for protective order.

7. If Dr. Mall is endorsed as a standard of care expert under Colo.R.Civ.P. 26(a)(2)(B)(II) – which defendants do not contemplate – defendants agree that plaintiffs have the right to re-depose Dr. Mall as to any additional opinions disclosed. That hypothetical does not, at this time, serve as grounds to override the limitations imposed by Rule 26(b)(4)(A).

8. **Because Dr. Mall's deposition is scheduled for January 30, 2007, defendant respectfully requests, if possible with the Court's docket, a telephone hearing on this Motion.**

Wherefore, defendants respectfully request Orders from this Court as follows:

a. Limiting the deposition of Dr. Mall to those matters relating to her care and treatment of Mrs. Heyman during her prenatal care and during the initial portion of her hospitalization up to 6:00 a.m. on June 17, 2003 when Dr. Mall was on-call.

b. Prohibiting any questioning of Dr. Mall as to events about which she has no personal knowledge, including seeking opinions about or standard-of-care testimony about fetal monitor tracings, any care provided by Dr. Cooper or the labor nurse, or any treatment rendered to Mrs. Heyman after 6:00 a.m. when Dr. Mall was no longer on call.

Respectfully submitted this 25th day of January, 2007

KENNEDY CHILDS & FOGG, P.C.

By: */s/ Edward D. Bronfin*
Edward D. Bronfin, #11170
Attorneys for Defendants Cooper and Drs. Cooper & Aptekar, P.C. d/b/a/ Partners In Women:s Health, P.C.

In accordance with C.R.C.P. 121 ¶1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S SUPPLEMENT TO REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D. AND REQUEST FOR EXPEDITED TELEPHONE HEARING** has been served on all parties herein by LexisNexis File and Serve or mailed via U.S. mail, postage prepaid on this 25th day of January 2007, addressed to:

Jim Leventhal, Esq.
Leventhal, Brown & Puga, P.C.
950 S. Cherry Street
Suite 600
Denver, CO 80246

Charles Goldberg, Esq.
Rothgerber, Johnson & Lyons, P.C.
1200 17th Street
Suite 300
Denver, CO 80202

Kevin Oncken, Esq.
Jeffrey H. Uzick, Esq.
Uzick, Oncken, Scheuerman & Berger, P.C.
2702 Treble Creek
San Antonio, TX 78258

Craig Adams, Esq.
Dickinson, Prud:Homme, Adams & Ingram, LLP
730 Seventeenth Street, Suite 730
Denver, Colorado 80202-3504

/s/ Kylee Ashmore

In accordance with C.R.C.P. 121 "1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DISTRICT COURT, COUNTY OF DENVER, COLORADO 2nd Judicial District 1437 Bannock Street Denver, Colorado 80202	▲ COURT USE ONLY ▲
Plaintiff: JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor vs. **Defendants:** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a/ PARTNERS IN WOMEN:S HEALTH, P.C., JUANITA SASSER, R.N. and HCA-HEALTHONE, LLC d/b/a/ ROSE MEDICAL CENTER	Case Number: 05CV4567 Courtroom: 6
Attorneys for Defendants Cooper and Drs. Cooper & Aptekar, P.C. d/b/a/ Partners In Women's Health, P.C. Name: Edward D. Bronfin, Atty. Reg. No. 11170 Address: Kennedy Childs & Fogg, P.C. 1050 Seventeenth Street, Suite 2500 Denver, CO 80265 Phone Number: 303-825-2700 Fax Number: 303-825-0434 E-Mail Address: edb@kcfpc.com	

DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D. AND REQUEST FOR EXPEDITED TELEPHONE HEARING

COME NOW the defendants, Theodore Cooper, M.D. and Drs. Cooper and Aptekar, P.C. d/b/a Partners in Women's Health, P.C., by their attorneys, Kennedy, Childs & Fogg, P.C., and respectfully submit the following reply in support of their Motion, pursuant to Colo.R.Civ.P. 26(c), for an Order enforcing the limitations of Colo.R.Civ.P. 26(b)(4)(A) during the deposition of Alison Mall, M.D. and specifically, precluding plaintiffs' counsel from questioning Dr. Mall (a non-defendant, treating physician) about expert and standard-of-care opinions relating to medical care in which she was not personally involved.

Defendants also respectfully request, if possible with the Court's docket and schedule, an expedited telephone hearing on this Motion.

1. Defendant's Motion for Protective Order was filed on January 5, 2007. Plaintiffs filed a Response to this Motion on January 23, 2007. However, in their Response, plaintiffs did not address this Motion whatsoever. Rather, the Response was addressed to another deposition.

2. Plaintiffs have not filed a timely Response to defendant's Motion and therefore they should be deemed to have confessed defendants' Motion. Colo.R.Civ.P. 121, Section 1-15(3).

3. Plaintiffs have not shown any reason why the relief requested – this Court's Order enforcing Colo.R.Civ.P. 26(b)(4)(A) during Dr. Mall's deposition – should not apply. As noted in the Motion, it is anticipated that plaintiffs' counsel will attempt to question Dr. Mall about events which transpired, and her interpretation of a fetal monitor tracings obtained, during a span of 10 ½ hours after Dr. Mall was last involved in the care of Mrs. Heyman. To the extent that Dr. Mall has no personal knowledge of these events which occurred after she was on call and provided any care to the patient, such testimony represents expert testimony. *Liscio v. Pinson*, 83 P.3d 1149, 1157 (Colo.App. 2003); *Patel v. Gayes*, 984 F.2d 214, 217 (7th Cir. 1993).

4. Colo.R.Civ.P. 26(b)(4)(A) provides:

> A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties *or ordered by the court*, **no discovery, including depositions, concerning *either* the identity *or the opinions* of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.**

(Emphasis added) Thus, until expert witness disclosures have been filed, depositions regarding opinions of non-party experts is not permitted except as ordered by the Court or stipulated by the parties.

5. Because (a) expert disclosures have not yet been filed, (b) any testimony by Dr. Mall about events which occurred after she was personally involved would represent expert testimony and (c) Rule 26(b)(4)(A) precludes discovery of expert opinions until expert disclosures have been filed and no Court Order or stipulation permitting such questioning has been entered, such questioning of Dr. Mall should not be permitted.

6. **Because Dr. Mall's deposition is scheduled for January 30, 2007, defendant respectfully requests, if possible with the Court's docket, a telephone hearing on this Motion.**

Wherefore, defendants respectfully request Orders from this Court as follows:

a. Limiting the deposition of Dr. Mall to those matters relating to her care and treatment of Mrs. Heyman during her prenatal care and during the initial portion of her hospitalization up to 6:00 a.m. on June 17, 2003 when Dr. Mall was on-call.

b. Prohibiting any questioning of Dr. Mall as to events about which she has no personal knowledge, including seeking opinions about or standard-of-care testimony about fetal monitor tracings, any care provided by Dr. Cooper or the labor nurse, or any treatment rendered to Mrs. Heyman after 6:00 a.m. when Dr. Mall was no longer on call.

Respectfully submitted this 24th day of January, 2007

KENNEDY CHILDS & FOGG, P.C.

By: */s/ Edward D. Bronfin*
Edward D. Bronfin, #11170
Attorneys for Defendants Cooper and Drs. Cooper & Aptekar, P.C. d/b/a/ Partners In Women:s Health, P.C.

In accordance with C.R.C.P. 121 ¶1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D. AND REQUEST FOR EXPEDITED TELEPHONE HEARING** has been served on all parties herein by LexisNexis File and Serve or mailed via U.S. mail, postage prepaid on this 24th day of January 2007, addressed to:

Jim Leventhal, Esq.
Leventhal, Brown & Puga, P.C.
950 S. Cherry Street
Suite 600
Denver, CO 80246

Charles Goldberg, Esq.
Rothgerber, Johnson & Lyons, P.C.
1200 17th Street
Suite 300
Denver, CO 80202

Kevin Oncken, Esq.
Jeffrey H. Uzick, Esq.
Uzick, Oncken, Scheuerman & Berger, P.C.
2702 Treble Creek
San Antonio, TX 78258

Craig Adams, Esq.
Dickinson, Prud:Homme, Adams & Ingram, LLP
730 Seventeenth Street, Suite 730
Denver, Colorado 80202-3504

/s/ Kylee Ashmore

In accordance with C.R.C.P. 121 ¶1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DISTRICT COURT, COUNTY OF DENVER, COLORADO 2d Judicial District 1437 Bannock Street Denver, Colorado 80202	**EFILED Document** **CO Denver County District Court 2nd JD** **Filing Date: Jan 25 2007 2:36PM MST** **Filing ID: 13593138** **Review Clerk: Jon M Libid**
Plaintiff: JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor **Defendants:** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a PARTNERS IN WOMEN'S HEALTH, P.C., JUANITA SASSER, R.N. and HCA-HEALTHONE, LLC d/b/a ROSE MEDICAL CENTER	**▲COURT USE ONLY ▲**
Attorney or Party Without Attorney: Jim Leventhal, #5815 950 S. Cherry Street, Suite 600 Denver, Colorado 80246 Phone Number: (303) 759-9945 FAX Number: (303) 759-9692 E-mail: jim@leventhal-law.com Charles Goldberg, #1972 1200 17th Street, Suite 3000 Denver, Colorado 80202 Phone Number: (303) 623-9000 FAX Number: (303) 623-9222 E-mail: cgoldberg@rothgerber.com	Case Number: 2005CV4567 Division: 6

PLAINTIFF'S RESPONSE TO DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C.'S MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D.

Plaintiff, Jennifer Heyman, Individually, and as Parent and Next Friend of Danielle Heyman, a Minor, through her attorneys, Leventhal, Brown & Puga, P.C. hereby submits her Response to Defendants' Cooper and Partners in Women's Health, P.C.'s Motion for Protective Orders to Enforce Colo.R.Civ.P. 26(b)(4)(A) During Deposition of Alison Mall, M.D. Plaintiff states as follows in support thereof:

1. Defendants seek an Order of this Court precluding testimony about expert and standard-of-care opinions by Dr. Alison Mall, a Board Certified Obstetrician/Gynecologist on the grounds that Dr. Mall was not personally involved in the medical care at issue in this case.

2. Colorado Rule of Civil Procedure 26(b)(1) provides that, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence". C.R.C.P. 26(b)(1) (2006).

3. Defendants cite C.R.C.P. 26(b)(4)(A) in support of their position that Plaintiffs should not be permitted to question Dr. Mall regarding expert and standard of care opinions. This rule distinguishes between those experts who are expected to testify at trial and those who are not. Both classes of experts are distinct from experts who personally witnessed an event. These so-called "actor-viewers" are beyond the reach of Rule 26(b)(4). *See Concerning Application for Water Rights*, 677 P.2d 320, 328 (Colo. 1984); *citing Nelco Corp. v. Slater Electric*, 80 FRD 411 (E.D.N.Y. 1978)(Courts have recognized that an expert witness may have acquired some facts and opinions as an actor or viewer and others in anticipation of litigation or for trial. In such circumstances, the former facts and opinions are discoverable without compliance with C.R.C.P. 26(b)(4) whereas the latter are not.) Here, Dr. Mall is clearly within possession of facts as well of opinions as accordingly, Dr. Mall's testimony is not covered by C.R.C.P. 26(b)(4).

4. Colorado Rule of Civil Procedure 26(c) governs the issuance of protective orders and provides that:

> ... for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...

C.R.C.P. 26(c) (2006). As the moving party, Defendants have the burden to establish and substantiate their objections, and to show "good cause".[1] The moving party must show specifically how the subject disclosure or discovery is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. The litany of "oppression" and "undue burden or expense" does not alone constitute grounds for a motion for issuance of a protective order under Rule 26(c).

5. Defendants have failed to show good cause and have further failed to show how questions regarding standard of care will cause annoyance, embarrassment,

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[1] *See Williams v. District Court*, 866 P.2d 908, 912 (Colo. 1993); *Direct Sales Tire Co. v. District Court*, 686 P.2d 1316, 1321 (Colo. 1984); *Bond v. Dist. Court*, 682 P.2d 33, 40 (Colo. 1984); *Hawkins v. Dist. Court*, 638 P.2d 1372, 1375 (Colo. 1982); *Leidholt v. Dist. Court*, 619 P.2d 768, 771 (Colo.1980); *Cameron v. Dist. Court*, 193 Colo. 286, 290, 565 P.2d 925, 928-29 (1977).

oppression or undue burden or expense to Dr. Mall. Dr. Mall is a Board Certified OB/GYN and at the time of this incident was an employee of the Defendant Drs. Cooper & Aptekar, P.C. d/b/a Partners in Women's Health. Presumably, Dr. Mall possesses information and knowledge regarding not only her own standard of practice as an OB/GYN, but also information and knowledge regarding practices and procedures of the Defendants. This testimony is relevant to the claims and defenses raised in this case and Plaintiffs should be permitted to inquire of Dr. Mall as to any and all issues relevant to the current litigation.

6. It is also important to note that Defendants have submitted the following disclosures pursuant to C.R.C.P. 26(a)(1):

Defendants HCA-Healthone, LLC d/b/a Rose Medical Center and Juanita Sassser, R.N.:

2. Various representatives of Drs. Cooper & Aptekar, P.C. d/b/a Partners in Women's Health P.C. c/o Ed Bronfin, Esq., Kennedy, Christopher, Childs & Fogg, P.C. Drs. Cooper & Aptekar, P.C. d/b/a Partner in Women's Health, P.C. is a co-defendant in this case. It will have information about its employees, their performance within the course and scope of their employment, and policies, procedures or protocols for treatment of its patients.

4. Alison Mall, M.D., formerly with Partners in Women's Health, P.C. Now at RWH Clinic for Women, 3421 W 9th Street, Suite G4500, Waterloo, IA 50702 (319) 233-8865. Dr. Mall followed Jennifer Heyman during her pregnancy and discharged her after delivery. She has information about the care she provided as summarized in the medical records.

Defendants Theodore Cooper, M.D., Drs. Cooper & Aptekar, P.C. d/b/a Partners in Women's Health, P.C.:

B. Allison Mall, M.D.
3421 W. 9th St., Suite G4500
Waterloo, IA 50702
(319)233-8865

Dr. Mall is a physician who specializes in obstetrics and gynecology. She will have information regarding her prenatal evaluation and care of Jennifer Heyman. In addition, she will have information regarding the admission orders for Mrs. Heyman upon her admission to Rose Medical Center on June 16, 2003.

(Emphasis added). These disclosures, which were made pursuant to C.R.C.P. 26(a)(1), admittedly do not contain any expert opinions of Dr. Mall; however, these disclosures do suggest that Dr. Mall has information and knowledge beyond her care and treatment of Mrs. Heyman on June 17, 2003, as represented by Defendants. Further, as stated above, Plaintiffs have no way to predict whether or not Defendants will designate Dr. Mall as a non-retained expert witness pursuant to C.R.C.P. 26(a)(2)(B)(II) at any point in time in the future.

7. If Defendants should elect to endorse Dr. Mall pursuant to C.R.C.P. 26(a)(2)(B)(II), Plaintiffs would clearly be permitted to question Dr. Mall regarding her personal practices and other issues related to standard of care. *See Wallbank v. Rothenberg*, 74 P.3d 413 (Colo.App. 2003) (Trial court did not abuse its discretion nor err as a matter of law in allowing the experts to testify about their own practices as well as the applicable standard of care).

8. Testimony of Dr. Mall, separate and apart from her personal knowledge of the events on June 17, 2003, is relevant to claims and defenses raised in this case. It is inappropriate for Defendants to attempt to limit Plaintiff's ability to discovery relevant and pertinent information in this matter. If the Court determines that a protective order is warranted, Plaintiff would request the opportunity to re-depose Dr. Mall should the Defendant designate Dr. Mall pursuant to C.R.C.P. 26(a)(2)(B)(II).

WHEREFORE, Plaintiff respectfully request this Court deny Defendants' Cooper and Partners in Women's Health, P.C.'s Motion for Protective orders to Enforce Colo.R.Civ.P. 26(b)(4)(A) during deposition of Alison Mall, M.D., or, in the alternative, permit Plaintiff to re-dose Dr. Mall in the event Defendant disclose Dr. Mall pursuant to C.R.C.P. 26(a)(2)(B)(II).

Respectfully submitted this 23rd day of January, 2007.

LEVENTHAL, BROWN & PUGA, P.C.

A duly signed original by Sommer Stephens is available at the offices of Leventhal, Brown & Puga, P.C.

By _____

Jim Leventhal, #5815
Sommer D. Stephens, #35053
950 South Cherry Street, Suite 600
Denver, CO 80246
(303) 759-9945

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

It is hereby certified that on this 23rd day of January, 2007, a true and correct copy of the foregoing was electronically filed and served on the following parties via JusticeLink:

Craig A. Adams, Esq.
Dickinson, Prud'Homme, Adams & Ingram, LLP
730 Seventeenth St., Suite 730
Denver, CO 80202-3504

Edward D. Bronfin
John H. Kechriotis
Kennedy, Childs & Fogg, P.C.
1050 Seventeenth St., Suite 2500
Denver, CO 80265

/s/ Linnzie King

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver CO 80202	**COURT USE ONLY**
Plaintiff(s): JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor **Defendant(s):** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a PARTNERS IN WOMEN'S HEALTH, P.C., JUANITA SASSER, R.N, and HCA-HealthONE LLC d/b/a Rose Medical Center	Case Number: 2005-CV-4567 Div./Ctrm.: 6
Attorneys for Defendant HCA-HealthONE, LLC d/b/a Rose Medical Center Craig A. Adams, No. 16753 Sean R. Dingle, No. 20776 Dickinson, Prud'Homme, Adams & Ingram, LLP 730 Seventeenth Street, Suite 730 Denver, Colorado 80202-3504 (303) 571-4428 Fax Number: (303) 571-1604 E-mail address: cadams@dpai-legal.com	

DEFENDANT HCA HEALTHONE d/b/a ROSE MEDICAL CENTER AND JUANITA SASSER'S JOINDER IN DEFENDANTS COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C.'S MOTION FOR PROTECTIVE ORDER TO ENFORCE C.R.C.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL M.D.

Defendant, HCA-HealthOne, LLC, d/b/a Rose Medical Center, by and through its attorneys, Dickinson, Prud'Homme, Adams & Ingram, LLP, hereby respectfully joins in Defendants, Cooper and Partners in Women's Health, P.C.'s Motion for Protective Order to Enforce C.R.C.P. 26(b)(4)(A) During Deposition of Alison Mall, M.D. as though fully set forth herein.

No additional attempt to confer with Plaintiffs' counsel was made regarding this motion given counsel for Dr. Cooper's representation regarding Plaintiffs' position in his C .R.C.P. 121 § 1-15(8) certification.

A proposed order is attached for the Court's consideration.

Respectfully submitted this 5th day of January, 2007.

DICKINSON, PRUD'HOMME, ADAMS & INGRAM, LLP

By: */s/ Sean R. Dingle*
Craig A. Adams
Sean R. Dingle
Attorneys for HCA-HealthONE LLC, d/b/a
Rose Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2007, I served a true and correct copy of the above and foregoing DEFENDANT HCA HEALTHONE d/b/a ROSE MEDICAL CENTER'S JOINDER IN DEFENDANTS COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C.'S MOTION FOR PROTECTIVE ORDER TO ENFORCE C.R.C.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL M.D. via Lexis-Nexis File & Serve, addressed to the following:

Jim Leventhal, Esq.
950 S Cherry Street, Suite 600
Denver, CO 80246

Charles Goldberg, Esq.
1200 17th Street, Suite 3000
Denver, CO 80202

Edward D. Bronfin, Esq.
John H. Kechriotis, Esq.
Kennedy, Christopher, Childs & Fogg P.C.
1050 Seventeenth Street, Suite 2500
Denver, Colorado 80265

By: *Julie K. Becker*

In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver CO 80202	**COURT USE ONLY**
Plaintiff(s): JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor **Defendant(s):** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a PARTNERS IN WOMEN'S HEALTH, P.C., JUANITA SASSER, R.N, and HCA-HealthONE LLC d/b/a Rose Medical Center	Case Number: 2005-CV-4567 Div./Ctrm.: 6

ORDER GRANTING DEFENDANT HCA HealthONE LLC d/b/a ROSE MEDICAL CENTER AND JUANITA SASSER'S JOINDER IN DEFENDANT COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C.'S MOTION FOR PROTECTIVE ORDER TO ENFORCE C.R.C.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D.

The Court, having reviewed Defendant HCA-HealthOne, LLC, d/b/a Rose Medical Center and Juanita Sasser's Joinder in Defendants Cooper M.D and Partners in Women's Health, P.C.'s Motion for Protective Order to Enforce C.R.C.P. 26(b)(4)(A) During Deposition of Alison Mall, M.D., and being advised in the premises, hereby Grants this defendant's motion as well as to Defendants HCA-HealthONE LLC d/b/a Rose Medical Center and Juanita Sasser.

Dated this _____ day of _____, 2007.

BY THE COURT:

_____
Larry J. Naves
Chief District Court Judge

LexisNexis File & Serve Transaction Receipt

Transaction ID:	13367953
Submitted by:	Julie Becker, Dickinson PrudHomme Adams & Ingram LLP
Authorized by:	Sean R Dingle, Dickinson PrudHomme Adams & Ingram LLP
Authorize and file on:	Jan 5 2007 3:51PM MST

Court:	CO Denver County District Court 2nd JD
Division/Courtroom:	6 - Division 6
Case Class:	Civil
Case Type:	Malpractice
Case Number:	2005CV4567
Case Name:	HEYMAN, JENNIFER et al vs. COOPER, THEODORE MD et al

Transaction Option:	File and Serve
Billing Reference:	heyrmc

Documents List
2 Document(s)

Attached Document, 2 Pages **Document ID: 7980258** View Original View PDF

Document Type:	Access:	Transaction Fee:	Linked:
Motion	Public	$0.00	

Document title:
DEFENDANT HCA HEALTHONE dba ROSE MEDICAL CENTER AND JUANITA SASSER'S JOINDER IN DEFENDANTS COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C.'S MOTION FOR PROTECTIVE ORDER TO ENFORCE C.R.C.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL M.D.

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Proposed Order	Public	$0.00	

Document title:
ORDER GRANTING DEFENDANT HCA HEALTHONE dba ROSE MEDICAL CENTER AND JUANITA SASSER'S JOINDER IN DEFENDANTS COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C.'S MOTION FOR PROTECTIVE ORDER TO ENFORCE C.R.C.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL M.D.

Expand All

Sending Parties (2)

Party	Party Type	Attorney	Firm	Attorney Type
HCA-HEALTHONE LLC	Defendant	Adams, Craig Alan	Dickinson PrudHomme Adams & Ingram LLP	Privately Retained Attorney
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Service List (6)

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Service	DRS COOPER & APTEKAR PC	Defendant	Bronfin, Edward David	Kennedy Childs & Fogg PC	Privately Retained Attorney	E-Service
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Service	HEYMAN, DANIELLE	Plaintiff	Leventhal, James Mark	Leventhal Brown & Puga PC	Privately Retained Attorney	E-Service

Service	HEYMAN, JENNIFER	Plaintiff	Leventhal, James Mark	Leventhal Brown & Puga PC	Privately Retained Attorney	E-Service

⊟ Additional Recipients (0)

⊞ **Case Parties**

Close

DISTRICT COURT, COUNTY OF DENVER, COLORADO 2nd Judicial District 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: JENNIFER HEYMAN, Individually, and as Parent and Next Friend of DANIELLE HEYMAN, a Minor vs. **Defendants:** THEODORE COOPER, M.D., DRS. COOPER & APTEKAR, P.C. d/b/a/ PARTNERS IN WOMEN:S HEALTH, P.C., JUANITA SASSER, R.N. and HCA-HEALTHONE, LLC d/b/a/ ROSE MEDICAL CENTER	Case Number: 05CV4567 Courtroom: 6
Attorneys for Defendants Cooper and Drs. Cooper & Aptekar, P.C. d/b/a/ Partners In Women:s Health, P.C. Name: Edward D. Bronfin, Atty. Reg. No. 11170 Address: Kennedy Childs & Fogg, P.C. 1050 Seventeenth Street, Suite 2500 Denver, CO 80265 Phone Number: 303-825-2700 Fax Number: 303-825-0434 E-Mail Address: edb@kcfpc.com	

DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D.

COME NOW the defendants, Theodore Cooper, M.D. and Drs. Cooper and Aptekar, P.C. d/b/a Partners in Women's Health, P.C., by their attorneys, Kennedy, Childs & Fogg, P.C., and pursuant to Colo.R.Civ.P. 26(c), respectfully move this Court for an Order enforcing the limitations of Colo.R.Civ.P. 26(b)(4)(A) during the deposition of Alison Mall, M.D. Specifically, defendants respectfully request an Order precluding plaintiffs' counsel from questioning Dr. Mall (a non-defendant, treating physician) about expert and standard-of-care opinions relating to medical care in which she was not personally involved.

AS GROUNDS THEREFOR, defendants show:

1/5/07

Colo.R.Civ.P. 121, Section 1-15(8) Certification

Defendants' counsel certifies that he personally spoke with plaintiffs' counsel, Mr. Leventhal, by telephone on January 4, 2007 to discuss this issue and the parties were unable to resolve this matter.

I. BACKGROUND

1. This is a medical and hospital malpractice case. The minor plaintiff, Danielle Heyman, was born on June 17, 2003. The case is set for trial in August 2007 and expert witnesses disclosures are not yet due. Plaintiffs apparently claim the care provided to Mrs. Heyman during her labor and delivery at Rose Medical Center on June 16-17, 2003 was allegedly inappropriate, leading to insufficient oxygen being delivered to Danielle Heyman's brain *in utero*, thereby causing severe neurologic and functional deficits.

2. Mrs. Heyman received her prenatal care during the pregnancy with Danielle through defendant Partners in Women's Health (PWH). During the pregnancy, she was seen by all of the obstetricians in the practice, including defendant Theodore Cooper, M.D., as well as several obstetricians who have not been named as defendants (Donald Aptekar, M.D.; Alison Mall, M.D. and Valerie Imperial, M.D.). The **sole** claim against PWH is for vicarious liability relating to **Dr. Cooper's care** of Mrs. Heyman during labor and delivery. (*See* Complaint, Third Claim for Relief for *Respondeat Superior*, ¶¶ 19-21). No claims have been asserted against PWH itself or any of the other physicians at PWH regarding their respective care of Mrs. Heyman. *Id.*

3. Mrs. Heyman was admitted to Rose Medical Center with a question of whether labor had started at 7:20 p.m. on June 16, 2003. Dr. Mall was the physician on call for PWH on the evening of June 16, 2003 and up to 6:00 a.m. on June 17, 2003. Following examination by a resident physician at the hospital, Dr. Mall was notified of Mrs. Heyman's condition at approximately 8:30 p.m. on June 16, 2003, and gave admitting orders for Mrs. Heyman.

4. Dr. Mall's role as physician-on-call for PWH ended at 6:00 a.m. on June 17, 2003. Thereafter, one of her partners, the defendant Dr. Cooper, came on call and was involved with the care provided to Mrs. Heyman up through Danielle's delivery at 4:25 p.m. on June 17, 2003. **Upon best information and belief, after Dr. Cooper came on call for PWH at 6:00 a.m. on June 17, 2003, Dr. Mall had no further involvement with Mrs. Heyman's labor, care or treatment or the delivery of Danielle**. Thus, Dr. Mall will have no personal knowledge of the events or care provided from 6:00 a.m. on June 17, 2003 forward until the time of delivery.

5. Dr. Mall's deposition is scheduled for January 30, 2007. It is anticipated that plaintiffs' counsel, Mr. Leventhal, will attempt to question Dr. Mall about the propriety of the care and treatment provided to Mrs. Heyman by Dr. Cooper and a labor nurse between 6:00 a.m. and delivery at 4:25 p.m. (the nearly 10 ½ hours which transpired **after** Dr. Mall was no longer involved in Mrs. Heyman's care), including asking Dr. Mall to interpreting the fetal monitor

tracings which were obtained during this 10 ½ hours, medications given to Mrs. Heyman, whether different treatment should have been provided by Dr. Cooper and/or the labor nurse – all matters which do not form part of Dr. Mall's actual treatment or observations of Mrs. Heyman.

6. Of course, to the extent that Dr. Mall has any personal knowledge of or has had discussions with others about the events occurring during those ensuing 10 ½ hours after she went off-call, questioning of her about such personal knowledge or discussions would be appropriate.

7. *However,* to the extent that Dr. Mall has no personal knowledge of, has not had discussions with others about, or reviewed records regarding, the ensuing 10 ½ hours after she went off-call, any such questioning of Dr. Mall about the care provided during the 10 ½ hours she was not involved would represent expert testimony. Rule 26(b)(4)(A) precludes deposing Dr. Mall as to expert testimony or opinions. In order to enforce Rule 26(b)(4)(A), defendants request a protective order limiting the questioning of Dr. Mall to those matters relating to her care of Mrs. Heyman and which are within her personal knowledge. Defendants request a protective order prohibiting questioning about matters outside of the scope of Dr. Mall's care (including opinions about Mrs. Heyman's condition, the fetal monitor tracing or the care provided by any defendant after Dr. Mall's involvement in the case ended) which would represent expert testimony in violation of Rule 26(b)(4)(A).

II. APPLICABLE LAW

8. Colo.R.Civ.P. 26(b)(4)(A) provides:

> A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties *or ordered by the court*, **no discovery, including depositions, concerning *either* the identity *or the opinions* of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.**

(Emphasis added) Thus, until expert witness disclosures have been filed, depositions regarding opinions of non-party experts is not permitted.

9. In this case, no expert disclosures have yet been filed. Plaintiffs' expert disclosures are due on March 16, 2007 and defendant's expert disclosures are due on April 16, 2007. Dr. Mall will not have been endorsed as an expert witness by the time of her deposition on January 30, 2007 (nor will she be endorsed as an expert witness).

10. This issue arose, in a somewhat different context, in *Liscio v. Pinson*, 83 P.3d 1149 (Colo.App. 2003). In that medical malpractice case, the deposition of a treating physician was taken who had not been endorsed as an expert on standard of care issues. During the deposition, the defendant's attorney began to question the treating doctor about standard of care opinions as to the defendant's surgical treatment. 83 P.3d at 1156. Plaintiff's counsel (Mr.

Leventhal) objected, "instructed the witness not to answer the question, and indicated that he would seek a protective order." *Id.*

11. In the first instance, the Court of Appeals held that the objection of plaintiff's counsel was **proper**: "We note that plaintiff's objection to defendant's particular line of inquiry was well-founded. *See* C.R.C.P. 26(b)(4)(A) ("Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule."); *cf. Patel v. Gayes*, 984 F.3d 214, 217 (7th Cir. 1993)(**absent endorsement of expert, treating physician could not relate opinion about facts of which he had no personal knowledge.**)" 83 P.3d at 1157 (emphasis added). However, the Court held that it was not proper, under those circumstances, to instruct the witness not to answer the question in a pending deposition (as instructions not to answer are only proper to preserve a privilege, enforce a court order, or present a motion under C.R.C.P. 30(d)(3)), and that a Rule 30(d)(3) motion was appropriate only if the deposition was being taken in an unreasonable manner to annoy, embarrass, or oppress the deponent. *Id.*

12. Based on *Liscio*, therefore, it would not be proper for the undersigned to do nothing before Dr. Mall's deposition, object to questions outside of Dr. Mall's personal knowledge and relating to matters unrelated to Dr. Mall's treatment of Mrs. Heyman and suspend the deposition under Rule 30(d)(3). *Liscio* does **not**, however, preclude a motion being filed with the Court before the deposition is taken in order to enforce the limitations of Rule 26(b)(4)(A). Indeed, Rule 26(b)(4)(A) specifically envisions that the Court may determine the scope of deposition questioning and whether expert questioning should be permitted in advance of the filing of Rule 26(a)(2) expert witness disclosures, in that the Rule prohibits such questioning except by stipulation of the parties or "as ordered by the Court."

13. In this case, the key question is Dr. Mall's personal knowledge. If Dr. Mall testifies that she has no personal knowledge about any of the events, the fetal monitor tracings, or the other care provided by Dr. Cooper and the labor nurse during the 10 ½ hours after Dr. Mall was no longer on call, questioning of her during her deposition about the 10 ½ hours after Dr. Mall was no longer on call (including Mrs. Heyman's course, the fetal monitor tracings and the care provided by Dr. Cooper and the labor nurse) can only represent expert testimony – just as described in *Patel v. Gayes*, 984 F.2d 214 (7th Cir. 1993), cited with approval by the Court in *Liscio* – and would therefore violate Rule 26(b)(4)(A) because expert depositions are not permitted before expert disclosures have been filed.

14. In *Patel*, two treating physicians of the plaintiff were questioned about an EKG which was not used by them (just as the fetal monitoring tracings after 6:00 a.m. on June 17, 2003 formed no part of Dr. Mall's care) and about whether the defendant-physician adhered to the standard of care. The Court held that this was classic expert testimony:

> In order to determine if an expert need be identified before trial, Rule 26 focuses not on the status of the witness, but rather the substance of the testimony. *See Nelco Corp.*, 80

> F.R.D. at 414 ("under Rule 26(b)(4)(A)[1], a witness sought to be discovered may be an 'expert' as to some matters and an 'actor' as to others.") . . . Under the Federal Rules, an expert must be identified if his testimony does not come from personal knowledge of the case, or if his knowledge was "acquired or developed in anticipation of litigation or for trial." The testimony of [the treating doctors] with respect to the standard of care falls with in this category. As [defendant] points out, at least one of the documents upon which the physicians were asked to comment, the electrocardiogram (EKG), was not used by them to treat Mr. Patel. Therefore, their knowledge, in this instance, was not based on their observations during the course of treating his illness. Moreover, the physicians were questioned about their opinion of the general medical standard of care within the community. As the district court determined, this is "classic" expert testimony.

984 F.2d at 217 (citations omitted).

15. Questioning of Dr. Mall about any of the care provided during the 10 ½ hours after she was no longer on call would be precisely the same: not testimony of Dr. Mall from personal knowledge or as an actor, but instead classic expert testimony. Any questions about what was done or should have been done, how the fetal monitor tracings should have been interpreted or what they showed, or whether the care provided during this 10 ½ hours by either Dr. Cooper or the labor nurse met accepted standards, would not represent personal knowledge acquired by Dr. Mall during her treatment of Mrs. Heyman. If, as is believed to be the case, Dr. Mall has no personal knowledge about these events and has not reviewed the fetal monitor tracings, questioning of her about the fetal monitor tracings (as with the EKG in *Patel*) or whether there was adherence to generally accepted standards of care by Dr. Cooper or the labor nurse (as occurred in *Patel*) would represent classic expert testimony. Because, however, Dr. Mall has not been endorsed as an expert, because Rule 26(a)(2) expert disclosures have not yet been filed, and because expert testimony by deposition is precluded by Rule 26(b)(4)(A) until after expert disclosures have been filed, such questioning of Dr. Mall would violate Rule 26(b)(4)(A).

16. A ruling by this Court prohibiting questioning of Dr. Mall during her deposition about care in which she was not involved or seeking to elicit expert opinions about care which occurred after she was on call will not be unfair or prejudicial. Dr. Mall has not been endorsed as an expert witness and will not be. Questioning Dr. Mall about whether other providers adhered to the standard of care in events in which she was not a participant, where she is not (and will not be) endorsed as an expert, and prior to expert disclosures, is an attempt to elicit expert testimony and do an end-run around the dictates of Rule 26(b)(4)(A). There is no reason for this

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1 There was a change to the federal version of Rule 26(b)(4)(A) after the *Patel* case was decided. Colorado did not adopt the similar change.

Court to allow an departure from rule for Dr. Mall's deposition.

17. Moreover, a ruling prohibiting questioning of Dr. Mall during her deposition about care in which she was not involved and has no personal knowledge is in line with the general rule that a factual witness cannot be forced to become an expert witness. "In other words, just because a party wants to make a person work as an expert does not mean that, absent the consent of the person in question, the party can generally do so." *Young v. United States*, 181 F.R.D. 344, 346 (W.D. Tx. 1997). *Accord Mason v. Robinson*, 340 N.W.2d 236 (Iowa 1983)(physician who had statistical data about surgery performed on the decedent could not be forced to render expert opinion about whether defendant adhered to standard of care in performing the surgery); *Commonwealth v. Vitello*, 367 Mass. 224, 327 N.E.2d 819, 827 (1975)(a "party may not by summons compel the involuntary testimony of an expert witness solely for the expertise he may bring to the trial, and in the absence of any personal knowledge on his part related to the issues. . . .")

18. In summary:

a. *Liscio* establishes that questioning of Dr. Mall about matters outside of her personal knowledge (including the adherence to standard-of-care by Dr. Cooper and the labor during the 10 ½ hours after her call ended, what the fetal monitor tracing showed, what should have been done, etc), is expert testimony as it would be derived not from Dr. Mall's personal knowledge and observations, but from conclusions and opinions derived from information about which she has no personal knowledge. Because Colo.R.Civ.P. 26(b)(4)(A) specifically prohibits expert depositions in advance of the filing of expert disclosures, and because Dr. Mall has not been (and will not be) endorsed as an expert witness, Rule 26(b)(4)(A) precludes questioning of her as an expert – as opposed to factual – witness.

b. *Liscio* does not prevent this Court from considering this motion or granting a protective order. Rule 26(b)(4)(A) *specifically* envisions that a Court *may* consider this question as it grants the Court authority to permit or prohibit expert questioning prior to expert disclosures. Rather, *Liscio* instead only prevents a party from stopping a deposition under Rule 30(d)(3) in order to enforce these limitations – not from seeking a prior Court order to enforce the limitations of Rule 26(b)(4)(A).

c. While defendants seek no limitation on questioning regarding Dr. Mall's personal knowledge and personal involvement in the prenatal care of Mrs. Heyman and the care which was provided while she was on call up to 6:00 a.m. on June 17, 2003, any further questioning about standard-of-care opinions as to events which occurred during the ensuing 10 ½ hours while Dr. Mall was not on call, and about which she has no personal knowledge, would represent an improper attempt to force her to become an expert witness in violation of both Rule 26(b)(4)(A) and the general rule that a party cannot compel a factual witness to go beyond his or her knowledge of the facts and render expert, standard-of-care opinions.

19. Defendants respectfully request Orders from this Court as follows:

a. Limiting the deposition of Dr. Mall to those matters relating to her care and treatment of Mrs. Heyman during her prenatal care and during the initial portion of her hospitalization up to 6:00 a.m. on June 17, 2003 when Dr. Mall was on-call.

b. Prohibiting any questioning of Dr. Mall as to events about which she has no personal knowledge, including seeking opinions about or standard-of-care testimony about fetal monitor tracings, any care provided by Dr. Cooper or the labor nurse, or any treatment rendered to Mrs. Heyman after 6:00 a.m. when Dr. Mall was no longer on call.

20. A proposed Order is attached for the Court's review and convenience.

Respectfully submitted this 5th day of January, 2007

KENNEDY CHILDS & FOGG, P.C.

By: */s/ Edward D. Bronfin*
Edward D. Bronfin, #11170
Attorneys for Defendants Cooper and Drs. Cooper & Aptekar, P.C. d/b/a/ Partners In Women:s Health, P.C.

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **DEFENDANTS' COOPER AND PARTNERS IN WOMEN'S HEALTH, P.C'S MOTION FOR PROTECTIVE ORDERS TO ENFORCE COLO.R.CIV.P. 26(b)(4)(A) DURING DEPOSITION OF ALISON MALL, M.D.** has been served on all parties herein by LexisNexis File and Serve or mailed via U.S. mail, postage prepaid on this 5th day of January 2007, addressed to:

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/s/ Kylee Ashmore

In accordance with C.R.C.P. 121 ¶1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	DATE FILED: November 6, 2014 3:37 PM CASE NUMBER: 2012CV5146
Plaintiff(s) HOWARD HOBBS v. **Defendant(s)** VIKING INS CO OF WISCONSIN et al.	⚠ **COURT USE ONLY** ⚠
	Case Number: 2012CV5146 Division: 424 Courtroom:

ORDER GRANTING WITH AMENDMENTS DEFENDANT VIKING'S MOTION IN LIMINE TO LIMIT THE OPINION AND TESTIMONY OF PLAINTIFFS NON-RETAINED EXPERTS TO THEIR MEDICAL RECORDS

The motion/proposed order attached hereto: GRANTED WITH AMENDMENTS.

Non-retained expert treating physicians may not testify as to opinions not expressed in their medical records.

Issue Date: 11/6/2014

Kenneth M. Laff

KENNETH MARTIN LAFF
District Court Judge

DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St. Denver, CO 80202	
Plaintiff(s): HOWARD HOBBS, **v.** **Defendant(s): VIKING INSURANCE COMPANY OF WISCONSIN & ARIELLE FOSTER.**	▲ **COURT USE ONLY** ▲ Case Number: 2012CV5146 Div./Ctrm.: 424

PROPOSED ORDER REGARDING DEFENDANT VIKING'S PARTIALLY UNOPPOSED MOTION IN LIMINE TO LIMIT THE OPINION AND TESTIMONY OF PLAINTIFF'S NON-RETAINED EXPERTS TO THEIR MEDICAL RECORDS

THIS MATTER comes before the Court on Defendant Viking's Partially Unopposed Motion in Limine to Limine the Opinion and Testimony of Plaintiff's Non-Retained Experts to Their Medical Records.

The Court, having reviewed the Motion and any being otherwise advised of the premise, HEREBY ORDERS that the Motion is GRANTED. Plaintiff's non-retained medical providers shall be limited to testimony and opinions in their medical records.

DATED this _____ day of _____, 2014.

_____
District Court Judge

District Court, El Paso County, State of Colorado **PO Box 2980** **Colorado Springs, CO 80901-2980** Phone Number: **(719) 452-5522**	DATE FILED: March 31, 2015 CASE NUMBER: 2014CV31351
Plaintiff(s): SARA HOWARD, as legal guardian of MINA HEMATI A/K/A MINA BELL v. **Defendant(s): ROYCE SOLANO, M.D., LUKASZ KOWALCZYK, M.D., RICK HATERIUS, M.D., MICHAEL STARKEY, M.D., AND PIO HOCATE, M.D.**	**▲ Court Use Only ▲**
	Case Number: **14CV31351** Division 22 Courtroom W370
ORDER REGARDING EX PARTE INTERVIEWS WITH MEDICAL WITNESSES	

This matter comes on for me to rule on defendants' motions for ex parte interviews of the following medical providers: Dr. Uragoda, Dr. Lindsey, Dr. Bowser, Dr. Steward, and Dr. Balazy. I have reviewed all of the pleadings filed on this issue as of this date (including the sample orders filed by the parties after the March 13, 2015 hearing) and enter the following order:

Defendants Solano, Starkey, and Hocate all provided medical care to Ms. Hemati in the two months before her cardiac arrest on April 25, 2012. (Complaint, ¶¶11-39). Drs. Kowalczyk and Haterius both provided medical care to Ms. Hemati on April 25, 2012. All five defendants treated Ms. Hemati for either chest or abdominal issues that first came to Dr. Solano's attention on February 29, 2012. (Id., ¶¶11-51).

Drs. Uragoda, Lindsey, Bowser, and Stewart all provided care to Ms. Hemati at Penrose St. Francis Hospital (PSF) as a direct result of her cardiac arrest on April 25, 2012 or the anoxic injury that followed. (Plaintiff's Response, ¶¶2-5). Drs. Uragoda and Bowser both provided

their care within three days of April 25, 2015. (Id., ¶5). Dr. Stewart provided his care on May 1, May 2, 2012, and May 23, 2012. (Id., Exhibit 7). Dr. Lindsey provided care starting April 25, 2012 and continued to provide care at PSF until May 29, 2012, when Ms. Hemati was discharged. (Id., Ex. 5). Dr. Balazy was Ms. Hemati's attending physician at Craig Hospital in Denver beginning May 29, 2012 and continuing until June 15, 2012. (Id.)

For purposes of the motion before me, I find that Drs. Uragoda, Lindsey, Bowser, and Stewart were all, pursuant to C.R.S. § 13-90-107(1)(d)(II), "in consultation with" Drs. Kowalczyk and Haterius, the two doctors working on Ms. Hemati at the time of her cardiac arrest on April 25, 2012. The care provided by Drs. Uragoda and Bowser, which occurred within three days of April 25, 2012, was part of a "unified course of treatment" as contemplated by *Reutter v. Weber*, 179 P.3d 977, 981 (Colo. 2007)(". . . medical providers are 'in consultation with' one another if they collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment."). I find that the care provided by Drs. Uragoda and Bowser is on all fours with the "Medical Witnesses" in *Reutter*. Id. at 982, n.3 (holding that the nurses who worked to rehabilitate Mr. Reutter over the three days following his brain injury were "in consultation with" the doctors who initially provided allegedly negligent medical care).

The analysis for Drs. Stewart and Lindsey is slighly different, in that the care provided to plaintiff by these two doctors spanned five to six weeks from the date of cardiac arrest. Despite this length of treatment, I find that such care is still part of the kind of "unified course of treatment" contemplated by *Reutter.*

I find that extending this analysis to Dr. Balazy at Craig Hospital in Denver would be too much of an attenuation of *Reutter*, not only because Dr. Balazy first saw plaintiff on May 29, 2012 but also because he works at a different hospital in a different city.

Even if I am wrong in my analysis of C.R.S. § 13-90-107(1)(d)(II) and *Reutter*, I find that under *Alcon v. Spicer*, 113 P.3d 735, 741 (Colo. 2005), plaintiff has waived her privilege regarding any information "relat[ing] to the cause and extent of the injuries and damages claimed." I agree with defendants' assertion that the five doctors they seek ex parte meetings with fall into a narrowly circumscribed category of medical care providers who all treated plaintiff for the injuries she has sustained as a result of the events on April 25, 2012. Any information these five non-party doctors have, therefore, that relates to "the cause or extent of the injuries and damages claimed" by plaintiff is no longer privileged.

In particular, plaintiff is claiming "damages and losses from an anoxic brain injury, severe cognitive deficits, and cardiac dysfunction . . . ." As such, any information these five providers have regarding the cause or extent of these injuries is no longer privileged. This waiver applies not only to Drs. Kowalzcyk and Haterius but also to the three remaining defendants as well. Moreover, unlike the "in consultation with" analysis above, this waiver extends to Dr. Balazy as well, as his treatment was the result of the events of April 25, 2012.

Next, I must consider whether there is a high risk that any of the five providers may divulge residually privileged information, i.e., information that does not "relate to the cause and extent of the injuries and damages claimed." *Samms v. District Court*, 908 P.2d 520 (Colo. 1995). If there is a high risk of residually privileged information being divulged during an ex parte meeting, plaintiff's counsel should be allowed to attend the meeting between defense counsel and the medical provider. *Id.* If, on the other hand, the risk is low, there is no requirement that plaintiff's counsel attend the meeting. *Reutter* at 982.

I find that the risk that residually privileged information will be disclosed during any ex parte meeting with any of the five medical witnesses is low. The five medical witnesses at issue

in this motion are similar to those in *Reutter*, in that they provided medical care for injuries resulting from the claimed negligent acts. Even if not all five medical witnesses here were "in consultation with" all five defendants the way the medical witnesses in *Reutter* were, I find that because all five treated the claimed injuries in this case, the risk of disclosure of residually privileged information is low. As such, plaintiff's counsel is not entitled to attend defense counsel's meeting with any of the five medical witnesses.

Plaintiff argues that I should bar ex parte meetings because the defense attorneys will learn of residually privileged information in the form of a full medical, family, and social history provided to the medical witnesses. To alleviate that concern, I hereby order that defense counsel shall not in any way elicit information that does not relate to the cause or extent of the injuries claimed by plaintiff.

In addition, I am ordering that defense counsel provide this order to any medical witness they meet with so that the medical witness has a proper understanding of what information that witness may and may not share with defense counsel. This order should not be understood by the medical witness as an order to meet with defense counsel. Whether a medical witness meets with defense counsel is entirely up to that witness.

Plaintiff also argues I should bar the ex parte meetings because defense counsel will improperly attempt to sway the witness. I am not persuaded. First, plaintiff's counsel has not described how any of the defense attorneys in this case have engaged in this kind of unethical behavior in the past. Second, any attempt by defense counsel to improperly influence a witness is barred by Colorado Rule of Professional Conduct 3.4(b). I can fairly presume that none of the defense attorneys in this case would risk their law licenses in order to gain an unethical advantage in this case. Finally, as holders of terminal degrees and professional licenses, the

medical witnesses here are not the kind of witnesses to be unduly and improperly influenced by defense counsel the way an unsophisticated witness might be.

Citing an order from Judge Ann Frick of Denver District Court, plaintiff requests that I order defense counsel not to share or discuss any medical records with a medical witness other than that witness's own records. That request is denied. I find that in interviewing a witness whom an attorney thinks does not have complete information, it is customary for that attorney to share information with the witness. I will, however, order that to the extent such sharing generates any change of opinion on the witness's part, such change of opinion and the basis for the change shall be promptly provided to plaintiff's counsel. This part of this order shall also extend to any meeting plaintiff's counsel has with a medical witness who changes an opinion.

Plaintiff also requests that I order defense counsel to tape record any ex parte meeting with a medical witness. That request is denied as unnecessarily burdensome.

Defendant Haterius has requested that I order plaintiff and her counsel not to interfere in any way with defendants' efforts to interview the medical witnesses ex parte, pursuant to *Samms v. Dist. Ct.*, 908 P.2d 520 (Colo. 1995). That request is granted, and it is so ordered.

I further order that if any of the five medical witnesses agrees to meet ex parte with defense counsel, defense counsel shall notify plaintiff's counsel of the date and time of the meeting before such meeting occurs.

A protection order also hereby enters barring any defendant or his counsel from using or sharing any medical information gathered during any ex parte meeting except for purposes of defending against the claims in this lawsuit.

To the extent any defense attorney seeks to meet ex parte with any medical witness other than the five who are the subject of this order, that attorney shall first confer with plaintiff's

counsel regarding such request. If the attorneys cannot resolve the issue, defense counsel may file a motion no longer than three pages in length setting forth the relevant facts. Plaintiff shall then have ten calendar days to file a response no longer than three pages. Defense counsel shall have five calendar days to file a reply no longer than two pages.

Finally, plaintiff's right to privacy argument is unpersuasive. I find that the law cited in this order is the law I must apply. In making such a finding, I note that none of the authority offered by plaintiff addresses medical information.

SO ORDERED this 31st day of March, 2015.

BY THE COURT:

William B. Bain
District Judge

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon, Colorado Springs, CO, 80901	DATE FILED: May 13, 2015 1:38 PM CASE NUMBER: 2014CV31351
Plaintiff(s) MINA BEALL v. **Defendant(s)** ROYCE SOLANO, MD et al.	⚠ **COURT USE ONLY** ⚠
	Case Number: 2014CV31351 Division: 22 Courtroom:

Order: Proposed Order Re: Defendant Royce Solano, MD's Second Motion for Ex Parte Meetings with Certain of Plaintiff's Treating Health Care Providers

The motion/proposed order attached hereto: GRANTED IN PART.

I have read the motion, response, and reply. I have also read Dr. Kowalczyk's joinder motion and reply.

I incorporate into this order my recitation of the applicable law from my order entered March 31, 2015. In that order, I did not find that Dr. Solano was "in consultation" with any witnesses under C.R.S. Sec. 13-90-107(1)(d)(II). Rather, I found that plaintiff had waived her medical privilege under Alcon v. Spicer, 113 P.3d 735 (Colo. 2005), which held that a plaintiff waives her privilege regarding any information "relat[ing] to the cause and extent of the injuries and damages claimed." Further, I noted that plaintiff has claimed "damages and losses from an anoxic brain injury, severe cognitive deficits, and cardiac dysfunction . . . . " These injuries are alleged to have occurred during an EGD procedure on April 25, 2012.

Under Alcon v. Spicer, I find that for all but three witnesses identified in Dr. Solano's motion, plaintiff has waived her privilege with respect to any information that relates to the cause or extent of the injuries she claims in this case. The three witness exceptions are: Lara Morris, RN, Turner Lloyd, PA, and Dr. Sunil Nath. Setting these three witnesses aside for the moment, Dr. Solano and his attorneys may engage in ex parte interviews of the other witnesses, but only regarding the "cause and extent of plaintiff's claimed injuries." Dr. Solano and his counsel shall not attempt to elicit any information other than that relating to the "cause and extent of plaintiff's claimed injuries."

In entering this order, I conclude that in light of the limited work these witnesses did on plaintiff, there is a low risk of any of these witnesses disclosing residually privileged information to Dr. Solano or his attorneys, i.e., privileged information that does not relate to either the cause or extent of plaintiff's injuries.

As for Lara Morris and Turner Lloyd, I find that they do fall under the "in consultation" exception of C.R.S. Sec. 13-90-107(1)(d)(II) for Dr. Solano. Plaintiff alleges that Dr. Solano was negligent in his treatment beginning on February 29, 2012 until the critical event on April 25, 2012. During these three months, these two witnesses worked with Dr. Solano in a manner that falls under C.R.S. Sec. 13-90-107(1)(d)(II). See Reutter v. Weber, 179 P.3d 977, 981 (Colo. 2007)("Under this analysis, medical providers are 'in consultation with' one another if they collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment."). Dr. Solano and his attorneys may interview these two witnesses about "any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient." C.R.S. Sec. 13-90-107(1).

As for Dr. Nath, I cannot conclude that this doctor worked "in consultation" with Dr. Solano as contemplated by the Reutter case, nor can I conclude, in light of Dr. Nath's ongoing treatment of plaintiff, that there is a low risk of residually privileged information being divulged. As such, Dr. Solano and his attorneys may not meet with Dr. Nath on an ex parte basis.

I note that none of the witnesses Dr. Solano seeks to interview are required to meet with Dr. Solano or his attorneys. It is completely up to these witnesses whether they decide to meet with Dr. Solano or his attorneys.

Any medical witness Dr. Solano seeks to interview without the plaintiff present shall be given a copy of this order so that they understand the parameters of any discussion they have with Dr. Solano or his attorneys.

As to Dr. Kowalczyk, I find that he was "in consultation" with those witnesses identified in Dr. Solano's motion who were part

of the EGD team or pre-procedure team on April 25, 2012 or who responded to the code blue on that same date. Dr. Kowalczyk and his counsel may interview these witnesses not only about the cause and extent of the injuries but about "any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient . . . ." C.R.S. Sec. 13-90-107(1)(d). Further, with the exception of the three witnesses identified above (Morris, Lloyd, and Nath), Dr. Kowalczyk may interview ex parte the remaining witnesses identified in Dr. Solano's motion regarding any information relating to the cause or extent of plaintiff's injuries. See Alcon, supra. I find that the risk of any of these witnesses disclosing residually privileged information is low.

As for witnesses Morris and Lloyd, I do not find that these witnesses fall within the "in consultation" exception of C.R.S. Sec. 13-90-107(1)(d)(II). See Reutter, supra. I further find that in light of the unlikelihood that these two witnesses have information about the cause of plaintiff's claimed injuries from April 25, 2012 and in light of the risk of disclosing residually privileged information, Dr. Kowalczyk's request to interview these two witnesses ex parte is denied.

My order regarding Dr. Solano and Dr. Nath also applies to Dr. Kowalczyk for the same reasons.

I note that none of the witnesses Dr. Kowalczyk seeks to interview are required to meet with Dr. Kowalczyk or his attorneys. It is completely up to these witnesses whether they decide to meet with Dr. Kowalczyk or his attorneys.

Any medical witness Dr. Kowalczyk seeks to interview without the plaintiff present shall be given a copy of this order so that they understand the parameters of any discussion they have with Dr. Kowalczyk or his attorneys.

Defense counsel shall notify plaintiff's counsel in advance of any ex parte meeting with any witnesses subject to this order. Plaintiff and her counsel are ordered not to interfere with defense counsel's effort to engage in ex parte interviews. The same protection order I entered in my previous order regarding the use of the information shared by the witnesses subject to this order applies here.

My order from March 31, 2015 regarding any change of opinion by a witness is incorporated into this order.

Issue Date: 5/13/2015

WILLIAM B BAIN
District Court Judge

DISTRICT COURT, COUNTY OF EL PASO, COLORADO COURT ADDRESS: Address: 4th Judicial District 270 South Tejon Street Colorado Springs, CO 80903 Phone: 719-227-5169	▲ COURT USE ONLY ▲
Plaintiff: SARA HOWARD, as legal guardian of MINA HEMATI, a/k/a MINA BEALL v. Defendants: ROYCE SOLANO, MD, LUKASZ KOWALCZYK, MD, RICK HATERIUS, MD, MICHAEL STARKEY, MD AND PIO HOCATE, MD	Case No. 2014CV31351 Div. 22

[PROPOSED] ORDER RE: DEFENDANT ROYCE SOLANO, MD'S SECOND MOTION FOR *EX PARTE* MEETINGS WITH CERTAIN OF PLAINTIFF'S TREATING HEALTH CARE PROVIDERS

The Court, having reviewed DEFENDANT ROYCE SOLANO, MD'S SECOND MOTION FOR EX PARTE MEETINGS WITH CERTAIN OF PLAINTIFF'S TREATING HEALTH CARE PROVIDERS, and being otherwise fully advised in the premises, rules as follows:

This Court GRANTS Dr. Solano's motion and ORDERS that Dr. Solano may meet with the listed health care providers *ex parte* without further notice to Plaintiff. All other provisions of this Court's March 31, 2015 order regarding *ex parte* meetings shall apply here.

Dated this _____ day of _____ 2015.

_____
DISTRICT COURT JUDGE

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	DATE FILED: September 24, 2014 12:31 PM CASE NUMBER: 2013CV34966
Plaintiff(s) HARVEY JACKSON et al. v. **Defendant(s)** HCA HEALTHONE LLC et al.	⚠ COURT USE ONLY ⚠ Case Number: 2013CV34966 Division: 275 Courtroom:

Order: HCA-HealthOne, L.L.C., d/b/a Presbyterian/St. Lukes Medical Centers Motion to Conduct ex parte Interviews with Isabella Jacksons Health Care Providers w/ attach

The motion/proposed order attached hereto: GRANTED.

The Court, having reviewed Defendant HCA-HealthOne, L.L.C., d/b/a Presbyterian/St. Luke's Medical Center's Motion to Conduct Ex Parte Interviews with Isabella Jackson's Health Care Providers, and being otherwise fully advised in the premises, rules as follows:

THE COURT FINDS that a plaintiff's counsel does not have a general right to attend defense counsel meetings with fact witnesses. Such a general right would be contrary to Colorado case precedent and encroach upon the well-recognized work product doctrine. Rather, a plaintiff's counsel is only entitled to attend defense counsel meetings with a health care provider "where the risk that residually privileged information will be divulged during an interview is relatively high." Reutter v. Weber, 179 P.3d 977, 983 (Colo. 2007).

THE COURT FURTHER FINDS that the physician-patient privilege is waived when the medical condition has been injected into the case as a basis of the claim.

THE COURT FURTHER FINDS that the waiver implied by the filing of a suit constitutes consent for medical providers to be examined as to information acquired in attending the patient that was necessary to enable treatment for the patient. This type of open discovery is appropriate when there is no privilege to protect. As explained in the case of Reutter v. Weber, 179 P.3d 977 (Colo. 2007), a defendant may conduct ex parte interviews of health care providers where there is not a high risk that residually privileged information will be divulged to the defense in those interviews. This is true regardless of whether the defendant health care provider acted in consultation with the outside treating provider. Here, Plaintiffs claims that P/SL's care and treatment of Ms. Jackson was the cause of her neurologic and physical injuries. Thus, the care and treatment that Ms. Jackson received from P/SL and its employees, as well as the cause of her injuries, have been placed squarely at issue in this case.

THE COURT FURTHER FINDS that the consultation is an exception to the physician-patient privilege that would allow ex parte interviews with non-party health care providers. Here, there is consultation because employees at P/SL were medical providers for Ms. Jackson and worked with her other health care providers to afford her a unified course of care.

THE COURT FURTHER FINDS that allowing Plaintiffs to participate in the requested ex parte interviews would improperly invade P/SL's counsel's work-product given that there is no privilege to protect.

THE COURT FURTHER FINDS that there is no physician-patient privilege at issue with regard to the individuals who are the subject of P/SL's Motion. As such, there is no risk, much less a high risk, that residually privileged information will be revealed to the defense should the defense be permitted to engage in the requested ex parte interviews. Accordingly, the providers at issue in the Motion are akin to any other lay witnesses with whom Colorado's discovery rules allow P/SL to meet freely and without notice to Plaintiffs.

THE COURT FURTHER FINDS that it would be improper for Plaintiffs or their counsel to instruct, advise, encourage, or otherwise influence health care providers at issue in this Motion not to participate in informal, ex parte interviews with defense counsel. Samms v. Dist. Ct., 908 P.2d 520, 526 (Colo. 1995).

IT IS THEREFORE ORDERED that P/SL's Motion is GRANTED; and it is further

ORDERED that P/SL and its counsel may engage in ex parte interviews, which is limited to matters solely about Ms. Jackson's medical information, with the health care providers who are the subject of this Motion, without first providing notice to Plaintiffs or their counsel; and it is further

ORDERED that Plaintiffs and their counsel may not instruct, advise, encourage, or otherwise influence the providers who are the subject of this Motion not to meet or speak with P/SL's counsel.

Issue Date: 9/24/2014

RONALD M MULLINS
District Court Judge

FILED
United States Court of Appeals
Tenth Circuit

July 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EMILY ROSE LASALA,

Plaintiff - Appellant,

v.

MATTHEW B. BAKER, an individual; PHILLIPPE A. CAPRARO, M.D., P.C.,

Defendants - Appellees,

and

JOHN A. MILLARD, M.D., P.C., in his individual capacity,

Defendant.

No. 22-1351
(D.C. No. 1:19-CV-00857-RMR-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **MATHESON**, and **McHUGH**, Circuit Judges.

Dr. John Millard performed a cosmetic surgery on plaintiff Emily Rose LaSala. After a complication ensued, Dr. Millard referred her to a second doctor,

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Dr. Matthew Baker, who performed an additional surgery. Ms. LaSala later sued Dr. Millard for medical malpractice.[1] In a second amended complaint she added Dr. Baker to her suit, pursuing claims against him and his employer Phillippe A. Capraro, M.D., P.C. (collectively, the Baker Defendants)[2] for breach of fiduciary duty, invasion of privacy, and civil conspiracy, based on Dr. Baker's sharing of her confidential medical information with Dr. Millard. The district court dismissed the claims against the Baker Defendants prior to trial. The malpractice claims against Dr. Millard proceeded to trial, and a jury found in his favor. Ms. LaSala now appeals the dismissal of her claims against the Baker Defendants. We affirm the dismissal, but remand to the district court to apply the proper criteria to determine whether the dismissal should be with or without prejudice.

BACKGROUND

In March 2017, Dr. Millard performed sub-muscular breast augmentation surgery on Ms. LaSala. After the surgery she experienced discomfort and pain and she was eventually diagnosed with "capsular contracture," a detachment of her pectoral muscle. Dr. Millard referred her to Dr. Baker for additional treatment. He

[1] Ms. LaSala named both Dr. Millard individually and his professional corporation. For simplicity's sake, and because the claims against Dr. Millard and his professional corporation are not directly at issue in this appeal, we refer to Dr. Millard as the applicable defendant.

[2] Phillippe A. Capraro, M.D., P.C., operates under the trade name "Grossman Capraro Plastic Surgery." Ms. LaSala refers to this entity as "Grossman Capraro, MD, PC" and we will also do so when referring individually to the corporate entity.

performed a second surgery that stretched the atrophied muscle. Dr. Baker's view, initially at least, was that the capsular contracture likely resulted from the surgery.

After Ms. LaSala began working with Dr. Baker, Dr. Baker communicated with Dr. Millard about her treatment and surgery. Ms. LaSala argues that these communications went beyond the scope of her treatment and devolved into a collaboration between the two doctors about how to help Dr. Millard escape malpractice liability. She also contends that in furtherance of this collaboration Dr. Baker betrayed her trust by sharing her confidential medical records, including photographs, with Dr. Millard, at a time when she no longer had a treatment relationship with Dr. Millard.

After she filed this suit, Ms. LaSala filed a "certificate of review" to support her malpractice claim against Dr. Millard. Colorado law generally requires a plaintiff to file a certificate of review—an affidavit confirming that counsel has conferred with a qualified expert who believes the relevant legal claims do not lack substantial justification—to pursue a medical malpractice claim. *See* Colo. Rev. Stat. § 13-20-602. Ms. LaSala's counsel prepared the certificate of review based on his consultations with Dr. Baker. But during Dr. Baker's deposition, which was taken after Ms. LaSala added Dr. Baker as a defendant, Dr. Baker expressed doubts about whether Dr. Millard had been responsible for her injuries.

Ms. LaSala did not file a certificate of review to support her claims against the Baker Defendants. All defendants moved to dismiss her complaint, arguing that she had failed to adequately comply with § 13-20-602 for her claims against either

doctor. Specifically, the Baker Defendants contended that Ms. LaSala required a certificate of review to pursue her claims against Dr. Baker but had not filed one, and Dr. Millard argued her certificate based on counsel's initial consultation with Dr. Baker was defective. The Baker Defendants later moved for summary judgment based on the related ground that Ms. LaSala had not presented expert testimony as required to support her claim against Dr. Baker.

The district court entered an order that resolved the dispositive motions. It denied Dr. Millard's motions concerning the medical malpractice-related claims but required Ms. LaSala to file a new certificate to support those claims. The district court further held that Ms. LaSala required a certificate of review to pursue her breach-of-fiduciary-duty claim against Dr. Baker. Because that claim required expert testimony, and because Ms. LaSala had failed to file any certificate of review, the court dismissed the claim. It then granted summary judgment to the Baker Defendants on the invasion-of-privacy claim, reasoning that disclosure to a single other physician did not satisfy the element of public disclosure. Because Ms. LaSala's civil conspiracy claim was predicated on these two claims, the district court dismissed it as well; and because there were no remaining live claims against Dr. Baker, the court dismissed the claims against his employer.

The Court later clarified that the breach-of-fiduciary-duty-claims and breach of privacy claims against the Baker Defendants, and the civil conspiracy claim, had been dismissed with prejudice. The remaining claims against Dr. Millard proceeded

to trial. A jury rendered a verdict in favor of Dr. Millard. The district court then entered final judgment in favor of the defendants, and Ms. LaSala appealed.

DISCUSSION

1. We review the statutory basis for dismissal de novo.

Colorado's certificate of review statute applies in cases, like this one, that are brought under a federal court's diversity jurisdiction. *See Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1538-41 (10th Cir. 1996) (concluding that § 13-20-602 is substantive and applies in diversity cases). A dismissal under § 13-20-602 is not the same as a dismissal for failure to state a claim, because it rests on a separate, statutory ground. *See Barton v. Law Offices of John W. McKendree*, 126 P.3d 313, 314-15 (Colo. App. 2005). We review the district court's interpretation of the pertinent statute, § 13-20-602, de novo. *See Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1117 (10th Cir. 2004).

"Our objective when interpreting and applying state substantive law is to reach the same result that would be reached in state court." *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1223 (10th Cir. 2016). "If the state's highest court has interpreted a state statute, we defer to that decision." *Id.* "The decisions of lower state courts, while persuasive, are not dispositive." *Id.* (internal quotation marks omitted).

2. Ms. LaSala required a certificate of review to pursue her breach-of-fiduciary-duty claim against the Baker Defendants.

"The Colorado certificate of review statute requires plaintiffs' attorneys in professional negligence cases to certify, within sixty days of [serving] the complaint,

that an expert has examined their clients' claims and found them to have 'substantial justification'; failure to comply with this requirement results in dismissal." *Trierweiler*, 90 F.3d at 1537-38 (quoting § 13-20-602). Colorado's legislative declaration states that the certificate requirement applies "in civil actions for negligence brought against those professionals who are licensed by this state to practice a particular profession and regarding whom expert testimony would be necessary to establish a prima facie case." Colo. Rev. Stat. §13-20-601.

Ms. LaSala argues that because breach of fiduciary duty is an intentional tort, and not a negligence claim, no certificate of review is required. But the Colorado Supreme Court rejected a narrow reading of § 13-20-602 in *Martinez v. Badis*, 842 P.2d 245, 251-52 (Colo. 1992). There the court explained that "[t]he statute applies to all claims based upon alleged professional negligence. It does not apply only to negligence claims." *Id.* at 251 (internal quotation marks omitted). The court then stated that a breach-of-fiduciary-duty claim against a licensed professional "often requir[es] the plaintiff to establish the identical elements that must be established by a plaintiff in negligence actions," such as "the applicable standard of care and the defendant's failure to adhere to that standard of care." *Id.* at 252. The key is whether "expert testimony is required to establish the scope of the professional's duty or the failure of the professional to reasonably conduct himself or herself in compliance with the responsibilities inherent in the assumption of the duty." *Id.* The court concluded that § 13-20-602 applied to the plaintiffs' breach-of-fiduciary-duty claims against their erstwhile attorneys. *See id.*

Nor does the fact that the alleged breach of fiduciary duty involved an *intentional* sharing of Ms. LaSala's medical records necessarily exempt that claim from the certificate requirement. In *Woo v. Baez*, 522 P.3d 739 (Colo. App. 2022), *cert. denied*, 2023 WL 3587464 (Colo. May 22, 2023) (No. 22SC873), for example, the Colorado Court of Appeals, citing *Martinez*, determined that to prove his breach-of-fiduciary-duty claim that his attorney "intentionally deprived him of his case files and digital property" the plaintiff would need to establish the willful violation of fiduciary duty by "present[ing] testimony on the scope of that duty." *Id.* at 746-47 (emphasis omitted). Although the alleged tort was intentional and involved the client's case files and digital property, the court of appeals concluded that the state district court did not err in determining that a certificate of review was required. *Id.* at 747.

In the same way, the alleged intentional misuse of Ms. LaSala's medical records required expert testimony to establish the scope of the Baker Defendants' duties concerning those records. This is not an issue that would likely be within the purview of a typical layperson; it involves a physician's responsibilities concerning patient confidentiality and the duty of loyalty when discussing the patient's care with another physician who has also treated that same patient. *Cf. Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23, 27 (Colo. App. 2005) (stating that when a breach-of-fiduciary-duty claim asserted against a lawyer is based on breach of the duties of loyalty and confidentiality owed to the lawyer's client, "those duties are measured against standards applicable to attorneys").

Ms. LaSala contends, however, that her case falls within two exceptions to the rule in *Martinez*. First, she notes that *Martinez* excepted breach-of-fiduciary-duty claims that were "admitted by the defendant." *Martinez*, 842 P.2d at 252. She argues that the Baker Defendants admitted in various text messages to Dr. Millard that the disclosures of medical information were improper, and deleted or sought to have others delete relevant evidence. But according to *Martinez*, the exception exists where the breach-of-fiduciary-duty *claim* was admitted, *see id.*, not merely where a professional privately confessed that he made an improper disclosure or took actions to conceal it. While Dr. Baker's alleged "admissions" might provide grist for the mill at a jury trial, Ms. LaSala fails to show that they exempted her from filing a certificate of review.

Second, Ms. LaSala argues that where a professional defendant's "alleged breaches deviated from express statutory requirements," so that the plaintiff must merely ask a jury to compare the defendant's conduct to statutory language, expert testimony (and, hence, a certificate of review) are not required. Aplt. Opening Br. at 32. She contends that she could point the jury to "one of many ethical standards out there explaining a physician's duty of loyalty and confidentiality." *Id.* at 35. But other than a passing reference to duties described in the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104–191, 110 Stat. 1936 (Aug. 21, 1996), which she does not quote or analyze, Ms. LaSala does not cite any particular statute or regulation to show that the Baker Defendants violated a statutory duty that a

layperson could understand without expert testimony. We therefore find this argument unpersuasive.

Ms. LaSala also briefly argues that she could call the Baker Defendants themselves as experts to "confirm their ethical standards relating to loyalty and confidentiality." Aplt. Opening Br. at 35-36. She cites *Smith v. Hoffman*, 656 P.2d 1327, 1329 (Colo. Ct. App. 1982), where the Colorado Court of Appeals reversed the grant of summary judgment on a malpractice complaint based on the plaintiff's failure to produce a statement from an expert witness asserting that the defendant's conduct was negligent. The Court of Appeals noted that "[b]ecause any qualified expert witness can present evidence with respect to the applicable standard of professional care, [the medical] defendant himself could be called by plaintiff as an adverse witness to present such testimony in this case." *Id.*

The court in *Smith* did not purport to apply § 13-20-602 or to discuss its requirements. It seems obvious that if a plaintiff could *always* simply assert they would call the defendant to testify at trial as an adverse witness in lieu of filing a certificate of review, the certificate of review requirement would become meaningless. *Cf. Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 624 (Colo. 1999) (noting it is "improper" for a trial court to accept expert reports in place of a certificate of review). To make an effective argument along these lines, Ms. LaSala would therefore need at a minimum to show why, in her particular circumstances, the hypothetical testimony should excuse her from the certificate of

review requirement. To the extent she attempts to make such a showing by relying on arguments we have already rejected, her argument is unpersuasive.

3. Ms. LaSala fails to show the district court improperly dismissed the claims against Dr. Baker's employer, Grossman Capraro, MD, PC.

The district court dismissed the claims against Dr. Baker's employer for two reasons. First, there were no longer live claims against Dr. Baker, so Ms. LaSala could not predicate corporate liability on such underlying claims. *See* Aplt. App., vol. III at 106. Second even if there were live claims, they would fail because medical corporations cannot be held liable for a doctor's negligence under a respondeat superior theory. *See id.* Although Ms. LaSala challenges the district court's second reason for dismissing Grossman Capraro, *see* Aplt. Opening Br. at 36-38, she presents no argument concerning the district court's first reason. We will uphold the dismissal on this alternative, unchallenged ground. *See Eaton v. Pacheco*, 931 F.3d 1009, 1030 n.18 (10th Cir. 2019) (noting court could affirm on alternative ground that was not adequately challenged in an opening brief).

4. We remand with instructions to reconsider whether the dismissal of the breach-of-fiduciary claim should be with or without prejudice.

In a minute order issued over a year after it dismissed the claims against the Baker Defendants, the district court stated without explanation that the "breach of fiduciary claim against Dr. Baker in this matter was dismissed with prejudice." Aplt. App., vol. III at 140. Although we treat the certificate of review requirement as substantive in diversity cases, a dismissal under § 13-20-602 is based on the plaintiff's procedural failure to file a certificate of review rather than the viability of

her claims. *See Blackwood v. Thomas*, 855 F. Supp. 1205, 1207 (D. Colo. 1994). A dismissal with prejudice for failure to adhere to a procedural rule is a severe sanction justified only in extreme circumstances. *See, e.g.*, *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002). Ultimately, in deciding whether to dismiss a claim with prejudice as a sanction for procedural error "a district court must consider: (1) the degree of actual prejudice to [the opposing party]; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007) (internal quotation marks omitted). "Only when these aggravating factors outweigh[ ] the judicial system's strong predisposition to resolve cases on their merits is outright dismissal with prejudice an appropriate sanction." *Reed*, 312 F.3d at 1195 (internal quotation marks omitted).

Here, the district court failed to provide any reasoning for its dismissal with prejudice of the breach-of-fiduciary-duty claim. We therefore remand so that the district court may redetermine, based on the appropriate factors, whether the dismissal should be with or without prejudice.[3]

[3] The Baker Defendants argue that we need not decide this issue, because "in the same order, the district court granted [their] motion for summary judgment on substantive grounds—Plaintiff's failure to disclose a qualified expert to establish the applicable standards of conduct, and breach of that standard, to support her claim of fiduciary breach." Aplee. Br. at 35. But the district court did not apply a summary-judgment standard to its dismissal of the fiduciary duty claim; instead, it dismissed

CONCLUSION

We affirm the district court's dismissal of Ms. LaSala's breach-of-fiduciary-duty claim, but remand to the district court to redetermine, based on the appropriate factors, whether the dismissal should be with or without prejudice.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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the claim for failure to file a certificate of review. *See* Aplt. App., vol. III at 102. We find the Baker Defendants' argument on this point unpersuasive.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 19, 2023

Mr. Adam D. Dolce
Law Office of Adam Dolce
1255 West Colton Avenue
Redlands, CA 92374

Ms. Elizabeth Craigmile Moran
Mr. Scott Sherman Nixon
Hall Booth Smith
5445 DTC Parkway, Suite 900
Greenwood Village, CO 80111

RE: 22-1351, LaSala v. Millard, et al
Dist/Ag docket: 1:19-CV-00857-RMR-SKC

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/klp

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-00857-DDD-SKC

EMILY ROSE LASALA,

Plaintiff,

v.

JOHN A. MILLARD;
JOHN A. MILLARD, M.D., P.C.;
MATTHEW B. BAKER; and
PHILIPPE A. CAPRARO, MD., PC.,

Defendants.

ORDER ON MOTIONS

This is a medical malpractice case governed by Colorado law. Plaintiff sought a sub-muscular breast augmentation from Defendant Dr. John Millard. After the surgery, Plaintiff was in pain and discomfort from what turned out to be a detachment of her pectoral muscle. Due to this complication, Dr. Millard referred Plaintiff to Dr. Matthew Baker, the second defendant in this case. After seeing Plaintiff, Dr. Baker conferred with Dr. Millard about the surgery and exchanged medical information and photographs relating to Plaintiff's surgery. Plaintiff then sued Dr. Millard for medical malpractice stemming from her surgery and later sued Dr. Baker for allegedly breaching his fiduciary duty and invading her privacy by sharing confidential information with Dr. Millard.

There are eight motions pending before the Court, including two motions for summary judgment and a motion to dismiss. These motions,

particularly the dispositive ones, center on whether Plaintiff has put forth sufficient expert testimony or timely disclosed experts to the extent they are required in this case. As set forth below, Defendant Dr. Baker and his employer are dismissed from this case because Plaintiff has failed to submit adequate expert testimony as to her claims against them. But the medical malpractice claims against Defendant Dr. Millard and his associated corporate entity may proceed for now.

BACKGROUND

Defendant Dr. John Millard performed a sub-muscular breast augmentation surgery on Plaintiff Emily LaSala in March 2017. (Doc. 31 at ¶¶ 11–12.) She experienced discomfort and pain after the surgery and brought this to Dr. Millard's attention. (*Id.* at ¶ 22.) She was later diagnosed with "capsular contracture"—detachment of her pectoral muscle—and referred to Defendant Dr. Matthew Baker for follow-up. (*Id.* at ¶¶ 28–29.) After Ms. LaSala came to Dr. Baker, he began communicating with Dr. Millard about Ms. LaSala's surgery and treatment without any initial objection by Ms. LaSala. (*See* Doc. 92 at pp. 3–4; Doc. 97 at pp. 2–4.) Ms. LaSala contends, however, that the ongoing communications between the two doctors went beyond the scope of her treatment and that those communications were primarily for the purpose of helping Dr. Millard escape liability. (*See* Doc. 92 at pp. 3–4; Doc. 97 at pp. 3–6.)

After sending a pre-litigation demand letter to Dr. Millard, Ms. LaSala brought this suit against him and a related Colorado corporation in March 2019, alleging medical malpractice. (Doc. 1.) Ms. LaSala then filed a "certificate of review"—an affidavit confirming that counsel has conferred with a qualified expert who believes the relevant legal claims have some justification—with the Court as is generally required under

Colorado law to pursue a medical malpractice claim. Ms. LaSala later amended her complaint to add Dr. Baker as a defendant to breach-of-fiduciary-duty, invasion-of-privacy, and civil conspiracy claims. (Doc. 31.) Ms. LaSala did not file a certificate of review as to her claims against Dr. Baker.

Dr. Millard and his related corporation later moved for summary judgment, arguing that the claims against them must be supported by expert testimony and that Plaintiff had not presented any expert testimony as to those claims. (Doc. 52.) In her initial disclosures, Ms. LaSala disclosed no "retained experts" but stated that she would "rely upon the Defendants as expert witnesses" to prove her own affirmative case. (Doc. 52-4 at pp. 1–2.) Ms. LaSala apparently did not depose the Defendants until several weeks after disclosing them as her experts. After those depositions were taken, and after the deadlines for disclosing initial experts had passed, Ms. LaSala filed a motion to extend her deadline to disclose experts so that she could designate her new "rebuttal" experts, a doctor and an attorney, as initial experts. (Doc. 54.) Within a week of that filing, Defendants filed a joint motion to strike Ms. LaSala's supplemental expert disclosures as untimely or otherwise improper. (Doc. 57.)

Defendants then filed a motion to dismiss premised on Ms. LaSala's failure to submit certificates of review that conformed with the requirements of Colorado Revised Statutes § 13-20-602. (Doc. 71.) Shortly before that motion was filed, counsel for Ms. LaSala revealed that the consulting physician for the original certificate of review regarding the claims against Dr. Millard was, in fact, Dr. Baker: Dr. Millard's co-defendant. Dr. Millard argues, based in part on Dr. Baker's deposition testimony in this case, that Dr. Baker would not have or did not certify that Ms. LaSala's case should go forward, contrary to the certificate that Ms. LaSala's counsel filed and attested to. Soon thereafter, all Defendants

filed a joint motion to amend the scheduling order to allow for a deposition of Ms. LaSala. (Doc. 84.)

After these filings, Dr. Baker filed his own motion for summary judgment, arguing that Ms. LaSala has not presented required expert testimony to prove her claims against him and that the claims against his related corporate entity fail as a matter of law. (Doc. 92.)

Ms. LaSala, for her part, filed a motion for sanctions, arguing that Defendants failed to timely produce a text message between Dr. Baker and Dr. Millard and destroyed other evidence in this case. (Doc. 95.) Related to that motion, Ms. LaSala also filed a motion to disqualify Dr. Millard's counsel, arguing that she needs to depose attorneys and paralegals representing Dr. Millard because they are allegedly complicit in destroying or withholding evidence. (Doc. 105.)

ANALYSIS

I. Ms. LaSala's Expert Disclosures and Defendants' Deposition of Her

The Court will first address the issue of Ms. LaSala's expert disclosures because resolution of that issue informs the resolution of several dispositive issues.

Scheduling orders can only be amended if the movant shows good cause. Fed. R. Civ. P. 16(b). If a party failed to make a required disclosure under Rule 26(a), a court may disallow that party from using that disclosed witness or information in the litigation unless the failure "was substantially justified or is harmless." Fed. R. Civ. P. 37(c). "In addition to or instead of this sanction," the court may order payment of fees or other appropriate sanctions. Fed. R. Civ. P. 37(c)(1). "The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to

the broad discretion of the district court." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999) (internal citation and quotation marks omitted). The following factors guide this discretionary analysis: prejudice to the party against whom testimony is offered, the ability to cure any such prejudice, the potential for disruption at trial, and the moving party's bad faith or willfulness. *Id.*

At first, Ms. LaSala did not retain her own experts to prove her claims in this case. Instead, she made the unorthodox decision to rely solely on the Defendants in this case to testify that they had breached the standard of care. She also chose this path before she had deposed the two Defendants. But after deposing the Defendants—and after the deadlines for disclosing both initial and rebuttal experts had passed—Ms. LaSala changed her mind. After these deadlines had passed, she formally disclosed, for the first time, her own retained experts. (Doc. 57-4.) Ms. LaSala also failed to provide expert reports for any of her experts initially but later filed them with the Court. (*See* Docs. 61-1, 61-2.)

Ms. LaSala now invokes Rule 37(c), arguing that she should be able to offer testimony from two untimely disclosed experts: Dr. Moliver, who would offer testimony relating to the medical malpractice claims against Dr. Millard, and Ms. Eiselein, an attorney who would offer testimony relating to the fiduciary-duty and invasion-of-privacy claims against Dr. Baker.

A. Dr. Moliver

As grounds for her untimely disclosure of Dr. Moliver, Ms. LaSala argues that the delay was due to failed meet-and-confer discussions and the apparent "revelation" that Dr. Baker's opinions as to Dr. Millard's negligence—as revealed during Dr. Baker's deposition— were not as favorable as she would have liked.

Several factors weigh against permitting Ms. LaSala's late disclosure of Dr. Moliver. Ms. LaSala knowingly made the strategic decision to rely on one Defendant to implicate another. That that decision apparently backfired, requiring her to retain experts after the fact, was predictable.[1] Allowing her to offer expert testimony from untimely-disclosed experts would also prejudice defendants, who have been preparing their defense under the timeline set in the scheduling order.

Yet the weight of the factors caution against disallowing testimony from Dr. Moliver. Any prejudice is fairly minimal because he was disclosed within two months of the relevant deadlines. These deadlines also fell during the initial disruptions of the COVID-19 pandemic and its spread in the United States. Any prejudice to Defendants can be cured, and Defendants themselves have sought their own extension to the discovery cut-off. Ultimately, our legal system strongly prefers to decide cases on their merits. *See, e.g.*, *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (noting that "no one, we hold, should count on more than three chances to make good a discovery obligation"). The Court will

[1] While Ms. LaSala's original approach of relying on defendants to submit expert testimony against themselves is unusual, the Court has found no rule or caselaw forbidding that approach. Indeed, some courts, particularly state courts, have allowed plaintiffs to prove their malpractice claims through examination of an adverse, defendant-physician witness. *See, e.g., Libby v. Conway*, 13 Cal. Rptr. 830, 833 (Cal. Ct. App. 1961) (noting that California law does not forbid requiring a defendant to be examined on the standard of care in a malpractice action); *see also McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 203 N.E.2d 469, 474 (N.Y. 1964) (allowing plaintiff to prove malpractice through cross-examination of defendant doctor). The Court does not necessarily agree that such a maneuver would be appropriate here, however, under Colorado law and the Federal Rules of Evidence. And given Dr. Baker's deposition testimony, the Court is not convinced that Ms. LaSala could prove her affirmative case using only the defendants as "experts" at trial.

allow Plaintiff to designate Dr. Moliver as an expert on the standard of care as to the medical malpractice claims against Dr. Millard.

B. Ms. Eiselein

Ms. LaSala also seeks to offer testimony from Ms. Eiselein, a lawyer who would opine that Dr. Baker and Dr. Millard violated the Health Insurance Portability and Accountability Act (HIPAA). In her supplemental expert disclosure, Ms. LaSala disclosed that Ms. Eiselein will opine on "the scope and application of HIPAA" on the Defendants' communications and their "compliance" with HIPAA. (Doc. 50-7.)

The Court will not, however, allow this untimely disclosure. As discussed in detail below in Section II(B), unlike her medical-malpractice claims, Ms. LaSala never filed a required certificate of review as to the breach-of-fiduciary-duty claims which require expert testimony under Colorado law; Ms. LaSala's untimely expert testimony does not establish the relevant standard of care; and there are serious questions about the admissibility of the proffered testimony. For these reasons, Ms. LaSala's untimely disclosure of Ms. Eiselein is disallowed.

C. Deposition of Plaintiff

Defendants also seek an extension of the discovery deadline to depose Ms. LaSala. (Doc. 84.) Ms. LaSala did not really oppose this motion and instead has referred back to her own motions to amend the scheduling order. (Doc. 86.) Because the motion is essentially unopposed, and for good cause shown, the Court will re-open discovery to allow Defendants to depose Plaintiff as discussed further in the conclusion of this order.

II. Dr. Millard's and Dr. Baker's Motion to Dismiss and Dr. Baker's Motion for Summary Judgment (ECF Nos. 71 and 92)

Dr. Millard and Dr. Baker also jointly moved to dismiss on procedural grounds, arguing that Ms. LaSala's "certificate of review" was defective. Dr. Baker separately moved for summary judgment, arguing that Ms. LaSala has not presented expert testimony as required for her claims against him.

In a professional-negligence suit brought under Colorado law, a plaintiff must file a "certificate of review" stating that his counsel has consulted with a professional in the relevant field, and that, after reviewing the relevant facts, the professional agreed that the plaintiff's claim "does not lack substantial justification." Colo. Rev. Stat. § 13-20-602. Certificates of review are only required in cases that require expert testimony, which includes most medical malpractice suits and some suits involving alleged breaches of professional duties. *See id*; *Martinez v. Badis*, 842 P.2d 245, 251 (Colo. 1992). In federal diversity cases, this state-law requirement is substantive for *Erie* purposes, so the Court must apply Colorado law on this issue. *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1117 (10th Cir. 2004). While the certificate need not identify the consulting professional, the court may later require identification to verify the content of the certificate. Colo. Rev. Stat. § 13-20-602(3)(b).

A. Dr. Millard

Ms. LaSala did file a certificate of review in this case for the claims against Dr. Millard. (Doc. 14.) But Dr. Millard argues that the certificate is defective primarily because it was later revealed that Dr. Baker was the physician whom Ms. LaSala's counsel consulted for purposes of the certificate before Ms. LaSala later sued Dr. Baker as well. (*See* Doc. 72

at p. 4.) At his deposition, Dr. Baker suggested that he had not reviewed enough facts to make a determination as to the viability of the claims against Dr. Millard and that he now had doubts that Dr. Millard was responsible for Ms. LaSala's injuries. (*See* Doc. 72-2 at 243:5–246:6.)

The Court is not convinced that Ms. LaSala has complied with the certificate requirements as to Dr. Millard by relying on the purported consultation with Dr. Baker. But that failure alone does not warrant the extreme remedy of dismissal. Granted, failure to file any certificate at all "shall result in the dismissal of the complaint." Colo. Rev. Stat. § 13-20-602(4). But Ms. LaSala did file a certificate, albeit a potentially defective one. In this scenario, the Court will instead require Ms. LaSala to file a new certificate as to the medical-malpractice claims and identify the consulting professional as well. *See Martinez*, 842 P.2d at 251–52 (certificate may be filed late for good cause shown); *see also Max Int'l, LLC*, 638 F.3d at 1321 (cases should be decided on their merits).

B. Dr. Baker

In contrast to her claims against Dr. Millard, Ms. LaSala never filed a certificate of review as to her breach-of-fiduciary-duty and invasion-of-privacy claims against Dr. Baker. Instead, she argues that those claims do not require expert testimony and therefore no certificate was required. Alternatively, she argues that an untimely expert disclosure satisfies the certificate requirement.

i. Breach of Fiduciary Duty

"Breach of fiduciary duty claims are in some, but not all, contexts basically negligence claims incorporating particularized and enhanced duty of care concepts often requiring the plaintiff to establish the identical elements that must be established by a plaintiff in negligence

actions." *Martinez*, 842 P.2d at 251–52. Given that, "some" breach-of-fiduciary-duty claims "may" be subject to the certificate-of-review requirement and require proof by expert testimony. *Id.* At least in the context of attorney malpractice, only in "clear and palpable" cases may breach-of-fiduciary duty claims be proved without expert testimony. *Boigegrain v. Gilbert*, 784 P.2d 849, 850 (Colo. App. 1989) (finding that claim was not clear and palpable and affirming dismissal based on lack of expert testimony).

The breach-of-fiduciary-duty claim against Dr. Baker is not so "clear and palpable" that Ms. LaSala may proceed without a certificate or without expert testimony. For instance, claims that a doctor inadequately informed a patient of the risks of a procedure in violation of consumer protection laws require expert testimony in Colorado. *Teiken v. Reynolds*, 904 P.2d 1387, 1389 (Colo. App. 1995). Legal malpractice claims, which closely mirror the sort of patient privacy claims that Ms. LaSala brings, also almost always require expert testimony. *See Boigegrain*, 784 P.2d at 850; *see also Martinez*, 842 P.2d at 252 (noting that alleging a breach of fiduciary duty in the attorney-client context always requires expert testimony unless such breach is admitted by the defendant). Indeed, doctors and lawyers have similar duties of confidentiality that arise out of their professional relationship with clients, and the extent of those duties can be highly context-dependent.

Ms. LaSala claims that Dr. Baker's and Dr. Millard's communications—at least at some point—crossed the line and violated Ms. LaSala's privacy and constituted a breach of patient confidentiality. But both doctors were treating physicians, and Ms. LaSala appears to concede that some of the communications were appropriate and done with at least implied permission. These claims therefore are not "clear and palpable" violations and instead likely require expert testimony under Colorado

law. The only cases Ms. LaSala points to, while acknowledging this limited "clear and palpable" exception in the abstract, have nevertheless required expert testimony. *Boigegrain*, 784 P.2d at 850 (requiring expert testimony and certificate of review in malpractice case); *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 628 (Colo. 1999) (excusing failure to file a certificate because adequate expert reports were submitted). While laypeople may have a general understanding that there is a duty of confidentiality owed to patients, most do not understand the intricacies of when that duty arises and the scope of that duty, particularly when two treating physicians are discussing a joint patient's medical history.

Ms. LaSala's alternative argument for avoiding the expert-testimony requirement—namely, that some derivative "special relationship" between her and Dr. Baker gives rise to her privacy and fiduciary-duty claim—is unavailing. Any such relationship arose out of the context of Dr. Baker's care as her physician and therefore would be compared to similar physician-patient relationships. *See Crystal Homes, Inc. v. Radetsky*, 895 P.2d 1179, 1182 (Colo. App. 1995) (finding that "the nature of any resulting special relationship and/or attendant duties arising" from an attorney-client relationship "would be measured against standards applicable to attorneys"). Because such a theory still requires proof of the relevant standard of care for Dr. Baker as a treating physician, Ms. LaSala would still need to offer expert testimony for her claim.

Because this claim requires expert testimony, and because Ms. LaSala failed to file any certificate of review, the Court will dismiss her claim. Colo. Rev. Stat. § 13-20-602(4) ("The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim."); *see also Redden v. SCI Colorado Funeral Servs.*, Inc., 38 P.3d 75, 83 (Colo. 2001), *as modified on*

denial of reh'g (Jan. 14, 2002) (upholding dismissal of claim based on defective certificate of review). And although Ms. LaSala has offered untimely expert testimony on this claim, allowing expert reports as substitutes for the certificate is "improper" under Colorado law. *Shelton*, 984 P.2d at 624 (nevertheless allowing such a substitution to avoid vacating a jury verdict because the expert reports provided the same information that would be required in the certificate).

Ms. LaSala counters that her untimely expert testimony from Ms. Eiselein absolves her of this certificate requirement. But even if the Court were to allow this as a substitute for a certificate, one question remains: what sort of expert testimony is required? In this case, like in an attorney malpractice case, Ms. LaSala must offer expert testimony on what the relevant standard of care is and whether Dr. Baker's conduct fell below that standard.

That is not what Ms. Eiselein is offering, however. Instead, her testimony is solely directed toward whether Dr. Baker and Dr. Millard violated HIPAA and regulations promulgated pursuant to HIPAA. Her opinions include: "The Text Messages Between Dr. Millard and Dr. Baker Contain PHI and are Governed by HIPAA"; "Certain of Plaintiff's PHI Shared Between Dr. Millard and Dr. Baker was Not for Treatment Purposes [as defined in HIPAA or related regulations]"; and "Drs. Millard's and Baker's Text Message Exchanges Breached the Security Rule [as defined in HIPAA regulations.]" (Doc. 61–2.) Ms. LaSala confirms in her briefing that Ms. Eiselein's testimony will amount to answering the following legal question: "did the Defendants violate any of HIPAA's applicable rules?" (Doc. 97 at p. 25–26.)

There are two main problems with this offered testimony. First, it appears to comprise inadmissible legal opinions. "In no instance can a

witness be permitted to define the law of the case." *Specht v. Jensen*, 853 F.2d 805, 810 (10th Cir. 1988). But that is what Ms. Eiselein seeks to do: define the parameters of a federal statute, HIPAA, for the jury and opine that defendants violated that statute. This conclusion finds support in *Luciano v. East Cent. Bd. Of Co-op. Educational Services*, 885 F. Supp. 2d 1063, 1067–68 (D. Colo. 2012), where the court, applying *Specht*, excluded expert opinions on the Americans with Disabilities Act's requirements and whether a defendant violated the ADA. Because opinions that "amount to instruction on the law" and that defendants "violated the law" are inadmissible legal conclusions, *Id.*, Ms. Eiselein's testimony about what HIPAA requires and whether Defendants violated HIPAA are inadmissible.

Perhaps more fundamentally, Ms. Eiselein's expert report is only tangentially relevant to Ms. LaSala's state-law fiduciary-duty claim. HIPAA did not create a private right of action, and Ms. LaSala cites no authority holding that a HIPAA violation, *ipso facto*, constitutes a breach of fiduciary duty under Colorado law. What is needed here, and what would render this testimony admissible, is an opinion on whether Dr. Baker met the accepted standard of care applied to physicians when dealing with patient privacy. *See Luciano*, 885 F. Supp. 2d at 1068 (noting that opinions as to whether a defendant failed to ameliorate barriers to disabled individuals, without reference to what the law requires or whether a legal violation occurred, would be admissible). While HIPAA violations may inform whether a breach occurred, that ultimate determination is reserved for the factfinder with instruction on the law from the Court, not an expert witness. *Specht*, 853 F.3d at 807 ("There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge" (internal citation and quotation marks omitted)). As a matter of Colorado law, Ms.

Eiselein must offer expert testimony on the standard of care for this claim. Because she has not, her untimely report cannot save this claim.

To sum up, expert testimony is required to prove Ms. LaSala's breach-of-fiduciary-duty claim against Dr. Baker. Because Ms. LaSala failed to file a certificate of review as to that claim, it must be dismissed. Nor can Ms. LaSala's expert testimony, which was submitted not only past the deadline for filing a certificate but also past the deadline for identifying expert witnesses, save her claim. Ms. LaSala's fiduciary-duty claim therefore will be dismissed.

ii. Invasion of Privacy

Ms. LaSala's invasion-of-privacy claim also fails to survive summary judgment, for slightly different reasons. Under Colorado law, to allege a privacy-related tort in the nature of "unreasonable publicity given to another's private life," one must establish five elements: (1) the facts must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be highly offensive to a reasonable purpose; (4) the facts are of no legitimate concern to the public; and (5) the defendant acted with reckless disregard. *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 (Colo. 1997). As to the second element, the disclosure must be made to "a large number" of persons. *Id.* at 378. Ms. LaSala appears to argue that, because Dr. Baker conveyed confidential information to Dr. Millard who, in turn, conveyed that information to his attorneys and insurance company, this element is satisfied. Not so. Ms. LaSala cites no authority holding that disclosure to a single other person, particularly in the context of sharing medical information between physicians, constitutes disclosure to the public, even if that information was passed along to attorneys in the context of a lawsuit or pre-suit discussions. Ms. LaSala cites *Borquez*, but that court made no indication that disclosure

to a single person, particularly in the medical context, satisfied this element. *Id.*

The two claims against Dr. Baker therefore will be dismissed. And because the civil-conspiracy claim is predicated on these claims, as discussed further below, it too will be dismissed in its entirety.

C. Philippe A. Capraro, M.D., P.C.

Finally, Ms. LaSala's claims against Dr. Baker's associated corporation, Philippe A. Capraro, M.D., P.C., fail as a matter of law. First, there are no longer live claims against Dr. Baker, so Ms. LaSala cannot predicate any corporate liability on the underlying claims against Dr. Baker. But even if there were live claims, they would fail because medical corporations and hospitals generally cannot be liable for the negligence of an employee-doctor under a respondeat-superior theory of liability. *Est. of Harper ex rel. Al-Hamim v. Denver Health & Hosp. Auth.*, 140 P.3d 273, 278 (Colo. App. 2006). Ms. LaSala asserts that her breach-of-fiduciary duty and invasion-of-privacy claims fall outside the scope of this doctrine, but has cited no authority for such a departure. She argues that they are not "negligence" claims, but "breach of fiduciary duty claims are in some, but not all, contexts basically negligence claims." *Martinez*, 842 P.2d at 251–52. This is such a context, and the claims are therefore dismissed.

III. Motion for Sanctions and Spoliation (ECF Nos. 95 and 105)

After Defendants filed their respective summary-judgment motions and joint motion to dismiss, Ms. LaSala moved for sanctions and disqualification of Dr. Millard's counsel, arguing that Defendants withheld various discoverable materials. Ms. LaSala argues that Dr. Millard never produced a phone call between him and Dr. Baker that Dr. Millard

allegedly recorded. She also notes that she had access to emails sent to her, pre-litigation, from Dr. Millard's office that Dr. Millard never produced during discovery. And she argues that Dr. Baker failed to disclose certain text messages between Defendants. Because of all this, Ms. LaSala seeks sanctions that include denial of Defendants' dispositive motions, a special jury instruction at trial, attorneys' fees, and disqualification of Dr. Millard's counsel.

A. Spoliation Sanctions

"A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." *Burlington Northern and Santa Fe Ry. Co. V. Grant*, 505 F.3d 1013, 1032 (10th Cir.2007) (internal citation and quotation marks omitted). "The movant has the burden of proving, by a preponderance of the evidence, that the opposing party failed to preserve evidence or destroyed it." *Ernest v. Lockheed Martin Corp.*, 2008 WL 2945608, at *1 (D. Colo. July 28, 2008).

Ms. LaSala's claims of an elaborate cover-up that involves defense counsel are overblown. Her best evidence of withheld discovery is that Dr. Millard failed to produce an incriminating text message sent between Dr. Millard and Dr. Baker. That text message has now been produced, and Dr. Millard's counsel contend it was mistakenly omitted from a prior production. To alleviate any potential prejudice related to the failure to produce that document, the Court has reviewed and considered the relevant text message in deciding Defendants' dispositive motions.

As to Ms. LaSala's remaining spoliation arguments, she has not met her burden of showing that evidence was destroyed and that she was

prejudiced by such destruction. Ms. LaSala first argues that Dr. Millard destroyed a recording of a phone call between him and Dr. Baker. Dr. Miller did claim to record that call in a written memorandum summarizing the call that has been produced in discovery. But at his deposition, he testified that he made no such recording, and Ms. LaSala has the written memorandum summarizing the call. This is not sufficient evidence to find that such a recording was destroyed or that she has been prejudiced by any alleged destruction because she possesses the memorandum and the existence of any such recording remains uncertain. Ms. LaSala next argues that Dr. Baker deleted text messages between him and Dr. Millard. The parties dispute whether Dr. Baker was obligated to preserve these text messages. But either way, Ms. LaSala has not shown prejudice or that the alleged text messages are "lost." Fed. R. Civ. P. 37(e) (allowing for sanctions against a party only if e-discovery is "lost because a party failed to take reasonable steps to preserve it"). It appears that Dr. Millard produced all of the relevant text messages, so they were not "lost" for purposes of spoliation. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 107 (E.D. Va. 2018) ("Information is lost for purposes of Rule 37(e) only if it is irretrievable from another source, including other custodians.")

Ms. LaSala's remaining arguments that there is missing evidence are even more highly speculative, and the Court will not grant a spoliation sanction based on such speculation. The motion is therefore denied.

B. Motion to Disqualify Counsel

Nor has Ms. LaSala met her burden to disqualify Dr. Millard's counsel. "Motions to disqualify are governed by two sources of authority. First, attorneys are bound by the local rules of the court in which they appear. Federal district courts usually adopt the Rules of Professional

Conduct of the states where they are situated. Second, because motions to disqualify counsel in federal proceedings are substantive motions affecting the rights of the parties, they are decided by applying standards developed under federal law." *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994). Under Colorado law, a lawyer shall not advocate at trial if they are likely to be a necessary witness. Colorado Rule of Professional Conduct 3.7. But because disqualification "severely impinges" on a litigant's right to representation by the counsel of his choice, it should be invoked sparingly, particularly where the movant has not demonstrated the violation of an ethical rule. *Carbajal v. Am. Fam. Ins. Co.*, No. 06CV00608, 2006 WL 2988955, at *2 (D. Colo. Oct. 18, 2006).

Ms. LaSala argues that, because Dr. Millard's attorneys failed to timely produce one text message that has since been produced, they must be disqualified as necessary witnesses involved in a cover-up. Ms. LaSala asserts that the failure to produce was a tactical decision by defense counsel but cites no concrete evidence for such an allegation. As a remedy, Ms. LaSala proposes disqualification because she argues that she must now depose, and possibly examine at trial, defense counsel to explore the implications of this alleged cover-up. But trial has not been set in this matter, and any motion to disqualify counsel as necessary trial witnesses is not yet ripe. *Wisehart v. Wisehart*, No. 18CV00021, 2018 WL 11182736, at *4 (D. Colo. Oct. 16, 2018). Nor has Ms. LaSala shown how what appears to be a relatively routine discovery dispute warrants the extraordinary remedy of disqualification of opposing trial counsel. The Court will not authorize a fishing expedition to depose opposing trial counsel and will not disqualify them.

IV. Dr. Millard's Motion for Summary Judgment (ECF No. 52)

Dr. Millard asserts two arguments for summary judgment. First, Dr. Millard argues that Ms. LaSala's medical-malpractice claims against him must be supported by expert testimony, and Ms. LaSala had not identified any retained experts at the time of filing that summary judgment motion (aside from Defendants, as discussed above). Second, Dr. Millard argues that Ms. LaSala's "civil conspiracy claim" must be dismissed because it is premised on a HIPAA violation, yet HIPAA provides no private right to action.

As to the medical-malpractice claims, Dr. Millard's argument fails because the Court will allow Ms. LaSala to present testimony from her newly retained expert physician, as discussed above. While the Court need not and does not decide here whether summary judgment may be appropriate in light of this new expert testimony, Dr. Millard's motion was premised solely on the fact that Ms. LaSala had presented no expert evidence. Given that, Dr. Millard's request as to the malpractice claims is denied.

The civil-conspiracy claim, however, is a different matter. "To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result." *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). "Additionally, the purpose of the conspiracy must involve an unlawful act or unlawful means. A party may not be held liable for doing in a proper manner that which it had a lawful right to do." *Id.* To establish a civil conspiracy claim in Colorado, "the underlying acts [must] be unlawful and *create an independent cause of action*." *Double Oak Const.,*

L.L.C. v. Cornerstone Dev. Int'l, L.L.C., 97 P.3d 140, 146 (Colo. App. 2003) (emphasis added).

Civil conspiracy is a derivative action, and Ms. LaSala has identified no predicate cause of action to support a civil conspiracy claim against Dr. Millard. Instead, Ms. LaSala argues that *Dr. Baker's* breach of his fiduciary duty and both defendants' violations of HIPAA constitute predicate unlawful acts. But Ms. LaSala concedes that HIPAA does not create a private right of action, so a HIPAA violation alone cannot qualify as a predicate act under Colorado law. *Id.* (the predicate act must "create an independent cause of action"). Nor can *Dr. Baker's* alleged breach of fiduciary duty or invasion of privacy, standing alone, serve as a predicate act for *Dr. Millard's* liability. *Elway*, 908 P.2d at 106. Ms. LaSala's claim that the conspiracy's objective was to minimize Dr. Millard's legal liability also is problematic: "'To get out of a lawsuit' is not a valid independent action to which a conspiracy claim may attach." *Hanley v. Univ. of Kansas Hosp.*, No. 15-CV-2227-DDC-TJJ, 2015 WL 4478636, at *2 (D. Kan. July 22, 2015) (applying Kansas's civil conspiracy law, which has identical elements as Colorado law). In any event, because Ms. LaSala has alleged no wrongful act by Dr. Millard that creates an independent cause of action, and because the claims against Dr. Baker are dismissed as discussed above, her civil conspiracy claim fails and will be dismissed.

CONCLUSION

Dr. Millard's Renewed Motion for Summary Judgment (Doc. 52) is **DENIED**.

Defendants' Joint Motion to Dismiss (Doc. 71) is **GRANTED IN PART** and **DENIED IN PART**, and Dr. Baker's Motion for Summary Judgment (Doc. 92) is **GRANTED** as follows. Ms. LaSala's Claim Five for civil conspiracy is **DISMISSED** as to all Defendants. Ms. LaSala's

Claims Three and Four are **DISMISSED** in their entirety. Dr. Baker and Philippe A. Capraro, M.D., P.C. are therefore **DISMISSED** from this case. Claims One and Two against Dr. Millard and John A. Millard, M.D. P.C. may proceed.

Ms. LaSala's motion for sanctions (Doc. 95) and motion to disqualify Dr. Millard's counsel (Doc. 105) are both **DENIED**.

Ms. LaSala's Motion to Amend the Scheduling Order (Doc. 54) is **GRANTED IN PART** and **DENIED IN PART**, and Defendants' motion to strike Ms. LaSala's supplemental disclosures (Doc. 57) is **GRANTED IN PART** and **DENIED IN PART** as follows. Ms. LaSala's otherwise-untimely disclosure of Dr. Moliver and his expert report is excused. But Ms. LaSala's late disclosure of Ms. Eiselein is not excused, and Ms. LaSala may not present her proposed testimony in this case.

Defendants' motion to amend the scheduling order to allow a deposition of Ms. LaSala (Doc. 84) is **GRANTED** to the extent that deposition has not already occurred.

It is **FURTHER ORDERED** that:

On or before April 30, 2021, Ms. LaSala shall file a certificate of review as to the remaining claims that strictly conforms to the requirements of Colorado Revised Statutes § 13-20-602. That certificate also shall identify the consulting physician and shall be attested to, under penalty of perjury, by that consulting physician.

It is **FURTHER ORDERED** that:

On or before April 30, 2021, the remaining parties (Plaintiff, Dr. Millard, and John A. Millard, M.D., P.C.) shall file a joint status report

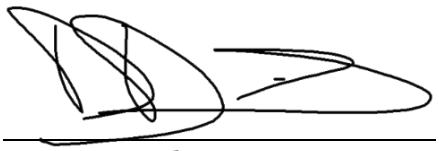
giving time estimates for completing the following tasks, to the extent they have not already occurred:

- The remaining Defendants' deposition of Ms. LaSala; and
- Expert depositions for the remaining defendants' disclosed experts and for Dr. Moliver, Ms. LaSala's sole retained expert.

Once that status report is filed, the Court will *briefly* re-open fact and expert discovery as necessary. If appropriate, the Court is inclined to allow the remaining defendants to file a renewed dispositive motion. The Court is also inclined to allow the remaining defendants to depose Dr. Moliver at Ms. LaSala's expense (not including attorneys' fees) due to the untimely disclosure of that expert.

DATED: April 7, 2021

BY THE COURT:



Hon. Daniel D. Domenico
United States District Judge

District Court, El Paso County, State of Colorado Court Address: 270 South Tejon Street P.O. Box 2980 Colorado Springs, CO 80903-2203 Phone Number: (719)452-5000	EFILED Document CO El Paso County District Court 4th JD Filing Date: May 16 2013 04:13PM MDT Filing ID: 52331894 Review Clerk: Cheryl A Laszar
Plaintiff: DEBORAH LEACH, **v.** **Defendant:** HEIDI MILES.	▲ COURT USE ONLY ▲ Case Number: 12CV4975 Div.:16 Ctrm: S370

ORDER RE: MOTION FOR PROTECTIVE ORDER AND MOTION FOR WRITTEN BRIEFING CONCERNING DEFENDANT'S VERBAL REQUEST FOR *EX PARTE* HEARINGS WITH TREATING DOCTORS IN A NON-MEDICAL MALPRACTICE CASE

The above motion was heard by way of argument on May 16, 2013 with both counsel stating their respective positions.[1] This is an automobile accident negligence case for which the plaintiff is requesting compensation for among other things, injuries to her neck and back.

The defendant has requested *Samms* interviews of a number of medical care providers who treated the plaintiff for her injuries. The request is that plaintiff's counsel not be provided an opportunity for notice or attendance pursuant to the reasoning in *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007).

The plaintiff objects to the procedure suggested by defendant on grounds that *ex parte* communications with treating caregivers are restricted to medical malpractice cases. Counsel

[1] During a previous discovery conference on April 18, 2013, the court granted the defendant's request for *ex parte* interviews of the requested medical providers. Because of the plaintiff's continued objection to the order, the defense is requesting a hearing in order to facilitate a better record. Prior to the hearing, the plaintiff filed its motion for protective order which the court will consider as a motion to reconsider. Although defense counsel expressed concern at not having an opportunity to fully brief the matter prior the hearing, the court does not believe further briefing is necessary.

further argued that should the court find that *ex parte* interviews under *Reutter* are not confined to medical malpractice cases, the *ex parte* interviews should still not be permitted because there is a substantial likelihood that residually privileged information would be divulged.[2]

After careful re-readings of *Samms v. District Court*, 908 P.2d 520 (Colo. 1995) and *Reutter*, the court must decline to accept the plaintiff's restricted interpretation of the right to exercise *ex parte* interviews by the defense. The medical malpractice statutory waiver in *Reutter* regarding consulting physicians found at C.R.S. § 13-90-107(1)(d)(II) was merely the statutory vehicle under which the court declared a waiver given the unique facts of that case. Neither *Reutter* or *Samms* restricts their reasoning, however, to medical malpractice cases. In fact, *Samms*, in distinguishing *Fields v. McNamara*, 540 P.2d 327 (1975), observes the legal precept that a plaintiff, by filing a civil action alleging injuries, impliedly waives his or her physician-patient privilege with respect to matters pertaining to those injuries (at 582). The *Samms* court further observed, "However to the extent that our decision in *Fields* suggested that in *civil actions* trial courts may not authorize a defense attorney, in the absence of the plaintiff or the plaintiff's attorney, to informally interview physicians who have treated the plaintiff regarding matters that are not subject to the physician-patient privilege, we disapprove of that decision." (at 527), emphasis added.

As stated above, *Reutter* provided further explanation of the *Samms* reasoning in finding that the basis for the waiver was the statutory exception specific to medical malpractice cases in which other physicians are in "consultation" with the physician/defendant. Nowhere does *Reutter* or *Samms*, however, restrict waivers and the attendant right of defense counsel to conduct *ex parte* interviews to just medical malpractice actions.

[2] The defendant – apparently conceding the residual privilege issue partially, has withdrawn her *ex parte* interview requests of two later treating specialists.

Rather, the entire analysis of *Reutter* is that once a waiver has been determined, the court must determine the risks that residually privileged information will be revealed at an *ex parte* interview where plaintiff's counsel is not present to protect the privilege. To that end, the preferred method of protecting the residual privilege is to allow plaintiff counsel's attendance where there is a "high risk" that such information should be divulged.

In this case, the court simply cannot find such a "high risk" – particularly for the ambulance and fire department personnel who have been identified as first responders and transporters of the plaintiff to the emergency room. Plaintiff's counsel has presented no evidence of such risk, and the court declines to ignore a common sense awareness of the scope of the role of first responders such as ambulance or fire department personnel who are working under emergency circumstances.

The emergency room personnel admittedly are a closer call, because both counsel acknowledge that some degree of a "personal history" was taken in the emergency room which may have contained residually privileged information. To that end, plaintiff's counsel did not identify the nature or scope of that information – if it did exist at all. No other potential residually privileged information was argued by defense counsel at the hearing.

Of greater importance, however, is the fact that the plaintiff has already produced the emergency room records – including what "personal history" was taken, to defense counsel. What privilege the plaintiff may have had to any residual information in those records was waived upon the production of the records. See *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013). While plaintiff counsel expressed a fear that defense counsel may go beyond that record in an *ex parte* interview, it would be a violation of counsel's ethical responsibilities to do so. Moreover, based upon this court's experience with medical testimony, it is highly unlikely that any medical

care provider in that emergency room from almost three years ago will have an independent memory of any treatment or statements by the plaintiff and will likely defer exclusively to their records.

Based on the foregoing, the court cannot find that there is a high likelihood that residually privileged information will be revealed that has not already been disclosed in this case. While the outcome would have likely been different for the specialists who saw and treated the plaintiff in the months and years after the accident, this analysis is limited to those caregivers who treated the plaintiff emergently after the accident.

Accordingly, it is this court's order that the following individuals may be interviewed *ex parte* by defense counsel without notice of time or date to plaintiff's counsel.

a. Representatives of American Medical Response:

   1. Brooks Dillahunty; and
   2. Wescott Pager.

b. Representatives of the Colorado Springs Fire Department:

   1. Lerry D. Armstead;
   2. Charles W. Grazioli;
   3. James Jiron;
   4. Robert D. Keese;
   5. Christopher R. Laurich;
   6. Barry J. Madison;
   7. Donald G. Rickert; and
   8. Maurice Santiago.

c. Representatives of Penrose Hospital:
   1. Kit R. Hooker, M.D.;
   2. Jamie Scolardi, R.N.; and
   3. Kristin Perry, SLP.

d. Representatives of Colorado Springs Radiologists:
   1. Russell Asleson, M.D.

Neither counsel or the medical provider shall discuss any residually privileged information unrelated to the injuries incurred in this case or otherwise found directly in the produced medical records.

The interview shall not be recorded by audio or video means without written approval by plaintiff's counsel, however a witness from defense counsel's office may be present along with counsel conducting the interview.

Presentation of this order to any of the above medical providers represents the court's specific finding that the plaintiff has impliedly waived the physician/patient privilege as to these medical professionals only, and that they may, if they are willing, participate in an interview with defense counsel without further release from the plaintiff. Under the law, the medical caregiver may refuse to participate in informal interviews, however the plaintiff or her counsel may not instruct the medical caregiver to decline to participate. (*Samms* at 526). Should the interviews take place, the medical caregivers may only discuss information directly related to the injuries and treatment provided relating to the plaintiff's automobile accident of March 10, 2010 or otherwise found in the records which are produced by the plaintiff.

DONE THIS 16TH DAY OF MAY, 2013.

BY THE COURT:

G. D. Miller

G. DAVID MILLER
District Court Judge

83 P.3d 1149
Colorado Court of Appeals,
Div. III.

Janell L. LISCIO and Robert Liscio, Plaintiffs–Appellants,
v.
Ronald C. PINSON, M.D.; David P. Fisher, M.D.; and Rocky Mountain Orthopedic Associates, P.C., Defendants–Appellees.

No. 02CA0124.
|
June 19, 2003.
|
Certiorari Denied Feb. 9, 2004.

Synopsis

Patient brought medical malpractice action against orthopedic surgeons to recover for alleged damage to saphenous nerve during a second knee surgery. Following jury trial, the District Court, City and County of Denver, Michael A. Martinez, J., entered judgment for surgeons. Patient appealed. The Court of Appeals, Dailey, J., held that: (1) proposed amendment to complaint that would have alleged negligence during initial knee surgery did not relate back to original complaint for limitations purposes; (2) exclusion of res gestae evidence concerning alleged negligence during first surgery was not abuse of discretion; (3) surgeon's deposition testimony, offered for impeachment purposes as prior inconsistent statement, was properly excluded; (4) patient "opened the door" to cross-examination about an informed consent document; and (5) patient was not entitled to protective order, and was properly subjected to monetary sanction for interrupting deposition of her former treating physician to seek such an order, when surgeons asked physician to express opinion as to their exercise of care.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1152** Leventhal, Brown & Puga, P.C., Jim Leventhal, Anthony Viorst, Denver, Colorado, for Plaintiffs–Appellants.

Montgomery Little & McGrew, P.C., Robert N. Spencer, Englewood, Colorado, for Defendant–Appellee Ronald C. Pinson, M.D.

Johnson, McConaty & Sargent, P.C., Craig A. Sargent, Bradley G. Robinson, Glendale, Colorado, for Defendant–Appellee David P. Fisher, M.D.

No Appearance for Defendant–Appellee Rocky Mountain Orthopedic Associates, P.C.

Opinion

Opinion by Judge DAILEY.

In this medical malpractice action, plaintiffs, Janell L. and Robert Liscio, appeal the judgment entered upon a jury verdict in favor of defendants, Ronald C. Pinson, M.D., David P. Fisher, M.D, and Rocky Mountain Orthopedic Associates, P.C. Plaintiffs also appeal an order imposing sanctions for abuse of deposition procedures. We affirm.

Defendants are orthopedic surgeons who, on October 31, 1997, performed surgery to reconstruct a torn anterior cruciate ligament (ACL) in Janell Liscio's left knee. Following surgery, the screw holding the ACL graft in place detached, requiring defendants to perform a "revision" knee surgery on November 28, 1997.

Within a month of the second surgery, Janell Liscio met with defendant Dr. Pinson on four separate occasions, complaining of pain in her leg. Dr. Pinson referred Mrs. Liscio to other specialists, and one eventually determined she suffered an injury to the sartorial, or main, branch of her saphenous nerve and had a condition known as reflex sympathetic dystrophy.

On November 24, 1999, plaintiffs filed this action, alleging that defendants negligently performed the second surgery, causing damage to Mrs. Liscio's saphenous nerve. Mrs. Liscio's husband, Robert, asserted a claim for loss of consortium. In their answers, defendants denied that they negligently caused any injury or loss of consortium.

In May 2001, plaintiffs filed a motion to amend their complaint to add two additional claims of negligence relating to the first surgery. Upon defendants' objection, the trial court summarily denied plaintiffs' motion.

A prominent issue at trial was whether Mrs. Liscio suffered an injury to the infrapatellar, as opposed to the sartorial, branch

of the saphenous nerve. Experts on both sides opined that the infrapatellar branch of the nerve is routinely (and thus, not negligently) sacrificed by doctors during this type of surgery.

After an eleven-day trial, the jury found that defendants had not been negligent.

I. Motion to Amend Complaint

Plaintiffs contend that the trial court erred in denying their motion to amend the complaint. We disagree.

Under C.R.C.P. 15(a), parties may amend their pleadings only by leave of court after responsive pleadings have been filed; however, "leave shall be freely given when justice so requires." C.R.C.P. 15(a) reflects ***1153** a liberal policy of allowing amendment, and trial courts are encouraged to look favorably on requests to amend pleadings. *Super Valu Stores, Inc. v. Dist. Court,* 906 P.2d 72, 77 (Colo.1995).

A trial court may deny leave to amend on grounds of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleadings via prior amendments, undue prejudice to the opposing party, and futility of amendment. *Benton v. Adams,* 56 P.3d 81, 86 (Colo.2002); *Sandoval v. Archdiocese of Denver,* 8 P.3d 598, 605 (Colo.App.2000).

Here, we are unable to determine the precise basis of the trial court's ruling. Nonetheless, we conclude that plaintiffs' motion was properly denied on grounds of futility of amendment. *See Davis v. Paolino,* 21 P.3d 870, 873 (Colo.App.2001)("if a proposed amendment to the complaint would be futile, reversal is not required").

"An amendment is futile, if, for example, 'it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.' " *Benton v. Adams, supra,* 56 P.3d at 86–87 (quoting 3 J.W. Moore, et al., *Moore's Federal Practice* § 15.15[3], at 15–48 (3d ed.1999)). We review de novo the issue presented in this case, namely, whether the amendment would be futile because it would not survive a motion to dismiss. *See Benton v. Adams, supra,* 56 P.3d at 86.

Here, plaintiffs' motion requested leave to file two new claims of negligence related to the first operation. Plaintiffs' motion was filed, however, three and a half years after the second operation. Defendants opposed plaintiffs' motion, arguing that plaintiffs' new claims were barred by the applicable two-year statute of limitations set forth in § 13–80–102.5(1), C.R.S.2002.

In determining when a claim accrues, for purposes of applying § 13–80–102.5, we look to § 13–80–108(1), C.R.S.2002, which provides, in pertinent part, that "a cause of action for injury to person ... shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."

In a medical malpractice case, a claim accrues when a plaintiff has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another. A plaintiff need not know the specific acts of negligence committed by the defendant or the details of the evidence necessary to prove the claim. "It is enough that the claimant knew, or may reasonably be charged with knowledge of, sufficient facts to be aware that a claim existed more than two years before it was filed." *Mastro v. Brodie,* 682 P.2d 1162, 1169 (Colo.1984); *see also Sandoval v. Archdiocese of Denver, supra,* 8 P.3d at 604 ("The limitation period does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of facts forming the basis of a claim for relief.").

Although whether a statute of limitations bars a claim is ordinarily a question of fact, *Owens v. Brochner,* 172 Colo. 525, 529, 474 P.2d 603, 605 (1970), it may, in appropriate cases, be decided as a matter of law. *See Adams v. Leidholdt,* 38 Colo.App. 463, 468, 563 P.2d 15, 18 (1976), *aff'd,* 195 Colo. 450, 579 P.2d 618 (1978).

Here, Mrs. Liscio was told that a second operation was required because a bone graft implanted in the first operation had pulled apart. And during her deposition she twice testified that, by the time of the second operation, she believed that defendants had done something negligently in the first operation. She also testified that within a week of the second surgery, she experienced excruciating pain in her left leg.

Under these circumstances, we conclude that reasonable people could not disagree that, within a week of the second operation, plaintiffs were "aware of [the] injury and knew or should have known that any alleged negligence occurred on or before the date of that injury." *See Adams v. Leidholdt, supra.* Because the amended complaint was filed well beyond two

years after this time, ***1154** the new claims would be barred by the statute of limitations, absent the application of C.R.C.P. 15(c).

C.R.C.P. 15(c) provides that a claim asserted in an amended pleading relates back to the date of the original complaint when it arises out of the same conduct, transaction, or occurrence alleged in the original pleading.

Because notice is the essence of C.R.C.P. 15(c), the issue is whether, when viewed from the perspective of a reasonably prudent party, a defendant ought to have anticipated or expected that "other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question." *See United States v. Bell,* 724 P.2d 631, 638 (Colo.1986)(quoting 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1497, at 498–99 (1971)).

A defendant will not be held to have anticipated or expected a new claim which arises from events other than those included in the original complaint. *See Allen Homesite Group v. Colo. Water Quality Control Comm'n,* 19 P.3d 32, 34 (Colo.App.2000); *see also Peters v. Smuggler–Durant Mining Corp.,* 930 P.2d 575, 581 (Colo.1997)("Where an 'amended complaint attempts to add a new legal theory which is unsupported by the factual claims raised in the original complaint, the proposed claim arises from new and distinct conduct, transactions, or occurrences not found in the original complaint.' " (quoting 27A *Federal Procedure Pleadings and Motions* § 62:335 (Lawyer's ed.1996)).

Here, plaintiffs' original complaint set forth several claims of relief, each specifically linked to the November 28, 1997 surgery. Plaintiffs' amended complaint alleged defendants were negligent in performing the October 31, 1997 surgery and in failing to properly secure the ACL graft at that time, which required Mrs. Liscio to undergo further surgery resulting in "an increase in her injuries and damages."

Plaintiffs' new claims alleged defendants' liability based upon specific conduct and events that were separate and distinct from that set forth in the original complaint. Thus, under C.R.C.P. 15(c), plaintiffs' new claims could not relate back to date of the original complaint.

Because the new claims were barred by the two-year statute of limitations, we conclude that the amended complaint would have been futile. Hence, we find no error in the trial court's denial of leave to amend the complaint.

II. Expert Testimony

Plaintiffs also contend the trial court erred in precluding their expert from testifying that defendants negligently or otherwise improperly performed the first surgery. Plaintiffs argue that the expert's opinion with respect to the first surgery qualified as res gestae evidence and was otherwise admissible under CRE 705. We are not persuaded.

Res gestae evidence provides the jury with a full and complete understanding of the events surrounding the incident at issue. Even assuming it embraces opinion evidence, res gestae evidence is admissible only if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice. *See* CRE 401, 403; *People v. Quintana,* 882 P.2d 1366, 1373–74 (Colo.1994).

Under CRE 705, an expert is permitted on direct examination to disclose the bases of his or her opinion. *See People v. Masters,* 33 P.3d 1191, 1206 (Colo.App.2001), *aff'd,* 58 P.3d 979 (Colo.2002). However, even this type of evidence may be excluded under CRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See Vialpando v. People,* 727 P.2d 1090, 1095 (Colo.1986).

A trial court has broad discretion to determine the probative value and prejudicial impact of evidence, *E–470 Pub. Highway Auth. v. 455 Co.,* 3 P.3d 18, 23 (Colo.2000), and to determine whether evidence should be excluded because it would confuse the issues or mislead the jury. *Schultz v. Wells,* 13 P.3d 846, 852 (Colo.App.2000).

"To say that a court has discretion ... means that the court is not bound to ***1155** decide an issue one way or another," but, rather, may choose from amongst a range of reasonable options. *See Buckmiller v. Safeway Stores, Inc.,* 727 P.2d 1112, 1115 (Colo.1986). Thus, we will not disturb, as an abuse of discretion, a trial court's ruling unless it was manifestly arbitrary, unreasonable, or unfair. *Hock v. N.Y. Life Ins. Co.,* 876 P.2d 1242, 1251 (Colo.1994).

We perceive no abuse of the trial court's discretion here, particularly in light of its denial of plaintiffs' motion to amend the complaint. In this context, the admission of evidence that defendants were negligent in the first operation would have

been unfairly prejudicial to defendants and may well have misled or confused the jury regarding the proper and only basis upon which liability could be imposed in this case, namely the second operation.

III. Deposition Testimony

Next, plaintiffs contend the trial court erred in precluding them from impeaching one of the defendants with inconsistent testimony in his deposition. Again, we disagree.

A trial court's evidentiary ruling will be upheld on appeal unless it was manifestly arbitrary, unreasonable, or unfair. *See People v. Garcia,* 17 P.3d 820, 828 (Colo.App.2000)(use of inconsistent statements for impeachment purposes).

Under C.R.C.P. 32(a)(2), "any part or all of a deposition, so far as admissible under the rules of evidence," may be used against a party-deponent "for any purpose." Here, plaintiffs offered Dr. Fisher's deposition for the purpose of impeaching his trial testimony.

Under CRE 613, a witness may be impeached with his or her prior inconsistent statements. "Although an inconsistency need not amount to a patent contradiction, there must be a material variance between the witness' testimony and the prior statement or at least the omission of a significant detail which it would have been natural to mention in the prior statement." *Williams v. Dist. Court,* 700 P.2d 549, 557 (Colo.1985). Also, the inconsistency must be sufficiently probative to avoid exclusion under CRE 403 on grounds of confusion of issues, misleading the jury, or causing an undue waste of time. *See People v. Saiz,* 32 P.3d 441, 446 (Colo.2001)(discussing the admissibility of prior inconsistent statement evidence under CRE 613 and § 16–10–201, C.R.S.2002).

Here Dr. Fisher testified at trial that: (1) he did not think "there was an injury to the saphenous nerve during the [second] procedure"; and (2) to a reasonable medical probability, the sartorial branch of the saphenous nerve had not been injured, cut, transected, compressed, or squeezed in any manner during the second surgery.

On each occasion, plaintiffs sought to impeach Dr. Fisher with that part of his deposition where he appears to have acknowledged, as part a convoluted dialogue, that something more likely than not occurred during the second surgery to cause Mrs. Liscio's pain problems. The trial court denied plaintiffs' requests to impeach Dr. Fisher with this testimony.

No abuse of the trial court's discretion is evident here. Plaintiffs wanted to contradict Dr. Fisher's testimony concerning nerve damage. But Dr. Fisher's acknowledgment in the deposition appears to have concerned not nerve damage, but a more general topic, pain. Even if Dr. Fisher's acknowledgment could somehow be interpreted as reaching the issue of nerve damage, such an interpretation would have been somewhat misleading. Elsewhere in the deposition, clear questions were asked, and Dr. Fisher was unequivocal, as he was at trial, in his testimony that Mrs. Liscio suffered no nerve damage as a result of the second surgery.

Dr. Fisher's deposition testimony, then, was excludable, either because it was not at material variance with his trial testimony or because it was, at best, only marginally relevant and was potentially misleading and confusing to the jury.

Consequently, reversal is not warranted on this ground.

IV. Informed Consent

Plaintiffs also contend that reversal is required because the trial court allowed defendants ***1156** to cross-examine Mrs. Liscio and later comment about an informed consent document. We find no reversible error.

Evidence pertaining to a patient's informed consent may be irrelevant and potentially unfairly prejudicial to the patient in cases where the patient sues a physician solely on the theory of negligent medical treatment. *See Waller v. Aggarwal,* 116 Ohio App.3d 355, 357–58, 688 N.E.2d 274, 275 (1996)(evidence may suggest that patient can and did consent to the risk of negligent medical treatment).

Here, however, defendants inquired of Mrs. Liscio only after plaintiffs had asked Dr. Pinson whether a patient's signing a consent form relieved a doctor of the obligation to properly perform surgery or precluded the patient from bringing suit.

We discern no error here because plaintiffs' inquiries opened the door to defendants' inquiries. *See Itin v. Ungar,* 17 P.3d 129, 132 n. 4 (Colo.2000)("The concept of 'opening the door' represents an effort by courts to prevent one party from creating a misleading impression through the selective presentation of facts by allowing the other party to explain

or contradict that impression through evidence that might otherwise be inadmissible.").

Even if error occurred, reversal would not be warranted. *See Rojhani v. Meagher,* 22 P.3d 554, 557 (Colo.App.2000)(error in the admission or exclusion of evidence is harmless if it does not substantially influence the outcome of the case).

Here, the trial lasted eleven days. The challenged events consisted of several questions and one comment in closing argument. Defendants' questions and comment would not naturally require the jury to infer that plaintiffs assumed the risk of their negligence. And plaintiffs had previously extracted an acknowledgement to the contrary when they questioned Dr. Pinson.

Given the issues in the case, the small part defendants' questions and comment played in the course of trial, and plaintiffs' placing the informed consent topic in proper perspective, we are not persuaded that any error here substantially influenced the outcome of the case.

Plaintiffs' reliance on *Waller* is misplaced. In *Waller,* the Ohio Court of Appeals reversed a judgment in favor of a physician defendant not only because the informed consent issue was pervasive throughout trial, but also because the trial court endorsed informed consent as a defense to a claim of negligent medical treatment. These circumstances are readily distinguishable from those of the present case.

V. Sanctions

Finally, plaintiffs contest the trial court's denial of their motion for protective order and the imposition of a $500 sanction against them. We are not persuaded.

Defendants deposed as one of their witnesses Mrs. Liscio's former treating physician. The deposition took place in Montrose, and plaintiffs' counsel appeared by telephone. Plaintiffs had not endorsed this witness as an expert under C.R.C.P. 26(a)(2). When defendants asked the witness to express an opinion concerning defendants' exercise of care during the surgery, plaintiffs' counsel objected, instructed the witness not to answer the question, and indicated that he would seek a protective order. Defendants desisted from any further inquiry along those lines.

Ten days later, plaintiffs sought a protective order. In the meantime, defendants had also sought a protective order and sanctions for plaintiffs' alleged unjustified interruption of the deposition.

The trial court denied plaintiffs' request for a protective order, granted defendants' request for a protective order, and imposed a $500 sanction on plaintiffs for effectively suspending a part of the deposition instead of simply noting their objection for the court to address later.

Decisions whether to grant a protective order or to award sanctions in connection with the discovery process are committed to the discretion of the trial court, and, as such, they will not be disturbed on appeal absent an abuse of discretion. *See Steiner v. Minn. Life Ins. Co.,* 71 P.3d 1017, —— (Colo.App., 2002)(*cert. granted* May 27, 2003) (protective orders); ***1157** *Koscove v. Bolte,* 30 P.3d 784, 788 (Colo.App.2001)(discovery sanctions).

We note that plaintiffs' objection to defendants' particular line of inquiry was well-founded. *See* C.R.C.P. 26(b)(4)(A) ("Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule."); *cf. Patel v. Gayes,* 984 F.2d 214, 217 (7th Cir.1993)(absent endorsement as expert, treating physician could not relate opinion about facts of which he had no personal knowledge).

However, a valid objection is not, in and of itself, ground for instructing a witness not to answer and suspending part of a deposition.

Under C.R.C.P. 30(d)(1), a party may instruct a witness not to answer a question during a deposition "only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule." And under C.R.C.P. 30(d)(3), a party is entitled to suspend a deposition for "the time necessary to make a motion for an order" to stop or limit a deposition "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."

Here, plaintiffs alleged that defendants questioned the witness in bad faith and in an unduly oppressive and burdensome manner. Specifically, plaintiffs contended that defendants

had neither endorsed the witness as an expert nor notified plaintiffs that they wished to question him as an expert.

However, defendants' failure to do so is not the type of conduct warranting a C.R.C.P. 30(d)(3) protective order. *See Kwik Way Stores, Inc. v. Caldwell,* 745 P.2d 672, 677 (Colo.1987)(" 'Bad faith' ... connotes conduct which ... amounts to a flagrant disregard or dereliction of one's discovery obligations."); *Boyd v. Univ. of Md. Med. Sys.,* 173 F.R.D. 143, 145 (D.Md.1997)(federal rule, identical to C.R.C.P. 30(d)(3), designed to remedy "abusive" deposition tactics "by an examining attorney, such as repeatedly asking the same question, or asking argumentative questions or questions seeking information not relevant to the litigation, but of a highly personal nature"); *see also In re Stratosphere Corp. Sec. Litig.,* 182 F.R.D. 614, 619 (D.Nev.1998)("it is not the embarrassment or annoyance which may be caused by unfavorable answers that is the criteria of [Fed.R.Civ.P.] 30(d)(3)," but "the 'manner' in which the interrogation is conducted that is grounds for refusing to proceed").

Thus, not only were plaintiffs not entitled to a protective order, but they also lacked substantial justification for interrupting the deposition to seek one. Accordingly, we perceive no abuse of the court's discretion in either denying their request for protective order or imposing sanctions. *See* C.R.C.P. 30(d)(3), 37(a)(4) (sanctions can be imposed unless, as pertinent here, actions were "substantially justified"); *cf. Eurpac Serv. Inc. v. Republic Acceptance Corp.,* 37 P.3d 447, 453 (Colo.App.2000)(for purposes of attorney fees statute, § 13–17–102, C.R.S.2002, a matter lacks substantial justification if, among other things, its "proponent can present no rational argument based on the evidence or law in its support").

The judgment and order are affirmed.

Judge MARQUEZ and Judge ROY concur.

All Citations

83 P.3d 1149

DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive, Brighton, CO, 80601	DATE FILED: April 15, 2014 1:43 PM CASE NUMBER: 2012CV1389
Plaintiff(s) JOHN MACCAGNAN v. **Defendant(s)** CATHOLIC HEALTH INITIATIVES COLO	⚠ **COURT USE ONLY** ⚠
	Case Number: 2012CV1389 Division: W Courtroom:

Order: PLAINTIFFS MOTION IN LIMINE TO PRECLUDE DEFENDANT FROM ELICITING UNDISCLOSED TESTIMONY FROM NURSE VERONICA SPARBY

The motion/proposed order attached hereto: GRANTED.

Before the court is plaintiff's Motion in Limine to Preclude Defendant from Eliciting Undisclosed Testimony from nurse Veronica Sparby (the Motion) filed on March 26, 2014.

Because the motion was filed less than 42 days before trial, under C.R.C.P. 121, Section 1-15(1)(b) defendant had until April 9, 2014, to file a response. Despite not having timely filed a response, the court proceeds to the merits of plaintiff's instant motion. For the below reasons, the court grants plaintiff's motion.

Defendant has cross-endorsed plaintiff's expert, R.N. Veronica Sparby, as its own expert. However, if defendant wishes to elicit testimony from her beyond what plaintiff disclosed in his C.R.C.P. 26(a)(2) disclosures, and thus make Nurse Sparby defendant's own expert witness, defendant was required to comply with the expert disclosure requirements contained in C.R.C.P. 26(a)(2). See Freedman v. Kaiser, 849 P.2d 811, 815 (Colo. App. 1992). Parties are also required to provide a summary of all expert testimony under C.R.C.P. 26(a)(2) and 26(e). Here, defendant has failed to disclose any expert testimony or provide its own expert reports. Therefore, to the extent that defendant attempts to introduce expert testimony from paintiff's experts, the scope of any such testimony will be limited to the scope set forth in plaintiff's C.R.C.P. 26(a)(2) disclosures and further limited to impeachment material.

For the foregoing reasons, the Court grants the plantiff's motion.

Issue Date: 4/15/2014

ROBERT WALTER KIESNOWSKI JR.
District Court Judge

DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive Brighton, Colorado 80601	
Plaintiff: JOHN MACCAGNAN **Defendant:** WELLNESS WAY, INC., d/b/a AMI Wellness	
Plaintiff's Counsel: LAW OFFICES OF J.M. REINAN, P.C. Jerome M. Reinan, #22031 Jordana Griff Gingrass, #38195 1437 High Street Denver, CO 80218-2608 (303) 894-0383 (303) 894-0384 (FAX) jreinan@reinanlaw.com jgingrass@reinanlaw.com	⑩ COURT USE ONLY⑩ Case No.: 2012CV1389 Division: W

PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE DEFENDANT FROM ELICITING UNDISCLOSED TESTIMONY FROM NURSE VERONICA SPARBY

COMES NOW the Plaintiff, JOHN MACCAGNAN, individually, by and through counsel, Law Offices of J.M. Reinan, P.C., and Moves the Court to Preclude Defendant from Eliciting Undisclosed Testimony from Nurse Veronica Sparby, as follows:

I. CERTIFICATE OF CONFERRAL

1. Undersigned counsel hereby certifies that he has conferred with counsel for Defendant, Jason Melichar, regarding the issue presented in this motion and that Defendant objects to the relief requested herein.

II. MOTION IN LIMINE REGARDING NURSE VERONICA SPARBY

2. As set forth in previous papers filed with the Court, Defendant has not endorsed any experts of its own. Rather, it has cross-endorsed Plaintiff's experts.

3. One of the experts cross-endorsed by Defendant is its own registered nurse, Veronica Sparby, R.N.

4. Rule 26 requires that summaries of any expert opinion contain identification of all opinions as well as the bases for those opinions:

> The report or summary shall contain a complete statement of **all opinions to be expressed and the basis and reasons therefor;** the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In addition, if a report is issued by the expert it shall be provided.
>
> C.R.C.P. 26(a)(2)

5. Nurse Sparby provided care and treatment to Plaintiff after his discharge from the hospital in April, 2012, after Mr. Maccagnan had developed wounds on his bottom.

6. Nurse Sparby has been endorsed to testify as follows:

Veronica Sparby, RN, AMI-Wellness, 3955 East Exposition, Suite 501, Denver, Colorado 80209, telephone (303) 722-2208. Veronica Sparby is a registered nurse. Nurse Sparby saw and assessed Plaintiff on April 26, 2012, shortly after his discharge from St. Anthony's North. Ms. Sparby is expected to opine that Mr. Maccagnan had four pressure sores on his bottom. Ms. Sparby is expected to opine that Mr. Maccagnan developed these wounds during his April, 2012 admission to St. Anthony's North and that he did not have those wounds prior to his April, 2012 hospital admission. Ms. Sparby is further expected to opine that Mr. Maccagnan discharged himself from the hospital in part due to the skin breakdown that he had suffered there, and that he had not had these kinds of problems before. Ms. Sparby is expected to render other nursing opinions consistent with the care and treatment that she provided to Plaintiff through AMI Wellness.

7. As can be seen from that endorsement, nurse Sparby is not endorsed to render any standard of care, causation, or apportionment opinions.

8. More specifically, nurse Sparby has not been endorsed to testify that her care of Mr. Maccagnan met applicable standard; that AMI's care of Mr. Maccagnan met applicable standards; or that the hospital's care of Mr. Maccagnan met applicable standards. The general language stating that she may offer additional opinions does not allow Defendant to have her offer new, undisclosed opinions for the first time at trial.

9. In fact, as can be seen from her original endorsement by Plaintiff, she was only endorsed to testify, from a nursing standpoint, as to the nature and extent of wounds she observed on Mr. Maccagnan's bottom at the time of his discharge from the hospital.

10. It has become clear that Defendant intents to try to expand nurse Sparby's opinion to include and endorsement of her own care, e.g., that her care met applicable standards.

11. Because nurse Sparby has not been endorsed to testify as to the standard of care, causation, or damages, it would be inappropriate for Defendant to attempt to expand her testimony as such at trial.

12. Plaintiff therefore asks the Court to limit nurse Sparby's testimony to that contained within the four corners of the endorsement.

13. Plaintiff suspects that Defendant will argue, in response to this motion, that Defendant should be allowed to expand nurse Sparby's testimony because Plaintiff was present at her deposition and had the opportunity to ask questions that may have elicited her expert opinions.

14. The fact that Plaintiff did not ask nurse Sparby expert-related questions in her deposition was in large part because she had not been endorsed to provide such expert opinions and thus there was no need to explore anything other than her knowledge as a percipient treating witness.

15. In any case, fundamental fairness as well as Rule 26(a)(2) precludes Defendants from going beyond their expert endorsements in this case.

WHEREFORE, for the reasons set forth herein, Plaintiff prays that the Court enter an Order in Limine precluding Defendant from expanding nurse Sparby's testimony as an expert beyond the scope of her endorsement.

Respectfully submitted this 26th day of March, 2014.

LAW OFFICES OF J.M. REINAN, P.C.

/s/ Jordana Gingrass

_____

Jerome Reinan, #22031
Jordana Griff Gingrass, #38195
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Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of March, 2014 a true and correct copy of the foregoing was transmitted via ICCES and, through that service, sent to the following:

Jason Melichar
Wilson Elser Moskowitz Edelman & Dicker, LLP
1512 Larimer Street
Suite 550
Denver, CO 80202
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/s/ Jordana Griff Gingrass

_____

For the Law Offices of JM Reinan, PC

2012 WL 3744635
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Jason MARCELLI, Plaintiff,
v.
ACE AMERICAN INSURANCE COMPANY, Gallagher Bassett Services, Inc., and Dish Network Corporation, f/d/b/a/ Echostar Communications Corporation, Defendants.

Civil Action No. 10–cv–03025–PAB–KMT.
|
Aug. 29, 2012.

Attorneys and Law Firms

Angela L. Ekker, Lathrop & Gage, LLP, Bruce Jeffrey Kaye, Mari Colleen Bush, Kaye & Bush, LLC, Denver, CO, for Plaintiff.

Richard K. Rediger, Overturf McGath Hull & Doherty, P.C., Denver, CO, for Defendants.

ORDER

KATHLEEN M. TAFOYA, United States Magistrate Judge.

***1** This matter is before the court on "Plaintiff's Motion to Reduce Expert Fee to Reasonable Rate, Pursuant to Fed.R.Civ.P. 26(b)(4)(e)" ("Mot.") [Doc. No. 118] filed May 15, 2012. Defendants filed a Response on June 5, 2012 [Doc. No. 126] ("Resp."), and Plaintiff replied on June 19, 2012 [Doc. No. 130]. The matter is ripe for review.

Plaintiff claims he sustained a work-related injury on November 7, 2008, while working for Dish Network Corporation, f/d/b/a/ Echostar Communications Corporation. He claims that as a result of this injury he has suffered spinal disk-related injuries and that he has undergone two surgical procedures on his low back, a micto-disectomy and a lumbar fusion in an effort to obtain relief from pain. Defendants claim that there is evidence that Plaintiff did not suffer the injury complained of on the job, but rather while he was lifting weights on his personal time, and that he had a pre-existing injury that is at the root of his back problems. In addition to numerous efforts to treat the plaintiff's back symptoms, the plaintiff has undergone several independent medical examinations in connection with this litigation. The expert at issue in this motion, Dr. Jeffrey Sabin, is an orthopedic surgeon who performed one of the IMEs.

In a supplement to their initial disclosures, the defendants disclosed Dr. Sabin as an expert in the field of orthopedic surgery stating, "Dr. Sabin's CV, list of publications, fee schedule and list of testimony are attached hereto as Exhibit E. Dr. Sabin's hourly rate on this case is $1500.00." (Resp. at 2, ¶ 1.) Dr. Sabin's fee schedule, which was a part of Exhibit E, is attached to the Response as Exhibit 1. The fee schedule provides that Dr. Sabin charges $1500.00 per hour for: deposition testimony, video deposition testimony, and records reviews. He charges $1000.00 per hour to consult with attorneys and to engage in other telephone conferences.

Dr. Sabin initially demanded $6000.00 as up front payment for his deposition to be taken on March 23, 2012. (Mot. at 2.) The plaintiff did not pay the deposition fee up front as required by Dr. Sabin; however, Dr. Sabin appeared for the deposition anyway and sat for three hours of questioning, ultimately billing $4500.00. (Resp.¶ 6.) To date the plaintiff has not paid any portion of Dr. Sabin's fees. (Resp. at 3, ¶ 6.) Defendants "paid Dr. Sabin's fees in a manner consistent with his fee schedule ... for the time Dr. Sabin required to prepare for his deposition." (*Id.,* ¶ 7.) Plaintiff seeks to have this court reduce the deposition fee of Dr. Sabin to $1000.00 per hour, which is the same rate charged by his own expert orthopedic surgeon, Dr. Chad Prusmack.

Whether or not a doctor has been retained, as long as he has been identified as a witness who will provide expert opinion testimony, pursuant to Rule 702, he may be deposed. Fed.R.Civ.P. 26(b)(4)(A). Rule 26(b)(4)(C) provides that "the court shall require that the party seeking discovery pay the expert a *reasonable* fee for time spent in responding to discovery," unless manifest injustice would result. Fed.R.Civ.P. 24(b)(4)(C)(emphasis added). Although few published cases discuss what constitutes a "reasonable" expert fee, seven factors have emerged to guide in the determination of the reasonableness of a fee under Rule 24(b)(4)(C)

> ***2** (1) the witness' area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available

> experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (6)[sic] any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Young v. Global 3, Inc., Case No. 03–N–2255(CBS), 2005 WL 1423594, at *1 (D.Colo. May 26, 2005). *See also U.S. Energy Corp. v. Nukem, Inc.,* 163 F.R.D. 344, 345–46 (D.Colo.1995); *Mathis v. NYNEX,* 165 F.R.D. 23, 24–25 (E.D.N.Y.1996); *Jochims v. Isuzu Motors, Ltd.,* 141 F.R.D. 493, 496 (S.D.Iowa 1992). A guiding principle is that the expert's fee should not be so high as to impair a party's access to necessary discovery or result in a windfall to the expert. *Young,* 2005 WL 1423594, at *1; *Mathis,* 165 F.R.D. at 24. *See Grady v. Jefferson Co. Bd. of County Comm'rs.,* 249 F.R.D. 657 (D.Colo.2008).

Regarding the first and second factors, Dr. Sabin is a licensed orthopedic surgeon, which, as evidenced by his curriculum vitae and as most lay-people would conclude, requires extensive specialized education and training. (Mot., Ex. C.) Given the lack of dispute over most of the Rule's factors, the parties spend most of their time arguing factor three, the prevailing rates of other comparable experts.

Plaintiff points to his own orthopedic treating expert, Dr. Prusmack, as a comparative surgeon who charges $1000.00 per hour for deposition testimony. While Plaintiff paints these experts as equivalent—which in some ways not incorrect—Dr. Sabin has been practicing fourteen more years than Dr. Prusmack. (Resp., ¶ 9.) Clearly, experience is a factor to be considered in this context.

Defendants point to fee schedules for other local orthopedic surgeons in connection with testimonial expertise in litigation. Dr. Michael Janssen charges $1525.00 per hour for deposition time and Dr. I Stephen Davis charges $1200.00 per hour for the same. (Resp., ¶¶ 9 and 10; Exs. 6 and 7.)

There have been several cases dealing with the fees of medical experts in the last few years. In a case decided by this court, orthopedic surgeons, several of whom had lengthy and impressive careers, had a fee schedule rate of between $750 to $1,000 per hour for deposition testimony, although two of the surgeons were actually charging their clients a negotiated rate of $450.00 per hour. *Grady,* 249 F.R.D. at 659–660. The court determined that the opposing expert could charge no more than $750.00 per hour. In a case involving the use of a pain pump, *Stewart v. Stryker,* No. 11–0376–CV–W–ODS, 2012 WL 1948001, at *1 (W.D.Mo. May 30, 2012), the court found $750 per hour to be a reasonable fee for a treating, board-certified orthopedic surgeon specializing in sports medicine and arthroscopy. In another case, a Colorado-licensed, board-certified orthopaedic surgeon, Dr. Bharat Desai's, rate of $750 per hour for his time in a deposition in a 2008 was found reasonable. *See Kumar v. Copper Mountain,* No. 07–cv–02597–PAB–MEH, 2008 WL 5225878, at *1 (D.Colo. Dec. 15, 2008). In one other recent case, the reasonable fees allowed to an orthopedic surgeon was set considerably lower. *See, e.g., Broushet v. Target Corp.,* 274 F.R.D. 432, 433–34 (E.D.N.Y.2011) (setting rate of $400 per hour for "clearly an experienced orthopedist and spine surgeon whose role in this lawsuit is that of a treating physician who is also being proffered as an expert"). *See also Edin v. Paul Revere Life Ins. Co.,* 188 F.R.D. 543, 546–47 (D.Ariz.1999) (setting rate of $450 per hour for "unquestionably a highly skilled and knowledgeable expert witness as he is a board-certified orthopedic surgeon, specializing in the spine and practicing medicine since 1986"). In *Smith v. Ardew Wood Products, Ltd.,* Case No. C07–5641, 2009 WL 2163131, at *2 (W.D.Wash. July 20, 2009), the court considered the $1500.00 per hour fee of Dr. Battaglia, who the court references as "unquestionably a highly skilled and knowledgeable expert witness as he is a board-certified orthopedic surgeon" but concluded "that the deposition hourly rate of $1,500.00 ... is excessive and unreasonable." *Id.* That court awarded Dr. Battaglia what it concluded was a reasonable hourly rate of compensation for deposition testimony of $750.00 per hour.

***3** The court, of course, recognizes that the fees for medical professionals have increased between 2009 and 2012, much less when compared to fees in 1999, as considered by the Arizona court. Certainly, the most reliable source for fees customarily charged would be to compare the same kind of expert during the same time period and in the same location.

No party questions that as to factor four, the issues in the case are complicated and require a good amount of skill to render helpful opinion testimony. However, that would be true of any orthopedic surgeon in these circumstances, especially contrasting Dr. Sabin, who conducted a record review, with Dr. Prusmack who was a treating physician of Plaintiff. As

to factor number five, the Defendants have stated that they are paying Dr. Sabin the hourly rates as published in his fee schedule referenced above. Additionally, Dr. Sabin did not ultimately bill anyone for a "minimum" number of hours in connection with his deposition testimony, and the Defendants paid the total bill of $4500.00 for the three hour deposition when the Plaintiff did not pay. Finally, as to factor number six, Dr. Sabin states that given his average billing to patients,

> My charges for patient office visits, for time only, exclusive of procedures such as X-rays, averages approximately $1,500 per hour. My charges for time spent performing surgery generally averages over $2,000 per hour. Consequently, I believe my hourly rate for depositions is generally lower than the hourly rate I am able to earn as a physician.

(Resp., Ex. 5, Aff. of Jeffrey J. Sabin, M.D., ¶ 5.)

The court takes seriously its independent responsibility as gatekeeper against excessive windfall billing by medical experts appearing in federal court. *See Young,* 2005 WL1423594, at *2. In light of the facts presented with respect to Dr. Sabin's education and experience and the comparison with other orthopedic surgeons both in Colorado and outside Colorado and, in spite of the fact Dr. Sabin says he has been charging $1500.00 per hour for expert testimony over the past ten years and has never even been questioned, much less had his fees reduced, the court finds that a reasonable hourly rate for Dr. Sabin's deposition testimony and trial testimony (to the extent he is called upon to render expert testimony) is not more than $1000.00 per hour.

Therefore, it is hereby ORDERED

"Plaintiff's Motion to Reduce Expert Fee to Reasonable Rate, Pursuant to Fed.R.Civ.P. 26(b)(4)(e)" [Doc. No. 118] is GRANTED, and Dr. Sabin's fees for testimony at deposition and at trial shall not exceed $1000.00 per hour.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3744635

2010 WL 6634466 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
Arapahoe County

Cory R. MULHALL, Plaintiff,
v.
COOL RIVER RESTAURANT, L.P., Defendant.

No. 08CV2043.
October 21, 2010.

Order Defendant's Renewal of January 4, 2010 Motion to Enforce Disclosure Deadlines, Renewal of December 14, 2009 Motion in Limine Re: Testimony Under C.R.E. 702, and Motion to Strike Plaintiff's August 4, 2010 Untimely Rule 26(a) Supplemental Disclosures

Charles M. Pratt, District Court Judge.

Ctrm.: 402

THIS MATTER comes before the Court on Defendant's Renewal of its January 4, 2010 Motion to Enforce Disclosure Deadlines; Renewal of December 14, 2009 Motion *In Limine* re: Testimony Under C.R.E. 702; and Motion to Strike Plaintiff's August 4, 2010 Untimely Rule 26(a) Supplemental Disclosures. The Court, being fully advised in the premises, FINDS and ORDERS as follows:

I. Statement of the Case

Defendant Cool River Restaurant, L.P. has renewed its previous motions in light of Plaintiff Cory R. Mulhall's purportedly late and incomplete expert disclosures. Defendant requests the Court preclude the experts from testifying and also to impose additional sanctions under C.R.C.P. 37(c)(1). Plaintiff asserts that he previously disclosed the curriculum vitae and medical records of the identified treating doctors, and therefore, has complied with C.R.C.P. 26(a)(2)(B)(I).

II. Findings and Order

The Court shall individually address each of the renewed motions.

a. Motion to Enforce Disclosure Deadlines

In the Renewed January 4, 2010 Motion to Enforce Discovery Deadlines, Defendant argues that the discovery deadlines set for the original January 25, 2010 trial should still be applicable to the new November 1, 2010 trial-i.e. that Plaintiff should be barred from the entry of any new evidence other than the discovery of medical documents and agreed upon depositions. The Court DENIES Defendant's renewed Motion to Enforce Disclosure Deadlines. The discovery deadlines set for in the Colorado Rules of Civil Procedure shall be keyed to the new trial date.

b. Motion to Strike Plaintiff's August 4, 2010 Rule 26(a) Supplemental Disclosures as Untimely

Next the Court addresses Defendant's newly filed Motion to Strike Plaintiff's supplemental disclosures. Plaintiff admits it erroneously endorsed Mr. Havens as an expert and has withdrawn that designation. Therefore, the Court need not address Defendant's arguments relating to Mr. Havens.

Turning now to the disclosures of the treating physicians as expert witnesses, C.R.C.P. 26(a)(2)(B)(II) states that "with respect to a witness who may be called to provide expert testimony but it not within the description contained in subsection (a)(2)(B)(I) above, the report or summary shall contain the qualifications of the witness and a complete statement describing the substance of the opinions to be expressed and the basis and reasons therefore." C.R.C.P. 26(a)(2)(B)(II).

Plaintiff contends, that "the preparation and disclosure of expert reports is not required for experts (like plaintiff's treating physicians) who were not retained for the purpose of merely providing expert testimony." While this assertion might be true for specially experts disclosed under C.R.C.P. 26(a)(2)(B)(I), C.R.C.P. 26(a)(2)(B)(II) does require a report or summary that contains the "qualifications of the witness and a complete statement describing the substance of the opinions to be expressed and the basis and reasons therefore." Plaintiff's disclosure for Dr. Russak, for example, merely states: "Dr. Russak will testify about the treatment he provided to plaintiff, the nature and extent of Mr. Mulhall's injuries resultant from the September 21, 2007 attack and plaintiff's diagnosis and prognosis." These disclosures, as well as the similar disclosures of Dr. Boulblik and Dr. Snook, lack a complete statement describing the substance of the witnesses' opinions and the basis and reasons for their opinions.

Plaintiff argues that it disclosed the doctors' medical records and that these records contain the substance of these witnesses' expected testimony. While this assertion may be true, it does not change the fact that Plaintiff failed to comply with the disclosure requirements of C.R.C.P. 26(a)(2)(B)(II). According to *Trattler v. Citron*, "Rule 37(c)(1) requires preclusion of undisclosed evidence...." *Trattler v. Citron*, 182 P.3d 674, 682 (Colo. 2008). Consequently, only opinions specifically disclosed in the medical records or in expert reports, if any, of the treating physicians will be allowed to be elicited on the witness stand.

By 5:00 pm on Tuesday, October 26, 2010 Plaintiff shall e-file a list of those pages or sections of the medical records which contain the opinions he intends to elicit from any treating medical provider.

With regards to the Preservation Deposition of Dr. Russak currently set for Friday, October 22, 2010 at 7:30 am, Dr. Russak may also only testify to those opinions specifically stated or disclosed in his medical records.

The Court declines Defendant's requests for any other sanctions.

Motion *In Limine* Re: Testimony Under C.R.E. 702

The renewed Motion *in Limine* contains many of the same arguments Defendant raised in the Motion to Strike; namely, the Defendant seeks to preclude the Plaintiff from offering any expert opinions in the case based on Plaintiff's failure to disclose his expert witnesses. For the reasons set forth above, treating medical providers may only testify to those opinions specifically disclosed in the disclosed medical reports. Defendant's renewed Motion *in Limine* is DENIED IN PART.

SO ORDERED THIS 21 October 2010.

BY THE COURT:

<<signature>>

Charles M. Pratt

District Court Judge

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DISTRICT COURT Jefferson County, State of Colorado 100 Jefferson County Parkway Golden, Colorado 80401	▲ COURT USE ONLY ▲
WESS PALGUT, Plaintiff v. **EXEMPLA, INC., et al** Defendant.	Case Numbers: 2011 CV 4941 Div.: 4 Ctrm: 5C
ORDER RE: MOTION TO CONDUCT *EX PARTE* INTERVIEWS WITH PROVIDERS FROM KINDRED HOSPITAL AND SPALDING REHABILITATION HOSPITAL	

THIS MATTER comes before the Court on the defendant Anthony John Mannina M.D.'s "Motion to Conduct *Ex Parte* Interviews with Providers from Kindred Hospital and Spalding Rehabilitation Hospital" dated May 21, 2012. The Court, after reviewing the pleadings and applicable rules and law hereby issues the following Order.

I. BACKGROUND

The following background represents the Court's understanding of the underlying facts of this case as taken from the Complaint and the various pleadings filed by the parties which the Court acknowledges are but untried allegations at this early stage in the litigation. The parties should not misinterpret the Court's inclusion of a particular fact below as a finding that the fact has been conclusively established as true.

The plaintiff Wess Palgut ("Plaintiff") filed this action alleging medical malpractice against Exempla, Inc. ("Exempla") and Anthony John Mannina, M.D. ("Dr. Mannina"). Plaintiff was admitted to Exempla Luthern Medical Center on February 2, 2009, suffering from muscle weakness, nausea and pain. Plaintiff was diagnosed with Guillain-Barre Syndrome, which

caused Plaintiff to go into respiratory failure. Plaintiff claims that Defendants Exempla and Dr. Mannina negligently extubated Plaintiff during the course of treatment on February 4, 2009. As a result, Plaintiff allegedly suffered a brain injury resulting from a lack of oxygen. After being discharged from Exempla on February 12, 2009, Plaintiff sought rehabilitation treatment from Kindred Hospital until March 27, 2009. Upon discharge from Kindred Hospital, Plaintiff was then admitted to Spalding Rehabilitation Hospital until April 10, 2009 when he was discharged.

Dr. Mannina filed the instant Motion seeking to conduct *ex parte* interviews with health care providers from Kindred Hospital and Spalding Rehabilitation Hospital. Plaintiff filed a Response on June 11, 2012, and Dr. Mannina filed a Reply on June 14, 2012.

II. ANALYSIS

Dr. Mannina seeks to conduct *ex parte* interviews with providers from Kindred Hospital and Spalding Rehabilitation Hospital. Dr. Mannina cites *Reutter v. Weber* in support. *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007). Plaintiff cites *Samms v. District Court* in support of his contention that Dr. Mannina can only conduct *ex parte* interviews with notice to Plaintiff and an opportunity for Plaintiff to attend. *Samms v. District Court*, 908 P.2d 520 (Colo. 1995). Plaintiff also contends that *ex parte* interviews violate HIPAA. The Court will address each argument in turn.

A. *Samms*

Samms was a medical malpractice action where the plaintiff visited an emergency room ("ER") citing upper abdominal pain. *Samms*, 908 P.2d at 523. The ER physician diagnosed the plaintiff with reflux esophagitis and discharged the plaintiff from the ER. *Id.* The plaintiff continued to suffer medical difficulties and sought advice from numerous other physicians over a fourteen month period. *Id.* Another physician concluded that the plaintiff actually suffered from myocardial ischemia, and the plaintiff thereafter sued the ER physician for failing to properly

diagnose the plaintiff's condition. *Id*. The ER physician then sought to conduct *ex parte* interviews with the physicians and medical providers with whom the plaintiff consulted over the fourteen month period. *Id*.

In determining if *ex parte* interviews were appropriate, the *Samms* Court looked to the physician-patient privilege codified in C.R.S. 13-90-107(1)(d):

> (d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined *without the consent of his or her patient* as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:
>
> (I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;
>
> (II) A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

(emphasis added).

The Court determined that the plaintiff had waived, or "consented" pursuant to C.R.S. 13-90-107(1)(d), to the examination of the physicians since he had put his medical condition at issue. *Samms*, 908 P.2d at 524. "When a patient initiates a civil action and by alleging a physical or mental condition as the basis for a claim of damages injects that issue into the case, the patient thereby impliedly waives his or her physician-patient privilege with respect to that medical condition." *Id*. Accordingly, because the plaintiff waived the physician-patient privilege with respect to his medical condition, *ex parte* interviews with treating physicians could occur as long as there is notice to the plaintiff and an opportunity for the plaintiff to attend. *Id*. at 520.

B. *Reutter*

Reutter came down after *Samms* and clarified *Samms* by holding that *ex parte* interviews can take place without notice to the plaintiff and an opportunity for the plaintiff to attend. *Reutter*, 179 P.3d at 979. In *Reutter*, the plaintiff was admitted to the emergency room at St. Mary Corwin Medical Center complaining of chest pain and shortness of breath. *Id*. Upon arrival, the plaintiff was examined by the attending physician, who then sought advice from a cardiologist. *Id*. The cardiologist then consulted with an anesthesiologist, who performed an intubation. *Id*. A third cardiologist then performed an angiogram. *Id*. The Plaintiff was then treated by medical staff and attending physicians at the critical care unit for four days before being transferred to the Veterans Administration Medical Center. *Id*. At the Veterans Administration Medical Center, the physicians determined that, most likely due to an improper intubation/extubation, the plaintiff had suffered a brain injury due to a lack of oxygen. *Id*.

A treating physician at St. Mary Corwin Medical Center then sought to conduct *ex parte* interviews with all of the other doctors and medical staff at St. Mary Corwin Medical Center. *Id*. The Court held that the plaintiff had waived the physician-patient privilege with respect to all of the doctors and medical staff at St. Mary Corwin Medical Center during his four day stay. *Id*. at 980. The basis of the holding was found in C.R.S. 13-90-107(1)(d)(II), which establishes that the physician-patient privilege does not apply to "[a] physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises . . . ." The Court found that the attending physicians, cardiologists, anesthesiologist, and attending nurses were working "in consultation with" each other and therefore the physician-patient privilege was waived when the plaintiff brought the lawsuit. *Id*.

Once it established that the plaintiff had waived the physician-patient privilege and *ex parte* interviews were appropriate, the *Reutter* Court then analyzed when a plaintiff is entitled to notice and an opportunity to attend *ex parte* interviews. *Reutter*, 179 P.3d at 983. The Court held that the key factor is the danger of divulging "residually privileged information" which is "medical information not relevant to [the plaintiff's] malpractice action." *Id*. at 979. The Court held that *Samms* did not create a blanket rule of notice and opportunity to attend, rather, "the trial court should take appropriate measures to protect against the divulgement of residually privileged information, and that allowing the plaintiff to attend the interview is the preferred measure where there is a high risk that residually privileged information will be divulged." *Id*.

The Court held that the risk is low when the providers are working "in consultation with" each other, however, the Court did not hold that working "in consultation with" each other was necessary to establish a low risk of divulging residually privileged information. *Id*. Rather, the trial court "should assess the risk that there is residually privileged information, taking into account not only the evidence offered by the platintiff-patient, but also the circumstances of the plaintiff-patient's treatment and the likelihood that those circumstances could give rise to residually privileged information." *Id*. at 983. The Court then distinguished *Samms*, finding that the nature of the *Samms* case lent itself to a much higher risk of divulging residually privileged information. *Id*.

C. Waiver of Privilege and Residual Privilege

This Court is therefore tasked with determining first whether Plaintiff has waived the physician-patient privilege, and second the risk that residually privileged information will be disclosed during the course of these prospective *ex parte* interviews. The Court does not find that the "in consultation with" exception fits this case, as there is no indication the three

providers even consulted with each other about Plaintiff's medical condition. However, it is not necessary for the providers to be "in consultation with" each other in order for the Plaintiff to waive the privilege. As *Samms* held, a plaintiff waives the privilege by injecting the medical condition into the lawsuit pursuant to C.R.S. 13-90-107(1)(d). Here, Plaintiff waived the physician-patient privilege by injecting the improper extubation into this lawsuit.

The next step is to assess the risk that residually privileged information will be disclosed during *ex parte* interviews. The instant case is a hybrid between the *Samms*' facts and the *Reutter*'s facts. On the one hand, Plaintiff spent about six weeks at Kindred Hospital receiving treatment and two weeks at Spalding Rehabilitation Hospital receiving treatment. This two month period is much longer than the four days of *Reutter*, and represents more opportunities for residually privileged information to be disclosed. On the other hand, Plaintiff has already disclosed to Dr. Mannina all medical records from his stay at Kindred Hospital and Spalding Medical Rehabilitation. Plaintiff has not alleged that any of the medical records contained residually privileged information, nor has Plaintiff brought forth any concrete examples of possible residually privileged information that may be disclosed during an interview. For these reasons, the Court Orders that the defendant Dr. Mannina may conduct *ex parte* interviews with Plaintiff's providers from Kindred Hospital and Spalding Medical Rehabilitation without providing Plaintiff with notice of the interviews and an opportunity to attend.

D. Health Insurance Portability and Accountability Act ("HIPAA")

Plaintiff argues that *ex parte* interviews violate HIPAA. Plaintiff contends that *ex parte* interviews are only allowed with authorization or agreement. *See* 45 C.F.R. § 164.508(a)(1) and 45 C.F.R. § 164.510. The *Reutter* court addressed HIPAA concerns in a footnote, stating:

> The HIPAA regulations permit the disclosure of medical information in response to a subpoena, discovery request, or other lawful process so long as the patient

> first receives sufficient notice in order to have an opportunity to object to the court. *See* 45 C.F.R. § 164.512(e)(1)(ii)(A). The Reutters received prior notice and an opportunity to object when Defendants filed their motion with the trial court requesting permission to interview the Medical Witnesses.

Reutters, 179 P.3d at 984 n. 4.

Furthermore, 45 C.F.R. 154.512(e) provides that disclosure of healthcare information is permitted "in response to an order of a court or administrative tribunal, providing that the covered entity discloses only the protected health information expressly authorized by such order." Therefore, pursuant to this Court's Order, *ex parte* interviews of the providers at Kindred Hospital and Spalding Rehabilitation Hospital are permitted under HIPAA regulations.

IT IS THEREFORE ORDERED that the defendant Dr. Anthony John Mannina may conduct *ex parte* interviews with the plaintiff Wess Palgut's treatment providers at Kindred Hospital and Spalding Rehabilitation Hospital without notice to Wess Palgut or an opportunity for Wess Palgut to attend.

Dated this 5th day of July, 2012.

BY THE COURT:

Tamara S. Russell
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2012, a true and correct copy of the foregoing document was served on all parties via e-filing with LexisNexis File & Serve.

Law Clerk, Division 4

179 P.3d 977
Supreme Court of Colorado,
En Banc.

Duane REUTTER and Patty Reutter, Plaintiffs
v.
Kevin WEBER, M.D.; Matthew Sumpter, M.D.; and Pueblo Cardiology Associates, P.C., Defendants.

No. 06SA79.
|
April 30, 2007.

Synopsis

Background: Patient who suffered brain injury from oxygen deprivation brought medical malpractice action against emergency room attending physician, cardiologist, and cardiologist's employer. The District Court, Pueblo County, David A. Cole, J., granted defendants' motion to conduct, outside patient's presence, interviews of non-party medical providers who were involved in patient's treatment. Patient petitioned for a rule to show cause.

Holdings: The Supreme Court, Eid, J., held that:

as a matter of first impression, the non-party medical providers were "in consultation with" the defendants, such that physician-patient privilege did not apply to information acquired by the non-party medical providers concerning the course of treatment that was the basis of patient's claims, and

patient was not entitled to attend defendants' informal interviews of the non-party medical providers.

Rule discharged.

Attorneys and Law Firms

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Opinion

Justice EID delivered the Opinion of the Court.

Plaintiffs Duane and Patty Reutter have sued Drs. Kevin Weber and Matthew Sumpter and Pueblo Cardiology Associates, P.C. (collectively, "Defendants") for malpractice based on what they allege to have been negligent medical treatment given to Mr. Reutter in January 2002. In this original proceeding, the Reutters seek relief from a trial court order allowing Defendants to interview on an informal basis other medical providers who were involved in Mr. Reutter's treatment but who are not parties to this suit. Under the trial court's ruling, these interviews would be permitted to take place outside the Reutters' presence.

We now hold that the trial court was correct when it ruled that the Reutters were not entitled to attend the interviews in question. The physician-patient privilege is inapplicable to information relevant to the Reutters' malpractice action because it is subject to a ***979** statutory exception to the privilege. This exception covers information acquired by medical providers who, like the non-party providers in this case, acted "in consultation with" other medical providers who have been sued for malpractice. § 13–90–107(1)(d)(II), C.R.S. (2006). We disagree with the Reutters' argument that,

under our decision in *Samms v. District Court,* 908 P.2d 520 (Colo.1995), they are entitled to attend the interviews in order to protect medical information not relevant to their malpractice action—that is, residually privileged information. *Samms* did not create a blanket rule that a plaintiff is always entitled to attend an interview of a non-party medical provider. Instead, it held that the trial court should take appropriate measures to protect against the divulgement of residually privileged information, and that allowing the plaintiff to attend the interview is the preferred measure where there is a high risk that residually privileged information will be divulged. Here, by contrast, the medical providers were "in consultation with" each other in a unified course of treatment —a course of treatment that forms the basis of the malpractice action. In this sort of situation, the risk that residually privileged information will be divulged is relatively low. Where, as here, the non-party medical providers do not possess residually privileged information, the trial court does not abuse its discretion by refusing to require that the plaintiff be permitted to attend the interviews of those non-party medical providers. Accordingly, we discharge the rule to show cause.

I.

On January 14, 2002, Duane Reutter arrived at the emergency room of St. Mary Corwin Medical Center complaining of chest pain and difficulty breathing. He was initially examined by the attending physician, Defendant Weber, who recognized his cardiac symptoms and sought advice from Defendant Sumpter, a cardiologist. Sumpter immediately decided to perform an angiogram, which required intubation due to Mr. Reutter's shortness of breath. Weber attempted to intubate Mr. Reutter, but was unsuccessful. Weber then contacted Scott Mantel, an anesthesiologist, who performed the intubation. Another cardiologist, George Gibson, performed the angiogram. All of these events happened within a short period of time on January 14.

Once the angiogram was completed, Sumpter consulted with a critical care specialist, Greg Shapiro, for Mr. Reutter's continuing treatment at St. Mary Corwin. Mr. Reutter was transferred to the hospital's critical care unit, where he remained for the next three days. Mr. Reutter continued to have difficulty breathing and could not be removed from the ventilator while under Shapiro's care. Nurses and respiratory therapists assisted in Mr. Reutter's treatment. Four days after arriving at St. Mary Corwin, Mr. Reutter was transferred to the Veterans Administration Medical Center. Doctors there determined that Mr. Reutter suffered a brain injury resulting from oxygen deprivation.

The Reutters sued Defendants for medical malpractice stemming from Mr. Reutter's hospitalization at St. Mary Corwin. [1] Defendants subsequently filed a motion requesting the trial court's permission to conduct interviews with Shapiro and Mantel, as well as the non-registered nurses and respiratory therapists who treated Mr. Reutter at St. Mary Corwin (collectively, the "Medical Witnesses"). Defendants sought to hold these interviews without the Reutters or their attorneys in attendance. The Reutters opposed Defendants' motion on grounds that the information acquired by the Medical Witnesses in the course of treating Mr. Reutter was privileged and in addition, under this court's decision in *Samms,* they were entitled to attend all interviews of non-party medical providers.

The trial court granted Defendants' motion on grounds that the physician-patient privilege was inapplicable to the Medical Witnesses because they were "in consultation ***980** with" Defendants and therefore excluded from the physician-patient privilege under section 13–90–107(1)(d)(II), C.R.S. (2006). In a motion to reconsider, the Reutters claimed for the first time that they were entitled to attend the interviews because the Medical Witnesses may have acquired "residually privileged information" while treating Mr. Reutter, i.e., medical information about Mr. Reutter that was unrelated to the course of treatment at St. Mary Corwin forming the basis of the malpractice action. At a hearing on the Reutters' motion to reconsider, the trial court asked the Reutters' counsel about the possibility of residually privileged information. Counsel was unable to provide any factual basis for the claim that the Medical Witnesses may have obtained residually privileged information, and the trial court denied the Reutters' motion to reconsider.

We issued a rule to show cause to determine whether the trial court was correct to grant Defendants' motion to conduct interviews with the Medical Witnesses.

II.

Our holding in this case takes two parts. First, we agree with the trial court that information relevant to this lawsuit acquired by the Medical Witnesses while treating Mr. Reutter is subject to the statutory exception to the physician-patient

privilege set forth in section 13–90–107(1)(d)(II). Here, the Medical Witnesses were "in consultation with" Defendants when they participated in a unified course of treatment for Mr. Reutter at St. Mary Corwin, and therefore the information they acquired in the course of that treatment and relevant to this lawsuit is not covered by the physician-patient privilege. Second, *Samms* does not create a blanket rule that entitles a plaintiff to attend any interview with a non-party medical provider regardless of the circumstances. Rather, when a non-party medical provider is "in consultation with" a sued provider in a unified course of treatment—a course of treatment that forms the basis of the malpractice action—the risk of residual privilege is relatively low. Where, as here, the trial court determines that the non-party medical providers possess no residually privileged information, the trial court does not abuse its discretion by refusing to require that the plaintiff be permitted to attend the interviews. We therefore discharge the rule.

A.

Communications between physicians and their patients generally are privileged under Colorado law. Protecting these communications from disclosure promotes "effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation" that could result from divulging her medical information. *Alcon v. Spicer,* 113 P.3d 735, 738 (Colo.2005) (internal quotations omitted). To this end, the General Assembly codified the physician-patient privilege in the Colorado Revised Statutes:

> A physician, surgeon, or registered professional nurse ... shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient....

§ 13–90–107(1)(d), C.R.S. (2006).

The General Assembly also has codified two circumstances where information acquired by a medical provider is *not* privileged. First, the privilege does not prevent a medical provider who is sued for malpractice from disclosing confidential medical information concerning the subject matter of the plaintiff's suit. [2] *See* § 13–90–107(1)(d)(I). This exception avoids the unfairness of allowing a patient to use privileged information to assert a medical malpractice claim while simultaneously preventing the sued medical provider from using the same information in its defense. *Cf. Johnson v. Trujillo,* 977 P.2d 152, 157 (Colo.1999); *Clark v. Dist. Court,* 668 P.2d 3, 10 (Colo.1983).

***981** Second, the statutory privilege does not apply to a medical provider "*who was in consultation with* a physician, surgeon, or registered professional nurse being sued ... on the case out of which said suit arises." § 13–90–107(1)(d)(II) (emphasis added). Defendants argue, and the trial court agreed, that the Medical Witnesses are subject to this exception because Defendants were "in consultation with" the Medical Witnesses in the course of Mr. Reutter's treatment at St. Mary Corwin. It is this statutory exception that occupies our attention, and the Reutters bear the burden of establishing that the exception is inapplicable. *See Alcon,* 113 P.3d at 739 ("The claimant of the privilege bears the burden of establishing the applicability of the privilege.").

The meaning of the statutory phrase "in consultation with" is a question of first impression under Colorado law. We begin by looking at the plain meaning of the term "consultation." *See Danielson v. Dennis,* 139 P.3d 688, 691 (Colo.2006). The Reutters argue that the plain meaning of "consultation" limits the exception to those medical providers who only offer advice to treating physicians, and does not extend to providers (like the Medical Witnesses) who offer advice as well as actually treat the plaintiff-patient.

We believe that the Reutters' narrow definition of "consultation" is inconsistent with both the meaning of that term and the overall structure of section 13–90–107(1)(d). The term "consultation" is defined as "[t]he act of asking the advice or opinion of someone," or more generally, "[a] meeting in which parties consult or confer." *Black's Law Dictionary* 311 (7th ed.1999). This definition is consistent with our use of the term "consultation" in the physician-patient context. *See, e.g., Hartmann v. Nordin,* 147 P.3d 43, 53 (Colo.2006) (using the term "consultation" to describe a patient's communications with doctors and nurses); *Hoffman v. Brookfield Republic, Inc.,* 87 P.3d 858, 861 (Colo.2004) (same). There is nothing in the meaning of "consultation," however, that excludes the taking of other actions. In other words, a medical provider who actually treats a patient can also consult with others who are providing treatment.

The overall structure of section 13–90–107(1)(d) supports this broader definition of "consultation" as well. By defining the scope of the exception to include *both* the sued provider *and* those who acted in consultation with her, section 13–90–107(1)(d) recognizes that medicine is not necessarily practiced alone, but rather in many cases may be practiced in a collaborative fashion with other practitioners. While one physician might be the primary medical provider, other medical providers typically play a role in the patient's treatment. In many instances, the primary physician could not act without the advice, knowledge, and special skills of these other practitioners.

Other courts have defined "consultation" in the medical context in a similar fashion. The Iowa Supreme Court, for example, has described "consulting physicians" as those physicians engaged in a "unified course of treatment," but excluded physicians "acting independently and successively on the same injury or illness...." *Brown v. Guiter,* 256 Iowa 671, 128 N.W.2d 896, 903 (Iowa 1964). Similarly, the South Dakota Supreme Court considers consultation between multiple physicians to be a "unitary affair," such that there was consultation when a physician treated the patient "during the time [the defendant doctors] were ministering to him," but not after the patient had been treated by such doctors. *Hogue v. Massa,* 80 S.D. 319, 123 N.W.2d 131, 135 (1963); *see also Doll v. Scandrett,* 201 Minn. 316, 276 N.W. 281, 283 (1937) (defining consultation as a "unitary affair").

The "unified course of treatment" analysis adopted by other jurisdictions adequately captures the meaning of "consultation" in section 13–90–107(1)(d)(II). Under this analysis, medical providers are "in consultation with" one another if they collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment.

Applying this analysis to the Reutters' case, we find that the collaborative effort between Defendants and the Medical Witnesses in treating Mr. Reutter was a unified course of treatment. When Mr. Reutter arrived at St. Mary Corwin, he suffered from ***982** chest pain and difficulty breathing. In order to assess these symptoms using an angiogram, Weber called on Mantel's skills as an anesthesiologist to intubate Mr. Reutter. Mantel's involvement in the case was limited to intubating Mr. Reutter. After the angiogram, Sumpter asked Shapiro to continue to evaluate Mr. Reutter's symptoms —particularly his difficulty breathing—in the critical care unit. Sumpter did so, and nurses and respiratory therapists contributed to this line of treatment. [3]

The unified course of treatment for Mr. Reutter offered by Defendants and the Medical Witnesses meets the definition of "in consultation with" under section 13–90–107(1)(d)(II), and therefore any privilege that applies to the information acquired by the Medical Witnesses relevant to this suit is subject to the statutory exception. The trial court correctly held that the physician-patient privilege does not apply to information acquired by the Medical Witnesses concerning the course of treatment that is the basis for the Reutters' claims against Defendants.

B.

The Reutters contend that, even if information relevant to this lawsuit acquired by the Medical Witnesses is excluded from the physician-patient privilege by operation of section 13–90–107(1)(d)(II), Defendants still must provide the Reutters with notice and an opportunity to attend Defendants' informal interviews. To support this argument, the Reutters rely on our decision in *Samms v. District Court,* 908 P.2d 520 (Colo.1995). We disagree with the Reutters' interpretation of *Samms*. *Samms* did not create a blanket rule that a plaintiff is always entitled to attend interviews of non-party medical providers. Instead, it held that the trial court should take appropriate measures to protect against the divulgement of residually privileged information in the course of discovery, which would include allowing the plaintiff to attend the defendant's interviews with non-party medical providers where the risk is high that residually privileged information will be divulged in those interviews. Here, by contrast, the medical providers were "in consultation with" each other in a unified course of treatment—a course of treatment that forms the basis of the malpractice action. In this sort of situation, the risk that residually privileged information will be divulged is relatively low. Where, as here, the non-party medical providers do not possess residually privileged information, the trial court does not abuse its discretion by refusing to require that the plaintiff be permitted to attend the interviews of those nonparty medical providers.

Like this case, *Samms* concerned a malpractice defendant's request to conduct interviews with non-party medical providers who treated the plaintiff. But unlike this case, *Samms* did not involve a plaintiff-patient who had been treated by medical providers "in consultation with" a sued

provider in a unified course of treatment; rather, the plaintiff-patient there had been treated by twenty different physicians offering separate medical advice and administering separate courses of treatment. *See* 908 P.2d at 523–24. We therefore had no opportunity in *Samms* to consider the "in consultation with" exception to the physician-patient privilege, nor did we consider the issue of residual privilege in such a situation.

In *Samms,* the privilege covering the patient's communications with the twenty physicians had been waived only "with respect to information related to her heart condition obtained by [each] physician in the course of diagnosing or treating [her] for that condition [that was the subject of her malpractice action]." *Id.* at 524. We recognized that the plaintiff had an interest in protecting any residually privileged information held by non-party medical witnesses, i.e., privileged information that was not relevant to the malpractice ***983** action. *Id.* at 525. We also noted that, in some instances, the waiver of the physician-patient privilege resulting from filing the medical malpractice action might cover virtually all that was discussed between a physician and patient. *Id.* In other cases, it might cover only a small portion of what was discussed. In such instances, "some or all of such discussions will remain subject to the privilege." *Id.* The facts of *Samms* clearly fell within this latter category. Indeed, in an order governing the interview procedures in the case, the trial court noted that the interviews might involve "a 'reasonable probability of disclosure of material which may be privileged....' " *Id.* at 523. Under these circumstances, we concluded that a malpractice defendant must give notice to the plaintiff-patient that she intends to interview the non-party providers—notice that would "afford a plaintiff or the plaintiff's attorney an opportunity to attend any scheduled interview" in order to protect against the disclosure of residually privileged information. *Id.* at 526.

Our conclusion in *Samms* thus does not impose the blanket rule put forward by the Reutters—namely, that the plaintiff-patient must be given the opportunity to attend interviews with non-party medical providers under any and all circumstances. Instead, *Samms* holds that the trial court must take appropriate measures to protect against the divulgement of residually privileged information. Where the risk that residually privileged information will be divulged during an interview is relatively high, the preferred method of protecting against divulgement is to provide the plaintiff-patient with prior notice and an opportunity to attend the interview. *See id.* at 526.

The facts of this case do not fall within the purview of *Samms.* Here, as discussed above, the Medical Witnesses were "in consultation with" the sued providers in administering a unified course of treatment. Under section 13–90–107(1)(d)(II), the privilege does not apply to medical information relevant to this course of treatment. The question then becomes whether the Medical Witnesses possess residually privileged information not relevant to the course of treatment. The answer to that question in this case, unlike in *Samms,* is no. As an initial matter, we note that when medical providers are "in consultation with" a sued provider in administering a unified course of treatment, and that course of treatment forms the basis of the malpractice action, the risk that residually privileged information will be divulged in an interview is much lower than in the *Samms* scenario, where twenty medical providers administered separate treatments over what appears to have been a significant period of time. The facts of this case illustrate the point.

One of the Medical Witnesses, Scott Mantel, treated Mr. Reutter on one brief occasion and only for the purpose of intubating him. The remaining Medical Witnesses treated Mr. Reutter continually over a three-day period following his angiogram at St. Mary Corwin. There is no evidence that these Medical Witnesses acquired any privileged information during this time that would be irrelevant to the malpractice action. Indeed, when pressed by the trial court below and by this court at oral argument, the Reutters were unable to provide any factual basis to support their claim that the Medical Witnesses had acquired residually privileged information when treating Mr. Reutter at St. Mary Corwin. Thus, the facts here fall within the category of cases described in *Samms* in which virtually all information obtained by medical providers is relevant to the malpractice action. *See Samms,* 908 P.2d at 525.

We appreciate that the existence of residually privileged information acquired by non-party medical providers is not demonstrable in the same way that documents recorded on a privilege log can be. *Cf. Alcon,* 113 P.3d at 742 (holding that purportedly privileged medical records should be recorded on a privilege log). If the trial court chooses to consider whether to permit an interview without the presence of the plaintiff, it should assess the risk that there is residually privileged information, taking into account not only the evidence offered by the plaintiff-patient, but also the circumstances of the plaintiff-patient's treatment and the likelihood that those circumstances could give rise to residually privileged information.

***984** Defendants complied with the notice requirement of *Samms* by filing their motion requesting permission to interview the Medical Witnesses, thereby giving the trial court the opportunity to evaluate the facts and make a conclusion about the likelihood of residually privileged information and the appropriate measures needed to protect against its divulgement.[4] On the facts of this case, it was reasonable for the trial court to conclude that the potential for residually privileged information was minimal enough that the Reutters were not entitled to attend Defendants' interviews with the Medical Witnesses. We continue to believe, as we stated in *Samms,* that the trial court has the discretion to make this determination. *See* 908 P.2d at 524 ("Issues arising in the course of pretrial discovery are committed to the discretion of the trial court ....").

III.

The trial court did not abuse its discretion by concluding that Defendants' interviews of the Medical Witnesses could proceed outside of the Reutters' presence. For the reasons stated above, the rule to show cause is discharged.

All Citations

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Footnotes

1 In addition to Defendants, the Reutters originally sued Mantel, Shapiro and St. Mary Corwin. The Reutters subsequently dismissed their claims against Mantel and Shapiro and the trial court dismissed their claims against St. Mary Corwin. The Reutters have sued Pueblo Cardiology Associates because it employs Sumpter and Gibson.

2 Defendants argue that Mantel and Shapiro fall within the "is sued" exception to the physician-patient privilege because the Reutters originally named them as defendants, but they were dismissed in an amended complaint. As explained in this section of our opinion, we find that Mantel and Shapiro were "in consultation" with Defendants and thus subject to the exception to the physician-patient privilege set forth in section 13–90–107(1)(d)(II). Consequently, we do not address Defendants' alternative argument under section 13–90–107(1)(d)(I).

3 We recognize that there is a dispute over whether the privilege described in section 13–90–107(1)(d) is limited to physicians, surgeons and registered nurses or whether the statutory privilege also includes other medical providers such as non-registered nurses and respiratory therapists. We need not resolve this question today because the Medical Witnesses (including the non-registered nurses and respiratory therapists) would be subject to the "in consultation with" exception to the physician-patient privilege set forth in section 13–90–107(1)(d)(II), as we have held in this section.

4 The notice requirement of *Samms* is consistent with federal regulations promulgated under the Health Insurance Portability and Accountability Act ("HIPAA"), and we disagree with the Reutters' argument to the contrary. The HIPAA regulations permit the disclosure of medical information in response to a subpoena, discovery request, or other lawful process so long as the patient first receives sufficient notice in order to have an opportunity to object to the court. *See* 45 C.F.R. § 164.512(e)(1)(ii)(A). The Reutters received prior notice and an opportunity to object when Defendants filed their motion with the trial court requesting permission to interview the Medical Witnesses.

District Court, County of Boulder, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-4746	
Plaintiff: Mark Salazar v. Defendant: State Farm Mutual Automobile Insurance Co. et al.	▲ COURT USE ONLY ▲
Attorney for Plaintiff: Marc Bendinelli; William Lapham; Martha Bohling; Sean Dormer *Attorney for Defendant*: Marc Levy; Heather Judd; Kathryn Cobb	Case Number: 10CV1088 Division: 2 Courtroom: T
MINUTE ORDER	

On January 29, 2013 and February 4, 2013, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

COURT REPORTER: FTR

APPEARANCES: Sean Dormer appeared on behalf of Plaintiff.
Marc Levy and Heather Judd appeared on behalf of Defendant State Farm Mutual Automobile Insurance Co.
Adrian Sach attended, but did not enter a formal appearance.

COURT ORDERS/ACTIONS: This matter comes before the Court for a Hearing on Defendant's Motion to Preclude Testimony from Plaintiff's Expert Witness Dr. Agarwala or in the Alternative Motion for Continuance. The Court also directed the parties to argue all pending discovery motions at the February 4, 2013 hearing, with the intent of resolving all issues necessary to bring the case to trial as scheduled. The oral findings made on the record are incorporated herein, and the Court finds as follows:

Defendant's Motion to Compel is granted in part, in the sense that the Defendant may ask questions about the delay it believes is attributable to the Plaintiff but not in a way that may cause Plaintiff to waive or assert the attorney-client privilege. If that kind of question is asked of Plaintiff by Defendant, any attempt to rehabilitate the Plaintiff on that basis may not refer to any communications with counsel. Plaintiff's counsel may not attempt to sever counsel from Plaintiff and argue that to the extent that there were delays attributable to Plaintiff, they were not Plaintiff's fault, but were counsel's fault.

With regard to Defendant's Motion to Quash Subpoenas, the subpoena with respect to proposed deponent Chris Prudhomme is withdrawn. The Court finds that Steve Engel is a necessary witness for the Plaintiff and even though there was no proper conferral, the Court orders that this deposition be set. The Court grants 3 hours for this deposition. The parties mutually withdraw their requests for the reports for the last 5 years for each party's experts. The discovery cutoff is shifted to allow the parties to complete the depositions of Steve Engel and of the experts.

The parties may not amend their expert reports to incorporate information learned at Mr. Engel's deposition or the information gleaned from Plaintiff's Motion to Compel. The Court declines to allow another round of expert disclosures.

Plaintiff's Motion to Compel is granted in part and denied in part. The Court does not agree with Plaintiff that Mr. Levy's direction to the witness not to provide driver's license, home address, or arrest history was improper. With regard to Questions 5 and 7, the Motion is denied because the notice focuses specifically on how this claim was adjusted and thus there was no notice to Defendant under 30(b)(6) that this witness or a witness was going to be asked about State Farm's policies and procedures or its general claims adjustment practices. The Motion is denied as to Questions 9, 10, 11, and 12 because those are not included in the 30(b)(6) notice. Questions 6 and 8 must be answered by Defendant in writing.

The Court does not agree that there has been a waiver of attorney-client privilege by Defendant State Farm. However, the Court agrees with Plaintiff that if there are internal communications among State Farm employees that are not seeking legal advice and are not attorney-work product, but are truly just a continuation of the adjustment of the claim, then those communications need to be produced if they have not been produced already.

The Court agrees with Defendant that disclosure of reserves and settlement authorities are not required in this case, and the Motion to Compel reserve and settlement authority is denied.

With regard to Defendant's Motion to Compel, the Court grants in part Defendants' Motion to Strike the testimony of Dr. Agarwala. He may not testify as to any opinion about the need for surgery, and may testify only as to his treatment records that Plaintiff had actually disclosed. The Court clarifies that Dr. Agarwala may testify as a treating physician only, not as a hybrid expert. The Court reminds the parties that if any treating physician is designated to testify as to occupant kinematics, any form of accident reconstruction, or causation issues not necessary to treatment, as to that portion of his or her report and testimony, he or she shall be treated as a "retained" rather than a "treating" expert for purposes of disclosures and discovery.

With regard to the monetary sanctions that Mr. Levy requested, the Court orders Plaintiff's counsel to pay the $1,100 that Mr. Levy was required to pay to depose Dr. Agarwala and the court reporter fees related to that deposition. These fees are the responsibility of Plaintiff's counsel, not Plaintiff, and shall be paid no later than 7 days prior to trial. The trial date is firm.

The Court grants Defendant an extension through February 6, 2013 to reply to the Motion for Summary Judgment.

DATED: February 15, 2013
NUNC PRO TUNC: January 29, 2013

BY THE COURT:

Lisa D. Hamilton-Fieldman
District Court Magistrate

CERTIFICATE OF SERVICE: I certify that I electronically served the foregoing via the jPOD e-filing service or U.S. Mail service on February 15, 2013.

/s/ Amber Byers

Amber Byers
Court Judicial Assistant
amber.byers@judicial.state.co.us
(303) 441-4746

908 P.2d 520
Supreme Court of Colorado,
En Banc.

Judy Anne SAMMS, and Frank Clifford Samms, Petitioners,
v.
The DISTRICT COURT, FOURTH JUDICIAL DISTRICT OF the STATE OF COLORADO, and Steven T. Pelican, one of the Judges thereof, Respondents.

No. 95SA22.
|
Dec. 18, 1995.
|
As Modified on Denial of RehearingJan. 8, 1996.

Synopsis

Medical malpractice plaintiff filed original proceeding seeking relief from trial court order which authorized defendant doctor's attorney to conduct ex parte interviews with plaintiff's treating physicians. After issuing rule to show cause why relief requested should not be granted, the Supreme Court, Kirshbaum, J., held that: (1) trial court could authorize defense attorney's informal interviews of plaintiff's treating physicians in absence of plaintiff or her attorney provided that questioning be confined to matters not subject to physician-patient privilege and that plaintiff be given reasonable notice of any proposed interview; (2) neither Ethics Opinion nor Interprofessional Code prohibited such interviews; however, (3) return of order to trial court was necessary to define scope of plaintiff's waiver of physician-patient privilege and to add notice requirement.

Rule to show cause discharged in part and made absolute in part, order vacated, and returned to trial court.

Kourlis, J., filed concurring and specially concurring opinion in which Vollack, C.J., joined.

Erickson, J., filed dissenting opinion.

Attorneys and Law Firms

***522** Robert S. Fisher, Colorado Springs, for Petitioners.

Kennedy & Christopher, P.C., Mark A. Fogg, John R. Mann, Matthew S. Feigenbaum, Denver, for Respondents.

Curt Kriksciun, Michael J. Steiner, Denver, for Amicus Curiae, Colorado Compensation Insurance Authority.

Johnson, Ruddy, Norman & McConaty, Brian G. McConaty, Thomas H. Anderson, Denver, for Amicus Curiae Colorado Defense Lawyers Association.

Dawes and Harriss, P.C., Gail C. Harriss, Durango, for Amicus Curiae Workers' Compensation Education Association.

Schaden, Lampert & Lampert, Susanna Meissner–Cutler, Denver, for Amicus Curiae, Colorado Trial Lawyers Association.

Opinion

Justice KIRSHBAUM delivered the Opinion of the Court.

The petitioners, Judy Anne Samms (hereafter referred to as "Samms") and her husband, Frank Clifford Samms, have initiated this original proceeding pursuant to C.A.R. 21. The petitioners seek relief from an order entered by the respondent, the District Court for the Fourth Judicial District of the State of Colorado (the trial court), which ***523** order authorized the attorney representing Dr. Michael Bjork, the defendant in a medical malpractice action filed by the petitioners, to conduct *ex parte* interviews with several physicians who had treated Samms. Having issued a rule to show cause why the relief requested should not be granted, we now discharge the rule in part and make the rule absolute in part.

I

On March 2, 1991, Samms visited the emergency room of a Colorado Springs hospital complaining of upper abdominal pain. Bjork, her treating physician, conducted several tests and concluded that Samms was suffering from peptic acid disease with reflux esophagitis. He then discharged her from the emergency room.

Samms continued experiencing medical difficulties and sought medical advice and treatment for her condition from numerous other physicians. When a cardiologist concluded that Samms had suffered a myocardial infarction on March 2, 1991, resulting from a pre-existing condition of myocardial ischemia, the petitioners initiated this medical malpractice action. Samms alleges that Bjork negligently failed to

diagnose and properly treat her on March 2, 1991, and that as a result of such negligence she suffered physical and mental injuries. Her husband alleges that he suffered a loss of consortium as a result of Bjork's negligence.

During the course of discovery Bjork's attorney sent a letter dated July 23, 1993, to the petitioners' attorney. The letter informed the petitioners' attorney that Bjork's attorney intended "to conduct *ex parte* interviews" with five physicians who had treated Samms and that "if any particular interview poses a reasonable concern that privileged matters not already waived by the filing of this suit will be disclosed, I will provide you with adequate notice and the opportunity to be present." The petitioners objected to any *ex parte* interviews by Bjork's attorney with any physicians who had treated Samms and filed a motion with the trial court to prohibit Bjork's attorney from conducting the proposed interviews.

On November 13, 1993, the trial court entered an order (hereafter referred to as the "1993 order") denying the petitioners' motion and authorizing Bjork's attorney to interview the physicians in the absence of Samms or Samms' attorney. In so doing, the trial court stated that it declined to follow this court's decision in *Fields v. McNamara,* 189 Colo. 284, 540 P.2d 327 (1975). In its 1993 order the trial court stated that Samms had placed her physical and mental condition in issue and "any other injuries or conditions, 'which arguably could have caused or contributed to the injuries or damages alleged in the complaint.' " (Citations omitted.) The order also contained the following pertinent provisions:

> 2. The scope of the waiver of the privilege has been set forth above. Based thereon, counsel for the [petitioners] may not "caution" any of the listed physicians in the manner suggested in his Reply Brief or in any similar manner. Any physician who is interviewed by defense counsel, *ex parte,* shall be provided with a copy of this Order so that he is aware, before the interview, of the scope of the waiver of the privilege.
>
> 3. Counsel for [Bjork] shall at all times be aware of the scope of the waiver of the privilege set forth herein. The Court agrees ... that, "... it is unethical for counsel, in any context, to attempt to elicit information which counsel knows or should know is subject to a statutory privilege which has not been waived." [T]his Court has defined the scope of that privilege in the case at bar.
>
> 4. This Order shall not apply to any physicians other than those listed above without prior application for extension by counsel.
>
> 5. Defense counsel shall provide notice of any *ex parte* contact with any of the above-mentioned treating physicians in which there is a "reasonable probability of disclosure of material which may be privileged or subject to protective order." That notice will comply with the Rules of Civil Procedure regarding notices of deposition and any Motion for Protective Orders shall comply with C.R.C.P. [26(c)].

***524** The petitioners did not seek review of the 1993 order.

Between November 13, 1993, and November 4, 1994, Bjork's attorney conducted interviews with several of the physicians referred to in the July 23, 1993, letter. On November 4, 1994, Bjork's attorney sent another letter to the petitioners' attorney. This letter indicated that Bjork's attorney intended to conduct similar *ex parte* interviews with fifteen additional physicians. The petitioners objected to such interviews and promptly filed a second motion for protective order. On January 5, 1995, the trial court entered an order (hereafter referred to as the "1995 order") denying the motion with respect to fourteen of the physicians named in the November 4, 1994, letter. The trial court stated that its 1995 order was based on its 1993 order. The petitioners subsequently filed this petition for writ of prohibition.

II

Issues arising in the course of pretrial discovery are committed to the discretion of the trial court and are in general reviewable only on appeal. *Hamon Contractors, Inc. v. District Court,* 877 P.2d 884, 887 (Colo.1994); *Clark v. District Court,* 668 P.2d 3, 7 (Colo.1983). However, if an order regulating pretrial discovery may result in damage to a litigant that cannot be cured on appeal, this court may consider the matter in the exercise of its original jurisdiction. *Hamon Contractors, Inc.,* 877 P.2d at 887; *Clark,* 668 P.2d at 7. In this case we choose to exercise our original jurisdiction.

III

The General Assembly has defined the physician-patient privilege in the following pertinent language:

> (d) A physician, surgeon, or registered professional nurse duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient....

§ 13–90–107(1)(d), 6A C.R.S.(1987). The statutory privilege is that of the patient and may be waived only by the patient. *Clark,* 668 P.2d at 8. The privilege is designed to encourage a patient to make full disclosure to his or her treating physician to promote effective diagnosis and treatment and to protect the patient from embarrassment which might result from the physician's disclosure of information regarding the patient's medical condition or treatment. *Id.; Williams v. People,* 687 P.2d 950, 953 (Colo.1984).

When a patient initiates a civil action and by alleging a physical or mental condition as the basis for a claim of damages injects that issue into the case, the patient thereby impliedly waives his or her physician-patient privilege with respect to that medical condition. *Clark,* 668 P.2d at 10. Such implied waiver constitutes consent for purposes of section 13–90–107(1)(d). *Clark,* 668 P.2d at 10.

In this case, Samms has alleged that Bjork's failure to properly diagnose myocardial ischemia resulted in injury to her. By injecting that issue into the case, Samms waived her physician-patient privilege with respect to information related to her heart condition obtained by a physician in the course of diagnosing or treating Samms for that condition. The question for determination is whether and to what extent this waiver authorized the trial court to allow Bjork's attorney to conduct informal interviews with Samms' treating physicians in the absence of Samms or Samms' attorney.

A

Courts are divided with respect to the question of whether in the absence of a plaintiff's express consent a trial court may authorize an attorney representing a defendant in a civil action to communicate informally with non-party physicians who have treated the plaintiff in the absence of the plaintiff or the plaintiff's attorney. *Compare Felder v. Wyman,* 139 F.R.D. 85 (D.S.C.1991) (*ex parte* interviews allowed); *Doe v. Eli Lilly & Co.,* 99 F.R.D. 126 (D.D.C.1983) (*ex parte* communications between defense counsel and patient's treating physician not precluded when patient has waived physician-patient privilege); ***525** *Langdon v. Champion,* 745 P.2d 1371 (Alaska 1987) (same); *Green v. Bloodsworth,* 501 A.2d 1257 (Del.Super.Ct.1985) (same); *Domako v. Rowe,* 438 Mich. 347, 475 N.W.2d 30 (1991) (same); *Brandt v. Medical Defense Assocs.,* 856 S.W.2d 667, 673 (Mo.1993) (treating physician does not have duty to give testimony that is favorable and beneficial to the patient and detrimental to the opponent); *Stempler v. Speidell,* 100 N.J. 368, 495 A.2d 857 (1985) (*ex parte* communications not precluded by rule or statute and are an accepted method of assembling facts and documents in preparation for trial); *with Horner v. Rowan Co.,* 153 F.R.D. 597 (S.D.Tex.1994) (*ex parte* interviews not permitted in the absence of patient's express authorization); *Weaver v. Mann,* 90 F.R.D. 443 (D.N.D.1981) (*ex parte* interviews not contemplated by Federal Rules of Civil Procedure); *Garner v. Ford Motor Co.,* 61 F.R.D. 22 (D.Alaska 1973) (same); *Petrillo v. Syntex Labs., Inc.,* 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952 (1986), *appeal denied,* 113 Ill.2d 584, 106 Ill.Dec. 55, 505 N.E.2d 361 , *cert. denied sub nom. Tobin v. Petrillo,* 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987) (*ex parte* conferences not permitted because of confidential relationship between a physician and patient);[1] *Wenninger v. Muesing,* 307 Minn. 405, 240 N.W.2d 333 (1976) (depositions guard against unauthorized disclosure of privileged information and presence of patient's attorney protects physician from inadvertent disclosure of confidential information);[2] *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (1990) (*ex parte* discussions not allowed without plaintiff's consent or court order); *Alexander v. Knight,* 197 Pa.Super. 79, 177 A.2d 142, 146 (1962) (physician owes patient a duty to refuse affirmative assistance to patient's adversary in litigation).

In *Clark v. District Court,* 668 P.2d 3, 10 (Colo.1983), we concluded that a plaintiff in a personal injury case impliedly waives the physician-patient privilege with respect to matters known to the physician that are relevant in determining the cause and extent of injuries which form the basis for a claim for relief. We also concluded, however, that such plaintiff does not impliedly waive the physician-patient privilege with respect to all his or her personal medical matters. *Id.* We thus recognized in *Clark* that the extent to which a plaintiff waives the physician-patient privilege by seeking judicial

determination of the cause and extent of personal injuries will necessarily depend upon the particular circumstances of the case. While the waiver in some situations might extend to all matters discussed by the plaintiff with a physician, in other situations some or all of such discussions will remain subject to the privilege.

B

We have recognized that the purpose of pretrial discovery is to eliminate surprise at trial, discover all relevant evidence, simplify the issues, and promote the expeditious settlement of cases. *J.P. v. District Court,* 873 P.2d 745, 748 (Colo.1994); *Bond v. District Court,* 682 P.2d 33, 40 (Colo.1984). ***526** Informal methods of discovery not only effectuate the goals of the discovery process but tend to reduce litigation costs and simplify the flow of information. *Trans–World Invs. v. Drobny,* 554 P.2d 1148, 1152 (Alaska 1976). Personal interviews are an accepted informal method of discovery. *See Doe,* 99 F.R.D. at 128. A rule permitting informal communications between a defense attorney and a plaintiff's treating physician promotes the discovery process by assuring that both parties have access to an informal, efficient, and cost-effective method for discovering facts relevant to the proceedings. *Bond,* 682 P.2d at 40. A contrary rule would encourage resort to expensive and time-consuming formal discovery methods when such methods could be avoided. *Doe,* 99 F.R.D. at 128; *Drobny,* 554 P.2d at 1152.

In view of these considerations, we conclude that our rules of discovery permit a defense attorney to conduct informal interviews in the absence of a plaintiff or the plaintiff's attorney with physicians who have treated the plaintiff. Consequently, trial courts may authorize such informal interviews. However, we also conclude that such informal questioning must be confined to matters that are not subject to a physician-patient privilege and that the plaintiff must be given reasonable notice of any proposed informal interview. Such notice will afford a plaintiff or the plaintiff's attorney an opportunity to attend any scheduled interview. Such notice will also enable a plaintiff to take other appropriate steps to ensure that interviews are limited to matters not subject to the plaintiff's physician-patient privilege, such as to inform the physician of the plaintiff's belief that certain information known to the physician remains subject to the physician-patient privilege or to seek appropriate protective orders from the trial court.[3] Although a physician may refuse to participate in informal interviews, a plaintiff may not instruct his or her treating physician not to participate in such interviews solely for the purpose of preventing the disclosure of non-privileged information.

IV

The petitioners argue that the trial court's order is inconsistent with this court's decision in *Fields v. McNamara,* 189 Colo. 284, 540 P.2d 327 (1975), and suggest that any rule authorizing a defense attorney to conduct *ex parte* interviews with a plaintiff's treating physicians would contravene Revised Ethics Opinion 71 of the Colorado Bar Association Ethics Committee. The petitioners also argue that *ex parte* communications should not be permitted because a treating physician complying with the order might be subject to liability for unauthorized disclosure of patient information. We reject these arguments.

A

The petitioners initially argue that our decision in *Fields v. McNamara,* 189 Colo. 284, 540 P.2d 327 (1975), prohibits trial courts from issuing orders such as the one entered by the trial court. In *Fields,* the plaintiff alleged injuries to his head, neck, back, and chest and other injuries resulting from an automobile accident. *Id.* at 285, 540 P.2d at 328. During discovery the trial court entered an order permitting the defendant's attorney to inspect and copy records, reports, and X-rays "limited, however, to the areas and disabilities for which Plaintiff is claiming injury." *Id.* The trial court further ordered the plaintiff to execute a form authorizing his physicians, *inter alia,* to undertake the following action:

> *to disclose* and deliver to [defendant's attorney] *all facts and particulars* desired with reference to [any] past, present and future physical condition and to furnish said parties any transcripts or hospital ***527** case histories or written records or copies of x-rays or physicians' or surgeons' diagnosis [sic] requested, provided, however, that such disclosure and furnishing shall be limited to physical conditions concerning [the plaintiff's] head, neck, back, arms, legs, chest and hips and physical conditions causing headaches, nosebleeds, diarrhea, blurred vision, nausea, pain in the hips, back and neck, and numbness and/or tingling of the arms and legs.

Id. (emphasis in original). In an original proceeding, we issued a rule to show cause to examine the breadth of the trial court's order. *Id.* at 284, 540 P.2d at 327. Asserting that a plaintiff waives the physician-patient privilege respecting medical matters "directly pertaining to the case filed by a plaintiff," the petitioner argued that the trial court's order erroneously permitted "unlimited inspection and copying in areas which could well be still privileged because they are correlated to the action in question." *Id.* at 286, 540 P.2d at 328.

We held that the trial court's order was too broad insofar as it authorized *ex parte* questioning of physicians by defendant's counsel. *Id.* at 286, 540 P.2d at 328–29. Noting that a plaintiff may stipulate that defense counsel can engage in limited discussions with a physician who treated the plaintiff, we stated that a trial court "cannot order such *ex parte* proceedings." *Id.*

While *Fields* may be read to prohibit, absent a plaintiff's consent, all forms of communication between a defense attorney and physicians who treated a plaintiff in the absence of the plaintiff or the plaintiff's attorney, such broad characterization of our holding in that case is not compelled by the sparse language of the opinion. The show cause order raised the limited issue of the breadth of the provisions of the authorization form the plaintiff was compelled to execute. The plaintiff did not argue that the trial court had no authority to require the plaintiff to authorize his physicians to disclose documents and facts relating solely to the action and therefore not privileged. We held only that the trial court's order went "too far." However, to the extent that our decision in *Fields* suggests that in civil actions trial courts may not authorize a defense attorney, in the absence of the plaintiff or the plaintiff's attorney, to informally interview physicians who have treated the plaintiff regarding matters that are not subject to the physician-patient privilege, we disapprove of that decision.

B

Petitioners suggest that any rule authorizing a defense attorney to conduct informal interviews with a plaintiff's treating physician in the absence of the plaintiff or the plaintiff's attorney would contravene Ethics Opinion 71 and section 6.3 of the Interprofessional Code of Responsibility.[4] In our view, neither the Ethics Opinion nor the Interprofessional Code prohibits informal interviews of the type we approve.

Ethics Opinion 71, as revised, provides in pertinent part as follows:

> By pleading a physical or mental condition as the basis of a claim in a personal injury or medical malpractice case, a plaintiff impliedly waives the physician-patient privilege or psychologist-client privilege of confidentiality for matters relating to those conditions. However, a lawyer representing a defendant in that lawsuit may engage in *ex parte* discussions with the plaintiff's treating physicians or psychologists concerning the doctor's care and treatment of the plaintiff or opinions resulting from that care and treatment only after first giving plaintiff's counsel reasonable notice and an opportunity to be present. In the event of a dispute between plaintiff's counsel and defendant's counsel, recourse to the formal discovery process remains an option.

CBA Ethics Comm., Rev. Formal Op. 71 (1985). Interprofessional Code section 6.3 provides in pertinent part as follows:

> ***528** 6.3 —A treating physician should not discuss the case privately with a patient's adversaries without a clear and expressed authorization to do so or without knowledge by the patient's attorney of the time and place with an opportunity to object or be present at that meeting....

We initially note that the rule we announce today does not conflict with Ethics Opinion 71. Furthermore, we do not

view such rule to be inconsistent with section 6.3 of the Interprofessional Code. The comments to section 6.3 of the Interprofessional Code contain the following statements:

> If such [express] authorization is not provided, the physician should advise his or her patient's counsel ... concerning the contact so as to enable that attorney to object to any such private contact or attend ... any such consultation with the opposing party.

Thus the purpose for the requirement of prior express authorization is to ensure that the patient has had an opportunity to protect the patient's interests.

The rule we announce today requires a defense attorney to initially provide the plaintiff with reasonable notice so as to enable the plaintiff to protect his or her interests. Additionally, although by filing a civil action alleging injuries a plaintiff impliedly waives his or her physician-patient privilege with respect to matters pertaining to those injuries, a treating physician may decline to participate in *ex parte* discussions with defense counsel. Finally, it must be presumed that both attorneys and physicians will conduct themselves ethically. A treating physician has a primary obligation to tell the truth, regardless of whether his or her testimony will help or hinder the patient's case. *See Brandt,* 856 S.W.2d at 673. Attorneys may not seek information not relevant to the physical or mental condition at issue in the litigation, and non-party treating physicians have no incentive to make irrelevant disclosures. *See Felder v. Wyman,* 139 F.R.D. 85, 89 (D.S.C.1991). Attorneys and physicians who violate the provisions of their respective codes of professional conduct remain subject to appropriate professional disciplinary procedures.

C

The petitioners argue that in the course of conducting an *ex parte* interview with a treating physician an attorney representing a party adverse to the patient might attempt to improperly influence the physician's trial testimony. That danger is inherent in every contact between an attorney and a prospective witness for a party adverse to the attorney's client. This legitimate concern does not warrant adoption of a rule prohibiting a defense attorney from informally communicating with a plaintiff's treating physician on matters not subject to a physician-patient privilege so long as the plaintiff is afforded reasonable notice of any proposed interview to permit the plaintiff or the plaintiff's attorney to attend or to seek appropriate protective orders. *Stempler v. Speidell,* 100 N.J. 368, 495 A.2d 857, 863 (1985).

In addition, Samms contends that during any *ex parte* interview with Bjork's attorney a treating physician may inadvertently disclose information regarding Samms' medical condition which is not relevant to issues in the case or for which her privilege has not been waived. She notes that because the physician may not be able to distinguish between information for which the privilege has been waived and information that remains privileged, the task of determining relevancy will impermissibly rest in the discretion of Bjork's attorney, who may not know that confidential information is about to be elicited. *See Roosevelt Hotel Ltd. v. Sweeney,* 394 N.W.2d 353, 357 (Iowa 1986).

We recognize that informal communications between lawyers representing a defendant and a physician who has treated a plaintiff affect many persons. The patient may be concerned that privileged information may be disclosed before the patient has any meaningful opportunity to object to the information solicited. The attorney representing the party seeking discovery is concerned about potential disciplinary proceedings for professional misconduct in seeking to elicit information for which the privilege has not been waived. The physician may be concerned about disclosing information to which the ***529** physician-patient privilege has not been waived. The scope of any implied waiver necessarily depends on the nature of the claim asserted by the patient, and physicians as well as attorneys and judges may at times find the task of delineating the scope of a waiver to be problematical.

In our view, these and similar legitimate issues may be addressed by the trial court in those situations wherein the parties and the physician are unable to resolve them informally. [5] We here determine only that, contrary to the petitioners' argument, a trial court has authority to permit a defense attorney to conduct informal interviews with a plaintiff's treating physicians in the absence of the plaintiff or the plaintiff's attorney about matters not subject to a physician-patient privilege so long as the plaintiff is given reasonable notice of such interviews to permit the plaintiff or the plaintiff's attorney to attend or to take other appropriate

steps to ensure that privileged information will not be discussed.

V

The trial court's January 5, 1995, order is based on the trial court's initial November 13, 1993, order. Although the 1993 order contains a statement that the scope of the waiver of the physician-patient privilege has been delineated and refers to some of the allegations of the complaint, the order does not specifically define the scope of Samms' waiver and no copy of the complaint is attached thereto. Neither order requires Bjork's attorney to give reasonable notice to Samms of when and where the informal interviews will be conducted. The 1993 order does direct Bjork's attorney to give notice when there is a "reasonable probability of disclosure of material which may be privileged or subject to protective order." However, Samms and Samms' physician, not Bjork or Bjork's attorney, know what privileged information the physician has acquired from Samms. Furthermore, the 1993 order implies that Bjork's attorney can elect not to notify Samms of proposed interviews in some circumstances.

As we have indicated, the patient and the physician must be informed specifically of the scope of the plaintiff's waiver of the physician-patient privilege prior to any informal interviews of the physician, whether by agreement of the parties or by court order. In the absence of such specificity, neither the interviewing attorney nor the physician will be able to ascertain what matters remain subject to the plaintiff's physician-patient privilege and therefore may not be discussed. A trial court determining that informal interviews by a defense attorney of a plaintiff's treating physicians in the absence of the plaintiff or the plaintiff's attorney are warranted must also make certain that the plaintiff or the plaintiff's attorney has an opportunity to attend any such informal interviews by requiring reasonable notice thereof.

The orders entered by the trial court in this case were entered prior to our decision here. We conclude that in fairness to both parties and to the physicians involved the trial court should be given an opportunity to reconsider its 1995 order in light of this opinion, giving particular attention to delineation of the scope of Samms' waiver of her physician-patient privilege.

VI

For the foregoing reasons, we conclude that the trial court had authority to authorize Bjork's attorney to conduct informal interviews with Samms' treating physicians, in the absence of Samms or her attorney, provided that the discussions are limited to relevant ***530** non-privileged information and provided further that Samms must be given reasonable notice of such interviews to permit her attorney to attend or to otherwise ensure that privileged information is not discussed. We also conclude that the trial court should be given an opportunity to reconsider its 1995 order. We therefore discharge in part and make absolute in part the rule to show cause previously issued herein; vacate the 1995 order entered by the trial court; and return the case to the trial court with directions to conduct further proceedings consistent with this opinion.

KOURLIS, J., concurs and specially concurs, and VOLLACK, C.J., joins in the concurrence and special concurrence.

ERICKSON, J., dissents.

Justice KOURLIS concurring and specially concurring:

The majority holds that a trial court may authorize *ex parte*[1] interviews between opposing counsel and a non-party physician witness with reasonable notice to counsel for the patient. Maj. op. at 525–529. I agree. However, I write separately because I reach those conclusions using a different analytical framework. Therefore, I specially concur in the majority opinion.

This is an original proceeding under C.A.R. 21 in which the plaintiffs seek relief from an order entered by the trial court that permits *ex parte* contact between the defendant's counsel and several non-party treating physicians. I conclude that the trial court had the authority to enter that order, and the authority to condition it upon defendant's counsel providing reasonable notice of the anticipated contact.

Three general principles of law and considerations of judicial economy and efficiency govern this matter. First, the purpose of discovery is preparation for trial. *See J.P. v. District Court,* 873 P.2d 745, 748 (Colo.1994). The purpose of trial is ascertainment of truth. The court's function is to facilitate those processes: to assure that both parties have access to an

efficient, effective method of resolving disputes. *See Bond v. District Court,* 682 P.2d 33, 40 (Colo.1984). Witnesses offer testimony at trial regarding the controverted issues to assist the trier of fact in arriving at the truth. Neither party has a right of ownership to or loyalty from any witness. *See International Business Machines Corp. v. Edelstein,* 526 F.2d 37, 42 (2d. Cir.1975) ("[C]ounsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made."); *Doe v. Eli Lilly & Co.,* 99 F.R.D. 126 (D.D.C.1983).

The second principle is that the Colorado Rules of Civil Procedure govern the progress and process of discovery in civil actions such as the one before us.[2] Under the Rules, the scope of discovery is very broad. *Williams v. District Court,* 866 P.2d 908, 911 (Colo.1993). Thus, under C.R.C.P. 26(b)(1), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." This includes the location and identification of any persons having knowledge of any discoverable matter. Parties are required to identify non-expert witnesses and expert witnesses during the course of discovery. C.R.C.P. 26(a)(1). Discovery against expert witnesses progresses according to certain procedures.[3] C.R.C.P. 26(b)(4). Discovery against non-expert witnesses is not similarly constrained under the Rules.

An attorney for a party has a right to interview any witness who has access to information relevant to the disputed issues. *International Business Machines Corp.,* 526 F.2d at 42. Despite this general rule, an attorney may not ask questions that impinge on areas of privilege.

***531** The issue presented to us is whether physician witnesses are to be treated differently from other witnesses and insulated from any contact by opposing counsel unless such contact occurs with the permission or presence of the plaintiff. The plaintiff argues that physicians should be treated differently than other witnesses because of the physician-patient privilege. § 13–90–107(1)(d), 6A C.R.S. (1987). The privilege provides in part:

> A physician, surgeon, or registered professional nurse duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient ...

§ 13–90–107(1)(d). Without patient consent, a physician may not be examined about privileged information.

We have previously held that the waiver inherent in the filing of a lawsuit constitutes consent for the purpose of the privilege statute as to the matters raised by the claims for relief. *See Bond v. District Court* 682 P.2d 33 at 38 (Colo.1984); *Clark v. District Court,* 668 P.2d 3, 10 (Colo.1983). Therefore, the privilege does not interpose an automatic bar to *ex parte* contact between opposing counsel and a non-party physician witness. If the non-party physician witness is not an expert witness, the Rules of Civil Procedure would permit opposing counsel to contact such person for an *ex parte* interview absent a protective order entered by the court prohibiting such contact.

I turn then to what I conceive to be the third general governing principle. Specifically, the trial court has broad discretion to address discovery matters as appropriate. *See Williams v. District Court,* 866 P.2d 908, 911 (Colo.1993). If a party or his or her non-party physician witness seeks protective orders prohibiting or limiting *ex parte* contact, the trial court is uniquely able to evaluate the competing interests and enter appropriate orders. *Id.* at 912.

Given these principles, I conclude that there is no special rule prohibiting opposing counsel from contacting treating nonparty physician witnesses on an *ex parte* basis.[4]

Ex parte interviews with non-party physicians are permissible with reasonable notice to opposing counsel, unless a trial court order provides otherwise. Upon application, the trial court has broad discretion to prohibit or regulate *ex parte* interviews as appropriate to the facts of the case. Therefore, I specially concur in the majority opinion in the present case.

I am authorized to say that Chief Justice VOLLACK joins in this special concurrence.

Justice ERICKSON dissenting:
I respectfully dissent.

I disagree with the majority's conclusion that a court in a personal injury action may authorize a defendant's attorney to conduct *ex parte* interviews with the plaintiff's treating physicians. *See* maj. op. at 525. In *Fields v. McNamara,* 189 Colo. 284, 540 P.2d 327 (1975), we held that a court may not order *ex parte* communications between defense counsel and a plaintiff patient's treating physicians in the absence of the plaintiff patient's express authorization. *Id.* at 286, 540 P.2d at 328–29. In *Fields,* the defendant in a personal injury action sought a court order requiring plaintiffs to execute medical authorization forms which allowed access to then-existing medical records and provided for private *ex parte* communications with plaintiffs' treating physicians. We held that the authorization was too broad and said:

> The authorization, however, goes too far in permitting *ex parte* questioning of physicians or others concerning documents to be examined. Not infrequently counsel will stipulate that the defendant's attorney acting *ex parte* may ask physicians and others to identify documentary material and may ask certain questions concerning it—and ***532** this is oft-times good practice. *The court, however, cannot order such ex parte proceedings; and, if the inspecting party needs further information concerning documentary material, the formal method of eliciting the same is by further discovery procedure.*

Id. (emphasis added). *See Neal v. Boulder,* 142 F.R.D. 325, 328 (D.Colo.1992) (holding that under *Fields* a medical malpractice plaintiff may preclude defense counsel's *ex parte* communications with treating physicians). Our prohibition of *ex parte* interviews of treating physicians is supported by discovery limitations in a number of other jurisdictions. *See Horner v. Rowan Cos.,* 153 F.R.D. 597, 601 (S.D.Tex.1994); *Weaver v. Mann,* 90 F.R.D. 443, 444–45 (D.N.D.1981); *Garner v. Ford Motor Co.,* 61 F.R.D. 22, 24 (D.Alaska 1973); *Roosevelt Hotel Ltd. Partnership v. Sweeney,* 394 N.W.2d 353, 357 (Iowa 1986); *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41, 45 (1990).

The district court's order authorizing Bjork's attorney to conduct *ex parte* interviews with the plaintiff Samms' physicians contravenes the limitations imposed by our unanimous opinion in *Fields.* Accordingly, I would make the rule to show cause absolute and remand the case to the district court with directions to enter an order granting Samms' motion for a protective order.

All Citations

908 P.2d 520

Footnotes

1 The Illinois General Assembly rejected the holding of *Petrillo* by enacting Ill. Comp. Stat. ch. 735, §§ 5/2–1003, 5/8–802 and 5/8–2001 (effective March 9, 1995). These statutes provide generally that in personal injury actions any party who puts his or her physical or mental condition at issue thereby waives the physician-patient privilege and must, upon request by any other party to the action, sign a consent form authorizing the other party or that party's attorney to inspect and copy medical records and to confer with treating physicians regarding the patient's health conditions. These statutes do not address the issue of whether the patient or the patient's attorney may be present during such informal communications.

2 The Minnesota legislature rejected the holding of *Wenninger* by enacting Minn.Stat. § 595.02, subd. 5 (1988). This statute provides that a patient waives the physician-patient privilege by filing an action alleging physical or mental injury and thereby permits all parties to the action to informally discuss with a treating physician the patient's health conditions as well as the physician's opinion with respect to those conditions. Minn.Stat. § 595.02, subd. 5 (1988). A party desiring such informal discussion must give the patient notice and the patient or the patient's attorney may be present during such discussions. *Id.* In *Blohm v. Minneapolis Urological*

Surgeons, P.A., 449 N.W.2d 168, 170 (Minn.1989), the Supreme Court of Minnesota observed "that [§ 595.02, subd. 5] was designed to minimize the difficulties of obtaining an interview by eliminating plaintiff's right to veto."

3 When an attorney representing a party adverse to a patient informally interviews a treating physician with respect to non-privileged matters in the absence of the patient or the patient's attorney, the interview is properly characterized as an "*ex parte* " interview. While the rules of discovery permit such *ex parte* interviews, because a patient may personally or through his or her attorney attend any interview of a treating physician scheduled by an adverse party, scheduled *ex parte* interviews may on occasion not occur. However, in the absence of a court order, a patient may not require an attorney for an adverse party to forego or postpone a scheduled informal *ex parte* interview of the patient's treating physician.

4 The Interprofessional Code is a document, endorsed by the Colorado Bar Association, the Colorado Medical Society, the Denver Bar Association, and the Denver Medical Society, designed to provide attorneys and physicians "with a guide for harmonious interprofessional relations, promote better understanding between the professions, and aid in the resolution of interprofessional disputes."

5 We do not suggest that formal discovery processes provide the only remedies for parties concerned about the scope of informal communications such as those here contemplated. A defense attorney need not seek court authorization before scheduling informal *ex parte* interviews. However, a defense attorney wishing to conduct such an interview must provide reasonable notice to the plaintiff, indicating the matters to be discussed. Such reasonable notice will inform the plaintiff of the proposed interviews; it is encumbent upon the plaintiff to take steps necessary to protect the physician-patient privilege to the extent it has not been waived. The parties may, of course, agree upon the scope of the interview. The plaintiff may also inform the physician of the plaintiff's belief that certain information known to the physician remains subject to the physician-patient privilege.

1 The majority defines an *ex parte* interview as one that takes place outside the patient's or patient attorney's presence. Maj. op. at 526 n. 3.

2 The Colorado Rules of Civil Procedure have been revised in pertinent part. This case was filed prior to the effective date of the revisions. Therefore, the prior version of the Rules applies.

3 The physicians involved in this case were identified as treating physicians and not experts.

4 The rule of law we today clarify speaks to the fact that the plaintiffs may not unilaterally bar such conversations, provided that the conversations are limited to the area of treatment waived by the filing of claims for relief. However, a physician may bar an informal interview with opposing counsel by declining to participate.

DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street, Room 256 Denver, CO 80202	DATE FILED: December 6, 2013 9:42 AM CASE NUMBER: 2012CV2561
VALERIE SCHEIRMAN **Plaintiff,** **v.** **NICOLETTE A. PICERNO, M.D.; JEFFREY L. CUTLER, M.D.; and EDWARD J. HEPWORTH, M.D.** **Defendants.**	**▲ COURT USE ONLY ▲**
	Case No.: 2012CV2561 Division: 414

ORDER RE: DEFENDANT NICOLETTE A. PICERNO'S MOTION TO MEET WITH CERTAIN OF VALERIE SCHEIRMAN'S TREATING PHYSICIANS *EX PARTE*, AND WITHOUT FURTHER NOTICE TO PLAINTIFF'S COUNSEL

THE COURT, having reviewed Defendant, Dr. Picerno's, Motion to meet with certain of Valerie Scheirman's treating physicians *ex parte*, and without further notice to Plaintiff's counsel; Plaintiff's response; and any reply thereto, and being fully advised in the premises,

HEREBY GRANTS Defendant's Motion. Plaintiff's treating physicians addressed in the motion (Drs. Dickey, Menachof, Kingdom, Waziri, Vollmer, Rao, Springer, Tam Sing, LeMole, Chiu and Wolff) all treated Plaintiff solely for medical conditions and alleged injuries Plaintiff has placed in issue in this litigation, and therefore there is no "high risk that residually privileged information will be divulged." *In re Reutter v. Weber,* 179 P.3d 977, 979 (Colo. 2007).

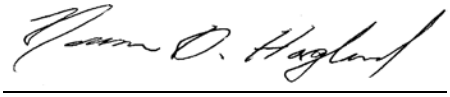
Further, the Court **ORDERS** that Plaintiff and Plaintiff's counsel may

not communicate to these physicians that they are restricted from meeting with Defendant's counsel on grounds of "ethical duty of confidentiality" or otherwise, and any such communications Plaintiff or Plaintiff's counsel may have already made to these physicians are invalid and of no effect.

Finally, the Court **GRANTS** Dr. Picerno's request for leave to provide timely supplementation of her C.R.C.P. 26(a)(2) expert disclosures (currently due October 21, 2013) of the above listed treating physicians no later than 30 days after date of this Order.

Dated this 6th day of December, 2013

BY THE COURT:



Judge Norman D. Haglund
Denver District Judge

2010 WL 9568708
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

KLM Gerald SCHLENKER, Plaintiff,
v.
CITY OF ARVADA, COLORADO, Charles J. Humphrey, in his individual capacity, Joseph Hertel, in his individual capacity, Kelley Sheehan, in his individual capacity, Defendants.

Civil Action No. 09–cv–01189–WDM–KLM.
|
June 16, 2010.

Attorneys and Law Firms

Darold W. Killmer, Denver, CO, Mari Anne Newman, Denver, CO, for Plaintiff.

Christopher K. Daly, William James Barber, Roberto Ramirez, Arvada City Attorney's Office, Arvada, CO, Edward Michael Allen, Timothy Michael Kratz, Pendleton, Friedberg, Wilson & Hennessey, P.C ., Denver, CO, Laura M. Wassmuth, Miles Leachman Buckingham, Nike Lee Fleming, Kennedy Childs & Fogg, PC, Denver, CO, David R. Demuro, Shelby Anne Felton, Vaughan & Demuro, Denver, CO, for Defendants.

ORDER

KRISTEN L. MIX, United States Magistrate Judge.

***1** This matter is before the Court on **Plaintiff's Motion to Compel Defendant City of Arvada to Provide Discovery Responses Related to Similar Claims** [Docket No. 163; Filed April 30, 2010] ("Motion to Compel") and **Defendants' Motion to Reduce Fee for Plaintiff's Expert Witness** [Docket No. 168; Filed June 1, 2010] ("Motion to Reduce Expert's Fees"). As a preliminary matter, the Court denied the Motion to Compel without prejudice to Plaintiff asserting it via the Court's discovery dispute resolution procedures. *See Order* [# 165] at 1. Plaintiff did so, and the Court heard argument on the disputes at issue in the Motion to Compel on May 25, 2010 and June 11, 2010 [Docket Nos. 166 & 189]. In addition, the Court permitted Defendant City to file a Response to the Motion to Compel on May 26, 2010 [Docket No. 167]. The Court also heard argument on the disputes at issue in Defendants' Motion to Reduce Expert's Fees on June 11, 2010, but no written response was permitted. Having considered the parties' written and oral arguments, the discovery disputes are now ripe for resolution.

IT IS HEREBY **ORDERED** that the Motion to Compel is **GRANTED** for the reasons set forth below. [1]

Plaintiff seeks information and documents relating to claims asserted against Defendant City that are substantially similar to those at issue in the present case. [2] Specifically, "[t]hrough discovery, Mr. Schlenker has learned that Defendants in this case are also defendants in at least two other lawsuits involving remarkably similar claims." *Motion to Compel* [# 163] at 4 (hereinafter the *"Maliszewski* and *Court* lawsuits"). Defendant City objects to producing information related to the *Maliszewski* and *Court* lawsuits because they are not substantially similar to the present case, the investigations are ongoing, and responsive records which are not privileged do not exist at this time. *Response* [# 167] at 3–4. Defendant City also contends that Plaintiff already has copies of court records from those lawsuits received from other sources. *Id.* at 4.

The primary issue here appears to be relevance. Whether the information relating to the *Maliszewski* and *Court* lawsuits is relevant is a broad determination, the goal of which is to allow the parties to discover whatever is necessary to prove or disprove their cases. *Gomez v. Martin Marietta Corp.,* 50 F.3d 1511, 1520 (10th Cir.1995); *Simpson v. Univ. of Colo.,* 220 F.R.D. 354, 356 (D.Colo.2004); *Cardenas v. Dorel Juvenile Group, Inc.,* 232 F.R.D. 377, 382 (D.Kan.2005) ("Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." (citations omitted)). In addition, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). As such, discovery cannot be avoided merely because the information or documents sought are likely to be inadmissible. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 29–30 (1984); 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2008, at 111–13 & nn. 31–33 (2d ed.1994). If the material sought is relevant to the case and may lead to admissible evidence, it should generally be produced.

***2** I agree with Plaintiff that the information sought relating to the *Maliszewski* and *Court* lawsuits is relevant to his municipal liability claim and should be produced. Defendant

City's other objections to production, except for the assertion of privilege, are unavailing. Accordingly,

IT IS FURTHER **ORDERED** that Defendant City must produce all documents and information related to the Internal Affairs investigation which is currently underway involving the conduct at issue in the *Maliszewski* and *Court* lawsuits. To the extent that Defendant City contends that any of this discovery is protected by a legally-recognized privilege, it must provide a privilege log consistent with the requirements set forth in Fed.R.Civ.P. 26(b)(5).

IT IS FURTHER **ORDERED** that Defendant City must produce any other documents and information *currently* in its possession, custody or control relating to the *Maliszewski* and *Court* lawsuits, including the Colorado Governmental Immunity Act notice, police reports, transcripts, etc. To the extent that Defendant City contends that any of this discovery is protected by a legally-recognized privilege, it must provide a privilege log consistent with the requirements set forth in Fed.R.Civ.P. 26(b)(5).

Plaintiff also seeks complete records relating to claims asserted against any agent of Defendant City involving allegations similar to those at issue in the present case. Specifically, Plaintiff seeks information relating to claims involving eight different types of events—unlawful search and seizure, use of excessive force, deprivation of a liberty interest without due process, invasion of bodily integrity, false arrest or imprisonment, violation of the right to free speech and conspiracy to violate civil rights. *Motion to Compel* [# 163] at 7. Defendant City objects to producing documents and information (beyond what has already been produced) for various reasons, including that there is no factual support for requesting claims related to certain alleged events. *Response* [# 167] at 5–6.

Again, the primary issue here appears to be relevance. I agree with Plaintiff that the information sought relating to similar claims is relevant to his municipal liability claim and should be produced. Defendant City's other objections to production are unavailing. Accordingly,

IT IS FURTHER **ORDERED** that Defendant City must produce all documents and information relating to any of the eight claims made by Plaintiff which have been asserted against Defendant City by third parties. As no objection to privilege has been raised in response to the Motion to Compel, this information must be produced in its entirety. Although Defendant City appears to raise a confidentiality issue, see *Response* [# 167] at 5–6, it failed to substantiate this concern or explain why production of these documents could not be protected by the Stipulated Protective Order entered in this case [Docket No. 98]. Therefore, the documents shall be produced without redaction.

***3** IT IS FURTHER **ORDERED** that Defendant City shall comply with this Order on or before **July 13, 2010,** and that the discovery deadline is extended to that date for this purpose.

IT IS HEREBY **ORDERED** that the Motion to Reduce Expert's Fees is **GRANTED in part and DENIED in part** for the reasons set forth below.

Defendants object to the fees being charged by Plaintiff's police practices expert to take his deposition. Specifically, Plaintiff's police practices expert, Michael D. Lyman, Ph.D., is charging two flat fees: $2300 for his deposition *and* $2300 for his travel expenses to travel from Columbia, Missouri to Kansas City, Missouri. *Motion to Reduce Expert's Fees* [# 168] at 2. Defendants contend that flat fees are not reasonable and that Dr. Lyman's hourly rate of $200/hour being charged to Plaintiff should apply. *Id.* By contrast, Plaintiff asserts that Dr. Lyman's fees are reasonable and in line with those being charged by similar experts with similar experience.

The Court's authority to reduce the fee charged by an expert witness for a deposition is derived from Fed.R.Civ.P. 26(b)(4)(C). *See also Grady v. Jefferson County Bd. of County Comm'rs,* 249 F.R.D. 657, 662 (D.Colo.2008) (noting that court is "the gatekeeper against excessive windfall billing"). Specifically, courts in this district utilize a seven-factor test for determining whether an expert's deposition fee is reasonable:

(1) the witness' area of expertise;

(2) the education and training required to provide the expert opinion;

(3) the prevailing rates of comparable experts;

(4) the nature, quality and complexity of the discovery responses provided;

(5) the fee being charged by the expert to the party retaining him;

(6) the fees traditionally charged by experts in related fields; and

(7) any other factor likely to assist the court in balancing the interests of Rule 26.

U.S. Energy Corp. v. NUKEM, Inc., 163 F.R.D. 344, 345–46 (D.Colo.1995). A reasonable rate is not what the market will bear, but what is reasonable under the circumstances. *Id.* at 346–47. It is the party whose expert is seeking reimbursement who bears the burden of establishing that the charged fee is reasonable. *Fiber Optic Designs, Inc. v. New England Pottery, LLC,* 262 F.R.D. 586, 589 (D.Colo.2009).

At the hearing, Plaintiff presented compelling evidence regarding the deposition fee being charged by Dr. Lyman in relation to the fees charged by other experts of comparable experience and education. Considering Dr. Lyman's expertise, training and experience, as well as the fees of comparable experts, I find that Dr. Lyman's $2300 deposition fee is reasonable. Further, although the field of police practices is not particularly complex, I note that Dr. Lyman will charge the same flat fee to Plaintiff for his trial testimony. To the extent that Defendants cite *Massasoit v. Carter,* 227 F.R .D. 264, 266 (M.D.N.C.2005) in support of their position, the court in that case specifically distinguished its holding in circumstances where the expert had to travel. *Id.* at 267 & n. 3 (recognizing that while flat fee may be unreasonable when expert is deposed at his place of business, flat fee may be reasonable where deposition is in location chosen by counsel). Accordingly, the Motion is **denied** to the extent that Defendants seek to reduce Dr. Lyman's $2300 deposition fee.

***4** However, little to no evidence was provided by Plaintiff as to the reasonableness of Dr. Lyman's travel fee. Despite Plaintiff's contention that this fee could be ameliorated by Defendants agreeing to depose Dr. Lyman in Columbia, Missouri or via video conference, neither speaks to whether Dr. Lyman's travel fee is reasonable. In addition, Defendants are entitled to depose Plaintiff's expert how and where they choose without being subjected to unreasonable rates. Here, Dr. Lyman testified that it is two hours by car to travel from Columbia, Missouri to Kansas City, Missouri, or four hours round trip. On its face, the fee of $2300 for this travel is unreasonable, and Plaintiff has not offered sufficient evidence to the contrary. Because I find that Plaintiff failed to show that Dr. Lyman's travel rate, on top of his deposition rate, is reasonable, the Motion is **granted** to the extent that Defendants seek to reduce Dr. Lyman's $2300 travel fee. Accordingly,

IT IS FURTHER **ORDERED** that Defendants shall compensate Dr. Lyman for his deposition at the rate of $2300.

IT IS FURTHER **ORDERED** that Defendants shall compensate Dr. Lyman for his travel at the rate of $200/hour, plus $.50/mile. If the deposition is scheduled to begin before 10:00 a.m., Defendants shall also compensate Dr. Lyman for his expenses, including reasonable meals and lodging.

The Court clarifies the discovery deadlines that are now set in this case. Pursuant to my Order of June 2, 2010, Defendants' deadline to conduct the Rule 35 examination of Plaintiff is **June 30, 2010** [Docket No. 176]. Pursuant to this Order, Defendant City's deadline to propound the discovery at issue here is **July 13, 2010.** Finally, pursuant to my Order of June 2, 2010, Defendants' deadline to depose Dr. Lyman is **July 16, 2010** [Docket No. 177].

All Citations

Not Reported in F.Supp.2d, 2010 WL 9568708

Footnotes

1 At the June 11, 2010 hearing, the Court granted the Motion to Compel in part and reserved the remaining issues for ruling via written order. Specifically, I held that "[t]o the extent that the Motion seeks discovery responses relating to *all* claims asserted by Plaintiff against the Defendant City, it is **GRANTED.**" *Order* [# 189] at 2.

2 The discovery requests that appear to be at issue here are Interrogatory No. 8 and Document Request No. 13 [Docket No. 163–1].

End of Document

2011 WL 2473284
Only the Westlaw citation is currently available.
United States District Court,
D. Colorado.

Todd E. SCHOLL, and Carla Scholl, Plaintiffs,
v.
Dhruv B. PATEDER, M.D., Defendant.

Civil Action No. 09–cv–02959–PAB–KLM. | June 22, 2011.

Attorneys and Law Firms

Francis Vincent Cristiano, Cristiano Law, LLC, Greenwood Village, CO, for Plaintiffs.

David Scott Rendleman, Michelle Lynn Harden, Bruce A. Montoya, Messner & Reeves LLC, Denver, CO, for Defendant.

ORDER

KRISTEN L. MIX, United States Magistrate Judge.

***1** This matter is before the Court on Defendant's **Motion to Strike and for Protective Order** [Docket No. 55; Filed May 4, 2011] (the "Motion"). Plaintiffs filed a Response [Docket No. 65] in opposition to the Motion on May 20, 2011, and Defendant filed a Reply [Docket No. 69] on June 1, 2011. The Motion is now fully briefed and ripe for resolution.

A. Procedural Background

This is a medical malpractice action arising from a surgical procedure performed by Defendant on Plaintiff Todd E. Scholl (hereinafter, "Mr.Scholl") in December of 2009. *Scheduling Order* [Docket No. 15] at 2. Defendant seeks an order precluding three of Plaintiffs' designated witnesses from providing expert testimony. *Motion* [# 55] at 2. At the Scheduling Conference held on May 5, 2010, the Court allowed each side to designate two retained expert witnesses. *Courtroom Minutes/Minute Order* [Docket No. 16] at 1. On January 11, 2011, the Court permitted each side to designate two additional retained experts, thus allowing a total of four retained expert witnesses per side.*Courtroom Minutes/Minute Order* [Docket No. 41] at 1. Plaintiffs have not sought to further increase the limit on retained expert witnesses.

On November 30, 2010, Plaintiffs disclosed four "retained experts." *Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [Docket No. 30] at 1–3. Plaintiffs also disclosed twenty-one "non-retained expert" witnesses. *Id.* at 3–7.Among these witnesses were Peter Witt, M.D. ("Witt"), David A. Wong, M.D. ("Wong"), and Jill E. Fishinger, CPA, PC ("Fishinger").*Id.* Witt consulted with Plaintiff Todd Scholl (hereinafter, "Mr.Scholl") on June 9, 2009. *Id.* at 3. Plaintiffs disclosed Witt's potential testimony as follows: "Dr. Witt may be called to testify in conformity with the assessments and conclusions contained in his [written medical] reports, as well as other radiographic reports and assessments which he relied upon. **This will include not only opinions concerning Mr. Scholl's condition, but the likely cause and extent of Mr. Scholl's nerve injuries.**"*Id.* (emphasis added). Wong saw Mr. Scholl on an unspecified date sometime after he underwent surgery performed by Defendant. *Id.* at 4. Plaintiffs disclosed Wong's potential testimony as follows: "[Dr. Wong] has expressed certain opinions in his disclosed medical reports, and may be called upon to testify consistent with such information."*Id.* Fishinger is Mr. Scholl's accountant. *Id.* at 7. Plaintiffs disclosed her potential testimony as follows: "[Ms. Fishinger] has information concerning [Mr. Scholl's] past income and business. **She is of the opinion that his business likely would have grown, but for [his] injuries,** in accordance with the projections set forth in her estimates attached hereto and [she] may be called to testify as to her opinions pursuant to Federal Rules of Evidence 702."*Id.* (emphasis added).

***2** On April 6, 2011, Plaintiffs supplemented their disclosures related to Witt and Wong. *Plaintiffs' Supplement to Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [Docket No. 55–1] at 12–13. Plaintiffs stated that Witt "may be asked questions concerning ... CT images of [a] misplaced pedicle screw which he had not seen prior to his consultation with [Mr. Scholl] on June 9, 2009, and testify concerning the likely cause of such and the affect [sic] of same with regard to Mr. Scholl's injuries."*Id.* at 12.Plaintiffs stated that Wong "may be asked questions in rebuttal to [Defendant's retained expert witness's] opinions."*Id.*

On May 2, 2011, Plaintiffs further supplemented their disclosures related to Witt. *Plaintiffs' Second Supplement to Fed.R.Civ.P. 26(a)(2)Disclosures of Expert Testimony* [# 55–1] at 14–36.They provided Witt's curriculum vitae, fee schedule, and testimonial history for the past four years. *Id.* They also elaborated on Witt's June 9, 2009 medical report following his consultation with Mr. Scholl: "This essentially is Dr. Witt's expression of opinion concerning the nature of [Mr. Scholl's] injury, i.e., L5, S1 and S2 nerve root injuries, more severe on the right than the left as a result [of] surgical complications in December 2007. [Witt] believes ... that the cause of the injuries is much more likely attributable to a 'retraction injury' or 'direct impact injury,' versus a postoperative blood clot as contended by [Defendant]."*Id.* at 15.Plaintiffs stated that Witt will explain that an "EMG study" and "CT scan" he ordered confirm his opinion regarding causation of Mr. Scholl's injuries. *Id.* at 16–17.Plaintiffs further stated that Witt "has now also examined [a separate] CT scan image showing Defendant's S1 screw transversing Mr. Scholl's foramen and nerve roots," and that Witt "is of the opinion ... that the severely misplaced S1 screw likely caused Mr. Scholl damage in the S1, S2 nerve roots on the right side."*Id.* at 17.

B. Analysis

Defendant contends that because Plaintiffs intend to rely upon expert opinions that Witt, Wong, and Fishinger were asked to develop specifically for this case, the Court should consider these witnesses to be "retained or specially employed" within the meaning of Fed.R.Civ.P. 26(a)(2)(B).*Motion* [# 55] at 2. Accordingly, Defendant argues that Plaintiffs' disclosures related to these witnesses are improper and inadequate. *Id.* First, Defendant argues that the disclosures are improper because Plaintiffs have already disclosed four retained expert witnesses, which is the maximum number allowed by the Court. [1] *Reply* [# 68] at 7. Second, Defendant argues that the disclosures are inadequate because they do not include reports signed by Witt, Wong and Fishinger containing the following information: (1) a complete statement of all opinions they will express and the basis therefore; (2) the facts or data used to summarize or support their opinions; (3) any exhibits used to summarize or support their opinions; (4) their qualifications; (5) a list of all other cases during the previous four years in which they testified as experts at trial or deposition; and (6) a statement of their compensation. *Motion* [# 55] at 2; *see*Fed.R.Civ.P. 26(a)(2)(B) (stating the content requirements for retained expert witness reports).

***3** In response, Plaintiffs concede that their disclosures related to Witt, Wong, and Fishinger do not satisfy the requirements of Fed.R.Civ.P. 26(a)(2)(B).*Response* [# 65] at 1–2. However, Plaintiffs contend that Witt, Wong, and Fishinger are non-retained expert witnesses. *Id.* Accordingly, Plaintiffs argue that these witnesses are not required to file a written report. *Id.*

Fed.R.Civ.P. 26(a)(2)(A) requires that "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705."*See Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 501 (D.Md.1997) (stating that even in the case of a "hybrid" witness who will provide both factual testimony and opinion evidence under Fed.R.Evid. 702, 703, or 705, a party must still disclose the witness's identity under Rule 26(a)(2)(A)). These witnesses are referred to as expert witnesses. If such a witness is "one retained or specially employed to provide expert testimony in the case," the disclosure of his identity must be accompanied by a written report prepared and signed by him. Fed.R.Civ.P. 26(a)(2)(B). If an expert witness is not retained or specially employed, no written report is required. Fed.R.Civ.P. 26(a)(2)(A-C). Instead, his disclosure must state (I) the subject matter on which he is expected to present evidence, and (ii) a summary of the facts and opinions to which he is expected to testify. Fed.R.Civ.P. 26(a)(2)(C).

Typically, a physician who has treated a party for injuries is not considered "retained or specially employed" within the meaning of Rule 26(a)(2)(B). Therefore, a treating physician is not ordinarily required to provide an expert report. *See, e.g.*, *Morris v. Wells Fargo Bank, N.A.*, No. 09–cv–02160–CMA–KMT, 2010 WL 2501078 at *1 (D. Colo. June 17, 2010) (unreported decision) ("[I]n general, treating physicians do not come within the purview of the report requirement."); *Stone v. Deagle*, No. 05–cv–1438–RPM–CBS, 2006 U.S. Dist. LEXIS 90430, at *9–10 (D.Colo. Dec. 14, 2006) (unreported decision) ("In contrast to the retained expert, the Advisory Committee Notes to Rule 26(a)(2)(B) state that a 'treating physician ... can be deposed or called to testify at trial without any requirement for a written report.'Presumably, a written report from a treating physician is not necessary because the treating physician prepares contemporaneous

notes documenting his observations, findings and treatments regime.").

However, "Rule 26(a)(2)(B) focuses not on the status of the witness, but rather on the substance and/or scope of [his] testimony ."*Sellers v. Butler*, No. 02–3055–DJW, 2006 WL 2714274 at *3 (D .Kan. Sept. 22, 2006) (unreported decision); *see also Trejo v. Franklin*, No. 04–cv–02523–REB–MJW, 2007 WL 2221433, at *1 (D.Colo., July 30, 2007) (unreported decision) (noting that a treating physician is not immunized "from the requirement of providing a written report in conformity with Rule 26(a)(2)(B) in all circumstances"); *Wreath v. Kansas*, 161 F.R.D. 448, 450 (D.Kan.1995) ("The determinative issue is the scope of the proposed testimony.")."[A] treating physician who has formulated opinions going beyond what was necessary to provide appropriate care for the injured party steps into the shoes of a retained expert for the purposes of"Rule 26(a)(2)(B).*Stone*, 2006 U.S. Dist. LEXIS 90430 at *11 (quoting *Thomas v. Consol. Rail Corp.*, 169 F.R.D. 1, 2 (D.Mass.1996)); *see also Wreath*, 161 F.5d at 450 ("[A] treating physician requested to review medical records of another health care provider in order to render opinion testimony concerning the appropriateness of the care and treatment of that provider would be specifically retained notwithstanding that he also happens to be the treating physician.").

***4** "Similarly, when a treating physician's information or opinions were developed for trial, or where [his] expert testimony will concern matters not based on observations during the course of treatment, the treating physician will be required to prepare a written report" pursuant to Rule 26(a)(2)(B).*Stone*, 2006 U.S. Dist. LEXIS 90430, at *11 (citing *Washington v. Arapahoe County Dep't of Soc. Servs.*, 197 F.R.D. 439, 441–42 (D.Colo.2000)). One matter that is typically "not based on observations during the course of treatment" is the cause of a patient's injuries. Generally, "when a treating physician opines as to causation, prognosis, or future disability, [he] is going beyond what he saw and did and why he did it. He is going beyond his personal involvement in the facts of the case and giving an opinion formed because there is a lawsuit."*Griffith v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 233 F.R.D. 513, 518 (N.D.Ill.2006). In some cases, however, a treating physician may be required to form an opinion about the cause of an injury in order to properly treat it. In such cases, the physician may testify about his opinion regarding causation "to the limited extent that [the opinion was] a necessary part of a patient's treatment" without being considered a retained expert witness.*Starling v. Union Pac. R.R. Co.*, 203 F.R.D. 468, 479 (D.Kan.2001). [2]

The Court has previously adopted a burden-shifting procedure for determining whether a designated expert witness is "retained or specially employed" and thus required to provide a report. *Morris*, 2010 WL 2501078, at *2 ("[I]t is clear that some showing must be made to distinguish an expert witness not required to provide a report under Rule 26(a)(2)(B) from the vast majority of cases where experts are required to provide a report."). The initial burden is on the party moving to strike the expert witness to show that the party who designated the witness has failed to produce an adequate written expert report pursuant to Rule 26(a)(2)(B).*Id.* The burden then shifts to the designating party to produce some evidence demonstrating that the designated expert is not retained or specially employed. *Id.* (noting that vague assertions that a designated expert is a non-retained treating physician are insufficient).

Turning to this case, the parties agree that Plaintiffs' disclosures related to Witt, Wong, and Fishinger are not "in compliance with [Rule] 26(a)(2)(B)."*Motion* [# 55] at 2; *Response* [# 65] at 13 ("The three experts that Defendant complains about fit [the] definition of a non-retained expert."). The Court therefore finds that Defendant has carried his initial burden. Accordingly, the burden shifts to Plaintiffs to demonstrate that Witt, Wong, and Fishinger are not retained or specially employed.

(1) Wong

Plaintiffs' original disclosure of Wong's testimony stated that he would testify only about medical reports that (1) were created during his treatment of Mr. Scholl, and (2) document opinions formed during the course of that treatment. *Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 30] at 4. When a treating physician testifies as to "contemporaneous notes documenting his observations, findings and treatments regime," he testifies as a non-retained expert witness. *Stone*, 2006 U.S. Dist. LEXIS 90430 at *9–10. However, Plaintiffs' supplemental disclosure related to Wong states that he will testify about another doctor's opinions. *Plaintiffs' Supplement to Fed.R.Civ.P.*

26(a)(2) Disclosure of Expert Testimony [# 55–1] at 12, ¶ 2. Because "a treating physician requested to review medical records of another health care provider in order to render opinion testimony ... [is considered to be] specifically retained," Wong acts as a retained expert witness if he testifies about another doctor's opinions. *Wreath,* 161 F.5d at 450. As Plaintiffs have already designated four retained expert witnesses, *see supra* n. 1, Wong's testimony must be limited to that of a non-retained expert witness.*Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 30] at 1–3; *Courtroom Minutes/Minute Order* [# 41] at 1. Accordingly, Wong may not testify "in rebuttal to Dr. Ginsberg's opinions set forth in Defendant's expert witness disclosures."*Plaintiff's Supplement to Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 55–1] at 12.He may testify only about his observations during the course of his treatment of Mr. Scholl, i.e., "what he saw and did and why he did it."*Griffith,* 233 F.R.D. at 518.

(2) Witt

***5** Plaintiffs' original disclosure of Witt's testimony stated that he would testify about medical reports that he created when treating Mr. Scholl as well as "other radiographic reports and assessments, which [he] relied upon."*Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 30] at 3. This proposed testimony includes "not only opinions concerning Mr. Scholl's condition, but [also opinions concerning] the likely cause and extent of Mr. Scholl's nerve injuries."*Id.* When a treating physician testifies as to "contemporaneous notes documenting his observations, findings and treatments regime," he testifies as a non-retained expert witness. *Stone,* 2006 U.S. Dist. LEXIS 90430 at *9–10. Further, "to the limited extent that opinions about the cause of an injury are a necessary part of a patient's treatment, treating physicians may opine on causation without triggering any need for a full-blown Rule 26(a)(2)(B) report."*Starling,* 203 F.R.D. at 479.Here, Plaintiffs' supplemental disclosures relating to Witt state that he will testify about a CT image "which he had not seen prior to [or during] his consultation with [Mr. Scholl]."*Plaintiffs' Supplement to Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 55–1] at 12.Because a treating physician whose "testimony will concern matters not based on observations during the course of treatment" is considered to be a retained expert witness, Witt acts as a retained expert witness if he testifies about the CT image. *Stone,* 2006 U.S. Dist. LEXIS 90430, at *11. Because Plaintiffs have already designated four retained expert witnesses, Witt's testimony must be limited to that of a non-retained expert witness. *Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 30] at 1–3; *Courtroom Minutes/Minute Order* [# 41] at 1. Accordingly, Witt cannot "be asked questions concerning the CT images of the misplaced pedicle screw which he had not seen prior to [or during] his consultation with [Mr. Scholl]."*Plaintiff's Supplement to Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 55–1] at 12.Witt also may not testify about other doctors' opinions or about CT images or other medical reports or diagnostic test results that he did not review contemporaneously with his provision of treatment to Mr. Scholl. He may testify only about his observations during the course of his treatment of Mr. Scholl, i.e., "what he saw and did and why he did it."*Griffith,* 233 F.R.D. at 518.

(3) Fishinger

Plaintiffs state that Fishinger will testify about (1) her opinion that Mr. Scholl's "business likely would have grown, but for [his] injuries," and (2) her projection of Mr. Scholl's future earnings from the date of his surgery performed by Defendant. *Plaintiffs' Fed R. Civ P. 26(a)(2) Disclosure of Expert Testimony* [# 30] at 7. When an expert witness's "information or opinions were developed for trial ... [the expert witness] will be required to prepare a written report" that satisfies the requirements of Rule 26(a)(2)(B).*Stone,* 2006 U.S. Dist. LEXIS 90430, at *11.[3] The burden is on Plaintiffs to show that Fishinger's proposed testimony and her projection of Mr. Scholl's business's growth were not prepared in anticipation of litigation. See Morris, 2010 U.S. Dist. LEXIS 68785, at *5. The Court finds that Plaintiffs have failed to carry this burden as they have offered no explanation of when or why Fishinger made her projection. Response [# 65] at 9–10. It may not be unusual for an accountant to prepare future income projections in the normal course of her work for a business. But Plaintiffs have not stated that Fishinger's projection was so made. *Id.* It appears to the Court that her opinions were developed specifically for this case. Thus, Fishinger acts as a retained expert witness if she testifies as to her projection of Mr. Scholl's business's future growth following his surgery. Stone, 2006 U.S. Dist. LEXIS 90430, at *11. Because Plaintiffs have already designated four retained expert witnesses and are allowed no more than four, Fishinger's testimony must be limited to that of a non-retained expert witness. Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of

Expert Testimony [# 30] at 1–3; Courtroom Minutes/Minute Order [# 41] at 1. Accordingly, Fishinger may testify only about the facts of Mr. Scholl's finances before and after his surgery. She may not provide any opinion testimony, including projections concerning Mr. Scholl's future income.

***6** IT IS HEREBY **ORDERED** that Defendant's Motion to Strike and for Protective Order [# 55] is **GRANTED.**Accordingly,

IT IS FURTHER **ORDERED** that the testimony of Witt, Wong, and Fishinger is limited as set forth above.

C. Conclusion

Footnotes

1 On November 30, 2010, Plaintiffs disclosed the following retained expert witnesses: Paul McAfee, M.D.; Patricia Pacey, Ph.D.; George Leimback, M.D.; and Cynthia Haseley, BSN, RN. *Plaintiffs' Fed.R.Civ.P. 26(a)(2) Disclosure of Expert Testimony* [# 30] at 1–2.

2 Plaintiffs urge the Court to adopt and apply a somewhat different rule setting the limits of a treating physician's testimony without being considered a retained expert. *Response* [# 65] at 13. Plaintiffs rely on the Court of Appeals for the First Circuit's decision in *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 7 (1st Cir.2011), which states as follows: "We conclude that as long as an expert was not retained or specifically employed in connection with the litigation, and his opinion about causation is premised on personal knowledge and observations made in the course of treatment, no report is required under the terms of Rule 26(a)(2)(B)."*Downey* is not controlling authority in this Circuit. As the Court of Appeals acknowledged in *Downey*, some district courts, including our neighboring court in the District of Kansas, "have held that a report is required for causation testimony that was not necessary to the treatment."*Id.* (citing *Starling*, 203 F.R.D. at 479).

3 The rules governing the limits of a treating physician's expert testimony apply equally to govern the limits of expert testimony offered by other professionals. *See Full Faith Church of Love West, Inc. v. Hoover Treated Wood Prods., Inc.*, No. Civ.A 01–2597–KHV, 2003 WL 169015 at *1 (D. Kan. Jan 23, 2003) (unreported decision) ("Plaintiff asserts that the testimony of [two general contractors that he had hired] is analogous to that of a treating physician. The Court agrees.").

2007 WL 4741335 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
Jefferson County

Tom PROBST, an individual, Plaintiff,
v.
PORTLAND SYSTEMS, LLC, a Colorado limited liability company d/b/a Portland Systems, Defendant.

No. 06CV2358.
June 22, 2007.

Division 9

Order on Defendant's Motions in Limine and for Continuance of Trial

Jack W. Berryhill, District Court Judge.

Ctrm 5F

THIS MATTER comes before me on defendant's motion in limine, filed on May 28, 2007, to limit the scope of testimony offered by plaintiff's witness Rodney Ems, and plaintiff's response in opposition thereto, filed on June 18, 2007. While the time for a reply has not yet passed, the trial in this case is set on June 28, 2007 and therefore I issue an expedited ruling based on the motion and response.

Defendant objects to plaintiff offering Mr. Ems as an expert witness at trial because Mr. Ems was not disclosed as an expert witness one hundred and twenty days before trial pursuant to C.R.C.P. 26(a)(2)(C)(I). Plaintiff asserts that because Mr. Ems was directly involved in the transactions underlying this case, he will be called as a fact witness and will testify about his personal involvement and communications he had with the parties.

The status of a witness as a "fact witness" versus an "expert witness" depends on the content of his or her testimony. If one only testifies as to what one has observed and done, one is a fact witness. But if, in addition to testifying to facts, the witness offers an opinion under Rule of Evidence 702 (or its comparable analogue), the person is testifying as an expert witness. *See, e.g., Smith v. Paiz,* 84 P.3d 1272 (Wyo. 2004).

A person such as Rodney Ems is within the fourth category of experts described in *Ager v. Jane C. Stormont Hospital & Training School for Nurses,* 622 D.2d 496, 500-03 (10th Cir. 1980): an expert whose expertise was not acquired in preparation for trial. This includes regular employees of a party not specially employed on the case and persons who were actors or viewers of occurrences that have rise to the suit. *See also Norfin, Inc. v. IBM Corp.,* 74 F.R.D. 529 (D. Colo. 1977).

Although an expert in the latter category does not have to prepare as full a report as a specially retained expert, *compare* C.R.C.P. 26[a][2][B][I] *with* C.R.C.P. 26[a][2][B][II], such a person must still be designated as an expert in order to give Rule 702 expert opinion testimony. *See Robolledoi v. Herr-Voss Corp.,* 101 F. Supp. 2d 1034 (N.D. Ill. 2000). Again, the *content* and *context* of the testimony are the touchstone. For example, a treating physician need only provide a report if she intends to offer expert testimony about matters not based on her observations during the course of providing treatment; but where her testimony is

limited to areas of "diagnosis and prognosis" no expert report is required. *Washington v. Arapahoe County Dep't of Social Services,* 197 F.R.D. 439 (D. Colo. 2000). *See also Full Faith Church of Love v. Hoover Treated Wood Prods., Inc.,* 2003 WL 169015 (D. Kan.) (no report required from contractor who repaired roof and intends to testify about damages).

IT IS THEREFORE ORDERED that defendant's motion in limine is GRANTED IN PART to the extent that Mr. Ems' testimony, if not properly disclosed under C.R.C.P. 26, will be limited in accordance with the above.

IT IS FURTHER ORDERED that defendant's motion for continuance is DENIED. This case has been set for a two-day trial (now only to the court rather than to a jury) since last October. The court has set aside the time to hear and will accommodate Mr. Canale's needs as much as it reasonably can. Plaintiff originally filed the case in the County Court, and it was defendant who asked to have it transferred to the District Court, where our docket will not accommodate another two-day trial setting until sometime after the first of the year. The case has been pending now for over a year. It needs to be tried without further delay. Trial therefore remains set to commence on June 28, 2007 at 8:30 a.m.

DATED: June 22, 2007

BY THE COURT:

<<signature>>

JACK W. BERRYHILL

District Court Judge

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DISTRICT COURT, LARIMER COUNTY, COLORADO

Court's Address: 201 LaPorte Ave., Suite 100
Fort Collins, Colorado 80521

Plaintiffs: **CHERRI SHINKLE, and CHERRI SHINKLE, as Personal Representative of the Estate of David Lee Shinkle,**

v.

Defendants: **WILLIAM JOHN WAGGENER, M.D., EDWARD ALLEN NORMAN, M.D., ANTHONY H. DOING, M.D., NELSON PEREZ TRUJILLO, M.D., MELINDA LEE HOFFERBER, R.N./N.P.C., and ROCKY MOUNTAIN CARDIOLOGY, P.C.**

▲ COURT USE ONLY ▲

Case Number: 07CV149

Div: 5C

ORDER GRANTING DEFENDANTS' MOTION TO MEET *EX PARTE* WITH PLAINTIFF'S TREATING HEALTH CARE PROVIDERS

This matter comes before the Court on Defendants' Motion to Meet *Ex Parte* with Certain of Plaintiff's Treating Health Care Providers. The Court is advised in its premises and has reviewed the responses and replies, and rules as follows:

The Court GRANTS the Motion. Defendants are permitted to meet *ex parte* with the health care providers listed in their motion.

The recent Colorado Supreme Court decision of *In re Reutter v. Weber*, __ P.3d __ (Colo. No. 06SA79, April 30, 2007), squarely addresses *ex parte* meetings with health care providers.

Plaintiffs bring claims against Defendants alleging negligence related to a cardiac evaluation and claiming that Defendants' alleged negligence caused David Lee Shinkle's death.

2/13/08

Therefore, at issue in this case is the cause of Mr. Shinkle's death and one aspect into the investigation of David Shinkle's death includes interviewing the health care providers who evaluated and treated Mr. Shinkle before his death.

Defendants demonstrate in their motion that there is no residually privileged information in possession of those health care providers identified and Plaintiffs' response does not identify residually privileged information. The standard in *Reutter v. Weber* is whether there exists a high risk that residually privileged information will be disclosed in meetings. *Id.* at *1. The purpose of *Samms* and *Reutter* is to protect privileged information by providing the right to attend an interview in the event that there exists, and is shown to be, a high risk that residually privileged information will be divulged in an interview of the health care provider. *Id.* If there is not a high risk that residually privileged information will be divulged in that interview, then *Reutter* dictates that the court should allow the *ex parte* meeting. *Id.* Here, no residual privilege exists, no residual privilege has been identified, and there is clearly no high risk that residually privileged information will be disclosed.

Plaintiffs have waived the physician-patient privilege by bringing their claims and injecting Mr. Shinkle's medical condition into this case. "[W]aiver of the physician-patient privilege occurs when 'the privilege holder has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense.'" *Weil v. Dillon Companies, Inc.*, 109 P.3d 127, 129-30 (Colo. 2005); *Clark v. District Court*, 668 P.2d 3, 10 (Colo. 1983); *see also Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 863 (Colo. 2004); and *Johnson v. Trujillo*, 977 P.2d

152, 155 (Colo. 1999). Waiver of the physician-patient privilege is not solely for medical malpractice cases. Indeed, a plaintiff can waive the physician-patient privilege in automobile accident cases, *see Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005), and in premises liability cases, *Weil v. Dillon Companies, Inc.*, 109 P.3d at 129-30.

Here, Plaintiffs do not dispute that a central issue in this case is the cause (or causes) of Mr. Shinkle's death. Indeed, Plaintiffs claim that Nurse Hofferber "was negligent in her failure to properly diagnose, treat, and care for David Lee Shinkle. Such negligence consisted of, but was not limited to, the evaluation of Decedent's condition and prescription of medication." Complaint, ¶ 42. This means that Plaintiffs place at issue the cause and extent of the injuries and damages resulting from Defendants' alleged negligence thereby waiving any physician-patient privilege for the associated treatment or evaluations. Specifically, Plaintiffs' expert claims that Defendants' negligence caused the "cardiac arrest, multisystem organ failure, brain damage and eventual death." It follows that Plaintiffs have waived the physician-patient privilege for treatment of Mr. Shinkle's cardiac arrest, multisystem organ failure, brain damage and eventual death. Additionally, it follows that Plaintiffs have waived the physician-patient privilege for anyone who evaluated and treated Mr. Shinkle for those same symptoms and problems that he presented with during Defendants' evaluation. Plaintiffs do not make (and cannot make) a showing that there is a residual privilege for any of these health care providers. These health care providers include those at McKee Medical Center who evaluated Mr. Shinkle in July 2004; Dr. Jenny Fox; Thompson Valley EMS personnel; the health care providers at

McKee Medical Center who treated Mr. Shinkle for cardiac arrest and multisystem organ failure; and the health care providers at Poudre Valley Hospital, where Mr. Shinkle was evaluated for multisystem organ failure until his death.

In addition to implied waiver of the privilege, *Reutter* is also clear that a defendant may meet *ex parte* with a physician for whom there is no physician-patient privilege. This includes those physicians under the "in consultation with" exception of the physician-patient privilege. *Reutter* at *3-6. As a preliminary matter, Plaintiffs have the burden of establishing that the "in consultation with" exception is inapplicable. *Reutter*, at *3. Plaintiffs have not met this burden.

Reutter explains that determination of whether a health care provider fits within the "in consultation with" exception under C.R.S. § 13-90-107(1)(d)(II) is whether the health care providers were engaged in a "unified course of treatment": "Under this analysis, medical providers are "in consultation with" one another if they collectively and collaboratively assess and act for a patient by providing a unified course of medical treatment." *Reutter*, at *4.

Like *Reutter*, in this case, Defendants and the medical providers were assessing Mr. Shinkle's ongoing illness and same symptoms which included chest pain and shortness of breath. The health care providers were treating Mr. Shinkle for these same symptoms and ongoing illness. As shown, the Defendants, the providers at McKee involved in the July 2004 cardiac evaluation and Dr. Jenny Fox provided a unified course of treatment for Mr. Shinkle. Under *Reutter* and *Samms*, Defendants are entitled to meet *ex parte* with the McKee providers for the July 2004 cardiac evaluation and Dr. Jenny Fox because there is no physician-patient privilege

for these providers are they were "in consultation with" Defendants under C.R.S. 13-90-107(1)(d)(II).

This Court orders that Defendants are permitted to meet *ex parte* with the following health care providers: Jenny Fox, M.D.; Thompson Valley EMS personnel (Tomi Robirds, EMT and Shawn Sorrow, EMT); providers at McKee Medical Center (including James P. Valin, M.D., Jeffery R. Weissman, M.D., R. Giansiracusa, M.D., Randall Sato, M.D., David Kukafka, M.D., James R. Singer, M.D., Maria S. Chand, M.D., Stanley R. Gunstream, M.D., Lewis R. Strong, M.D., Bradford R. Keeler, M.D., Monica Minkoff, M.D., Curtis Markel, M.D., Bob F. Klingelheber, M.D., Robert L. Lile, M.D., Aimee Voklmann, RN, and Staci Love, RN.); and providers at Poudre Valley Hospital (including David Kukafka, M.D., Diana Mahurin, M.D., Jacob C. Liao-Ong, M.D., Christopher M. Eriksen, M.D., Winfield M. Craven, M.D., Bruce A. Berkowitz, M.D., Charles J. Singer, M.D., Thomas J. Luttenegger, M.D., and Musa A. Mbahi, M.D.).

Dated this 13th day of February, 2008.

District Court Judge

94 P.3d 1204
Colorado Court of Appeals,
Div IV.

Linda SVENDSEN, Plaintiff–Appellant,
v.
Walter G. ROBINSON, M.D., and
Woodridge Orthopaedic and Spine
Center, P.C., Defendants–Appellees.

No. 03CA0365.
|
March 25, 2004.
|
Certiorari Denied Aug. 2, 2004.

Synopsis

Background: Plaintiff brought a medical malpractice action against a physician and medical center. After granting defendants' motion to strike plaintiff's standard of care expert for failure to comply with disclosure requirements, the District Court, Jefferson County, No. 01CV1841, Frank Plaut, J., granted summary judgment for defendants. Plaintiff appealed.

Holdings: The Court of Appeals, Graham, J., held that:

disclosures of plaintiff's expert witness failed to meet minimum requirements with regard to identification of cases in which the witness had previously expressed opinions;

failure of plaintiff's expert to comply with disclosure requirements was not harmless; and

plaintiff was unable to establish prima facie case of negligence without testimony of plaintiff's expert.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***1205** Andrew T. Brake, P.C., Lee T. Judd, Englewood, Colorado, for Plaintiff–Appellant.

Pryor, Johnson, Montoya, Carney & Karr, P.C., Irving G. Johnson, Elizabeth C. Moran, Felice S. Haas, Greenwood Village, Colorado, for Defendants–Appellees.

Opinion

Opinion by Judge GRAHAM.

Plaintiff, Linda Svendsen, appeals the order striking her expert witness and the summary judgment entered in favor of defendants, Walter G. Robinson, M.D. and Woodridge Orthopaedic and Spine Center, P.C., on her medical malpractice claim. We affirm.

I.

Plaintiff contends that the trial court erred in granting defendants' motion to strike her standard of care expert without affording her an opportunity to respond to the motion. We perceive no reversible error.

Defendants filed a motion to strike plaintiff's standard of care expert for failure to comply with C.R.C.P. 26. The court granted the motion before time had expired for plaintiff to file her response, and defendants then filed a motion for summary judgment. After receiving the court's order, plaintiff filed a motion for reconsideration and a response to ***1206** defendants' motion to strike. The trial court set the matter for hearing. Before the hearing, plaintiff filed a supplement to her motion for reconsideration, a supplemental endorsement of her standard of care expert, and a response to defendants' motion for summary judgment.

At the hearing, plaintiff explained how her expert disclosures complied with C.R.C.P. 26, or alternatively, why noncompliance was substantially justified or harmless to defendants. After considering all the motions, the court upheld its order striking plaintiff's standard of care expert and entered summary judgment in favor of defendants.

We conclude that, although the court entered its order to strike prematurely, plaintiff was not prejudiced because she had an adequate opportunity to show why the motion should not have been granted. Any error was therefore harmless. *See Ferrera v. Nielsen,* 799 P.2d 458 (Colo.App.1990)(no error where plaintiff requested and received an opportunity to respond in its summary judgment order to the new issue raised by the trial court).

II.

Plaintiff next contends that the trial court improperly precluded the testimony of her expert witness under C.R.C.P. 37(c) for failure to comply with the disclosure requirements of C.R.C.P. 26(a)(2)(B)(I). We find no error.

The trial court concluded that: (1) plaintiff's failure to comply with C.R.C.P. 26(a)(2)(B)(I) precluded defendants from fully and effectively preparing for the expert's deposition; (2) plaintiff did not establish that the failure was harmless; (3) the preparation of this case was expensive, and any further delay enabling plaintiff to comply with all pretrial requirements would cause defendants to incur substantial duplicative costs and fees; (4) plaintiff was aware of the disclosure requirements and did not establish difficulty obtaining the information from the experts; and (5) there was no way to easily identify or, more importantly, locate the expert's prior testimony because the expert disclosures did not provide the jurisdiction, venue, or case numbers, nor was there information regarding where in the United States the listed parties and attorneys might be located.

We review the trial court's decision to preclude an expert witness for abuse of discretion. *Carlson v. Ferris,* 58 P.3d 1055 (Colo.App.2002), *aff'd,* 85 P.3d 504 (Colo.2003); *Sheid v. Hewlett Packard,* 826 P.2d 396 (Colo.App.1991).

Discovery obligations and the expert disclosure requirements of C.R.C.P. 26(a) are enforced by the sanction mechanisms of C.R.C.P. 37. C.R.C.P. 37(c) provides for the preclusion of nondisclosed evidence unless the nondisclosing party establishes that its failure to disclose was either substantially justified or harmless. *Todd v. Bear Valley Vill. Apartments,* 980 P.2d 973 (Colo.1999).

C.R.C.P. 26(a)(2)(B)(I) requires that witnesses retained to provide expert testimony submit a disclosure report containing, among other things, "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Failure to comply with this rule warrants precluding the expert's testimony. C.R.C.P. 37(c)(1); *Carlson v. Ferris, supra.*

The identification of cases in which an expert has previously expressed opinions should include, at a minimum, the name of the court or administrative agency where the testimony occurred, the names of the parties, the case number, and whether the testimony was by deposition or at trial. *Carlson v. Ferris, supra.*

Here, plaintiff's expert initially provided defendants with a "sales by customer" list that included the attorney's name and firm, the date of the testimony, the amount charged, and in some instances, the case name. The list also contained a numerical code, which, as the expert later explained during his deposition, identified whether it was arbitration or trial testimony. The list did not contain case numbers, the name of the court or agency, or the venue or state where the attorneys were located. Furthermore, this list only included testimony taken at trials and arbitrations, not at depositions.

Because of the insufficient disclosures, in connection with their notice of deposition sent to plaintiff's expert, defendants requested, ***1207** among other things, "a listing of deposition and trial testimony expert has provided over the past four years." Defendants explained that plaintiff was required to provide this information under C.R.C.P. 26(a)(2)(B) and that it was included in the deposition notice because the expert endorsement was insufficient under *Carlson v. Ferris, supra.* Defendants stated that they would not require the expert to supply the additional information that was requested with the notice of deposition if the expert complied with C.R.C.P. 26 before his deposition. Defendants warned that if the proper disclosures were not made, they would file a motion to strike the expert witness.

Defendants were not given any information regarding the expert's prior deposition testimony until the day of his deposition in California. That deposition list, however, consisted only of the date and the attorney's name. Again, there was no case number, case name, court, or party name listed. This deposition list was never supplemented.

We agree with the trial court that the disclosures of the expert failed to meet the minimums of C.R.C.P. 26(a)(2)(B)(I) either in the initial or supplemental disclosures, and plaintiff provided no justification for the noncompliance. The expert had a list of the attorneys' names, as well as sufficient other information so that, with some diligent effort, he could have supplied the information required in C.R.C.P. 26. *See Carlson v. Ferris, supra.*

Nor was the failure to comply harmless. Failure to comply with the mandate of C.R.C.P. 26 is harmless when there is no prejudice to the party entitled to disclosure. The purpose

of providing a list of prior cases is to enable opposing counsel to obtain prior testimony of the expert that may be relevant to the proposed testimony in the pending case and to enable a party to prepare for cross-examination at a deposition or a trial. Failure to disclose the information is not harmless as contemplated by the rules. *Carlson v. Ferris, supra; see also Todd v. Bear Valley Vill. Apartments, supra* (in evaluating harmlessness under C.R.C.P. 37(c), the inquiry is whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence).

Plaintiff contends that there was substantial compliance with the rule when the expert disclosed to defendants the case names, attorney names, firm names, and dates of prior testimony during his deposition. We disagree.

One purpose of C.R.C.P. 26 is to avoid having to take depositions in the interest of judicial economy and cost reduction. The burden was on plaintiff and her expert to furnish the required information in advance; it was not shifted to defendants to discover it by deposition. *See Carlson v. Ferris, supra.* Furthermore, although plaintiff supplemented some of the expert's listings by providing the venue and case name, the list was not updated until after the expert's deposition.

With the information supplied, defendants would be required to contact each of the attorneys listed and identify the cases. Of necessity, each attorney contacted would be required to cooperate by searching indexes and files to obtain the information and by providing such information in a timely manner. Although ultimately defendants might have obtained the information in those cases where the attorneys were sufficiently identified and cooperative, the burden was shifted from the disclosing party to the discovering party to identify the cases. To obtain the information that plaintiff is required to disclose, defendants were, and would be, required to expend substantial time and resources. *See Nguyen v. IBP, Inc.,* 162 F.R.D. 675 (D.Kan.1995)(cooperation required of more than 100 attorneys who were not involved in the case).

We also reject plaintiff's contention that, before a court may preclude expert testimony under C.R.C.P. 37(c)(1), the court first must order compliance and then allow the nondisclosing party to correct the deficiencies. A C.R.C.P. 37 sanction is automatic and self-executing. *Todd v. Bear Valley Vill. Apartments, supra; see also Ortiz–Lopez v. Sociedad Espanola de Auxilio Mutuo Y Beneficiencia,* 248 F.3d 29 (1st Cir.2001)(a court order need not first be violated before the court may impose the sanction provided under ***1208** Fed.R.Civ.P. 37(c)); *Palmer v. Rhodes Mach.,* 187 F.R.D. 653, 657 (N.D.Okla.1999)(there is no "one warning" exception contemplated by Fed.R.Civ.P. 26(a)); *Miller v. Rowtech, LLC,* 3 P.3d 492 (Colo.App.2000)(a motion for sanctions filed by the opposing party is not a prerequisite to the imposition of the sanction).

Defendants warned plaintiff that her expert disclosures were deficient. Although plaintiff had several opportunities to supplement the expert's disclosures before the deposition, she failed to do so.

Finally, defendants' request for information beyond what is required by C.R.C.P. 26(a)(2)(B)(I) does not relieve the expert from disclosing information required by that rule.

Thus, we conclude that the trial court did not abuse its discretion in precluding the testimony of plaintiff's standard of care expert.

III.

We also reject plaintiff's contention that the trial court erred in granting summary judgment in favor of defendants.

We review a summary judgment de novo, using the same standards that govern the trial court's determination. Thus, we uphold summary judgment only if the pleadings and supporting documents demonstrate that there is no genuine issue for trial as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.,* 901 P.2d 1251 (Colo.1995).

In a medical malpractice case, the burden is on the plaintiff to establish a prima facie case of negligence. To establish a prima facie case, the plaintiff must show that the defendant failed to conform to the standard of care. The standard of care in a medical malpractice action is measured by whether a reasonably careful physician in the same medical discipline as the defendant would have acted in the same manner as did the defendant in treating and caring for the plaintiff. *Melville v. Southward,* 791 P.2d 383 (Colo.1990).

Unless the subject matter of a medical malpractice action lies within the ambit of common knowledge or experience of

ordinary persons, the plaintiff must establish the controlling standard of care, as well as the defendant's failure to adhere to that standard, by expert opinion testimony. Without expert opinion testimony in such cases, the trier of fact would be left with no standard at all against which to evaluate the defendant's conduct. *Melville v. Southward, supra.*

Here, once the testimony of plaintiff's standard of care expert was precluded, it could not be considered on summary judgment, and therefore, plaintiff was unable to demonstrate that a genuine issue of material fact existed to support her medical malpractice claim. Thus, summary judgment was proper.

The judgment and order are affirmed.

Judge CASEBOLT and Judge LOEB concur.

All Citations

94 P.3d 1204

182 P.3d 674
Supreme Court of Colorado,
En Banc.

Barbara L. TRATTLER, individually, as representative of the Estate of Larry Trattler, deceased, and as next friend of Larry T. Trattler, Adam G. Trattler, and Andrew D. Trattler, minor children, Petitioner
v.
Daniel C. CITRON, M.D.; Colorado Internal Medicine Center, P.C.; Mark W. Keller, M.D.; and Aurora Denver Cardiology Associates, P.C., Respondents.

No. 06SC681.
|
April 14, 2008.
|
Rehearing Denied May 12, 2008. *

Synopsis

Background: Wife of husband who died as a result of a heart attack brought wrongful death action against husband's two treating physicians and their respective partnerships, alleging that they were liable for husband's death when they failed to find the arterial blockage that eventually led to his heart attack. The District Court, City and County of Denver, Joseph E. Meyer, III, J., granted defendants' motion to exclude testimony of both of wife's expert witnesses, and subsequently granted summary judgment for defendants as to wife's claim against one physician, and entered judgment on a jury verdict that found other physician not liable. Wife appealed. The Court of Appeals affirmed.

Holdings: On grant of wife's petition for writ of certiorari, the Supreme Court, en banc, Martinez, J., held that:

when preclusion of undisclosed evidence is an inappropriate or inadequate sanction for violation of expert witness disclosure requirements, further analysis is necessary to determine whether preclusion of disclosed evidence, or some alternative sanction, is appropriate; overruling *Woznicki v. Musick,* 119 P.3d 567, *Svendsen v. Robinson,* 94 P.3d 1204, and *Carlson v. Ferris,* 58 P.3d 1055, and

precluding plaintiff's experts from testifying was a disproportionate sanction for plaintiff's violation of rule that required her to disclose experts' testimonial history.

Judgment of the Court of Appeals reversed; case remanded for new trial.

Eid, J., dissented and filed a separate opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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Opinion

Justice MARTINEZ delivered the Opinion of the Court.

In this appeal, we review the unpublished opinion of the court of appeals in *Trattler v. Citron,* No. 04CA2113, 2006 WL 2506741 (Colo.App. Aug. 31, 2006). The court of appeals affirmed the trial court's order that two of the plaintiff's experts were properly excluded from testifying in a wrongful death action. Interpreting the disclosure provisions in C.R.C.P. 26(a)(2)(B)(I) and the sanctions for a violation of these disclosure rules available under C.R.C.P. 37(c)(1) the trial court found that the failure of two of the plaintiff's expert witnesses to disclose a portion of their testimonial history required preclusion of their trial testimony under Rule 37(c)(1).

We reverse the ruling of the court of appeals that Rule 37(c)(1) requires that experts be precluded from testifying when they fail to provide their testimonial history under Rule 26(a)(2)(B)(I). We find that the court of appeals' opinion is contrary to Rule 37(c)(1) in two ways. First, the court of appeals held that preclusion of the witnesses' testimony was the required sanction under Rule 37(c)(1) for a violation of Rule 26(a)(2)(B)(I). To the contrary, we read Rule 37(c)(1) first to provide for preclusion of the undisclosed evidence rather than for preclusion of the testimony of expert witnesses. Second, the court of appeals did not direct the trial court to consider the Rule 37(c)(1) sanctions available to the trial court in lieu of ***676** or in addition to preclusion of the undisclosed evidence. Thus, we hold that the court should look to the sanctions listed in the "in addition to or in lieu of" section of Rule 37(c)(1) when precluding undisclosed evidence is an inappropriate or inadequate sanction.

I. Facts and Procedural History

Barbara Trattler ("Trattler"), wife of the deceased Larry T. Trattler, brought this wrongful death action on behalf of herself, as next friend, as representative to the estate of the deceased, and on behalf of the deceased's two sons. She alleges that two doctors, Daniel Citron ("Dr. Citron") and Mark Keller ("Dr. Keller"), along with their respective partnerships, Colorado Internal Medicine Center and Aurora Denver Cardiology Associates respectively, were liable for the decedent's death when they failed to find the arterial blockage that eventually led to his heart attack.

In 1989, the deceased retained Dr. Citron as his primary physician. During the twelve years preceding his death, the deceased began registering an elevated cholesterol count, necessitating cholesterol inhibitors to curb a high LDL count. In November 1999, Dr. Citron ordered an EBCT scan to determine the extent to which the deceased exhibited calcium deposits in and around his coronary arteries. The deceased posted an EBCT score in the "slightly" to "highly" elevated range, suggesting the existence of arterial plaque.

Subsequently, Dr. Citron increased the deceased's cholesterol medications and referred him to a cardiologist, Dr. Keller, who was retained for the purpose of ruling out obstructive heart disease. Dr. Keller conducted a stress EKG on the decedent to test for heart abnormalities. Finding nothing out of the ordinary in the test results, Dr. Keller advised the decedent to continue treatment with Dr. Citron.

In late November or early December 2001, the deceased called Dr. Citron's office complaining of chest pains. Based on the description of the pain, Dr. Citron advised the deceased that the symptoms likely were not heart-related. Despite Dr. Citron's belief that the pain represented nothing serious, the deceased scheduled a complete physical for January 4, 2002. However, on December 22, 2001, the deceased suffered a sudden severe heart attack, which left him in a deep coma. He did not regain consciousness. With no prognosis for recovery and a high likelihood of brain damage, his family removed the deceased from life support on December 27, 2001. When he died, Larry Trattler was fifty years old. An autopsy later indicated that the deceased's heart attack was due to heart failure as a consequence of coronary blockage.

On her husband's behalf, Barbara Trattler filed suit against Drs. Citron and Keller, along with their partnerships, alleging substandard care, including the failure to offer a more sensitive cardiac test to detect obstructive heart disease. To prove her case, Trattler hired Drs. Jay Schapira ("Dr. Schapira") and Richard Birrer ("Dr. Birrer"), along with a third doctor, to serve as expert witnesses to demonstrate that Drs. Citron and Keller failed to meet their respective standards of care.

Specifically, Dr. Schapira was of the opinion that both Drs. Citron and Keller provided substandard medical care to Larry Trattler. Dr. Schapira was prepared to testify that Dr. Keller did not order the appropriate medical test and, as a result, did not detect Larry Trattler's obstructive heart disease. Further, Dr. Schapira was prepared to testify that Dr. Citron did not obtain Larry Trattler's informed consent by failing to refer Larry Trattler for additional tests once he posted a high heart score and complained of chest pains.

Dr. Birrer was prepared to testify that a stress thallium test should have been ordered by either Dr. Citron or Dr. Keller when Larry Trattler exhibited a high heart score and chest pains. In addition, Dr. Birrer was of the opinion that Dr. Citron should have referred Larry Trattler to an emergency room when he exhibited chest pains in the days before the heart attack. Unlike the third doctor, who was an academic doctor at a teaching hospital, both Drs. Birrer and Schapira were practicing clinicians with substantially ***677** more clinical experience than Trattler's third expert physician. [1]

In accordance with C.R.C.P. 26(a)(2), Trattler filed a disclosure approximately 120 days before trial, endorsing the three doctors to serve as expert witnesses on the various standards of care required in a medical malpractice suit. At the time of the endorsement, she provided the experts' qualifications, reports summarizing their findings, and a comprehensive list of their recent publications, each of which is required by Rule 26(a)(2)(B)(I). However, Trattler did not provide a complete list of the other cases in which Drs. Schapira and Birrer testified during the preceding four years, which Rule 26(a)(2)(B)(I) also requires.

Several weeks after the 120–day deadline passed, Trattler updated the experts' partial testimonial history and promised to supplement the list as additional information became available. Not waiting for Trattler to file a complete testimonial history for both experts, defendants' attorneys consulted a defense attorneys' expert witness database to compile their own list of cases in which Drs. Schapira and Birrer had previously testified. While it is unclear from the record whether the defendants' list was exhaustive, it was far more complete than the early lists provided by Trattler.

On June 15, 2004, when Dr. Schapira was deposed, defendants' attorneys used their more complete testimonial history to ask Dr. Schapira the details of several cases Trattler failed to disclose. This prompted a meeting between Trattler's attorney and Dr. Schapira over the lunch break, where Dr. Schapira attempted to remember every case in which he had testified over the previous four years and provided an updated list to the defense. However, this too was an incomplete list. When the parties did not finish the deposition in the eight hours allotted, Trattler agreed to allow the defendants a second day to depose Schapira so that they could further inquire about Schapira's testimonial history.

Similarly, when defendants' attorneys deposed Dr. Birrer a week later, he too was asked about cases not listed in his disclosure documents. Dr. Birrer also attempted to supplement his testimonial history. At the end of Dr. Birrer's deposition, the parties again agreed to continue the deposition at an undetermined later date so that the defendants could ask more questions about Dr. Birrer's past testimony once that testimonial history was known to them.

Before Drs. Schapira and Birrer could be scheduled for additional depositions, however, defendants filed motions to strike both Drs. Schapira and Birrer, claiming that each failed to provide adequate testimonial histories as required by Rule 26(a)(2)(B)(I). Specifically, defendants argued that Dr. Schapira failed to properly document over one hundred previous cases in which he testified in the four years prior to Trattler's suit. The defendants also claimed that Dr. Birrer failed to document six prior cases in which he gave testimony in the previous four years. Trattler filed a detailed response, and each of the experts further supplemented their prior disclosures. On July 9, 2004, twenty-five days prior to trial, Dr. Schapira submitted a list of 155 previous cases. Trattler claimed this was a complete list. Similarly, Dr. Birrer supplemented his testimonial history nineteen days prior to trial. While it is unclear from the record whether Dr. Schapira's list of past testimony was complete, the record does indicate that Dr. Birrer's testimonial history was complete by this final disclosure.

The defendants ignored Trattler's effort to schedule additional depositions. Instead, the defendants filed a motion with the trial court on July 2, 2004, to exclude the testimony of both experts. On August 18, 2004, less than four days before trial, the court issued a written order ruling in favor of defendants' motion to strike Trattler's experts. The trial court ordered that neither Dr. Schapira nor Dr. Birrer could testify at trial.

As to Dr. Schapira, the trial court found that he "did not timely comply with the ***678** obligation of a retained expert witness to provide four years of testimonial history under C.R.C.P. 26(a)(2)(B)(I)." The court then quoted Rule 37(c)(1) and concluded that "Rule 37(c)(1) *requires* that trial courts sanction all failures to disclose under Rules 26(a) and 26(e) with evidence or witness preclusion unless the failure to disclose is either substantially justified or harmless." (emphasis added). The court concluded that "Dr. Schapira's failure to abide by the rules precludes him from testifying as an expert." Declaring that it was bound by the language of the rule, the court concluded that Rule 37(c)(1) required that the experts be precluded from testifying at trial for violating Rule 26(a)(2)(B)(I), which mandates a timely, complete disclosure of testimonial history 120 days prior to trial. The trial court noted, however, that it did "not fault plaintiffs' counsel who seems to have made repeated efforts to persuade Dr. Schapira to make the required disclosure." As to the provision excusing incomplete disclosure if justified or harmless, the trial court concluded that "the sheer volume of testimony that Dr. Schapira failed to disclose convinces me that the failure was either willful or grossly negligent on his part" and thus not justified. Further, the court concluded that a "failure to disclose testimonial history is not harmless as contemplated by the rules." The record does not indicate what

the trial court used as a basis for determining that Trattler's nondisclosure was not harmless.

The trial court's written ruling also barred testimony from Dr. Birrer. The court found that, like Dr. Schapira, Dr. Birrer failed to adequately comply with Rule 26(a)(2)(B)(I) when he failed to provide a complete testimonial history 120 days prior to trial. The court again found that the failure to disclose was not harmless.

The day after the trial court issued the ruling precluding Drs. Schapira and Birrer from testifying, the court heard Trattler's motion to reconsider the exclusion of her two expert witnesses. At the hearing, Trattler made several arguments as to why the court's sanction was unwarranted or, at the very least, too harsh. She informed the court that both experts were from out-of-state and had never encountered a rule requiring full disclosure of past testimony, thus they did not have records that allowed for easy compliance. She also contended that once it became apparent that the experts were having difficulty adhering to the rule, Trattler made every attempt to help her experts properly disclose the information to the defendants. Further, she informed the court that, at least in the case of Dr. Birrer, he had difficulty accessing his old records, having left his previous practice to join another professional group. As for Dr. Schapira, the parties disputed whether he had provided a complete testimonial history. Trattler claimed that a full, complete, and comprehensive list of Dr. Schapira's testimonial history was provided on July 9, 2004, some six weeks before trial. The defendants, however, insisted that they discovered as many as fifteen additional cases in which Dr. Schapira testified even after Trattler claimed his testimonial history was complete.

Trattler also argued that the defendants already possessed or could have easily accessed the missing testimonial history through a defense attorneys' database. A transcript of the hearing demonstrates that Trattler's counsel argued to the court that the defendants were not harmed by the late disclosure:

> *Trattler's Attorney:* Judge, I'll represent to you that if you ask these lawyers as officers of the court whether they had access to all of the information which was supplemented related to Dr. Schapira, [including] cases, case names, case numbers, lawyers, et cetera, they will have to admit they did. They will have to admit this is all available. Every single one of those cases was available to them and all of that information was available to them. And, if you ask them, and I request that the court [ask] this, "how much of it did you have prior to Dr. Schapira's deposition?" I suspect that they will have to admit that they had all of it, or they had access to all of it, because they have access to defendants' deposition bank, which contains all of this information.

The court did not ask the defendants' attorneys whether they possessed or had easy ***679** access to the missing testimonial history. Later in the hearing, Trattler's attorney again asked the court to inquire as to whether the defendants were prejudiced. At this point, the court formally refused:

> *Trattler's Attorney:* Judge, just one other thing.... There is a harmless part to this argument. I am not asking you to change your ruling, but I would ask the court to inquire of [defense counsel] ... how much of the disclosure he had at the time of Dr. Schapira's deposition, because it goes directly to the harmless portion of the test. And, while [defense counsel] is correct that the rule requires that the witness disclose this information, it also goes on to say that before the witness is stricken, there is a determination of whether it's harmless. If he had everything, then this becomes a legal game, which it shouldn't be.
>
> *The Court:* Well, I'm not going to require [defense counsel] to answer that question.

When the court denied Trattler's motion to reconsider, Trattler then made two additional motions. She moved for the court to grant a continuance so that Drs. Schapira and Birrer could further supplement the record. In the absence of that, Trattler moved that the court grant a continuance so she could replace her lost experts. The court denied both of these motions. At no point during discussions of the failure to timely provide complete testimonial histories did the trial court acknowledge awareness of any possible sanctions other than witness preclusion, which it believed was required by the rule.

The trial went forward as scheduled three days after the motion hearing. Trattler presented her case to a jury, but without an expert witness to testify to Dr. Keller's standard of care, the court granted summary judgment for the defendants as to her claim against Dr. Keller. The claims against Dr. Citron went to the jury with only the testimony of Trattler's third expert witness. Dr. Citron was found not liable.

Trattler appealed, arguing that the trial court's exclusion of her two expert witnesses was an abuse of discretion. The court of appeals affirmed, holding that Rule 26(a)(2)(B)(I) was written

to prevent the discovering party from the expenditure and time required to discover information necessary to the defense of Drs. Citron and Keller, and that Rule 37(c)(1) "requires preclusion" of an offending witness when that witness does not make the disclosures mandated by the rule.

II. Analysis

Among the many important purposes of discovery, the most central to a fair trial is the parties' production of all relevant evidence. *J.P. v. Dist. Court,* 873 P.2d 745, 748 (Colo.1994); *see also Todd v. Bear Valley Vill. Apartments,* 980 P.2d 973, 977 (Colo.1999); *Bond v. Dist. Court,* 682 P.2d 33, 35 (Colo.1984). Here, we consider whether Trattler's failure to disclose her experts' recent testimonial history, in violation of Rule 26(a)(2)(B)(I), prevented a fair trial and necessitated the sanction of witness preclusion under Rule 37(c)(1).

Because both parties agree and the court found that Trattler failed to timely disclose a portion of Drs. Schapira and Birrer's testimonial history, the question here is whether Rule 37(c)(1) requires preclusion of the evidence and to what extent the trial court should consider the alternative sanctions found in the "in addition to or in lieu of" section of the rule. Thus, we begin by considering the language of Rule 37(c)(1).

A. Rule 37(c)(1)

Rule 37(c)(1) provides sanctions available to the court for violations of several aspects of the disclosure requirements of Rule 26(a)(2)(B)(I). These disclosure requirements include 1) the identity of expert witnesses; 2) the qualifications for those witnesses; 3) a summary report of the experts' findings relative to the case at issue; 4) any exhibits to be used; 5) a list of the experts' past publications; 6) the compensation received by the expert for work in this case; and 7) a list of the cases in which the experts testified over the previous four years. C.R.C.P. 26(a)(2)(B)(I). The first provision of Rule 37(c)(1), captured in the first two sentences of the rule, require preclusion of the undisclosed evidence if there is no substantial ***680** justification and the failure to disclose is not harmless. Rule 37(c)(1) states:

> A party that without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56.

This part of the rule neither requires nor authorizes the preclusion of evidence that was disclosed.

The final sentence of Rule 37(c)(1) provides for other appropriate sanctions that may be imposed either instead of the preclusion of evidence not disclosed or in addition to preclusion of evidence not disclosed.

> In addition to, or in lieu of this action, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions, which, in addition to requiring payment of reasonable expenses including attorney fees caused by the failure, may include any of the actions authorized pursuant to subsections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of this rule.

Thus, there are two significant parts to subsection (c) of Rule 37. The first provides for preclusion of evidence not disclosed, and the second provides for other appropriate sanctions "in addition to or in lieu of" preclusion of undisclosed evidence, where preclusion of undisclosed evidence is either inappropriate or insufficient.

As with the first portion of the rule, the other sanctions in the second part of Rule 37(c)(1) are only authorized when the party is not justified and the failure to disclose is not harmless to the opposing party. Whether any of the other sanctions are appropriate must be determined by the trial court. If preclusion of the undisclosed evidence is not appropriate or sufficient, possible alternative sanctions include payment of reasonable expenses and attorneys fees. C.R.C.P. 37(c)(1). In addition, sanctions can include an order designating that certain facts have been established, an order preventing the nondisclosing party from supporting or opposing certain claims or defenses, or an order striking parts or all of a

pleading until the order is obeyed. C.R.C.P. 37(b)(2)(A)-(C). Further, the court has the authority, should such a sanction be appropriate, to prohibit the admission of any evidence, dismiss the case, or issue a default judgment against the party in violation of the rule. *Id.*

There is no argument as to whether Trattler violated Rule 26(a)(2)(B)(I) when she failed to provide the defendants with a portion of her experts' testimonial history. Both parties and the court have concluded that Trattler failed to make the timely disclosure required by the rule. Further, because she does not claim to be substantially justified in failing to provide the experts' testimonial history, we need not address substantial justification. What Trattler does argue is that the court misinterpreted Rule 37(c)(1) to require preclusion of the witnesses' testimony for failure to provide a complete testimonial history. We agree with Trattler that the trial court erred when it precluded her experts from testifying. We find that Rule 37(c)(1) requires preclusion of undisclosed evidence, which in this case is the testimonial history, unless that sanction is not appropriate. We further find that in cases where preclusion of the evidence is inappropriate, as here, or an insufficient sanction, the trial court may consider the alternative sanctions described in the "in addition to or in lieu of" part of the Rule 37(c)(1).

Trattler makes a second argument that her failure to provide her experts' testimonial history caused the defendants no harm because they possessed or could have easily accessed the undisclosed information. Because the record before us is inadequate and because we find in Trattler's favor on the ground that the court imposed an inappropriate sanction under Rule 37(c)(1), we do not consider the argument that her failure to disclose her experts' testimonial history was harmless in that the defendants already possessed or could have easily accessed the experts' testimonial history.

B. Preclusion of Evidence Under Rule 37(c)(1)

Trattler's central contention is that the trial court erred when it read Rule 37(c)(1) to require preclusion of her expert ***681** witnesses' testimony as the only sanction available under the rule. We agree. We conclude that Rule 37(c)(1) initially requires preclusion of the undisclosed evidence, which in this case was only some of the experts' testimonial history. Because the identity of the expert witness and the other mandated information was disclosed, the entire testimony of the witness cannot be described as undisclosed evidence.

Rule 37(c)(1) specifies that a party who fails to disclose the "information required by C.R.C.P. 26(a)" shall not be permitted to present at trial "any evidence not so disclosed." We have previously interpreted this first provision of Rule 37(c)(1) to require preclusion of testimony from an expert witness where the fact that the witness would be testifying was not timely disclosed. *Todd,* 980 P.2d at 978; *see also Cook v. Fernandez–Rocha,* 168 P.3d 505, 506 (Colo.2007). However, the present facts do not concern a failure to disclose information the non-disclosing party sought to present at trial. Instead, it was information sought by the opposing party during pretrial discovery. Thus, the question here is whether preclusion of Trattler's experts' testimony was the proper sanction when the witnesses were timely endorsed but their testimonial history was not timely disclosed. We consider this question by first examining our previous holdings in *Todd* and *Cook.*

In *Todd,* we applied the first provision of Rule 37(c)(1) to find that when a party fails to timely endorse an expert witness, as required by Rule 26(a)(2)(B)(I), and the failure is not either substantially justified or harmless, the court acts within its discretion when it precludes the expert from testifying. In the case of *Todd,* the evidence in question was the testimony of the expert doctor endorsed to testify six weeks prior to trial. Rule 26(a)(2)(B)(I) requires that experts be endorsed to testify 120 days prior to trial. By endorsing a new expert witness so close to trial, the plaintiff in *Todd* prejudiced the opposing party by giving the defendant inadequate time to prepare for a new expert witness. This failure to endorse a witness implicated the first provision of Rule 37(c)(1). *Todd,* 980 P.2d at 978. When the "information required by C.R.C.P. 26(a)" is also the evidence the non-disclosing party seeks to present at trial, the first provision of Rule 37(c)(1) requires preclusion of that evidence. *Id.* Hence, the trial court would have properly precluded the doctor from giving evidence had not an unrelated continuance made the nondisclosure of Todd's expert harmless. *Todd,* 980 P.2d at 979.

Similarly, in *Cook,* we held that a trial court acts within its discretion when it sanctions a party for failure to endorse an expert witness in a timely manner. 168 P.3d at 507. As in *Todd,* the automatic sanction in *Cook* was preclusion of the undisclosed evidence, the expert's testimony. *See id.* 168 P.3d at 506. Thus, in both *Todd* and *Cook,* the evidence that was precluded was the evidence that was not disclosed.

We did not find it necessary in Todd or Cook to discuss whether a court could sanction a failure to disclose information by precluding evidence that was properly disclosed. On three occasions since we decided *Todd,* the court of appeals has cited our opinion in *Todd,* which addresses the preclusion of undisclosed evidence required by the first part of Rule 37(c)(1), and has concluded that trial courts did not abuse their discretion by precluding undisclosed evidence, without discussing the remaining provisions of the rule. *See Woznicki v. Musick,* 119 P.3d 567, 575 (Colo.App.2005); *Svendsen v. Robinson,* 94 P.3d 1204, 1208 (Colo.App.2004); *Carlson v. Ferris,* 58 P.3d 1055, 1059 (Colo.App.2002). When preclusion is not required by the first part of Rule 37(c)(1), further analysis is necessary to determine whether preclusion of disclosed evidence, or some alternative sanction, is appropriate. [2]

Here, the evidence that Trattler failed to disclose was not the identity of Trattler's experts but her experts' testimonial history. Thus, when the court determined that a sanction ***682** was mandated by Trattler's failure to provide the experts' previous testimony, the court was not required by Rule 37(c)(1) to preclude the complete testimony of the experts. Rather, Rule 37(c)(1) only requires the preclusion of undisclosed evidence. However, because precluding the experts' undisclosed testimonial history would have been an inappropriate sanction in that it would have further disadvantaged the defendants who sought to use the testimonial history to cross-examine the experts at trial, the court should have looked to the alternative sanctions in the "in addition to or in lieu of" part of Rule 37(c)(1).

C. Alternative Sanctions Under Rule 37(c)(1)

Alternative sanctions are provided for in the last sentence of Rule 37(c)(1), which states that "in addition to or in lieu of" preclusion of the undisclosed evidence, the court may impose other appropriate sanctions. Hence, the final sentence of Rule 37(c)(1) specifically states that the trial court may use its discretion to impose an appropriate sanction in cases where preclusion is an inappropriate or inadequate sanction. To properly exercise its discretion to impose an appropriate sanction, the trial court should first look to the nature and severity of the violation and then to the alternative sanctions specified in the rule.

Here, the defendants knew the identity of Trattler's experts and had timely received other disclosures required by Rule 26(a)(2)(B)(I), including written summaries of the experts' proposed testimony describing the bases for the experts' findings, exhibits to be used as support for their opinions, a list of the experts' qualifications, and a list of the experts' recent publications. Thus, the only evidence not disclosed in violation of Rule 26(a)(2)(B)(I) was a portion of the experts' past testimonial history.

While an expert's past testimony may be useful when the opposing party seeks to impeach that expert during cross-examination, the expert's testimonial history is not central to the case. Here, the defendants knew the identity of the experts, received all relevant information about the experts except for a portion of their testimonial history, had ready access to the experts' testimonial history by use of a defense attorney's database, and had already undertaken lengthy depositions of each of Trattler's experts, including extensive questioning of the doctors' expertise, their previous testimony in other cases, and their opinions on the present case. In addition, defendants had the opportunity to depose each doctor a second time prior to trial. Thus, much of the experts' forensic testimony was thoroughly probed prior to the defendants' Rule 37(c)(1) claim and could have been explored further.

The record also indicates that the trial court believed Trattler acted in good faith and was not to blame for her experts' failure to fully disclose their testimonial history. In its written order, the court stated: "I do not fault petitioners' counsel, who seem to have made repeated efforts to persuade Dr. Schapira to make the required disclosure." Finally, because the defendants possessed or could easily have accessed Trattler's experts' testimonial history through a defendants' database, the possible harm arising from late or incomplete disclosure of the experts' testimonial history was, at least, greatly minimized. In light of these circumstances, precluding Trattler's experts from testifying was disproportionate to the failure to disclose testimonial history.

Where preclusion of the undisclosed evidence is not a proper sanction, the appropriate alternative sanction should be in keeping with the significance of the violation. We reaffirm the principle that sanctions should be directly commensurate with the prejudice caused to the opposing party. *See Kwik Way Stores, Inc. v. Caldwell,* 745 P.2d 672, 677 (Colo.1987). Consequently, we have previously held that "it is unreasonable to deny a party an opportunity to present relevant evidence based on a draconian application of pretrial rules." *J.P.,* 873 P.2d at 750 (citing *Nagy v. Dist. Court,* 762 P.2d 158 (Colo.1988)). Further, Colorado courts have held

that when a party violates the discovery rules, trial courts are permitted "to choose an appropriate sanction, which may include evidence preclusion. However, that sanction is not mandatory." *Genova v. Longs Peak* ***683** *Emergency Physicians,* 72 P.3d 454, 466 (Colo.App.2003). In so doing, "the trial court must strive to afford all parties their day in court and an opportunity to present all relevant evidence at trial." *Todd,* 980 P.2d at 979. We reaffirm, as we did in *Todd,* our longstanding principle that the objective of the discovery rules is "to provide a 'just, speedy, and inexpensive determination' of civil cases." *See id.* (quoting C.R.C.P. 1(a)). Accordingly, we hold that preclusion of expert witnesses for failure to provide testimonial history is a disproportionate sanction.

When considering an appropriate sanction for nondisclosure or late disclosure of testimonial history, the trial court should be guided by the alternatives specified in Rule 37(c)(1), including the alternatives cross referenced in sections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of the rule. Thus, the court may consider rescheduling depositions or trial, payment of attorney fees and costs, contempt proceedings against the experts, admitting evidence of the noncompliance, instructing the jury that noncompliance may reflect on the credibility of the witness, or any other sanction directly commensurate with the prejudice caused.

III. Conclusion

Because the court misread Rule 37(c)(1) to require witness preclusion for failure to disclose testimonial history, failed to consider other sanctions provided in the "in addition to or in lieu of" section of Rule 37(c)(1), and imposed a sanction that was not commensurate with the nature of the violation, we find that the trial court abused its discretion by precluding the testimony of Drs. Schapira and Birrer. We therefore reverse the judgment of the court of appeals and return this case to that court for remand to the trial court for a new trial.

Justice EID dissents.

Justice EID, dissenting.

It is undisputed in this case that Trattler failed to disclose her expert witnesses' testimonial histories as required by Rule 26(a)(2)(B)(I). The trial court found that the nondisclosure of Dr. Schapira's testimonial history was "either willful or grossly negligent on his part." It implicitly found the same with regard to Dr. Birrer, who "attempted to excuse his [nondisclosure] by claiming that he did not have access to his administrative calendar due to a change in employment," when he did in fact have access at the time the disclosure was due. Yet the majority takes the trial court's sanction for these willful or grossly negligent nondisclosures—that is, preclusion of the expert witnesses' testimony—off the table. Unlike the majority, I believe that expert witness preclusion is an available sanction under Rule 37(c)(1) for such willful or grossly negligent disclosure violations. In my view, under Rule 37(c)(1), if a party fails to disclose "information" required by Rule 26(a)(2) (here, the testimonial histories of expert witnesses), the trial court can preclude the party from "presenting any evidence not so disclosed" (here, the expert testimony). Because the majority reaches a contrary conclusion, I respectfully dissent from its opinion.

I.

Rule 26(a) requires a plaintiff to disclose her expert witnesses 120 days before trial. C.R.C.P. 26(a)(2)(C)(I). A disclosure of an expert witness must include, in addition to the witness's identity and "fields of expertise," C.R.C.P. 26(a)(2)(A), a written report or summary. C.R.C.P. 26(a)(2)(B). The report or summary must contain (1) a statement of all opinions to be expressed and the basis and reasons therefor; (2) the data considered by the expert in forming the opinions; (3) any exhibits to be used; (4) the witness's qualifications, including a list of all publications he authored within the previous ten years; (5) the compensation for the study and testimony; and, relevant to this case, (6) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. C.R.C.P. 26(a)(2)(B)(I)-(II). The listing of cases must, at a minimum, provide the name of the court, whether the testimony was by deposition or at trial, the parties' names, and the case number. *Carlson v. Ferris,* 58 P.3d 1055, 1058 (Colo.App.2002).

***684** Failure to comply with Rule 26(a) is governed by Rule 37(c)(1), which provides:

> A party that without substantial justification fails to disclose *information* required by [Rule 26(a)] shall not, unless such failure is

> harmless, be permitted to present *any evidence* not so disclosed at trial....

(Emphasis added.) The majority reasons that the "information" and "any evidence" are the same thing. As applied here, the majority reasons, because Trattler failed to disclose her experts' testimonial histories, Rule 37(c)(1) would not permit her to present those testimonial histories at trial. Maj. op. at 681. But, the majority continues, that sanction would make no sense in this case, because Trattler is not the one who would be seeking to present the testimonial histories at trial—the defendants would, for purposes of impeachment. *Id.* at 681–82. Therefore, because the preclusion sanction of Rule 37(c)(1) would be absurd in such a situation, it simply falls away, and the trial court must choose another sanction. *Id.*

I disagree with the majority's reading because it renders expert witness preclusion inapplicable in all but a narrow set of cases—that is, where the party has failed to disclose the witness's identity. That is because under the majority's interpretation, the "evidence" excluded and the "information" not disclosed must be the same thing, and that is only true for expert witness preclusion when the "information" is the expert witness's identity. Thus, under the majority's interpretation, if the party fails to disclose other information required by Rule 26(a)(2)—for example, the witness's field of expertise; his opinions to be expressed; the data he considered in forming his opinions; the amount he was compensated for the testimony; or, as here, an expert's voluminous testimonial history—the trial court cannot exclude the witness, regardless of how willful or grossly negligent the nondisclosure was.

Unlike the majority, I do not believe the language of Rule 37(c)(1) compels such a result. In my view, the majority's fundamental mistake is to interpret "fail[ure] to disclose information required by [Rule 26(a)]" as the equivalent of "any evidence not so disclosed" in Rule 37(c)(1). In contrast to the majority, I would interpret the first phrase as referring to the specific "information" required by Rule 26(a)(2), including an expert witness's identity, the expert's field of expertise, the data on which the expert relied, any exhibit the expert will use, the expert's testimonial history, and so on. A failure to disclose any of the information required by Rule 26(a)(2) is, as the title to Rule 26(a)(2) suggests, a failure to "Disclos[e] ... Expert Testimony." When read in context, the "any evidence not so disclosed" phrase refers not to the specific "information" not disclosed, but to the failure to disclose expert testimony. Under this reading, a party who does not disclose the information required by Rule 26(a)(2) faces the possibility that she will not be permitted to present her expert testimony at trial.

Moreover, the trial court's action in this case was justified under the second sentence of Rule 37(c)(1), which permits the court, upon a motion, to impose "appropriate" sanctions "in lieu of or in addition to" witness preclusion. The sanctions of Rule 37 are thus of two kinds: those that are self-executing, and those that can be imposed based on a motion from a party. We have held that the preclusion sanction contained in the first sentence of Rule 37(c)(1) "is automatic and self-executing in the sense that a motion for sanctions filed by the opposing party is not a prerequisite to the imposition of the sanction." *Todd v. Bear Valley Vill. Apartments,* 980 P.2d 973, 978 (Colo.1999). By contrast, a party may choose to file a motion for "appropriate sanctions" under Rule 37(a)(2), which occurred here. When a motion for sanctions is made, the second sentence of Rule 37(c)(1) applies, which permits the trial court to impose sanctions "[i]n addition to ... this sanction," referring to the preclusion sanction contained in the first sentence. In other words, because a motion was made in this case, the trial court could have precluded the expert testimony *and* imposed additional sanctions.

Significantly, I could find no decision in Colorado or elsewhere adopting the majority's interpretation. On the contrary, our courts have consistently permitted expert witness preclusion for failure to comply with ***685** any disclosure requirement of Rule 26(a)(2). *See, e.g., Woznicki v. Musick,* 119 P.3d 567, 575 (Colo.App.2005) ("If the party offering the testimony fails to provide sufficient information about the proposed expert's qualifications or opinions, the trial court has broad discretion to determine sanctions, including disallowing the expert's testimony."); *Svendsen v. Robinson,* 94 P.3d 1204, 1208 (Colo.App.2004) (holding that trial court did not abuse discretion when it precluded expert who failed to disclose prior testimony); *Carlson v. Ferris,* 58 P.3d 1055, 1058–59 (Colo.App.2002) (same); *see also Todd,* 980 P.2d at 979 ("[S]ection (c) of Rule 37 requires that trial courts sanction all failures to disclose under Rules 26(a) and 26(e) with *evidence or witness preclusion* unless the failure to disclose is either substantially justified or harmless.") (emphasis added). Not even Trattler proposes the interpretation adopted by the majority, instead arguing that the nondisclosures were harmless.

The majority appears to be concerned that in this particular case, expert witness preclusion was too harsh a sanction for Trattler's failure to disclose her experts' testimonial histories. For example, it suggests that testimonial history is "not central to the case" because it will only be used by the defendants for impeachment purposes; that Trattler's expert reports were complete except for the testimonial histories; that the defendants could access the experts' testimonial histories in a computer database; that the defendants could have deposed the experts a second time; and that Trattler was not to blame for her experts' nondisclosures. Maj. op. at 682. From this, the majority concludes that the trial court's sanction of "precluding Trattler's experts from testifying was disproportionate to the failure to disclose testimonial history." *Id.*

Yet Rule 37(c)(1) permits the trial court to weigh all of these considerations. As noted above, while the first sentence of the rule states that the nondisclosing party "shall" not be permitted to present evidence, the second sentence provides that "[i]n addition to or in lieu of this sanction [of expert witness preclusion], the court, on motion after affording an opportunity to be heard, may impose *other appropriate sanctions* ...." In my view, the trial court is in the best position to consider whether a sanction other than expert witness preclusion is appropriate given the circumstances of the case. The majority, however, through its mistaken interpretation of Rule 37(c)(1), declares expert witness preclusion to be out of bounds from the beginning, and then weighs for itself whether the trial court's sanction of "precluding Trattler's experts from testifying was disproportionate to the failure to disclose testimonial history," concluding that it was. Maj. op. at 682.

Contrary to the majority's conclusion, *see id.* at 681–82, I do not believe that the trial court in this case believed that expert witness preclusion was mandatory, nor could it, given that a motion for sanctions was made. Rather, it based its decision on the circumstances of this particular case, finding that other possible remedies such as additional depositions or continuing the trial were not appropriate. The trial court's findings of fact and the record before us indicate that Trattler's initial expert disclosures, due 120 days before trial but filed one week thereafter based on Trattler's request to postpone the deadline, provided *no* testimonial history for either Dr. Schapira or Dr. Birrer, despite the clear requirements of Rule 26(a)(2)(B)(I). After the defendants requested the experts' testimonial history, Trattler provided a partial list for each doctor on May 20, 2004, ninety days before trial. Dr. Schapira's list contained only thirty-five cases, twenty-two of which were not fully identified. This list was supplemented twice prior to Dr. Schapira's June 15, 2004 deposition. At that deposition, Dr. Schapira listed additional cases from memory but was nonetheless unable to state that his listing was complete. On July 2, 2004, defendants filed motions to strike Dr. Schapira and Dr. Birrer for failure to disclose their testimonial histories. On July 9, 2004, only forty-five days before trial, Trattler filed what she claimed to be a complete list of Dr. Schapira's prior testimony, identifying 117 additional cases. Even that listing did not contain all of the information required by Rule 26(a)(2)(B)(I). Further, even after this "final" list was filed, defendants ***686** discovered an additional fifteen cases in which Dr. Schapira had testified.

Dr. Birrer's list filed on May 20, 2004, ninety days before trial, contained only six cases. His list was not supplemented before June 21, when defendants took his deposition. Dr. Birrer testified that his list was incomplete and that he had lost access to his administrative calendar when he left his previous job on May 29, 2004. He conceded that he did have access to his administrative calendar on April 30, 2004, when the initial expert disclosures were filed, and on May 20, 2004, when his incomplete list of cases was provided. Through their own efforts, defendants later located six additional cases in which Dr. Birrer had testified. Three weeks after the deposition, and only thirty-nine days before trial, Trattler filed a supplemental disclosure listing a total of fourteen cases. However, Dr. Birrer provided no certification that the list was complete and accurate—nor could he, given that he had lost access to his calendar, and that he could not recall his prior testimonial history.

It is thus unclear to this day whether complete testimonial histories for these experts were ever provided. Dr. Schapira's final testimonial history omitted fifteen cases discovered through the defendants' independent research. Further, Dr. Birrer would never be able to certify a complete and accurate testimonial history, because he did not provide a full list during the time that he had access to his administrative calendar and because he was unable to reconstruct a complete list of cases from memory.

In my view, the trial court was acting within its discretion when it found that these nondisclosures warranted preclusion of the expert witnesses' testimony. The trial court found that based on "[t]he sheer volume of the testimony Dr. Schapira failed to disclose"—including over *a hundred cases* that were disclosed after the disclosure deadline—his conduct was

"either willful or grossly negligent." The trial court concluded that the nondisclosure was not harmless, in that most of Dr. Schapira's cases were not disclosed until after his deposition, and that the offer of a second deposition only a few weeks before trial was an insufficient remedy. As for Dr. Birrer, the trial court concluded that "[d]isclosing only half the cases where a witness has given deposition or trial testimony is not substantial compliance, and the lack of disclosure is not harmless" for the same reasons provided with regard to Dr. Schapira, and because Dr. Birrer was unable to certify that his list was complete. In addition, the court made an implicit finding of willfulness or gross negligence on the part of Dr. Birrer, stating:

> [He] attempted to excuse his failure to produce a complete list by claiming that he did not have access to his administrative calendar due to a change in employment. However, he was still at the employment where his administrative calendar was located on computer [sic] at the time of the original [disclosure] and the first supplemental disclosure.

The purposes of the Rule 26 requirements are "to enable opposing counsel to obtain prior testimony of the expert that may be relevant to the proposed testimony in the pending case and to enable a party to prepare for cross-examination at a deposition or a trial." *Svendsen,* 94 P.3d at 1207; *Carlson,* 58 P.3d at 1059. In particular, an expert's prior testimony can provide impeachment evidence, as well as information relevant to the expert's credibility and possible bias. Rule 26(a) is designed to prevent the discovering party from having to expend substantial time and resources to discover necessary information. *See, e.g., Svendsen,* 94 P.3d at 1207; *see also Todd,* 980 P.2d at 979 (stating that the purpose of Rule 37(c)(1) is to "reduce abuses of the system such as dilatory discovery tactics and inefficient trial preparation"). In this case, the defendants were able to uncover some, but not all, of the experts' prior testimony. The trial court was well within its discretion to preclude the experts, rather than requiring the defendants to expend additional time and money to investigate the experts' prior case history and take additional depositions concerning over a hundred undisclosed cases shortly before trial.

II.

For the foregoing reasons, I would find that expert witness preclusion was an available ***687** sanction to the trial court, and that the court did not abuse its discretion in ordering such preclusion given the circumstances of the case. I therefore respectfully dissent from the majority's opinion.

All Citations

182 P.3d 674

Footnotes

* Justice Eid would grant the Petition.

1 Trattler argues that the third doctor's lack of clinical experience was a critical detriment during the defendants' cross examination at trial. Trattler contends that the jury would have received the opinions of Drs. Schapira and Birrer differently than the purely academic opinions of the third doctor.

2 It is unclear from the sparse detail concerning the nature and extent of undisclosed information in *Woznicki,* 119 P.3d at 575; *Svendsen,* 94 P.3d at 1208; and *Carlson,* 58 P.3d at 1059, whether these decisions can be reconciled with our opinion today. To the extent, if any, that they are inconsistent with our opinion, they are overruled.

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DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 Sixth Street P.O. Box 4249, Boulder, CO, 80306-4249	DATE FILED: May 17, 2013 12:43 PM CASE NUMBER: 2011CV1050
Plaintiff(s) STEVE VASAUNE v. **Defendant(s)** SHANNON S SOVNDAL, MD et al.	⚠ **COURT USE ONLY** ⚠
	Case Number: 2011CV1050 Division: 2 Courtroom:

Order Re: Defendant BCH's Renewed Motion to Conduct Ex Parte Meetings with Plaintiff's Treating Medical Care Providers

This matter is before the Court on Defendant Boulder Community Hospital's (BCH) Renewed Motion to Conduct Ex Parte Meetings with Plaintiff's Treating Medical Care Providers, filed March 14, 2013 (Motion). Plaintiff Steve Vasaune filed a Response thereto on April 4, 2013 (Response). Defendant BCH filed a Reply on April 11, 2013. Defendant Shannon S. Sovndal, MD, filed Joinders to the Motion and Reply. For the reasons set forth below, the Court GRANTS the Motion.

I. BACKGROUND

In this medical malpractice action, Plaintiff contends that Defendants provided negligent care and treatment when he was seen by the Defendants at BCH on October 1, 2009. He presented to Defendants with complaints of headache, neck pain, photophobia, nausea, and vomiting. Plaintiff alleges that he was suffering a stroke caused by a dissection of his internal carotid artery while he was seen at BCH, and that the Defendants negligently evaluated him in the emergency room and failed to detect the stroke as the underlying cause of his symptoms. Plaintiff was discharged from BCH later that day.

On October 2, 2009, Plaintiff awoke with worsening symptoms, including left-sided paralysis. Plaintiff was transported via ambulance by two emergency responders of the Louisville Fire Protection District to Avista Adventist Hospital (Avista). At Avista, Plaintiff was treated by emergency room physician G.A. Geer, MD and Bruce Contini, RN. Dr. Geer took a history, performed a physical evaluation, and ordered a CT of Plaintiff's head. Radiologist Mitchell Achee, MD, read the CT as showing findings consistent with an ischemic stroke. Dr. Geer determined to send Plaintiff to St. Anthony's Central Hospital (St. Anthony's). Later that day, Plaintiff was transported to St. Anthony's on Flight for Life by B. Lach, RN and S. Byers, EMT-P.

At the St. Anthony's emergency room, Plaintiff was cared for by Sean Bender, MD and nurses John Heath, Kelly Flynn, Michellina Ehler, Jill Tobak, and Renee Robledo. Once admitted, Plaintiff was evaluated by neurologist Josh Renkin, MD, neurosurgeon John Hudson, MD, and his images were reviewed by interventional radiologist Theodore Larsen, MD. These physicians determined that Plaintiff was suffering an ischemic stroke, caused by

EXHIBIT B

a dissection of his internal carotid artery. Plaintiff then underwent radiologic studies and a CT angiogram, interpreted by radiologist William Berger, MD. Dr. Berger also interpreted a CT brain perfusion study and a head CT. Plaintiff also underwent a transthoracic echocardiogram, performed and interpreted by cardiologist Takeshi Katoaka, MD. A chest x-ray was interpreted by Brian Burke, MD. Plaintiff was then admitted to the neurologic critical care unit at St. Anthony's. He was evaluated and followed for three days by Garry Lambert, DO. While in critical care, he was also followed by Tom Bost, MD through October 11, 2009 (Motion, Exhibit N). (Hereafter, the Avista, Flight for Life, and St. Anthony's medical providers specifically identified in this Background section shall be referred to collectively as "Providers"). Plaintiff remained at St. Anthony's through December 7, 2009 for treatment related to ischemic stroke and dissection.

Former Defendant David Oppenheimer, MD, who has been voluntarily dismissed from this case, filed a Motion for Leave to Conduct Ex Parte Interviews on October 25, 2012. BCH joined in this motion. Like the instant Motion, the Oppenheimer motion sought ex parte interviews with a number of Plaintiff's treating providers. Magistrate Hamilton-Fieldman issued an Order on this motion on February 15, 2013. The Order, which will be discussed in more detail below, directed Plaintiff to prepare a privilege log.

In accordance with the Order, Plaintiff filed a privilege log on March 1, 2013. The remaining Defendants reviewed the privilege log, and maintain that they are still entitled to ex parte interviews with the Providers. The parties attached exhibits to the briefing, including but not limited to, the privilege log and certain medical records.

II. GENERAL LEGAL STANDARDS

In general, communications between physicians and patients are privileged. The protection of these communications from disclosure promotes "effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation" that could result from divulging medical information. Alcon v. Spicer, 113 P.3d 735, 738 (Colo. 2005). This privilege is codified at § 13-90-107(1), C.R.S.

There are two statutory exceptions to the privilege. First, the privilege does not prevent a medical provider who is sued for malpractice from disclosing confidential medical information concerning the subject matter of the plaintiff's suit. § 13-90-107(1)(d)(I), C.R.S. Second, the privilege does not apply to a medical provider "who was in consultation with a physician, surgeon, or registered professional nurse being sued . . . on the case out of which said suit arises." § 13-90-107(1)(d)(II), C.R.S. Medical providers are "in consultation with" one another if they collectively and collaboratively assess and act for a patient by providing a "unified course of medical treatment." Reutter v. Weber, 179 P.3d 977, 981 (Colo. 2007).

The physician-patient privilege can be waived if the privilege holder (patient) "has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense." Alcon, 113 P.3d at 739, citing Clark v. Dist. Court, 668 P.2d 3, 10 (Colo. 1983). Making such a showing does not mean that the party seeking to overcome the privilege has established a complete waiver of all communications between the physician and patient. Alcon, 113 P.3d at 739. The privilege is still retained with respect to communications unrelated to the claim or

defense (residually privileged information). Id. In a typical personal injury case, the plaintiff does not waive the privilege "for medical records wholly unrelated to his injuries and damages claimed." Id.; Weil v. Dillon Companies, Inc., 109 P.3d 127, 128 (Colo. 2005).

Similarly, in Samms v. Dist. Court, 908 P.2d 520, 524 (Colo. 1995), in determining whether defense counsel could conduct ex parte interviews of the plaintiff's physician, the Court explained that the scope of the implied waiver necessarily depends on the nature of the claim asserted by the patient. Because the plaintiff in that case was making a claim for medical malpractice for failure to diagnose a heart condition, the Court observed that by injecting that issue into the case, the plaintiff waived the physician-patient privilege "with respect to the information related to her heart condition obtained by her physician in the course of diagnosing or treating Samms for that condition." Id. The plaintiff-patient had been treated by twenty different physicians offering separate medical advice and administering separate courses of treatment over a significant period of time. Id. at 523-24. The Court recognized that plaintiffs have an interest in protecting any residually privileged information held by non-party witnesses. Id. at 525. Under these facts, the Court held that defense counsel was required to provide the plaintiff with reasonable notice of the interviews to enable the plaintiff to protect her privilege interest regarding unrelated medical conditions. Id. at 528.

In Reutter v. Weber, 179 P.3d 977, 982 (Colo. 2007), the Colorado Supreme Court held that the trial court correctly determined that the physician-patient privilege does not apply to information acquired by the medical witnesses concerning the course of treatment that was the basis for the Reutters' claims. Critically for the analysis in this case, and as previously interpreted by Magistrate Hamilton-Fieldman, the Court determined that Samms did not create a blanket rule that a plaintiff is always entitled to attend interviews of non-party medical providers. Id. at 982. Rather, the Reutter Court interpreted Samms to require trial courts to "take appropriate measures to protect against the divulgement of residually privileged information in the course of discovery, which would include allowing the plaintiff to attend the defendant's interviews with non-party medical providers where the risk is high that residually privileged information will be divulged in those interviews." Id. at 982. Where the non-party medical providers do not possess residually privileged information, a "trial court does not abuse its discretion by refusing to require that the plaintiff be permitted to attend the interviews of those non-party medical providers." Id.

In determining whether providers possess residually privileged information, a trial court must determine whether there is any evidence that the providers acquired any privileged information during the time of treatment that would be irrelevant to the subject condition. Id. at 983. If a trial court chooses to consider whether to permit an interview without the presence of the plaintiff, it should assess the risk that there is residually privileged information, taking into account not only the evidence offered by plaintiff-patient, but also the circumstances of the plaintiff-patient's treatment and the likelihood that those circumstances could give rise to residually privileged information. Id.

III. ANALYSIS

In this Court's February 15, 2013 Order, Magistrate Hamilton-Fieldman determined that once Plaintiff was discharged from BCH on October 1, 2009, he was no longer a patient of any of

the Defendants. There was therefore no "unified course of treatment," as discussed in Reutter. The Court found that, with the exception of a physician (Dr. King) and two EMTs, with whom Plaintiff conceded Defendants may conduct ex parte interviews, the subsequent treating professionals with whom Defendants sought interviews were not "in consultation with" Defendants, and therefore, were not statutorily excepted from the physician-patient privilege under Reutter.

The Court then determined that to be afforded notice of the meetings with the Providers under Alcon v. Spicer, 113 P.3d 735 (Colo. 2005) and Samms v. Dist. Court, 908 P.2d 520 (Colo. 1995), Plaintiff must make a particularized assertion in a privilege log about the privileged information concerning which he has not waived his right to privacy, as well as what risk the proposed interviews with Providers pose to the privilege. (Order, p. 4). The Court concluded that Plaintiff had not met that burden by making a general assertion that the information concerning a prior urologic condition was disclosed during the course of his treatment at St. Anthony's. Consistent with Reutter, Plaintiff was required to make a showing, with regard to each of the Providers, that they had access to residually privileged information and therefore could be at risk to disclose it.

Plaintiff's privilege log identifies records that contain residually privileged information. Certain records were redacted because they contain confidential identifying data, such as social security number. Many records were redacted on the basis of pastoral visit. Certain other records were redacted because they referred to unrelated medical or mental conditions. The vast majority of these redacted medical records were prepared after mid-October 2009. More particularly, two of the records were prepared on October 2, 2009 (referencing an unrelated mental condition and a history of trauma from lifting heavy furniture). The balance of the redacted medical records (approximately 65), were prepared from October 14, 2009 – early December, 2009.

Plaintiff has not shown that there is a high risk that the Providers possess residually privileged information. Based on the briefing, exhibits, and privilege log, the Court finds that there is minimal, if any, risk that the Providers possess residually privileged information.

Plaintiff has not made any showing that the Avista and Flight for Life Providers possessed or had access to residually privileged information. These Providers provided treatment to Plaintiff relevant to the medical issue at issue in this case (ischemic stroke). In the narrative to the privilege log, Plaintiff states that these Providers "likely have information that is not included in the charts." (Privilege Log, p. 2). This general assertion does not amount to the particularized assertion required by Magistrate Hamilton-Fieldman in the February 15, 2013 Order. Further, the Avista and Flight for Life Providers treated Plaintiff for less than a day, on October 2, 2009.

According to the privilege log, the only redacted documents created by these Providers consisted of the admission sheet and documents containing personal data, such as Plaintiff's social security number and insurance information. No privileged medical records are identified. Although personal information such as social security numbers is confidential, the physician-patient privilege does not protect non-medical information. See Belle Bonfils Memorial Blood Center v. Dist. Court, 763 P.2d 1003, 1009 (Colo. 1988) (the physician-

patient privilege does not extend to names, addresses and telephone numbers, as such information is not acquired in attending the patient, nor is it necessary to enable the physician to prescribe or act for the patient). There is no credible risk that the Avista and Flight for Life Providers will disclose this type of personal identifying information to Defendants' counsel in interviews. Under these circumstances, Plaintiff has not provided sufficient information to support a finding that these Providers obtained residually privileged information.

Critically, with regard to the St. Anthony Providers, Plaintiff has acknowledged that the medical records authored by these Providers have no redacted information in them. There is little risk that these Providers acquired residually privileged information because they provided care and treatment for only a few days. Most of the Providers treated Plaintiff only on October 2, 2009 (Motion, Exhibits G – L). Dr. Lambert treated Plaintiff from October 2, 2009 through October 5, 2009 (Motion, Exhibit M). Dr. Bost treated Plaintiff from October 5, 2009 through October 11, 2009 (Motion, Exhibit N). In contrast, according to the privilege log, the vast majority of redacted medical records were prepared from October 14, 2009 through December 7, 2009. These records were prepared after the Providers treated Plaintiff. Additionally, several of the Providers are radiologists, who likely had no direct communication with Plaintiff or his family.

Plaintiff asserts that even if these Providers did not author any records containing residually privileged information, they at least had access to residually privileged information through St. Anthony's electronic medical record database. Relying on Ortega v. Colorado Permanente Group, P.C., 265 P.3d 444, 448 (Colo. 2011), BCH contends that because the Providers had access to the entire St. Anthony's electronic database, no privilege attached to any of the patient's medical records. Therefore, BCH reasons that there is no residually privileged information in the St. Anthony's database.

The Court does not agree with BCH's interpretation of Ortega. As Plaintiff points out, Ortega involved an HMO that maintained a complete, comprehensive electronic record of all of its patients' medical records. In contrast, the St. Anthony's electronic database is limited to hospital records. Moreover, Ortega focused on whether a patient's electronic medical records were privileged under §§ 13-90-107(1)(d)(I) & 10-16-423, C.R.S. (confidentiality of HMO members' information). Ortega does not hold that a patient waives the physician-patient privilege as to all medical records, even those involving unrelated medical conditions, by filing a medical negligence action. Cf. Alcon, 113 P.3d at 739 (the privilege is still retained with respect to communications unrelated to the claim or defense); Weil, 109 P.3d at 127 (plaintiff does not waive the privilege for medical records wholly unrelated to his injuries and damages claimed). Lastly, Ortega did not involve a request to conduct ex parte meetings with medical providers, or address residually privileged information in this context.

Nonetheless, the fact that Plaintiff's unrelated medical records remain privileged does not mean that there is a high risk that the Providers will disclose information regarding Plaintiff's unrelated medical conditions. The fact that the Providers had access, three years ago, to a database that included records documenting unrelated medical conditions does not create a high risk that the Providers will reveal this information in interviews. Additionally, the vast majority of the records containing residually privileged information were created after the Providers treated Plaintiff.

To the extent there is any risk that the Providers will disclose privileged information regarding unrelated medical conditions, the risk can be substantially minimized or entirely eliminated if, as BCH suggests, counsel for Defendants use only the medical records that have been disclosed by Plaintiff. By using only the redacted medical records in the interviews, which do not contain residually privileged information, it is extremely unlikely that the Providers would disclose information concerning medical conditions unrelated to this lawsuit.

Accordingly, under Reutter, the Court concludes that there is not a high risk that the Providers possess residually privileged information. Any risk may be minimized or eliminated by requiring Defendants' to use only the redacted medical records previously provided by Plaintiff in this action in their interviews with the Providers. Subject to the conditions below, Defendants' counsel may meet ex parte with the Providers.

Through its Motion, BCH also requests an order prohibiting Plaintiff's counsel from interfering with Defendants' counsel's ability to meet with the Providers, such as by informing the Providers of Plaintiff's objection to the meetings through correspondence. With its Motion, BCH attached an example of a letter issued by Plaintiff's counsel in another case, advising a medical provider that Plaintiff's counsel objected to the provider's meeting with defense counsel (Motion, Exhibit O). As set forth below, the Court will impose certain conditions on the meetings. This Order includes notice that the Providers are not legally required to meet with Defendants' counsel. Accordingly, Plaintiff's counsel shall not interfere with the scheduling or conducting of the ex parte meetings, and may not inform the Providers of Plaintiff's objection to the meetings.

Lastly, as set forth below, although the Court approves several of the conditions and limitations suggested by Plaintiff on pages 6-7 of its Response, the Court will not require Defendants' counsel to inform Plaintiff's counsel of the meetings within a week of their occurrence. There is no legal basis for such an order. Further, an order requiring counsel to disclose ex parte meetings with witnesses could run afoul of the work-product doctrine. See Cardenas v. Jerath, 180 P.3d 415, 421 (Colo. 2008) (under C.R.C.P. 26(b)(3), the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney concerning the litigation).

IV. CONCLUSION/ORDER

There is little to no risk that the Providers possess residually privileged information. Defendants' counsel may meet ex parte (outside the presence of Plaintiff and his counsel) with Drs. Geer, Achee, Larsen, Bender, Renkin, Hudson, Berger, Katoaka, Burke, Lambert and Bost, and Nurses Contini, Lach, Heath, Flynn, Ehler, Tobak and Robledo, subject to the following conditions:

1) Any Provider who is interviewed by defense counsel ex parte shall be provided with a copy of this Order at least 48 hours before the meeting. The meetings are legally permissible, however, Providers are not legally compelled to meet with defense counsel, and may decline to participate in the ex parte meetings.

2) The Providers may not bring any records to the meetings. Defense counsel shall supply any and all medical records to be discussed at the meetings, as these medical records are limited to the medical issues involved in this litigation and do not contain residually privileged information.

3) The ex parte meetings are limited in scope to the medical conditions at issue in this lawsuit (conditions related to Plaintiff's ischemic stroke). There shall be no discussion regarding Plaintiff's unrelated medical conditions.

4) Defendants are prohibited from using or disclosing protected health information for any purpose other than this litigation.

No consent necessary, CRM 7(a).

Issue Date: 5/17/2013

Robert M. Gunning

ROBERT GUNNING
Magistrate