IN THE SUPREME COURT OF THE STATE OF OREGON

PAMELA PARRAZ, Plaintiff-Adverse Party, v. MICHAEL R. WILSON, D.O. and REHABILITATION MEDICINE ASSOCIATES, P.C., Defendants-Relators.	)	Multnomah County Circuit Court Case No. 0910-15327 Supreme Court No. S058764 **MANDAMUS PROCEEDING**

OREGON ASSOCIATION OF DEFENSE COUNSEL AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR PREEMPTORY WRIT OF MANDAMUS OR ALTERNATIVE WRIT OF MANDAMUS

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AMICUS CURIAE BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITION FOR PREEMPTORY WRIT OF MANDAMUS OR ALTERNATIVE WRIT OF MANDAMUS

Introduction

Amicus Curiae Oregon Association of Defense Counsel (hereinafter "OADC") appears in support of the Petition for Preemptory Writ of Mandamus or Alternative Writ of Mandamus filed in this case by Defendants-Relators Michael R. Wilson, D.O. and Rehabilitation Medicine Associates, P.C (hereinafter "defendants"). Specifically, OADC appears in order to demonstrate that mandamus review should be granted.

Statement of Amicus Curiae

The Oregon Association of Defense Counsel (OADC) seeks leave of the court to file this amicus curiae brief in support of defendants' petition. OADC is a private, non-profit association of lawyers who specialize in the defense of civil actions. OADC has often appeared as an amicus curiae in this court, sometimes at the court's request. OADC is not related to any of the parties in this case and has no interest of its own in this proceeding, other than to aid the court in determining the correct rule of law. Ultimately, the court's decision may affect the interests of other parties represented by OADC's members in other cases, now and in the future.

Argument

I. Mandamus review is appropriate to vindicate the systematic deprivation of defendants' right to pretrial discovery of relevant, non-privileged matters.

Mandamus review is appropriate when a direct appeal will not sufficiently serve to vindicate a party's rights with regard to obtaining discovery before trial. *State ex rel. Anderson v. Miller*, 320 Or 316, 322-23, 882 P2d 1109 (1994). The dispute in this case involves a pretrial discovery ruling that is based, in part, on the application of a "same body part or area" standard in Multnomah County and other jurisdictions. As set forth in detail below, the application of this standard has had the effect of systematically preventing defendants' pretrial access to relevant, non-privileged health information of plaintiff.

Ordinarily, defendants are entitled to request and receive before trial all information "relating to injuries for which recovery is sought." ORCP 43B and ORCP 44C. The Multnomah County Civil Motion Panel has adopted a statement of consensus interpreting ORCP 44C, in which it states, "Generally, records relating to the 'same body part or area' have been discoverable, when the court was satisfied that the records sought actually relate to the presently claimed injuries." *See* Mult. Co. Civil Motion Panel Statement of Consensus.

In this brief, the OADC offers two reasons why the adoption and application of a "same body part or area" standard by trial courts in Multnomah County and

other jurisdictions when determining the scope of discovery of medical records under ORCP 44 warrants this court's attention on mandamus.

First, the adoption and application of the standard is leading to arbitrary and erroneous rulings that are systematically depriving defendants of their right to the pretrial discovery of information necessary to prepare a defense to plaintiff's injury claims. Second, the application of the standard by non-medically trained judges and counsel unfairly deprives defendants of the ability to provide their medical experts with the same information to which plaintiff's medical experts have access before trial.

A. The adoption and application of a "same body part or area" standard leads to arbitrary and erroneous rulings that warrant this court's intervention on mandamus.

The OADC would posit that the trial court's ruling in this case is reflective of a systematic problem that persists through the pretrial application of the "same body part or area" consensus standard adopted by Multnomah County and other jurisdictions that follow it. Based on the experience of OADC members, the "same body part or area" standard has essentially acquired the force of law in Multnomah County, despite the fact that it has been adopted neither by the Oregon legislature nor by the Oregon Supreme Court or Court of Appeals. It is frequently relied on by plaintiffs' counsel to withhold production of related information, as it was by plaintiff's attorney in the current case. Pl's Memo in Opp 5, 11. Thus,

the application of the consensus statement position has led to a systematic deprivation of defendants' right to critical information necessary to the preparation of their case.

A hypothetical example illustrates the nature of the problem that defense counsel routinely face as a result of the adoption of a "same body part or area" standard: Suppose plaintiff sues defendant in negligence after plaintiff breaks his leg. The plaintiff files a complaint and makes claims to recover his medical expenses and various non-economic injuries, including loss of enjoyment of life and permanent injury. One of the primary bases for his loss of enjoyment of life claim is that he cannot play competitive soccer for the rest of his life.

Suppose further that plaintiff also has a serious degenerative heart disease that would independently prevent him from playing soccer. In this case, many plaintiffs would argue, and at least some trial courts would likely agree, that information relating to the plaintiff's heart disease is not discoverable because a heart is not a leg, and therefore not the "same body part" that was alleged to be injured, despite the heart condition's clear relation to the plaintiff's loss of enjoyment of life and plaintiff's permanent injury claims. Under the "same body part or area" guideline medical records about plaintiff's heart condition would be deemed undiscoverable.

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The scenario illustrated by the hypothetical becomes more complicated when the injury involves a complex medical condition, and not simply a broken leg. In such instances, the determination of medical relatedness cannot and should not be made simply by looking at the "same body part or area" as that which is claimed to be injured. Given that this guideline has taken on the force of law, defendants are being systematically denied access to relevant and non-privileged information to which they should be entitled to access before trial.

The question before this court, however, is whether even if the trial court's ruling is erroneous, defendants in this case and others have an adequate remedy with an ordinary appeal. The answer is no. An adequate remedy is only one that affords "*any and all* relief to which the relator is entitled." *State ex rel Hupp etc. Corp. v. Kanzler*, 129 Or 85, 97, 276 P 273 (1929) (emphasis added).

Defendants are entitled to all discovery of relevant matters, not privileged, under ORCP 36, and they are entitled to obtain such discovery *before trial* when properly requested under ORCP 43. The "same body part or area" standard is being systematically applied to rulings on motions to compel discovery before trial, resulting in the deprivation of defendants' right to obtain discovery at a time when they are entitled to it. Thus, it is the timing of this trial court's ruling, not simply the fact of its being erroneous, that warrants this court's immediate attention on mandamus.

B. The application of a "same body part or area" standard by non-medically trained judges and counsel unfairly deprives defendants of their ability to provide their experts with the same information given to plaintiffs' experts before trial.

Defendants' right to access relevant, non-privileged health information of plaintiff before trial is critical not only with respect to their evaluation of plaintiff's injury, but also with respect to their expert's review of the case.

Mandamus is an appropriate remedy where the relief afforded by a direct appeal is inadequate, such as where a party would suffer the loss of a *tactical advantage* which could not be restored on direct appeal. *State ex rel. Automotive Emporium, Inc. v. Murchison*, 289 Or 265, 268-69, 611 P2d 1169 (1980). This kind of loss is considered to be a special loss beyond the burden of litigation. *Id.*

There are two unfair tactical advantages gained by plaintiff if the trial court's erroneous ruling is allowed to stand in this case and others like it. First, as it stands now, the trial court's ruling prohibits defendants' experts from the same level of access to plaintiff's medical history that plaintiff's experts are given. Instead, defense experts are left with a skewed and incomplete medical history that is defined in scope by an overly simplistic "same body part or area" standard as applied by judges and/or plaintiff's counsel, none of whom are medically trained. Meanwhile, nothing is preventing plaintiff's counsel from providing his expert

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with any and all of plaintiff's medical records, or the portion of those records that would be most advantageous to him.

Given this setup, plaintiffs' experts are given the distinct advantage of being able to render opinions at trial based on a complete medical history, whereas defense experts are given only as much information as plaintiff's counsel or a trial judge determine to be medically related to the injuries for which recovery is sought. This inequity obviously gives plaintiffs a major tactical advantage at trial that cannot be restored if defendants are required to wait for a direct appeal after judgment.

Second, the tactical advantage of "trial by ambush" cannot be restored to defendants on a post-judgment appeal. The identity of defendants' experts and their defense strategies will be revealed to plaintiffs during the course of a trial. The element of surprise and similar tactical advantages that are associated with trying a case for the first time are lost when a case is tried a second time after remand on direct appeal. Defendants should not be required to lose those advantages in order to remedy a systematic deprivation of their right to discovery of relevant, non-privileged health information critical to their case.

Conclusion

For all of the reasons set forth above, an ordinary appeal of the trial court's ruling in this case is not an adequate remedy. OADC respectfully requests that

this court issue the preemptory writ sought by defendants. Alternatively, this court should issue an alternative writ of mandamus directing the trial court to show cause why a writ should not issue.

In the event this court issues an alternative writ of mandamus, OADC intends to seek further leave to file an *amicus curiae* brief, in which it will propose clear rules of law relating to the scope of discovery and the pretrial waiver of privilege over protected health information, including medical and mental health records and deposition testimony of treating medical providers.

DATED this 24th day of September, 2010.

Respectfully submitted,

/s/ Matthew J. Yium

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I filed the foregoing **OREGON ASSOCIATION OF DEFENSE COUNSEL AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR PREEMPTORY WRIT OF MANDAMUS OR ALTERNATIVE WRIT OF MANDAMUS** by mailing the original and 15 copies thereof via U.S. Postal Service to:

State Court Administrator
Oregon State Supreme Court
1163 State Street
Salem, Oregon 97301-2563

on the date stated below.

I further certify that I served the foregoing **OREGON ASSOCIATION OF DEFENSE COUNSEL AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR PREEMPTORY WRIT OF MANDAMUS OR ALTERNATIVE WRIT OF MANDAMUS** on the following parties:

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by mailing two true and correct copies thereof to said parties on the date stated below.

DATED: September 24, 2010.

/s/ Matthew J. Yium

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