IN THE SUPREME COURT OF THE STATE OF OREGON

JANET HODGES,
Plaintiff,

v.

OAK TREE REALTORS, INC., et al.,
Defendants.

Jackson County Circuit Court Case No. 16CV31078

EMILY HODGES,
Plaintiff-Relator,

v.

OAK TREE REALTORS, INC., an Oregon Corporation, ROBERT C. NICCOLLS; LOUIS F. MAHAR; ROBERT C. NICCOLLS and MARY RUTH NICCOLLS, in their capacity as Trustees of the Niccolls Family Trust; MARY RUTH NICCOLLS; and KATHRYN E. MAHAR,
Defendants-Adverse Parties.

Jackson County Circuit Court Case No. 16CV31245

SADIE HODGES,
Plaintiff,

v.

OAK TREE REALTORS, INC., et al.,
Defendants.

Jackson County Circuit Court Case No. 16CV31677

May 2018

SUSAN HA.G.ER HAMILTON,
Plaintiff,

v.

OAK TREE REALTORS, INC., et al.,
Defendants.

Jackson County Circuit Court Case No. 16CV31680

CLARA J. DALEY,
Plaintiff,

v.

OAK TREE REALTORS, INC., et al.,
Defendants.

Jackson County Circuit Court Case No. 16CV31681

AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL BRIEF MANDAMUS PROCEEDING

Supreme Court Case No. S065530

Petition from Jackson County Circuit Court Order
November 28, 2017
Hon. Benjamin Bloom, Presiding

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OREGON ASSOCIATION OF DEFENSE COUNSEL
AMICUS BRIEF

INTRODUCTION

The request for mandamus relief calls into question the scope of the physician-patient privilege and its limits, accepted Oregon discovery practices, and whether notions of fundamental fairness and due process require that a plaintiff in personal injury litigation may be examined about communications with her medical providers concerning the medical treatment and injuries for which she seeks damages. This Court has determined that the physician-patient privilege prevents any physician being examined without the consent of the plaintiff. *State ex rel Grimm v. Ashmanskas*, 298 Or 206, 690 P2d 1063 (1984); *Barrier v. Beaman,* 361 Or 223, 390 P3d 1048 (2017). Whether it also prohibits the plaintiff from being examined about the very injuries for which recovery is sought, including information learned and communications made during medical treatment for those injures, has not been expressly considered.

OADC supports defendant's arguments that such inquiry is not privileged pursuant to ORCP 44 C and OEC 504-1(b)(2) and (4) . The physician-patient privilege was not intended to prohibit inquiry of the *plaintiff* in civil litigation that she has brought against the defendant seeking to recover for her personal injuries. Consistent with "settled practice," discussed below, plaintiff may be examined at deposition about her medical care without waiving her privilege.

Reports and notations of medical examinations must be produced when requested. ORCP 44 C, 44 E; *see also* ORCP 55 H(2). Defendants, historically and routinely, have been entitled to examine plaintiffs concerning their injuries and communications with providers about those injuries.

Although they step back from the position in this case, in *Barrier*, Oregon Trial Lawyers Association (OTLA) acknowledged that "the settled practice among members of the Oregon State Bar" is that testimony by injured plaintiffs in discovery depositions does not waive the physician-patient privilege. OTLA explained what had occurred in *Barrier* as the norm:

> "Defendants then noticed Plaintiff for deposition, which he attended as required under law. Consistent with the current practice in Oregon, Plaintiff answered questions during that deposition pertaining to his medical care and treatment."

OTLA Brief, *Barrier v. Beaman*, pp 2-3. This settled and accepted practice reflects the original intent behind the physician-patient privilege, which was to allow plaintiff to prevent examination of treating physicians until such time as the privilege was waived, not to prevent the discovery deposition of the plaintiff in her own lawsuit.

Plaintiff's arguments in this case seek a dramatic shift in application of the physician-patient privilege and personal injury litigation, one that would potentially preclude defendants from asking any question of plaintiff about the plaintiff's treatment and communications with medical providers and the injuries

giving rise to the lawsuit. OADC shows that, in context, a reasonable construction of OEC 504-1 (ORS 40.235) does not support this shift.

Even if the privilege would otherwise apply to the examination in this case, the inquiry ordered by the trial court still is permissible. In addition to ORCP 44 C, the legislature recognizes limits on the privilege that are "non-exclusive", leaving an opening for judicially recognized limits on its application in OEC 504-1(b)(4). Deposition examination of plaintiffs about their injuries and the medical care received for those injuries, is a long-recognized and permissible limit on the physician-patient privilege in Oregon practice.

The issue plaintiff identifies is:

> "In a personal injury case, does the physician-patient privilege protect against discovery into oral discussions between a patient and physician relating to injuries for which recovery is sought?"

Amended Petition for Writ, p 2. Whether the trial court has authority to order the plaintiff in her own personal injury litigation to respond to deposition questions about the injuries for which she is seeking damages is essential to the analysis. To the extent needed, protections for plaintiffs' interests in preventing anyone from "parading" plaintiff's communications before the public are available through protective orders and other court-enforced restrictions. ORCP 36 C.

ARGUMENT

Physician-patient communications about injuries for which recovery is sought are a proper matter for inquiry at the plaintiff's discovery deposition under ORCP 36, 39 and 44 C, and OEC 504-1(4) (ORS 40.235). The parties have found no Oregon case on point, indicating that the issue presented has not been one subject to significant, if any, debate. Rather, accepted practice has been to allow plaintiffs to testify at deposition about their injuries.

Answering questions about the conditions and communications noted in plaintiffs' medical records does not, as this court has held, waive the physician-patient privilege. *Barrier,* 361 Or at 233. *Barrier* reaffirmed that defendants may not depose treating physicians until the plaintiff has voluntarily offered a witness about her condition. *Grimm,* 298 Or at 213, n 3. *Barrier* clarified that a plaintiff does not voluntarily offer himself as a witness when giving testimony at a deposition requested by the defendant. *Barrier* resolved that waiver is not at risk when a plaintiff is deposed during discovery about their injury and treatment. 361 Or at 233. That rule is not in debate here. *Barrier,* in which the plaintiff testified about his medical care and treatment, cannot be considered support for a different rule. [1]

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[1] Plaintiff's reading of *Barrier* stretches too far. *Barrier* does not hold that defendants may not obtain testimony from the plaintiff regarding conversations with their treating provider about the injuries and treatment. The reference by defendants in *Barrier,* on which plaintiff relies, was that the plaintiff in *Barrier*

1. The Court's Inherent Authority

In *Carnine v. Tibbetts*, 158 Or 21, 27, 74 P2d 974 (1937), the court recognized that a trial court has "inherent general power" to order the plaintiff to submit to a physical examination by medical experts selected by the defendant or designated by the court." 158 Or at 31. *See Nielsen v. Brown*, 232 Or 426, 439-44, 374 P2d 896 (1962), *overruled in part on other grnds by State v. Foster*, 296 Or 174, 182, 674 P2d 587 (1983). This Court has stated the reason:

> "'Courts should not sacrifice justice to notions of delicacy, and knowledge of the truth is essential to justice.'"

A.G. v. Guitron, 351 Or 465, 471-72, 268 P3d 589 (2011), *quoting Lane v. Spokane Falls & N. Ry. Co.*, 21 Wash 119, 121, 57 P 367 (1899).

The legislature was content with the court's "inherent general power" in this regard and did not act on the matter of medical examinations in litigation until 1973. When it did, it codified the existing case law by adopting the predecessors to ORCP 44. *See former* ORS 44.610 through 44.640 (1974), repealed by Or Laws 1979, ch 284, section 199; *A.G. v. Guitron*, 351 Or at 473-78 (discussing legislative history of *former* 44.610 through 44.640). At the same time, the legislature expressly adopted the provisions for discovery of reports of

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could have objected to the inquiry, meaning plaintiff could have asserted the privilege and sought the trial court's ruling. This Court agreed with that, 361 Or at 233; it did not hold that the communications about which plaintiff freely testified – consistent with accepted practice – were in fact privileged from disclosure in that setting. The Court did not examine the context or meaning of allowing a "patient to refuse to disclose" as used in OEC 504-1(b)(2).

treating physicians now set forth in ORCP 44 C. *See A.G. v. Guitron*, *supra*, 351 Or at 473-78; Or Laws 1973, ch 136, § 3, *former* ORS 44.620(2).

The legislature was aware of the "inherent general power" of the courts, when it adopted the evidence code in 1981, including OEC 504-1, and in 1987 when it expressly amended OEC 504-1 to provide that its list of limits on the privilege is "non-exclusive." *See also* OEC 514 (ORS 40.295) (preserving all existing privileges created by the Oregon Constitution and statutes "or developed by the courts of Oregon" unless changed or repealed). In keeping with the statutory framework, the same "inherent general power" that allows a court to require a plaintiff in litigation, without waiving the privilege, to submit to a medical examination allows the court to order a plaintiff to respond to deposition questions about communications with her medical providers regarding the injuries for which she is seeking recovery.

2. Legislative History and Construction

OEC 504-1(2) should be construed consistent with the long-established Oregon practice of allowing deposition examination of a plaintiff concerning communications with treating medical providers. Rules of Civil Procedure are construed in the same manner as statutes:

> "[W]e look to its context as well as its text, and that, to the extent we deem appropriate, we may also consider legislative history. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993)(explaining statutory interpretation methodology).

> Existing case law forms a part of a statute's context, *SAIF v. Walker*, 330 Or 102, 108-09, 996 P2d 979 (2000)."

A.G. v. Guitron, 351 Or at 471; *see* ORS 174.020.

When adopted and in later versions, the physician patient privilege made no reference to shielding a plaintiff in litigation from testifying about their own injury and medical treatment for the injury. *See* General Laws of Oregon, Civ Code, c VIII, title IV § 702(4) p 325 (Deady 1845-1864). Rather, the statute proscribed others from being examined. *Former* ORS 44.040 provided:

> "(1) There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: * * *
>
> "(a) A husband shall not be examined * * *
>
> "(b) An attorney shall not, without the consent of his client, be examined * * *
>
> "(c) A priest or clergyman shall not, without the consent of the person making the confession, be examined * * *
>
> "(d) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient * * *."
>
> "* * *

The privilege, just as now, could be waived:

> "(2) If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a wife,

> husband, attorney, clergyman, physician or surgeon, stenographer or licensed professional nurse on the same subject."

Former ORS 44.040(2); *State v. Betts*, 235 Or 127, 136-37, 384 P2d 198 (1963) ("This statute was enacted in 1962. Deady's Code, Civ Code, § 702. The privilege was later extended to the stenographer-employer and nurse-patient relationship.") (*see former* ORS 44.040 (f) and (g) (1963). The physician-patient privilege prohibited inquiry of any physician attending the patient, but on its face did not prohibit inquiry of a party-plaintiff.

In 1973, the legislature codified existing case law with respect to medical examinations of plaintiffs during litigation and the required exchange of reports. Or Laws 1973, ch 136, §§ 1 and 2; *see A.G. v. Guitron*, 351 Or at 474 (reviewing legislative history of ORCP 44); *Carnine v. Tibbetts*, 158 Or at 31 (recognizing "inherent general power" to order the plaintiff to submit to a physical examination by medical experts). The legislature also added a provision which was considered new, to permit discovery of the reports of all examining physicians. *A.G. v. Guitron*, 351 Or at 474-76; *former* ORS 44.620(2). ORCP 44 C now provides:

> "**Reports of examinations; claims for damages for injuries.** In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply."

This was a change from then-existing law. *Nielson v. Bryson*, 257 Or at 184 (interpreting the privilege to extend to all written records created in the course of the patient's medical treatment and diagnosis).

The court in *A.G. v. Guitron* explored the legislative history of the amendments and summarized:

> "That testimony demonstrates that the drafters of HB 2101 contemplated that, on request, at any time after initiation of an action for personal injuries, a plaintiff would be required to produce the reports of his or her treating experts. The drafters anticipated that early disclosure of such reports could eliminate the need for a defense examination, promote settlement, and reduce costs."

A.G. v. Guitron, 351 Or at 478.[2]

The legislature also amended *former* ORS 44.040 in 1973 to add references to *former* ORS 44.610 to 44.640, the predecessors to ORCP 44. "HB 2101 included an amendment of the physician-patient privilege that made that

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[2] The proponents of the bill testified: " 'It has been decided by both the plaintiffs' and defense bar in Oregon that it would be more fair and appropriate if there were an exchange between the parties of any doctor's report dealing with a specific action or suit.'

Minutes, House Judiciary Subcommittee II, HB 2101, Feb 12, 1973, Tape 6, side 1 (statement of Austin Crowe); Tape Recording, House Judiciary Subcommittee II, HB 2101, Feb. 12, 1973, Tape 6, side 1 (Statement of Austin Crowe)." This change " 'would promote settlement and reduce the costs of litigation'" and " 'help to alleviate the inequities in the exchange of material between the lawyers before a trial.'" *A.G. v. Guitron*, 351 Or at 476-77 (quoting Minutes, Senate Judiciary Committee, HB 2101, May 2, 1973, 5 (statement of David Landis)).

privilege 'subject to' the provisions of that act. Or Laws 1973, ch 136, § 6." *A.G. v. Guitron*, 351 Or at 484.[3]

After amendment in 1973, *former* ORS 44.040 remained largely unchanged until 1981 when the Oregon Evidence Code was enacted. With reports of all examining physicians required to be produced – effectively all medical records related to the injury in question – the right to examine plaintiffs in discovery depositions about the records, including communications, has not been a matter of debate. There has been no reason to draw the issue into question. Had there been any question about the ability to depose injured plaintiffs, or an effort to construe OEC 504-1 otherwise, the issue would certainly have been raised long before now. [4]

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[3] As amended, *former* ORS 44.040(1)(d) provided:

"(d) Subject to ORS 44.610 to 44.640, a regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." Or Laws 1973 ch 136, § 6. *Former* ORS 44.040 was repealed in 1981 with the enactment of the Oregon Evidence Code and replaced with OEC 504-1 (ORS 40.235).

[4] In contrast, debate has often focused on whether plaintiffs can restrict discovery and examination to only the "same body part," *see* Minutes, Council on Court Procedures ORCP 44 C, and whether plaintiff may require the presence of a third party at an independent medical examination requested by the defendant, *see Lindell v. Kalugin*, 353 Or 338, 297 P3d 1266 (2013)

The accepted practice did not change with the adoption of the Oregon Evidence Code in 1981. The legislature repealed *former* ORS 44.040 and enacted each of the existing privileges in separate provisions. *E.g.*, ORS.40.225 (lawyer-client); ORS 40.240 (nurse-patient); ORS 40.260 (clergy). As enacted in 1981, OEC 504-1(2) (ORS 40.235(2)), set forth the physician-patient privilege:

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

The privilege, however, was not absolute. OEC 504-1 also provided two exceptions: communications made in the course of a physical examination ordered by a judge, and communications made in the course of a physical examination performed under ORCP 44. *Former* OEC 504-1(4) and (5); Or Laws 1981 ch 892, § 33(a). With the requirement that reports of all examining physicians be produced, the "well-settled" practice remained: plaintiffs could be and were examined as to the reports and about communications about their conditions.

OTLA mistakenly relies on the phrase in OEC 504-1(2) that "A patient has a privilege to refuse to disclose * * *," to argue that a *patient-plaintiff* may not be examined in discovery about her communications with treating

physicians. That phrase was included in some of the privileges enacted in 1981, but not others. *Compare* the nurse privilege, OEC 504-2 (ORS 40.240; "a licensed professional nurse shall not * * *") with the attorney-client privilege, OEC 503(2) (ORS 40.225(2); "A client has a privilege to refuse to disclose and to prevent any other person * * *). When read in context with the nurse-patient privilege, this phrase does not compel the conclusion that a plaintiff may not be examined in her own litigation. If that were the case, then the fact that the phrase is *absent* from the nurse-patient privilege would mean that a patient-plaintiff could not be examined about treating *physician* communications, but *could* be examined about communications with their treating *nurses*, including nurse practitioners. This could lead to a situation where the plaintiff is examined about some of the care at issue, but not all. Statutes should not be construed ion a manner that leads to illogical or absurd results. *Johnson v. Star Machinery Co.*, 270 Or 694, 705, 530 P2d 53 (1974).

A more reasonable construction of the phrase on which OTLA relies, one that is consistent with settled practice and comports with ORCP 44 C, is that the privilege is limited to allow inquiry of the plaintiff when she puts her own injuries in question in litigation and is required to produce records of her treatment for those injuries. ORCP 44 C. Conversely, patients who are not parties to litigation, who have not sued for compensation for their injuries, are entitled to rely without limitation on the physician-patient privilege to prevent

disclosure of their records or to refuse to be deposed. *OHSU v. Oregonian*, 362 Or 68, 403 P3d 732 (2017).

In keeping with this construction of OEC 504-1, in 1987 the legislature reformatted OEC 504-1 and adopted subsection (4). In doing so it replaced any reference to exceptions and instead identified "limits" on the privilege, which it expressly made a "non-exclusive list." OEC 504-1(4). The legislature identified two express limits: communications made in the course of a physical examination ordered by a judge, and communications made in the course of a physical examination performed under ORCP 44. OEC 504-1(4) (a) and (b).[5] By making the list "a nonexclusive list of limits on the privilege granted", the rule acknowledges there are other limits on the privilege not enumerated in the statute.

Just a few examples of non-listed limits include: ORS 146.750 (injuries caused by deadly weapons when there is reasonable suspicion that injury was caused by other than accidental means); ORS 419B.010 (reporting child abuse); ORS 434.020 (reporting cases of venereal disease). Nothing in OEC 504-1(4), however, restricts recognized limits to those imposed by statute. *See* OEC 514 (ORS 40.295) (recognizing judicially developed privileges). Rather, the list is considered "non-exhaustive." *Crimson Trace Corp. v. Davis Wright Tremaine*

[5] In relevant part, OEC 504-1(4)(b) provides, "Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44."

LLP, 355 Or 476, 496-498, 326 P3d 1181 (2014) (distinguishing OEC 504-1(4) as a "non-exhaustive" list of exceptions to the privilege from the exclusive list provided in OEC 503(4) (attorney-client)).

One such limit is that a plaintiff who is seeking compensation for her injuries in civil litigation may be examined as to communications with her medical providers and information learned about the injuries and treatment received. This is consistent with ORCP 44 C, which permits discovery of the reports and notations of treating medical providers, and it is necessary to ensure defendants' due process rights to be able to defend the claims brought against them. The examination does not waive a plaintiff's privilege to prevent her medical providers from being deposed. *Barrier*, 361 Or at 233.

3. Preventing Inquiry of the Plaintiff Would Change Oregon Practice in a Manner Not Intended by the Legislature

The plaintiff's condition is central to the claim being litigated. *See generally Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969) (endorsing the policy of putting both parties on an equal footing through defendant's choice of medical examiner). Her own medical condition is something uniquely within the knowledge of the plaintiff. The need to put defendants more closely on an equal footing with plaintiff with regard to knowledge about the plaintiff's alleged injuries is not just an important policy, it is an important function of ORCP 44 and a critical reason why ORCP 44 C was adopted. *See A.G. v.*

Guitron, 351 Or at 485 ("the legislature * * * considered the 'search for truth and justice' to be paramount").

In preparing a defense in personal injury actions, defendants are hamstrung by a rule that is unique to Oregon. Plaintiff controls if and when the privilege will be waived to allow examination of treating physicians, and a plaintiff can delay that waiver by choosing to delay, or deferring entirely, depositions of defendants or other providers. *Grimm*, 298 Or at 213. No inquiry can be made of any of plaintiff's other experts because of Oregon's rule prohibiting pretrial discovery of expert witnesses. *Stotler v. MTD Products, Inc*., 149 Or App 405, 943 P2d 220 (1997). In contrast, under the federal rules, a defendant at least has some access to plaintiff's witnesses, including experts, by interrogatory and deposition, to find out what they know about plaintiff's condition and what conclusions the experts reached.

Defendants are not voluntary parties to litigation. Yet, if plaintiffs are allowed to prohibit *any* inquiry about communications with their medical providers and information learned from them, they can effectively prevent defendants from discovering plaintiff's own personal knowledge about elements of the defenses, including statutory defenses, as well as the claims. This would

be true even though the plaintiff intends to testify about the subject of inquiry at trial, both as to her claim, and to refute the defenses.[6]

For example, without direct information from plaintiff about what she knew and when, defendant could be prevented from determining when plaintiff discovered or should have discovered her claims for purposes of statute of limitations defenses. *See*, e.g., ORS 12.110(4) ("An action to recover damages for injuries * * * shall be commenced within two years from the date when the injury is first discovered or in the exercise of reasonable care should have been discovered"). What a medical provider tells a plaintiff about her condition can and frequently does have a critical role in the outcome of the case. *See Greene v. Legacy Emanuel Hosp.*, 335 Or 115, 121, 60 P3d 535 (2002) (plaintiff's "awareness that a medical procedure has resulted in a distinct injury," and that defendant "caused that injury will establish the plaintiff's discovery, either actual or imputed, of the defendant's tortious conduct for purposes of ORS 12.110(4)"). The discovery rule in ORS 12.110(4) was adopted in 1967. Or Laws 1967, ch 426, § 2. The legislature certainly did not intend to prohibit

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[6] The legislature understands how to enact a privilege that is absolute, making evidence both non-discoverable *and inadmissible*. *See* ORS 41.675 and 41.685. ORS 41.675(3), for example, provides that "[a]ll data shall be privileged and shall not be admissible in evidence in any judicial, administrative, arbitration or mediation proceeding. * * *". In contrast, the physician-patient privilege may, and in litigation that is tried, will be will be waived – when plaintiff voluntarily examines a witness about her medical condition. It is not a question of if, but rather a question of when.

inquiry into what a plaintiff's doctors had told her when the defense provided by the legislature depends on what plaintiff knew or should have known about her injury.

Further, a plaintiff may share information with a provider that would reveal that the accident for which she is suing for damages was not the cause of her injury. Plaintiff's arguments would allow plaintiff to keep that information from defendant until trial, hoping that in the constraints of examination during trial, adverse information that had been withheld would not be revealed. By the same analysis, unless allowed to examine plaintiff about what she was told by her physicians, defendants could be severely impaired in developing comparative fault defenses, including that plaintiff was under the influence at the time of an accident, or that plaintiff knew of and was failing to follow physician instructions on how to manage a medical condition caused by her injury.

Further, if plaintiff's view is accepted, a plaintiff could argue in a claim for informed consent pursuant to ORS 677.097, that the defendant is not permitted to inquire as to the fundamental elements of the claim – whether plaintiff was informed of the risks of the procedure and gave her informed consent. ORS 677.097. According to plaintiff, the conversation with her physician would not be a proper subject of inquiry because it involved communications about her medical care even though it goes to the core of her claim. Plaintiff's position is untenable.

This Court recognizes "the right of the trial court to provide both parties with an equal opportunity to establish the truth." *Bridges v. Webb*, 253 Or 455, 457, 455 P2d 599 (1969). In each of the scenarios above, the defendant would be unfairly limited in defending the claims to the extent plaintiff cannot be examined as to the very injuries and treatment for which she seeks redress. Acknowledging that the physician-patient privilege already imposes an unequal opportunity to establish the truth in personal injury litigation, this court should reject plaintiff's invitation to curtail or abandon the previously-unchallenged and accepted limit on the physician-patient privilege.

4. Abandoning the Limit Has Real Consequences

The privilege on which a plaintiff relies is transient when she chooses to put her injuries and medical care at issue in litigation. At trial, the plaintiff will be required to put on proof of her injuries and medical treatment, meaning that the privilege will be waived. Preventing deposition inquiry before trial about her personal knowledge, including communications with her medical providers, would sacrifice fairness and defendants' rights to due process in favor of confidentiality that the plaintiff has chosen to make temporary.

If this Court considers the physician-privilege to apply without limitation in this context, then, at a minimum, the Court should acknowledge the consequences when a plaintiff refuses to be examined in circumstances in which an examination does not waive the privilege. *See Pamplin v. Victoria*, 319 Or

429, 877 P2d 1196 (1994) (recognizing sanctions pursuant to ORCP 46 for failure to make discovery). Plaintiffs can, whenever necessary, seek protective orders to restrict use of the information disclosed for purposes of the litigation. ORCP 36 C. It is entirely within the trial court's authority to limit plaintiff's proof at trial and exclude testimony that plaintiff chooses to withhold in discovery when providing the requested deposition testimony will not waive the privilege, and other protections are available to preserve confidentiality. ORCP 46; *see also DeWolf v. Mt. Hood Ski Bowl, LLC*, 284 Or App 435, 392 P3d 759, *rev den* 361 Or 885 (2017) (new trial required where failure to produce evidence materially affected plaintiff's rights).

The practical considerations of abandoning the accepted limit on the privilege weigh heavily in the analysis. The legislature's interest in promoting settlements and limiting the costs of litigation is evident, as revealed in the adoption of ORCP 44 C. The same interests are at stake when the issue is the accepted practice of examining plaintiffs about their injuries and medical treatment. Without the information, defendants' ability to fairly evaluate cases and entertain settlements will be impaired. Defendants will have little choice in every case but to challenge the assertion of the privilege and whether particular communications sought are in fact "confidential" and "made for the purposes of diagnosis or treatment" within the meaning of OEC 504-1(1)(a). Motions to

compel will proliferate, increasing the costs of litigation and the burdens on the court.

CONCLUSION

After *Barrier v. Beaman*, it is clear that a plaintiff does not waive her physician-patient privilege by testifying about her condition and physician communications at a deposition requested by the defendant. Plaintiff is free to testify without subjecting her treating physicians to deposition; that must await her waiver. Requiring a plaintiff's own testimony at deposition regarding the medical care and communications with medical providers about her injuries, is and ought to be a recognized limit on the physician-patient privilege. That being the case, it is perfectly appropriate and within the trial court's authority to require plaintiff's responses to deposition questions.

DATED this 2nd day of May 2018.

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum complies with the word count limitation for briefs pursuant to ORAP 5.05(1)(b); the word count is 5681 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(3)(b)(ii).

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

DATED this 2nd day of May 2018.

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CERTIFICATE OF FILING AND SERVICE

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by electronic delivery from the Court of Appeals e-filing system; and

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by delivering a copy by first class mail, deposited with the U. S. Postal Service at Portland, Oregon on said day.

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

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