



Oregon Supreme Court Restricts the Scope of Discoverable Communications Between Plaintiffs and Treating Physicians

From the Desk of Ryan McLellan: Communications between plaintiffs and their treating physicians have long been discoverable in Oregon depositions after the plaintiff has put their injuries at issue. Does the physician-patient privilege in Oregon's evidence code now allow plaintiffs to refuse to answer questions about such communications? Read on to find out.

Claims Pointer: In this personal injury lawsuit, a woman was injured when she fell through an allegedly faulty deck at an apartment. After filing her lawsuit against the apartment, defense counsel took her deposition and sought to learn what she told her treating physician about her injuries. Plaintiff's attorney objected to the question as constituting a violation of Oregon's physician-patient privilege. After the defense obtained a ruling from a trial court compelling plaintiff to answer the questions, plaintiff sought mandamus review by the Oregon Supreme Court. The Supreme Court reversed the trial court, finding that plaintiff's communications with her treating physician were protected. This case has changed the longstanding practice of defense counsel in Oregon. It will now be more challenging for defense counsel and claims professionals to get all of the information they need to fully evaluate their claims.

[Hodges v. Oak Tree Realtors, 363 Or 601 \(September 13, 2018\).](#)

Rule 504-1 of Oregon's Evidence Code establishes a privilege commonly known as the physician-patient privilege. In a civil lawsuit, a patient has the privilege to refuse to disclose any communications with his or her physician "made for the purposes of diagnosis or treatment of the patient's physical condition..." The privilege is subject to a non-exclusive list of three exceptions. Importantly in this matter, the privilege does not extend to "communications made in the course of a physical examination performed under ORCP 44. ORCP 44 provides, among other things, a method by which a court may order a party to a lawsuit "to submit to a physical or mental examination by a physician..." An ORCP 44 examination typically takes the form of a court-ordered Independent Medical Examination ("IME").

In this matter, Janet Hodges ("Plaintiff") was injured when an apartment balcony she was standing on collapsed. She, along with others injured in the collapse, filed a lawsuit against various entities, including Oak Tree Realtors, Inc. ("Defendants"). Defendants deposed Plaintiff and sought to learn what she told her treating physician about the injuries she allegedly sustained in the collapse. Plaintiff's counsel, however, objected to the line of questions and instructed Plaintiff not to answer. For example, Defendants asked Plaintiff whether there was a bone that she believed she broke in her right hip. She responded that it was her femur, but Plaintiff's counsel jumped in and asked her whether she was testifying based on what her doctor told her. After responding in the affirmative to her counsel, counsel directed her not to answer any more questions that involved any potential communication from her doctor.

After concluding the deposition, Defendants moved for an order compelling Plaintiff to answer the questions that her counsel had instructed her not to answer. The trial court granted the motion, agreeing with Defendants' assertion that the communications at issue fell into the ORCP 44 examination exception of the privilege. Plaintiff then sought a writ of mandamus with the Oregon Supreme Court seeking to vacate the trial court's motion to compel. The Supreme Court accepted mandamus



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and focused its review on whether the physician-patient privilege protected Plaintiff’s communications with her treating physician about the injuries for which she was seeking damages.

Defendants’ arguments at the Supreme Court focused on two distinct theories. First, they argued that “every physical examination...for the injuries for which [Plaintiff] seeks damages constitutes ‘a physical examination performed under ORCP 44.’” Second, they argued that, because the list of exceptions to the physician-patient privilege is non-exclusive, the Court should “determine as a matter of law that another limitation on the privilege applies.” Specifically, Defendants argued that allowing the “routine practice of a defendant deposing a plaintiff about her injuries, treatment, and communications with her providers related to injuries for which recovery is sought” would promote practicality, fairness and the discovery of relevant information.

Plaintiff argued in response that Defendants had misinterpreted ORCP 44. She argued that ORCP 44 examinations only occur when authorized by the authority granted to courts in ORCP 44. In essence, Plaintiff argued that the only physical examinations which would qualify under ORCP 44 were those that were ordered by the court.

First, the Court analyzed and rejected Defendants’ assertion that every physical examination of injuries for which recovery is sought constitutes an ORCP 44 examination. It arrived at its decision after engaging in an analysis of the language in the ORCP 44 statute. The Court identified that the statute was intended to have its ordinary meaning, leading to a conclusion that an ORCP 44 examination must be performed under the authority of ORCP 44 in order to be excluded from the physician-patient privilege. Typically, the Court noted, this would take the form of a court-ordered examination at the request of the defendant (in other words, an IME). Further, the Court relied on the interplay between the physician-patient privilege and the psychotherapist-patient privilege. In the psychotherapist-patient privilege, communications between a plaintiff and their psychotherapist are not privileged when a plaintiff puts the mental condition at issue. Because that limitation is not present in the physician-patient privilege, the Court concluded, the legislature did not intend for such a waiver.

Based on its reading of the rules at issue, the Court concluded that Plaintiff’s communications with her doctor were protected, as her treatment and examinations were not ordered under the authority of ORCP 44. Accordingly, the trial court had erred in granting Defendants’ motion to compel.

Finally, the Supreme Court flatly declined to create a judicial exception to the physician-patient privilege, stating that it “decline[s] defendants’ invitation to create that limitation.” It relied heavily on the interplay between the physician-patient privilege and the psychotherapist-patient privilege in declaring that the legislature did not intend such a limitation on the physician-patient privilege. Instead of creating a judicial exception, the Court declared, Defendants would be better served making their policy arguments to the legislature.

This opinion will undoubtedly affect personal injury litigation in Oregon. It remains to be seen how often plaintiffs will invoke this privilege, but when it is invoked, it will certainly draw out the evaluation process. We anticipate challenges to this opinion and/or attempted legislative changes in the upcoming year. In the meantime, we are working on developing strategies to overcome this obstacle.

View full opinion at: <https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll3/id/6846/download#page=1&zoom=auto>



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