SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

District Court, Adams County, Colorado
Hon. John Popovich
Case No. 06-cv-546

In Re:

Plaintiff:

CYNTHIA CARDENAS, Mother and Next Friend of ISABELLE PEREZ

v.

Defendants:

VADNA MERATH, M.D. and ST. ANTHONY HOSPITAL NORTH

▲ COURT USE ONLY ▲

Case No. 07-SA-150

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF COLORADO

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STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The American Civil Liberties Union of Colorado ("ACLU of Colorado") is a nonprofit and nonpartisan organization with more than 11,000 members and supporters. The mission of the ACLU of Colorado is preserve for individuals all the protections of the United States Constitution's Bill of Rights, as well as the individual protections provided for by the Constitution of the State of Colorado.

At the heart of this case is a court's power to order a parent suing on behalf of his or her injured child to relinquish the fundamental right to privacy through disclosure of medical records that are unrelated to the injured child's gestation or birth when that parent has not placed his or her own medical condition at issue. Because of the far-reaching implications of the trial court's rulings that failed to give due regard to Ms. Cardenas's independent right of privacy that is separate and apart from that of her child, the ACLU of Colorado has a substantial interest in the outcome of this Court's decision.

The ACLU of Colorado has two main points in its brief. First, Ms. Cardenas did not waive her fundamental right to privacy embodied in the physician-patient privilege by bringing an action on behalf of her injured daughter. Regardless of whether Ms. Cardenas's medical records from before or after her

pregnancy may contain relevant information as to the cause of her daughter's injuries, mere relevance is not enough. Because Ms. Cardenas did not place her medical condition at issue in this case, there was no waiver of her physician-patient privilege. Thus, the trial court had no basis for granting the Defendants license to rummage through her medical records in search of potentially relevant information.

Second, even if Ms. Cardenas had waived the physician-patient privilege, the trial court's order compelling her to sign releases allowing medical records to be sent directly to Defendants ignored the procedural protections embodied in the Colorado Rules of Civil Procedure. At minimum, Ms. Cardenas should have been afforded the opportunity to shield privileged information from Defendants through the use of a privilege log.

ARGUMENT

At the outset, the ACLU notes that the briefs submitted in support of the Defendants' position have at least one common (and ironic) thread among them. While championing a broad, far-reaching application of the attorney-client privilege to shield <u>indisputably</u> relevant information from the Plaintiff, those supporting Defendants' position simultaneously argue that the physician-patient privilege should not protect Ms. Cardenas's medical records from discovery, despite the fact that these medical records are, at best, <u>potentially</u> relevant to the claims at issue.

The practice of invoking privileges as both a sword and a shield has been disapproved by this Court. *See, e.g., Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999). Instead, the present inquiry should focus on the fundamental right to privacy that each of these well-established privileges embody.

I. The Fundamental Right to Privacy Embodied in the Physician-Patient Privilege Must be Protected Absent Waiver.

A person's medical information is entitled to protection under both statutory and constitutional provisions. *See* § 13-90-107, C.R.S. (2007); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (the right to privacy protects "the individual interest in avoiding disclosure of personal matters.); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) (holding that "confidential medical information is entitled to constitutional privacy protection")*; see also Martinelli v. District Court*, 199 Colo. 163, 173-74, 612 P.2d 1083, 1091 (Colo. 1980) (the right to privacy, alternatively referred to as the "right to confidentiality," is guaranteed by the Fourteenth Amendment and other provisions of the United States Constitution and encompasses the "power to control what we shall reveal about our intimate selves, to whom, and for what purpose."); *Corbetta v. Albertson's, Inc.* 975 P.2d 718, 720 (Colo. 1999) (same).

The physician-patient privilege, § 13-90-107, C.R.S., protects the relationships between patients and the doctors, surgeons, and registered nurses with

whom they consult for medical treatment. *See Hartmann v. Nordin*, 147 P.3d 43, 49 (Colo. 2006). "In addition to 'inspiring the making of medical confidences,' the privilege can also be viewed as recognizing the inherent importance of privacy in the physician-patient relationship by protecting the confidences once made." *Alcon v. Spicer*, 113 P.3d 735, 738 (Colo. 2005) (quoting McCormick on Evidence § 105 (John. W. Strong, ed., 5th ed. 1999)). Further, this privilege protects the patient from "the embarrassment and humiliation that might be caused by the physician's disclosure of information imparted to him by the patient during the course of a consultation for purposes of medical treatment." *Clark v. Dist. Court*, 668 P.2d 3, 10 (Colo. 1983). This privilege applies "equally to in-court testimony and to pretrial discovery of information." *Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 861 (Colo. 2004).

In light of the important purposes served by the physician-patient privilege, "the only basis for authorizing a disclosure of the confidential information is by express or implied waiver." *Weil v. Dillon Co., Inc.*, 109 P.3d 127, 129 (Colo. 2005) (internal citations omitted). Thus, the propriety of the trial court's decision in this case must rest on whether Ms. Cardenas waived the physician-patient privilege.

II. A Parent Does Not Waive His or Her Right to Physician-Patient Privilege by Asserting Claims Based on the Injury to a Minor Child.

The physician-patient privilege may be invoked in litigation to protect disclosure of a patient's medical records in litigation. The initial burden of establishing the applicability of the physician-patient privilege rests with the claimant of the privilege. *See People v. District Court*, 743 P.2d 432, 435 (Colo. 1987). Once the privilege attaches, the burden shifts to the challenging party to establish express or implied waiver. *See Hartmann*, 147 P.3d at 51. A patient implicitly waives the physician-patient privilege when he or she injects "his [or her] physical or mental condition into the case as the basis of a claim or an affirmative defense." *Clark*, 668 P.2d at 10.

a. **Applicability of the Physician-Patient Privilege Does Not Depend on the Purported Relevance of Ms. Cardenas's Medical Records.**

Defendants and certain *Amici* supportive of Defendants' position go to great lengths to establish that Ms. Cardenas's medical records *may* be relevant to issues related to the cause of Isabelle Perez's injuries. *See e.g., Brief of Amici Curiae Vandna Jerath, M.D. and the Colorado Civil Justice League* at Pp. 10-12.[1] However, this argument is misplaced.

[1] Interestingly, the Defendants have *not* sought the medical records of Isabelle's father. Presumably, his medical records would be equally relevant to many of the issues raised by Defendants, including genetic predisposition to injury.

The applicability of the physician-patient privilege is neither weighed against, nor contingent upon, the purported relevance of a person's medical records. *See Clark*, 668 P.2d at 10 (rejecting the notion that a claim of privilege should be balanced against the other party's need to obtain information essential to a claim or defense, this Court held that once the physician-patient privilege attaches, the only basis for disclosure of confidential information is waiver); *Alcon*, 113 P.3d at 741 ("[w]e have repeatedly stated that 'relevance alone cannot be the test' for waiver of the physician-patient privilege.") (quoting *Weil*, 109 P.3d at 131).

Rather, the question of implied waiver of the physician-patient privilege is focused entirely on whether the party has placed their medical condition at issue in the case and, if so, to what extent. To base waiver upon a finding of relevance would "ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances." *Alcon*, 113 P.2d at 740.

The disclosure of *privileged* information is distinguishable from situations where a party seeks disclosure of confidential, but *nonprivileged*, information such as tax returns. In those situations, a balancing test is appropriate. *See e.g.*, *Corbetta*, 975 P.2d at 720-21 (where right to privacy is invoked to prevent discovery of personal materials or information, the trial court must balance

considerations of the individual's expectation of privacy, whether the disclosure nonetheless serves a compelling state interest, and whether the disclosure is narrowly tailored to minimize intrusion upon one's privacy) (citing *Martinelli*, 612 P.2d at 1091); *see also Alcon*, 113 P.3d at 737, 743 (because tax returns were confidential, but not privileged, a balancing test between the right of confidentiality and "compelling need" was necessary). Under the circumstances of this case, however, the only issue is whether Ms. Cardenas has waived the physician-patient privilege. Defendants arguments regarding the potential relevance of Ms. Cardenas's medical records, or their need for this information, serve no valid purpose in deciding the issue of waiver.

b. **Ms. Cardenas has Not Placed Her Medical Condition at Issue in this Case and Therefore has Not Waived the Physician-Patient Privilege.**

Defendants seek to apply a theory of implicit waiver in this case in order to obtain a blanket authorization for the release of all of Ms. Cardenas's medical information, even though she alleges no physical or psychological injury in her own right. Rather, only her daughter Isabelle Perez's physical injuries are at issue. Ms. Cardenas's claim is solely for economic losses directly related to the extraordinary expenses she will incur over her daughter's lifetime.

The fact that Ms. Cardenas gave birth to Isabelle does not present an automatic waiver of privilege as to medical information *unrelated to her prenatal care and delivery of her daughter*. Ms. Cardenas has provided Defendants with all of her prenatal, labor, and delivery records that are inextricably linked to the medical records pertaining to her daughter Isabelle. This disclosure has been deemed by other courts to suffice for purposes of satisfying a defendant's right to fully and fairly defend an action. *See Palay v. Superior Court*, 22 Cal. Rptr. 2d 839 (Cal. App. 1993) (holding that while mother's prenatal medical records were discoverable in case brought on behalf of infant, defendants had no cognizable interest in medical records unrelated to the pregnancy); *In re New York County DES Litigation*, 168 A.D.2d 44, 46 (N.Y. App. 1991) (limiting discovery of nonparty

mother's medical records to prenatal records); *Herbst v. Bruhn*, 106 A.D.2d 546, 547-48 (N.Y. App. 1984) (same).

This conclusion is consistent with the Court's recent decision in *Hartmann*. In that opinion, this Court determined that the trial court had correctly ordered the plaintiff's husband and guardian to answer questions related to his knowledge of the medical history of the plaintiff's family members. 147 P.3d at 52. The Court reasoned that the information regarding family history was not, in and of itself, privileged. Critical to this Court's reasoning, however, was the fact that "Defendants did not ask the district court to order [Plaintiff's guardian] to testify to or produce any family members' medical records, information, or substance of any physician-patient communications beyond that which the family members had previously revealed to [the Plaintiff or her guardian]." *Id.* at 53. Further, the Court ruled that the plaintiff's guardian was not required to disclose his own medical information, as he had not placed his medical condition at issue in the case. *Id.* at 54.

No cases support the notion that a mother's medical records, or any other family member's records for that matter, are subject to unfettered access by a defendant when a relative commences an action for medical malpractice. *See Hartmann*, 147 P.3d at 56 (Eid, J., concurring) (noting that plaintiff in medical

negligence action "cannot waive the privilege for her close family members; that waiver can only be accomplished by the family members themselves."); *see also In re New York County DES Litigation*, 168 A.D.2d at 47 ("The mere fact that a relative, distant or near in terms of kinship, has commenced a medical malpractice action alleging a birth defect should not subject all her relatives to the 'long arm' reach of the law authorizing their medical histories opened to all.").

In short, the disclosure of Ms. Cardenas's medical information beyond those records relating to her child's gestation and birth are protected by the physician-patient privilege. *See* § 13-90-107, C.R.S. Ms. Cardenas has not implicitly waived the privilege by either giving birth to her daughter, *see e.g.*, *In re New York County DES Litigation*, 168 A.D.2d at 46, or by making claims for economic losses related to the injuries suffered by her daughter, see *Johnson*, 977 P.2d at 157.

III. **Unregulated Access to Medical Records Through Blanket Releases Unnecessarily Invades the Right to Privacy**.

Even assuming, *arguendo*, that Ms. Cardenas did partially waive her physician-patient privilege, the trial court erred by failing to narrowly tailor its order to prevent the disclosure of confidential and irrelevant medical information.

Even where the physician-patient privilege has been partially waived, a party is still entitled to assert privilege as to medical information unrelated to the medical

conditions that have been placed at issue. This Court outlined the appropriate method for asserting that privilege in *Alcon*, 113 P.3d at 741-42; *see also* C.R.C.P. 26(b)(5). This process involves the creation of a privilege log and, in the event that the parties are unable to resolve disputes regarding privilege informally, the trial court's *in camera* review of the medical records. *Id.* This procedure is consistent with a trial court's obligation to consider "how disclosure may occur in a manner which is least intrusive with respect to the right of confidentiality." *See Corbetta*, 975 P.2d at 721.

In this case, the trial court completely ignored the Plaintiff's right to confidentiality and the proper procedures outlined by this Court and the Colorado Rules of Civil Procedure for protecting that right. This unwarranted invasion of Plaintiff's privacy cannot stand.

CONCLUSION

For the reasons set forth above, the ACLU of Colorado asks the Court to reaffirm its prior holdings that prohibit the disclosure of privileged medical records in the absence of waiver. Further, the ACLU of Colorado asks the Court to conclude that the use of blanket releases authorizing medical records to be sent directly to another party unnecessarily invade the right to privacy.

Respectfully submitted August 22, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 22, 2007, a true copy of the foregoing **BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF COLORADO** was served via United States Mail First Class, postage prepaid, addressed to the following:

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