No. A15-0896

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In Supreme Court

Anita J. Howard,

Appellant,

v.

Shelly R. Svoboda, M.D., Christopher J. Geisler, MPAS, PA-C, Noran Neurological Clinic, P.A.,

Respondents.

BRIEF OF *AMICUS CURIAE* MINNESOTA MEDICAL ASSOCIATION

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INTRODUCTION AND STATEMENT OF INTEREST[1]

The Minnesota Medical Association (MMA) is a professional association representing approximately 11,000 physicians, residents, and medical students in Minnesota. The MMA seeks to promote excellence in health care, to insure a healthy practice environment, and to preserve the professionalism of medicine through advocacy, education, information, and leadership. For more than 150 years, the MMA and its members have worked together to safeguard the quality of medical care in Minnesota as well as the future of medical professionalism.

MMA's interest in this case is primarily a public one, and its interest in this issue has a lengthy history, beginning more than 30 years ago when MMA was involved in the creation of the informal-conference statute. The outcome of this case will impact the participation of treating physicians in all medical malpractice lawsuits. The issue of physician-patient privilege is of the utmost importance to MMA's membership, and MMA is concerned that the position advocated by Appellant and supported by *Amicus Curiae* Minnesota Association for Justice (MAJ) would result in confusion for treating physicians and an unworkable rule for physician participation in medical malpractice lawsuits, leading to a deterioration of patient care and the physician-patient relationship. Under the position advocated by Appellant, physicians compelled to participate in lawsuits involving their patients will be required to navigate a complicated and uncertain framework regarding the line between facts and opinions, as well as privileged versus non-privileged information. This will impose

[1] Pursuant to Minn. R. Civ. App. P. 129.03, neither MMA nor its counsel have received or been promised any monetary or other compensation in regards to this case, and neither has a financial stake in the outcome of the case. No one affiliated with a party has participated in writing any part of this brief.

unnecessary strain on that relationship and an increased and unnecessary legal risk to physicians. In contrast, the Court of Appeals' decision offers a simple framework for the informal conference process, allowing physicians to limit their participation in these cases and instead focus on patient care. The MMA therefore seeks to provide an overview of the practical implications of Appellant's position to aid this Court in analyzing and resolving these critical issues.

DISCUSSION

The Court of Appeals' opinion amounts to a straight-forward interpretation of Minn. Stat. § 595.02, subd. 5. Under this statute, a plaintiff who commences an action for medical malpractice "waives in that action *any privilege* existing under subdivision [1(d)], *as to any information or opinion in the possession of a health care provider* who has examined or cared for the party." Minn. Stat. § 595.02, subd. 5 (emphases added). This same statute allows all parties to the action to "informally discuss the information or opinion" with the health care provider, if he or she consents. *Id.* The Court of Appeals concluded that the statute, which articulates the scope of a patient's waiver of physician-patient privilege, includes the waiver of both facts and opinions held by a treating physician. *Howard v. Svoboda*, 877 N.W.2d 562, 566-67 (Minn. App. 2016). The Court of Appeals recognized that the statute does not require a treating physician to form an opinion during this informal conference—it simply allows parties to *inquire* into existing opinions held by the physician during these discussions. *Id.* at 567.

The Court of Appeals' decision is consistent with the statute and it provides a practical framework for treating physicians to follow when asked to participate in medical

malpractice cases. Under the position advocated by Appellant and MAJ, it would be exceedingly difficult for a treating physician to discern the information that could be disclosed pursuant to the patient/plaintiff's waiver of statutory privilege. Instead of focusing on patient care, treating physicians would be pulled from their hospitals and clinics not only to participate in the informal conference, but also to engage in lengthy preparation sessions with the goal of parsing out unacceptable testimony under the confusing framework advocated by Appellant. They would need counsel to protect themselves from the blurry line which would attempt to delineate which aspects of the privilege have (or have not) been waived. On behalf of its members, MMA instead urges this Court to affirm the Court of Appeals' ruling, which represents a straight-forward application of the statute and a practical rule for physician testimony in medical malpractice cases, both of which protect the physician and the patient from an erosion of their relationship.

I. The Court of Appeals' decision is consistent with the purpose and goals of the Minnesota Commission on Professional Liability initiated by MMA in 1985.

In 1985, MMA convened the Minnesota Commission on Professional Liability to address the "professional liability crisis in other states and indicators of an emerging problem in access to quality care in Minnesota." (R.Add. 3.) This Commission included representatives from the insurance, legal, business, hospital, and medical professions, in addition to members of the judiciary and the broader community. (R.Add. 10.) A sub-group—the Task Force on Civil Justice—was charged with exploring a possible change to the Minnesota Rules of Civil Procedure, which allowed for depositions of treating physicians only upon a showing of good cause. (R.Add. 11.) In recommending a change to the rule, the Task Force recognized that

> The current treating physician is . . . a good source of information regarding the assessment of the plaintiff's condition and any relationship to alleged injury. *The process would be more fair if both parties had access to that individual.*

(R.Add. 12 (emphasis added).) Accordingly, the Task Force advised a change to interpretation of the rule "to allow physicians and the attorneys representing the parties to have an open and frank informal meeting to provide better access to relevant information in the possession of the plaintiff's current treating physician." (R.Add. 11.) And ultimately the Commission as a whole recommended a modification to the rule "to provide both plaintiff and defense counsel with equal access to facts in the possession of any treating physician." (R.Add. 9.) The following year, the legislature took on this call to action, and enacted the informal-conference statute at issue in this case.

The MMA's position has not changed since it commissioned this discussion in the mid-80s. And for years, the process has worked well to provide all parties with access to the information and opinions known by a patient/plaintiff's treating physician. The position advocated by Appellant and supported by *Amicus* MAJ is inconsistent with the origin and purpose of the informal-conference statute. Their position would actually thwart the very goal the Commission sought to achieve, and which the legislature embraced, in the mid-1980s. The Court of Appeals' decision is consistent with the Commission's recommendations that led to the statute's enactment, as it allows both parties to learn facts and opinions held by a treating physician in a medical malpractice case. For the reasons discussed below, permitting fair and uniform access to the information known by treating providers benefits the legal and medical community.

II. Appellant's position would frustrate the purpose of lawsuits, which is to find the truth.

MMA recognizes that the process of litigation is in essence the search for truth. *See Sullivan v. Minneapolis S. R. Co.*, 161 Minn. 45, 53, 200 N.W. 922, 925 (1924) ("The object of evidence in a legal controversy is to ascertain the truth. Resort should be had to every proper means of learning the truth."). In some cases, physician testimony is a significant aid to that process, and that is particularly true in medical-malpractice lawsuits. Thus, MMA members have long been concerned with the goals of litigation when physicians are involved in the case. Whether the physician is a treating physician or a defendant in a medical malpractice suit, MMA continues to advocate for a position that is aimed at allowing all parties access to relevant, helpful information to evaluate and resolve these types of cases. And while the Court of Appeals' decision is consistent with a lawsuit's quest for truth, Appellant's position is antithetical to that goal.

In medical malpractice litigation, testifying medical providers are often the most knowledgeable about the factual issues involved the case.[2] Treating physicians have expertise and personal knowledge of the patient/plaintiff's condition that may be helpful to a jury in resolving disputed issues. Critically, a patient/plaintiff may always obtain this information from his or her treating physician, and may involve that physician if he or she chooses. However, in instances where the patient/plaintiff has *not* elected to involve his or her treating physician in the case, the defense and ultimately the finder of fact has no access

[2] The issues in this appeal focus on treating care providers who have been involved in the patient's care prior to the litigation. Of course, the issues in this case are far different from retained experts, who were never a part of the patient/plaintiff's care team.

to a non-party, treating physician, except through the informal conference process, a subpoenaed deposition, or trial testimony.

Allowing a patient/plaintiff to withhold from the parties potentially relevant and helpful information held by his or her treating physician is inconsistent with the goal of litigation and the search for the truth in these cases. A patient/plaintiff may not pick and choose which aspects of the privilege to waive— Minn. Stat. § 595.02, subd. 5 is clear that by bringing a medical malpractice case, the patient/plaintiff has waived "any privilege" in total. If the physician has opinions regarding the quality of care the patient received or whether the care resulted in harm, the search for truth in the litigation should allow counsel to make that inquiry. Otherwise, under the position advocated by Appellant and supported by *Amicus* MAJ, the patient/plaintiff would have the opportunity to privately learn the treating provider's opinions, but the same opportunity would be denied to the defense. Such an incongruous resolution is inconsistent with the search for truth a lawsuit is intended to inspire. The Court of Appeals' holding is consistent with the search for truth, and allows for the possibility of early, expedient resolution of medical malpractice cases.

III. Appellant's position is confusing and unworkable for treating physicians.

The primary concern of MMA's membership is the care of their patients. At times, MMA physicians are asked to give testimony or discuss the circumstances surrounding their treatment and care of a patient/plaintiff, but because of the clear guidance of the statute, physicians are able to easily understand the scope of their patient's waiver of privilege and the scope of permissible testimony. But the rule advocated by Appellant is unworkable and confusing. Appellant's interpretation would result in less time for patient care as physicians

would require more time to prepare for the potential scope of discussion in these informal conferences, including essential meetings meeting with their own counsel even when the physician is not a party to the litigation. MMA therefore urges this Court to affirm the holding of the Court of Appeals.

The holding of the Court of Appeals is simple to apply. The waiver of privilege outlined in section 595.02, subd. 5, includes "information and opinions" held by the treating physician of a patient/plaintiff in a medical malpractice case. This holding recognizes that the line between "facts" or "information" held by a treating physician, and that physician's "opinions," is not always clear, and that attorney questioning in these informal settings is not black and white.

A treating physician must consider a number of factors in assessing his or her patient and making a treatment recommendation. These factors include the patient's prior treatment history (which would include the physician/defendant's treatment), the patient's response to that treatment, the patient's current condition, and a review of the pertinent medical-record history. With that information, the treating physician is able to reach a diagnosis and treatment plan for his or her patient. But the weight given to these various factors informs the treating physician's diagnosis. If the treating physician is asked during an informal conference *how* or *why* he or she arrived at a certain diagnosis, Appellant's proposed rule likely would not allow the physician to testify as to his thoughts or opinions on the prior treatment of the physician/defendant, even if that information impacted his opinions about the patient/plaintiff's current treatment plan and prognosis. Indeed, the patient-plaintiff's prior treatment and a treating physician's assessment of that prior medical treatment is

oftentimes "necessary to enable the professional to act in that capacity." *See* Minn. Stat. § 595.02, subd. 5. Under the Court of Appeals' holding, the treating physician would be able to discuss those opinions during an informal conference. But under Appellant's proposed rule, it is unclear whether that discussion would be subject to privilege, blurring the line even further and causing confusion and uncertainty for Minnesota's physicians.

Appellant's position also assumes that questions in an informal conference will be as clear as: "What is your opinion on whether Physician/Defendant violated the standard of care?" But the questions during these informal conferences are likely to be more nuanced, and will require treating physicians to take extended time away from patient care to prepare with counsel to ensure that only certain information and opinions are disclosed. And even with the best of intentions and the most rigorous of preparation, a physician may inadvertently violate the privilege by answering an unclear question posed by either party.[3] It is unfair to put non-party physicians in the position of determining what is and is not allowed, particularly when the legal implications of inadvertent disclosure of non-waived patient information are so significant. A physician may face licensing actions, civil penalties, and litigation for the inadvertent disclosure of privileged information, which is a concern of MMA given the confusing rule advocated by Appellant in this case. Non-party physicians should not be put in this position. The line Appellant seeks to create between what is or is

[3] MMA notes that a patient/plaintiff and her counsel may speak with her treating physician at leisure and without the presence of opposing counsel. This preserves the patient-physician relationship and allows the treating physician to continue treating his or her patient without regard to any pending litigation. The defendant/physician and his or her counsel do not receive the same opportunity.

not proper disclosure is simply too blurred for a treating physician to interpret, especially with the attendant risks of inadvertent disclosure.

More importantly, the Court of Appeals recognized that treating physicians may not have any opinions on standard of care, causation, or prior treatment of their patient. Nothing in the statute or the lower court's decision compels providers to form opinions during these informal discussions; in fact, nothing in the statute requires the treating physician to participate in the informal conference *or* divulge his or her opinions. *See Anderson v. Florence*, 288 Minn. 351, 361, 181 N.W.2d 873, 879 (1970) (recognizing that "a qualified individual has in his expert opinion a property right of which he would be deprived if compelled to offer expert testimony under the adverse-witness rule").

Again, MMA members are champions of the physician-patient relationship and acutely aware of the importance of preserving that relationship. But the Minnesota legislature has determined that a patient/plaintiff waives his or her privilege by bringing a medical malpractice lawsuit and the same statute allows the parties to inquire of information and opinions held by treating physicians. Thus, allowing physicians to answer these questions in an informal setting can lead to a more robust understanding of the issues, more opportunities to obtain an early resolution of the case, and, in fact, will preserve the physician-patient relationship. Instead of putting the treating physician in the position of determining what aspect of his or her treatment is proper to disclose, and the patient/plaintiff in the position of defining and enforcing that unclear boundary, the Court of Appeals' holding resolves the tension in a simple and practical manner.

In short, the priority of Minnesota's physicians and MMA's membership is to provide the highest quality patient care. Appellant's proposed holding would frustrate that goal, by turning the informal-conference into a confusing, time-consuming, and expensive process for the parties and treating physicians. The better rule is that handed down by the Court of Appeals, where a treating physician may appear at an informal conference and discuss "information" and "opinions" held by that physician. To hold otherwise would be to open Minnesota's physicians to an increased and undesired amount of participation in medical malpractice litigation.

CONCLUSION

For the foregoing reasons, the MMA respectfully submits that the Court should affirm the decision and analysis of the Court of Appeals on this important issue.

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Dated: September 20, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a 13-point, proportionately spaced font, and the length of this document is 2,749 words. This document was prepared using Microsoft Word 2010 software.

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