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In Case Involving In Vitro Fertilization, Appeals Court Rules:

Confidentiality Law Allowed Disclosures to Patient's Ex-Fiancé

By DAVID WATSON, Staff Writer

California's statute on confidentiality of medical records permitted a clinic to disclose that a woman underwent in vitro fertilization to her ex-fiancé, whose credit card was used to pay for the procedure, this district's Court of Appeal ruled yesterday.

Writing for Div. Seven, Justice Earl Johnson said Civil Code Sec. 56.10(c)(2), part of the Confidentiality of Medical Information Act, authorized the disclosure even though the woman's use of the card was part of an agreement under which the ex-fiancé was repaying a debt.

Johnson said the appellate panel had found no prior decisions construing Sec. 56.10(c)(2), which provides that medical information "may be disclosed to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, contractor, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment made."

Intended for Insurers

The provision, he reasoned, generally "applies to requests for information from insurance companies, self-insured employers and other entities which have a contractual responsibility to pay for the patient's health care services and who are seeking to determine whether the particular claim submitted by the patient is covered under the contract and the amount of benefits payable under the coverage."

He conceded:

"It is a closer question whether this exception also applies to a private person whose credit card is used by an unrelated third party to pay for that party's medical services."

The plaintiff in the action, identified by the court only as Colleen M., sued Fertility and Surgical Associates of Thousand Oaks after the clinic told her ex-fiancé over the telephone that the charges she incurred using his credit card were for in vitro fertilization. She alleged causes of action for invasion of privacy and infliction of emotional distress.

She also contended that the clinic should not have released her medical records to the ex-fiancé's attorney in response to a subpoena issued as part of his suit against her for breach of contract and fraud. In that action, the ex-fiancé — identified by the court only as Ronald O. — alleged Colleen M. told him the $8,700 charge was for surgery and therapy necessitated by a life-threatening blood disease.

The parties agreed that when their engagement ended after a year, Ronald O. permitted Colleen M. to use his credit card because he owed her money.

Los Angeles Superior Court Judge Michael B. Harwin granted summary judgment in favor of the clinic, reasoning that Colleen authorized the disclosure when she signed a clinic form permitting it to release "any information during the course of my examination or treatment."

Deficient Authorization

Harwin erred in relying on the authorization form, Johnson said, because it did not comply with the requirements of Sec. 56.11. The typeface was too small, the provision was not clearly separated from other language on the form, it was not separately executed, it was not sufficiently specific about what types of disclosure were being authorized, and it did not advise Colleen M. of her right to receive a copy of the form, Johnson explained.

But Harwin's grant of summary judgment was nonetheless correct, the appellate jurist said, since it was supported by Sec. 56.10(c)(2).

"In this case Ronald told Colleen she could charge up to the amount he owed her for the purpose of having a medical procedure which he understood to involve therapy and surgery for a rare blood disorder," Johnson wrote. "Upon receiving his credit card bill and discovering a charge for in vitro fertilization Ronald quite naturally called the health care provider to inquire about the charge. This seems to us analogous to an insurance company whose policy covers certain medical procedures, but not in vitro fertilization, inquiring about the medical procedure the provider furnished to its insured. Upon learning the procedure was not something he had agreed to pay for with his credit card Ronald could protest payment with his credit card company or otherwise seek recovery from Colleen just as the insurance company could decline to pay for the medical services in a similar situation."

The justice said disclosure might also have been authorized under Sec. 56.16, which provides that in the absence of a written request to the contrary, a medical provider may release "at its discretion" identifying information about a patient and a "general description of the reason for treatment."

By using the term "discretion," Johnson said, the Legislature meant to require providers to exercise "prudence, circumspection, tact" before releasing information under Sec. 56.16.

"Plainly," he declared, "the Legislature did not intend a provider could use section 56.16 to justify releasing to the media the name and address of a 12 year old girl who received an abortion, was treated for drug addiction or underwent psychotherapy. The duty of a health care provider to exercise discretion in the disclosure of information also implies a duty on the part of the provider to develop standard policies and procedures as to what information will be disclosed to whom, to train its employees in the execution of these policies and procedures and to monitor and enforce employees' compliance with the provider's standards."

But triable issues of fact remained, he said, both as to whether the clinic had properly exercised that discretion and as to whether the information it released could be characterized as "general."

Turning to Colleen M.'s claim that the clinic should not have released records in response to a subpoena, Johnson said that was clearly foreclosed by Sec. 56.10(b)(3), which requires providers to comply with subpoenas. While notice to her attorney was required, the justice said, the attorney's

"weasel worded testimony he was 'never made aware' of the subpoena" was insufficient to rebut the presumption of service based on the executed proof of service declaration.

Johnson pointed out in a footnote that the case had been litigated under the assumption, apparently shared by both parties, that if a disclosure was authorized by the CMIA that would "provide a complete defense to a cause of action alleging violation of the constitutional right to privacy, not just to a cause of action alleging violation of the CMIA itself."

Citing *Garrett v. Young* (2003) 109 Cal.App.4th 1393, and *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, he cautioned:

"There are cases suggesting this assumption may be incorrect....We do not address this unbriefed issue."

Justice Laurie Zelon and Presiding Justice Dennis M. Perluss concurred in the opinion authored by Johnson.

Agoura Hills attorney Morton A. Kamzan and Pasadena lawyer Jonathan P. Milberg represented the plaintiff on appeal. Jeffrey T. Bell and Michael J. Trotter of Carroll, Kelly, Trotter, Franzen & McKenna in Long Beach appeared on behalf of the clinic.

The case is *Colleen M. v. Fertility and Surgical Associates of Thousand Oaks*, B172083.