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1997 Survey of Rhode Island Law: Cases: Confidential Health-Care Records

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Confidential Health-Care Records. *Washburn v. Rite Aid Corp.*, 695 A.2d 495 (R.I. 1997). A witness, subpoenaed to provide confidential health-care information at a judicial proceeding, must not disclose such information to a third party unless the disclosure was authorized by the court or by the individual who is the subject of the confidential health-care information.

In 1986, the Rhode Island Supreme Court found a particular section of the Confidentiality of Health Care Information Act (Confidentiality Act)[1] unconstitutional.[2] However, the privilege of limited confidentiality created by the Act was not eliminated by that decision. The Confidentiality Act protects the disclosure of confidential health-care information to unauthorized third parties unless doing so falls within a statutory exception or the privilege holder consents to such disclosure.[3] If confidential health-care information is subpoenaed, then the witness must strictly follow the procedures set forth in that subpoena.[4]

FACTS AND CASE TRAVEL

In 1992, the plaintiff, Christine Washburn (Christine), and her estranged husband, Robert Washburn (Robert), were in the process of getting a divorce.[5] Christine was pregnant at this time.[6] During the divorce proceedings, Robert filed a motion seeking to restrain Christine from ingesting prescription drugs without the court's consent.[7] The Rhode Island Family Court scheduled a hearing for May 5, 1992.[8] Robert's attorney prepared a subpoena duces tectum requesting Rite Aid Corporation (Rite Aid) to bring to the hearing all prescription drug records for Christine and Robert for the period between June of 1987 to June of 1992. Christine did

1. R.I. Gen. Laws § 5-37.3-6 (1976).

2. *See* Bartlett v. Danti, 503 A.2d 515, 517 (R.I. 1986) (holding that Rhode Island General Laws section 5.37.3-6(a), which provided the general rule that confidential-health information is not subject to the compulsory-legal process in any proceeding, violated the separation of powers mandated by Article Five of the Rhode Island Constitution).

3. *See* Washburn v. Rite Aid Corp., 695 A.2d 495, 498 (R.I. 1997).

4. *See id.*

5. *See id.* at 496.

6. *See id.*

7. *See id.* at 497. The motion also sought a court order preventing Christine from moving their other two children from Rhode Island. *See id.*

8. *See id.*

not receive a copy of the subpoena or any other form of notice that these records had been subpoenaed.[9]

The local Rite Aid pharmacy gathered the requested records and sent them to its corporate office, along with the subpoena.[10] A corporate officer/attorney reviewed the records. Instead of bringing them to court, Rite Aid mailed them directly to Robert's attorney with an authenticating affidavit.[11] This was not in accordance with Rhode Island General Laws section 9-17-5, which requires a subpoenaed witness to attend the proceedings for at least one day.[12]

Christine sued Rite Aid. She contended that Rite Aid violated the Confidentiality of Health Care Information Act[13] and the Privacy Act[14] when it disclosed her prescription drug records without strictly complying with the subpoena.[15] The Rhode Island Superior Court granted summary judgment in favor of Rite Aid,[16] relying on *Bartlett v. Danti*[17] and *State v. Almonte*.[18] Christine appealed.[19]

BACKGROUND

At common law, Rhode Island did not recognize a physician-patient privilege.[20] The privilege was created by statute.[21] The

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9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.* Rhode Island General Laws section 9-17-5 (1995) provides:
> [e]very witness who shall be duly served with a subpoena in behalf of any party to a suit or proceeding, civil or criminal, and shall have his lawful fees tendered to him for his travel from his place of abode to the place at which he shall be summoned to attend, and for one (1) day's attendance, shall be obliged to attend accordingly.

Id.
13. R.I. Gen. Laws § 5-37.3-9 (1995).
14. R.I. Gen. Laws § 9-1-28.1 (1997). This issue is not analyzed in this survey in detail. The Rhode Island Supreme Court held that Christine stated a right-to-privacy claim. Rite Aid's unauthorized disclosure of Christine's prescription drug records to her husband's attorney violated her right to be secure from unreasonable intrusion and her right to be secure from unreasonable publicity given to one's private life. *See Washburn*, 695 A.2d at 499-500.
15. *See Washburn*, 695 A.2d at 498-99.
16. *See id.* at 496-97.
17. 503 A.2d 515 (R.I. 1986).
18. 644 A.2d 295 (R.I. 1994).
19. *See Washburn*, 695 A.2d at 497.
20. *See* State v. Guido, 698 A.2d 729, 734 (R.I. 1997).

current version of the Confidentiality Act creates a privilege that protects a person's confidential health-care records from unauthorized disclosure to third persons.[22] However, this privilege is limited and is therefore not a blanket privilege. The statute establishes exceptions to the privilege. However, the exceptions enumerated in the version of the statute that was applicable to this case did not include the information being subject to compulsory legal processes without obtaining the privilege holder's consent.[23]

In *Bartlett v. Danti*,[24] the Rhode Island Supreme Court found that section 5-37.3-6 of the Confidentiality Act[25] was unconstitutional because it barred the production of confidential heath-care records during a judicial proceeding.[26] The court in *Bartlett* found that the exclusion of confidential health-care records from compulsory legal process violated the separation-of-powers doctrine as provided by Article Five of the Rhode Island Constitution.[27] The court reasoned that the statute interfered with the subpoena power of the judiciary and the court's discretion in determining the

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21. *See id.*

22. *See Washburn*, 695 A.2d at 498; *see also* R.I. Gen. Laws § 5-37.3-6(a) (Supp. 1997).

> Except as provided in subsection (b), confidential health care communications shall not be subject to compulsory legal process in any type of judicial proceeding, and a patient or his or her authorized representative shall have the right to refuse to disclose, and to prevent a witness from disclosing, his or her confidential health care communications in any such proceedings.

Id.

23. *See id.*; *see also* R.I. Gen. Laws § 5-37.3-6(b) (Supp. 1976). The statute was amended in 1996 and included a procedure for the disclosure of confidential-health-care information in judicial proceedings. *See* R.I. Gen. Laws § 5-37.3-6.1 (Supp. 1997).

24. 503 A.2d 515, 518 (R.I. 1986).

25. R.I. Gen. Laws § 5-37.3-6(a) (1976). The statute provides:

> Except as provided in subparagraph (2) hereof, confidential health care information shall not be subject to compulsory legal process in any type of proceeding, including, but not limited to, any civil or criminal case or legislative or administrative proceedings or in any pre-trial or other preliminary proceedings, and a patient or his authorized representative shall have the right to refuse to disclose, and to prevent a witness from disclosing, his confidential health care information in any such proceedings.

Id.

26. *See Bartlett*, 503 A.2d at 518.

27. *See id.* at 517. Article 5 provides that "[t]he powers of the government shall be distributed into three departments: The legislative, executive and judicial." *Id.* (quoting R.I. Const., art. IV).

admissibility of relevant evidence.[28] Additionally, the court held that the Act makes an arbitrary distinction without a rational basis when it authorizes the production of confidential health-care information without the patient's consent in a workers' compensation proceeding,[29] while barring it in most other actions.[30]

In *State v. Almonte*,[31] the court reaffirmed its holding that the general exemption of confidential health-care records from the judicial process is unconstitutional.[32] The statute at issue in *Almonte* was the Privileged Communications Act.[33] This statute was enacted in response to the court's decision in *Bartlett*.[34] This Act granted a privilege of confidentiality to medical information by requiring patient consent before medical information can be disclosed in any judicial proceeding.[35] The court found the statute unconstitutional because it was equally as broad as the section of the Confidentiality Act considered in *Bartlett*.[36]

Justice Lederberg strongly dissented in *Almonte*.[37] She noted that only Rhode Island has concluded that health-care privilege statutes impermissibly intrude on the powers of the judicial branch.[38] The dissent pointed out that communications between physicians and patients are privileged and are held so in many jurisdictions.[39] The majority conceded that this assertion was accurate,[40] but distinguished Rhode Island's law of an absolute privilege from other jurisdictions. In other jurisdictions, the privilege is limited to confidential communications between a physician and a patient.[41] All other information such as the observations or physical examination of the patient, are excluded from the privilege.[42] The majority found that the Rhode Island privilege, as codi-

28. *See Bartlett*, 503 A.2d at 517.
29. *See id.* at 518. The relevant section is section 5-37.3-4(b)(11).
30. *See id.*
31. 644 A.2d 295 (R.I. 1994).
32. *See id.* at 298.
33. R.I. Gen. Laws § 9-17-24 (1985).
34. *See Almonte*, 644 A.2d at 297-98.
35. *See id.* at 296.
36. *See id.* at 299.
37. *See id.* (Lederberg, J., dissenting).
38. *See id.* at 302.
39. *See id.*
40. *See id.* at 299.
41. *See id.*
42. *See id.*; *see, e.g.*, Nev. Rev. Stat. Ann. §§ 49.225, 49.215(1) (Michie 1986); Or. Rev. Stat. § 40.235, Rule 504-1(1)(a) & 2 (1993).

fied in the Confidentiality Act and the subsequent Privacy Act, was too broad because it bars all health-care information from the judicial process, including objective tests and observations.[43]

ANALYSIS AND HOLDING

In *Washburn*, the Rhode Island Supreme Court considered its previous holding in *Bartlett* and *Almonte* as to the constitutionality of the Confidentiality Act.[44] *Bartlett* held section 5-37.3-6 of the Rhode Island General Laws unconstitutional because of its intrusion on judicial powers.[45] Additionally, the Act makes an arbitrary distinction by exempting health-care records in judicial proceedings other than worker's compensation proceedings.[46] The *Washburn* court concluded that the underlying privilege created by the Confidentiality Act was not disturbed by the holdings in *Bartlett* and *Almonte*.[47] Thus, the privilege is limited to the non-disclosure of confidential health-care records to unauthorized third parties, unless the privilege holder consents or the holder of such information has strictly complied with the legal process with respect to such documents.[48]

The plaintiff alleged that Rite Aid failed to comply with the terms of the subpoena by not personally bringing the documents to court as required by section 9-17-5 of the Rhode Island General Laws.[49] The court agreed.[50] Section 9-17-5 requires a subpoenaed witness to attend the judicial proceeding for at least one day.[51] The subpoena received by Rite Aid commanded the witness to bring the records to court rather than respond by certified mail as allowed by section 9-19-39 of the Rhode Island General Laws.[52]

Even if the subpoena as prepared by Robert's attorney allowed Rite Aid to respond by certified mail, such response would not have

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43. *See Almonte*, 644 A.2d at 299.
44. Washburn v. Rite Aid Corp., 695 A.2d 495, 498 (R.I. 1997).
45. Bartlett v. Danti, 503 A.2d 515, 517 (R.I. 1986).
46. *See id.* at 518.
47. *Washburn*, 695 A.2d at 498.
48. *See id.*
49. *See id.* at 497.
50. *See id.* at 498.
51. *See id.* at 497 n.3; *see also* R.I. Gen. Laws § 9-17-5 (1997); *supra* note 12.
52. R.I. Gen. Laws § 9-19-39(2)(a) (1997) (allowing an employee of any health-care facility to respond by certified mail after notification to the attorney requesting the information and notification of all attorneys or other parties to the proceeding).

been in accordance with section 9-19-39.[53] Rite Aid is not a "health-care facility" as defined by statute.[54] The fact that Rite Aid is not a "health-care facility" does not exempt it from the provisions of the Confidentiality Act. Rite Aid was a "third party" as defined under section 5-37.3-3(14).[55] Therefore, Rite Aid was required to follow the provisions of the Act.

The court summarized its position by stating that confidential health-care information may be disclosed in a compulsory legal process without a person's consent.[56] However, such disclosure is not without its procedural safeguards. The privilege holder must be notified of the subpoena, given an opportunity to review the information being offered, given the chance to object and granted the occasion to request protective limitations pertaining to the nature, extent and use of such records.[57] By failing to follow the strict procedures set out in the subpoena, Rite Aid violated the Confidentiality Act. Therefore, Rite Aid was liable to the privilege holder for actual damages, and on remand, if the court deems it appropriate, exemplary damages.[58]

CONCLUSION

Contrary to the popular belief that health-care information is absolutely protected from disclosure, such information may be disclosed in a judicial proceeding. Disclosure is necessary because blanket nondisclosure would hinder the judicial process by exempting relevant information. Relevant evidence is necessary for the court to perform its function of fairly adjudicating controversies

53. *See Washburn*, 695 A.2d at 498.

54. *See id.*; *see* R.I. Gen. Laws § 23-17-2(5) (defining, in pertinent part, a health-care facility as "any institutional health service provider, facility or institution, place, building, agency, or portion thereof . . . used, operated, or engaged in providing health care services").

55. *See Washburn*, 695 A.2d at 498-99; *see also* R.I. Gen. Laws § 5-37.3-3(14) (Supp. 1997) (stating that a third party is "a person other than the patient to whom the confidential health care information relates and other than a health care provider)."

56. *See Washburn*, 695 A.2d at 498.

57. *See id.* at 498. The Confidentiality Act was amended by Pub. L. 1996, ch. 248, § 3, and Pub. L. 1996, ch. 266, § 3. The amendments were not applicable in *Washburn*. The amendments establish procedures for the disclosure of health-care information. *See Washburn*, 695 A.2d at 498 n.5.

58. *See id.* at 501; *see, e.g.*, Palmisano v. Toth, 624 A.2d 314, 318 (R.I. 1993) (holding that a defendant may be liable for exemplary damages if the malice rose to the level of criminality).

properly. However, disclosure of such information cannot be freely supplied to third parties. Procedural safeguards are in place to protect the sensitive nature of confidential health-care information. When a party to an action requests confidential health-care information, it is the discretion of the privilege holder, or the court, to allow such information to become part of the record.

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