

SUPREME COURT OF COLORADO

Gennaro DeSantis, individually and as representative of the Estate of Virginia DeSantis; Pamela Buckner; Terry Elliott; and Cynthia Naeb v. John S. Simon, M.D. and Michael Fenoglio, M.D.

DeSantis v. Simon, 209 P.3d 1069 (Colo. 2009) · No. No. 08SA321 · Decided June 22, 2009

SUMMARY

The Colorado Supreme Court held that the Medical Practice Act provision exempting Board of Medical Examiners proceedings from public inspection did not create a blanket privilege against civil discovery. It also held that the Peer Review Act privilege did not apply because the Board was not a peer review committee. The trial court abused its discretion by ordering production of all documents without conducting an in camera review and Martinelli balancing analysis, so the order was reversed and the matter remanded.

CASE DETAILS

COURT	Supreme Court of Colorado
WRITING FOR THE COURT	Justice Hobbs
JURISDICTION	Colorado
DECIDED	June 22, 2009
DOCKET	No. 08SA321
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Original proceeding under C.A.R. 21 challenging a trial court order compelling Dr. Simon to produce all documents in his possession relating to Colorado Board of Medical Examiners investigations.
STANDARD OF REVIEW	Statutory construction is reviewed de novo. The trial court's discovery and privilege determinations are reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Gennaro DeSantis, individually and as representative of the Estate of Virginia DeSantis, Pamela Buckner, Terry Elliott, Cynthia Naeb v. John S. Simon, M.D., Michael Fenoglio, M.D.

TOPICS

discovery dispute

medical records privacy

writ of certiorari

statutory interpretation

civil procedure

PRACTICE AREAS

civil procedure

health law

medical malpractice

evidence

QUESTIONS PRESENTED

1. Whether section 12-36.5-104(10), C.R.S., of the Peer Review Act protects documents exchanged between a physician and the Colorado Board of Medical Examiners from civil discovery.
2. Whether section 12-36-118(10), C.R.S., of the Medical Practice Act creates a privilege against civil discovery of BME investigatory records.
3. Whether the trial court abused its discretion by ordering production of all documents listed in Simon's privilege log without conducting an in camera review and Martinelli balancing analysis.

HOLDINGS

1. Section 12-36.5-104(10) does not apply because the Colorado Board of Medical Examiners is not a peer review committee; the statute protects records of professional review committees, governing boards, and committees on anticompetitive conduct, not the BME itself.
2. Section 12-36-118(10) does not create a privilege against civil discovery of BME investigatory records; it addresses only public inspection of BME proceedings, minutes, and records.
3. The trial court abused its discretion by ordering production of all documents without reviewing them in camera and conducting a Martinelli analysis.

KEY QUOTATIONS

"We hold that the trial court abused its discretion in this case by ordering the doctor to produce all of the documents listed in his privilege log without reviewing the documents in camera and conducting a Martinelli analysis." (1070)

"We conclude, from its plain language, that the General Assembly did not intend section 12-36-118(10) to foreclose operation of our discovery rules in a civil lawsuit." (1075)

"Thus, the trial court must engage in an ad hoc balancing of the competing interests through an in camera examination of the materials." (1076)

FACTUAL BACKGROUND

Virginia DeSantis underwent two hernia surgeries performed by Dr. John Simon in 2005 and subsequently developed an enterocutaneous fistula before dying in February 2006. Her family brought a medical-malpractice and wrongful-death action alleging negligence and lack of informed consent, and also filed a complaint against Simon with the Colorado Board of Medical Examiners. During discovery, the plaintiffs subpoenaed all documents relating to BME disciplinary proceedings, including documents exchanged between Simon and the BME and its chart auditor.

PROCEDURAL HISTORY

The plaintiffs in an underlying medical-malpractice action subpoenaed Dr. Simon's documents relating to BME disciplinary investigations. Simon asserted statutory and physician-patient privileges and filed a privilege log. The trial court held that the Medical Practice Act created no privilege and that the Peer Review Act did not apply because the BME was not a peer review committee, then ordered production of all listed documents. Simon petitioned for relief under C.A.R. 21, and the Supreme Court issued a rule to show cause.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

If the parties continue to contest discovery, the trial court must conduct an in camera inspection of the documents listed in Simon's privilege log, perform the appropriate Martinelli analysis, and decide whether the materials should be disclosed, withheld, redacted, or subject to a protective order.

CASES CITED

- Martinelli v. Dist. Court, 199 Colo. 163, 612 P.2d 1083 (1980)
- Freedom Colo. Info., Inc. v. El Paso County Sheriff's Dep't, 196 P.3d 892 (Colo. 2008)
- Colo. Dep't of Revenue v. Garner, 66 P.3d 106 (Colo. 2003)
- Lobato v. Indus. Claim Appeals Office, 105 P.3d 220 (Colo. 2005)
- Colo. Min. Ass'n v. Bd. of County Comm'rs of Summit County, 199 P.3d 718 (Colo. 2009)
- Posey v. Dist. Court, 196 Colo. 396, 586 P.2d 36 (1978)
- People v. Turner, 109 P.3d 639 (Colo. 2005)
- Cantrell v. Cameron, 195 P.3d 659 (Colo. 2008)
- Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988)
- Jenkins v. Dist. Court, 676 P.2d 1201 (Colo. 1984)
- People v. State, 797 P.2d 1259 (Colo. 1990)
- Alcon v. Spicer, 113 P.3d 735 (Colo. 2005)
- Stone v. State Farm Mut. Auto. Ins. Co., 185 P.3d 150 (Colo. 2008)
- McClain v. Coll. Hosp., 99 N.J. 346, 492 A.2d 991 (1985)
- Lipschultz v. Superior Court, 128 Ariz. 16, 623 P.2d 805 (1981)
- Combined Commc'n Corp. v. Pub. Serv. Co. of Colo., 865 P.2d 893 (Colo. App. 1993)