ADVANCE SHEET HEADNOTE
May 12, 2025

2025 CO 23

No. 24SA262, *In re Trenshaw v. Jennings*—Privilege—Physician–Patient Privilege—§ 13-90-107(1)(d)—Waiver of the Physician–Patient Privilege—*Clark v. Dist. Ct.*, 668 P.2d 3 (Colo. 1983)—*People v. Covington*, 19 P.3d 15 (Colo. 2001)—*Jordan v. Terumo BCT, Inc.*, 2024 CO 38, 550 P.3d 628—C.R.C.P. 26(b)(5)—C.A.R. 21.

In this original proceeding, the supreme court holds that when, as here, medical records contain information provided by a patient to a physician during the course of receiving treatment for an injury, the records are protected by the physician–patient privilege. Such documents fall within the purview of section 13-90-107(1)(d), C.R.S. (2024), because they contain information "that was necessary to enable [the treating physician] to prescribe or act for the patient." § 13-90-107(1)(d).

Of course, the information shared by a patient with a treating physician may include facts about the underlying incident that led to the injuries sustained. A patient cannot immunize from disclosure relevant facts about the underlying incident by simply disclosing them to a treating physician or anyone else with

whom the patient may have a confidential relationship. Those facts are discoverable, including through interrogatories, requests for admission, and at a deposition. But the medical records themselves are privileged because they contain the patient's communications with the treating physician about how the injuries were sustained.

Accordingly, the district court should not have reviewed (even in camera) a screenshot of a portion of the defendant's medical records, much less conducted a sentence-by-sentence analysis of a handful of sentences to determine whether the information in each sentence was necessary for the defendant's treating physician to prescribe or act on his behalf. A standard that would only protect information in medical records that a court, in hindsight, concludes was necessary for a physician to have acted or prescribed on behalf of a patient flies in the face of our jurisprudence and is, in any event, infeasible.

Because the district court erred, the supreme court makes absolute the order to show cause. The matter is remanded for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 23

Supreme Court Case No. 24SA262
Original Proceeding Pursuant to C.A.R. 21
Custer County District Court Case No. 22CV30013
Honorable Lynette Mary Wenner, Judge

In Re
Plaintiffs:

Lucas Trenshaw and Theresa Gardner, as Personal Representative for the Estate of Timothy Trenshaw,

v.

Defendants:

Eugene Jennings and All State Enterprise, Inc.

Order Made Absolute
en banc
May 12, 2025

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 "What I may see or hear in the course of the treatment . . . in regard to the life of men, which on no account one must spread abroad, I will keep to myself[,] holding such things shameful to be spoken about." Ludwig Edelstein, *The Hippocratic Oath: Text, Translation and Interpretation*, *in* 1 Supplements to the Bulletin of the History of Medicine (Henry E. Sigerist ed., Johns Hopkins Press 1943) (providing a translation from the Greek). This excerpt from the ancient version of the Hippocratic Oath highlights the importance of the special relationship between physicians and their patients. *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 476 (E.D. La. 2005). The physician–patient relationship has historically been one of the most sacrosanct and protected relationships throughout the globe. *Id.* Today, upon graduation, most medical students in the United States take a contemporary version of the Hippocratic Oath, declaring that they "will respect the privacy of [their] patients, for their [patients'] problems are not disclosed to [them] that the world may know." *Id.* at 476 n.8.

¶2 The principles underlying the Hippocratic Oath were introduced into this country in the 1800s through a code of ethics, but they are now largely incorporated into state law. *Id.* at 476–77. In Colorado, our General Assembly has recognized that "[t]here are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate." § 13-90-107(1), C.R.S. (2024).

The physician–patient relationship is one of those. § 13-90-107(1)(d). Therefore, "[a] physician . . . shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient." *Id.* Such information is protected by what we now call the physician–patient privilege.

¶3 The physician–patient privilege applies as forcefully to pretrial discovery as it does to in-court testimony. *See Cardenas v. Jerath*, 180 P.3d 415, 424 (Colo. 2008). Thus, the privilege protects certain information even if it would otherwise be discoverable as relevant to the subject matter of the litigation. *Id.*

¶4 In this original proceeding, we must determine whether medical records generated during Eugene Jennings's visit to a hospital's emergency department, following a motor vehicle collision during which he was injured, are protected under the physician–patient privilege. The district court reviewed a screenshot of a portion of those records in camera. It then undertook a sentence-by-sentence analysis of five particular sentences to determine whether the information in each sentence was privileged. Despite finding that Jennings provided the information in question to his emergency department physician while describing how he sustained the injuries for which he was being treated, the court concluded that the information was not protected by the physician–patient privilege. Specifically, the court ruled that the information provided by Jennings about how the collision

occurred was not "necessary for the medical team to act or prescribe on" his behalf and thus fell outside the scope of the privilege.

¶5 We now make absolute the order we issued to show cause. We hold that when, as here, medical records contain information provided by a patient to a physician during the course of receiving treatment for an injury, the records are protected by the physician–patient privilege. Such documents fall within the purview of section 13-90-107(1)(d) because they contain information "that was necessary to enable [a treating physician] to prescribe or act for the patient." § 13-90-107(1)(d).

¶6 We recognize that the information shared by a patient with a treating physician may include facts about the underlying incident that led to the injury sustained. Indeed, in describing how he was injured to his emergency department physician, Jennings provided details about the collision. Of course, Jennings could not immunize from disclosure relevant facts about the collision by simply disclosing them to his emergency department physician or anyone else with whom he may have had a confidential relationship. Those facts are discoverable, including through interrogatories, requests for admission, and at a deposition. But the medical records themselves are privileged because they contain Jennings's *communications* with his emergency department physician about how he sustained

his injuries, and those communications were pertinent to the treatment provided by the physician.

¶7 As such, the district court should not have reviewed (even in camera) the screenshot of a portion of Jennings's medical records, much less conducted a sentence-by-sentence analysis of a handful of sentences to determine whether the information in each sentence was necessary for Jennings's emergency department physician to prescribe or act on his behalf. A standard that would only protect information in medical records that a court, in hindsight, concludes was necessary for a physician to have acted or prescribed on behalf of a patient flies in the face of our jurisprudence and is, in any event, infeasible.

I. Facts and Procedural History

¶8 Late one afternoon, Jennings was driving a tractor-trailer truck for his employer, All State Enterprise, Inc. ("All State"), in Custer County. As he negotiated a curve on Highway 69, his truck flipped over and crushed the vehicle in the oncoming lane driven by Timothy Trenshaw, killing him instantly. Paramedics and Colorado State Patrol ("CSP") troopers contacted Jennings at the scene of the collision. He did not exhibit signs of intoxication, but the troopers nevertheless detained him for investigation. Because Jennings reported that he was injured, the troopers eventually transported him to Parkview Hospital.

¶9 During the course of receiving medical treatment from an emergency department physician at the hospital, Jennings discussed how he was injured. As he did so, he made statements describing how the collision occurred. The emergency department physician documented these statements.

¶10 Thereafter, CSP allegedly collected some of Jennings's medical records from the hospital without Jennings's knowledge or consent and without a warrant. A trooper then transported Jennings to a Colorado Bureau of Investigations office before releasing him in a convenience store parking lot. The same trooper subsequently took all the records and reports related to the incident (including the medical records collected from the hospital), scanned them, and sent them to Master Trooper David Conway.

¶11 Approximately one month later, Master Trooper Conway applied for a search warrant to obtain a complete copy of Jennings's medical records from Parkview Hospital. Although Master Trooper Conway had stated in his report that Jennings didn't show any signs of impairment, he attested in the affidavit in support of the search warrant that he was trying to verify the presence or absence of narcotic analgesics in Jennings's system. The district court approved the search warrant and required the production of all of Jennings's medical records from his visit to Parkview Hospital (not just those related to alcohol and drug testing). Parkview Hospital, in turn, produced all the requested records to CSP.

¶12 The district attorney's office for the Eleventh Judicial District ("district attorney's office") ultimately charged Jennings with one count of vehicular homicide and two counts of careless driving resulting in injury. Further, Trenshaw's sister (in her capacity as personal representative of Trenshaw's estate) and Trenshaw's son (collectively, "Plaintiffs") sued Jennings and All State in this wrongful death action. After this case was filed, Plaintiffs served Jennings with written discovery requests inquiring how the collision occurred and requesting any statements Jennings and all other witnesses had made about the collision. Thereafter, Jennings served a request on the district attorney's office, pursuant to Colorado's Open Records Act and Colorado's Criminal Justice Records Act, seeking all communications between that office and Plaintiffs' counsel. According to Jennings, the district attorney's office responded by producing, among other things, the medical records from his visit to Parkview Hospital. Two business days later, Jennings notified Plaintiffs and the district attorney's office that he had "never waived his privilege to the medical records." He expressed concern that his medical records had been improperly acquired and disseminated, and he requested that those records not be further disclosed.

¶13 Because the district attorney's office's response indicated that the physician–patient privilege does not apply to district attorneys and that it was thus free to share the medical records with "other lawyers involved in litigating this

matter," and because he viewed Plaintiffs' response as ambiguous, Jennings filed a motion for a protective order. The district court, which is presiding over both this case and the criminal case, granted the motion.

¶14 First, the court found that Plaintiffs had failed to show the relevance of the medical records. More specifically, it noted that there did not appear to be a basis for alleging that Jennings was impaired by drugs or alcohol at the time of the collision. Second, the court concluded that the authority cited by Jennings supported his position that "the medical records are privileged" under section 13-90-107(1)(d) and that "the privilege is not overborne by the fact that the records were disclosed" without his permission to the district attorney's office. And third, the court noted that no authority supported Plaintiffs' contention that an "order for a warrant entitle[d] a third party (i.e.[,] Plaintiff[s]) to receive the fruits of the search." Given that Jennings had not waived his physician–patient privilege, the court (1) prohibited Plaintiffs from possessing Jennings's "medical records or any reports that rely upon them," (2) ordered Plaintiffs to destroy any copies of Jennings's medical records in their possession, and (3) precluded Plaintiffs from engaging in further efforts to obtain those records.

¶15 Thereafter, Plaintiffs obtained from the district attorney's office a police report containing a screenshot of a portion of the medical records: the emergency department physician's notes summarizing Jennings's past "medical history" and

"present symptoms," which included Jennings's description of how the collision occurred. Jennings sought the district court's intervention again, arguing that this constituted a violation of the protective order. Plaintiffs disagreed, countering that the police report was publicly available.

¶16 During a hearing closed to the public, Plaintiffs maintained that five sentences in the emergency department physician's notes summarizing Jennings's description of the collision (the "five sentences") were not privileged. According to Plaintiffs, the five sentences documented statements made by Jennings that were "not medically relevant" because, in their view, those sentences were "not necessary to enable the [hospital's] medical practitioner to prescribe or act" for him. Plaintiffs asked the court to rule that they could make use of the five sentences in this litigation. Jennings, for his part, insisted that his medical records—including the portion reflected in the screenshot within the police report—were privileged regardless of whether they contained statements about how the collision occurred.

¶17 A few weeks after the hearing, the court received from Plaintiffs the police report containing the screenshot of a portion of Jennings's medical records. The court then performed an in camera review. Pursuant to Plaintiffs' request, the court focused on the five sentences. It undertook a sentence-by-sentence analysis to determine whether the information in each sentence was required to permit the

emergency department physician to prescribe or act on Jennings's behalf. The court determined that, while the five sentences reflected statements uttered by Jennings about the "injuries resulting from the accident," they described how the collision occurred and were thus "not necessary for the medical team to act or prescribe on [his] behalf." Accordingly, the court (1) ruled that Jennings had failed to make "an adequate showing" that these statements were protected by the physician–patient privilege, (2) dissolved the protective order, and (3) required Jennings to disclose "the portion[] of the medical records containing only the [five] statements."

¶18 Jennings then invoked our original jurisdiction through a C.A.R. 21 petition, arguing that the medical records generated by Parkview Hospital are privileged and the district court thus shouldn't have reviewed (even in camera) the screenshot of a portion of those records.[1] We issued an order to show cause.

[1] Jennings framed the issue as follows:

> 1. Whether, where an emergency department visit was medically necessary, the district court erred in reviewing statements made to the emergency department physician and documented in the medical records by parsing sentence-by-sentence the information to consider whether it was "necessary to the physician to act on" and therefore protected under the statutory patient–physician privilege, rather than finding the entire medical record privileged.

II. Original Jurisdiction

¶19 We have sole discretion to exercise our original jurisdiction pursuant to C.A.R. 21. *Rademacher v. Greschler*, 2020 CO 4, ¶ 20, 455 P.3d 769, 772. Relief under C.A.R. 21 is extraordinary and is limited both in purpose and availability. *Id.*

¶20 Discovery orders are generally interlocutory in nature and thus reviewable only on direct appeal following entry of a final judgment. *Jordan v. Terumo BCT, Inc.*, 2024 CO 38, ¶ 23, 550 P.3d 628, 633. Consequently, we "will not ordinarily" exercise our original jurisdiction to "review a trial court's pretrial discovery order." *Ortega v. Colo. Permanente Grp., P.C.*, 265 P.3d 444, 447 (Colo. 2011). However, we have previously exercised our discretion under C.A.R. 21 to review a trial court's discovery order in circumstances in which no other appellate remedy is adequate because, absent our intervention, a party may suffer irreparable harm. *Id.* "When a trial court's order involves records which a party claims are protected by a statutory privilege, . . . an immediate review is appropriate because the damage that could result from disclosure would occur regardless of the ultimate outcome of an appeal from a final judgment." *Id.*

¶21 The exercise of our original jurisdiction under C.A.R. 21 is warranted in this case given "the nature of the rights implicated and the potential irreparable harm from disclosure of medical information." *Id.* Were we to deny Jennings's C.A.R. 21 petition, it would render his privilege claim effectively moot because the

order under challenge grants Plaintiffs access to some of the contents of his medical records. And, as the saying goes, once the cat's out of the bag, it can't be put back in.

¶22 Having explained why we granted Jennings's C.A.R. 21 petition, we move on to address the merits of the parties' contentions. In the process, we explain why we make absolute the order we issued to show cause.

III. Analysis

¶23 We begin by setting forth the standard of review that guides our analysis. We then discuss the legal principles undergirding the physician–patient privilege in Colorado. Next, we consider Jennings's claim and conclude that the medical records in question (including the portion reflected in the screenshot within the police report) are protected by the physician–patient privilege. We end by rejecting the waiver contention advanced by Plaintiffs.

A. Standard of Review

¶24 We generally review a trial court's discovery order concerning privilege for an abuse of discretion. *Jordan*, ¶ 26, 550 P.3d at 633. However, in this case, we deal with the interpretation of a statute, which presents a legal question subject to de novo review. *Miller v. Amos*, 2024 CO 11, ¶ 11, 543 P.3d 393, 396. Because the physician–patient privilege is statutory, we review a trial court's application of the privilege de novo. *See People v. Kailey*, 2014 CO 50, ¶ 12, 333 P.3d 89, 93 (making

this point in the context of the psychologist–patient privilege, which also resides in section 13-90-107). Hence, our review is de novo.

B. The Physician–Patient Privilege in Colorado—Legal Principles

¶25 Our General Assembly adopted the physician–patient privilege "to encourage a patient to make full disclosure to a doctor to enhance the effective diagnosis and treatment of illness." *Hartmann v. Nordin*, 147 P.3d 43, 53 (Colo. 2006). The privilege aims to accomplish this goal "by protecting the patient from the embarrassment and humiliation that might be caused" through the disclosure of information obtained by the physician during the course of treatment. *Clark v. Dist. Ct.*, 668 P.2d 3, 8 (Colo. 1983). Through the physician–patient privilege, a patient is vested with the power to prevent the disclosure of such information. *Weil v. Dillon Cos.*, 109 P.3d 127, 129 (Colo. 2005). As we stated in *Alcon v. Spicer*, 113 P.3d 735, 738 (Colo. 2005), the privilege may be viewed "as recognizing the inherent importance of privacy in the physician[–]patient relationship by protecting the confidences once made." Interfering with the physician–patient relationship would not only be unfair to the patient, who has provided information in confidence, it could also adversely affect the quality of medical care available. *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. at 477.

¶26 The privilege isn't limited to communications with a physician during an examination conducted for purposes of treatment; it also includes observations

made by a physician during such an examination. *People v. Covington*, 19 P.3d 15, 19 (Colo. 2001). Further, the protection provided by the privilege extends beyond "in-court testimony" and sweeps in the "pretrial discovery of information." *Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 861 (Colo. 2004). This includes discovery of privileged information contained in medical records. *See Clark*, 668 P.2d at 11.

¶27 The burden of establishing the applicability of a privilege rests with the party asserting it. *Hartmann*, 147 P.3d at 49. Once the physician–patient privilege attaches, "the only basis for authorizing a disclosure of the confidential information is an express or implied waiver." *Clark*, 668 P.2d at 9. Any party seeking to overcome the privilege bears the burden of establishing a waiver. *Id.* at 8. For an express waiver to occur, the privilege holder must explicitly waive the privilege. But when the privilege holder injects a "physical or mental condition into the case as the basis of a claim or an affirmative defense," an implied waiver occurs. *Id.* at 10.

¶28 In determining whether the privilege has been impliedly waived, "the proper inquiry is not whether the information sought may be relevant." *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002). After all, the physician–patient privilege may protect information even when the information is relevant to the subject matter of the case. *Cardenas*, 180 P.3d at 424. It follows that "relevance alone

cannot be the test" for implied waiver. *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (quoting *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994)). To apply implied waiver to any information that's relevant would be to allow the exception to swallow the privilege. *Alcon*, 113 P.3d at 741. But because the privilege withholds potentially relevant information, we construe it narrowly. *Hartmann*, 147 P.3d at 49.

¶29 The physician–patient privilege is personal to the patient (or the patient's estate) and may not be invoked by the physician or a third party. *See Gadeco, LLC v. Grynberg*, 2018 CO 22, ¶ 10, 415 P.3d 323, 328; *People v. Palomo*, 31 P.3d 879, 885 (Colo. 2001). Nor may it be waived by the physician or a third party. *See Samms v. Dist. Ct.*, 908 P.2d 520, 524 (Colo. 1995).

¶30 We have explained that not all information acquired by a physician from a patient is safeguarded from disclosure. *Covington*, 19 P.3d at 19. By the very terms of the privilege statute, such information is protected only when it is necessary for the physician to "prescribe or act for the patient." § 13-90-107(1)(d). Thus, for example, a physician's record containing only the name, address, and phone number of a patient falls outside the scope of the privilege because those are matters unnecessary for the physician to prescribe or act for the patient. *Wolf v. People*, 187 P.2d 926, 927 (Colo. 1947). The same holds true with respect to information obtained by a physician to assist a patient in pending litigation, *see*

B.B. v. People, 785 P.2d 132, 140 (Colo. 1990) (involving the psychologist–patient privilege, which we have equated to the physician–patient privilege), and a physician's testimony in a criminal case premised on a blood sample procured at the request of a police officer investigating the defendant's level of intoxication, *see Hanlon v. Woodhouse*, 160 P.2d 998, 1001 (Colo. 1945).

¶31 In contrast to *Wolf*, *B.B.*, and *Hanlon*, we landed on the other side of the privilege ledger in *Covington*. There, a physician assistant took photographs of Mrs. Covington's gunshot wounds while providing her treatment in a hospital's emergency room shortly after her husband shot her with a rifle. *Covington*, 19 P.3d at 18. The physician assistant took the pictures at the request of a sheriff's deputy. *Id.* Before her husband's criminal trial, Mrs. Covington invoked the physician–patient privilege with respect to the photographs, but the trial court ruled that they were not protected by the privilege because they were unnecessary for her treatment. *Id.* at 18–19. Accordingly, the court permitted the prosecution to call the physician assistant as a witness to provide foundation testimony to admit the photographs into evidence. *Id.* at 19.

¶32 A division of the court of appeals reversed, ruling that the admission of the photographs constituted prejudicial error because they were protected by the physician–patient privilege. *Id.* Although we reversed on other grounds, we agreed with the division's determination regarding the application of the

physician–patient privilege.[2] *Id.* at 18. We sided with the defense's contention that, although the physician assistant had taken the photographs at the request of law enforcement, she'd used the information depicted in them to treat Mrs. Covington. *Id.* at 19–20. Because the information contained within the photographs memorialized the observations made by the physician assistant during her examination of Mrs. Covington, and because these were observations she could not have made but for her position as a treating professional, we concluded that the photographs fell within the physician–patient privilege. *Id.*

C. Application

¶33 Jennings argues that the district court erred in reviewing the screenshot of a portion of his medical records. Moreover, he asserts that it was improper for the court to undertake a sentence-by-sentence analysis of the five sentences to determine whether the information contained in each sentence was necessary for the emergency room department physician to prescribe or act on his behalf. Plaintiffs counter that the court correctly resolved the issues before it.

¶34 In ruling for Plaintiffs, the district court relied almost exclusively on cases in which we have determined that the physician–patient privilege didn't apply

[2] We ultimately held that the physician assistant's testimony was admissible based on the statute then in effect requiring healthcare providers to report certain incidents to law enforcement, which we viewed as abrogating the physician–patient privilege in certain circumstances. *Covington*, 19 P.3d at 22–23.

because the information acquired by the physician in treating the patient was not necessary to prescribe or act on the patient's behalf. While we stand by these cases today, they are distinguishable.

¶35 This is not a case involving records in a physician's custody containing only a patient's identifying information (i.e., the patient's name, address, and phone number). *See Wolf*, 187 P.2d at 927.[3] Nor are we dealing with information provided by a patient for the purpose of receiving a physician's assistance in pending litigation, *see B.B.*, 785 P.2d at 140, or with testimony regarding a blood sample obtained at the request of law enforcement for purposes of determining someone's level of intoxication, *see Hanlon*, 160 P.2d at 1001. Rather, it is undisputed that the medical records at issue here contain information acquired by an emergency department physician while treating Jennings for the injuries he sustained in the collision. As such, this case is more akin to *Covington*.

¶36 Although the district court leaned on *Covington*, that case actually undermines its discovery order. The photographs in *Covington* found shelter in the physician–patient privilege both because their contents memorialized observations made by the physician assistant while treating Mrs. Covington for

[3] The district court cited *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1009 (Colo. 1988), instead of *Wolf*. But, as relevant here, *Belle Bonfils*, which involved blood donors (not patients), merely repeated our holding in *Wolf*.

gunshot wounds and because the physician assistant would not have been in a position to make those observations if she hadn't been a treating professional. *Covington*, 19 P.3d at 20. So, too, here: The notes in the medical records reflect information provided by Jennings to his emergency department physician during treatment, and the physician would not have been in a position to receive that information if he hadn't been a treating professional.

¶37 Plaintiffs contend, however, that the five sentences fall outside of the privilege's protective blanket because, in their view, Jennings's description of the collision was unnecessary to permit the emergency department physician to prescribe or act on his behalf. Therefore, urge Plaintiffs, we should approve the district court's approach of wading through the five sentences one by one to determine what information, if any, was protected by the physician–patient privilege. We decline Plaintiffs' invitation.

¶38 We have never sanctioned a system in which a trial court must conduct a sentence-by-sentence analysis of medical records (or a statement-by-statement analysis of proffered testimony) to determine, in hindsight, whether the information contained in each sentence or statement was necessary for the treating physician to prescribe or act for the patient. None of the cases cited by the district court endorse this analytical framework.

¶39 Instead, after concluding in *Wolf*, *B.B.*, and *Hanlon* that the physician–patient privilege was inapplicable because the information acquired by the physician was not necessary to prescribe or act on the patient's behalf, we simply deemed the documents or testimony under challenge wholly admissible. *See Wolf*, 187 P.2d at 927; *B.B.*, 785 P.2d at 140; *Hanlon*, 160 P.2d at 1001. There was no sentence-by-sentence or statement-by-statement parsing.

¶40 *Cook v. People*, 153 P. 214 (Colo. 1915), a 110-year-old opinion cited by Plaintiffs, doesn't support their proposed piecemeal analysis. In that case, the defendant was taken to the hospital after suffering a gunshot wound on the night he allegedly murdered the victim. *Id.* at 215. At trial, he objected to his treating physician's testimony based on the physician–patient privilege. *Id.* The trial court overruled his objection and permitted the physician to testify. *Id.* We affirmed, but our treatment of the privilege issue was cursory. *Id.* at 215–16. After noting that the physician had simply testified about the defendant's refusal to consent to the removal of the bullet or to explain how he was shot, we concluded that this "was not necessary information to enable the doctor to prescribe or act for his patient." *Id.* at 216. We didn't engage in the type of statement-by-statement dissection for which Plaintiffs advocate.[4] *Id.*

[4] *People v. Reynolds*, 578 P.2d 647 (Colo. 1978), a sexual assault case, is of the same ilk as *Cook*. We acknowledged there that, before ruling on the privilege claim raised by the prosecution on behalf of the victim, the trial court had to determine

¶41 Not only does Plaintiffs' suggested methodology lack support in our jurisprudence, it is unworkable. To begin, it would require trial court judges to regularly access privileged medical confidentialities for purposes of assessing what information, if any, was necessary for the physician to prescribe or act on the patient's behalf. Yet, we have made clear in the context of the attorney–client privilege that providing documents containing privileged information to a trial court judge for an in camera review is still a form of disclosure. *See People v. Cortes-Gonzalez*, 2022 CO 14, ¶ 56, 506 P.3d 835, 847. Even if an in camera review of medical records were to result in no documents being disclosed to any party, there would still be "a chilling effect" on physicians and patients, especially where such reviews would occur routinely and would be easily obtained. *Id.*, 506 P.3d at 848 (quoting *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005)) (making this point with respect to attorneys and clients). Not surprisingly, C.R.C.P. 26(b)(5)(A), which directs civil litigants on when and how to assert a privilege claim (including one rooted in section 13-90-107(1)(d)), aims to reduce the need for in camera reviews. *Alcon*, 113 P.3d at 742.

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whether the information acquired by the physician during his examination was necessary to enable him to prescribe or act for the victim. *Id.* at 649. But we at no point suggested, let alone approved, a statement-by-statement analysis of the physician's proposed testimony. *Id.*

¶42 Moreover, Plaintiffs' proposal would render the application of the physician–patient privilege unpredictable. Patients would have no way of knowing at the outset of medical treatment whether information shared with a treating physician would be protected. Consequently, patients who obviously lack the ability to diagnose and treat themselves would be forced to parse what information is "necessary" for the physician to prescribe or act for them. This would discourage, not encourage, patients' forthrightness with a treating physician and would frustrate the chief purpose of the physician–patient privilege.

¶43 Lastly, the standard offered by Plaintiffs would require a trial court to substitute its judgment for that of a physician's. This would be problematic because a trial court lacks the medical expertise of a physician. How can a trial court be expected to determine—on a cold record and in hindsight—what information was necessary for the physician to prescribe or act for the patient? The alternative would be equally impractical: It would require physicians or other medical personnel to come to court in every case in which there is a dispute about the physician–patient privilege to identify what information acquired during treatment was necessary to prescribe or act for the patient.

¶44 We now hold that where, as here, medical records contain information provided by a patient to a physician during the course of receiving treatment for

an injury, the records are protected by the physician–patient privilege. Hence, the district court erred in reviewing the screenshot of a portion of Jennings's medical records.[5]

¶45 We recognize that the information shared by a patient with a treating physician may include details regarding how an injury occurred. Indeed, it is not unusual for a physician treating a patient who has suffered an injury to ask how the injury occurred, as such information may be of assistance in prescribing or acting for the patient. And we understand that the patient's response may include facts about the underlying incident that led to the injury.

¶46 This reality causes Plaintiffs consternation. They maintain that extending the physician–patient privilege's protective mantle to Jennings's medical records allows him to conceal relevant facts about the case—specifically, his version of how the collision occurred. Not so. Although neither party cited it, our recent opinion in *Jordan* is instructive.

¶47 There, plaintiffs retained an expert to opine about when and where they had been exposed to a carcinogen allegedly emitted by a plant operated by defendants.

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[5] This is not to say that trial courts may never perform in camera reviews of medical records. C.R.C.P. 26(b)(5) expressly allows such reviews—but only after certain well-worn procedures have been followed and efforts to resolve any dispute over a privilege claim have been exhausted. *See Alcon*, 113 P.3d at 742. The district court did not adhere to C.R.C.P. 26(b)(5) here.

Jordan, ¶ 1, 550 P.3d at 630. To assist the expert, plaintiffs' counsel put together a spreadsheet showing where each plaintiff had lived and worked during the pertinent timeframe. *Id.* After plaintiffs' counsel shared this spreadsheet with the expert, defendants sought access to any communications between plaintiffs and their counsel containing the information used to create the spreadsheet. *Id.* at ¶ 2, 550 P.3d at 630. Plaintiffs objected, arguing that the communications were protected by the attorney–client privilege and fell outside the scope of disclosures required by C.R.C.P. 26(a)(2). *Jordan*, ¶ 2, 550 P.3d at 630. The trial court granted defendants' request and ordered plaintiffs to produce "the raw facts or data reported by plaintiffs" to their counsel. *Id.* Plaintiffs then sought relief from our court pursuant to C.A.R. 21, and we issued a rule to show cause. *Id.* at ¶ 3, 550 P.3d at 630.

¶48 In making the rule absolute, we concluded that, "although the underlying facts" were "not privileged," the trial court had erred in determining "that the attorney[–]client privilege does not apply to protect a client's *confidential communications* of such facts to trial counsel." *Id.* at ¶ 4, 550 P.3d at 630 (emphasis added). We explained that clients routinely share factual information with their counsel, but that doesn't entitle opposing counsel to access the clients' *communications* containing such information. *Id.* Instead, we said, the proper method of obtaining those facts is through discovery directed at the clients. *Id.*

And we ruled that C.R.C.P. 26(a)(2) merely obligated plaintiffs to disclose the spreadsheet their counsel had provided to their expert, not the privileged and confidential communications counsel had used in preparing the spreadsheet—communications the expert had never seen. *Jordan*, ¶ 5, 550 P.3d at 631.

¶49 It is likewise here. Jennings may not refuse to disclose relevant facts within his knowledge simply because he incorporated those facts into his communications with his emergency department physician. Otherwise, he could immunize from disclosure any relevant fact by disclosing it to a treating physician or anyone else with whom he may have a confidential relationship. *Cf.* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.6:103, at 137 (2d ed. Supp. 1997) (stating, while discussing the attorney–client privilege, that "the fact that a client has discussed the facts with a lawyer does not protect *the client* from thereafter being asked about the facts"; otherwise, "a client could immunize herself against interrogation about the facts simply by telling them to her lawyer"), *cited with approval in Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000). Still, Plaintiffs may not learn about those facts by accessing Jennings's medical records because Jennings cannot be compelled to disclose his communications with his emergency department physician. Although the facts contained in the communications about how the

collision occurred are not privileged, the communications themselves *are* privileged. The proper method for Plaintiffs to learn about those facts is through discovery directed at Jennings.[6]

¶50 But what about the screenshot of a portion of Jennings's medical records? Of course, the fact that this screenshot appears in a police report does not, by itself, entitle Plaintiffs to access it. The screenshot reflects privileged information contained in Jennings's medical records, and law enforcement allegedly accessed that information improperly. Under the circumstances of this case, it would make little sense to preclude Plaintiffs from obtaining access to Jennings's medical records but to then turn around and allow Plaintiffs to use the screenshot of a portion of those records within the police report. Jennings certainly should not suffer the consequences of law enforcement obtaining his privileged information without his consent.[7]

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[6] Jennings invoked his Fifth Amendment privilege against self-incrimination in response to certain written discovery requests and a deposition request. However, he has since pleaded guilty in his criminal case and is now awaiting sentencing later today. Accordingly, on remand, Plaintiffs may re-notice his deposition and re-serve any appropriate written discovery to inquire about Jennings's version of events.

[7] Jennings also asks us to conclude that any information derived from an investigation conducted by law enforcement based on privileged information allegedly obtained improperly should be treated as fruit of the poisonous tree and thus suppressed. We do not reach this request because it hasn't been addressed by the district court yet.

¶51 This leaves Plaintiffs' waiver contention, which we reject in short order. Plaintiffs argue that Jennings waived his physician–patient privilege because his attorney did not submit a privilege log in accordance with C.R.C.P. 26(b)(5). We are unpersuaded.

¶52 Plaintiffs elevate form over substance. The record reflects that Jennings's counsel timely asserted the physician–patient privilege by email two business days after becoming aware that law enforcement had obtained Jennings's medical records and shared them with Plaintiffs' counsel. And Plaintiffs fail to identify any information that would have appeared in a privilege log that was not included in this email. Nor do Plaintiffs show that Jennings's counsel engaged in deception, misrepresentation, or some other form of misconduct. Thus, Plaintiffs suffered no prejudice, and Jennings gained no advantage. Besides, by the time counsel sent the email, Jennings's physician–patient privilege had already been breached, and time was of the essence. Accordingly, under the specific circumstances of this case, we decline to find a waiver of the physician–patient privilege as a sanction for counsel's failure to complete a privilege log.

IV. Conclusion

¶53 For the foregoing reasons, we make absolute the order to show cause. We remand the case for further proceedings consistent with this opinion.