

THE ARKANSAS SUPREME COURT HOLDS THAT WHEN DEFENSE
COUNSEL ENGAGES IN PROHIBITED EX PARTE
COMMUNICATIONS WITH A TREATING, NONPARTY PHYSICIAN
WITHOUT THE PATIENT’S CONSENT, A NEW TRIAL IS
WARRANTED AND THE DEFENSE ATTORNEY IS DISQUALIFIED.

In *Bulsara v. Watkins*, on April 19, 2004, Dr. Ketan Bulsara filed a medical-malpractice and wrongful-death action against Dr. Julia Watkins, St. Vincent Doctor’s Hospital, and the Arkansas Women’s Center, P.A., after his child, Baby Simi, was stillborn.¹ The latter two defendants were dismissed, and the case against Watkins was tried by a jury, which rendered a judgment in favor of Watkins.²

Two weeks later, Bulsara filed a motion for a new trial, citing a number of bases in support of his motion, namely that Watkins’s attorney should have been disqualified for misconduct.³ The circuit court denied Bulsara’s motion for a new trial, and he subsequently appealed after obtaining a final order from the circuit court.⁴ The Arkansas Supreme Court reversed the lower court’s denial of Bulsara’s motion on the basis of the defense attorney’s misconduct and remanded for a new trial.⁵ Thus, the Court did not address the other issues on appeal.⁶

On appeal, a circuit court’s decision to grant or deny a motion for a new trial will only be reversed if there is a manifest abuse of discretion.⁷ The court’s factual determinations on a motion for a new trial are only reversed if they are found to be clearly erroneous.⁸ The Arkansas Supreme Court addressed Bulsara’s claim for a new trial on the basis that Watkins’s attorney, Phil Malcom, violated Arkansas Rule of Civil Procedure 35(c)(2)⁹ and Arkansas Rule of Evidence 503(d)(3)(B)¹⁰, both of which prohibit ex parte contact with a patient’s nonparty, treating physician by an adverse party.¹¹

Dr. Seguin, the physician with whom Bulsara claimed Malcom had wrongful ex parte communications, submitted an affidavit to the circuit court.¹² Seguin stated that “she and Watkins discussed [Mrs.] Bulsara[’s] case and decided that they ‘needed to obtain the services of an attorney’”

1. 2012 Ark. 108, at 2, 387 S.W.3d at 165 (2012).

2. *Id.* at 2, 387 S.W.3d at 167.

3. *Id.*

4. *Id.* at 3, 387 S.W.3d at 166–67.

5. *Id.* at 11, 387 S.W.3d at 175.

6. *Id.*

7. *Bulsara*, 2012 Ark. 108, at 6, 387 S.W.3d at 169.

8. *Id.* at 7, 387 S.W.3d at 169.

9. ARK. R. CIV. P. 35(c)(2).

10. ARK. R. EVID. 503(d)(3)(B).

11. *Bulsara*, 2012 Ark. 108, at 5–6, 387 S.W.3d at 170.

12. *Id.* at 7, 387 S.W.3d at 170.

due to the fear that a lawsuit would be brought against them.¹³ Seguin stated that Watkins had later told her that Malcom had agreed to represent both doctors as well as their clinic.¹⁴ Additionally, Seguin stated in her affidavit that she had provided Malcom with important information, that he requested information from her, and that she “provided written information to him” in his representation of her in the *Bulsara* matter.¹⁵

The Court begins its analysis by pointing out that both Seguin and Watkins were free to seek legal counsel, including Phil Malcom.¹⁶ However, a conflict in representation arose for Malcom when the lawsuit was filed against Watkins and failed to name Seguin as a defendant, making Seguin a nonparty.¹⁷ *Bulsara* cited an Illinois Appellate Court case, *Baylaender v. Method*,¹⁸ which the Court found persuasive.¹⁹

In *Baylaender*, Dr. Method had failed to diagnose the decedent of breast cancer.²⁰ Before the trial, Baylaender filed a motion in limine to bar the testimony of Dr. Southwick, a witness for the defense, who had treated the decedent after Method’s alleged negligence.²¹ Southwick “discussed [the decedent] with an attorney [who was] assigned to represent him by his malpractice insurance carrier.”²² “The same attorney was [later] assigned by the [insurance] carrier to represent . . . Dr. Method.”²³ The circuit court denied Baylaender’s motion to bar Southwick’s testimony, and Baylaender appealed, arguing that Southwick should not have been allowed to testify because he had violated the physical-patient privilege he owed the decedent when he discussed her care with an attorney appointed to represent him before any suit had been filed and without obtaining the decedent’s consent.²⁴ The appellate court agreed with Baylaender, holding that the separation of information would be difficult with two attorneys employed by the same insurer, but impossible when the same attorney represented the defendant after representing the treating physician and taking with him any confidential information he learned from the treating physician.²⁵ The Illinois court determined that this transfer of counsel from representing the treating physician to representing the defendant had “fatally compromised” the plaintiff’s

13. *Id.*

14. *Id.* at 8, 387 S.W.3d at 170.

15. *Id.*

16. *Id.*

17. *Bulsara*, 2012 Ark. 108, at 8, 387 S.W.3d at 170.

18. 594 N.E.2d 1317 (1992).

19. *Bulsara*, 2012 Ark. 108, at 8, 387 S.W.3d at 170.

20. *Id.*

21. *Id.* at 8–9, 387 S.W.3d at 170.

22. *Id.* at 9, 387 S.W.3d at 170.

23. *Id.*

24. *Id.*

25. *Bulsara*, 2012 Ark. 108, at 9, 387 S.W.3d at 171.

rights to prevent her confidential medical information from being disclosed to the defendant.²⁶

In the instant case, the Court held that, as in *Baylaender*, Mrs. Bulsara's right to keep confidential her communications with Seguin had been compromised when Malcom continued to represent Watkins, having taken with him any confidential information he learned from his representation of Seguin.²⁷ This "taking" of information, the Court ruled, was sufficient to establish a violation of Arkansas Rule of Evidence 503 and Arkansas Rule of Civil Procedure 35.²⁸ Malcom, the Court opined, should have removed himself from the representation of Watkins.²⁹

The Court proceeded to reject Malcom's argument that his communications with Seguin were justified because he also represented the clinic, a defendant in the lawsuit.³⁰ The Court responded that the policy underlying the physician-patient privilege is to encourage patients to honestly and openly communicate with their doctors.³¹ Seguin was Mrs. Bulsara's treating physician, and Malcom was therefore forbidden by Rule 503(d)(3)(B) from communication with Seguin, except to obtain medical records and conduct formal discovery.³²

Justice Brown concurred in part and dissented in part, stating that, while Malcom did violate rules regarding communication with Seguin, his disqualification from representation of both Seguin and Watkins was an inappropriate sanction.³³ Instead, Justice Brown stated that the remedy resulting from violations such as Malcom's has typically been to limit or exclude the treating physician's testimony and to impose monetary sanctions on the defendant's attorney.³⁴ Brown points out that in *Baylaender*, on which the majority heavily relies, the remedy was to bar the treating physician's testimony, not to disqualify the defense attorney.³⁵ Furthermore, Brown states that, according to ethical rules, Malcom's representation would be materially limited by his responsibilities to Seguin, but he notes that Bulsara did not really argue this point on appeal.³⁶ Brown does agree, however, that a new trial is warranted due to the ex parte communications.³⁷

26. *Id.* at 9–10, 387 S.W.3d at 171.

27. *Id.* at 10, 387 S.W.3d at 171.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Bulsara*, 2012 Ark. 108, at 10, 387 S.W.3d at 171.

32. *Id.*

33. *Id.* at 12, 387 S.W.3d at 172 (Brown, J., concurring).

34. *Id.*

35. *Id.* at 16, 387 S.W.3d at 175.

36. *Id.* at 17–18, 387 S.W.3d at 175.

37. *Id.* at 19, 387 S.W.3d at 176.

Ex parte communications by an attorney with a treating physician who is a nonparty will not be allowed. Policy compels courts to uphold the patient-physician privilege and protect patients' rights to keep confidential medical information they have shared with their physicians. The consequence for violating rules prohibiting such communications may be the exclusion of testimony, monetary sanctions, or even disqualification as counsel in a given case.

* Jack Burns