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ADVANCE SHEET HEADNOTE
June 5, 2023

2023 CO 32

No. 22SA874, *People v. Kelley*—Physician-Patient Privilege—Waiver—Involuntary Intoxication.

In this original proceeding, the supreme court considers whether a defendant impliedly waives their statutory physician-patient privilege by endorsing the affirmative defense of involuntary intoxication. The court concludes that a defendant injects their physical or mental condition into a case when they endorse involuntary intoxication as an affirmative defense, thus impliedly waiving their physician-patient privilege. The implied waiver is limited to the records and information that are pertinent to the defendant's endorsement of the affirmative defense.

Accordingly, the court discharges the rule to show cause.

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

2023 CO 32

Supreme Court Case No. 22SA874
Original Proceeding Pursuant to C.A.R. 21
Arapahoe County District Court Case No. 21CR2305
Honorable Eric Barclay White, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Noelle Dawn Kelley.

Rule Discharged
en banc
June 5, 2023

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

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 Noelle Dawn Kelley was taken by ambulance to the hospital after she was involved in a car accident in which another person was injured. At the hospital, an officer investigating the accident asked Kelley if she would release her medical records to the police. She refused. After Kelley was charged with vehicular assault, careless driving, and driving under the influence, she pled not guilty and endorsed the affirmative defense of involuntary intoxication.

¶2 The People subsequently filed a motion asking the trial court to conclude that Kelley's endorsement of involuntary intoxication as an affirmative defense constituted an implied waiver of her physician-patient privilege and thus the People were entitled to the disclosure of her medical records from the hospital that night. They further asked the court to determine that Kelley's refusal to release her medical records was admissible at trial. The trial court granted the People's motion as to both issues. Kelley then petitioned this court to exercise its original jurisdiction pursuant to C.A.R. 21, and we issued a rule to show cause.

¶3 Kelley's petition raises two issues. First, Kelley contends that when she endorsed the affirmative defense of involuntary intoxication, she did not impliedly waive her physician-patient privilege. She further asserts that even if she did waive the privilege, the trial court's order requiring the release of her medical records was too broad. We conclude that (1) a party impliedly waives the

physician-patient privilege when they assert the affirmative defense of involuntary intoxication, (2) the scope of the implied waiver is limited to those medical records related to the affirmative defense, and (3) the trial court's disclosure order here was not overbroad because it was carefully limited to those medical records that related to Kelley's endorsement of the affirmative defense of involuntary intoxication.

¶4 Second, Kelley argues that her refusal to release her medical records is inadmissible because she cannot be penalized for exercising her Fourth Amendment right to refuse a warrantless search. Because the parties did not have the opportunity to fully litigate this specific issue before the trial court, we decline to address it.

¶5 For these reasons, we discharge the rule to show cause.

I. Facts and Procedural History

¶6 The People allege that on September 7, 2021, Kelley caused a car accident in Aurora, injuring another person. When Officer Lloyd Johnson arrived at the scene, Kelley was in an ambulance. Before Kelley was transported to the hospital, Officer Johnson talked with her and inquired about her registration and insurance. At that time, Officer Johnson did not notice any indicia of intoxication or find any intoxicants in Kelley's vehicle, which she gave Officer Johnson consent to search.

¶7 After the search, the ambulance transported Kelley to the hospital to treat her injuries, and Officer Johnson followed. There, he spoke to Kelley again and noticed that her speech was slurred, her eyes were closing, she had trouble forming sentences, and she seemed confused. During their interaction, Kelley claimed she was not driving that day but had instead been a passenger on a motorcycle. Kelley's account, however, was inconsistent with what Officer Johnson observed at the scene because the accident involved two cars. Ultimately, Kelley asked to have an attorney present. But before terminating their communication, Officer Johnson asked whether Kelley was willing to sign a release to allow the police to obtain her medical records. Kelley refused.

¶8 The People charged Kelley with vehicular assault, § 18-3-205(1)(b), C.R.S. (2022); driving under the influence, § 42-4-1301(1)(a), C.R.S. (2022); and careless driving, § 42-4-1402(1), (2)(b), C.R.S. (2022). Kelley subsequently endorsed the affirmative defense of involuntary intoxication, § 18-1-804(3), C.R.S. (2022), and filed multiple motions. Among them was a motion to suppress the statements obtained by the police both at the scene of the accident and at the hospital on the grounds that they were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article II, sections 18 and 25 of the Colorado Constitution. Specifically, Kelley argued that (1) her statements were involuntary because of her vulnerable mental state and

(2) officers were required—but failed—to read Kelley her *Miranda* rights because her communication with Officer Johnson constituted a custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

¶9 The trial court subsequently held a motions hearing at which Officer Johnson testified. Applying the factors from *People v. Matheny*, 46 P.3d 453, 465–66 (Colo. 2002), the trial court determined that Kelley was not in custody for purposes of the Fifth Amendment when she spoke to Officer Johnson at either the scene of the accident or at the hospital and, thus, Officer Johnson did not need to advise Kelley of her *Miranda* rights. Further, the court concluded that Kelley's statements were voluntary.

¶10 After the court explained its ruling, Kelley raised a separate Fifth Amendment issue: She argued that because Officer Johnson asked her to consent to releasing her medical records *after* she asked for an attorney, her refusal should be suppressed as a violation of her Fifth Amendment right to counsel. The court agreed with Kelley and concluded that her refusal should be suppressed.

¶11 The People then filed a motion to reconsider and raised two issues. First, the People asked the trial court to revisit its decision to suppress Kelley's refusal to release her medical records, citing *People v. Beaver*, 725 P.2d 96, 99 (Colo. App. 1986) (concluding that the refusal to consent to a search is not testimonial in nature and therefore is not entitled to *Miranda* protection). Second, the People argued

that they were entitled to disclosure of Kelley's relevant medical records because, in their view, she impliedly waived her physician-patient privilege by endorsing the affirmative defense of involuntary intoxication.

¶12 In response, the court issued an order, explaining that (1) it recognized that *Beaver* appeared to directly contradict its initial ruling suppressing Kelley's refusal to consent to the release of her medical records and (2) it "perceive[d] the Defendant's endorsement of the defense of Involuntary Intoxication . . . as a potential implied waiver of her physician-patient privilege for medical records from her hospitalization beginning on September 7, 2021." However, the court did not rule on the People's motion; instead, it ordered Kelley to file a response.

¶13 The following day, the People served a subpoena on the hospital:

> YOU ARE . . . COMMANDED TO PRODUCE for Noelle Dawn Kelley . . . relating to a vehicular assault for the day of September 7, 2021: Any and all records, documents or notes relating to any toxicology evaluation, screen, or analysis, including breath, blood, and urine. Any and all records, evaluations, screens or testing for or detecting alcohol, controlled substances, or any other drug. Any and all records, documents, or notes reflecting the verbal history given by Noelle Dawn Kelley.

¶14 The hospital filed the subpoenaed documents under seal with the court two weeks later.

¶15 In her response, Kelley argued that *Beaver* did not apply. In the alternative, she asserted—for the first time—that the trial court should deny the People's motion for reconsideration under the Fourth Amendment because, "[j]ust as the

[People] cannot penalize an accused person for invoking the right to remain silent under the Fifth Amendment, the [People] cannot penalize an accused person for invoking the right to refuse a warrantless search under the Fourth Amendment." Kelley also refuted the People's argument that she waived her physician-patient privilege, noting the plain text of the involuntary intoxication statute did not provide for such a waiver.

¶16 The trial court ultimately granted the People's motion. First, it concluded that Kelley's endorsement of involuntary intoxication constituted an implied waiver of the physician-patient privilege. The court then turned to the scope of the waiver and considered Kelley's burden at trial to present some evidence of involuntary intoxication. Next, the court determined that the scope of the waiver was limited to the elements of her involuntary intoxication defense and included:

> records from her hospitalization of September 7, 2021 as involve basic identification information for herself and her medical providers; toxicology testing results; medications prescribed to the Defendant and/or being used by the Defendant at the time of the accident; the Defendant and her medical providers' observations of her mental and physical capacities and interactions; statements made by the Defendant related to her physical condition and mental capacities; and any observations or statements by the Defendant or her medical providers as to her capacity to conform her conduct to the law.

¶17 Then the trial court described its in camera review of the subpoenaed documents and ordered the disclosure, with certain redactions, of twenty-seven pages of Kelley's records from her hospitalization the night of the accident.

¶18 Finally, the court concluded that Officer Johnson's request for Kelley's consent to release her medical records was not an interrogation and that Kelley's response was therefore not protected by *Miranda*. The court did not reach the argument Kelley raised for the first time in her response—the assertion that she could not be penalized for refusing to consent to a warrantless search under the Fourth Amendment.

¶19 Kelley petitioned this court for a rule to show cause, which we issued.[1]

II. Analysis

¶20 Kelley first contends that her endorsement of the affirmative defense of involuntary intoxication did not constitute an implied waiver of the physician-patient privilege, and, in the alternative, that the court's order requiring disclosure of her records was overbroad. Second, Kelley argues that her refusal to release her medical records is inadmissible under the Fourth Amendment. We consider her arguments in turn.

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[1] Kelley's petition presents two issues:

1. Whether endorsing involuntary intoxication as an affirmative defense to driving under the influence waives physician-patient privilege.
2. Whether refusal to provide consent for police to search and seize privileged medical records can be used against the accused at trial.

A. Waiver of Physician-Patient Privilege

¶21 We begin our analysis by explaining why we choose to exercise our original jurisdiction as to this issue. Next, we provide the legal background related to the physician-patient privilege. We then explain why we conclude that (1) Kelley waived her physician-patient privilege by endorsing the affirmative defense of involuntary intoxication, (2) the scope of her implied waiver was limited to those medical records related to that affirmative defense, and (3) the trial court's order requiring disclosure of those twenty-seven pages of redacted medical records was not overbroad.

1. Original Jurisdiction and Standard of Review

¶22 "The exercise of our original jurisdiction under C.A.R. 21 rests within our sole discretion." *People v. Tafoya*, 2019 CO 13, ¶ 13, 434 P.3d 1193, 1195. "Under C.A.R. 21, we have original jurisdiction to review whether a trial court has abused its discretion in circumstances where the remedy on appeal would be inadequate." *Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 861 (Colo. 2004). In cases, as here, where the challenged order involves records that a party claims are protected by a statutory privilege, the remedy on appeal would be inadequate "because the damage that could result from disclosure would occur regardless of the ultimate outcome of an appeal from a final judgment." *Ortega v. Colo. Permanente Med. Grp., P.C.*, 265 P.3d 444, 447 (Colo. 2011); *accord Weil v. Dillon Cos.*, 109 P.3d 127, 129

(Colo. 2005). Accordingly, we choose to exercise our original jurisdiction under C.A.R. 21 here because of the irreparable harm that could result from disclosure of Kelley's privileged medical information. Simply put, this is a bell that cannot be unrung.

2. Legal Background

¶23 Section 13-90-107(1)(d), C.R.S. (2022), provides that "[a] physician, surgeon, or registered professional nurse . . . 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." The physician-patient privilege thus "vests [a] patient with the power to prevent a treating physician from disclosing information obtained in the course of treatment." *Weil*, 109 P.3d at 129. The privilege applies both to pretrial discovery and in-court testimony. *Liggett v. People*, 2023 CO 22, ¶ 46, __ P.3d __.

¶24 The purpose of the physician-patient privilege is "'to enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused' by the disclosure of that information." *Alcon v. Spicer*, 113 P.3d 735, 738 (Colo. 2005) (quoting *Weil*, 109 P.3d at 129). "[T]he privilege can also be viewed as recognizing the inherent importance of privacy in the physician-patient relationship by protecting the confidences once made." *Id.* A party seeking to overcome the physician-patient

privilege bears the burden of establishing waiver. *Weil*, 109 P.3d at 129. Absent waiver, information protected by the physician-patient privilege is protected from discovery and from in camera review by the court. *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002). And because the privilege is designed to protect the patient, "the only basis for authorizing a disclosure of the confidential information [protected by the privilege] is an express or implied waiver." *Clark v. Dist. Ct.*, 668 P.2d 3, 9 (Colo. 1983). "To determine whether there was a waiver, the proper inquiry is not whether the information sought may be relevant." *People v. Johnson*, 2016 CO 69, ¶ 12, 381 P.3d 316, 319 (quoting *Sisneros*, 55 P.3d at 801). Rather, waiver must be supported by a showing that the privilege holder has somehow forsaken, through words or action, a claim of confidentiality as to the information in question. *Clark*, 668 P.2d at 8; *Sisneros*, 55 P.3d at 801.

¶25 Waiver "can [also] be implied through a patient's conduct." *Alcon*, 113 P.3d at 739. For instance, a party impliedly waives the physician-patient privilege when they "inject[] [their] physical or mental condition into the case as the basis of a claim or an affirmative defense." *Clark*, 668 P.2d at 10. As we explained in *Clark*, "[w]hen the privilege holder pleads a physical or mental condition as the basis of a claim or as an affirmative defense, the only reasonable conclusion is that he thereby impliedly waives any claim of confidentiality respecting that same condition." *Id.* Under those circumstances, the privilege holder "has utilized his

physical or mental condition as the predicate for some form of judicial relief, and his legal position as to that condition is irreconcilable with a claim of confidentiality." *Id.*

¶26 Although *Clark* was a civil case, we are not without guidance in analyzing this type of privilege in criminal cases.[2] Specifically, we have applied the same standard in criminal cases, albeit under different procedural circumstances. For instance, in *People v. Sisneros*, we addressed whether a trial court has the discretion to review a victim's psychotherapy records to determine which of those records are privileged. 55 P.3d at 801. In concluding that the trial court did not have this discretion, we explained that "the proper inquiry is whether the victim has injected her physical or mental condition into the case as the basis of a claim or an affirmative defense." *Id.*

¶27 Later, in *People v. Johnson*, we considered whether a juvenile impliedly waived her psychotherapist-patient privilege by requesting a reverse-transfer

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[2] Our past analyses involve implied waiver of the psychotherapist-patient privilege. These cases directly inform our consideration of implied waiver of the physician-patient privilege. *See* § 13-90-107(1)(d), (g) (codifying both the physician-patient privilege and the psychotherapist-patient privilege); *Clark*, 668 P.2d at 8 ("The purpose of the psychologist-patient privilege, as is obvious from the plain meaning of its statutory terms, is identical to that of the physician-patient privilege."); *Johnson v. Trujillo*, 977 P.2d 152, 154–55 (Colo. 1999) (noting the identical purposes of these "two distinct but closely related statutory privileges").

hearing. ¶ 13, 381 P.3d at 319. There, the trial court concluded that the reverse-transfer statute, § 19-2-517(3)(b)(VI), C.R.S. (2016),[3] required the court to evaluate Johnson's mental health and thus the prosecution was entitled to access all of her mental health records. *Johnson*, ¶¶ 4–5, 381 P.3d at 317–18. We began our analysis with the text of the statute, noting that it only required a trial court to consider "[t]he current and past mental health status of the juvenile as evidenced by relevant mental health or psychological assessments or screenings that are *made available* to both the district attorney and defense counsel." *Id.* at ¶ 10, 381 P.3d at 318 (emphasis added) (quoting § 19-2-517(3)(b)(VI), C.R.S. (2016)). Relying on the framework in *Sisneros*, we concluded that "[i]f privileged information is not 'made available' by the privilege-holder, nothing in the statute gives the trial court the power to force a party to disclose privileged information." *Johnson*, ¶¶ 13, 15, 381 P.3d at 319.

¶28 Most recently, we applied the *Clark* standard in *People v. Brown*, 2019 CO 50, ¶ 20, 442 P.3d 428, 433. There, the People charged Brown, who was a minor when the alleged crimes occurred, as an adult. Brown sought a reverse transfer to remove his case to juvenile court. *Id.* at ¶ 3, 442 P.3d at 430–31. Unlike the

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[3] The reverse-transfer statute has since been recodified. Ch. 136, sec. 2, § 19-2.5-801, 2021 Colo. Sess. Laws 557, 614–18.

defendant in *Johnson*, Brown planned to use his medical records at the reverse-transfer hearing but sought a protective order prohibiting the prosecution from using those records against him at trial. *Brown*, ¶ 4, 442 P.3d at 431. The trial court denied the protective order, and Brown appealed. *Id.* at ¶¶ 5–6, 442 P.3d at 431. On appeal, both parties agreed that our holding in *Clark*, that a party waives their privilege when they inject their "physical or mental condition into the case as the basis of a claim or an affirmative defense," applied. *Brown*, ¶ 20, 442 P.3d at 433 (quoting *Alcon*, 113 P.3d at 739). But Brown contended that "'as the basis of a claim or an affirmative defense' mean[t] that he [was] only putting his physical and mental condition at issue with respect to the jurisdictional issue in the reverse-transfer hearing[,] . . . [not] as to the underlying alleged crimes." *Id.* (quoting *Alcon*, 113 P.3d at 739). Rejecting Brown's argument, we recognized "that Brown face[d] a difficult choice regarding whether to disclose privileged information during his reverse-transfer hearing," but concluded "that difficulty d[id]n't grant him the right to limit any resulting waiver to that hearing." *Id.* at ¶ 31, 442 P.3d at 435.

¶29 Finally, once an implied waiver has been established, the court must also determine the scope of the waiver. "[A]n implied waiver does not grant adverse parties access to the entirety of one's medical history: '[I]mplied waivers have always been limited by the circumstances of the case, rather than amounting to consent to general disclosure of all the patient's communications with his or her

physician.'" *Hartmann v. Nordin*, 147 P.3d 43, 50 (Colo. 2006) (alteration in original) (quoting *Alcon*, 113 P.3d at 739). We have explained that "[t]he scope of any implied waiver necessarily depends on the nature of the claim asserted by the patient." *Samms v. Dist. Ct.*, 908 P.2d 520, 529 (Colo. 1995).

3. Application

¶30 We first consider Kelley's assertion that she did not waive her physician-patient privilege. Then, we address Kelley's argument that the trial court's disclosure order was overbroad.

¶31 To begin, Kelley broadly argues that the plain language of the involuntary intoxication statute supports her interpretation. *See* § 18-1-804(3). She contends that section 18-1-804(3) precludes implied waiver of the physician-patient privilege because the plain language of the statute does not provide for a waiver. Kelley is correct that the involuntary intoxication statute does not explicitly provide that invoking involuntary intoxication as an affirmative defense constitutes a waiver of the physician-patient privilege. *Id.* But the notion that the absence of an *express* statutory waiver precludes an *implied* waiver defies logic, and Kelley fails to point to any precedent that suggests otherwise.

¶32 In a similar vein, Kelley contends that the absence of an express statutory waiver provision in the involuntary intoxication statute demonstrates that the General Assembly did not intend for a defendant's assertion of the affirmative

defense to constitute a waiver. In support of this argument, Kelley points to section 16-8-103.6, C.R.S. (2022), which explicitly addresses waiver of the physician-patient privilege in the context of two other affirmative defenses. *See id.* (expressly providing that a defendant who asserts the affirmative defense of impaired mental condition or pleads not guilty by reason of insanity waives the physician-patient privilege). That the General Assembly knows how to create such a waiver but declined to do so here, she contends, is dispositive. We are unpersuaded.

¶33 The statutory provisions regarding the affirmative defenses of insanity and impaired mental condition, on one hand, and the affirmative defense of involuntary intoxication, on the other, are inapposite. Although involuntary intoxication, insanity, and impaired mental condition are all affirmative defenses that are found in article 1 of title 18, §§ 18-1-802 to -804, C.R.S. (2022), their similarities end there as they relate to the questions before us. *See People v. Garcia*, 113 P.3d 775, 782 (Colo. 2005) ("Involuntary intoxication and insanity are legally separate and distinct defenses with significantly distinct legal consequences.").

¶34 Separate from title 18, the General Assembly has crafted a detailed scheme that governs the affirmative defenses of insanity and impaired mental condition. *See* §§ 16-8-101 to -122, C.R.S. (2022). The explicit waiver provision is contained there, in title 16, not in title 18. § 16-8-103.6(1)(a). The General Assembly has not

created a comparable detailed and distinct statutory scheme that governs the affirmative defense of involuntary intoxication. Kelley's argument that the legislature's inclusion of a waiver provision in the insanity and impaired mental condition statutes means that it did not intend for the assertion of the affirmative defense of involuntary intoxication to waive the physician-patient privilege misses the mark. She argues, "If the [l]egislature intended the affirmative defense of involuntary intoxication to waive any privilege, the legislature would have written such a waiver into the specific affirmative defense's statute, as they have done with other affirmative defenses like impaired mental condition and . . . insanity," citing to sections 18-1-802 and 18-1-803, C.R.S. (2022). But the waiver provision related to those affirmative defenses is not written into title 18. And, more importantly, none of Kelley's arguments regarding the insanity and impaired mental condition statutes answer the People's argument, which centers on implied waiver.[4]

[4] But what about our statement in *Johnson*—which Kelley does not raise—that "because the [psychotherapist–patient] privilege is so important, the General Assembly explicitly states when a party waives her privilege[?]" ¶ 14, 381 P.3d at 319. At first blush, this might be viewed as suggesting that the privilege is so important that it cannot be impliedly waived. Read in context, however, the statement is not so broad. *See id.* Indeed, later in the opinion we went on to conclude that the statute does not impliedly waive a juvenile's psychotherapist-patient privilege. *Id.* at ¶ 15, 381 P.3d at 319.

¶35 Second, Kelley contends that her endorsement of the affirmative defense of involuntary intoxication merely constitutes a response to the People's allegation that she was voluntarily intoxicated and that she has thus not injected her physical condition into the case. But Kelley conflates pleading not guilty with endorsing an affirmative defense. Endorsing an affirmative defense is legally distinct from pleading not guilty or from denying the prosecution's allegations: "Affirmative defenses, including involuntary intoxication, do not simply challenge the existence of an element of the offense, but seek to justify or mitigate the entire crime." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005); *accord People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) (explaining that affirmative defenses "admit the defendant's commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act").

¶36 For these reasons, we reject Kelley's contentions and conclude that her endorsement of the affirmative defense of involuntary intoxication impliedly waived her physician-patient privilege. We emphasize that the scope of her waiver is limited to her medical records related to her endorsement of the affirmative defense of involuntary intoxication. That affirmative defense, by definition, plainly implicates Kelley's physical or mental condition: section 18-1-804(4) defines intoxication as "a *disturbance of mental or physical capacities* resulting from the introduction of any substance into the body." *Id.*

(emphasis added); *see Clark*, 668 P.2d at 10. We acknowledge, as we did in *Brown*, that our conclusion leaves Kelley with a difficult choice—whether to assert the affirmative defense of involuntary intoxication and disclose her records related to involuntary intoxication or, instead, to protect her physician-patient privilege by foregoing the affirmative defense. ¶ 31, 442 P.3d at 435. But concluding otherwise would be at odds with our precedent and the statute's plain language.

¶37 Finally, we conclude that the trial court's order requiring disclosure of Kelley's records was not overbroad. Contrary to Kelley's contention, the required disclosure is "limited by the circumstances of the case," and does not amount to a "general disclosure of all [Kelley]'s communications with . . . her physician." *Hartmann*, 147 P.3d at 50 (quoting *Alcon*, 113 P.3d at 739). Recall, the trial court issued a detailed order that requires only the disclosure of records from Kelley's September 7, 2021 hospitalization that "contain information related to involuntary intoxication." Moreover, the trial court further narrowed the scope of the disclosure by enumerating the precise types of documents for which Kelley impliedly waived the physician-patient privilege. Then the court redacted the documents to exclude information that was not subject to the waiver. Because the court here carefully tailored the disclosure to Kelley's involuntary intoxication affirmative defense, the order was not overbroad. *Id.*

B. Admissibility of Kelley's Refusal to Release Her Medical Records

¶38 Kelley also contends that her refusal to consent to releasing her medical records is inadmissible because she has the right to refuse a warrantless search under the Fourth Amendment and the Colorado Constitution. *See* U.S. Const., amends. IV, XIV; Colo. Const. art. II, § 7. However, the litigation surrounding the admissibility of Kelley's refusal to release her medical records centered around the Fifth Amendment and the fact that Officer Johnson asked Kelley to release her medical records after she invoked her right to an attorney. Kelley didn't raise her Fourth Amendment argument until she responded to the People's motion to reconsider—and, even then, she did so very briefly without citing supporting case law[5]—so the People did not have the opportunity to respond, and the trial court did not have a chance to rule on the argument. While *People v. Pollard*, 2013 COA 31M, ¶ 28, 307 P.3d 1124, 1129–30, might suggest that this type of evidence is

[5] In support of her assertion before the trial court that the People "cannot penalize an accused person for invoking the right to refuse a warrantless search under the Fourth Amendment," Kelley cited only one case. But that case is inapposite because it involved the defendant's Fifth Amendment right to remain silent, not the Fourth Amendment right to be free from unreasonable searches and seizures. *See People v. Ortega*, 597 P.2d 1034, 1036–37 (Colo. 1979).

inadmissible, we decline to address this issue because it was not adequately litigated before the trial court.

III. Conclusion

¶39 For the foregoing reasons, we discharge the rule as to the trial court's order concluding that Kelley impliedly waived her physician-patient privilege by asserting the affirmative defense of involuntary intoxication and further directing the disclosure of twenty-seven redacted pages of Kelley's hospital records that fell within the limited scope of that waiver. We decline to address Kelley's Fourth Amendment argument related to her refusal to release her medical records as the parties and the trial court lacked an adequate opportunity to address this issue.