STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY IRENE DELUCA,

Plaintiff-Appellee,

v

BROWNSTOWN ASSISTED LIVING CENTER, LLC, doing business as BROWNSTOWN FOREST VIEW ASSISTED LIVING,

Defendant-Appellant.

UNPUBLISHED
December 06, 2024
11:42 AM

No. 367518
Wayne Circuit Court
LC No. 22-013735-NH

Before: YATES, P.J., and CAVANAGH and MARIANI, JJ.

PER CURIAM.

In this medical-malpractice action resulting from injuries plaintiff sustained after falling at defendant's assisted-living center, defendant appeals by leave granted[1] the May 22, 2023 qualified protective order (QPO) that permits defendant to conduct ex parte meetings with plaintiff's treating physicians and healthcare providers subject to a post-meeting notice condition. Defendant asserts that the trial court did not identify good cause to impose a notice condition upon the meetings, so the trial court abused its discretion by adding such a condition to the QPO. Although plaintiff has presented substantial evidence that such a notice condition is commonplace in QPOs issued by the trial courts in Michigan, this Court has issued an unbroken line of opinions and orders concluding that such a notice condition is impermissible unless the trial court identifies case-specific facts that demonstrate such a notice condition is necessary. Because the notice condition in the QPO issued by the trial court is unsupported by any case-specific facts, we must vacate the portion of the QPO imposing a notice condition and remand for further proceedings consistent with this opinion.

[1] *Deluca v Brownstown Assisted Living Ctr LLC*, unpublished order of the Court of Appeals, entered December 19, 2023 (Docket No. 367518).

I. FACTUAL BACKGROUND

Plaintiff filed this suit against defendant for injuries she sustained on May 20, 2020, when another resident at defendant's assisted-living center allegedly caused plaintiff to fall. During the discovery process, defendant requested that the trial court enter a QPO that would permit defendant to conduct ex parte meetings with plaintiff's healthcare providers. Plaintiff insisted that defendant should not be permitted to conduct any ex parte interviews with plaintiff's healthcare providers. Alternatively, plaintiff contended that if the trial court permitted such meetings, defendant should be required to identify the individuals whom it intended to interview or that defendant be required to provide prior notice to plaintiff of any meetings. Plaintiff claimed that a notice condition was appropriate because (1) it would promote the legislative intent of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., by informing plaintiff of the providers who were accessing her health information, (2) other statutes that govern the disclosure of health information impose notice conditions, and (3) plaintiff was entitled to know when her healthcare information had been disclosed and by whom the disclosure was made. Defendant argued in reply that plaintiff had not provided good cause to support the inclusion of a notice condition in the QPO because she had failed to identify any case-specific facts that established good cause to justify the notice condition. Nevertheless, the trial court issued a QPO with a condition requiring defendant to "disclose to Plaintiff within 7 days of any such [ex parte] meetings who they have interviewed." This interlocutory appeal followed.

II. LEGAL ANALYSIS

On appeal, defendant argues that the trial court abused its discretion by including the post-meeting notice condition in the QPO because plaintiff did not establish good cause to impose that condition. "A trial court's decision on a motion for a protective order is reviewed for an abuse of discretion." *Holman v Rasak*, 486 Mich 429, 449 n 10; 785 NW2d 98 (2010). A trial court abuses its discretion when its decision "falls outside the range of reasonable and principled outcomes." *Id*. A trial court also abuses its discretion when it errs as a matter of law. *Gay v Select Specialty Hosp*, 295 Mich App 284, 294; 813 NW2d 354 (2012).

"Ex parte interviews are permitted under Michigan law, and nothing in HIPAA specifically precludes them." *Holman*, 486 Mich at 442. HIPAA balances "the need for disclosure in certain contexts with the importance of individual privacy," so ex parte interviews of healthcare providers do not contravene HIPAA's purpose "so long as the interviews are sought according to the specific requirements of 45 CFR 164.512(e)." *Id*. at 447. Under 45 CFR 164.512(e), a "covered entity" may disclose protected health information in the course of any judicial proceeding in response to "a subpoena, discovery request, or other lawful process, that is accompanied by an order of a court" if that covered entity "receives satisfactory assurances . . . from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of" 45 CFR 164.512(e)(1)(*v*). In order to meet the requirements of 45 CFR 164.512(e)(1)(*v*), a QPO must clearly state that it "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested" and it "[r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." 45 CFR 164.512(e)(1)(*v*)(A)-(B).

If conditions imposed in a QPO have no bearing on the disclosure of health information, such as a requirement that plaintiff's counsel be notified of any ex parte meetings, "MCR 2.302(C) requires that the additional conditions be justified in their own right." *Szpak v Inyang*, 290 Mich App 711, 715; 803 NW2d 904 (2010). According to MCR 2.302(C), "[o]n motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Thus, a trial court cannot impose a condition on an ex parte interview unless good cause for the condition has been established. *Szpak*, 290 Mich at 714. Generalized concerns are insufficient to establish good cause. *Id*. at 716. Instead, the party seeking the imposition of a condition must identify case-specific facts demonstrating good cause to impose the requested condition. *Id*. at 715-716. A fear that could be "theoretically present in any medical malpractice case" is insufficient to demonstrate good cause. *Id*. at 715.

Here, the trial court entered a QPO that permitted defendant to conduct ex parte meetings with plaintiff's treating physicians and healthcare providers, provided that defendant must disclose to plaintiff whom it interviewed within 7 days. The trial court made no factual findings to support the imposition of that condition. On appeal, defendant argues that plaintiff failed to establish good cause to impose the notice condition, so the trial court abused its discretion when it included that condition in the QPO. Plaintiff insists there was good cause to impose the notice condition because (1) notice would enable plaintiff to avoid the lengthy process of finding out about those meetings through traditional discovery procedures, (2) the notice provision addressed the privacy concerns associated with those meetings, and (3) plaintiff is entitled under HIPAA to information about who is disseminating her protected health information. Plaintiff's justifications for the notice condition are unpersuasive, especially when none of those justifications was reflected in any findings of fact rendered by the trial court.

As in *Szpak*, plaintiff's request for notice of meetings with her healthcare providers has no bearing on the disclosure of her health information, so "MCR 2.302(C) requires that the additional conditions be justified in their own right." *Szpak*, 290 Mich App at 715. Plaintiff's claim that the notice condition was justified because it provides an efficient method for her to obtain information about the ex parte interviews is meritless. Despite general grievances about the discovery process, plaintiff has not articulated how she would suffer "undue burden or expense" by using the standard discovery procedures to obtain information about ex parte interviews. See MCR 2.302(C).

This Court recently rejected that claim in *Sampson v Shorepointe Nursing Ctr*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2020 (Docket No. 346927), p 4.[2] In that case, the plaintiff asserted that it was appropriate to impose a post-meeting notice condition because "her counsel might find it burdensome to undertake ordinary mechanisms of discovery to determine when and with whom ex parte interviews took place, particularly given the likelihood that defendants will assert the work product privilege in denying the requested information." *Id*. This Court concluded that that was "essentially an argument for convenience," and disagreed that

[2] "Although unpublished opinions of this Court are not binding precedent, they may . . . be considered instructive or persuasive." *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted); see MCR 7.215(C)(1).

"an ordinary discovery request, and the assertion of privilege in response to the request, is an undue burden on plaintiffs in this, or in any other, case." *Id*. Accordingly, this Court concluded that the trial court abused its discretion by imposing the notice condition. *Id*. at 2. We likewise conclude that the use of ordinary discovery tools to obtain information about any ex parte meeting defendant conducted does not impose an undue burden on plaintiffs, so that justification is insufficient under MCR 2.302(C) to support a notice requirement.

Plaintiff also argues that, without the notice condition, the ex parte meetings would infringe on her privacy interests because she would be unable to monitor the dissemination of her protected health information. She further contends that HIPAA entitles her to receive information about that dissemination. But Michigan law permits ex parte meetings of this nature, *Holman*, 486 Mich at 442, and a post-meeting notice condition is unrelated to dissemination of information in ex parte meetings. See *Szpak*, 290 Mich App at 715. Indeed, HIPAA allows the dissemination of protected health information pursuant to a QPO under certain conditions, but notification to plaintiff that the dissemination occurred is not one of those conditions. See 45 CFR 164.512(e)(1)(*v*)(A)-(B). And although plaintiff insists that she is entitled to that information under HIPAA, she has not explained why that entitlement, or her desire to monitor dissemination of her protected health information, could not be accomplished through ordinary discovery, which she concedes is an available option.

Our Supreme Court addressed the claim that ex parte interviews with healthcare providers conflict with HIPAA's purpose of protecting the privacy of plaintiffs' health information. *Holman*, 486 Mich at 446. The Supreme Court noted that HIPAA seeks to balance "the need for disclosure in certain contexts with the importance of individual privacy," and ruled that ex parte interviews do not undermine the objectives of HIPAA "so long as the interviews are sought according to the specific requirements of 45 CFR 164.512(e)." *Id*. at 447. Here, the QPO that defendant proposed met the requirements of 45 CFR 164.512(e)(1)(*v*), so it did not require the addition of any notice condition to uphold the purpose of HIPAA.

Furthermore, plaintiff's purported justifications for the notice condition do not include any case-specific facts revealing a "specific fear" of "annoyance, embarrassment, oppression, or undue burden or expense" that would be ameliorated by a notice requirement. See *Szpak*, 290 Mich App at 715-716. Plaintiff's three justifications for the notice condition merely amounted to generalized concerns that would apply with equal force to any case where the dissemination of protected health information was at issue. Generalized concerns are not sufficient to establish good cause to add a notice requirement to a QPO. *Id*. at 716. Thus, plaintiff did not demonstrate good cause to support the imposition of a notice condition. Because plaintiff failed to establish good cause to impose the notice condition, the trial court abused its discretion when it imposed the notice condition without offering any findings of fact to satisfy the "good cause" standard in MCR 2.302(C). See *id*. (stating that a trial court abuses its discretion when it implements a condition in a QPO in the absence of a showing of good cause for the condition). Although plaintiff has supplied ample evidence that the inclusion of a notice requirement in QPOs is a common practice in the trial courts of this state, the standards prescribed in MCR 2.302(C) and refined by this Court in our published and unpublished

opinions and orders leave no doubt that the common practice is unsustainable as a matter of law.[3] To be sure, the trial court has the power on remand to render case-specific findings of fact and then impose a notice condition if those findings of fact establish "good cause" as contemplated by MCR 2.302(C) and the rulings of this Court. But on the existing record, we must vacate the trial court's inclusion of a notice condition in the QPO.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher P. Yates
/s/ Mark J. Cavanagh

[3] In the unpublished opinion in *Sampson*, this Court quoted extensively from two orders that struck notice requirements virtually identical to the notice provision in this case. *Sampson*, unpub op at 4 n 2.

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MARIANI, J. (*concurring*).

I concur in the majority's conclusion that this matter should be remanded for the trial court to make a finding of good cause regarding the imposition of plaintiff's requested post-meeting notice requirement. MCR 2.302(C) requires "good cause shown" to "issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." And, as recognized in *Szpak v Inyang*, 290 Mich App 711; 803 NW2d 904 (2010), this requirement applies when a plaintiff seeks to impose a notice condition on a defendant's ex parte interviews with the plaintiff's healthcare providers. The trial court in this case, however, imposed plaintiff's requested notice condition without providing any insight as to why it may have deemed the condition warranted under MCR 2.302(C). The trial court must cure this deficiency before it may reimpose the condition.

I write separately to add two observations that may bear on what happens next before the trial court. First, while *Szpak* recognizes the need for a finding of good cause to impose a notice condition on a QPO, it does not purport to precisely dictate or categorically limit what that "good cause" must entail. To the contrary, since *Szpak*, this Court has repeatedly recognized the longstanding principle that, "[i]n the context of our court rules, good cause simply means a satisfactory, sound or valid reason," and "[a] trial court has broad discretion to determine what constitutes good cause." *Thomas M Cooley Law School v Doe*, 300 Mich App 245, 264; 833 NW2d 331 (2013), quoting *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks and alterations omitted). See also, e.g., *Schaumann-Beltran v Gemmete*, 335 Mich App 41,

54; 966 NW2d 172 (2020), rev'd on other grounds by 509 Mich 979 (2022); *Burris v KAM Transp, Inc*, 301 Mich App 482, 488; 836 NW2d 727 (2013). MCR 2.302(C) identifies a host of general considerations—"annoyance, embarrassment, oppression, or undue burden or expense"—that, together or separately, may form the basis of good cause, and it is for the trial court, in its discretion, to determine how they might fit with the needs and circumstances of the specific matter at hand.

Szpak is consistent with this principle, and must be read with it in mind. At issue in *Szpak* was a particular, and particularly burdensome, set of conditions that would have effectively foreclosed the defendant from conducting an ex parte interview with a provider—and thus from availing itself of a permissible form of discovery—unless the plaintiff allowed it. See *Szpak*, 290 Mich App at 714-715 (confirming that "[e]x parte interviews are permitted under Michigan law" and describing the conditions at issue as "requiring defendants to give plaintiffs' attorney notice of the time, date and locations of meeting[s]" and "allowing plaintiffs' counsel to attend the meetings") (quotation marks and citation omitted). The condition at issue in this case, however, is materially different and much less intrusive, leaving defendant with free rein to conduct ex parte interviews and requiring only an after-the-fact notification of whatever ones it may choose to do. It stands to reason—and nothing in *Szpak* suggests otherwise—that the difference in degree and kind between this condition and those in *Szpak* would correspondingly be reflected in the good cause necessary to justify each. That is, while a given "reason" (such as a particular form or extent of annoyance, expense, or burden) may not be sufficiently "satisfactory, sound or valid" to justify conditions as extreme as those in *Szpak*, it may well be enough to support the far more measured condition at issue here.

Second, while a showing of good cause by plaintiff under MCR 2.302(C) is necessary for plaintiff's requested post-meeting notice condition, it does not likewise strike me as necessary for the alternative that plaintiff previously proposed: that the QPO identify the healthcare providers to whom it applies. It seems wholly unexceptional, and wholly within a court's authority and discretion, for a court to want to know and specify to whom its orders apply. And it is not apparent to me why, under *Szpak* or otherwise, the court in this case could not require as much unless plaintiff made a showing of good cause.[1] Indeed, while defendant may prefer to proceed with a

[1] For instance, while the conditions at issue in *Szpak* "ha[d] no bearing on the disclosure of health information" and were "unrelated to compliance with HIPAA, or any related privacy concerns," *Szpak*, 290 Mich App at 715-716, the same cannot be said for a QPO's identification of the provider(s) permitted, by virtue of the order, to disclose protected health information under HIPAA.

It also bears noting that a QPO's identification of the provider(s) it covers strikes me as, even if not required by HIPAA, fully consistent with it and the manner in which it seeks to "balanc[e] the need for disclosure in certain contexts with the importance of individual privacy" as to personal (and often personally sensitive) health information. *Holman v Rasak*, 486 Mich 429, 447; 785 NW2d 98 (2010). Cf., e.g., 45 CFR 164.508(c)(1)(*ii*) (providing that, for an individual's authorization of the disclosure of their protected health information to be valid, the authorization must, among other things, contain "[t]he name or other specific identification of the person(s), or

blanket QPO that applies to, without naming, any of plaintiff's providers it may wish to contact, it has identified nothing that would entitle it to proceed in that manner—or, for that matter, that would preclude the court from even requiring it to seek a separate QPO for each individual provider. Needless to say, there is ample reason why a court may want nothing to do with such a provider-by-provider approach and its attendant inefficiencies, and the party seeking the QPO may well have compelling arguments against it. But I fail to see why the court's case-management discretion in that regard would depend on a showing of good cause by the other party, or why that conclusion would hold with any less force for a QPO that identifies and applies to multiple providers rather than just one.

/s/ Philip P. Mariani

class of persons, authorized to make the requested use or disclosure"). And while defendant has expressed concern about having to reveal its litigation strategy through its QPO, the order's identification of the provider(s) it covers would not, in itself, require defendant to disclose whether or to what extent it may ultimately choose to contact a given provider.