STATE OF MICHIGAN

COURT OF APPEALS

ISIDORE STEINER, DPM, PC, d/b/a FAMILY FOOT CENTER, Plaintiff/Counter-Defendant-Appellant,	FOR PUBLICATION April 7, 2011 9:00 a.m.
v	No. 294016 Livingston Circuit Court
MARC A. BONANNI, Defendant/Counter-Plaintiff-Appellee.	LC No. 09-024169-CZ

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J.

This Court granted plaintiff's application for leave to appeal a trial court order that denied plaintiff's motion to compel discovery. For the reasons set forth below, we affirm.

I. NATURE OF THE CASE

Plaintiff, Isidore Steiner, DPM, PC, claims that defendant, Dr. Marc Bonanni, a former employee of the corporation, breached his employment contract with plaintiff and misappropriated property of the corporation. Plaintiff maintains that defendant stole its patients in violation of a clause in the employment agreement that prohibited defendant from soliciting or servicing any patients of the corporation after he left the practice. After defendant left the employment of plaintiff, plaintiff sued defendant and seeks disclosure of defendant's patient list to prove its case and damages. Defendant objected to disclosure pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and state law regarding physician-patient privilege. This discovery dispute requires us to decide whether federal or state law controls and whether disclosure would violate the nonparty patients' privacy rights.

By its language, HIPAA asserts supremacy in this area, but allows for the application of state law regarding physician-patient privilege if the state law is more protective of patients' privacy rights. In the context of litigation which, as here, involves nonparty patients' privacy, HIPAA requires only notice to the patient to effectuate disclosure whereas Michigan law grants the added protection of requiring patient consent before disclosure of patient information. Because Michigan law is more protective of patients' privacy interests in the context of this litigation, Michigan law applies to plaintiff's attempted discovery of defendant's patient list.

And, because Michigan law protects the very fact of the physician-patient relationship from disclosure, absent patient consent, the trial court properly rejected plaintiff's efforts to obtain this confidential information and we affirm the trial court's ruling.

I. FACTS AND PROCEEDINGS

On July 6, 1999, plaintiff and defendant entered into an employment agreement that contained a non-competition and non-solicitation clause. Among other things, the clause in issue prohibited defendant from inducing, soliciting, diverting, servicing or taking away patients from plaintiff for a three year period following the termination of the employment agreement. Defendant resigned from plaintiff in July 2007. Thereafter, plaintiff filed a lawsuit against defendant for breach of contract, conversion, fraud and misrepresentation, and accounting. An essential component of plaintiff's claim for damages is that, after he left the practice, defendant treated plaintiff's patients in violation of the employment agreement.

During discovery, plaintiff sent defendant a set of interrogatories, one of which requested the names, addresses and telephone numbers for every patient treated by defendant since he resigned. Plaintiff claims that it cannot protect its contractual rights to its patients without discovery of which of its former patients are now patients of defendant. Defendant objected to the interrogatory on the ground that such disclosure would violate HIPAA and Michigan's physician-patient privilege, and the trial court issued a qualified protective order in which the parties agreed to conduct their litigation in compliance with HIPAA and agreed to maintain all privileges. Because defendant failed to fully respond to plaintiff's interrogatories, plaintiff filed a motion to compel. In response, defendant argued that the information requested is protected by Michigan's statutory physician-patient privilege which, he argued, contains more stringent requirements than HIPAA. The trial court denied plaintiff's motion to compel production of patients' names, and ruled that the names of the nonparty patients are privileged under Michigan law.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo a trial court's decision about the application of the physician-patient privilege. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). If the privilege does apply, we review for an abuse of direction the trial court's order on disclosure. *Id*. An abuse of discretion occurs when a trial court chooses a result that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Whether HIPAA preempts Michigan law is a question of law, which is reviewed de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

B. DISCUSSION

Plaintiff argues the trial court erred in holding that the names, addresses and telephone numbers of the nonparty patients that defendant allegedly wrongfully took from plaintiff are privileged and protected from disclosure under Michigan law, under MCL 600.2157 and *Baker*, 239 Mich App at 461, because HIPAA applies and permits disclosure.

HIPAA is the federal regulation that governs the retention, use, and transfer of information obtained during the course of the physician-patient relationship. *In re Petition of Attorney Gen for Investigative Subpoenas*, 274 Mich App 696, 699; 736 NW2d 594 (2007). "Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510." *Holman v Rasak*, 486 Mich 429, 438-439; 785 NW2d 98 (2010). However, 45 CFR 164.512 "enumerates several specific situations in which '[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 CFR] 164.508, or the opportunity for the individual to agree or object as described in [45 CFR] 164.510 . . . .'" *Id*. at 439. Included within those situations is disclosure for judicial and administrative proceedings, which allows a provider or other covered entity to disclose the protected information in response to an order or in response to a subpoena or discovery request if the provider receives satisfactory assurance that notice was provided to the patient or that reasonable efforts were made to secure a qualified protective order. 45 CFR 164.512(e). As our Supreme Court also explained in *Holman*:

> Under HIPAA, "[a] standard, requirement, or implementation specification" of HIPAA "that is *contrary* to a provision of State law preempts the provision of State law" unless, among other exceptions, "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under" HIPAA. 45 CFR 160.203 (emphasis added). "Contrary" means either that "[a] covered entity would find it impossible to comply with both the State and federal requirements" or that "[t]he provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA. 45 CFR 160.202. "More stringent," in this context, means "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 CFR 160.202. [*Holman*, 486 Mich at 441.]

Plaintiff maintains that Michigan law is less stringent than HIPAA because it can be informally waived and that, therefore, MCL 600.2157 is preempted by HIPAA as a matter of law.

We first observe that, under Michigan law, the privilege belongs to the patient and only the patient may waive it. *Baker*, 239 Mich App at 470. The purpose of the physician-patient privilege is to protect the confidential nature of the physician-patient relationship. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 560; 475 NW2d 304 (1991); *Gaertner v Michigan*, 385 Mich 49; 187 NW2d 429 (1971). These principles are particularly important in a context, as here, wherein plaintiff seeks the names, addresses and telephone numbers of nonparty patients, many of whom are unlikely to know this lawsuit is pending.

MCL 600.2157 provides, in part, that, "[e]xcept as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a

surgeon." When interpreting a statute, this Court must give effect to the Legislature's intent as expressed in the language of the statute by analyzing the words, phrases, and clauses according to their plain meaning. *Bukowski v Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007). The language of MCL 600.2157 states that physicians "shall not" disclose information obtained from patients for purposes of medical treatment, except as otherwise provided in the law. The use of the word "shall" denotes mandatory action. *Wolverine Power Supply Coop, Inc v DEQ*, 285 Mich App 548, 561; 777 NW2d 1 (2009). This type of mandatory language is not found in HIPAA. Instead, a physician *may* disclose protected health information in response to a subpoena or discovery request when adequate assurances are given from the requesting party that the patients have been notified and informed of their right to deny the request. 45 CFR § 164.512(e). Thus, the language of HIPAA allows for permissive disclosure, whereas Michigan law generally prohibits disclosure.

There are no exceptions under Michigan law for providing random patient information related to any lawsuit. Unlike HIPAA, MCL 600.2157 does not provide for disclosure in judicial proceedings. Also, HIPAA, unlike Michigan law, makes disclosure exceptions for public health activities, victims of abuse, neglect, or domestic violence or for health oversight activities. 45 CFR 164.512(b), (c) and (d).[1]

Plaintiff argues that because the privilege may be involuntarily waived under MCL 600.2157, it is less stringent than HIPAA. Under MCL 600.2157, the privilege may be waived if a patient pursues a medical malpractice claim and calls his physician as a witness, if the heirs of a patient contest the patient's will, or if the beneficiaries of a life insurance policy provide the necessary documents to a life insurer when examining a claim for benefits. Relying on *Law v Zuckerman*, 307 F Supp 2d 705, 711 (D MD, 2004), plaintiff contends that HIPAA should apply here because these waiver possibilities "can force disclosure without a court order, or the patient's consent." In *Law*, the United States District Court for the District of Maryland held, "If state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations." *Id.* The *Law* court ruled, in a case of first impression,

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[1] However, Michigan law does provide for some exceptions other than the waivers specifically stated in MCL 600.2157. See *People v Keskimaki*, 446 Mich 240; 521 NW2d 241 (1994) (If after an accident, a sample of a person's blood is withdrawn for the purpose of medical treatment, that sample shall be admissible in a criminal prosecution. An accident is often unexpected and undesired by at least one of the parties involved, but not necessarily all); *People v Johnson*, 111 Mich App 383; 314 NW2d 631 (1981) (Communications between physician and patient, however confidential they may be, are held not to be privileged if they have been made in the furtherance of an unlawful or criminal purpose); *Osborn v Fabatz*, 105 Mich App 450; 306 NW2d 319 (1981) (Communication between a person and a physician which is for the purpose of a lawsuit, and not for treatment or advice as to treatment, is not protected by the physician-patient privilege).

that HIPAA preempted Maryland state law and governed all ex parte communications between defense counsel and the patient's treating physician. *Id*. at 709. However, the key component in analyzing HIPAA's so-called "more stringent" requirement is *the ability of the patient to withhold permission and to effectively block disclosure*. *Id*. at 711. Under MCL 600.2157, a patient or his representative can withhold permission by not engaging in acts that waive the privilege. In this way, the patient may indeed block disclosure. Moreover, HIPAA also provides for instances in which the patient's consent is not necessary in order to warrant disclosure. A patient's protected health information may be disclosed without the patient's written consent or authorization in a judicial or administrative proceeding in response to court order, or in response to a subpoena or discovery request without a court order, if the party seeking the information has given the patient notice and an opportunity to object. 45 CFR 164.512(e)(ii)(A) and (B). Thus, disclosure under HIPAA may be made without judicial order, much like some disclosures under MCL 600.2157. Additionally, unlike HIPAA, MCL 600.2157 does not authorize disclosure under a qualified protective order. For these reasons, we do not find persuasive the argument that automatic waiver of privilege under some circumstances makes Michigan law less stringent than HIPAA.

We further note that the policy behind the *Law* standard on stringency supports the application of Michigan law. The Maryland District Court opined that the main concern regarding the disclosure of patient medical information is that the patient is in a position to authorize the disclosure. *Law*, 307 F Supp 2d at 711. This policy has also been repeatedly expressed by this Court and the Michigan Supreme Court. See *Baker*, 239 Mich App at 470; *Gaertner*, 385 Mich at 53; *Swickard*, 438 Mich at 560-561. Here, protecting the interests of the nonparty patient is of utmost importance. The nonparty patients who defendant allegedly treated confided in defendant with personal information, including the fact that they were treated at all, which should not be disclosed without their consent. Moreover, these patients are not in a position to waive their rights. Nothing in the record shows that they are aware of this case or were given the right to decide the issue. Thus, the public policy underlying both HIPAA and Michigan's physician-patient privilege supports applying Michigan law, specifically because there are only limited exceptions to Michigan's general nondisclosure requirement and there is no rule for nonconsensual disclosure of nonparty patients in judicial proceedings as in HIPAA. Therefore, on this issue, Michigan law is more stringent than HIPAA and HIPAA does not preempt MCL 600.2157.[2]

Applying MCL 600.2157, we affirm the trial court's holding that the names, addresses and telephone numbers are privileged. In *Schechet v Kesten*, 372 Mich 346, 350-351; 126 NW2d 718 (1964), our Supreme Court held that the physician-patient privilege protects the names of patients who were not parties to the case. The Court ruled that the physician-patient privilege

> imposes an absolute bar. It protects, 'within the veil of privilege,' whatever . . . 'was disclosed to any of his senses, and which in any way was brought to his

[2] We further note that nothing in the protective order supports a conclusion that HIPAA controls.

> knowledge for that purpose.' Such veil of privilege is the patient's right. It prohibits the physician from disclosing, in the course of any action wherein his patient or patients are not involved and do not consent, even the names of such noninvolved patients. [*Id.* at 351 (citation omitted).]

In *Dorris v Detroit Osteopathic Hosp Corp*, 220 Mich App 248, 249; 559 NW2d 76 (1996), the plaintiff sued a hospital and alleged that she refused a particular drug that was subsequently administered to her. After she received the drug, the plaintiff's blood pressure dropped. *Id*. at 249. The plaintiff requested the name of her roommate in the hospital because she claimed the roommate was present when she refused the drug. Relying on *Schechet*, this Court held the name of the nonparty roommate was protected by the physician-patient privilege. *Id*. at 251-252.

Similarly, in *Popp v Crittenton Hosp*, 181 Mich App 662; 449 NW2d 678 (1989), this Court relied on *Schechet* and held that the plaintiff was not entitled to the name and medical records of a nonparty patient. In *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 164-165; 393 NW2d 564 (1986), the plaintiffs brought a medical malpractice action claiming their first-born daughter suffered central nervous system damage because of defendant's negligence. The defendant requested the medical records of the plaintiffs' two youngest children, one of whom appeared to have a similar disorder as the eldest daughter, to determine if the central nervous system damage could have been genetic. *Id*. at 165. This Court held that the two younger children had not placed their disorder in controversy, and therefore did not waive the privilege. *Id*. at 167. This Court in *Baker*, 239 Mich App at 463, with the support of the above cited cases, held that "the physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of patient medical records, including when the patients are not parties to the action."

Thus, *Schechet* and its progeny fully support our holding that the names, addresses and telephone numbers requested by plaintiff are privileged under Michigan law.[3] These cases clearly state that nonparty names and other related medical information is "within the veil of privilege." *Schechet*, 372 Mich at 351. The nonparty patients in this case have not waived the privilege by putting their medical condition in controversy. *Dierickx*, 152 Mich App at 167. Additionally, much like the nonparty patient in *Dorris*, the patients in this matter likely are not aware of the pending lawsuit. Because we hold that HIPAA does not preempt Michigan law on this issue and that, under MCL 600.2157, plaintiff is not entitled to the requested nonparty

[3] To support its request for defendant's patient list, plaintiff says it cannot press its claim that defendant stole its patients without knowing defendant's patients and that, unless the courts grant such discovery, it cannot enforce its contractual rights to protect its valuable patient list from poaching by any unscrupulous ex-employee, such as plaintiff regards defendant. To this, we say that it is not our role to address either the wisdom of a physician's efforts to restrict with whom a patient may consult or the appropriate business or legal means by which a corporation can effectively protect its practice. Instead, our limited role is to decide whether the names, addresses and telephone numbers of non-party patients are protected from disclosure by law.

patient information, we hold that the trial court did not abuse its discretion when it denied plaintiff's motion to compel discovery.[4]

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[4] We also reject plaintiff's assertion that defendant did not timely raise this claim of privilege under MCL 600.2157. MCR 2.310 requires that a party to whom a request for the production of documents is served must make a written response within 28 days after service of the request. Plaintiff submitted the interrogatories on April 7, 2009, and defendant timely objected to plaintiff's interrogatory on May 5, 2009. Defendant stated that "HIPAA, as well as medical privilege, precludes Defendant from releasing the information sought in this request." Defendant's response clearly stated he objected to the requested information and gave a sufficient reason for the objection. Therefore, defendant's reply was timely and his objection stated adequate grounds in accordance with MCR 2.310.