

STATE OF MICHIGAN
COURT OF APPEALS

VIRGINIA HALEY, Personal Representative of
the Estate of MELVIN TOMICH,

UNPUBLISHED
March 9, 2010

Plaintiff-Appellee,

v

JAMES M. TSCHIRHART, M.D.,

No. 289842
Saginaw Circuit Court
LC No. 08-000547-NH

Defendant-Appellant.

Before: SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ.

PER CURIAM.

In this medical malpractice action, defendant appeals by leave granted a circuit court order granting plaintiff's motion to compel defendant to answer three interrogatory questions. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's complaint alleges that defendant diagnosed the decedent with gallbladder disease and removed the decedent's gallbladder on February 14, 2006. After the surgery, the decedent began feeling weak; a second operation was performed, and the decedent was found to be bleeding internally. Following the second surgery, the decedent went into cardiac arrest and died. Plaintiff alleged the defendant breached the standard of care by failing to discontinue the decedent's aspirin therapy before surgery, failing to monitor the decedent closely post-operatively, and failing to obtain a medical clearance including review of cardiac tests. Defendant failed to answer the complaint and a default was entered. However, the circuit court set aside the default after determining that defendant experienced a serious but undisclosed illness in March 2008, which prevented him from responding to the complaint and thus, provided good cause to set aside the default. Thereafter, plaintiff directed a second set of interrogatories to defendant, which included the following questions:

1. What medical condition necessitated your hospitalization in March 2008?
2. What was the under cause of the medical condition that necessitated your hospitalization in March 2008?
3. In the last 10 years have you suffered from any of the following:

- a. Drug abuse;
- b. Alcohol abuse;
- c. Substance abuse of any kind.

Defendant objected on several grounds and plaintiff filed a motion to compel defendant to answer the interrogatories. Following a hearing, the trial court granted plaintiff's motion to compel, but directed that the answers be subject to a protective order so that the information "is not for disclosure to any third party," and "not subject to disclosure at case evaluation, facilitation, or trial unless allowed by the Court pursuant to the appropriate motion."

On appeal, defendant challenges the trial court's decision to compel him to answer plaintiff's interrogatories. MCR 2.302(B)(1) sets forth the general scope of permissible discovery. *Bauroth v Hammoud*, 465 Mich 375, 378; 632 NW2d 496 (2001). That rule provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

However, a court should protect a party opposing discovery from excessive, abusive, or irrelevant discovery requests. *Cabrera v Ekemm*, 265 Mich App 402, 407; 695 NW2d 781 (2005). This Court reviews for an abuse of discretion a circuit court ruling on a motion to compel discovery. *Id.* at 406. A trial court abuses its discretion only when its decision results in an outcome outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). The interpretation and application of a court rule present a question of law that we review de novo. *Bauroth*, 465 Mich at 378.

Defendant argues that the trial court erred by ordering him to disclose this information because it is protected by Subtitle F of Title II of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.* We disagree.

"Subtitle F of Title II of HIPAA . . . regulates patient information retained, used, and transferred by health care providers." *In re Petition of Attorney Gen for Investigative Subpoenas*, 274 Mich App 696, 699; 736 NW2d 594 (2007). Pursuant to HIPAA and the regulations promulgated thereunder, a "covered entity" "may not use or disclose protected health information, except as permitted or required [by specified regulations.]" 45 CFR 164.502. A covered entity means "a health plan," "a health care clearinghouse," and "a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 CFR 160.103; 42 USC 1320d-1. HIPAA does not apply to other entities. See, e.g., *United States v Mathis*, 377 F Supp 2d 640, 645 (MD Tenn, 2005) (HIPAA does not apply to the FBI).

Here, the requested information involved defendant's own health information. Defendant was not asked to provide or disclose health information as a healthcare provider for a third party. HIPPA does not apply to prevent defendant's disclosure of his own health information.

Defendant's reliance on the physician-patient privilege is also misplaced. MCL 600.2157 states:

Except 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. . . .

The interrogatories did not ask defendant to disclose "any information that the person has acquired in attending a patient in a professional character" *Id.* The interrogatories concerned defendant's own medical history and conditions. By its terms, the statutory privilege does not apply to that information.

Defendant also contends that the information sought by plaintiff was not relevant to whether he breached the standard of care. It is unclear whether the reasons for defendant's hospitalization in 2008 have any bearing on defendant's conduct two years earlier when the alleged malpractice occurred. However, information subject to discovery under MCR 2.302(B)(1) need not be admissible at trial, it need only reasonably appear to be calculated to lead to the discovery of admissible evidence. Further, in light of the protective limitations imposed by the trial court, we conclude that the trial court's decision to require defendant to answer the questions concerning his medical condition in 2008 was not an abuse of discretion.

With respect to the third interrogatory concerning whether defendant suffered from any type of substance abuse in the previous ten years, the theory of relevance is that at the time defendant treated the decedent in 2006, defendant may have been affected by a substance abuse condition that affected his decision-making abilities. If defendant had a prior substance abuse history, it may be more likely that he was affected by a substance abuse condition at the time of treatment, which would be relevant to whether he breached the standard of care. Thus, the requested information was reasonably calculated to lead to the discovery of admissible evidence. Further, in light of the protective measures to guard defendant's privacy interests, we again conclude that the trial court did not abuse its discretion.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood