STATE OF MICHIGAN

COURT OF APPEALS

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs-Appellants,

v

KARL OTTO MUELLER,

Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

UNPUBLISHED
April 28, 2000

No. 212478
Washtenaw Circuit Court
LC No. 96-002725-NI

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting of summary disposition in favor of defendant William C. Bucknam, M.D. pursuant to MCR 2.116(C)(10). We affirm.

This appeal arises out of an automobile accident that occurred in Ypsilanti on October 3, 1995. Karl Mueller was traveling on Dixboro Road when his vehicle crossed the center lane and collided with a vehicle driven by plaintiff Sheryl Knight, which was traveling in the opposite direction. When the police arrived at the scene ten to fifteen minutes later, Mueller told them that "he could not explain why he was on the wrong side of the road" and that he was "having a manic episode."[1]

Defendant Bucknam had treated Mueller for his psychiatric disorder for over eight years and, on the day of the accident, the two had met at Bucknam's office. Bucknam then drove to the hospital, with Mueller following in his own car. When Bucknam arrived at the hospital, he noticed that Mueller had not followed him into the parking lot, so he retraced the route and eventually arrived at the accident scene. After speaking with Mueller at the scene, Bucknam told a police officer that Mueller was "having a manic episode." About a month after the accident, Bucknam completed a psychiatric

evaluation at Mueller's request and submitted it to the Secretary of State for the purpose of restoring his driving privileges.

Plaintiffs initially sued only Mueller, alleging that he was negligent in failing to yield the right of way to southbound traffic. During discovery, Mueller did not assert his psychiatric condition as a defense to the accident and admitted negligence. Both Mueller and Bucknam were subsequently deposed for the purpose of establishing plaintiffs' damages. At the depositions, Mueller's counsel objected to questions concerning his medical condition or treatment based on the physician-patient privilege either at the outset or in response to specific inquires, and confirmed that Mueller would not waive the privilege. Plaintiffs then amended the complaint to add Bucknam as a defendant, alleging that his special relationship with Mueller gave rise to a duty to protect third persons who might be foreseeably injured by Mueller's unsafe driving and that he breached that duty.[2] In response to the allegations against Bucknam, Mueller asserted the physician-patient privilege as a bar to any inquiry concerning his psychiatric condition or treatment.

Plaintiffs subsequently filed a motion to deem the physician-patient privilege waived on grounds that Mueller had voluntarily disclosed information concerning his condition and treatment during discovery. The trial court denied the motion, ruling that any information regarding Bucknam's treatment of Mueller that Mueller had already disclosed (i.e., answers to interrogatories and deposition questions, and documents submitted to the Secretary of State) remained unprivileged, but that plaintiffs could not "compel the disclosure of further information." Bucknam moved for summary disposition, arguing that the trial court's decision to uphold the privilege, although proper, would result in a denial of due process because it would prevent him from introducing evidence necessary to defend against plaintiffs' claims, and alternatively, that plaintiffs could not establish a prima facie case of negligence without such evidence. Plaintiffs filed a response and moved for partial summary disposition under MCR 2.116(I)(2), contending that Bucknam's admissions in his deposition and other evidence established his liability as a matter of law. The trial court granted summary disposition for Bucknam based on the due process theory, and expressly declined to review plaintiff's motion for summary disposition.[3]

On appeal, plaintiffs argue that the trial court abused its discretion in concluding that Mueller did not waive the physician-patient privilege with respect to medical information not disclosed during discovery. We disagree. This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *Dorris v Detroit Osteopathic Hospital Corp*, 220 Mich App 248, 250; 559 NW2d 76 (1996).

The physician-patient privilege prohibits a physician from disclosing information acquired when attending a patient in a professional character if the information was necessary to enable the physician to prescribe for the patient as a physician. MCL 600.2157; MSA 27A.2157; *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 33; 594 NW2d 455 (1999). The purpose of the privilege is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclosure of symptoms and conditions. *Id.* In addition to the statutory privilege, the court rules contain several provisions regarding the discovery of medical information. MCR 2.314(A)(1)(b) provides in part that, "[w]hen a mental or physical condition of a party *is in controversy*, medical information is subject to discovery under these rules to the extent that . . . the party does not assert that

the information is subject to a valid privilege." (Emphasis added). See also *Domako v Rowe*, 438 Mich 347, 354; 475 NW2d 30 (1991).

The privilege belongs to the patient and, once asserted, can be waived only by the patient. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 276; 568 NW2d 411 (1997). A true waiver is an intentional, voluntary act, which has been defined as the "voluntary relinquishment of a known right." *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969); *Dorris, supra* at 39. MCR 2.314(B)(1) also permits an implied waiver when the patient fails to timely assert the privilege in the party's written response to a request for production of documents, in answers to interrogatories, before or during the taking of a deposition, or by moving for a protective order. See also *Landelius v Sackellares*, 453 Mich 470, 475; 566 NW2d 472 (1996); *Domako, supra* at 354-355.

Plaintiffs' contention that Mueller waived the privilege when he voluntarily disclosed information regarding his medical condition and treatment on three occasions during discovery lacks merit. Plaintiffs first refer to medical information contained in the psychological evaluation Bucknam submitted to the State for the purpose of restoring Mueller's driving privileges. However, we find no waiver where, as here, the disclosure was made before the suit against Mueller had been filed, Mueller only authorized the release of the information to the State for a specific purpose, and plaintiffs subpoenaed the report from the State. See also *Kelly, supra* (a physician's letter to the defendant insurance company describing the medical condition of the insured did not effect a waiver of the physician-patient privilege). Nor can we conclude that Mueller's responses to interrogatories constituted an intentional relinquishment of the privilege. The answers merely provided basic information regarding his present condition, treating physician's name, and medication; they did not include specific details regarding either his treatment or his condition on the day of the accident. Further, because Mueller's condition was not "in controversy" at the time he responded to the interrogatories, the implied waiver provisions contained within MCR 2.314(B)(1) did not apply. Cf. *Domako, supra*; see also *LeGendre v Monroe County*, 234 Mich App 708; 600 NW2d 78 (1999).

Plaintiffs also assert that Mueller waived the privilege by discussing the psychological condition and treatment during his deposition. In the portion of the deposition to which plaintiffs refer, Mueller testified that he had Bucknam complete the evaluation for the State and confirmed that the statements therein were accurate; that on the day of the accident he questioned whether he was entering into a manic episode and saw Bucknam to allow him to make the determination; and, that he thought the accident occurred just before or at the beginning of a manic episode. Again, we cannot conclude that this testimony expressly or impliedly waived the privilege where Mueller did not provide specific information regarding his treatment on the day of the accident, his counsel announced at the outset that Mueller would not waive the privilege, and his counsel objected to inquiry regarding medical information which had not been previously disclosed.[4] Accordingly, the trial court correctly determined that the privilege had not been waived.

Next, plaintiffs argue that the trial court erred in granting Bucknam's motion for summary disposition. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought

pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455, quoting *Quinto, supra* at 362.

Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence. See *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997) (reversal is not required where the trial court reaches the right result for the wrong reason). In order to establish a claim of negligence against a defendant physician for injuries caused by the patient to a third-party, the plaintiff must show (1) the existence of a physician-patient relationship between the physician and the patient who was the cause in-fact of the plaintiff's injuries (2) breach of the applicable standard of care required by the physician in the treatment of the patient and (3) that the negligent treatment of the patient was the proximate cause of the plaintiff's injuries. *Welke v Kuzilla*, 144 Mich App 245, 252-253; 375 NW2d 403 (1985); *Duvall v Goldin*, 139 Mich App 342, 350-352; 362 NW2d 275 (1984).

Here, plaintiffs submitted documentary and testimonial evidence establishing: that Bucknam had treated Mueller for several years and knew that he had a history of manic episodes that were characterized by "impaired judgment, delusion, bizarre behavior"; that Bucknam knew that the episodes occurred every two years and required hospitalization for one to two weeks, and that Mueller was asymptomatic between episodes; that Mueller submitted himself to Bucknam's care on the day of the accident because he was not sure whether he was experiencing the onset of a manic episode; that after meeting with Bucknam, the two drove to the hospital in separate vehicles; that the accident occurred while on route to the hospital; and that after Bucknam arrived at the scene of the accident and spoke with Mueller, he told the police that Mueller was having a manic episode.[5] While this evidence shows the existence of a patient-physician relationship, plaintiffs failed to present evidence establishing that Bucknam breached the standard of care. Plaintiffs produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive. Although plaintiffs offered an affidavit from an expert's psychiatrist in which he opined that Bucknam was negligent in allowing Mueller to drive to the hospital in his own vehicle, his conclusion was speculative at best. Plaintiff's expert did not independently examine Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485-486; 502 NW2d 742 (1993) (a party opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact); see also *Garabedeian v Wm Beaumont Hospital*, 208 Mich App 473, 475-476; 528 NW2d 809 (1996). Accordingly, we conclude that the trial court's grant of summary disposition was proper.

Given our disposition of this issue, we need not reach plaintiffs' claim that summary disposition should have been granted in their favor.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] At deposition, Mueller testified that did not recall making the statement to the police and that he believed that the accident occurred just before or during the beginning stages of the manic episode.

[2] Specifically, plaintiffs alleged that Bucknam was negligent in failing to diagnose and recognize the severity of Mueller's condition; failing to recognize that the condition prevented Mueller from driving safely; failing to take reasonable measures to prevent injury to persons who might be injured by Mueller's unsafe driving; failing to use alternative means of transportation; failing to inform Mueller that he should not drive a vehicle while he was experiencing the condition; and, permitting Mueller to drive while he was under care for an emergency psychotic condition.

[3] Mueller settled with plaintiffs and is not a party to this appeal.

[4] The authority upon which plaintiffs rely for the proposition that prior disclosures waive the privilege are distinguishable. In those cases, the privilege was deemed waived where, unlike the present case, the individuals sought to assert the privilege after they had expressly authorized the release of medical records to opposing parties. *Landelius*, *supra*; *Domako*, *supra*.

[5] Plaintiffs also rely on an excerpt from a medical textbook, which states that "reckless driving" is a common feature of manic episodes. Although Bucknam testified at deposition that he relied on the textbook in diagnosing and treating the condition, there is no indication that the excerpt was submitted to the trial court and therefore may not be considered on appeal. MCR 7.210(A); *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7 ; 582 NW2d 841 (1998).