STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. KALINOWSKI, Plaintiff-Appellant,	UNPUBLISHED February 14, 2012
v	No. 301845 Bay Circuit Court
ROBERT T. MCALESTER and J&R TRUCKING, LLC, Defendants-Appellees.	LC No. 10-003260-NI

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In this third-party no fault action, plaintiff Thomas R. Kalinowski appeals by leave granted the December 13, 2010, order denying his motion to compel defendant Robert T. McAlester to answer questions concerning his medical condition. We reverse and remand for additional proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

On November 28, 2009, plaintiff was injured when he was struck by a vehicle driven by McAlester as plaintiff was standing inside a line of safety cones on a street near his home. In response to the complaint, McAlester raised a defense of sudden medical emergency, and admitted in response to discovery requests that he had recently been prescribed Xanax, and had taken a pill about four hours before the accident. Two witnesses reported McAlester had told them that he had fallen asleep at the wheel, and medical records McAlester provided from his emergency room visit that day showed that he told emergency room doctors that he thought he took Xanax and fell asleep. McAlester also reported that he has other medical conditions and takes several medications every day. Finally, McAlester indicated he believed that he had blacked out for an unknown reason just before the accident.

Plaintiff served a second set of interrogatories on McAlester on August 20, 2010, inquiring further into McAlester's medical condition. On September 16, 2010, McAlester's counsel sent plaintiff a letter stating that he was voluntarily withdrawing his sudden medical emergency affirmative defense and, therefore, he would be asserting the physician-patient privilege and would not be providing the requested medical information.

Plaintiff moved to compel answers to the interrogatories pursuant to MCR 2.313(A). Plaintiff argued at the subsequent motion hearing that McAlester waived the physician-patient privilege when he raised the medical emergency defense and voluntarily provided medical information in response to plaintiff's initial discovery requests. There was no assertion of privilege when those records were provided. McAlester conceded that he had provided plaintiff treatment records from Bay City Hospital on the night of the accident. He argued, however, that his initial response to plaintiff's discovery requests was limited to his admission that he may have blacked out prior to the accident. McAlester argued that once plaintiff requested detailed medical information, he withdrew the medical emergency affirmative defense and asserted the privilege.

The circuit court concluded that the circumstances of this case were similar to those in *Stroshine v Adams*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 1999 (Docket No. 208242), and concluded that the fact that McAlester provided basic medical information did not waive the privilege when plaintiff later requested more detailed information.

II. ANALYSIS

We review de novo a trial court's determination regarding the applicability of the physician-patient privilege. *Isidore Steiner, DPM, PC v Bonanni*, 292 Mich App 265, 269; ___ NW2d ___ (2011). "If the privilege does apply, we review for an abuse of discretion the trial court's order on disclosure. An abuse of discretion occurs when a trial court chooses a result that falls outside the range of reasonable and principled outcomes." *Id.* (citation omitted).

The physician-patient privilege is a statutory creation. *Domako v Rowe*, 438 Mich 347, 353; 475 NW2d 30 (1991); MCL 600.2157. "The purpose of the physician-patient privilege is to protect the confidential nature of the physician-patient relationship." *Bonanni*, 292 Mich App at 271. MCL 600.2157 provides, in relevant part:

> 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.

Relative to litigation, MCR 2.314(B)(1), which "clarifies the procedure by which the patient waives the privilege," *Domako*, 438 Mich at 354, provides as follows:

> A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. *The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action*, but is not waived for the purposes of any other action. [MCR 2.314(B)(1) (Emphasis added.).]

Domako explained that

> [t]he rules in Michigan allow the assertion of the physician-patient privilege at various stages of the proceedings. The court rules do permit, however, an implied waiver when the patient fails to timely assert the privilege. MCR 2.314(B)(1) requires that the party assert the privilege "in the party's written response under MCR 2.310," and MCR 2.302(B)(1)(b) requires the assertion of the privilege "at the deposition." *The penalty for not timely asserting the privilege, under either of these court rules, is to lose the privilege for purposes of that action.* [*Domako*, 438 Mich at 355 (Emphasis added and internal footnote omitted.).]

As an initial matter, the record reveals that McAlester has not, in fact, withdrawn his sudden medical emergency defense. The most recent amended defenses still contain the defense. Nevertheless, even assuming that McAlester does, eventually, withdraw the defense, we conclude that he has already waived the privilege because the record is clear that McAlester provided medical information and documents without asserting the privilege.

In response to plaintiff's interrogatories, requests to produce, and requests to admit, McAlester failed to assert that the information sought was privileged. Indeed, not only did he fail to assert the privilege, but in his response to plaintiff's request for production McAlester stated, "Defendant's doctors may support the medical emergency defense." Furthermore, as McAlester's counsel conceded, and the trial court noted in its opinion, McAlester provided medical records and other medical information during discovery without asserting the privilege. Thus, under MCR 2.314(C)(1), McAlester elected to neither object nor assert that the information was privileged, but instead provided the information.

McAlester only asserted the privilege when he believed that plaintiff's requests had become "intrusive." Such a change in strategy, however, is precisely the type of situation that our Supreme Court declared impermissible in *Domako*: "After the patient voluntarily allows discovery of the medical information, the [party] is not thereafter free to assert the privilege because the plain language of MCR 2.314(B)(1) declares that the privilege is waived *for that action*." *Domako*, 438 Mich at 357 (Emphasis in the original.). It makes no difference why McAlester elected not to assert the privilege initially. He made that election and is now bound by it.[1]

The trial court's reliance on *Stroshine* was misplaced. First of all, *Stroshine* is nonbinding, MCR 7.215(C)(1), and should not have been looked to as the answer to the issue when the binding court rules and Supreme Court speak precisely to the *legal rule* applicable in this circumstance. Our unpublished cases are nonbinding for a reason; they provide an answer to the parties involved in the particular case, but in no way are meant to provide guidance in other

[1] It appears that the trial court may have been concerned with the scope of medical discovery that plaintiff sought. If so, the proper result would have been to deny McAlester's assertion of privilege, but consider his objections on the grounds that the discovery was unduly burdensome and irrelevant. Permitting a piecemeal assertion of the physician-patient privilege, however, was contrary to the law and, therefore, an abuse of discretion. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006).

unrelated cases. Second, *Stroshine* is in any event inapplicable because of significant factual differences with the present case. *Stroshine* involved the inquiry into a medical condition that was gratuitously revealed by the defendant, which triggered the plaintiff's request for 20 years of medical records. *Stroshine*, unpub op at 2. Although the defendant had responded to the initial request for information, there is no indication that she provided any medical records to the plaintiff. In the instant case, however, it was McAlester who raised his medical condition as an issue and who subsequently provided information about his prescriptions as well as produced medical records from his post-accident hospitalization without any assertion of privilege.

We reverse the trial court's determination that McAlester had not waived his physician-patient privilege and remand for additional proceedings consistent with this opinion. We do not retain jurisdiction.

Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray