STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BARNES and LOIS BARNES, Plaintiffs-Appellants,	UNPUBLISHED July 27, 2006
v	No. 266468 Monroe Circuit Court
MARK ALAN BEATTIE, DDS, Defendant-Appellee.	LC No. 04-018545-NH

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

In this dental malpractice action, plaintiff appeals as of right from the grant of defendant's motion for summary disposition. We reverse and remand.

I Facts

During discovery, defendant sent forms entitled "HIPAA[1] Privacy Authorization" to plaintiff for his signature. The forms stated that plaintiff's "authorization hereby waives the physician-patient privilege and authorizes but did not require oral communications between [defense counsel] and the [healthcare provider]." Plaintiff signed and returned the forms. Later, however, plaintiff, in a letter to defendant, revoked "any alleged authorization for you to contact any of Plaintiff's doctors in any respect, other than requesting and receiving Plaintiff's medical/dental charts." Defendant moved for summary disposition arguing that plaintiff's revocation of the signed forms constituted an assertion of the physician-patient privilege, which entitled him to dismissal under MCR 2.314(B)(2).[2] The circuit court agreed and granted defendant's motion.

[1] Health Insurance and Portability Accountability Act of 1996, 42 USC 1320d *et seq*.

[2] MCR 2.314(B)(2) provides that if a party asserts that medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

II Standard of Review

This Court reviews de novo a circuit court's determination regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers*, Inc, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(c)(10).

III. Analysis

Plaintiff argues on appeal that the circuit court improperly dismissed his complaint. We agree.

Under MCR 2.314(B)(2), "if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information," that party "may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." The circuit court accepted defendant's argument that plaintiff prevented discovery of medical information by revoking "any alleged authorization for [defendant] to contact any of Plaintiff's doctors in any respect, other than requesting and receiving Plaintiff's medical/dental charts." Specifically, the circuit court held, that:

> Well, I would hope any physician that honors the doctor/patient privilege would not talk to you [defense counsel]. And if the Plaintiff isn't going to give the authorization to do that, regardless how they cloak it, then they have no case. The Court would grant the motion for summary disposition because the Court finds the statute is clear. Once this person brings a claim for medical malpractice they thereby waive it; however, doctors don't know that and doctors aren't going to talk to you unless they sign those. So if that's their stance, then the motion for summary disposition is granted and the case is hereby dismissed.

Initially, we agree with defendant that plaintiff's tender of a signed SCAO Form MC315, entitled "authorization for release of medical information," is not dispositive. MCR 2.314(C)(1), provides that "[a] party who is served with a request for production of medical information under MCR 2.310 must either:"

(a) make the information available for inspection and copying as requested;

(b) assert that the information is privileged;

(c) object to the request as permitted by MCR 2.310(B)(2); or

> (d) furnish the requesting party with signed authorizations in the form approved by the state court administrator sufficient in number to enable the requesting party to obtain the information requested from persons, institutions, hospitals, and other custodians in actual possession of the information requested.

MCR 2.314(C)(1) relates the "production of medical information under MCR 2.310." MCR 2.310 relates to requests for production of "documents" and "other tangible things," not *ex parte* communications between defense counsel and plaintiff's treating physician. Rather *ex parte* communication between defense counsel and plaintiff's treating physician are an informal method of discovery, not expressly recognized by the court rules. *Domako v Rowe*, 438 Mich 347, 358 n 7, 361-362; 475 NW2d 30 (1991).

Domako explained that:

> The omission of interviews from the court rules does not mean that they are prohibited, because the rules are not meant to be exhaustive. See MCR 2.302(F)(2) (permitting parties to modify the court rules to use other methods of discovery). Their absence from the court rules does indicate that they are not mandated and that the physician cannot be forced to comply, but there is nothing in the court rules precluding an interview if the physician chooses to cooperate.

We conclude that the circuit court erred in concluding that plaintiff prevented defendant from conducting *ex parte* communications with plaintiff's treating physician. Under MCR 2.314(B)(2), plaintiff cannot prevent discovery of medical information. Prevent is commonly defined, in this context, as "to stop from doing something," or, as used in the accompanying sentence: "There is nothing to prevent us from going." Random House Webster's College Dictionary, 2 ed. Here, plaintiff has not stopped defendant from interviewing plaintiff's treating physician. Further, *Domako*, *supra*, held that a defendant may conduct an *ex parte* interview with plaintiff's treating physician without plaintiff's authorization. ("there is nothing in the court rules precluding an interview if the physician chooses to cooperate.")

In addition, there is also no requirement that plaintiff "authorize" defense counsel to conduct *ex parte* communications with plaintiff's treating physician. Authorize is commonly defined as "to give authority of official power to; empower." Random House Webster's College Dictionary, 2 ed. There is no legal requirement that plaintiff "give authority of official power to" or "empower" defense counsel to conduct *ex parte* communications with plaintiff's treating physician. Thus, because plaintiff did not prevent defendant from conducting an *ex parte* interview with plaintiff's treating physician, defendant was not entitled to summary disposition.

Defendant also argues that HIPAA *may* require that plaintiff consent to *ex parte* communications between defense counsel and plaintiff's treating physician. We reject this claim as speculative. Defendant has not presented a legal basis that plaintiff is required to sign defendant's HIPAA authorization form. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Moreover, even without plaintiff's written consent to

conduct *ex parte* communications with plaintiff's treating physician, 45 CFR 164.512(e) may lead to the discovery sought by defendant.

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

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Brian K. Zahra