

STATE OF MICHIGAN
COURT OF APPEALS

WALTER EMIL STROSHINE and
MARGARET A. STROSHINE,

UNPUBLISHED
March 12, 1999

Plaintiffs-Appellees,

v

No. 208242
Wayne Circuit Court
LC No. 96-617836 NI

MICHELE JANECE ADAMS and
RONALD N. ADAMS,

Defendants-Appellants.

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Previously, defendants applied for leave to appeal to this Court from a discovery order requiring defendants to release all of defendant's¹ medical records from the past twenty years to plaintiffs. This Court denied defendants' application for leave to appeal. Defendants applied for leave to appeal to the Supreme Court and the Supreme Court remanded the case to this Court for consideration as on leave granted. *Stroshine v Adams*, 456 Mich 893; 572 NW2d 8 (1997). We reverse.

On appeal, defendants argue that the trial court erred in ordering defendant to release her medical records to plaintiffs because defendant asserted her physician-patient privilege, and as a result, her medical records were not subject to discovery. We agree. This Court reviews a trial court's grant or denial of discovery for an abuse of discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).

The scope of discovery is outlined in MCR 2.302(B)(1), which provides that parties may obtain discovery regarding any relevant matter that is *not privileged*. Defendant argues that her medical records were not discoverable because they were privileged. The applicable privilege is the physician-patient privilege which is statutorily created.² *Landelius v Sackellares*, 453 Mich 470, 474; 556 NW2d 472 (1996).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The statute provides for a “patient-litigator exception” which applies when a plaintiff produces a physician as a witness in her own behalf in personal injury or malpractice actions. *Landelius, supra*, 453 Mich 474; *Domako v Rowe*, 438 Mich 347, 354; 475 NW2d 30 (1991). This exception does not apply here because plaintiffs are seeking defendant’s medical records. *Landelius, supra*, 453 Mich 475. The Michigan Court Rules also allow a patient to assert or waive the privilege. MCR 2.314(A)(1) and (B)(1); *Domako, supra*, 438 Mich 354. MCR 2.314(B)(1) provides for a waiver when a party does not assert the privilege in her written response to interrogatories or request for production of documents. *Domako, supra*, 438 Mich 355. The penalty for not timely asserting the privilege is to lose the privilege for purposes of the action. *Domako, supra*, 438 Mich 355.

Plaintiffs submitted to defendants interrogatories and a request for production of documents under MCR 2.309 and MCR 2.310. Plaintiffs inquired about defendant’s medical condition and any drugs which defendant may have taken before the accident. Defendant responded that she took Phenobarbital and Tegretol, denied having any of the medical conditions specifically inquired about, and gratuitously added that she had epilepsy. In addition, plaintiffs requested the production of any documents relating to defendants’ answers. Defendants denied that there were any documents to produce which related to the interrogatory answers.

Thereafter, plaintiffs filed a motion to compel, seeking additional information, including medical records, regarding defendant’s epilepsy. At this point, defendant raised the physician-patient privilege. The trial court ruled that, because defendant had not raised the privilege in her first written response to the initial request for production of documents under MCR 2.310 and in answers to interrogatories under MCR 2.309(B), defendant failed to assert the physician-patient privilege and therefore waived it under MCR 2.314(B)(1). We disagree. Plaintiffs’ first set of interrogatories did not ask about epilepsy and the request for production of documents related to the specific medical conditions inquired about in the interrogatories. In short, we do not believe that defendant’s gratuitous reference to having epilepsy obligated her to simultaneously invoke the privilege. When plaintiffs thereafter sought the information relative to epilepsy, defendant was then obligated to invoke the privilege or waive it, and defendant properly invoked it.

Reversed.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Robert B. Burns

¹ Because defendant, Michele Janece Adams, is the only defendant whose medical records are at issue, we will refer to Michele Janece Adams as “defendant” individually throughout the opinion.

² 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. If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient’s own behalf who has treated the patient for the injury or for any

disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. [MCL 600.2157; MSA 27A.2157.]