

STATE OF MICHIGAN
COURT OF APPEALS

BILLY SIMMONS and DEAN VANBRAGT,

Plaintiffs-Appellees,

v

JAMES FRIGO,

Defendant,

and

PAUL BRINKLEY, ROBERT BANNER, TINA
HARTLEY MALIVUK, SUE DIANE HARRIS,
GREG VAUGHN, DEBRA HITCHCOCK, SUSAN
MENCARELLI, CORY SMITH, and LINDA L.
MYERS,

Defendants-Appellants.

UNPUBLISHED

May 5, 2000

No. 216541

Allegan Circuit Court

LC No. 97-021018-NO

Before: Fitzgerald, P.J., and Bandstra, C.J., and O'Connell, J.

PER CURIAM.

Defendants¹ appeal by leave granted the order compelling defendants to answer interrogatories submitted by plaintiffs. We remand.

This case arises out of numerous instances of alleged assault, battery, and sexual abuse suffered by plaintiffs, who are both mentally handicapped adults. In their complaint, plaintiffs alleged that they were abused and sexually assaulted while in the care of defendants Frigo and Hitchcock, who are employees of Allegan County Community Mental Health. Plaintiffs' complaint further alleged that the other named defendants, who are also employees of Allegan County Community Mental Health, were aware of the sexual abuse, but neglected to protect plaintiffs from the abuse and failed to report the abuse to the appropriate authorities.

During discovery, defendants objected on the grounds of statutory privilege to a number of interrogatories served on them by plaintiffs. Specifically, defendants objected to questions regarding

four individuals who are not parties to this action but who are alleged to have been recipients of treatment at Allegan County Community Mental Health. Defendants argued that supplying the information requested would “violate statutory confidentiality as provided in the mental health code and penal code.”

On appeal, defendants argue that the trial court abused its discretion in ordering defendants to answer interrogatories requesting information subject to statutory privilege because the interrogatories in question require employees of Allegan County Community Mental Health to disclose information obtained “in the course of employment” about the sexual behavior of four non-party individuals whom plaintiffs identify as being recipients of the services of Allegan County Community Mental Health. Defendants argue that the information is privileged because defendants obtained the information about the sexual conduct of these individuals in defendants’ various positions of psychologists, counselors, or social workers in the course of treatment, diagnosis, or counseling.

Generally, this Court reviews a trial court’s grant or denial of discovery for abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass’n*, 219 Mich App 46, 50-51; 555 NW2d 871 (1996). However, the trial court’s decision whether a statutory privilege applies to the information sought by plaintiffs involves the interpretation of a statute, the application of which is a question of law that this Court reviews de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998); *People v Sartor*, 235 Mich App 614, 618-619; 599 NW2d 532 (1999).

Michigan has a strong commitment to open discovery, and thus its discovery rules are liberally construed. Generally, parties may obtain discovery regarding any unprivileged matter that is relevant to the pending action. MCR 2.302(B)(1); *Domako v Rowe*, 438 Mich 347, 353; 475 NW2d 30 (1991); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). However, our Supreme Court has recently ruled that “[t]he concept of privilege . . . supersedes even the liberal discovery principles of this state.” *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 37; 594 NW2d 455 (1999).

In this case, defendants rely on the psychologist-patient privilege, MCL 333.18237; MSA 14.15(8237), the social worker privilege, MCL 339.1610; MSA 18.425, and the professional counselor-client privilege under MCL 333.18117; MSA 14.15(18117). The admissibility of privileged communications is governed by MCL 330.1750; MSA 14.800(750), which provides that such communications “shall not be disclosed in civil . . . cases or proceedings . . . unless the patient has waived the privilege” Furthermore, the psychiatrist/psychologist-patient privilege prohibits disclosure of “the fact that the patient has been examined or treated or undergone a diagnosis” except where that information is relevant to a health care provider’s or insurer’s rights or liabilities unless the patient has waived the privilege. MCL 330.1750(3); MSA 14.800(750)(3). The most common cases where a waiver of the privilege has been found is “a civil action by or on behalf of the patient . . . arising from the treatment of the patient against the mental health care practitioner for malpractice.” MCL 330.1750(d); MSA 14.800(750)(d). However, in this case, the interrogatories at issue ask defendants to disclose information they possessed about individuals who plaintiffs allege were recipients of care at Allegan County Community Mental Health, but who are not parties to this action. Specifically, the

interrogatories asked for details known by defendants regarding incidents of sexual contact involving the non-party individuals and defendant Frigo or any other individuals.

In *Dorris*, *supra*, our Supreme Court recently overruled *Porter v Michigan Osteopathic Hospital Ass'n*, 170 Mich App 619, 39 n 7; 428 NW2d 719 (1988), which held that names of other patients are not protected by the psychiatrist-patient or physician-patient privilege. *Dorris*, *supra* at 26. In *Dorris*, our Supreme Court held that the name of an unknown patient is privileged information, and that where a patient has neither voluntarily nor impliedly waived the privilege, there are strong public policy reasons for applying the privilege to disclosure of an unknown patient's name. *Id.* at 48. The majority of the *Dorris* Court specifically held that “defendant *hospitals* have a duty to refrain from disclosure.” *Id.* at 28 (emphasis added). The *Dorris* Court reasoned as follows:

Historically, confidentiality has been understood to be necessary to promote full disclosure of a patient's medical history and present medical concerns. See *Breisenmeister v Knights of Pythias*, 81 Mich 525, 531; 45 NW 977 (1890). As the dissent notes, “information falls within the purview of the physician-patient privilege only if it was ‘necessary’ to enable a physician ‘to prescribe’ for a patient.” The dissent goes on to argue that we have disregarded this language and render the language of the statute surplusage. However, patients armed with the knowledge that their name may not be kept confidential may not be as willing to reveal their full medical history for fear that, ultimately, that information, too, may lose its confidential status. This chilling of the patient's desire to disclose would have a detrimental effect on the physician's ability to provide effective and complete medical treatment and is therefore “necessary” to enable a physician “to prescribe” for a patient.

* * *

We hold that the names of unknown patients are protected by the physician-patient privilege, MCL 600.2159; MSA 27A.2157, and that the defendant hospitals have a duty to refrain from disclosure. [*Id.* at 38-39, 48.]

In this case, to answer the interrogatories defendants would be forced to identify the four individuals whose names are referenced in the disputed interrogatories as patients at Allegan Community Mental Health. Specifically, interrogatories 19(e)-(h) ask each defendant whether they had “contact with or knowledge of” the four non-party individuals “in the course of [their] employment.” Assuming plaintiffs correctly state that these people had been patients, an answer to this question would necessarily require an affirmation that the non-party individuals were examined, treated, or diagnosed at Allegan County Community Mental Health. We believe that this would be contrary to the rationale set forth in *Dorris*. See also *Baker v Oakwood Hosp Corp*, ___ Mich App ___, ___ NW2d ___ (Docket No. 206407, dec'd 1/18/00), slip op p 4.

In the instant case, defendants have maintained the confidentiality of the identity of Allegan County Community Mental Health patients by refusing to disclose whether the four individuals named in the interrogatories were patients at Allegan County Community Mental Health. The question then

becomes whether any privilege preventing disclosure applies to defendants, either because they are within a professional classification giving rise to such a privilege or because of their relationship with Allegan County Mental Health. See *Dorris*, *supra* at 38, n 6. The trial court, which did not have the benefit of the *Dorris* decision, did not answer this question, and the lower court record does not adequately disclose the nature of the employment relationship between Allegan County Community Mental Health and the defendants. Accordingly, we remand this matter to the trial court for reconsideration in light of *Dorris* and *Baker*.

Remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Peter D. O'Connell

¹ Defendant James Frigo is not a party to this appeal.