STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM SLOBIN, Personal Representative of the ESTATE of MARTIN SLOBIN,

Plaintiff-Appellant,

v

HENRY FORD HEALTH CARE,

Defendant-Appellee.

UNPUBLISHED
July 9, 2002

No. 216196
Wayne Circuit Court
LC No. 97-720935-CP

Before: White, P.J., and Wilder and Zahra, JJ.

WILDER, J. (*concurring in part and dissenting in part*).

I join with parts I, II, III(B)-III(E) of the lead opinion, but respectfully dissent from part III(A) and IV of the opinion.

In part III(A), the lead opinion concludes that even if there was a common law right to access and copy medical records for a reasonable fee, plaintiff's common law claim should fail because the $44.26 copy fee did not realistically impede his right to copy the records. *Ante* at 6. I believe the proper query is whether defendant charged plaintiff an *unreasonable* fee for his medical records. Whether plaintiff was actually able to copy the records does not eliminate the genuine issue of material fact as to whether the charge was reasonable, and I would conclude that the determination of whether the $44.26 fee was reasonable is a factual issue to be resolved by the trier of fact, not a legal issue to be decided by this Court. As indicated in III(B) of the lead opinion:

> [P]laintiff provided documentary evidence that defendant's charge of $.85 per page was almost double the amount charged by seventeen other hospitals in the Detroit Metropolitan area. Plaintiff further established that the aggregate charge of $44.26 was almost double what plaintiff would have been charged at the other hospitals. The evidence presented by defendant did not explain why its charge was higher than other metro Detroit hospitals cited by plaintiff, or establish that defendant charged less than other hospitals or medical facilities in the area. [*Ante* at 9.]

Thus, I conclude that when viewed in the light most favorable to plaintiff, *Weakly v City of Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000), reasonable minds may differ as to whether plaintiff was charged an unreasonable fee for his twenty-two page medical record,

and, as such, this is question must be resolved by finder of fact. See *Pratt v Smart*, 968 SW2d 868, 874 (Tenn, 1997) (Trier of fact must determine whether a $28.58 copy charge for a four-page medical record is reasonable.) Further, rather than assume the existence of a common law right to copy medical records at a reasonable fee, I would hold that such a right does exist, and remand for trial on this basis as well.

In *Bugbee v Fowle*, 277 Mich 485, 492; 269 NW 570 (1936), our Supreme Court discussed what is meant by the common law:

> The common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. . . . The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. . . . This flexibility and capacity for growth and adaptation is . . . the peculiar boast and excellence of the common law." [Internal quotations and citations omitted.]

See also *People v Selwa*, 214 Mich App 451, 473; 543 NW2d 321 (1995) (Holbrook, J., dissenting)(citing *Semmens v Floyd Rice Ford, Inc*., 1 Mich App 395, 399; 136 NW2d 704 (1965).) Michigan common law recognizes that medical records are the property of the physician who treated the patient. See *McGarry v J A Mercier Co*, 272 Mich 501, 503-504; 262 NW 296 (1935) and OAG, 1977-1978, No 5125, p 454, 455, 457. See also Sterns, *Access to and cost of reproduction of patient medical records: A comparison of state laws*, 21 J Legal Med 79, 98, 103 (2000) and Nadel, *The consumer protection selection process in the internet age: Obstacles to maximum effectiveness and policy options*, 14 Harv J L & Tech 183, 261 n 458 (2000). Michigan common law also expressly recognizes a patient's right to access his or her medical records. See *Gaertner v State of Michigan*, 385 Mich 49, 54; 187 NW2d 429 (1971) (the patient or his lawful representative shall have access to all of the patient's hospital records).

In *Gaertner*, the Supreme Court affirmed the trial court's injunction that prohibited the state from "interfering with or denying plaintiff the right to examine, inspect and *copy* the hospital records. . . ." *Id*. at 52. Since the Supreme Court has treated the right to inspect medical records as including the right to copy those medical records, it is appropriate to derive from that treatment the principle that the right to copy such records is also a common law right, as the common law in this area has been interpreted by the Supreme Court. I would further conclude that incident to the common law right of a patient to copy his or her medical records is the entitlement to copy those records at a reasonable fee. To hold otherwise, in my opinion, would permit the owners of the records to interfere with the right to access and copy the records. *Pingree v Mut Gas Co*, 107 Mich 156, 159; 65 NW 6 (1895). On the basis of this conclusion, as well as my conclusion that it is for the factfinder to determine whether the fees charged by defendant were reasonable, I would conclude that the trial court erred in dismissing plaintiff's common law claim.

As such, I would reverse the trial court's order granting defendant summary disposition with regard to plaintiff's common law claim, and permit plaintiff's concert of action claim to proceed with regard to both the MCPA claim and the common law claim.

/s/ Kurtis T. Wilder