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Personal Injury Claimants Must Disclose Medical Records

By Drew W. Broaddus

Under Michigan law, a plaintiff who brings a personal injury action waives the physician-patient privilege. *Holman v Rasak,* 486 Mich 429, 436 (2010); MCL 600.2157. This is reflected in MCR 2.314(B)(2), which states that "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 otherwise discoverable ... 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." This waiver is based on the fundamental fairness of permitting defense counsel equal access to investigate the facts put at issue by plaintiff's claims alleging personal injuries. *Domako v Rowe,* 438 Mich 347 (1991). "The purpose of providing for waiver is to prevent the suppression of evidence ... an attempt to use the privilege to control the timing of the release of information exceeds the purpose of the privilege and begins to erode the purpose of the waiver by repressing evidence." *Id.*

SECREST WARDLE NOTES:

A litigant who places their medical condition into controversy cannot pick and choose what medical records the opposing parties receive. *Filas,* unpub op at 4.

Trial courts have broad discretion with respect to docket management and the oversight of discovery, and – although the instances are rare – that discretion can include dismissing a suit, either for lack of progress or as a discovery violation. *Filas,* unpub op at 4.

The Court of Appeals recently underscored these principles in *Filas v Culpert,* unpublished opinion per curiam of the Court of Appeals, issued March 10, 2015 (Docket No. 317972). In *Filas* the plaintiff – a *pro se* litigant – raised a number of novel arguments as to why she should not have to sign medical authorizations (or at least, not at the time or in the manner requested by the defendants).

In January 2013, plaintiff filed suit alleging that, in January 2010, she sustained serious injuries when she was rear-ended by a vehicle being driven by Culpert (represented on appeal by Secrest Wardle) in the course of his employment with co-defendant Efficient Design. In March 2013, plaintiff terminated her attorney and filed a "motion for continuance," requesting an extension of time to answer defendants' discovery requests and to extend the scheduling order dates. At the hearing of this motion, the trial court advised plaintiff that discovery would be stayed for 30 days or until an attorney filed an appearance on her behalf, whichever was sooner. During the course of that hearing, the trial court referenced plaintiff's refusal to sign record release authorizations that had been requested by defendants, noting that the case had already been dismissed once because of her refusals and "[t]here's going to come a point where if I've dismissed the case twice, it's going to be with prejudice, and then you're not going to be able to bring a lawsuit again, so this is something you have to do." The trial court further advised plaintiff: "This is what the law requires. I understand you don't want to do it, but in order to bring such a lawsuit, you have to do it." Plaintiff responded: "But I'm being asked to give records to a third party, not just the attorneys. I'm being asked to give them to this deposition service, and I just wanted to clarify that it was just going to the one attorney." The court responded: "It goes through Record Copy Service. They don't care about your medical records, but that's the way it's done, okay. … That way they know they get all your records and that you're not keeping any back." *Id.* at 1.

Plaintiff did not retain new counsel and elected to proceed *pro se.* At the end of the 30-day stay, both defendants filed re-notices of hearing for their previously filed motions to compel discovery. In response, plaintiff refused to disclose her medical record to Efficient Design "until it is established through discovery that Efficient Design is liable for harm caused by Kevin Culpert while in the course and scope of his

employment...." *Filas,* unpub op at 2. Instead, the plaintiff requested additional time to conduct discovery on the issue of Efficient Design's potential liability, before she would sign the authorizations. (The nature of her objection to signing Culpert's authorizations at the time is not clear from the record.) The trial court advised plaintiff that her argument had no merit and that if she did not provide the requested authorizations, the case would be dismissed. Plaintiff responded: "Okay, it's just that Efficient Design hasn't said they were liable, so." Again the court advised plaintiff that she had to provide the requested authorizations and asked her if she was going to do so. Plaintiff said that she would provide the authorizations and, although the trial court wanted her to do so while they were in court, plaintiff protested that "it takes a lot more time than that." Plaintiff was instructed to sign the authorizations by the following Monday. She did not do so, and the case was dismissed.

Plaintiff then objected to the proposed order of dismissal, claiming that she did in fact sign some of the authorizations and that others were never provided to her. In response, defendants explained that instead of signing their authorizations, plaintiff had filled out SCAO forms that she had found on her own, which are not accepted by many medical providers, and that she had limited the authorizations to records for specific treatment dates. Further, plaintiff still had not provided numerous other authorizations that had been requested. The trial court conducted a hearing on the plaintiff's objections; at the beginning of that hearing, the court advised plaintiff that if she wanted to have the court reinstate her case, she would have to sign the authorizations that were there in court at that time. Plaintiff responded: "I have a problem with some of the clauses." The court advised plaintiff that it had already ruled on whether the language was appropriate, and that this was her last chance; if she signed the authorizations, her case would be reinstated but if she did not, the case would be dismissed. Plaintiff again responded: "I have some problems with some of the clauses they're asking for in the forms." The court then entered the order of dismissal. Plaintiff appealed by right.

The Court of Appeals affirmed in all respects, with little analysis. *Filas,* unpub op at 4. The panel summarized the record as follows:

> Plaintiff's proffered reasons for refusing to sign record release authorizations included that: the requested records would be going to a third-party for copying; Efficient Design did not admit liability; she had "a problem with some of the clauses" on the authorizations; and she did not want some of her records provided to defendants. None of these reasons have merit. Again, defendants are entitled to liberal discovery of any matter, not privileged, that is relevant to defending against and disproving plaintiff's numerous allegations [of personal injury]…. *Id.*

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