

STATE OF MICHIGAN
COURT OF APPEALS

ANDRE WILSON, personal representative of the Estate of JUANITA WILSON, deceased; RENITA STULTZ McCOLLOUGH, personal representative of the Estate of HAROLD McCOLLOUGH, deceased; JACQUELINE WINSTON, personal representative of the Estate of NELSON EVANS, deceased; MYRA WOLLS ROLLINS, personal representative of the Estate of ALMA HOLLIE, deceased; LADONNA COKOR, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

v

SINAI GRACE HOSPITAL and DETROIT MEDICAL CENTER,

Defendants-Appellants.

UNPUBLISHED
April 29, 2004

No. 243425
Wayne Circuit Court
LC No. 01-114580

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM

Defendants Sinai Grace Hospital and Detroit Medical Center appeal by leave granted from the trial court's August 8, 2002, orders denying in part their motion for summary disposition and granting plaintiffs' "permanent" class certification. We affirm.

I. Facts and Procedural History

The named plaintiffs either received medical treatment or represent the estates of persons who received medical treatment at Sinai Grace Hospital. On May 1, 2001, when plaintiffs' complaint was filed, defendants had failed to fulfill each plaintiffs' request for a complete copy of their medical records. Plaintiffs alleged claims for negligent destruction or alteration of medical records; fraudulent or intentional destruction or alteration of medical records;

interference with prospective economic advantage; intentional infliction of emotional distress; and civil conspiracy.¹ Defendants subsequently provided the remainder of the medical records.

Plaintiffs moved for class certification on July 30, 2001. The trial court *preliminarily* certified the class in an August 27, 2001 order. At that time the trial court defined the class as: “those who believe that they had a claim for some form of malpractice and requested their . . . medical chart, . . . and the request was not fulfilled in a timely fashion. Timely, being . . . [ninety] days.” The order provided plaintiffs ninety days to give notice by publication to potential plaintiffs and assemble a class. Defendants sought leave to appeal the trial court’s preliminary grant of class certification. This Court denied defendants’ request on December 11, 2001, without prejudice.²

Defendants renewed their motion to decertify the class and filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). According to defendants, class certification was improper because plaintiffs’ named class representatives could not state a claim for injunctive relief or damages, as they had already received their medical records. Defendants further argued that the gravamen of plaintiffs’ claims involved allegations of spoliation of evidence, a tort that has not been recognized in Michigan. With no independent torts remaining, defendants maintained that plaintiffs’ civil conspiracy claim also must fail.

At an April 19, 2002 hearing, the trial court certified plaintiffs’ class although the actual number of plaintiffs had yet to be determined. Class membership was redefined as people who requested medical records not provided within ninety days. The class was further limited to those cases falling within the two-year statute of limitations for normal cases, and five years for wrongful death cases.

The trial court also ordered defendants to provide plaintiffs with the number of individuals who requested medical records in the past two years, including, to the extent known, those patients who have died and requested medical records in the past five years. In an attempt to ensure physician-patient confidentiality, the trial court directed defendants to excise the patients’ names.

The trial court thereafter granted defendants’ motion for summary disposition only as to the intentional infliction of emotional distress claim. The trial court rejected defendants’ contention that plaintiffs’ claims regarding the destruction or alteration of medical records and interference with prospective economic advantage was a guise for spoliation of evidence. The trial court entered two orders on August 8, 2002, denying in part defendants’ motion for

¹ The trial court granted defendants’ motion for summary disposition with respect to plaintiffs’ claim for intentional infliction of emotional distress. Plaintiffs have not appealed that dismissal.

² *Wilson v Sinai Grace Hosp*, unpublished order of the Court of Appeals, entered December 11, 2001 (Docket No. 236590).

summary disposition and denying defendants' motion to decertify the class. The instant appeal by leave granted ensued.³

II. Analysis

A trial court's grant or denial of a motion for summary disposition is reviewed de novo.⁴ A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint.⁵ We accept all well-pleaded factual allegations as true and construe them in the light most favorable to the nonmovant.⁶ A court must base its decision on the pleadings alone.⁷ Summary disposition is appropriate under MCR 2.116(C)(8) "if no factual development could possibly justify recovery."⁸

A trial court's determination regarding class certification is reviewed for clear error.⁹ Factual findings are considered clearly erroneous when "there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made."¹⁰ The party seeking to achieve class certification bears the burden of proving that the action satisfies all of the requirements under the court rule.¹¹ Because there is "little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule (FR Civ P 23) for guidance."¹²

A. Summary Disposition

Defendants first contend that plaintiffs' claims regarding the destruction or alteration of medical records and interference with prospective economic advantage are really claims for "spoliation of evidence." Because Michigan does not recognize a tort for spoliation of evidence, defendants maintain that the trial court erroneously refused to grant their motion for summary disposition for failure to state a claim upon which relief may be granted.¹³ "When a party brings a motion for summary disposition, courts 'look beyond the face of a plaintiff's pleadings to

³ This Court granted defendants leave to appeal in *Wilson v Sinai Grace Hosp*, unpublished order of the Court of Appeals, entered December 16, 2002 (Docket No. 243425).

⁴ *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

⁵ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

⁶ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

⁷ *Id.* at 119-120.

⁸ *Beaudrie*, *supra* at 130.

⁹ *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

¹⁰ *Id.*

¹¹ *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002).

¹² *Zine*, *supra* at 287 n 12.

¹³ MCR 2.116(C)(8).

determine the gravamen or gist of the cause of action contained in the complaint.’’¹⁴ A review of the claims raised in plaintiffs’ complaint shows that plaintiffs’ claims are not solely for spoliation of evidence. Rather, we find that the gravamen of plaintiffs’ complaint is that defendants have violated their *statutory duty* to provide medical records in an attempt to deny plaintiffs access to the court system.

1. Defendants’ Statutory Duty

Under MCL 333.20175(1), defendants have a duty to “keep and maintain a record for each patient including a full and complete record of tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization.” The statute creates an implied duty to provide these records upon a reasonable demand by the patient. Nothing in the statute limits its applicability to providing medical records solely for the benefit of future medical treatment. Indeed, after a plaintiff files the requisite notice of intent to file a medical malpractice claim, a health facility *shall* provide access to the necessary medical records within fifty-six days of receiving notice.¹⁵

Absent the ability to bring the instant action, plaintiffs would essentially be without recourse for a defendant’s continual refusal to provide access to medical records. Indeed, aside from the fact that health facilities have a clear duty to provide patients access to their medical records, the typical remedies cited by defendants for failure to produce evidence would be futile in medical malpractice actions. Plaintiffs in medical malpractice actions cannot even obtain access to the court to receive the remedies suggested by defendants.

Plaintiffs who intend to bring a medical malpractice action are required to file a notice of intent setting forth the legal and factual basis for their claim.¹⁶ This notice *must* indicate what actions the plaintiff alleges that the defendant should have taken to conform to the standard of care and the extent to which the deviation from that standard led to the resulting injuries.¹⁷ Access to medical records is essential for plaintiffs to file a proper notice of intent. Defendants have failed to cite any existing remedies that would toll the statute of limitations and assist potential plaintiffs in gaining access to their medical records before filing the notice of intent.

Even if a party could file a proper notice of intent without their medical records, they are next required to file a complaint and an affidavit of merit signed by an appropriate expert.¹⁸ The

¹⁴ *Electrolines, Inc v Prudential Assurance Co, LTD*, ___ Mich App ___; ___ NW2d ___ (Docket No. 240983, issued December 23, 2003), slip op at 7, quoting *Sankar v Detroit Bd of Ed*, 160 Mich App 470, 474; 409 NW2d 213 (1987).

¹⁵ MCL 600.2912b(5).

¹⁶ *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997); see also MCL 600.2912b(4).

¹⁷ MCL 600.2912b(4).

¹⁸ MCL 600.2912d.

failure to timely and completely file this documentation will not serve to toll the applicable limitation period.¹⁹ Moreover, it has been the practice of Michigan courts to strictly apply the statutory requirements regarding the validity of the affidavit of merit, the timeliness of filing, and the qualifications of the plaintiff's expert.²⁰ Absent timely access to their medical records, plaintiffs are severely prejudiced and placed in an inferior position to file a proper complaint and affidavit of merit. While a party may request an additional twenty-eight days to file an affidavit of merit for good cause shown, the mere filing of such a motion does not toll the period of limitation.²¹ Further, the ninety-one day extension for a plaintiff to file an affidavit of merit when the defendant does not allow access to medical records, MCL 600.2912d(3), fails to identify what, if any, recourse would be available to the plaintiff if the defendant continues to refuse. Particularly, there is nothing in the statute to indicate whether the statute of limitations can be repeatedly tolled for a defendant hospital's noncompliance.

The standard jury instruction for a defendant's failure to produce evidence over which it has control allows the jury to infer that the evidence would have been adverse to the defendant.²² It is specious to assert that this adverse inference jury instruction would provide any remedy for plaintiffs who are precluded from even filing the action in a court of law.

We also disagree with defendants' contention that MCL 600.6013(11) would provide plaintiffs alleging medical malpractice relief where they were denied access to medical records. The statute provides as follows:

If a civil action is based on medical malpractice and the defendant in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from the date notice was given in compliance with section 2912b to the date of satisfaction of the judgment.^[23]

However, plaintiffs' redress under this statute is nugatory when they are impeded from obtaining access to the courts, and therefore, could never obtain a final judgment upon which interest may be charged.

Defendants further argue that there are already criminal penalties in place for health care providers who intentionally alter or destroy medical records.²⁴ Specifically, defendants cite the

¹⁹ *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000).

²⁰ See *id.*; *Young v Sellers*, 254 Mich App 447; 657 NW2d 555 (2002); *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703; 620 NW2d 319 (2000).

²¹ *Barlett v North Ottawa Comm Hosp*, 244 Mich App 685, 693-694; 625 NW2d 470 (2001); see also MCL 600.2912d(2).

²² SJI2d 6.01.

²³ MCL 600.6013(11).

²⁴ MCL 750.492a.

fact that MCL 750.492a “does not create or provide a basis for a civil cause of action for damages.” But as this Court noted in *Dresden v Detroit Macomb Hosp Corp*,²⁵ “[t]he fact that this statute does not create or provide a basis for a civil cause of action for damages for the destruction of medical records does not mean that such a cause of action could not be brought under a different statute or recognized legal theory.”

2. Spoliation of Evidence

A review of the complaint indicates that plaintiffs’ claims are clearly based on defendants’ statutory duty to provide medical records, not on spoliation of evidence. Plaintiffs’ claims are explicitly affirmed on the basis of defendants’ statutory duty to timely provide to patients’ medical records upon a reasonable request.

Michigan has yet to recognize an independent tort for the spoliation of evidence. A review of the controlling case law indicates that Michigan has never explicitly refused to consider spoliation of evidence as an actionable tort claim if the right facts were present.²⁶

In *Panich v Iron Wood Products Corp*, for instance, the plaintiff was injured at work when an electrical box exploded.²⁷ The plaintiff subsequently brought a charge against his employer for intentionally discarding the electrical box, despite knowledge that he had a third-party claim against the manufacturer. This Court noted that the plaintiff never requested his employer to save the electrical box and the defendant never assumed such an obligation.²⁸ Based on these facts and the relative newness of the proposed tort (only two other jurisdictions had recognized it), this Court declined to create such a tort in Michigan.²⁹ In reaching this decision, we explained that the key difference between this case and other states that had recognized the tort, was the fact that the employer had never assumed a duty to preserve the evidence in question.³⁰ This Court did not explicitly decline to recognize spoliation of evidence as an actionable tort. We have since denied claims of spoliation of evidence in other instances,³¹ but have not considered the tort a medical malpractice claim wherein defendants have a statutory duty to preserve and provide access to medical records.

²⁵ *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 299; 553 NW2d 387 (1996).

²⁶ See 2 Torts: Michigan Law & Practice (2d ed), § 18.28, p 18-27.

²⁷ *Panich v Iron Wood Products Corp*, 179 Mich App 136, 137-138; 445 NW2d 795 (1989). *Panich* is not binding authority on this Court under MCR 7.215(I)(1).

²⁸ *Panich, supra* at 138.

²⁹ *Id.* at 142-143.

³⁰ *Id.* at 142.

³¹ See *Helzer v CBS Boring & Machine Co*, unpublished per curium opinion of the Court of Appeals, issued June 8, 1999 (Docket No. 205805) (involving a claim against an employer for covering up evidence of a workplace injury); *Cavin v General Motors Corp*, unpublished per curium opinion of the Court of Appeals, issued November 4, 1997 (Docket No. 190558) (holding that the belatedness of the plaintiffs’ actions was fatal to their cause of action).

As stated previously, and unlike our earlier case law regarding spoliation of evidence, medical malpractice plaintiffs are essentially without recourse to file their claims when they are denied timely access to their medical records. Furthermore, defendant health care facilities have a duty to provide these records. If this were a complaint for spoliation of evidence, which it is not, it would be ripe for recognition as an independent tort in medical malpractice actions. However, in this case, plaintiffs' claims are explicitly affirmed on the basis of defendants' statutory duty.

3. Civil Conspiracy

Defendants' contention that plaintiffs' civil conspiracy claim must be dismissed as it is premised on underlying torts which fail to state a claim is without merit. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means."³² Plaintiffs have stated a proper claim for defendants' negligent or intentional failure to provide plaintiffs access to their medical records. As such, defendants have failed to show how plaintiffs' civil conspiracy claim is invalid.³³

4. Mootness

Defendants also assert that summary disposition was proper because plaintiffs already received their medical records; thereby, making any potential injuries hypothetical and the instant action moot. We disagree.

As a general rule, this Court will not decide issues that are moot.³⁴ There are exceptions to this rule, however, as noted in *Morales v Parole Board*:

This Court's duty is to consider and decide actual cases and controversies. "To that end, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." This Court will entertain cases that are technically moot if the issues involved are of public significance and are likely to recur in the future and yet evade judicial review. Generally, a case is not moot if the issues sought to be litigated are capable of repetition yet evade review.^[35]

While the five named plaintiffs received their medical records before the statute of limitation expired on their claims, we find that plaintiffs raise issues of public significance that are likely to

³² *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992).

³³ Compare *id.*

³⁴ *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

³⁵ *Morales v Parole Bd*, ___ Mich App ___; ___ NW2d ___ (Docket No. 239936, issued December 16, 2003), slip op at 2 (internal citations omitted).

recur yet evade judicial review. Proper medical care and access to medical records is something that affects every individual who frequents the hospital or a physician for medical attention.

More importantly, this issue is likely to recur and yet evade judicial review. Before the instant lawsuit was filed, each of the five named plaintiffs in the class action had been waiting *a minimum of nine months* for their medical records. And this was despite several follow-up requests. Defendants' risk manager, Maryann Kruger, testified that it typically took an average of seven to ten days to fulfill a medical records request when all the formalities, such as payment, were met. She further agreed that the trial court's suggestion of ninety days to receive records was reasonable. Here, the named plaintiffs only received their records after filing the instant lawsuit. On these facts, plaintiffs' claims meet the mootness exception.

Regardless, members of plaintiffs' class are people who requested their medical records and did not receive them in ninety days. The injury designated by the trial court is the ninety-day delay. On these facts alone plaintiffs' claims are clearly ripe.

B. Class Certification

As noted *supra*, this Court denied defendants' first request for leave to appeal on the class certification issue because the trial court's ruling was only preliminary. We granted defendants' request for interlocutory leave to appeal after the trial court granted "permanent" class certification. At the same time, however, we denied plaintiffs' request to enlarge the record on appeal to show that between January 1, 2000 and December 31, 2001, there were 8,662 medical records requests that were outstanding for more than ninety days.

The court rule governing class actions, MCR 3.501(A)(1), requires the plaintiff to prove the following in order to justify class certification:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; and (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.^[36]

³⁶ MCR 3.501(A)(1).

The trial court defined the instant class as follows:

[A]ny person who requested medical records in the two years prior to the filing of this lawsuit and whose request was not responded to for a period of greater than ninety days. The class also includes any person who has requested records on behalf of a deceased person within the five years prior to the filing of this lawsuit and whose request was not responded to for a period of greater than ninety days.

1. Numerosity

In *Zine*, this Court made the following comments regarding the numerosity requirement:

There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members.^[37]

Defendants presented evidence that Sinai Grace Hospital alone received over 50,000 requests for medical records since mid-1999, and that approximately 7,000 medical records were sent out each month. During the hearing on defendants' second motion to decertify the class, plaintiffs stated that there were approximately thirty additional named claimants who had not timely received their records. But later, plaintiffs asserted that the *total* number of individuals involved was still incomplete because defendants refused to answer the interrogatory questions in this regard. From the record, it appears that the trial court concluded that plaintiffs satisfied the numerosity requirement based on judicial notice that there were several lawsuits against hospitals for access to medical records. On May 21, 2002, after the trial court certified the class, defendants belatedly forwarded the requested interrogatory information indicating that between January 1, 2000 and December 31, 2001, there were 8,662 records requests that took more than ninety days to complete.

Plaintiffs clearly established the numerosity requirement based on the thirty additional named claimants who had not timely received their medical records.³⁸ However, as there were an additional 8,662 potential claimants discovered after his finding, we conclude that the trial

³⁷ *Zine, supra* at 287-288 (internal citations omitted).

³⁸ See, e.g., *Neal v James*, 252 Mich App 12, 16; 651 NW2d 181 (2002) (finding the numerosity requirement established where there were over forty class members); *Zine, supra* at 287-288 (finding that “the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large”); see also *Perez-Funez v Dist Director, Immigration & Naturalization Service*, 611 F Supp 990, 995 (CD CA, 1984) (finding twenty-five class members sufficient to satisfy numerosity).

court's class certification should be amended.³⁹ The numerosity is staggering as established by defendants' own admissions in its belated answers to interrogatories. These interrogatories were served more than a year prior to the receipt of their answers. The trial court's inability to specifically refer to these 8,662 potential class members in its certification of plaintiffs' class was caused by defendants' dilatory tactics. We are faced with a situation where defendants waited until the certification before they forwarded this monumental information.

Accordingly, although we conclude that plaintiffs' class met the numerosity requirement with the thirty additional named claimants, the trial court is not precluded from amending the class to include these additional outstanding potential claimants. Defendants' dilatory tactics should not limit the expansiveness of the class.

2. Commonality & Typicality of the Claims

The commonality and typicality of claims requirements essentially concern "whether there 'is a common issue the resolution of which will advance the litigation.'"⁴⁰ Issues in a class action subject to generalized proof must predominate those issues that are subject to individualized proofs.⁴¹

In their complaint, plaintiffs raised claims for negligent destruction or alteration of medical records; fraudulent or intentional destruction or alteration of medical records; interference with prospective economic advantage; and civil conspiracy. But the heart of plaintiffs' claims arise out of the same core allegation—whether defendants improperly delayed in providing plaintiffs seeking to file medical malpractice claims access to their medical records for over ninety days. While defendants claim that factual issues involving damages will predominate, the trial court stated that it was not particularly concerned with those plaintiffs who had lost their opportunity to actually file a malpractice claim. Rather, the trial court indicated that the focus of the action would be broad public policy issues.

Because this action was limited to broad public policy issues concerning the delay in receiving medical records from a hospital, defendants have failed to establish that plaintiffs did not meet the commonality and typicality requirements.

3. Adequate Representation

Defendants next assert that the class representatives cannot be members of the class, given that they already received their medical records. According to *Zine*, class members must

³⁹ See, e.g., *Kilgo v Bowman*, 789 F2d 859, 877-878 (CA 11, 1986) (finding that a trial court has broad discretion to amend a class even following a trial on the merits).

⁴⁰ *Id.* at 289, quoting *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998).

⁴¹ *Zine, supra* at 289.

have endured an injury in order to have standing to sue.⁴² Thus, to represent a class the plaintiffs must be able to maintain their own individual causes of action.⁴³

Here, each named plaintiff experienced the common injury of having to wait more than ninety days to receive his or her medical records. And while their claims may be moot, they involve issues of public significance that are capable of repetition yet may evade judicial review.⁴⁴ Furthermore, the fact that plaintiffs received their records fails to automatically prove that they were not harmed by defendants' tardiness. Therefore, we find that the named class representatives adequately represent plaintiffs' class.

4. Maintenance as a Class Action

Defendants ultimately argue that a class action is not a superior method of adjudication in this case. To meet this requirement, the trial court must determine whether the maintenance of the action as a class action would be superior to other available adjudication methods. In this regard, MCR 3.501(2) provides the following as guidance:

(a) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

⁴² *Id.* at 288.

⁴³ *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 408; 526 NW2d 12 (1994).

⁴⁴ *See Bd of School Comm'rs v Jacobs*, 420 US 128; 95 S Ct 848; 43 L Ed 2d 74 (1975).

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.^[45]

Defendants essentially argue that plaintiffs cannot meet this requirement because they would have to violate the statutory physician-patient privilege under MCL 600.2157. Specifically, defendants insist that plaintiffs would be required to identify the individual patients involved in order to prove their claims at trial. While the patients' names would not have to be disclosed to provide notice, defendants assert that they would definitely have to be revealed to prove liability and damages.

The trial court addressed this issue by requiring defendants to excise the names of the patients who requested medical records in the past. But where defendants were aware that the patient had passed away, the trial court indicated that they would have to provide plaintiffs the name of the personal representative of the estate.

Under MCR 3.501(C)(3), the trial court has the authority to determine who provides notification. The patients' confidentiality would not be breached if plaintiffs provided notice of the action by publication, or defendants were given the task of notifying the potential class members and their names were excised on any documentation provided to plaintiffs. Further, if these potential plaintiffs ever choose to join the class action it would be their choice to identify themselves. Accordingly, we find that defendants have failed to establish that plaintiffs cannot meet this requirement.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood

⁴⁵ MCR 3.501(2).