

STATE OF MICHIGAN
COURT OF APPEALS

ANDRE WILSON, personal representative of the Estate of Juanita Wilson, RENITA STULTZ McCULLOUGH, personal representative of the Estate of Harold L. McCullough, JACQUELINE WINSTON, personal representative of the Estate of Nelson Evans, MYRA WOLLS ROLLINS, personal representative of the Estate of Alma Hollie, and 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UNPUBLISHED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-NZ

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

O’CONNELL, J. (*dissenting*)

I respectfully dissent. I would deny class certification because plaintiffs do not have in place a process that would safeguard the physician-patient privilege, MCL 600.2157, and failed to meet the “commonality” class certification requirement. Identification of 8,662 patients and their accompanying medical records clearly violates the physician-patient privilege. MCL 600.2157. The statute prohibits revealing names, contact information, or any information gained during the course of medical treatment. *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 38-39; 594 NW2d 455 (1999). Plaintiffs argue that defendants might not be required to reveal the names of the patients for initial notice purposes. However, to prove damages, the substance of the records must be revealed. This would likely result in disclosure of a patient’s intimate information and violation of his or her trust. It is simply unconscionable to allow outsiders to plunder a patient’s medical records – with names redacted but contact information intact – merely for the potential advancement of a prospective lawsuit. The majority fails to take any measures that would minimize the potential for a large-scale violation. In my opinion, the substantial likelihood that these proceedings will result in a massive violation of the physician-patient privilege is of paramount importance.

Also, before a court may certify a class, the class's proponent must demonstrate that a class action is the most efficient means of managing the suit. MCR 3.501(A)(1)(e). A factor in considering the suitability of a class action is the "commonality" of the plaintiffs in the class. MCR 3.501(A)(1)(b). In this case, the class's members share a common duty and, presumably, its common breach.¹ They differ drastically, however, in the issues of damages that each prospective member suffered and whether the delay in receiving the records caused that damage. For some, the lack of records may mean the loss of a viable cause of action. To prove those damages, however, the plaintiffs must try their entire cause of action as if it had been timely filed. This would certainly cause the particular issues to dominate over the common issues. *In re Agent Orange Product Liability Litigation*, 818 F2d 145, 164-165 (CA 2, 1987).

At the other extreme, the records of some potential plaintiffs will exonerate the hospital and staff from wrongdoing. Some may have requested records for insurance purposes – others, for personal reasons. When a class action becomes several distinct trials of varying size and complexity packed into a single, immense, and unfathomable proceeding, it fails to serve its purpose as an efficient procedural tool. *Id.* With the unauthorized disclosure of medical information, affirming plaintiffs' class status transforms this case into a large-scale fishing expedition. I would reverse.

/s/ Peter D. O'Connell

¹ It also bears noting that upholding the common legal issues asserted by plaintiffs requires us to recognize "spoliation" as an independent tort. In the past, we have declined the invitation to recognize this cause of action. *Panich v Iron Wood Products Corp*, 179 Mich App 136, 143; 445 NW2d 795 (1989). Moreover, our Supreme Court has rejected a theory of negligence based on the failure to properly keep medical records. *Boyd v Wyandotte*, 402 Mich 98, 104; 260 NW2d 439 (1977). Because I am inclined to leave the acceptance of novel legal theories to our Supreme Court under these circumstances, I would reverse based on the summary disposition issue alone.

Imposition of a fine upon the hospital each time it was tardy in the production of the records is another method to speed up the record production process.