Appeal Nos. 03-1413
03-0784

Cir. Ct. No. 96CV001228

WISCONSIN COURT OF APPEALS
DISTRICT IV

CHARLES JOHNSON AND KAREN JOHNSON,

PLAINTIFFS-APPELLANTS,

V.

ROGERS MEMORIAL HOSPITAL, INC.,

DEFENDANT-RESPONDENT,

HEARTLAND COUNSELING SERVICES AND SOUTH STREET CLINIC,

DEFENDANTS,

KAY PHILLIPS, PH.D., JEFF HOLLOWELL, TIM REISENAUER, AND WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

FILED

APRIL 15, 2004

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Higginbotham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2001-02)[1] this court certifies this appeal to the Wisconsin Supreme Court for its review and determination. It

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

provides the opportunity to address a significant issue of public policy that the Supreme Court has previously recognized but not yet decided. That issue is whether an exception to the therapist/patient privilege should apply when an adult child accuses her parents of physical and sexual abuse based on memories recovered during therapy, and the parents sue the child's therapists for infliction of emotional harm.

FACTS

After receiving therapy from or under the auspices of the defendants, Charlotte Johnson, an adult, came to believe that her parents had physically and sexually abused her when she was a young child. As a result of her accusations against them, her parents, Charles and Karen Johnson, filed this lawsuit, alleging that the treatment she received from the defendants caused her to develop false memories of abuse that never occurred.

The trial court dismissed the complaint, and the Johnsons appealed. In the meantime, the Supreme Court decided ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 595 N.W.2d 423 (1999). The court concluded that parents could pursue a cause of action against their child's therapists for allegedly implanting false memories. ***Id.*** at 129, 137. We then affirmed dismissal of the Johnsons' complaint on other, public policy, grounds, after concluding that the Johnsons could neither pursue their claim, nor the defendants defend against it, without access to Charlotte's medical records, which were unavailable because Charlotte had invoked the doctor/patient privilege set forth in WIS. STAT. § 905.04(4). ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2000 WI App 166, ¶¶12-20, 238 Wis. 2d 227, 616 N.W.2d 903.

The Supreme Court reviewed our decision and reversed without reaching the merits of our holding. The court concluded that Charles and Karen Johnson presented claims upon which relief could be granted. The court also concluded that the record was insufficient to determine whether the Johnsons' claims were barred by public policy considerations on the applicable statute of limitations. ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2001 WI 68, ¶22, 244 Wis. 2d 364, 627 N.W.2d 890.

On remand, the trial court determined, from undisputed evidence on summary judgment, that Charlotte's records and communications with her therapists were privileged and that she had not waived her privilege against releasing them to the litigants in this proceeding. The trial court again dismissed the action, holding that without the ability to use Charlotte's records the defendants could not defend themselves. The Johnsons appeal from that judgment.

DISCUSSION

With certain limited exceptions, WIS. STAT. § 146.82(1) provides that "[a]ll patient healthcare records shall remain confidential." Under WIS. STAT. § 905.04(3), a patient may assert the doctor/patient privilege to prevent disclosure of confidential communications made, or information obtained, during or for the purpose of treating a physical, mental or emotional condition. Here, all agree that if Charlotte has, in fact, asserted a valid privilege under these statutes, then this lawsuit cannot proceed unless the statutes are ruled inapplicable on public policy grounds.

The Johnsons contend that courts have authority to declare public policy exceptions to the rules on privilege. They argue that an exception is

warranted here because: (1) creating an exception is a necessary corollary to the holding in ***Sawyer,*** because ***Sawyer*** creates a cause of action that they cannot otherwise pursue; (2) privileges are to be strictly construed; (3) the legislature has already created an exception to confidentiality in certain circumstances where child abuse is alleged; (4) precedent exists for court-created exceptions to the privilege; and (5) reason to remove the privilege exists where questionable conduct by a therapist is at issue. The exception they seek removes the privilege when "a third-party claim is brought against a therapist based upon allegations of therapeutic malpractice which arise from accusations by the patient that the third-party engaged in felonious conduct and only after these accusations were made to someone other than the therapist."

In response, the defendants contend that: (1) Charlotte's interest in protecting her records lies squarely within the interests that the statutory provisions are intended to protect; (2) the public policy exception sought in this case would substantially reduce the protection afforded by the confidentiality statutes; (3) prior court-created public policy exceptions are limited to situations where non-disclosure poses a risk of physical injury; (4) other jurisdictions considering the issue have refused to recognize the exceptions sought here; and (5) the burden of the exception, in this case, falls on a non-party.

In ***Sawyer***, the issue of doctor/patient privilege did not arise because the patient was deceased and the plaintiffs, her parents, already had access to her records. ***Sawyer***, 227 Wis. 2d at 150. However, the court noted that "[p]erhaps problems of confidentiality would preclude liability from being imposed in a future case …." ***Id.*** The concurring opinion explored the issue further, expressing additional concern over the threat to confidentiality imposed by third-party actions against therapists. ***Id.*** at 162-64. (Wilcox, J., concurring).

We believe that the factual record is now sufficient and, notwithstanding the other issues presented, this case should be decided on public policy grounds. The supreme court has previously indicated its interest in the issue, and now has the opportunity to clarify the holding in ***Sawyer*** as it applies to cases where privilege is an issue.