



92663465

9

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

ALEXEI G. ESTRADA, M.D.
Plaintiff

ERICA J. GLANCY, M.D.
Defendant

Case No: CV-14-834630

Judge: MICHAEL E JACKSON

JOURNAL ENTRY

PLAINTIFF ALEXEI GONZALEZ-ESTRADA'S MOTION TO COMPEL SUPPLEMENTAL DISCOVERY OF THE COMMUNICATIONS BETWEEN DEFENDANT ERICA J. GLANCY AND WITNESS JESSE LEMON IS GRANTED IN PART. O.S.J.

O.S.J.

Judge Signature

Date

FILED

2016 JAN 27 P 3: 13

CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

2016 JAN 27 P 3:13

ALEXEI GONZALEZ-ESTRADA, M.D.,) Case No. CV 14-834630
)
)
PLAINTIFF,) JUDGE MICHAEL E. JACKSON
)
v.)
) **JOURNAL ENTRY AND OPINION:**
) **PLAINTIFF'S MOTION TO COMPEL**
ERICA J. GLANCY, M.D.,) **SUPPLEMENTAL DISCOVERY OF**
) **COMMUNICATIONS BETWEEN**
DEFENDANT.) **DEFENDANT AND WITNESS JESSE**
) **LEMON.**

CLERK OF COURTS
CUYAHOGA COUNTY

During the 01/20/2016 telephone conference call with the Court, the parties discussed the outstanding issues of the production of communications between Defendant Erica J. Glancy (Defendant) and Jesse Lemon (Lemon) to Plaintiff Alexei Gonzalez-Estrada (Plaintiff) initiated by his first discovery request on 01/27/2015. Plaintiff has made repeated requests for supplementation of this request pursuant to Civ.R. 26(E)(3). During this conference call, certain dates were agreed to regarding production of supplemental discovery. This order documents these obligations, and decides issues not resolved during that conference call.

Previously, the Court issued an agreed order on 08/19/2015 that required Defendant to produce to the Court for an in camera inspection all communications between Defendant and Lemon from two months prior to the events giving rise to the claims in this case until 01/12/2015 (Stage 1 communications) that she asserted were privileged with an objection log. Defendant was also ordered to produce all other Stage 1 communications to Plaintiff. Defendant was to confirm

by affidavit that all were provided to the Court for an in camera inspection or produced to Plaintiff's counsel. The order contained additional terms to be included in the affidavit. Failure to comply may result in sanctions.

Pursuant to the 08/19/2015 Court order, Defendant also was required to produce all communications between herself and Lemon from 01/27/2015 through the present to her Defense counsel (Stage 2 communications), with an affidavit of confirmation, which must comply with other specific terms of the order. Defendant was previously put on notice of her duty to preserve all communications. The Court ordered this provision to provide Plaintiff the assurance that in the event the Court orders either an in camera inspection or production of the Stage 2 communications, Defense Counsel will be able to produce them.

Further, the 08/19/2015 Court order was structured so that the Court would make discovery determinations on whether communications between Defendant and Lemon were privileged, as follows: (1) the Court would make a determination regarding the Stage 1 communications; (2) the Court will make determinations regarding Stage 2 communications between 01/27/2015 and 07/17/2015 (Stage 2A communications), the date the Court ordered that Lemon was precluded from acting as legal counsel in this case because of his status as a material witness, based on events which started before he was a lawyer and continued thereafter; and (3) the Court will make determinations regarding Stage 2 communications from 07/17/2015 to the present (Stage 2B communications).

On 12/22/2015, this Court determined that no privileged existed as either attorney-client communications or attorney work product regarding the selected Stage 1 communications up to 02/19/2016 when Lemon's notice of appearance as an attorney for Glancy was filed. Thereafter, Defendant filed a notice of an appeal to the Eight Appellate District Court and filed a request to

stay the production of these communications, which this Court granted. In light of this order, the Court has reconsidered the order to stay production of the Stage 1 documents, and will produce the communications addressed in the 12/22/2015 order on 02/03/2016 by making a CD of the communications available to the Plaintiff.

Stage 2A Communications from 01/27/2015 to 07/17/2015

Defendant objects to the production of these communications for three reasons: (1) not reasonably calculated to lead to the discovery of admissible evidence, (2) privilege, and (3) protection by the agreed order¹. For the reasons stated in this section, Defendant is to produce all the communications, written and electronic, including social media, to Plaintiff by 01/27/2016, except the documents that Defendant asserts an objection based on an asserted privilege. Defendant must contemporaneously produce to the Court and Plaintiff an objections log by e-mail. The parties are to agree upon an acceptable format for production of the communications. The Court requires Defendant to produce the communications on a USB drive (aka a thumb drive). (During the telephone conference with the Court, the parties were informed of the Court's order regarding to these communications, and the deadlines for production.)

The Court overrules Defendant's objection based on relevance to produce any of these communications. "The scope of pretrial discovery is broad. 'Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter * * *. Civ. R. 26(B)(1).' It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence. Civ.R. 26(B)(1)." *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St.3d 94, 95, 554 N.E.2d 1297 (1990) (holding that a trial court, in the course of regulating

¹ Defendant asserts that there was a settlement agreement that the parties entered, but did not produce a written settlement agreement between the parties. The Court can only infer that she means the 08/19/2015 agreed Court order.

discovery, has authority to direct an in camera inspection of hospital records despite claims of the medical review committee privilege under R.C. 2305.251). As a material witness, the Defendant has indicated that she expects Lemon, who was once was her boyfriend, and now they remain friends, to testify at trial regarding: the extent and effects of Defendant's alleged injuries, conversations following the incident; observations of Defendant's conditions and the changes that occurred; their relationship; events on the evening in question; effects of Plaintiff's relationship with Defendant; damages; intent; reporting to law enforcement and other individuals; and the purpose of such reporting. Def. Tr. Br. at 5 P. 8. Based on this expected testimony, these communications are reasonably calculated to lead to admissible evidence.

The Court, however, is not making any rulings regarding the admissibility of these communications as evidence at trial. Plaintiff is entitled to broad discovery, and in light of Defendant's claims and the breath of testimony, she asserts this witness will offer, this Court determines that the request is reasonably calculated to lead to the discovery of admissible evidence. It is fundamental to judicial powers and process, that the Court has inherent powers including "extensive jurisdiction and power over discovery." *Id.* For the reasons explained below, Defendant's proposition that any of her communications between herself and Lemon are protected through an alleged settlement agreement, as referenced in an agreed order, limits this Court's authority to exercise its jurisdiction over the discovery in this case, lacks merit.

Stage 2B Communications from 07/17/2015 to the present

Plaintiff also seeks production of the Stage 2B communications from 07/17/2015 to the present, and has made supplemental requests for production of these communications under Civ.R. 26(E)(3). Defendant now objects to the production of these communications for three reasons: (1) privilege, (2) protection by the agreed order, and (3) not reasonably calculated to

lead to the discovery of admissible evidence. Defendant references an unknown protective order, but fails to explain what protective order; therefore, this argument is waived.

On 07/10/2015, Defendant, along with Lemon who had filed a notice of appearance as counsel, and Defense Counsel Richard T. Robol attended a hearing on pending motions, including Plaintiff's motion to preclude Lemon from legal representation on this matter because he was a material witness. Defense counsel represented that there was no objection to Lemon's preclusion from acting with further involvement as an attorney in this matter on behalf of Defendant, as reflected in that Journal Entry dated 07/17/15. Lemon did not dispute or disagree with this representation. The Court granted Plaintiff's motion to exclude and preclude Lemon from acting as legal counsel on behalf of Defendant in this case, and included Defendant's representation that she did not object to the granting of this motion. Defendant did not appeal the 07/17/2016 order.

"The burden of showing that testimony [or documents] sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude [them] * * *." *Peyko v. Frederick*, 25 Ohio St.3d 164, 166, 495 N.E.2d 918 (1986), citing *Waldmann v. Waldmann* (1976), 48 Ohio St. 2d 176, 178 [2 O.O.3d 373] (citing *In re Martin* [1943], 141 Ohio St. 87, 103 [25 O.O. 225]). The party asserting the privilege must first prove "the existence of the relationship of client and attorney," and then must prove "that the communications dealt with were connected with business for which the attorney had been retained and not extraneous matters." *In re Martin*, at 103. (Internal citations omitted).

"To render the attorney incompetent to testify to communications of his client [or a party to produce documents under a claim of privilege], the communications must have been made strictly in the relation of attorney and client. The testimony of a witness as to conversations with

a party to an action [or production of communications in discovery] cannot be excluded merely on the ground that the witness is an attorney at law and that the communications were confidential, unless it appears that he was the attorney for the party and that the communications were made in the course of such professional employment. In other words, before the communication will be held to be privileged, it must have been made by the client to one who had been engaged to represent him as legal counsel, or to whom the revelation was made with the purpose of engaging him, so that the relation of attorney and client may be said to exist. * * *

In re Martin, at 103-04, citing 42 Ohio Jurisprudence, 276, Section 276.

"It is sometimes said that all communications between counsel and client are privileged; but this is too general, and is inaccurate. They must relate to the business and interest of the client. The privilege extends only to communications connected with the business in which the attorney has been retained, and not to extraneous matters." *In re Martin*, 104, citing 28 Ruling Case Law, 559, Section 149.

As of the Journal Entry dated 07/17/2015, if not the hearing date of 07/10/2015 when Defense counsel agreed to the preclusion of Lemon as legal counsel, Defendant was on notice that Lemon was not legal counsel on this case. Therefore, any communication between Defendant and Lemon, regardless of the assertion of attorney-client communication or attorney work product fails because Defendant agreed that Lemon would not be providing legal representation in this case at the hearing on 07/10/2016. Therefore, no attorney-client privilege can exist in this situation. Any legal advice, strategy, mental impressions or trial matter communicated between Defendant and Lemon are a violation of this Court's 07/17/2015 order, and Defendant proceeded at her own risk to engage in such communications with this material witness. Defendant is estopped from raising objections to production of these communications

on any basis related to trial preparation, attorney-client communications, or attorney-work product.

Defendant's objection to production of any of these communications based upon the agreed Court order lacks merit, and is overruled. It is fundamental to judicial powers and process, that the Court has inherent powers including "extensive jurisdiction and power over discovery." *State ex rel. Grandview Hosp. & Med. Ctr.* at 95. Defendant's proposition that any of her communications between herself and Lemon are protected through a settlement agreement that the parties are alleged to have entered or that the agreed Court order could limit this Court's authority to exercise its jurisdiction over the discovery in this case, lacks merit.

Defendant's objection to production of any of these communications because the request is not reasonably calculated to lead to the discovery of admissible evidence lacks merit, and is overruled for the same reasons stated earlier. "The scope of pretrial discovery is broad. 'Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter * * *. Civ. R. 26(B)(1).' It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence. Civ.R. 26(B)(1)." *Id.*

The Court is not making rulings regarding the admissibility of these communications as evidence at trial. Plaintiff is entitled to broad discovery, and in light of Defendant's claims and the breath of testimony, she asserts this witness will offer, as previously noted, this Court determines that the request is reasonably calculated to lead to the discovery of admissible evidence.

For all the foregoing reasons, Defendant is to produce all the Stage 2B communications, written and electronic, including social media, between Defendant and Lemon from 07/17/2015 through the date of this order to Plaintiff by 02/03/2016, in a format that the parties agree.

IT IS SO ORDERED.

DATED: 1/27/2016



JUDGE MICHAEL E. JACKSON

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.