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FILED

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

2016 FEB -5 P 4: 06

ALEXEI G. ESTRADA, M.D.  
Plaintiff

Case No: CV-14-834630

Judge: MICHAEL E JACKSON

WINDOW 3  
CLERK OF COURTS  
CUYAHOGA COUNTY

ERICA J. GLANCY, M.D.  
Defendant

JOURNAL ENTRY

PLAINTIFF'S MOTION TO COMPEL DISCOVERY OF STAGE 2A COMMUNICATIONS BETWEEN DEFENDANT AND WITNESS JESSE LEMON. O.S.J.

O. S. J.

\_\_\_\_\_  
Judge Signature

\_\_\_\_\_  
Date

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

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., ) **DISCOVERY OF STAGE 2A**  
) **COMMUNICATIONS BETWEEN**  
DEFENDANT. ) **DEFENDANT AND WITNESS JESSE**  
) **LEMON.**  
)

On January 27, 2015, Plaintiff Alexei Gonzalez-Estrada propounded discovery on Defendant Erica J. Glancy and included a request for communications<sup>1</sup> between Defendant and her boyfriend Jesse Lemon who became a licensed attorney in the state of Ohio<sup>2</sup> on November 17, 2014. Plaintiff has made repeated requests for supplementation of this request pursuant to Civ.R. 26(E)(3). Defendant has objected to the production of many of the communications asserting that the communications are (1) privileged attorney client communications or attorney work product, (2) protected by a settlement agreement, or (3) not reasonably calculated to lead to admissible evidence.

Pursuant to the Court's August 19, 2015 order, the Court has been conducting in-camera inspections of communications that Defendant objects to producing through objection logs. On December 22, 2015, the Court issued its first order regarding the production of documents dated two months prior to the October event giving rise to the claims in this case until January 27,

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<sup>1</sup> Communications means all written and electronic communications including text messages, e-mails, and social media communications.

<sup>2</sup> Lemon graduated from the Ohio State University Moritz College of Law in 2014, and passed the July 2014 Ohio bar exam. He is not licensed in any other jurisdiction.

2016, the date of Plaintiff's request for discovery (Stage 1 communications). On January 27, 2016, this Court ordered communications from January 27, 2015 until July 17, 2015 (Stage 2A communications) be produced to Plaintiff by January 27, 2016, unless there was an objection to production of a particular communication, and then Defendant was to produce the communications by January 27, 2016 to the Court for an in-camera.<sup>3</sup> Defendant was ordered to submit simultaneously an objection log to the Court and Plaintiff regarding the communications. The objection log contains the following columns: (1) date and time, (2) subject, and (3) privilege. Defendant produced only texts messages to the Court for inspection, and the objection log only references these test messages.

The January 27, 2016 order determined that the communications between Defendant and Lemon from July 17, 2015 until the present (Stage 2B communications) were not privileged, were not subject to a settlement agreement, and were reasonably calculated to lead to discoverable evidence. All communications from Stage 2B were ordered to be produced directly to Plaintiff by February 3, 2016.

The Court has completed the in-camera inspection of Stage 2A communications and orders that the following communications are protected from discovery: 3/17/2015, 9:34am (p.15); 4/8/5015, 9:01pm (pg. 58); 4/27/2015, 10:20pm (pg. 108-109); 5/1/2015, 10:02 (pg. 115-116); 5/1/2015, 2:33pm (pg. 116-117); 5/2/2015, 3:58pm (pg. 121-126); 5/23/2015, 2:50am (pg. 138), 5/13/2015, 10:44am (pg. 138); and 5/23/2015, 10:44 am (pg. 138-141). These communications concern Lemon's representation of Defendant in matters not related to this case and are not reasonably calculated to lead to discoverable evidence in this case. Defendant is granted protection from producing these communications. Civ.R. 26(C).

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<sup>3</sup> The parties were aware of these orders through a telephone conference with the Court held January 20, 2016. The Court granted Defendant's motion for time until January 28, 2016 to comply with the order.

All other communications that Defendant objects to producing are overruled, and she is ordered to produce these communications to Plaintiff no later than 9:00 AM on Monday, February 8, 2016. The Court incorporates its previous reasoning and analysis to deny Defendant's objection pursuant to a settlement agreement. Any communication not produced to the Court for inspection must be produced to Plaintiff pursuant to this and previous Court orders requiring production. Any objections not raised by Defendant in her objection logs are waived. The Court is not making evidentiary rulings regarding the admissibility of these communications, and will do so at the appropriate time during trial.

"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).

A notice of appearance as counsel in this case was filed on behalf of Lemon on February 19, 2015. Lemon was already identified by the parties as a material witness in this case at the time he entered an appearance.

The attorney-client privilege is premised on the principle that confidences shared in the attorney-client relationship remain confidential. *Li v. Olympic Steel, Inc.*, 2012-Ohio-603, ¶ 10 (8th Dist.), citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 660, 635 N.E.2d 331 (1994). However, it is not an absolute privilege, and not all communications made between an

attorney and a client are presumed confidential within the scope of the attorney client privilege. *Liv* at ¶ 10, citing *Moskovitz* at 660. The circumstances of the case will determine whether the communication should be afforded the cloak of privilege and the privilege must yield when justice so requires. *Liv* at ¶ 10, citing *Lumley v. Kaiser*, 6 Ohio St.3d 258, 264, 6 Ohio B. 324, 452 N.E.2d 1304 (1983). Work product contains "documents and tangible things prepared in anticipation of litigation or for trial. *Liv* at ¶ 10, citing Civ.R. 26(B)(3). While work product that reveals mental impressions and legal theories of a lawyer are typically afforded protection, that protection can be overcome by a showing of good cause. *Liv* at ¶ 11. Moreover, "ordinary fact" work product such as witness statements and underlying facts receives lesser protection. *Id.*

The record is clear that Defense Counsel, Richard T. Robol, and Lemon understood that Lemon is a material witness in this case, both on behalf of the Defendant, and as part of Plaintiff's case before Lemon's appearance. His testimony is relevant and probative of the claims and defenses in this case. By Defendant's own assertions, Lemon will testify concerning his observations of Defendant, her state of mind, changes in personality and behavior. Defendant's psychological well-being is at issue for proving her claim of intentional infliction of emotional distress. Lemon, as her boyfriend and friend, has been intimately involved in caring and protecting her well-being before and after the events giving rise to this case. Plaintiff has also raised an affirmative defense of consent to Defendant's claims of assault and battery, and her personal relationship with Lemon is relevant to Plaintiff's defenses. Knowing that he will be a witness, and aware that Plaintiff objected to Lemon acting as legal counsel on behalf of Defendant, Defendant proceeded at her own risk to engage in communications about this case with her boyfriend, friend, witness. The communications contain facts of the case for which this witness is being called to testify.

The Court did not find any communications that included attorney work product, or mental thoughts or impressions related to the strategy of this case distinct to an attorney-client relationship. Most of the communications are inter-woven in conversations that occur in the ordinary course of communications between people who have a personal relationship, and are not a professional communication between a client and lawyer. These communications, even if they do include any mental thoughts or impressions, may lead to admissible evidence, provide evidence of the existence of relevant facts, or be useful for the purposes of impeachment or corroboration. *Jerome* at ¶19, citing, *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

The Court determines that these communications are important in the preparation of Plaintiff's case, cannot otherwise be obtained, and under the circumstances of this case not worthy of the cloak of privilege. *Liv* at ¶ 10. Defendant expects Lemon to be a witness in this case on her own behalf, prior to Lemon entering an appearance on her behalf, and these communications are reasonably calculated to lead to admissible evidence, including this witness's testimony. Therefore, for good cause shown, all the communications that Defendant objects to producing in the objection log that this Court has not ordered protected are discoverable, and are ordered to be produced to Plaintiff by 9:00 AM on Monday, February 8, 2016.

IT IS SO ORDERED.

DATED: 2/5/16

  
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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.**