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IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

DAVID HOWELL, JR.
Plaintiff

Case No: CV-17-876418

PARK EAST CARE & REHABILITATION, ET AL
Defendant

Judge: SHANNON M GALLAGHER

JOURNAL ENTRY

DECISION DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND GRANTING PLAINTIFF'S MOTION TO
COMPEL. O.S.J.

OSSJ

Judge Signature

Date

2017 JUL 18 PM 2:48
CLERK OF COURTS
CUYAHOGA COUNTY

FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

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| DAVID HOWELL, JR., AS THE |) | CASE NO. CV-17-876418 |
| REPRESENTATIVE OF THE ESTATE |) | |
| OF PAULINE WILBOURN, DEC. |) | |
| Plaintiff, |) | JUDGE SHANNON M. GALLAGHER |
| |) | |
| vs. |) | |
| |) | |
| PARK EAST CARE AND |) | <u>DECISION DENYING DEFENDANTS'</u> |
| REHABILITATION, ET AL. |) | <u>MOTION FOR PROTECTIVE ORDER</u> |
| |) | <u>AND GRANTING PLAINTIFF'S</u> |
| |) | <u>MOTION TO COMPEL</u> |

Shannon M. Gallagher, J.:

This matter involves a discovery dispute in which plaintiff seeks production of third party personal and medical records in defendants' possession. For the reasons that follow, defendants' motion for protective order, filed 6/22/2017 is denied, and plaintiff's motion to compel, filed 6/29/2017, is granted.

I. Background and Procedural History

Plaintiff David Howell, Jr., as the representative of the Estate of Pauline Wilbourn, brings claims for nursing home negligence and wrongful death. Plaintiff alleges that his decedent, Pauline Wilbourn, was a resident at defendant Park East Care and Rehabilitation Nursing Home when she was attacked by a fellow nursing home resident, Lewis Warren. Plaintiff further alleges that Ms. Wilbourn died as a result of these injuries.

This is a re-filed case. During the initial filing, defendants refused to produce Lewis Warren's records. Mr. Warren is deceased and is not a named party to this action. Mr. Warren's Estate has refused to sign an authorization consenting to production of his records.

In the initial filing of this case, the court denied defendants' motion for protective order. Defendants appealed. The Eighth District Court of Appeals dismissed the appeal for failure of a final appealable order and remanded the case. *Howell v. Park East Care and Rehabilitation*, 8th Dist. Cuyahoga No. 102111, 2015-Ohio-2403. The Court of Appeals reasoned that the denial of the protective order did not grant the plaintiff's motion to compel or order the defendants to produce the records, and therefore did not deny a provisional remedy, as required under R.C. 2505.02(B)(4). Even assuming that the denial of the protective order constituted a denial of a provisional remedy, the Court of Appeals concluded that the defendants failed to establish that a provisional appeal was necessary because they would not otherwise be afforded a meaningful or effective remedy through an appeal after a final judgment in the case.

The initial filing of this case was ultimately dismissed without prejudice. Plaintiff timely refiled this case and propounded discovery requests, again seeking production of Mr. Warren's records and incident reports involving Mr. Warren. As in the initial filing, defendants filed a motion for protective order. Plaintiffs responded with a motion to compel.¹

The following plaintiff's discovery requests are in dispute:²

Request for Production of Documents 2: documents relative to Lewis Warren, including nursing home chart, medical records, physician's notes, nurse's statements and notes, progress notes, documentation of activities of daily living, assessment reports, incident/accident reports, physical therapy, administration of narcotics, dietary records, communications about Lewis Warren, etc.

¹ Plaintiff argues that the court should deny defendants' motion for protective order because the court denied defendants' motion for protective order in the initial filing of this case and that decision constitutes the law of the case. Plaintiff relies upon *Kolosai v. Mouaid*, 8th Dist. Cuyahoga No. 102920, 2016-Ohio-5831, which stands for the proposition that a court's decision continues to govern the same issues in subsequent stages in the same case. However, a refiled case is not a continuation of the initial case that was dismissed without prejudice. Rather, the prior action is deemed to have never existed. *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, P24. Accordingly, the court gives no deference to its decision in the initial filing.

² The discovery requests have been paraphrased for brevity. Full requests are attached to defendants' motion to compel as Exhibit A.

Request for Production of Documents 5: documents relative to Lewis Warren including medical records, documentation of any incidents, police reports, and witness statements.

Request for Production of Documents 6: Lewis Warren's original nursing home chart during his entire residency.

Request for Production of Documents 7: documentation of any incidents in which Lewis Warren verbally and/or physically threatened, abused, assaulted, and/or otherwise attacked anyone at the nursing home.

Request for Production of Documents 9: documentation in any incident, investigation, or abuse file which contains reference to Lewis Warren or any incident involving or otherwise pertaining to Lewis Warren.

Request for Production of Documents 11: documentation reported to the Ohio Department of Health relative to Lewis Warren, including any reports of injuries of unknown origin or suspected abuse to that individual.

Request for Production of Documents 14: billing that was sent out relative to Lewis Warren.

Request for Production of Documents 15: documentation of amounts paid relative to Lewis Warren.

Request for Production of Documents 20: incident reports and/or witness statements relative, in any way, to Lewis Warren.

Interrogatory 5: Identify and describe any and all instances in which Lewis Warren, at any time, verbally and/or physically threatened, abused, assaulted, battered, and/or otherwise attacked anyone in the building or on the premises of the nursing home, or exhibited any type of aggressive behavior. The interrogatory also seeks more specific information for each incident.

Defendants move for a protective order, prohibiting the production of Mr. Warren's personal and medical records. Defendants argue that these records are privileged and protected from disclosure pursuant to HIPAA, R.C. 3721.13, and R.C. 2317.02(B).

II. Law and Analysis.

Defendants argue that Mr. Warren's personal and medical records are privileged under R.C. 3721.13. Pursuant to R.C. 3721.13(A), a resident of a nursing home has the right to confidential treatment of personal and medical records, and "the right to approve or refuse the

release of these records to any individual outside the home, except...as required by law or rule..."

However, this statute merely creates a duty for nursing homes, and does not create a privilege that would prohibit such records from being produced in response to discovery requests or pursuant to a court order.

Defendants also argue that producing the records would be a violation of HIPAA. However, there is an exception to HIPAA for any records produced in response to discovery requests or pursuant to a court order. The HIPAA privacy regulation, found in Section 164.512, Title 45, C.F.R. allows "disclosure of protected health information in the course of any judicial or administrative proceeding in response to a court order. HIPAA also allows for discovery of privileged health information by subpoena, discovery request, or by other lawful processes if the covered entity receives adequate assurances that the individual who is the subject of the health information has been given notice of the request or that reasonable efforts have been made to secure a protective order." *Medina v. Medina Gen. Hosp.*, 8th Dist. Cuyahoga No. 96171, 2011-Ohio-3990, P16.

Finally, defendants argue that Mr. Warren's personal and medical records are privileged as physician-patient communication pursuant to R.C. 2317.02(B)(1) and R.C. 2317.02(B)(5)(a). The statute defines "communication" broadly. Communication means:

[A]cquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician, advanced practice registered nurse, or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

R.C. 2317.02(B)(5)(a).

Medical records are generally considered privileged documents that are not subject to discovery absent an exception or a showing that they are necessary to protect or further a countervailing interest that outweighs the privilege. *Dubson v. Montefiore Home*, 8th Dist. Cuyahoga No. 97104, 2012-Ohio-2384.

Defendants argue there is no statutory exception that would allow them to produce Mr. Warren's medical records because Mr. Warren is a third party and his estate has refused to provide consent. However, records that are otherwise privileged are also subject to production based upon a showing that they are necessary to protect or further a countervailing interest that outweighs the privilege. *Dubson, supra*, 2012-Ohio-2384, *Biddle v. Warren Gen. Hospital*, 89 Ohio St. 3d 395, 399, 1999-Ohio-115, 715 N.E.2d 518, paragraph two of the syllabus.

A plaintiff's interests can outweigh the privilege for a nonparty if that nonparty is a potential tortfeasor. In *Ward v. Summa Health Sys.*, 128 Ohio St. 3d 212, 217-219, 2010-Ohio-6275, 943 N.E.2d 514, the plaintiff claimed he contracted hepatitis B while undergoing a procedure to replace his heart valve. The defendant hospital refused to identify the source of the plaintiff's exposure. The plaintiff then sought to depose the treating surgeon. The surgeon refused to testify to his own personal medical information. The trial court granted the surgeon's protective order. The court of appeals reversed, and the Ohio Supreme Court upheld the reversal.

The Supreme Court noted that the physician-patient privilege requires strict construction. The Court emphasized the purpose of the privilege – encouraging patients to fully and freely disclose all relevant information which may assist the physician in treating the patient. It held that the personal medical information of a nonparty, especially when that nonparty is a potential

tortfeasor, is not absolutely privileged and protected from discovery by R.C. 2317.02(B)). *Id.* at ¶28.

Ward is somewhat distinguished from this case because the plaintiff in *Ward* sought a potential tortfeasor's own testimony about his health records. Since the physician was acting as the patient, he was not protected by the statute. In this case the plaintiff is asking the defendant nursing home to produce a third party's records. But despite these differences, *Ward* ultimately stands for the proposition that a third party's medical records are not subject to an absolute privilege. Here, plaintiff's interests in prosecuting this case outweigh Mr. Warren's interests in confidentiality. There is also a societal interest in encouraging nursing homes to disclose incidents of violence. Accordingly, Mr. Ward's medical records are subject to production.

Additionally, documentation of "conduct" within a third party's medical records is not privileged. *Medina v. Medina General Hospital*, 8th Dist. Cuyahoga No. 96171, 2011-Ohio-3990. In *Medina*, the trial court granted plaintiff's motion to compel responses to interrogatories, even though the defendant hospital would have to refer to a third-party's hospital records in order to respond. Similarly, the defendants in this case have to refer to Mr. Warren's medical records to respond to Interrogatory 5, which seeks information about any instances of violence involving Mr. Warren. But simply because this information is found in confidential records does not protect the information itself from discovery. *Id.* at ¶14.

Finally, not all of plaintiff's discovery requests are covered by the physician-patient privilege. Plaintiffs' request for production 7, 9, 11, 14, 15, and 20 request incident reports, reports to the Ohio Department of Health, and documentation of billing and amounts paid.

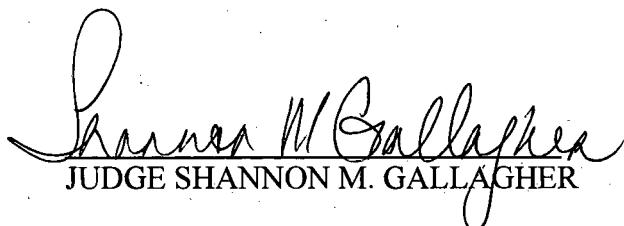
These documents are not protected by the physician-patient privilege and are subject to production.³

III. Conclusion

Accordingly, the court grants plaintiff's motion to compel and orders defendants to produce complete and accurate answers to plaintiff's first request for production of documents and first set of interrogatories, including responses to requests for production 2, 5, 6, 7, 9, 11, 14, 15, and 20, and Interrogatory 5, within 14 days of the date of this order. Failure to produce the requested responses on or before this date may result in further sanctions, including but not limited to, prohibiting the introduction of evidence at trial, limiting or dismissal of claims and/or defenses, granting of costs and/or attorneys' fees and such other relief as the court deems appropriate.

IT IS SO ORDERED.

Date: July 17, 2017



JUDGE SHANNON M. GALLAGHER

³ Plaintiff also argues that R.C. 2921.22(F) abrogates the physician-patient privilege relative to documentation of incidents of abuse. R.C. 2921.22(F) refers specifically to documentation of treatment for victims of domestic violence. Domestic violence means attempting to cause or recklessly causing bodily injury against a family or household member. R.C. 33113.31(A)(1). Plaintiff presented no evidence or law to support a finding that Lewis Warren and Pauline Wilbourn were family or household members at the time of the alleged assault, so R.C. 2921.22(F) is inapplicable to this case.

CERTIFICATE OF SERVICE

A copy of this decision was sent by email through the Court's e-filing system, this _____ day of July, 2017 to the following:

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