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ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

DARLENE LANE FERRARO,)	CASE NO. 2011-10371
)	
Plaintiff,)	JUDGE PATRICK McGRATH
)	
vs.)	<u>PLAINTIFF'S MEMORANDUM IN</u>
)	<u>OPPOSITION TO DEFENDANT'S</u>
THE OHIO STATE UNIVERSITY)	<u>MOTION TO ORDER THE OHIO</u>
MEDICAL CENTER)	<u>DEPARTMENT OF</u>
)	<u>REHABILITATION AND</u>
Defendant.)	<u>CORRECTION TO PRODUCE</u>
)	<u>RECORDS</u>

MEMORANDUM

Plaintiff, Darlene Lane Ferraro, individually and as the fiduciary of the Estate of Junior Lee Lane, Deceased, submits this response to the Defendant's Motion to Order the Ohio Department of Rehabilitation and Corrections to Produce Records dated February 3, 2015 ("Defendant's Motion"). Plaintiff does not oppose the release of medical records that are potentially relevant to the anticipated life expectancy of Junior Lee Lane, Deceased ("Decedent"). The remainder of the demand for production, however, amounts to nothing more than a fishing expedition and should be denied.

BACKGROUND

During the first phase of the trial that commenced on July 28, 2014, Plaintiff established that the Decedent was killed when he was struck by an automobile that was being operated by Defendant, Rolf Barth, M.D. ("Dr. Barth"). Dr. Barth maintained that he had been driving to a meeting in the course of his employment with Defendant, Ohio State University Medical Center ("OSUMC"). At the time of the accident, the Decedent was working on a trailer attached to a truck belonging to Defendant, Gary Fury ("Fury"), that was stopped on the highway.

ON COMPUTER

In a decision that was issued on December 19, 2014 in favor of Plaintiff, this Court apportioned one third of the liability to Defendant Dr. Barth, one third to Defendant Fury, and one third to the Decedent. The trial on damages is now set to commence on May 13, 2015. *See Judgment Entry dated January 16, 2015.*

On February 3, 2015, Defendant OSUMC filed the aforementioned Motion seeking the complete disclosure of every record maintained by the Ohio Department of Rehabilitation and Correction ("ODRC") pertaining to the Decedent, including disciplinary proceedings, educational testing, mental health evaluations, vocational assessments, and everything else that "is necessary for the proper preparation of OSUMC's defense in the upcoming damages trial." *Defendant's Motion, p. 2.* Since this request is wildly overbroad, Plaintiff now submits this Memorandum in Opposition.

STANDARDS

Plaintiff is mindful that the Ohio Rules of Civil Procedure have long permitted parties to seek discovery with respect to matters that are relevant, or potentially relevant, to the claims at issue. *Civ.R. 26(B)(1)*. Nevertheless, mere "fishing expeditions" are not permitted. *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d 663, 668, 591 N.E.2d 752, 755 (9th Dist. 1990). Such excursions can be prohibited in appropriate instances even when no "privilege" has been claimed and the evidence sought is theoretically relevant. *Tschantz v. Ferguson*, 97 Ohio App. 3d 693, 715-716, 647 N.E. 2d 507, 522 (8th Dist. 1994). The burden rests upon the party seeking the discovery to demonstrate "a likelihood that relevant evidence will be obtained." *Drawl v. Cleveland Ortho. Ctr.*, 107 Ohio App.3d 272, 277-278, 668 N.E.2d 924, 927 (11th Dist. 1995), citing *Bland v. Graves*, 85 Ohio App.3d 644, 659, 620 N.E.2d 920, 930 (9th Dist. 1993). Ultimately, the decision is left to the trial judge's sound exercise of discretion. *Ruwe v. Board of Twp. Trustees of Springfield Twp.*, 29 Ohio St.3d 59, 61,

505 N.E.2d 957, 959 (1987).

ANALYSIS

While it is conceivable that the records of the Decedent's physical health could bear upon his life expectancy, Defendant OSUMC has made no attempt to explain how his "education, *** mental health, Rules Infraction Board and other disciplinary matters, parole matters, pre-sentence investigation and any other file generated or maintained by ODRC" could possibly be relevant to the damages phase of the trial. *Defendant's Motion, pp. 2-3*. There is no logical reason to believe that such information could have anything to do with longevity. At the very least, such a non-sensical proposition would have to be supported by competent and reliable expert testimony. But Defendant has offered none.

As previously noted, Plaintiff does not object to the disclosure of any physical health care records that may bear upon the Decedent's anticipated life expectancy. But the wholesale release of the entire ODRC file is unwarranted. In all likelihood, Defendant OSUMC intends to use the disciplinary and physiological/psychiatric portions in a last-ditch attempt to malign and discredit the Decedent during the second phase of the trial. Substantial time will be wasted in the effort to prove that the Decedent was a "bad person," which Plaintiff will then be forced to counter through her own witnesses and exhibits. Apart from the medical records, there is nothing that the ODRC possesses that could possibly satisfy the requirements for relevancy imposed by Civ. R. 26(B)(1).

As Defendant OSUMC has acknowledged, several privileges have been implicated in this instance. *Defendant's Motion, p. 2*. Initially, the prohibitions against disclosure afforded by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) protect everything contained in or derived from the Decedent's medical

and mental health records. The rigid safeguards codified therein supersede any state laws regarding the publication of privileged health information. *Law v. Zuckerman*, 307 F.Supp.2d 705, 708-711 (D. Md. 2004) *Crenshaw v. Mony Life Insur. Co.*, 318 F.Supp. 2d 1015 (S.D. Cal. 2004). It has been recognized that “there is strong federal policy in favor of protecting the privacy of patient medical records.” *Law*, 307 F.Supp.2d at 711.

HIPAA generally precludes health care providers from utilizing “protected health information without an authorization that is valid under this section.” 45 C.F.R. 164.508(a)(1). The Department of Health and Human Services has broadly declared that:

Health information means any information, whether oral or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. [emphasis added]

45 C.F.R. 164.512. There can be no legitimate disagreement that Decedent’s medical, psychiatric, psychological, and mental health records fall squarely within HIPAA.

Absent a valid release, HIPAA only allows protected health information to be divulged in certain instances delineated in 45 C.F.R. 164.512. While subsection (e) pertains to judicial and administrative proceedings, a court order is essential. Such authorization is appropriate in this instance only with regard to the records of the Decedent’s physical health, as the notion that anything else contained in the ODRC files could be relevant to life expectancy is truly far-fetched. This Court should not allow the vitally important protections imposed by HIPAA to be overridden so casually.

Even under Ohio law (which is now superseded in certain respects by HIPAA), The Decedent's medical and mental health records are plainly privileged. Pursuant to R.C. 4732.19, psychological communications are afforded the same protections as medical information under R.C. 2317.02. Subsection (B) of that statute establishes broad protections for such highly personal information. The Ohio Supreme Court has explained that:

Unfortunately, however, mental illness still carries with it a stigma that can have adverse consequences for the individual. *** Therefore, it is argued that the physician-patient privilege is of heightened importance in the mental-health setting. Because of the nature of psychotherapy, it is important to foster open and complete communication between the psychiatrist (or psychologist) and the patient. *** It is urged that if the physician-patient privilege is not scrupulously protected in the treatment of mental illness, this type of communication is threatened. A patient who anticipates that potentially damaging matters related in strict confidence may be revealed will be reluctant to communicate openly to his or her psychiatrist or psychologist. This reluctance could seriously impede the patient's chances for a recovery. [citations omitted, emphasis added]

In re Miller, 63 Ohio St.3d 99, 108, 585 N.E.2d 396, 404 (1992). A waiver of the privilege will be effective only if the specific terms of the statute have been satisfied. *State v. Smorgala*, 50 Ohio St.3d 222, 223, 553 N.E.2d 672, 674 (1990); *Mohan J. Durve, M.D., Inc. v. Oker*, 112 Ohio App.3d 432, 447, 679 N.E.2d 19, 28 (8th Dist. 1996). Regardless of the implications, courts will not adopt exceptions that the General Assembly declined to incorporate into R.C. 2317.02. *In re Wieland*, 89 Ohio St.3d 535, 538, 2000-Ohio-233, 733 N.E.2d 1127, 1130.

The only exception to the privilege that could conceivably apply in this instance is R.C. 2317.02(B)(1)(a)(iii), which permits disclosure when the patient has filed a "civil action." The mere fact that one has commenced legal proceedings does not, by itself, result in the wholesale disclosure of medical and mental health records. *McCoy v.*

Maxwell, 139 Ohio App.3d 356, 359, 743 N.E.2d 974, 976 (11th Dist. 2000). As stated in R.C. 2317.02(B)(3)(a), the statutory protections are lost only with respect to communications and records that are “related causally or historically to physical or mental injuries that are relevant” to the claim. *Wooten v. Westfield Ins. Co.*, 181 Ohio App.3d 59, 62, 2009-Ohio-494, 907 N.E.2d 1219, 1221 ¶14-15 (8th Dist.); *Nester v. Lima Mem. Hosp.*, 139 Ohio App.3d 883, 886-887, 2000-Ohio-1916, 745 N.E.2d 1153, 1156 (3rd Dist. 2000). It is not enough that the records might be indirectly relevant to a side-issue. *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 432, 2009-Ohio-5224, 921 N.E.2d 286, 296, ¶40-41 (8th Dist.). An *in camera* inspection is necessary to determine whether this requirement for disclosure has been met. *Cargile v. Barrow*, 182 Ohio App.3d 55, 2009-Ohio-371, 911 N.E.2d 911 ¶15-14 (1st Dist.); *Folmar v. Griffin*, 166 Ohio St.3d 154, 159, 849 N.E.2d 324, 328 ¶24-25 (5th Dist.); *Neftzer v. Neftzer*, 140 Ohio App.3d 618, 622, 748 N.E.2d 608, 612 (12th Dist. 2000).

As an accommodation, Plaintiff is willing to waive the privilege protecting the records of the Decedent’s physical health. But she will go no further than that, and all the mental health, educational, disciplinary, vocational, and other materials should remain off-limits. Otherwise, the second phase of the trial will be substantially delayed by the presentation of “bad person” evidence by both sides. Consistent with the spirit of the statutory privileges that have been enacted and Civ. R. 12(B)(1), this Court should refuse to permit the pointless excursion.

CONCLUSION

For the foregoing reasons, this Court should order the release of only the Decedent's physical health records. The remainder of the pending Motion should be denied. *Civ. R. 12(B)(1)*.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** has been served by e-mail on this 2nd day of March, 2015 upon:

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