



Court of Claims of Ohio

The Ohio Judicial Center
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DARLENE LANE FERRARO, etc.

Plaintiff

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER

Defendant

Case No. 2011-10371

Judge Patrick M. McGrath

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On February 3, 2015, defendant filed a motion to order the Ohio Department of Rehabilitation and Correction (ODRC) to produce records related to plaintiff's decedent, Junior Lee Lane. The request included all files related to the decedent, including medical and mental health records. On March 3, 2015, with leave of court, plaintiff filed a response. On March 11, 2015, defendant filed a reply memorandum.

On March 31, 2015, this court granted defendant's motion to compel in part and ordered ODRC to produce all of the decedent's medical records (excluding any psychiatric or mental health records) because plaintiff had specifically waived privilege with regard to such documents. The court also ordered all non-medical records maintained or generated by ODRC to be produced to defendant's counsel. With regard to the decedent's psychiatric or mental health records, ODRC filed such records under seal, for an in camera inspection. At issue is whether plaintiff waived the physician-patient privilege with respect to the decedent's mental health records.

Civ.R. 26(B)(1) governs the scope of discovery and provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action * * * ." (Emphasis added.)

While health records are generally privileged, both federal and state law provide exceptions. Under the federal Health Insurance Portability and Accountability Act (HIPAA), otherwise protected medical information can be generally disclosed in response to an order

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from a court or administrative tribunal. 45 CFR 164.512(e). Privileged medical records may also be discovered in response to a party's subpoena or other discovery request. *Id.* While HIPAA supersedes state laws in many aspects, it provides that "[a] provision or requirement under this part * * * shall not supersede a contrary provision of State law, if the provision of State law * * * relates to the privacy of individually identifiable health information." 42 USCS § 1320d-7(a). Consequently, R.C. 2317.02(B) governs the physician-patient privilege and any waiver of that privilege. *See Mason v. Booker*, 185 Ohio App.3d 19, 2009-Ohio-6198, ¶ 14 (10th Dist.).

R.C. 2317.02(B)(1) states:

The following persons shall not testify in certain respects:

* * *

(B)(1) A physician * * * concerning a communication made to the physician * * * by a patient in that relation or the physician's * * * advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject. The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123 of the Revised Code, under any of the following circumstances:

- (i) If the patient or the guardian or other legal representative of the patient gives express consent;
- (ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;
- (iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, *an action for wrongful death*,

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any other type of civil action, or a claim under Chapter 4123 of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative. (Emphasis added.)

“Communication” is defined broadly and includes “acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician * * * to diagnose, treat, prescribe, or act for a patient. A ‘communication’ may include, but is not limited to, any * * * record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis or prognosis.” R.C. 2317.02(B)(5)(a).

Ohio courts have held that a plaintiff’s medical records are not privileged and are discoverable when he or she files any civil action and the medical records are related “causally or historically to the physical or mental injuries put at issue by such civil action.” *National City Bank v. Rainer*, 10th Dist. Franklin No. 98AP-1170, 1999 Ohio App. LEXIS 6507, 6-8 (Aug. 12, 1999). However, the records sought should be pertinent to the claim at issue. *Ward v. Johnson's Indus. Caterers*, 10th Dist. Franklin No. 97APE11-1531, 1998 Ohio App. LEXIS 2841, 13-16, (June 25, 1998) (finding that a general medical release authorization was too broad and that trial court should conduct an in camera review to discern what was discoverable under R.C. 2317.02(B)(2)).

Plaintiff seeks to limit discovery of the mental health records because it “amounts to nothing more than a fishing expedition.” Plaintiff contends that the decedent’s mental health records should not be discoverable because they are not relevant to the calculation of damages. Lastly, plaintiff argues that the mental health records are not “casually” relevant to the claims. Plaintiff’s Memorandum in Opposition, pp. 1, 2, 6, filed March 3, 2015. Defendant argues that the mental health records are important for a determination of damages, especially with regard to the decedent’s life expectancy and future earning potential. Defendant’s Motion to Compel, p. 2, filed February 3, 2015; Defendant’s Reply in Support of Motion to Compel, p. 2, filed March 11, 2015.

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This court has conducted an in camera inspection of all the documents provided by ODRC. As a preliminary matter, the majority (approximately 55%) of these documents constitute medical records, to which plaintiff has already waived privilege. Per this court's order on March 31, 2015, these records should have already been provided to defendant.

Next, approximately 45% of the documents provided by ODRC appear to be mental health records. Many of the documents consist of physician notes, medical charts, and mental health evaluation exams and detail prescribed medication and various mental health diagnoses. Such documents are discoverable pursuant to R.C. 2317.02 inasmuch as plaintiff initiated this action for wrongful death and such records are casually related to the decedent's life expectancy and a calculation of damages in the form of potential future earnings. Indeed, plaintiff has put the decedent's life expectancy and earning capacity at issue by filing this wrongful death action seeking compensatory damages. Compensatory damages include the loss of support from the reasonably expected earning capacity of the decedent. R.C. 2125.02(B)(1). As a result, these records are discoverable because they are "casually" related to plaintiff's claim. See *Ward*, 1998 Ohio App. LEXIS 2841, 13-16.

For the foregoing reasons, defendant's February 3, 2015 motion is GRANTED with regard to the decedent's mental health records. Within 14 days of the date of this order, ODRC shall produce all documents provided to the court for the in camera inspection by defendant's counsel.



PATRICK M. MCGRATH
Judge

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