

DIVISION OF ST. THOMAS AND ST. JOHN

Defendant.

CASE NO. ST-12-CV-461

Although 5 V.I.C. § 855(4) recognizes the existence of a physician-patient privilege, there is no privilege “in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.” Fed. R. Civ. P. 34 requires Plaintiff to produce any relevant records in the Plaintiff’s

possession so that Defendant may inspect and copy them.¹ Given that Plaintiff has placed his mental and physical health at issue, any records in the Plaintiff's possession relating to those issues should be produced.²

In addition, the Third Circuit has determined that "so long as the party has the legal right or ability to obtain ... documents from another source upon demand, that party is deemed to have control" of those documents.³ Accordingly, Plaintiff's duties under Fed. R. Civ. P. 34 also include signing authorizations and producing his medical records in the custody of his healthcare providers.

Notwithstanding, Plaintiff argues that HIPAA⁴ requires that medical records may only be produced subject to a confidentiality agreement or protective order. 45 C.F.R. § 164.512(e) provides the HIPAA standard for disclosures in judicial and administrative proceedings. In response to a discovery request that is not accompanied by a court order, a covered entity may disclose protected health information if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

¹ Fed. R. Civ. P. 34 provides that: "a party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form..."

² See, e.g., *Fields v. W. Virginia State Police*, 264 F.R.D. 260, 264 (S.D.W. Va. 2010).

³ *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004). See also *Gerling Int'l Ins. Co. v. Comm'r*, 839 F.2d 131, 140 (3d Cir. 1988); 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2210 (2d ed. 1994).

⁴ Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. 1320d et seq.

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.⁵

A “covered entity” is defined as a health plan, healthcare clearinghouse, or healthcare provider,⁶ and is distinguishable from the “individual” patient.⁷ Given that Plaintiff is not a “covered entity,” Plaintiff may not effectively rely⁸ on 45 C.F.R. § 164.512(e) to circumvent a motion to compel production of medical documents in his possession, custody, or control.⁹ Accordingly, the Court will grant Defendant’s motion and order Plaintiff to turn over his medical records in his possession and submit an authorization releasing his medical records in possession of his healthcare providers.¹⁰

⁵ 45 C.F.R. § 164.512(e)(1)(ii).

⁶ 45 CFR § 160.103 indicates that a “covered entity” is a

(1) A health plan.

(2) A healthcare clearinghouse.

(3) A healthcare provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

⁷ See, e.g., 45 C.F.R. § 164.502(a)(1) (“a covered entity is permitted to use or disclose protected health information ... to the individual”).

⁸ One of the authorities Plaintiff relies on is *Wallace v. Kmart Corp.*, CIVIL 2002-0107, 2009 WL 1587283 (D.V.I. June 5, 2009), in which the District Court of the Virgin Islands required that a protective order be issued in accordance with 45 C.F.R. § 164.512(e)(1)(v). This provision provides: “For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that: (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.”

⁹ See *Lyons v. Folsom Mercy Hosp.*, 2013 WL 2318989, at *8 (E.D. Cal. 2013).

¹⁰ Defendant resists Plaintiff’s attempt to require execution of a confidentiality agreement and protective order by asserting its request “does not encompass treatment for HIV/AIDS, mental health issues, or drug and alcohol dependency unrelated to the injuries alleged herein.” Should any medical records or other documents be related to those areas of treatment be disclosed as a result of this opinion, inadvertently or otherwise, Defendant will be required to execute an appropriate confidentiality agreement.

David Aubain v. Kazi Foods

ST-12-CV-461

•Memorandum Opinion, June 14, 2013

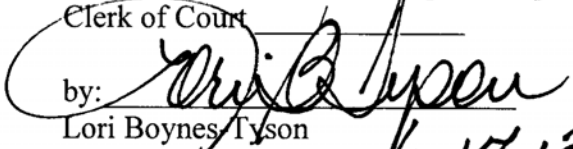
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An Order consistent with this Opinion shall follow.

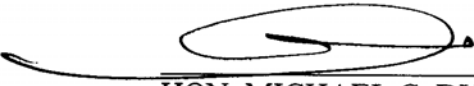
Dated: June 14, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:


Lori Boynes Tyson
Court Clerk Supervisor

6/17/13


HON. MICHAEL C. DUNSTON *For Hon. Kenneth Mackey*
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS