

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER W. WOMACK : CIVIL ACTION
 :
 v. :
 :
 STEVENS TRANSPORT, INC. : NO. 99-862

MEMORANDUM AND ORDER

M. FAITH ANGELL
U.S. MAGISTRATE JUDGE

JUNE 29, 2000

I. INTRODUCTION

Presently before the Court is a Motion for a Protective Order and/or Motion to Quash Subpoena pertaining to the disclosure of the psychiatric records and any factors about such records or treatment filed by the Plaintiff, Walter Womack. The Defendant, Stevens Transport, Inc. has responded with a Motion to Quash Subpoena and for a Protective Order.

II. BACKGROUND

The Plaintiff's lawsuit arose from a neck and back injury suffered by Mr. Womack in a motor vehicle accident involving two trucks that took place on September 5, 1997. A collision occurred between the vehicle being operated by Plaintiff, Mr. Womack, and the tractor-trailer operated by an employee of defendant, Stevens Transport, Inc. The Plaintiff, Mr. Womack, alleges that the negligent act of the Defendant's employee was the cause of the accident at issue. Mr. Womack's principal claim is for neck and back injury for which he has been treated.

In addition to the Plaintiff's primary claim, Mr. Womack alleges in his complaint that he sustained mental injuries associated with the physical injuries. These include "excruciating and agonizing aches, pains, mental anguish, suffering, emotional distress, humiliation, inconvenience, disfigurement and limitations which have prevented him in the past and will prevent him in the future from engaging in his usual activities, pursuits, and avocations, with a

consequent loss of the pleasures and enjoyment of life.” (Plaintiff’s Complaint filed on Jan. 20, 1999 at p. 4, paragraph 13). The Plaintiff submitted a vocational evaluation that was prepared by Dr. Ronald Kaiser in which Mr. Womack reported that the accident has affected him emotionally. (Defendant’s Motion filed on May 22, 2000, Exhibit A, p. 6). According to Dr. Kaiser, the Plaintiff’s score of 22 on the Beck Depression Inventory II test was indicative of a moderate level of depression. This test also suggested to Dr. Kaiser the impact that Mr. Womack’s altered physical state and his vocational status had on his mood and was therefore deemed to be in need of psychotherapeutic counseling.

After the accident, Mr. Womack consulted with Dr. Dirk Skinner, a neurologist. The Plaintiff reported a number of complaints after the accident, namely that of “bad nerves” and headaches. (Defendant’s Motion filed on May 22, 2000 Exhibit D, p. 3). Upon examining Mr. Womack, Dr. Skinner concluded that his “bad nerves” and his bitemporal headaches are more closely related to muscular or tension headaches than with post-traumatic headaches. Id.

In the process of discovery, defendant obtained Mr. Womack’s medical records and a report from Dr. Eliot Kaplan, a psychiatrist, which disclosed that the Plaintiff had consulted with a psychiatrist two years before the accident. According to Dr. Kaplan’s records from September, 21, 1995, Womack reported “a prior history of depression associated with “vegetative symptoms. Stressors for him have included social isolation, having endured two divorces and certain work issues.” (Defendant’s Motion filed on May 22, 2000, Exhibit B, p. 1). Given the difficulty dealing with the Plaintiff’s job and his duties as a truck driver, Dr. Kaplan recommended that “it would be prudent for him to take some time off from work at this point.” Id. at p. 2.

This matter is presently before the Court after the defendant directed a subpoena to Dr. Kaplan for the production of his records consisting of Mr. Womack’s psychiatric care prior to the accident. In response, the Plaintiff filed for a Motion to Quash the Subpoena and requested a Protective Order in an effort to bar the discovery of these matters on grounds of privilege.

III. LEGAL STANDARD

The matter before this Court is governed by Federal Rules of Evidence 501, which provides in relevant part that: "...in all civil actions and proceedings, with respect to an element of a claim or defense to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." FED. R. EVID. 501. In the present case, federal jurisdiction was founded upon diversity of citizenship. Therefore, Pennsylvania state law of privilege applies. In interpreting state statutes, only decisions of the state's highest court are binding upon federal courts in a diversity suit. Gruber v. Owens-Illinois, Inc., 899 F.2d 1366, 1369 (3rd Cir. 1990); See also Premack v. J.C.J. Ogar, Inc., 148 F.R.D. 140, 143 (E.D.Pa.1993).

IV. DISCUSSION

The Defendant has sought discovery of Mr. Womack's treatment records pertaining to his psychological condition before the accident at issue. Defendant argues that this record is relevant in examining the issue of personal injury. The Plaintiff objects to the production of these records on grounds that they are irrelevant to Plaintiff's cause of action.

The Plaintiff alleges in his Motion to Quash Subpoena and for a Protective Order that the records of the psychiatric treatment given to Walter Womack noted by Dr. Eliot Kaplan prior to the accident is not discoverable. Plaintiff argues that the psychiatric component of Womack's claim is merely for the mental anguish in accordance with the personal injuries that he allegedly sustained and does not amount to an overt psychiatric condition.

A. A Prediction of the Response by the Pennsylvania Supreme Court

If a state's highest court decision interpreting a state statute does not exist, "the federal court is called upon to predict how the state court would resolve the issue should it be called upon to do so." Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir.1990) (citing, Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967)). In making a prediction of the response by the Pennsylvania Supreme Court to an issue which it has not yet addressed, the federal court must examine: (1) what the Pennsylvania Supreme Court has said regarding any related matters; (2) the judge-made laws of Pennsylvania's

intermediate courts; (3) federal court decisions that have interpreted Pennsylvania's law; and (4) holdings from other jurisdictions that have ruled on the issue. Gruber, 899 F.2d at 1369-1387; See also Premack, 148 F.R.D. at 144.

1. Pennsylvania Supreme Court

The application and function of the privilege in a civil case is not clear. This is because the Pennsylvania Supreme Court has not yet addressed the issue of whether the privilege pursuant to 42 Pa.C.S. § 5944, the statute that governs the confidentiality of communications to licensed psychologists and psychiatrists, is waived by filing a civil action for personal injuries.

2. Judge-made laws of Pennsylvania's intermediate courts

Under Pennsylvania state law, Mr. Womack cannot assert psychiatrist-patient privilege. The decisions made by both the Commonwealth Court and Superior Court of Pennsylvania strongly indicate that in a civil case, the privilege pursuant to 42 Pa. C.S. §5944 is waived when the party places confidential information at issue. See Kraus v. Taylor, 710 A.2d 1142 (Pa.Super.1998) (citing Rost v. State Bd. of Psychology, 659 A.2d 626 (Pa.Cmwlth.1995)). The Superior Court of Pennsylvania stated:

“We cannot believe that the Pennsylvania General Assembly intended to allow a plaintiff to file a lawsuit and then deny a defendant relevant evidence, at plaintiff's ready disposal, which mitigates defendant's liability.... Rather, the General Assembly must have intended the privileges to yield before the state's compelling interest ‘in seeing that truth is ascertained in legal proceedings and fairness in the adversary process.’”

Kraus, 710 A.2d at 1145.

Accordingly, Mr. Womack placed his psychiatric records at issue by filing this case. His complaint included claims relating to mental anguish, suffering, emotional distress, humiliation and inconvenience. His psychiatric records prior to the accident would be relevant since it would help ascertain the truth regarding the Plaintiff's mental condition. Hence, Mr. Womack waived the psychiatrist-patient privilege under Pennsylvania law.

3. Federal courts that have interpreted Pennsylvania's law

Federal caselaw also strongly indicates that Womack has waived the Pennsylvania statutory privilege. Federal courts have determined that statutorily-created privileges are not absolute. O'Boyle v. Jensen, 150 F.R.D. 519, 522. After noting that “unlike the statute governing disclosures by physicians”, 42 Pa.C.S. § 5944 does not “expressly provide for the patient’s waiver of the privilege by placing her condition at issue in litigation,” the court in Thorne v. Universal Properties Inc., 1987 WL 7683 *1, went on to state that section 5944 does not create an absolute privilege. The Thorne Court also added “that it would be improper” to permit disclosure of such confidential records only upon written consent of a patient who intends to pursue a claim to which those records are relevant. Id. at *2.

Furthermore, a federal court stated that in Pennsylvania, a claim of privilege is not absolute because it does not only depend on the statutory or constitutional ground. Id. at *1. The privilege must be weighed against countervailing interests in order to insure the “fairness and integrity of the judicial system.” O'Boyle, 150 F.R.D. at 522. One cannot pursue a claim against the defendant for personal injuries related to their mental condition while blocking access to treatment records that are potentially relevant to the issue of causation. Leslie v. Brames, 682 F.Supp. 608, 609-10 (D.Me.1988) and Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 298 (E.D.Pa.1983).

Accordingly, various federal courts in interpreting Pennsylvania law have opined that one implicitly waives their statutory privilege by placing the confidential information at issue in a civil action. Mullholland v. Dietz, 896 F.Supp. 179 (E.D.Pa.1994); O'Boyle v. Jensen, 150 F.R.D. 519 (M.D.Pa. 1993); Premack v. J.C.J. Ogar, Inc., 148 F.R.D. 140 (E.D.Pa. 1993); Thorne v. Universal Properties, 1987 WL 7683 (E.D.Pa.) *1. The filing of the suit functions as an implied waiver of privilege. Premack, 148 F.R.D. at 145 (E.D. Pa.1993) (Plaintiff implicitly waived psychologist-patient privilege pursuant to 42 Pa.C.S. § 5944 (Supp. 1993).

In the present case, Mr. Womack is seeking damages for alleged mental injuries. The defendant’s case should not be bound by the Plaintiff’s decision not to introduce available psychiatric records that pertains directly to the truth of this claim. See Thorne, 1987 WL 7683 at

*2. This Court believes that the Pennsylvania Supreme Court would agree that when a person places their mental condition directly at issue in a civil action as the Plaintiff has done here by claiming mental anguish, suffering, emotional distress, humiliation, and convenience, the psychiatrist-patient privilege is implicitly waived.

While the Plaintiff does not make a claim for psychiatric injury as a result of this accident, Mr. Womack is claiming for mental sufferings associated with the physical injuries he allegedly sustained and his inability to continue in his profession. Evidence of psychiatric treatment before the accident would strongly suggest whether or not the plaintiff's psychological injuries are due to the circumstances prior to or a result of the accident at issue. We share concern with the Plaintiff that while relevant, discovery of treatment records that are not directly related to his emotional response to the incident that is a part of this case, would be extremely prejudicial to the confidentiality upon which the therapist-client relationship greatly depends. However, in the case of Lowe, the court permitted discovery regarding plaintiff's past personal history in order to allow the defendant to "present evidence that other stressful situations in her past personal history have contributed to her emotional distress." Lowe, 101 F.R.D. at 299.

The "interest of the state in seeing that truth is ascertained in legal proceedings and fairness in the adversary process" justifies implied waivers of privilege. Miller v. Colonial Refrigerated Transportation, Inc., 81 F.R.D. 741, 747 (M.D.Pa.1979). Upon balancing these competing interests, this Court holds the position in favor of disclosure. The Plaintiff impliedly waived the statutory privilege by filing this civil lawsuit and deem that the records held by Dr. Kaplan are not privileged. The requested records are relevant to the Plaintiff's cause of action and are therefore discoverable.

4. Other jurisdictions that have ruled on the issue

Mr. Womack waived his privilege even under the laws of other federal jurisdictions. Similar to the federal court decisions cited above, other jurisdictions have decided that privileges created by statute are not absolute. O'Boyle, 150 F.R.D. at 522. These courts have stated that privilege must be balanced against competing interests in "insuring the fairness and integrity of

the judicial system.” Id. The state’s “compelling interest” in revealing the truth in an adversarial process justifies an implied waiver of privilege. Caesar v. Mountanos, 542 F.2d 1064, 1069 (9th Cir.1976) and Premack, 148 F.R.D. at 145, citing Miller, 81 F.R.D. at 747.

In the present case, Mr. Womack’s assertion of privilege and need for confidentiality must be weighed against the countervailing interests of insuring fairness in an adversarial judicial system. In the instant case, there is a compelling need for truth regarding the Plaintiff’s psychiatric history in order to determine whether or not the mental injuries associated with the physical injuries are sufficiently related to the accident at issue. Mr. Womack’s need for confidentiality is superseded by the compelling need for truth. Therefore, he cannot be afforded the privilege in this civil action.

B. Criminal v. Civil Matters

Mr. Womack does not have absolute privilege in a civil matter. Because absolute privilege exists in the criminal context, the Plaintiff proposes that it should be afforded in the civil context as well. This Court does not agree. In a criminal action, absolute confidentiality is virtually the only way to insure that psychological help will be sought. Premack, 148 F.R.D. at 145. On the contrary, in a civil matter, there are many other ways to insure that an individual’s privacy and the truth-seeking function of the courts is sufficiently protected.” Id.

First, in assuming psychiatrist-client privilege, an individual is always free to exclude their mental condition from a complaint. Id. This option was available to Mr. Womack in this case since he could have chosen not to include the emotional claims. Second, even if placed at issue, the privilege is waived only as to the issue “directly related” to the incident at issue in the case. Id. Hence, the Defendant in this case would be limited to observing records that apply directly to the claims made out by Mr. Womack. Third, the recovery for damages will not totally be barred by release of information pertaining to a preexisting condition. Id. In the instant case, the Plaintiff is not precluded from alleging that his mental condition was aggravated by the accident. Therefore, the disclosure of Mr. Womack’s psychiatric records would preclude false allegations that his current mental condition was a cause of the injury. See Id.

For the foregoing reasons, this Court deems Mr. Womack's psychiatric records, as they pertain to the Plaintiff's cause of action, to be discoverable since the privilege according to 42 Pa.C.S.A. § 5944 for communications between a psychiatrist and patient is waived where damages for mental injury are sought. As such, the Plaintiff's Motion for a Protective Order and/or Motion to Quash Subpoena is denied.

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ORDER

AND NOW, this 29th day of June, 2000, upon consideration of the Plaintiff's Motion for a Protective Order and/or Motion to Quash and Defendant's response thereto, IT IS HEREBY **ORDERED** that Plaintiff's Motion is **DENIED**.

It is further Ordered that Dr. Eliot F. Kaplan is to produce the records pertaining to Mr. Womack's psychiatric information within ten (10) days from date of this Order, but not later than **Monday, July 10, 2000**, so that this Court can conduct an *in camera* inspection to determine whether the records are relevant to the Plaintiff's claims in order to guard against the unwarranted disclosure of Plaintiff's psychiatric treatment records.

BY THE COURT:

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE