

STATE OF VERMONT

SUPERIOR COURT
Caledonia Unit

CIVIL DIVISION
Docket No. 42-2-13 Cacv

CAROL KULIGOSKI, individually and on behalf of
MICHAEL KULIGOSKI &
MARK KULIGOSKI &
JAMES KULIGOSKI,
Plaintiffs

v.

EVAN M RAPOZA &
JOHN E. RAPOZA &
ANNE M. RAPOZA &
JOHN A RAPOZA &
CHRISTINE M. RAPOZA,
Defendants

FILED
NOV 10 2014
CALEDONIA COURTS

OPINION AND ORDER RE: PLAINTIFFS' MOTION TO COMPEL DISCOVERY & NON-PARTIES' MOTIONS FOR PROTECTIVE ORDER

The Plaintiffs, Carol Kuligoski et al., move for an order compelling Armand Henault, Steven MacLeod, and Timothy Rowland ("Providers") to give deposition testimony. Non-parties Brattleboro Retreat ("Retreat") and Northeast Kingdom Human Services ("NKHS") oppose the motion on behalf of the named deponents and seek emergency protective orders against discovery. After reviewing the briefs and applicable law, the Plaintiffs' motion is granted and the non-parties' motions are denied.

Procedural History

This is a tort action coming before the Caledonia Superior Court, filed by the Plaintiffs on February 25, 2013, and alleging personal injury as the result of an alleged assault. The Retreat's Motion for an Emergency Protective Order and NKHS's Motion for Protective Order at issue were filed on April 16, 2014. The Plaintiffs opposed both motions on the same day. The Plaintiffs' Motion to Compel Discovery at issue was filed on April 22, 2014.

There is a concurrent tort action by the Plaintiffs against the Retreat and NKHS pending in the Windham Superior Court, Civil Division, Docket No. 47-2-14 Wmcv. A motion to quash has been filed in that case.

A hearing on the motions was held on October 9, 2014, in the Caledonia Superior Court, Judge Harold E. Eaton, Jr. presiding. The Plaintiffs were represented by Richard T. Cassidy, Esq. Defendants Evan Rapoza, John A. Rapoza, and Christine M. Rapoza were represented by Kevin

A. Lumpkin, Esq. Defendants John E. Rapoza and Anne M. Rapoza were represented by Kaveh S. Shahi, Esq. The Retreat was represented by Joe Wonderly, Esq. NKHS was represented by Stephen J. Soule, Esq.

Discussion

The primary issue before the court is whether there are grounds for preventing the Plaintiffs from deposing Armand Henault, Steven MacLeod, and Timothy Rowland, healthcare providers employed by the Retreat and NKHS. Because the legal arguments apply to both, the court treats the non-parties the same for the purposes of this motion.

Both the Retreat and NKHS assert that they cannot comply with the discovery orders because of the patient privilege and privacy rules as they exist under Vermont law and the Health Insurance Portability and Accountability Act under federal law. The court addresses each principle in turn.

Patient privilege under Vermont law

The Retreat and NKHS assert that even if depositions were allowed, the Providers would be prevented from disclosing information regarding their treatment of Evan Rapoza because such information is protected by the patient privilege under Vermont law. The court concludes that the patient privilege is unavailing in this case.

Vermont Rules of Evidence 503

The patient privilege is recognized in Vermont. Under Vermont Rule of Evidence 503, “[a] patient has a privilege to refuse to disclose and to prevent any other person . . . from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, dental, or emotional condition.” V.R.E. 503(b). A “patient” is defined as “a person who consults or is examined or interviewed by a . . . mental health professional,” while a “mental health professional” is defined as a “qualified person designated by the Commissioner of Mental Health and Mental Retardation or a physician, psychologist, social worker, or nurse with professional training . . . in the treatment of mental illness.” V.R.E. 503(a)(1), (5).

The Plaintiffs do not dispute that the patient privilege would ordinarily apply to communications between the Providers and Evan Rapoza. However, the Plaintiffs assert that the privilege is waived because the Defendants, including Evan Rapoza, raised Evan Rapoza’s mental health as an element of their defense. Under Rule 503, there is no privilege where the patient “relies upon the [mental health] condition as an element of his claim or defense.” V.R.E. 503(d)(3).

Here, Evan Rapoza and his parents, collectively as the Defendants, raised Evan’s mental health as an element of his defense to the tort action. In the Defendants’ Answer in this case, filed on April 22, 2013, the Defendants raised Evan’s mental health in paragraphs 19, 37, 40, and 41 as a defense to the alleged torts. This is a situation similar to *In re C.I.*, where the Vermont Supreme Court held that the Rule 503(d)(3) waiver applied to a juvenile who opposed a CHINS petition because “the physical, mental and emotional well-being of [the juvenile] were very much at issue,” because the “impact of the home environment . . . lies at the heart of any CHINS

proceeding.” *In re C.I.*, 155 Vt. 52, 59 (1990). In this case, Evan himself, through counsel, placed his mental health at issue by relying on it as a defense in the Defendants’ Answer. Evan’s mental health will likely be central to the dispute because the act in question—the alleged assault—is admitted. Accordingly, the patient privilege as between the Providers and Evan Rapoza has been effectively waived under Rule 503(d)(3).

Because the privilege has been waived by the patient, it cannot be raised independently by the Providers. The privilege is personal to the patient: it “may be claimed by the patient, his guardian or conservator, or the personal representative of the deceased patient.” V.R.E. 503(c). Although it can be invoked on his behalf by healthcare providers, it cannot be asserted independently; that is, once waived by the patient, the privilege does not continue to exist for the provider. V.R.E. 503(c); see *State v. Chenette*, 151 Vt. 237, 247-48 (1989) (“Once it is clear that [the provider] does not speak for the patient, his power to invoke the privilege ceases.”).

Notwithstanding, the Retreat and NKHS argue that Evan Rapoza lacks the capacity to waive the privilege. However, the Retreat and NKHS offer no evidence in support of this contention other than the fact that, by stipulation, the parties agreed not to take his deposition because of his agitation. This is insufficient to contest the patient’s *legal* capacity to waive the privilege. It is undisputed that Pietro Lynn, Esq. represented Evan at the time the Defendants’ answer was filed, and that he was acting on Evan’s behalf.

12 V.S.A. § 1612

To the extent the patient privilege is also supported by state statutory law, the outcome in this case is no different. Under 12 V.S.A. § 1612, “[u]nless the patient waives the privilege . . . a mental health professional as defined in 18 V.S.A. § 7101(13) shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity.” 12 V.S.A. § 1612(a).

In the court’s view, § 1612 is coextensive with Rule 503(b). See V.R.E. 503, Reporter’s Notes. As the Vermont Supreme Court noted in *State v. Wright*, Rule 503, “promulgated in 1983, generally supersedes the 1974 statute.” *State v. Wright*, 154 Vt. 512, 522 n.10 (1989). Here, there is a waiver by the patient that expressly satisfies Rule 503(d)(3). It would be illogical to conclude that the same conduct—here, raising mental health as a defense—waives the privilege under the Rules but not under the statute.

Regardless, it is clear from the Court’s holding in *Mattinson v. Poulen* that putting mental health at issue as an element of a claim or defense waives the privilege under § 1612. *Mattinson v. Poulen*, 134 Vt. 158, 161 (1976). Indeed, the privilege is waived as to “the discovery of matters causally or historically related to the patient-plaintiff’s health put in issue.” *Id.* at 163. Accordingly, the patient privilege is not a bar to discovery in this case.

Doctor-patient confidentiality

The Retreat and NKHS also assert that privacy rules under state law and the federal HIPAA preclude disclosure. Because the court grants the Plaintiffs’ motion to compel, the Retreat and NKHS’s objection is moot.

HIPAA

The general rule under HIPAA is that a covered entity may not disclose protected health information. 45 C.F.R. § 164.502. However, HIPAA also provides that a covered entity will not be in violation of the privacy rules if it discloses protected health information “[i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order.” 45 C.F.R. § 164.512(e)(1)(i). Responding to a court order does not require the patient’s authorization. 45 C.F.R. § 164.512.

Because the court concludes that the patient privilege with respect to Evan Rapoza’s mental health treatment has been waived, the court is ordering that the named providers comply with the subpoenas and give deposition testimony regarding their treatment of the patient. Because HIPAA would not be violated by a disclosure of this sort pursuant to court order, HIPAA is not a bar to compliance with the subpoenas.

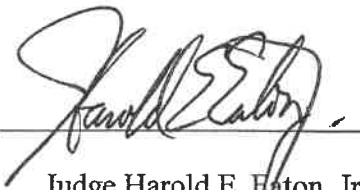
Vermont law

The result is no different under state statutory law. 18 V.S.A. § 7103 provides that all records “directly or indirectly identifying a patient or former patient or an individual whose hospitalization or care has been sought or provided under [Vermont mental health law], together with clinical information relating to such persons shall be kept confidential.” 18 V.S.A. § 7103(a). However, the same statute provides an exception, that the information may be disclosed “as a court may direct upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make disclosure would be contrary to the public interest.” 18 V.S.A. § 7103(a)(3). Evan Rapoza, as a defendant in this action, has raised his mental health as a defense to the Plaintiffs’ tort claim. Inquiry into Evan Rapoza’s mental health is necessary for proper resolution of this case. As with HIPAA above, the court’s order in this case obviates the privacy rule.

Order

The Plaintiffs’ Motion to Compel is GRANTED and the non-parties’ Motions for Protective Orders are DENIED. The Retreat, NKHS, and the named Providers are ordered to comply with the Plaintiffs’ subpoenas with respect to Evan Rapoza’s mental health treatment history and protected health information. Depositions and disclosures are to occur forthwith.

Dated this 5 day of November, 2014.



Judge Harold E. Eaton, Jr.
Caledonia Superior Court