

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 1971

EDGEWATER SERVICES, INC. and)
LUCINDA DOSHER,)
)
Plaintiffs)
)
v.)
)
EPIC LOGISTICS, INC., DON and)
BARBARA SHERRILL, and)
JOLIE ANN OSGOOD,)
)
Defendants)
)
_____)

ORDER

THIS CAUSE, designated a complex business and exceptional case and assigned to the undersigned Special Superior Court Judge for Complex Business Cases by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts, came to be heard upon the motion of the Plaintiffs to compel (the "Motion") Defendant Jolie Anne Osgood ("Osgood"), pursuant to North Carolina Rule of Civil Procedure ("Rule(s)") 37; and

THE COURT; having considered the arguments, motion, and other submissions of counsel and appropriate matters of record; CONCLUDES:

A.

BACKGROUND

1. Plaintiffs filed the Motion on September 19, 2006, seeking to compel Osgood to respond to Interrogatory No. 20 ("Interrogatory No. 20") and Request for Production of Documents No. 2 ("Request for Production No. 2") of Plaintiffs' First Set of

Interrogatories and Request for Production of Documents, and to respond to certain deposition questions (the “Deposition Questions”). The court heard argument on the Motion, via telephone, first on October 17, 2006, and then again on March 20, 2007. Osgood did not file a response to the Motion.

2. Plaintiffs contend that the information sought by Interrogatory No. 20 and the Deposition Questions is relevant to the issue of Osgood’s credibility. Supporting this contention, Plaintiffs’ counsel offers a certain nine (9) pages of Osgood’s psychiatric records which he possesses and provided to Osgood’s counsel and the court, per its request, on October 17, 2006 (the “Pages”). Neither Osgood nor Plaintiffs have offered more than speculation as to how the Pages came to enter the chain of custody leading to Plaintiffs’ counsel. There has been no allegation of bad faith.

3. Having heard the first arguments of counsel, and having reviewed the Motion and the Pages, the court concluded that it could not determine the merits of the Motion without first reviewing Osgood’s psychiatric records (the “Records”) *in camera* and, therefore, on January 26, 2007, ordered that Osgood produce the Records for such *in camera* review. Osgood complied.

B.

PLAINTIFFS’ INTERROGATORY NO. 20

1. Interrogatory No. 20 states:

Identify whether or not you have been diagnosed with any psychological disorders, such as Bipolar Disorder, Borderline Personality Disorder, Dysthymia, and or [sic] Panic Disorder, and if so, identify the name, phone number and address of the diagnosing and/or treating physician.

2. Osgood objected to Interrogatory No. 20, contending that it seeks information that is physician-patient privileged and/or irrelevant, and is therefore not discoverable.

3. Communications between a psychologist and client or patient are subject to a qualified statutory privilege. North Carolina General Statute Section 8-53.3 (the “Psychologist-Patient Privilege Statute” creating the “Psychologist-Patient Privilege”) provides in pertinent part that:

No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice.

N.C. Gen. Stat. § 8-53.3 (2007).

4. The Psychologist-Patient Privilege Statute is to be read *in pari materia* with North Carolina General Statute Section 8-53 (the “Physician-Patient Privilege Statute” creating the “Physician-Patient Privilege”). *In re Albermarle Mental Health Center*, 42 N.C. App. 292, 299-300, 256 S.E.2d 818, 823 (1979).

5. The Psychologist-Patient Privilege Statute “extends, not only to information orally communicated by the patient, but to knowledge obtained by the [psychologist] through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe.” *In re Farrow*, 41 N.C. App. 680, 682, 255 S.E.2d 777, 779 (1979) (interpreting prior, analogous enactment of the Physician-Patient Privilege Statute) (*quoting Smith v. Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717, 718 (1908)). Accordingly, it seems that the Psychologist-Patient Privilege Statute may serve to protect diagnoses such as those solicited by Interrogatory No. 20.

6. The Psychologist-Patient Privilege Statute, however, is to be strictly construed. *Sims v. Insurance Company*, 257 N.C. 32, 37, 125 S.E.2d 326, 330 (1962) (interpreting a

prior, analogous enactment of the Physician-Patient Privilege Statute). Accordingly, the Psychologist-Patient Privilege should not be extended beyond the plain text of the statute. *Id.* The Psychologist-Patient Privilege belongs only to the patient, who must object to the disclosure of information he or she contends is protected and who bears the burden of establishing the existence of such privilege. *Adams v. Lovette*, 105 N.C. App. 23, 28-29, 411 S.E.2d 620, 624, *aff'd*, 332 N.C. 659, 422 S.E.2d 575 (1992) (per curiam). A patient may expressly or impliedly waive his or her Psychologist-Patient Privilege during discovery or at trial. *Id.* What constitutes waiver is “determined largely by the facts and circumstances of the particular case on trial.” *Capps v. Lynch*, 253 N.C. 18, 23, 116 S.E.2d 137, 141 (1960) (interpreting a prior, analogous enactment of the Physician-Patient Privilege Statute).

7. Based upon representations of counsel and examination of the Records, it appears that Osgood’s Records and psychological condition have been the subject of, or have been utilized in, previous civil or criminal litigation and/or other proceedings involving the State. Certain documents within the Records purport to be letters regarding Osgood’s condition and care sent to professionally-unidentified third-parties. Furthermore, on their face, the Pages and other certain portions of the Records appear to document evaluations to which the Psychologist-Patient Privilege may be inapplicable. *See State v. East*, 345 N.C. 535, 545, 481 S.E.2d 652, 659-660 (1997) (analyzing a defendant’s claim of the Psychologist-Patient Privilege, stating “that no physician-patient privilege is created between a physician and a criminal defendant who is examined in order to determine whether the defendant is able to stand trial,” and analogizing that situation to one “where

the psychologist was appointed by the trial court at the request of defense counsel for the purpose of evaluating the defendant's mental status, as opposed to treating him.")

8. The court has been provided no basis on which to determine that, throughout such prior proceedings and disclosures, Osgood has preserved her Psychologist-Patient Privilege. Except for counsel's objections to certain discovery in this action, no showing has been made of Osgood's efforts, attempts, or desire to preserve her Psychologist-Patient Privilege. *Cf. Neese v. Neese*, 1 N.C. App. 426, 428 (1968) (interpreting a prior, analogous enactment of the Physician-Patient Privilege Statute to allow a patient to provide an affidavit as to her treating physicians and certain basic parameters of her care without waiving her Physician-Patient Privilege). Similarly, no showing has been made to establish that the Psychologist-Patient Privilege was ever in fact applicable to the evaluations documented by the Records. Accordingly, the court is forced to conclude that Osgood has not met her burden of establishing the existence of the Psychologist-Patient Privilege regarding the information solicited by Interrogatory No. 20.

9. The court is unable to conclude that Interrogatory No. 20 neither seeks admissible evidence nor will lead to the discovery of admissible evidence relevant to Osgood's credibility. *Cf. N.C.R.Civ.P. 26(b)(1)* ("[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence"); *and State v. Adams*, 103 N.C. App. 158, 161, 404 S.E.2d 708, 710 (1991) (medical records regarding mental and emotional condition properly excluded when found to reveal no evidence bearing on the witness's credibility).

10. Accordingly, the Plaintiff's Motion to Compel is GRANTED to the extent it seeks to compel Osgood to answer Interrogatory No. 20. Such discovery shall be treated as "CONFIDENTIAL INFORMATION" in accordance with the Consent Protective Order entered in this action on October 27, 2005, except that such discovery shall be subject to review only by the counsel of record for the parties to this action (*i.e.* "attorneys' eyes only").

11. This ruling is without prejudice to Osgood's rights to object to admission of any information solicited by Interrogatory No. 20 as evidence in this action.

C.

REQUEST FOR PRODUCTION NO. 2

1. Plaintiffs' Request for Production No. 2 states:

Produce all documents identified in, or used in the preparation of, your responses to Plaintiffs' First Set of Interrogatories.

2. Osgood objected to Request for Production No. 2 as it pertains to Interrogatory No. 20 on a variety of grounds. By inference, through her objection to Interrogatory No. 20, Osgood again raised the Psychologist-Patient Privilege as a bar to such production. She also contends that Request for Production No. 2 seeks privileged attorney-client communications and/or attorney work product, and that it exceeds the scope of discovery under Rule 26.

3. The Physician-Patient Privilege Statute provides in part that "[c]onfidential information obtained in medical records shall be furnished only on the authorization of the patient" Accordingly, read *in pari materia*, the Psychologist-Patient Privilege may extend to a patient's psychological records.

4. As concluded herein, however, Osgood has not met her burden of proving that any document she may need to produce in response to Request for Production No. 2 in support of her answer to Interrogatory No. 20 is protected by the Psychologist-Patient Privilege. Also, the court is unable to conclude that such document will not lead to the discovery of admissible evidence relevant to Osgood's credibility. Furthermore, the court has no grounds on which to conclude that any such document is protected by any other privilege or limitation on discovery.

5. Accordingly, the Plaintiff's Motion to Compel is GRANTED to the extent it seeks to compel Osgood to produce documents relevant to Osgood's answer to Interrogatory No. 20. Such production, if any, however, shall be treated as "CONFIDENTIAL INFORMATION" in accordance with the Consent Protective Order entered in this action on October 27, 2005, except that such production shall be subject to review only by the counsel of record for the parties to this action (*i.e.* "attorneys' eyes only").

6. This ruling is without prejudice to Osgood's rights to object to admission of any document produced as evidence in this action.

D.

THE DEPOSITION QUESTIONS

1. At the November 3, 2005 Deposition of Osgood (the "Deposition"), Osgood's attorney ("Counsel") objected to the Deposition Questions as asked by Plaintiffs' counsel, and instructed Osgood to not answer. Found between line 20 of page 156 and line 16 of page 157 of the transcript of that Deposition, the Deposition Questions and objections are as follows:

Q: Have you ever had a psychological examination?

Counsel: Objection. Instruct my client not to answer the question.

Q: Have you had psychological evaluation that had made a determination as to your ability to distinguish reality from fiction?

Counsel: Objection. Do not answer the question.

Q: Have you and your husband, Jack Osgood, ever both been ordered to have psychiatric evaluations?

Counsel: Objection. Do not answer the question.

Q: Do you know whether your psychiatric evaluation you've had, if you have had any, have been utilized in court regarding custody issues?

Counsel: Objection. Do not answer the question.

Q: Have you ever undergone psychiatric treatment in the past ten years?

Counsel: Objection. Do not answer the question.

Q: Have you been diagnosed with a substance abuse problem in the last ten years?

Counsel: Objection. Do not answer the question.

2. Pursuant to the court's rulings herein, Counsel has not demonstrated a basis for sustaining the objections to the Deposition Questions, or to similar questions, on grounds of the Psychologist-Patient Privilege. Accordingly, Plaintiffs' Motion to Compel is GRANTED, to the extent it seeks to have Osgood answer the Deposition Questions.

3. Further deposition of Osgood on such subjects shall only be attended by counsel of record for the parties in this action and, unless otherwise ordered by the court, the relevant portions of the transcript of any such deposition shall be treated as "CONFIDENTIAL INFORMATION" in accordance with the Consent Protective Order entered in this action on October 27, 2005, except that such transcripts or portions thereof shall be subject to review only by the counsel of record for the parties to this action (*i.e.* "attorneys' eyes only").

4. This ruling is without prejudice to Osgood's right to object to admission of such deposition testimony as evidence in this action.

E.

CONCLUSION

1. Plaintiffs' Motion to Compel is GRANTED as allowed herein.
2. Except as explicitly granted herein, Plaintiffs' Motion to Compel is DENIED.

SO ORDERED, this the 24th day of May, 2007.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases