[Cite as *Dauterman v. Toledo Hosp.*, 2011-Ohio-148.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Paul E. Dauterman

Appellee

v.

Toledo Hospital, et al.

Appellant

Court of Appeals No. L-10-1167

Trial Court No. CI09-7328

DECISION AND JUDGMENT

Decided: January 14, 2011

* * * * *

Robert A. Bunda, for appellee.

Gerald R. Kowalski and Meredith L. Mercurio, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, The Toledo Hospital, appeals the May 25, 2010 judgment of the Lucas County Court of Common Pleas which granted plaintiff-appellee Paul E. Dauterman's motion to compel a discovery response. Because we find that the information requested was neither privileged nor confidential, we affirm the trial court's judgment.

{¶ 2} Appellee commenced this medical malpractice action on October 5, 2009, alleging the failure to assess the risk of, and adequately care for, a pressure ulcer that developed when appellee was a patient at The Toledo Hospital. On the same date, appellee served appellant with his first set of interrogatories. Relevant to this appeal, appellee requested the following:

{¶ 3} "Interrogatory No. 7: Identify all patients who were assigned to Room 676, Bed #2 in Defendant Hospital between November 19, 2008 and November 23, 2008, including name, last known address and telephone number."

{¶ 4} Appellant objected to this request stating that "privacy laws prohibit defendant from providing the confidential information sought * * *." The parties unsuccessfully attempted to resolve the dispute. Thereafter, appellee filed a motion to compel. In his motion, appellee argued that a patient in his room alerted his daughter to the "lack of care" appellee was receiving and the "reddened area" on his buttocks. The patient identified himself as "Mr. Archer" but appellee had not been able to locate him. Appellee stated that he needed Archer's contact information in order to question him about his observations of appellee's care. Appellee claimed that he was not requesting any confidential medical information.

{¶ 5} On March 1, 2010, appellant filed a memorandum in opposition. Appellant argued that names and contact information of non-party patients are both privileged and confidential. Specifically, appellant stated that R.C. 2317.02(B)(1), the physician-patient

privilege statute, and the Health Insurance Portability and Accountability Act ("HIPAA") barred the information from discovery.

{¶ 6} On May 25, 2010, the trial court granted appellee's motion to compel a response to Interrogatory No. 7. The court concluded that the disclosure of only the contact information of nonparties was not privileged or confidential. This interlocutory appeal followed.

{¶ 7} Appellant now raises the following assignment of error for our consideration:

{¶ 8} "Assignment of Error No. 1: The trial court erred when it ordered appellant The Toledo Hospital to disclose the names, addresses, and phone numbers of patients who shared a room with appellee during his hospitalization."

{¶ 9} We must first determine the appropriate standard of review. Appellant argues that a review of a discovery order involving a claim of confidentiality is to be reviewed de novo. Appellee asserts that an abuse of discretion standard is used on review of such a ruling.

{¶ 10} Upon review, we agree that a de novo standard is appropriate under the present facts. Generally, an abuse of discretion standard is used to review discovery rulings. However, the determination of whether the subject of a discovery dispute is confidential and privileged involves an interpretation of law and is reviewed de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13; *May v. N. Health Facilities, Inc.*, 11th Dist. No. 2008-P-0054, 2009-Ohio-1442, ¶ 7.

{¶ 11} Turning to the merits of the appeal, appellant contends that the trial court erred when it ordered it to disclose the names, addresses and telephone numbers of appellant's roommates during his hospitalization. Appellant argues that both R.C. 2317.02(B)(1) and HIPAA preclude discovery.

{¶ 12} Generally, Civ.R. 26(B)(1) permits discovery of "any matter, not privileged, which is relevant to the subject matter involved * * *." R.C. 2317.02(B)(1) sets forth the scope of the physician-patient privilege as follows:

{¶ 13} "The following persons shall not testify in certain respects:

{¶ 14} "A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist'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."

{¶ 15} Appellant relies upon several Ohio cases to support its argument that the information sought by appellee was privileged and confidential. Appellant first cites two cases from this court: *Fairfield Commons Condominium Assn. v. Stasa* (1985), 30 Ohio App.3d 11, and *Walker v. Firelands Community Hosp.*, 6th Dist. No. E-03-009, 2004-Ohio-681. Both are distinguishable.

{¶ 16} In *Stasa*, a permanent injunction was granted against a group that was picketing an abortion clinic. On appeal, appellants, inter alia, challenged the trial court's

grant of a protective order preventing the discovery of patients' and employees' names and addresses. Id. at 15. Upholding the order, this court concluded that the court could have issued the order for a variety of reasons including, as to the patients, the physician-patient privilege. Id. Certainly, the names of individuals who have had abortive procedures are confidential in that, by simply giving the names, the clinic would have divulged confidential, medical information.

{¶ 17} In *Walker*, a class action where the class members had suffered a miscarriage or stillbirth, the appellees agreed that the names of potential class members were confidential (thus, confidentiality was not at issue.) However, they argued that the class members' interest in being apprised of the class out weighed their privacy interests. Id. at ¶ 23. This court concluded that no "countervailing interest" existed to warrant disclosure of the confidential information. Id. at ¶ 24. We determined that the hospital would first need to get consent from the patients prior to releasing their names. Id. at ¶ 25.

{¶ 18} Appellant also cites an Eighth Appellate District case captioned *Stewart v. Cleveland Clinic Found.* (1999), 136 Ohio App.3d 244. In *Stewart*, an informed consent case, the appeal centered on whether summary judgment was appropriate. The court did discuss the fact that the lower court, on privilege grounds, denied appellant's motion to compel the names and addresses and consent forms of approximately 100 individuals making up a cancer clinical trial. Id. at 255. However, this was not an issue on appeal.

{¶ 19} Finally, appellant cites a Michigan Supreme Court case, *Dorris v. Detroit Osteopathic Hosp. Corp.* (Mich.1999), 594 N.W.2d 455, which is factually similar but interprets Michigan's physician-patient statute. In *Dorris*, the plaintiff sued the hospital for administering a drug despite her refusal. The plaintiff desired the name of the patient's roommate who allegedly witnessed the refusal. Id. at 458. The court, strictly construed the physician-patient statute which precluded disclosure of "any information that the person has acquired in attending a patient * * *" as including the patient's name. Id. at 461. The *Dorris* dissent, noted that the statute limits the privilege only to the "information necessary to prescribe for the patient as a physician." The Ohio statute specifically refers to "communications," not, generically, "information".

{¶ 20} Appellant also attempts to distinguish *May v. N. Health Facilities, Inc.*, supra, the case relied upon in the court below. In *May*, the court examined whether an appellant's nursing home roommates' names and addresses were discoverable. The court, interpreting R.C. 2317.02, concluded that the names of the appellants roommates were "not confidential information under statute insomuch as the names and addresses did not concern any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for a patient." Id. at ¶ 18.

{¶ 21} Upon review of the relevant statutory and case law, we must conclude that, under the facts of this case, the trial court did not err when it granted appellee's motion to compel. First, unlike *Stasa* and *Walker*, disclosure of the requested information, ipso facto, reveals nothing, other than the fact that the individuals were hospitalized, regarding

their medical conditions. Appellee was hospitalized on a general surgery floor where individuals had varying medical conditions. Next, appellee had a specific, non-medical reason for desiring the information. Appellee alleges that his roommate first became aware of and alerted a family member to appellee's condition. Finally, we agree with the trial court that the reasoning in *May* is persuasive.

{¶ 22} As to the claim that disclosure of the requested material violates HIPAA, appellant acknowledges that Ohio courts have determined that "Ohio statutes are more stringent." We agree. The court in *May*, supra, also addressed HIPAA's application and determined that R.C. 2317.02 is more restrictive in that HIPAA allows disclosure of '"protected health information in the course of any judicial or administrative proceeding in response to a court order * * * by subpoena, discovery request or by other lawful processes * * *."' Id. at ¶ 12, quoting *Grove v. Northeast Ohio Nephrology Assocs., Inc.* 164 Ohio App.3d 829, 2005-Ohio-6914, ¶ 22. Thus, Ohio law is not preempted by HIPAA. Id.; Section 160.202, Title 45, C.F.R.

{¶ 23} Based on the foregoing, we find that the information sought by appellee was not privileged or confidential and the trial court did not err when it granted appellee's motion to compel. Appellant's assignment of error is not well-taken.

{¶ 24} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE