IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

DEAN COSGROVE and DIANNE PATRICIA COSGROVE,	:	**NO: CV-2015-4557**
Plaintiffs,	:	
v.	:	
EASTON COACH COMPANY and EASTON COACH NUC LLC,	:	
Defendants.	:	

ORDER OF COURT

AND NOW, this 26th day of April, 2016, upon consideration of the Plaintiffs', Dean and Dianne Cosgrove's (collectively "Plaintiffs"), twenty-five Objections to Defendants', Easton Coach Company and Easton Coach NUC LLC's ("Defendants"), proposed subpoenas and its Answer to Defendants' Motion to Strike Objections to Subpoenas with accompanying Memorandum of Law, and Defendants' Motion to Strike Plaintiffs' Objections to Subpoenas ("Motion to Strike Plaintiffs' Objections") and Memorandum of Law in support of thereof, it is hereby **ORDERED** that Defendants' Motion to Strike Plaintiffs' Objections is **GRANTED**, in part, and **DENIED**, in part, as follows:

1. We **GRANT** Defendants' Motion to Strike Plaintiffs' Objections, in part, as to the following proposed subpoenas as submitted by Defendants': Pocono Medical Center (1); DML Laboratories; JMB Construction; World Kitchen; and the Pennsylvania Department of Labor and Industry Unemployment Compensation.

2. We **DENY** Defendants' Motion to Strike Plaintiffs' Objections, in part, as to the following proposed subpoenas as submitted by Defendants': AT&T Mobility; Bank of America; Bill Me Later; Chase; Chase Bank (1); Chase Bank (2); Chase Bank c/o Weltman Weinberg Reis (1); Chase Bank c/o Weltman Weinberg Reis (2); Capital One Bank; Capital One Services c/o Capital Management Services; Chase Student Loans; DML Medical Laboratory c/o Commonwealth Financial Systems; DML Medical Laboratory c/o NCC; Pennstar Bank; Pocono Medical Center (2); Pocono Medical Center c/o Computer Credit, Inc.; Pocono Medical Center c/o Mark L. Nichter, PC; Pocono Medical Center c/o Penn Credit, Sears/Citibank; and Sear Credit Cards.

STATEMENT OF REASONS

I. Factual and Procedural History

Prior to and on August 13, 2013, through October 18, 2013, and after, Defendants had a contract with Sands Casino Resort in Bethlehem, Pennsylvania ("Sands Casino"), whereby Defendants provided shuttle/transportation services to Sands Casino employees. Compl. ¶ 4. During this time period, Dean Cosgrove ("Cosgrove") was an employee of the Sands Casino. Id. On or about August 20, 2013, while traveling on one of Defendants' shuttle buses, Cosgrove avers that the bus hopped a curb, causing the bus to jerk and jolt. Id. at ¶ 5. This jerk and jolt motion threw

Cosgrove up and off of his seat and caused him to land awkwardly and with force back into his seat. Id. Cosgrove was injured, but he maintains that he did not realize the severity of his injury at the time and as a result, did not immediately file an incident report. Id. at ¶¶ 5-6. Cosgrove's symptoms progressed, and on September 4, 2013, Cosgrove reported the incident to Defendants. Id. at ¶ 6. Thus, August 20, 2013, is an estimated date of the actual occurrence, and in the alternative, Cosgrove avers that this incident occurred between August 13, 2013, and September 4, 2013. Id.

Then on October 17, 2013, while in one of Defendants' shuttle buses, Cosgrove stood up after the bus came to a stop and prepared to exit the bus. Id. at ¶ 8. Cosgrove maintains that the bus was driven my Michael Achenbach, the same driver from the August 20, 2013, incident. Id. at ¶¶ 5, 8. Cosgrove avers that after the bus stopped and he was already standing, the bus lurched forward, and Cosgrove was forced back and hit his back on a portion of the bus. Id. at ¶ 8. As a result, Cosgrove's injury from the August 20, 2013, incident was aggravated. Id. Cosgrove reported this incident but pleads that in the alternative, the second bus incident occurred on a day between August 13, 2013, and October 18, 2013. Id.

On July 27, 2015, Plaintiffs filed their Complaint, alleging four counts of negligence. We move to the relevant procedural history. During the course of discovery, Defendants submitted numerous proposed subpoenas to Plaintiffs. Defendants' subpoenas can be categorized into four groups: (1)

Plaintiffs' cellphone records; (2) records from Plaintiffs' previous medical providers; (3) records from Plaintiffs' previous employers; and (4) credit card and financial records. Plaintiffs filed an Objection to those subpoenas on December 2, 2015, and Plaintiffs filed an additional twenty-four Objections to the subpoenas on January 14, 2016. Defendants filed their Motion to Strike Plaintiffs' Objections and an accompanying Memorandum of Law on February 23, 2016. On March 3, 2016, Plaintiffs filed their Answer to Defendants' Motion to Strike Objections to Subpoenas.

This matter was placed on the March 22, 2016, Argument List. The parties presented argument before the undersigned and submitted briefs.

II. Discussion

"Relevant materials in the hands of non-parties to a suit are generally discoverable." Rohm & Haas Co. v. Lin, 992 A.2d 132, 145 (Pa. Super. 2010). The Pennsylvania Rules of Civil Procedure set forth the proper procedure to be used when discoverable documents are in the hands of a non-party. Id. The Rules, in relevant part, provide that

> Any party may serve a request upon . . . a person not a party . . . to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents . . . which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the . . . person upon whom the request or subpoena is served, and may do so one or more times.

Pa.R.C.P. 4009.1. Rule 4003.1 sets forth the scope of discoverable matters: "a party may obtain discovery regarding any matter, not privileged, which is

relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Pa.R.C.P. 4003.1(a). Further, the discovery sought must "appear[] reasonably calculated to lead to the discovery of admissible evidence." Id. at (b).

"The rules of discovery involve a standard that is necessarily broader than the standard used at trial for the admission of evidence." Com. ex rel. Pappert v. TAP Pharm. Prods., Inc., 904 A.2d 986, 994 (Pa. Commw. 2006); see also In re Thompson's Estate, 206 A.2d 21, 28 (Pa. 1965) ("requests for discovery must be considered with liberality as the rule rather than the exception"). The purpose of this broader standard is "to ensure that a party has in its possession all relevant and admissible evidence before the start of trial" and to "avoid surprise and unfairness at trial." Id.

Plaintiffs' first Objection is based on the following grounds: "[i]nvasion of privacy, overbroad and not reasonably calculated to lead to the discovery of admissible evidence. May also contain privileged information regarding other privileges, such as attorney-client privilege." Plaintiffs' subsequent twenty-four Objections are based on similar grounds and are identical to one another but add "fishing expedition" to the litany of the above-mentioned grounds.

To begin, we address Plaintiffs' first Objection, filed on December 2, 2015, which concerns Defendants' proposal to subpoena Cosgrove's AT&T

Mobility records. Defendants argue that Cosgrove's cellphone records are relevant to "evaluat[e] whether and when Plaintiff might have reported any injuries and to whom he reported them, as well as dates he might have been a passenger in one of Defendants' vehicles." Mot. Strike Pls.' Objections ¶ 24. At the Argument Hearing, Defendants reasoned that Cosgrove could have, for example, called his wife or doctor immediately following the alleged incidents, and that those cellphone records would help Defendants to ascertain the exact dates of those incidents. Defendants also recognized that the cellphone records would not provide the content of any phone calls or the global positioning system coordinates but rather, would provide time-stamped records of incoming and outgoing calls.

Although we use a broad standard when considering discovery requests, this Court is unpersuaded by Defendants' argument. If, for example, Cosgrove admitted that directly following one of the incidents, he called a particular doctor, perhaps Defendants' subpoena would seem less attenuated. However, there is no such averment in this case, and Cosgrove denies using his phone immediately following either incident. Pls.' Answer to Defs' Mot. ¶ 1. We are unconvinced that combing through months of Cosgrove's cellphone records is reasonably calculated. Thus, we deny Defendants' Motion to Strike Plaintiffs' Objections as to the subpoena directed to AT&T Mobility.

We next turn to Plaintiffs' Objections to those subpoenas that seek Cosgrove's medical treatment history. Plaintiffs object to Defendants' subpoenas directed to Pocono Medical Center (1) and DML Laboratories. Both of these subpoenas request any documentation pertaining to the medical treatment of Cosgrove, including office notes, reports or other documents prepared by his doctors, radiological reports or films, prescriptions, telephone call messages, correspondence with Cosgrove, psychological and/or psychiatric records, and medical billing records. Further, the subpoenas request all of the above documentation beginning August 1, 2008, until the present. Plaintiffs argue that these medical records are not discoverable, and Plaintiffs are "attempting to compel the Defendants to comply with the Rules of Civil Procedure instead of in bad faith attempting to invade the plaintiff's privacy in hopes of discouraging the Plaintiffs from proceeding with litigation against the Defendants." Pls.' Answer to Defs' Mot. ¶ 26. Plaintiffs do not elaborate as to their allegation that Defendants are acting in bad faith by seeking Cosgrove's medical history.[1]

[1] At the Argument Hearing, Plaintiffs represented that they recognized that Cosgrove's medical records were discoverable but argued that those medical providers must be served subpoenas within the Commonwealth. On review of the subpoenas directed to Pocono Medical Center (1) and DML Laboratories, it appears both of these proposed subpoenas are addressed to Pennsylvania addresses. Therefore, the balance of Plaintiffs' argument is unclear, although we do consider Plaintiffs' jurisdictional argument as it relates to Defendants' other subpoenas below.

The Pennsylvania physician-patient privilege statute provides that a physician must not disclose any information "which he acquired in attending the patient in a processional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient." 42 Pa. Cons. Stat. § 5929 (2016). However, Rule 5929 explicitly provides an exception to this general rule: "except in civil matters brought by such patient, for damages on account of personal injuries." Id. In a interpreting Rule 5929, our Superior Court reasoned that "[b]y filing actions for personal injuries, the plaintiff-patients waive their privilege and, in effect, implicitly consent to disclosures by their physicians concerning matters relating to the plaintiff-patients' medical conditions." Moses v. McWilliams, 549 A.2d 950, 956 (Pa. Super. 1988).

Here, Plaintiffs allege that Cosgrove was injured following two separate incidents on Defendants' shuttle buses. The success of Plaintiffs' cause of action hinges, in part, on Cosgrove's alleged injuries. Plaintiffs' claims are clearly ones rooted in "damages on account of personal injuries," and accepting the plain meaning of Rule 5929, there is no reason that Plaintiffs' medical documentation is barred from discovery. Denying Defendants the chance to review Plaintiffs' medical records would effectively deny Defendants the opportunity to defend themselves. We recognize Plaintiffs' contention that Defendants seek Plaintiffs' medical records in bad faith, but in reviewing Defendants' proposed subpoenas, we can glean no evidence of

this serious accusation. Therefore, we grant Defendants' Motion to Strike Plaintiffs' Objections as it relates to the above-listed, medical-related, subpoenas.

Plaintiffs also object to Defendants' subpoenas directed to Cosgrove's former employers, JMB Construction and World Kitchen, and to the Pennsylvania Department of Labor and Industry Unemployment Compensation. These subpoenas seek information regarding Cosgrove's "employment/personnel files," "applications for unemployment," unemployment "payments made and/or benefits received," and all other employment and unemployment records. Defendants maintain that on review of Cosgrove's previous bankruptcy action, they learned that Cosgrove formerly worked for JMB Construction and World Kitchen and that he received unemployment benefits. Mem. Law Supp. Mot. Strike 6. Further, Defendants argue that Cosgrove's "previous employment and income is relevant and directly related to his loss of future earning capacity claim." Id. Plaintiffs argue that "[w]hether or not the plaintiff received unemployment in the past is something that can simply be asked of the plaintiff and does not justify the issuance of the subpoena in question." Pls.' Answer to Defs' Mot. ¶ 21. Despite Plaintiffs' argument that deposing Cosgrove would alleviate Defendants' justification of these subpoenas, Defendants claim that they already have Plaintiffs' admissions by and through his bankruptcy action and now need the relevant documentation to calculate future earning capacity

and lost wages. Plaintiffs do not respond to the merits of Defendants' argument or provide case law that would preclude discovery of these past employment records.

We agree that Cosgrove's past employment and unemployment history are relevant to calculating Plaintiffs' damages. Accordingly, we find that Defendants' subpoena for Cosgrove's past employment records are reasonably calculated and within the scope of discovery. Thus, we grant Defendants' Motion to Strike Plaintiffs' Objections as to Defendants' subpoenas directed to JMB Construction, World Kitchen, and the Pennsylvania Department of Labor and Industry Unemployment Compensation.

Finally, we turn to Plaintiffs' Objections to Defendants' subpoenas for credit card and financial records.[2] Defendants cite to two cases—Sofia v. Cicala and In re Estate of Griggs—to support their subpoenas for Cosgrove's financial records, but on review, we find that these cases, which are both from other Pennsylvania trial courts, are not dispositive. In Sofia, a Monroe County case, the Court's entire analysis on the present issue is stated as follows: "Defendant contends that the credit card statements are relevant to

[2] Among this category of subpoenas, Plaintiffs object to those that seek Cosgrove's financial and/or credit records. This category of subpoenas includes subpoenas directed to: Bank of America, Bill Me Later, Chase, Chase Bank (1), Chase Bank (2), Chase Bank c/o Weltman Weinberg Reis (1), Chase Bank c/o Weltman Weinberg Reis (2), Capital One Bank, Capital One Services c/o Capital Management Services, Chase Student Loans, DML Medical Laboratory c/o Commonwealth Financial Systems, DML Medical Laboratory c/o NCC, Pennstar Bank, Pocono Medical Center (2), Pocono Medical Center c/o Computer Credit, Inc., Pocono Medical Center c/o Mark L. Nichter, PC, Pocono Medical Center c/o Penn Credit, Sears/Citibank, and Sear Credit Cards. When we refer to the subpoenas directed to Cosgrove's credit and financial providers, we are referring to the above list in its entirety.

this proceeding 'to substantiate plaintiffs' wage loss claim.' We find defendant's contention valid and plaintiffs shall produce as many of the credit card statements as they possess." No. 199 CIVIL 2008, 2010 WL 2914475 (Pa. Com. Pl. Mar. 17, 2010) (internal citations omitted). Without greater factual analysis, we are not inclined to interpret our sister court's opinion as binding precedent for the present matter. Furthermore, Griggs contains a significantly different set of facts from the ones in the case before us. The Griggs case involved an allegation of undue influence, and the Court held that two subpoenas that were directed to the decedent's credit card providers were not overbroad. Griggs, No. 1510-1958, 2012 Pa. Dist. & Cnty. Dec. LEXIS 125, at *12 (Pa. C.P. July 19, 2012).

Thus, without sufficient case law to direct our decision, we turn to the parties' arguments as to the relevance of the credit card records. Defendants contend that "Plaintiffs' credit card statements and other financial records are relevant and necessary in order for Defendants to fully evaluate and substantiate Plaintiffs' claims for lost wages, loss of future earning capacity, and inability to pursue life's pleasures" and that these financial records "may reveal post-event activities that may contradict [Cosgrove's] claims of disability." Mem. Law Supp. Mot. Strike 5-6. Plaintiffs' argue that Defendants' obtained Cosgrove's financial records through a bankruptcy filing from 2011, two years prior to the alleged incidents, and therefore, many of the subpoenas will target dated and

irrelevant financial records. At the Argument Hearing, Plaintiffs' also articulated that credit card records do not necessarily indicate the information relevant in calculating lost wages, loss of future earning capacity, and the inability to pursue life's pleasures. We agree.

Our analysis is similar to our consideration of Defendants' subpoena directed to AT&T. There is no indication that credit card statements will depict Cosgrove's wages. Further, because we deny Plaintiffs' Motion to Strike Plaintiffs' Objections insofar as Defendants' subpoenas directed to Cosgrove's former employers, it is not as though Defendants' do not have other, more reasonably calculated, channels to discover information regarding Cosgrove's past wages. Moreover, it is unclear how credit card or financial records are relevant to calculating Plaintiffs' alleged loss of life's pleasures. At the Argument Hearing, Defendants' proffered that Cosgrove's credit card and financial records could determine and verify whether Cosgrove suffered a loss of life's pleasures. We understand Defendants' argument and recognize that Cosgrove's credit and financial history could be discoverable under certain circumstances; however, this Court finds that Defendants' arguments are premature. If, for example, Cosgrove was deposed and testified that he used his credit card to pay for certain activities that he is now unable to enjoy, our decision would differ. In addition, the fact that at least some of the credit card and financial documents sought by Defendants may be too remote to be relevant does not help Defendants'

position. Thus, we find that those subpoenas directed to Plaintiffs' credit and financial providers are overly board and not reasonably calculated. Consequently, we must deny Defendants' Motion to Strike Plaintiffs' Objections to the subpoenas directed to Plaintiffs' credit card and financial providers.

We also address Plaintiffs' argument that those subpoenas that are directed to out-of-state corporate offices are unlawful. Plaintiffs' rely on Westerby v. Johns-Manville Corp. and argue that Defendants' "extraterritorial" subpoenas are "illegal." Pls.' Answer to Defs' Mot. ¶ 5. We first note that Westerby considered whether its case at bar must be dismissed and reinstituted in a more appropriate forum. See generally Westerby v. Johns-Manville Corp., 32 Pa. D. & C.3d 163 (Pa. Com. Pl. 1982). Westerby quotes our Supreme Court in Rini v. New York Cent. R. Co., 240 A.2d 372, 374 (Pa. 1968), which states, "neither the plaintiffs nor any of the witnesses reside in or have any connection with Allegheny County, nor are the witnesses within subpoena range of the Court of Common Pleas of Allegheny County." See Westerby, 32 Pa. D. & C.3d at 173. However, and because these courts were not faced with the same issue that we are faced with today, neither Westerby nor Rini explore our subpoena power with any additional detail.

To the contrary, Pennsylvania law contemplates foreign subpoenas and does not disallow them. See 42 Pa. Cons. Stat. § 5335 (2016). Through

Pennsylvania procedural rules, a party can serve a valid subpoena to one in another state. See id. Our state rules allow another state to reissue a trial state's subpoena and effectively eliminate a jurisdictional issue. See id. Defendants must follow the relevant procedural rules in serving their subpoenas, but given Plaintiffs' Objections, Defendants have not yet served any of their subpoenas, making Plaintiffs' argument premature.

BY THE COURT:

/s/ Samuel P. Murray
SAMUEL P. MURRAY, J.