

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: DECEMBER 5, 2018)

WAYNE SMITH and
REBECCA SMITH,
Plaintiffs,

v.

DAVOL INC. and C. R. BARD INC.,
Defendants.

:
:
:
:
:
:
:
:

C.A. No. PC-2008-8307

DECISION

GIBNEY, P.J. Davol Inc. (Davol) and C. R. Bard Inc. (Bard) (collectively Defendants) move to compel Wayne Smith and Rebecca Smith (collectively Plaintiffs) to respond to Davol's first set of interrogatories and Defendants' first set of requests for production of documents. Plaintiffs object to all of Defendants' discovery requests. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

On December 23, 2008, Plaintiffs filed a Complaint alleging Wayne Smith was injured by a defective Composix® Kugel Mesh Patch (Kugel Patch), a medical device designed, manufactured and distributed by Defendants. The Kugel Patch was implanted in Mr. Smith's body to repair a ventral hernia and was thereafter removed upon the advice of his physician. Plaintiffs allege Mr. Smith suffered physical pain and mental anguish, incurred substantial medical bills and loss of earning capacity as a result of the removal of the Kugel Patch.

On October 26, 2017, Davol served each Plaintiff with a set of interrogatories and Defendants served each Plaintiff with a request for production of documents. On December 27, 2017, without supporting legal memoranda, Plaintiffs objected to each of these discovery requests offering a cursory and incomplete list of reasons for their refusal to produce the requested information.

In an April 6, 2018, letter to Plaintiffs' attorney, Defendants stated that these responses were insufficient, both procedurally and substantively. As a procedural matter, Defendants alleged Plaintiffs neglected to sign their interrogatory responses as required by Super. R. Civ. P. 33. Substantively, Defendants argued Plaintiffs' objections were incomplete as Plaintiffs failed to answer any interrogatories or produce any requested documents and offered only a list of objections that ignored many of Defendants' requests. Defendants further asserted that the discovery requests seeking health-related information and damages are relevant to this suit, and Plaintiffs cannot claim a privilege for this information.

After Plaintiffs failed to respond to the letter, Defendants moved to compel Plaintiffs' responses to their discovery requests on June 26, 2018. Defendants ask the Court to enter a thirty day order compelling Plaintiffs to produce these materials and to order Plaintiffs to verify their amended interrogatory responses. Plaintiffs have not objected or otherwise responded to Defendants' motion nor have they provided any discovery materials to date.

II

Standard of Review

Underlying the rules of discovery is the principle "that prior to trial, all data relevant to the pending controversy should be disclosed unless the data is privileged." *Cabral v. Arruda*, 556 A.2d 47, 48 (R.I. 1989) (citing 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2001

at 15 (1970)). Accordingly, trial courts have broad discretion over discovery matters and may sanction recalcitrant litigants. *Martin v. Howard*, 784 A.2d 291, 296 (R.I. 2001) (citing *Colvin v. Lekas*, 731 A.2d 718, 720 (R.I. 1999); Super. R. Civ. P. 37(d)). This discretion extends to motions to compel discovery, which will be disturbed by the Supreme Court only in the event it finds “an abuse of that discretion.” *Colvin*, 731 A.2d at 720 (citing *Corvese v. Medco Containment Servs., Inc.*, 687 A.2d 880, 881 (R.I. 1997)). In reviewing discovery orders, the Supreme Court has adopted a test “to determine relevancy . . . [that examines] ‘whether the material sought is relevant to the subject matter of the suit, not whether it is relevant to the precise issues presented by the pleadings.’” *Cardi v. Med. Homes of R.I., Inc.*, 741 A.2d 278, 279 (R.I. 1999) (quoting *DeCarvalho v. Gonsalves*, 106 R.I. 620, 627, 262 A.2d 630, 634 (1970)). “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Super. R. Civ. P. 26(b)(1).

III

Analysis

In his December 27, 2017 objections, Wayne Smith argues Davol’s first set of interrogatories exceed the scope of Rules 26 and 33 of the Superior Court Rules of Civil Procedure. These interrogatories seek, *inter alia*, Mr. Smith’s medical history as it relates to the hernia repair and the Kugel Patch; support for Plaintiffs’ claims of manufacturing defect, inadequate warning, breach of express or implied warranty, failure to warn, and negligence; Mr. Smith’s employment history; and possible witnesses in the case. Specifically, Wayne Smith argues interrogatory 6 (which inquires into “accidents, injuries, or surgeries that happened . . . prior to the implantation of [the] . . . Kugel Patch”) and interrogatory 7 (which asks Mr. Smith to

identify “medical conditions, congenital defects or conditions, or any other physical or emotional disability” prior to the hernia surgery) seek confidential health information. He further objects to interrogatories 4, 5, 8, 10-18 and 25 on the grounds that responses to such requests would reveal privileged information. These interrogatories seek details regarding the Kugel Patch, such as “whether [it was] inspected or tested,” along with “the amount of all damages [sought] . . . in [the] Complaint.” Mr. Smith argues interrogatories 1, 9, 20, 21 and 24 are overly broad, and he has neither objected nor responded to interrogatories 2, 3, 19, or 23.

Wayne Smith raises similar objections to Defendants’ first set of requests for production of documents. He objects to requests 11, 13, 17, 18, 20 and 35 on the grounds that the requested documents contain confidential health information. These requests seek, *inter alia*, documentation of benefits received by Mr. Smith in payment for his health care treatment, communications with the physician who implanted the Kugel Patch, Mr. Smith’s medical records from the past fifteen years, and documentation of warnings received by Mr. Smith prior to the implantation of the Kugel Patch. He further argues document requests 4, 9, 10, 16, 19, 22, 24-26, 28-34, 38 and 39 (which seek information including statements of “any person . . . who was a witness to any of the facts,” “documents that support . . . damages in [the] case”) seek privileged information and that document requests 37 and 40 are overly broad. Request 37 solicits social media postings or emails by Mr. Smith regarding the Kugel Patch or this action since 2004 and request 40 seeks documentation of Mr. Smith’s lost wages, if he plans to claim them. Mr. Smith fails to provide a response or an objection to requests 1, 3, 5-8, 12, 14, 15, 21, 23, 27, 30 and 36.

Rebecca Smith likewise objects to Davol’s first set of interrogatories on the grounds that they exceed the scope of Rules 26 and 33 of the Superior Court Rules of Civil Procedure. Specifically, Mrs. Smith argues that interrogatory 9 (which requests “additional injuries, losses,

or damages . . . you contend result . . . from Plaintiff Wayne Smith’s use of the [] Kugel Patch”) and interrogatory 10 (“the total amount of damages . . . for which you seek recovery”) involve privileged information. Mrs. Smith provides neither responses nor objections to the remaining eleven out of thirteen interrogatories.

Lastly, Mrs. Smith objects to Defendants’ first set of request [sic] for production of documents. She argues document request 10 (which seeks “support [for her] loss of consortium and/or loss or services claim”) involves privileged information. Mrs. Smith argues requests 2, 4, 6 and 7 are overly broad (which seek “photographs taken . . . of Wayne Smith after May 2006,” “social media entries or postings . . . [of] Wayne Smith’s daily activities,” and “documents in [her] possession . . . related to claims in this lawsuit” or “claimed damages”). Mrs. Smith argues requests 5 (which seeks Rebecca Smith’s statements concerning Defendants, the Kugel Patch, or the physicians who performed the implant or explant of the Kugel Patch) and 10 (which seeks support for her claim of loss of consortium) are privileged work product and opinions of counsel, respectively. Mrs. Smith neither objects nor responds to requests 1, 3, 8 and 9.

A

Confidential Health Care Information

Confidential health care communications are generally exempted from compulsory legal process under Rhode Island law. G.L. 1956 § 5-37.3-6(a). However, this exemption does not apply if a party places his or her physical or mental health in issue. Sec. 5-37.3-6(b)(1); *State v. Boss*, 490 A.2d 34, 36 (R.I. 1985) (holding that under The Health Care Confidentiality Act, the privilege as to confidentiality of medical records no longer applies once a claimant “introduces his physical or mental condition . . . as an element of his claim or defense”).

By filing this suit to recover for Wayne Smith's personal injuries, Plaintiffs have placed his physical and mental condition in issue. Indeed, the Complaint arises from an allegedly defective medical device that caused Mr. Smith "severe abdominal pain" and "severe emotional distress." Thus, the privilege of confidentiality of medical information does not apply to the within Complaint. Accordingly, Plaintiffs must respond to all interrogatories and produce all documents to which they have previously objected on the basis of healthcare confidentiality.

B

Privilege Log

Plaintiffs objected to multiple interrogatories and requests for production of documents on the bases of attorney-client privilege and the work-product doctrine. Defendants respond that Plaintiffs must produce the requested information or must supply a privilege log for information not produced on the basis of privilege or the work-product doctrine.

"A party who withholds discovery materials must provide sufficient information, usually in the form of a privilege log, to enable the other party to evaluate the applicability of protection." *State v. Lead Indus. Ass'n, Inc.*, 64 A.3d 1183, 1197 (R.I. 2013). Under Rule 26(b)(5),

"[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Super. R. Civ. P. 26.

If a party "fails to adequately state the reasons for an objection, he or she may be held to have waived the objections, including those based on privilege." *Lead Indus. Ass'n*, 64 A.3d at 1197. However, courts must avoid "hair-trigger findings of waiver" in cases in which parties do not

provide sufficient support for claims of privilege. (citing 8B Charles A. Wright et al., *Federal Practice and Procedure* § 2213 at 185 (3d ed. 2010)).

Here, Plaintiffs have failed to comply with Super. R. Civ. P. 26(b)(5). They provide no description of the nature of the documents—or interrogatories—for which they claim a privilege, making it impossible for this Court or the Defendants to assess the applicability of the privileges and other protections claimed. *See Lead Industries Ass’n*, 64 A.3d at 1197-98. A finding of waiver is unnecessary now, although Plaintiffs must provide adequate support for their claims in the form of a privilege log within thirty days of this order or risk forfeiting said privileges.

C

Overbreadth

Plaintiffs make additional claims that the information requested by Defendants is either overly broad, beyond the scope of Rule 26, or not reasonably calculated to lead to admissible evidence. Defendants respond that Plaintiffs’ objections are “baseless,” arguing that their requested discovery materials are clearly relevant and within the scope of Rule 26. Defendants also note the remaining requests to which Plaintiffs have neither objected nor replied.

In general, “the Superior Court Rules of Civil Procedure pertaining to discovery . . . are liberal, and are designed to promote broad discovery among parties during the pretrial phase of litigation.” *DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413, 420 (R.I. 2017) (quoting *Henderson v. Newport Cty. Reg’l Young Men’s Christian Ass’n*, 966 A.2d 1242, 1246 (R.I. 2009)). Discoverable evidence includes “information that is relevant and nonprivileged,” and is not limited to evidence admissible at trial. *Cabral*, 556 A.2d at 48; *DeCurtis*, 152 A.3d at 421. “[Q]uestions of relevancy are addressed to the sound discretion of the trial justice,” and are

reviewed only for abuse of discretion. *State v. Barnville*, 445 A.2d 298, 302 (R.I. 1982) (citing *State v. Camerlin*, 116 R.I. 726, 729, 360 A.2d 862, 865 (1976)).

This Court has reviewed Davol's first set of interrogatories and Defendants' first set of requests for production of documents and finds them relevant and within the scope of Super. R. Civ. P. 26. Defendants seek support for allegations in Plaintiffs' Complaint, including Wayne Smith's medical records, the amount of damages sought, and potential witnesses. The Court is unpersuaded by Plaintiffs' general objections of overbreadth and orders Plaintiffs to respond to Defendants' first set of requests for production of documents and Davol's first set of interrogatories. After review, the Court also finds relevant those interrogatories and document requests to which Plaintiffs have neither objected nor responded and orders Plaintiffs to respond to same.

IV

Conclusion

For the reasons stated above, Defendants' Motion to Compel interrogatory responses and production of documents is granted. Plaintiffs must provide Defendants with the requested discovery materials within thirty days and must produce a detailed privilege log within thirty days in support of information for which they claim a privilege. Plaintiffs must verify all interrogatory responses in accordance with Super. R. Civ. P. 33.

Counsel shall present the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Wayne Smith and Rebecca Smith v. Davol Inc. and C. R. Bard Inc.

CASE NO: PC-2008-8307

COURT: Providence Superior Court

DATE DECISION FILED: December 5, 2018

JUSTICE/MAGISTRATE: Gibney, P.J.

ATTORNEYS:

For Plaintiff:	Robert W. Smith, Esq. Ryan C. Hurley, Esq.
For Defendant:	Mark T. Nugent, Esq. Thomas W. Robinson, Esq.