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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2015 FEB -2 PM 3: 11

Tom Hanna, Individually and on behalf of the Estate and Wrongful Death Beneficiaries of Sharon Hanna

PLAINTIFF

vs.

CAUSE NO. 13-C-1137  
Jury Demanded

HCR ManorCare, LLC; HCR ManorCare, Inc.; MC Operations Investments, Inc.; HCRMC Operations, LLC; HCR ManorCare Operations II, LLC; HCR ManorCare Heartland, LLC; Manor Care, Inc.; HCR Healthcare, LLC; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC; Heartland Employment Services, LLC; Joseph Donchatz; John Does 1 Through 10; and Unidentified Entities 1 Through 10 (as to Heartland of Charleston)

DEFENDANTS

**ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND THE COURT'S ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH COURT'S ORDER ON FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION**

This cause came to be heard on December 30, 2014 on Defendants' Motion to Alter or Amend the Court's Order Granting Plaintiff's Motion to Compel Compliance with Court's Order on First Interrogatories and Requests for Production, and after hearing argument by the Parties, the Court having considered the pleadings, arguments of counsel, exhibits, applicable case law, and otherwise being fully advised in the premises hereby finds as follows:

1. Defendants have requested this Court revisit an issue previously determined by this Court both on March 26, 2014 and again on September 4, 2014. Defendants seek to alter or amend the Court's Order that they are to produce "Center Visit

Summary" documents that were created by nurse consultants regarding visits to Heartland of Charleston. Defendants argue that these documents are protected from discovery by the peer review/quality assurance privilege.

2. Defendants again argue that the Court is required to conduct an *in camera* review of the subject documents because they have asserted a "privilege" based on the holding set out in *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W.Va. 37, 43 (W.Va. 2008).
3. The Court in *Kaufman* sets forth a "general procedure" to be followed when addressing privileges in Syllabus Pt. 2. See *id.* at 43.
4. This Court believes that the appropriate standard for determining the application of the peer review/quality assurance privilege includes both the general procedure outlined in *Kaufman* as well as the specific peer review/quality assurance privilege factors as set forth in *State ex rel. Shroades v. Henry*, 187 W.Va. 723 (1992).
5. In *Kaufman*, the privilege asserted by the defendants was that of attorney-client and attorney work product. This "privilege protects the substance of communications [.]" *State ex rel Medical Assurance of West Virginia Inc. v. Recht*, 213 W.Va. 457, 465 (W.Va. 2003). Thus, to determine that attorney-client or work product privilege applies, the substance of the information communicated must be considered to determine whether the communication was made "by an attorney acting in his or her legal capacity for the purpose of advising the client." *State rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 438 (W.Va. 1995).

6. However, if no attorney client relationship ever existed, there would be no need to conduct an *in camera* review of the communications to discover if the substance was "legal advice" from the client's attorney.
7. *Shroades* specifically addresses the peer review/quality assurance privilege and this Court reads the analysis of that case similarly.
8. The Supreme Court of Appeals explained in *Shroades* that in determining whether peer review/quality assurance privilege applies the circuit court "should first determine from whom the material is sought and, then, if necessary the origin of the material." *Shroades*, 187 W.Va. at 728. "Material that originates in a non-review organization does not become privileged after presentation to a review organization." *Id.*
9. Thus, prior to conducting an *in camera* review to identify "the non-privileged parts of a record [that] are discoverable," the Court should determine if there is a review organization that qualifies under W. Va. Code, 30-3C-1. *Id.* at 729.
10. In summary fashion, the evidence before this Court at the September 4, 2014 hearing was that during Sharon Hanna's residency at Heartland of Charleston there were Center Visit Summaries conducted by nurses that were not part of the quality assurance committee. Additionally, these nurses not only provided the Center Visit Summaries to staff at Heartland of Charleston, but also to a supervisor. While Defendants claim to have a quality assurance committee they have not offered any evidence of by-laws or any other support to the Court to establish that such committee is a "review organization" as defined in W. Va. Code, 30-3C-1. See *Shroades*, 187 W.Va. at 728-29.

11. Based on these findings, and those previously set forth by this Court in the November 6, 2014 Order, the Court finds that the "Center Visit Summaries" are being sought from a non-review organization, or in other words, from an original source. Accordingly, the Defendants have not provided evidence to demonstrate their asserted Quality Assessment and Assurance Committee qualifies under W. Va. Code, 30-3C-1 such that an *in camera* review of these documents would be required.

12. The objections and exceptions of any party aggrieved by this order are preserved.

WHEREFORE, Defendants Motion to Alter or Amend the Court's Order Granting Plaintiff's Motion to Compel Compliance with Court's Order on First Interrogatories and Requests for Production is DENIED.

SO ORDERED AND ADJUDGED, this the 2 day of <sup>Feb</sup>~~Jan~~, 2015.

  
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JUDGE JAMES STUCKY

Prepared by:

  
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Deputy Clerk

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED  
2014 SEP 7 AM 11:31  
CATHY S. PATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Tom Hanna, Individually and  
on behalf of the Estate and  
Wrongful Death Beneficiaries  
of Sharon Hanna

PLAINTIFF

vs.

CAUSE NO. 13-C-1137  
Jury Demanded

HCR ManorCare, LLC; HCR  
ManorCare, Inc.; MC Operations  
Investments, Inc.; HCRMC Operations, LLC;  
HCR ManorCare Operations II, LLC;  
HCR ManorCare Heartland, LLC;  
Manor Care, Inc.; HCR Healthcare, LLC;  
HCR Manor Care Services, Inc.; Health  
Care and Retirement Corporation of America, LLC;  
Heartland Employment Services, LLC;  
Joseph Donchatz;  
John Does 1 Through 10; and  
Unidentified Entities 1 Through 10  
(as to Heartland of Charleston)

DEFENDANTS

**ORDER ON PLAINTIFF'S MOTION TO COMPEL  
COMPLIANCE WITH COURT'S ORDER ON FIRST INTERROGATORIES  
AND REQUESTS FOR PRODUCTION**

This matter came before the Court for hearing on September 4, 2014, on Plaintiff's Amended Motion to Compel Compliance with Court's Order on First Interrogatories and Requests for Production to Defendants. The Court, having reviewed the pleadings, heard argument of counsel, and being otherwise fully informed, finds as follows:

**Findings of Facts**

1. This case involves Sharon Hanna's residency at Heartland of Charleston from June 29, 2011, until September 23, 2011. It is alleged by Plaintiff that, due to the substandard care provided during this residency, Sharon Hanna suffered injuries including, but not limited to, falls, fractures,

pneumonia, and ultimately death.

2. Plaintiff has alleged that many of the issues which caused injury to Sharon Hanna are systemic failures that were caused by the way in which the Corporate Defendants operated Heartland of Charleston. Specifically, Plaintiff alleges that these Corporate Defendants intentionally and systematically understaffed and improperly allocated resources to Heartland of Charleston while, at the same time, knowing that such understaffing and improper allocation would likely lead to the injury of residents such as Sharon Hanna.
3. On March 26, 2014, the Court heard Plaintiff's Motion to Compel First Interrogatories and Requests for Production and entered an order dated May 12, 2014. Two issues included in this Court's May 12, 2014 Order covered Plaintiff's First Request for Production Nos. 16 & 26. These specific requests focus on reports received from consultants and others to the nursing home. At the time of the hearing, Defendants had asserted generic objections related to these requests, had not provided any privilege log, and had not submitted any evidence related to a "review organization."
4. This Court's Order provided Defendants thirty (30) days from the hearing date, March 26, 2014, to provide the Ordered supplementation. As to Request No. 26, the Court provided that if the Defendants wanted to assert any quality assurance privilege, Defendants were required to file a

privilege log in the allotted time.<sup>1</sup> There is no similar language as it relates to Request No. 16.

5. Plaintiff's Motion to Compel Compliance was served on the Defendants on May 29, 2014, two (2) months after the earlier hearing and an entire month after this Court Ordered the Defendants to provide all supplements. Plaintiff noticed this motion for hearing on September 4, 2014. The Defendants provided no supplement to First Requests for Production Nos. 16 & 26 until August 27, 2014, some five (5) months after the hearing on this issue.<sup>2</sup>
6. This August 27, 2014 discovery supplement included a privilege log according to the supplemental response. According to the pleadings and argument of Counsel, the privileges asserted included HIPAA, Peer Review, and Quality Assurance.

#### Conclusions of Law

7. As to the HIPAA concern, Plaintiff has stipulated that the names of any other residents should be redacted. Therefore, it is so ordered that any other resident names be redacted.
8. As to the issue of Peer Review/Quality Assurance, the Defendants cite *State ex rel. Shroadas v. Henry*, 187 W. Va. 723 (1992) and indicate that

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<sup>1</sup> The Court recognizes that the Order was not entered until after the deadline for said productions but Plaintiff's Counsel represented to the Court that they provided copies of the proposed order to Defense Counsel on three (3) occasions after the March 26, 2014 hearing. Upon getting no response from Defense Counsel, Plaintiff provided the proposed Order to the Court via letter dated April 25, 2014 and the Court held the Order until May 12, 2014, and, receiving no objections to the Order from the Defendants, the Court entered the Order at that time.

<sup>2</sup> This supplement was provided just eight (8) days prior to this hearing and not within the thirty (30) days provided by the Court for the Ordered supplementations.

they provided the above referenced privilege log. See Defendants' Response to Plaintiff's Motion to Compel Compliance with Court's Order on First Interrogatories and Requests for Production at page 3 – 4.

9. The Supreme Court, in *Shroades*, held "the determination of which materials are privileged under W. Va. Code, 30-3C-3 [1975] *et seq.* is essentially a factual question and the party asserting the privilege has the burden of demonstrating that the privilege applies." See syllabus pt. 2.
10. It is clear to the Court that at an earlier date Plaintiff propounded these requests as part of the discovery process. Defendants asserted in their initial response a quality assurance privilege, citing *Shroades*. However, Defendants did not provide a privilege log at that time. At the March 26, 2014, Defendants, still maintaining this privilege assertion had not filed a privilege log related to the documents now at issue. The Court gave the Defendants at that time thirty (30) days to supplement these responses as well as provide a privilege log as it related to Request No. 26. Two (2) months later, Plaintiff filed the instant Motion to Compel Compliance because no supplementation had been made. It was not until five (5) months after the initial hearing on this matter and eight (8) days before this hearing do the Defendants file a privilege log.
11. Defendants first explain that "Before, frankly, we were arguing quality assurance privileges over documents that we weren't sure existed, and we – at the time, we did not believe they existed." See September 4, 2014 hearing transcript at page 51. The Court has trouble comprehending

how one can assert and argue that a document is protected by the quality assurance privilege when they have never seen it nor do they even believe that it exists.

12. Defendants next explained at the hearing that "Because these aren't things that are kept in somebody's office like that. Most of them were thrown away, or discarded, or stored some place, and so it took us awhile to figure out where they were." See September 4, 2014 hearing transcript at page 55. Defendants also argued that one of the problems of locating these documents was that these documents were on the nurse consultant's computers. *Id.* However, the privilege log provided by the Defendants indicates that the "Document Custodian" is "Health Care and Retirement Corporation of America/Quality Assurance Committee" and the "Document Source" is 333 N. Summit St., Toledo, OH 43604" which, upon information and belief, is the Defendants' corporate headquarters. These positions are not consistent and are a cause of concern for the Court.<sup>3</sup>
13. Defendants argued at the hearing that the reason they did not provide the privilege log sooner or disclose the existence of these "Center Visit Summaries" sooner was because they were unaware that the summaries existed. Further, according to Defendants, it was not until Plaintiff's

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<sup>3</sup> These requests clearly seek reports from consultants to Heartland of Charleston. One would think certainly one would ask the consultants and specifically the nurse consultants for these reports before responding to discovery and coming to a hearing on a Motion to Compel this very issue. According to the record in this matter this was not done by the Defendants, not when this request was filed by Plaintiff, not when this Court initial ordered the production on March 26, 2014, not until Plaintiff's Counsel asked the nurse consultant in a deposition. See September 4, 2014 hearing transcript at page 55.

Counsel asked the Defendants' current employees about these reports that Defense Counsel became aware of these summaries.

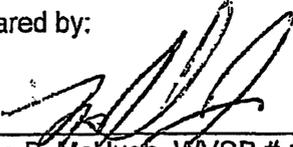
14. Plaintiff provided the depositions of two (2) nurse consultants that indicated that these reports were done as a regular part of their job responsibilities and were not only provided to facility staff but also to their supervisors. These nurse consultants also testified that they were not part of the Heartland of Charleston quality assurance committee.
15. There is no evidence in the record at the time of this Court's ruling to support the application of the Peer Review/Quality Assurance privilege to the specific documents in Request No. 26. Specifically, based on *Shroades*, the Defendants have failed to put forth any evidence that a quality assurance committee existed or that the documents at issue were submitted to any such quality assurance committee.
16. Therefore, the Defendants are Ordered to provide any responsive documents to Plaintiff's First Request for Production Nos. 16 and 26, including the Center Visit Summaries identified by the Defendants.
17. The objections and exceptions of any party aggrieved by this order are preserved.

WHEREFORE this Court finds and holds that Plaintiff's Motion to Compel Compliance with Court's Order on First Interrogatories and Requests for Production to Defendants is hereby GRANTED as set out above. Defendants shall make the Ordered productions and supplementations within 30 days from the date of the hearing of this matter.

SO ORDERED AND ADJUDGED, this the 6 day of <sup>NOV</sup> ~~October~~, 2014.

  
The Honorable Judge James Stucky

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF November 2014  
10  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
*by H. Blank*