



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ZOLOFT LITIGATION

Civil Action No. 14-C-7000

THIS DOCUMENT RELATES TO:

D.B., a minor by and through his mother and next friend, Nina E

Civil Action No. 12-C-164 WNE

ORDER REGARDING DEFENDANTS' MOTION TO COMPEL PRODUCTION OF MEDICAL RECORDS FOR MINOR PLAINTIFF'S FATHER AND BROTHER

The Presiding Judges have reviewed and maturely considered *Defendants' Motion to Compel Production of Medical Records for Minor Plaintiff's Father and Brother* and memorandum of law in support thereof (Transaction IDs 58644100 and 58644448), Plaintiffs' Response (Transaction ID 58714870) and Defendants' Reply (Transaction ID 58748371). Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously find and conclude that:

1. The medical records of the Minor Plaintiff's father and brother are relevant and discoverable, inasmuch as the cause of the Minor Plaintiff's seizures is at issue, and Defendants' expert, Dr. Amy Malphrus, intends to testify "that while the specific cause of epilepsy in most patients is unknown, seizures can have a strong genetic component and that Plaintiffs' family history of seizures is evidence that the Minor Plaintiffs' epilepsy may well be an inherited condition." (Mem., p. 1)
2. Plaintiffs do not argue in their opposition that obtaining the medical records of the Minor Plaintiff's father and brother would implicate any privilege or impose any undue burden on Plaintiffs. (Reply, p. 1)
3. Rule 34(a) provides that, "Any party may serve on any other party" a request for production or inspection of any tangible things "which constitute or contain matters

- within the scope of Rule 26(b) and which are in the possession, custody or control of *the party upon whom the request is served . . .*” W. Va. R. Civ. P. Rule 34(a) (emphasis added).
4. “Discovery under Rule 34(a) is limited generally to parties. That is, ‘[r]equests for production under [Rule] 34 may be served only on parties, not nonparties.’” *Litigation Handbook on West Virginia Rules of Civil Procedure*, Fourth Edition, p. 893 (2012) (citations omitted).
 5. “A subpoena duces tecum is available against third parties in both civil and criminal cases upon an adequate description of the material sought. Furthermore, it is necessary to show that material is relevant to an issue in the case and that its proof is not otherwise practically available.” Syllabus Pt. 4, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).
 6. “Any time a subpoena duces tecum is used to require the production of hospital records as defined in W. Va. Code § 57-5-4a(a)(1981)(Repl. Vol. 1997), whether such records are sought in connection with a hearing, deposition, trial or other proceeding, or are merely sought for inspection and copying, the requirements of W. Va. Code §§ 57-5-4a-4j apply and must be followed.” Syl. Pt. 3, *Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000).

Because the Minor Plaintiff’s father and brother are not parties to this case, Defendants’ motion to compel production of documents from them is procedurally improper under Rule 34(a) and is, therefore, DENIED. Defendants are granted leave to obtain these records by way of appropriate subpoenas duces tecum. Plaintiffs shall provide Defendants with the names of the

relevant healthcare providers who possess the medical records of the Minor Plaintiff's father and brother.

Defendants' motion to compel is the only motion related to fact discovery filed by the parties on or before March 1, 2016. See Court's *Second Case Management Order* (Transaction ID 57813632). If Plaintiffs intend to file a motion to quash Defendants' subpoenas duces tecum, the Court will hear the motion on April 11, 2016, provided the motion is filed and served **no later than April 4, 2016**. Otherwise, the Court will cancel the April 11, 2016, hearing on fact discovery motions.

It is so **ORDERED**.

ENTER: March 29, 2016.

/s/ James P. Mazzone
Lead Presiding Judge
Zoloft Litigation