IN THE SUPREME COURT OF OKLAHOMA

NARCONON OF OKLAHOMA, INC., d/b/a NARCONON ARROWHEAD; and NARCONON INTERNATIONAL, Petitioner, v. THE HONORABLE JAMES D. BLAND, Judge of the District Court of Pittsburg County, Respondent.	Case No.: PR - 110,954

PLAINTIFF'S RESPONSE TO THE PETITIONER'S APPLICAIOTN TO ASSUME ORIGINAL JURISDICTION, FOR *WRIT* OF PROHIBITION AND REQUEST FOR EMERGENCY STAY OF TRIAL COURT'S ORDER FOR SUBPOENA PRODUCTION

In re: *LANDMEIER V. NARCONON OF OKLAHOMA INC d/b/a NARCONON ARROWHEAD AND NARCONON INTERNATIONAL*
PITTSBURG COUNTY DISTRICT COURT CASE NO. CJ-2010-057
THE HON. JAMES D. BLAND, PRESIDING

Respectfully submitted,

Donald E. Smolen, II, OBA # 19944
701 S. Cincinnati Avenue
Tulsa, Oklahoma 74119
(918) 585-2667 P
(918) 585-2669 F
donaldsmolen@ssrok.com
Attorney for Valerie L. Landmeier, Real Party in Interest

August 29, 2012

SUBJECT INDEX

INTRODUCTION

The real party in interest, Valerie L. Landmeier (hereafter, "Plaintiff"), filed the instant lawsuit alleging that Defendant Narconon and employees of the same provided her daughter, Heather, with drugs and alcohol (in exchange for sexual favors) while she was a resident at Defendant's drug rehabilitation center, causing Heather to fall further into the grip of addiction. Thereafter, when it became known that Heather was afflicted with addiction and actively consuming the drugs and alcohol Defendant's staff was providing her, Defendant kicked her out of the program and off of the premises without notifying her family. She, along with the member of Defendant's staff that had been kicked out with her, overdosed on the drugs Narconon staff had provided her only hours later.

SUMMARY OF THE RECORD

The case from which this original jurisdiction proceeding arises involves the negligence of Defendant's drug treatment facility and the injuries to Plaintiff's daughter, Heather Landmeier, caused thereby. *See* Appendix, Ex. C. The original Petition was filed on March 2, 2010, and Defendants (Petitioners herein) entered their appearances by the end of March, 2010. *Id.* Plaintiff served discovery upon Defendants and their responses were served on Plaintiff in September, 2010. *See* Ex. 1 to Plaintiff's *Motion to Compel* (Appx., Ex. A). An agreed protective order was entered on October 7, 2010 to control the sensitive and confidential documents relevant to this case. Appx., Ex. C. After over a year of trying to informally resolve discovery issues, Plaintiff filed a motion to compel on October 17, 2011. *Id.*; *see also* Appx., Ex. A. Through her motion to compel, Plaintiff sought information and documents related to other incidents of employee

misconduct, including incidents of sexual intercourse with residents (which is expressly prohibited by Narconon's "official" policy) and incidents of staff providing alcohol and/or drugs to residents. *See* Motion to Compel, Appx. Ex. A, pp. 11-15, 16-17, and 19-21. Defendants objected claiming the requested information was privileged and confidential pursuant to section 527 of the Public Health Service Act (42 U.S.C. § 290ee-3). *See* Defendants' Response to Plaintiff's Motion to Compel, Appx. Ex. B, p. 3. Eventually, with the assistance of the court and by the agreement of the parties, the discovery at issue was narrowed to three (3) reports of sexual misconduct that the Hon. James D. Bland reviewed *in camera*. *See* Tr. of Hearing on July 26, 2012, Appx. Ex. D, p. 4. The Court first determined that, pursuant to the applicable federal regulations to § 290ee, before disclosure could be made, notice had to be given to the individuals involved in the reports at issue and they had to be given an opportunity to object. *Id.* at p. 7.

The Court directed Defendants to provide the requisite notice to the individuals involved and set the matter for hearing on July 26, 2012. At the hearing, the Court found the individuals had been properly notified and no objections were made. *Id.* at p. 7 ("Everything has been sufficiently briefed. The Court has considered the federal statutes, the law as submitted by the parties. The federal procedure has been followed. Notice has been given. There have been no objections received."). The Court determined that the reports at issue were responsive to Plaintiff's discovery requests and sufficiently relevant to the proceedings to warrant production, subject to the pending protective order. *Id.* at p. 7 ("The Court has considered the competing interest in disclosure versus allowing discovery. And of course we aren't talking about admissibility at trial, we're just talking

about whether access would be allowed subject to a protective order, and having considered all those things made a ruling. So I think we're done.").

Defendant requested a fifteen (15) day stay of the order to disclose the reports to Plaintiff for the sole purpose of requesting emergency relief from this Court. *Id.* at pp. 7-9. The Court granted Defendant 15 days. *Id.* at p. 9 ("I will stay [production] 15 days, if [the Supreme Court] want[s] to stay it further that would be up to them."). Thirteen (13) days later, Defendants filed a Petition for *Writ* of Prohibition, contending "Narconon on it's [*sic*] own standing objects to the production of any student (patient) reports. Such reports are highly personal to both the facility and the people involved, may interfere with the treatment of other students, are privileged from production and any probative value is greatly outweighed by the privacy concerns to all parties." *See* Petition for *Writ* of Prohibition, p. 3.

STANDARD OF REVIEW

Prohibition is an extraordinary writ, and cannot be resorted to when the ordinary and usual remedies provided by law are available; it will only issue where an inferior tribunal does not have jurisdiction or assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force. *Jeter v. District Court of Tulsa County*, 206 P. 831, 832 (Okla. 1922). "On application for prohibition the only inquiries permitted are whether the inferior court is exercising a judicial power not granted by law, or is attempting to make an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by it." *Id.*, quoting *Hirsh, et al. v. Twyford, et al.*, 139 P. 313 (Okla 1913); *see also Farmer v. Sanford*, 1960 OK CR 55 ("On application for writ of prohibition the only inquiry which

will be entertained is as to the jurisdiction of the court against which relief is invoked."). This Court will not investigate the merits of the cause before the inferior court. *Id. Writs* of Prohibition are thus truly extraordinary, in that they cannot issue but for in instances where a trial court exceeds the bounds of its jurisdiction.

Proposition 1: Disclosure of Defendants' records is within the trial court's jurisdiction.

The Oklahoma Discovery Code provides the trial court the authority to make all necessary and just rulings regarding discovery matters. *See, e.g.,* 12 O.S. §§ 3226, 3237(A). Moreover, with respect to documents that are claimed to be protected under 42 U.S.C. § 290ee, the trial court is authorized to order disclosure upon a determination of good cause:

> (a) *Disclosure authorization.*
>
> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall...be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under section (b) of this section.
>
> (b) *Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent*
>
> * * *
>
> (2) Whether or not the patient...gives his written consent, the content of such record may be disclosed as follows:
>
> * * *
>
> (C) **If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor.**

42 U.S.C. § 290ee-3(b)(2)(C) (emphasis added).

In determining good cause, the court is to weigh the public interest and the need for disclosure against injury ***to the patient, to the physician-patient relationship, and to the treatment services***. *Id.* (emphasis added). Moreover, the court is required to impose appropriate safeguards to protect against unauthorized disclosure. *Id.*

Here, the threat of injury to the patient is *de minimus* as the affected individuals have been provided notice and an opportunity to object and have not done so. The threat of injury to the physician-patient relationship and treatment services is similarly minimal because the controlling protective order prohibits Plaintiff from disseminating the information beyond what is required for the purposes of litigation. On the other hand, Plaintiff's need for the information is considerable. Plaintiff is alleging that Defendants' employees supplied her daughter with drugs and alcohol in exchange for sex while she was in a drug and alcohol rehabilitation facility. Plaintiff is further alleging that Defendants knew or had reason to know that such activities had been occurring at their facility. Moreover, incidents of sexual misconduct between students and residents, which is expressly prohibited by Narconon policy, could prove a pattern and/or practice of Defendant's disregard of its own policy and demonstrate a practice of generally tolerating neglectful or abusive behavior. Judge Bland, cognizant of the federal standard for good cause under § 290ee, reviewed the documents at issue *in camera* and determined disclosure was warranted. Defendant's claim that the trial court is without jurisdiction to order disclosure is without merit.[1]

---

[1] Defendant sets forth the applicable procedure to follow in disclosing confidential records under § 290ee. *See* Defendant's Petition for *Writ of Prohibition*, p. 5-6 (citing 42 C.F.R. § 2.64). However, Defendant does not suggest or set forth any place in the record

Proposition 2: Defendant's reliance on 10 O.S. § 7005 – 1.2 is misplaced.

Defendant cites 10 O.S. § 7005 – 1.2, which was renumbered as 10A O.S. § 1-6-102 on May 21, 2009, of the Oklahoma Children's Code in support of its contention that "such records" are "confidential and shall only be disclosed by a court upon a showing of a 'compelling reason' necessary for the protection of a public or private interest." Defendants' Petition for *Writ* of Prohibition, p. 6. Defendant has not raised the age of the individuals involved as an issue heretofore in this litigation and should not be permitted to argue now for the first time that the Oklahoma Children's Code applies to this litigation. Moreover, § 1-6-102 provides that disclosure may be as provided by federal law pertaining to drug or alcohol treatment records. 10A O.S. 1-6-102(C). Defendant is simply attempting to raise the standard of "good cause" beyond that provided by § 290ee-3(b)(2)(C).

Proposition 3: The Oklahoma Discovery Code allows disclosure in this case.

As set forth above, the Oklahoma Discovery Code provides the trial court the authority to make all necessary and just rulings regarding discovery matters. *See, e.g.*, 12 O.S. §§ 3226, 3237(A). Nonetheless, Defendant contends that the Physician-Patient Privilege of 12 O.S. § 2503 somehow divests the trial court of its authority to authorize disclosure of the records at issue. *See* Defendant's Petition, p. 6-7. First, Plaintiff is not seeking patient treatment records, Plaintiff is seeking Narconon's records relating to *employee* misconduct. However, Narconon apparently asserts that because it only employs individuals who are current or former students, *all* employee records are

---

where the trial court deviated from the prescribed procedure and the trial court itself determined the federal procedures had been complied with. *See* Tr. of Hearing dated 7/16/2012, Appx. Ex. D, p. 7. As such, Plaintiff need not address the procedural requirements of 42 C.F.R. § 2.64.

considered confidential drug and alcohol treatment records. While this is convenient for Narconon in attempting to avoid producing the vast majority of its records, it does not invoke the physician-patient privilege. Defendant's reliance on § 2503 is a red herring, designed to distract the parties and the Court from the controlling standard and procedure set forth in § 290ee that Defendant cannot in good faith challenge. The privilege provided by § 2503 belongs ***to the patient***, which is defined as a person who consults or is examined or interviewed by a physician or psychotherapist. 12 O.S. § 2503(C) (emphasis added). It is doubtful that the individual records at issue here were created in the scope of an examination or interview by a physician or psychotherapist for the purpose of providing treatment; it is much more likely that the records were created in the scope of an employee incident report. Regardless, while the person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege, such authority is only ***on behalf of the patient***. *Id.* (emphasis added). Here, Narconon is not a physician or psychotherapist so it is questionable whether or not they may even raise the privilege in the first place.[2] **However, even if Defendant were a proper party to raise the privilege, the individuals have been notified and have not objected, meaning any authority**

[2] 12 O.S. § 2503 defines "physician" as "a person authorized to practice medicine in any state or nation," and defines "psychotherapist" as either "a person authorized to practice medicine...while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction," or "a person licensed or certified as a psychologist under the laws of any state or nation...while similarly engaged." 12 O.S. §§ 2503(2), (3). At no time in the proceedings below has Narconon argued that the records at issue were created in the scope of an interview or examination between a "patient" as that term is defined by § 2503 and a physician or psychotherapist.

Narconon arguably may have had to resist disclosure pursuant to the physician-patient privilege has been waived.

Proposition 4: Defendant's request for a stay must be denied.

Supreme Court Rule 1.15 allows a party to request a stay in the trial proceedings directly from the Supreme Court under narrow and specific circumstances. *See* Rule 1.15. Defendant initially requested a stay from the trial court pending a ruling from this Court on the Petition for *Writ* of Prohibition it sought to file. *See* Tr. Hearing dated 7/26/12 (Appx., Ex. D), pp.7-9. The trial court, in light of the extraordinary length of time Plaintiff has been seeking these documents, declined to grant indefinite relief, instead giving Defendant fifteen (15) days to obtain an extended stay from the Supreme Court. *Id.* When Defendant filed its request for relief with the Supreme Court, only two (2) days remained before the expiration of the stay, requiring the Supreme Court to act in less than a week and thus qualifying as an "emergency" request pursuant to Rule 1.15(c). Under Rule 1.15(c), Defendant was required to (1) state the effective date of the order (*i.e.*, August 10, 2012), (2) contain a certification by counsel stating why the application was not made earlier, (3) address the likelihood of success on appeal, (4) demonstrate the threat of irreparable harm to the moving party if relief is not granted, (5) demonstrate the potential harm to the moving party, and (5) address any risk of harm to the public interest, and state that the relief was first sought in the district court. Rule 1.15(c), (d). Because Defendant has not satisfied any of the requirements of Rule 1.15(c), this Court should not grant Defendant's request to stay production.

Proposition 5: This Court should issue sanctions against Defendant pursuant to Supreme Court Rule 1.191(j).

Rule 1.191(j) allows this Court to impose sanctions against a party for filing a frivolous application to invoke this Court's extraordinary powers to issue original jurisdiction writs, including an award of costs and attorneys fees. Pursuant to the rule, "[a] frivolous proceeding may include one brought for the sole purpose of delay or to disrupt the proceeding in the court below or a proceeding so obviously without any merit as to impute bad faith on the party bringing the action." Rule 1.191(j).

While Defendant included "Request for Emergency Stay" in the title of its Petition for *Writ* of Prohibition, Defendant did not even attempt to satisfy any of the requirements of Rule 1.15. Plaintiff would submit that Narconon has not made any effort to satisfy Rule 1.15 because it cannot do so in good faith. For this Court to consider a stay over the denial of the trial court, Narconon would have to demonstrate that Narconon is likely to succeed on appeal and that Narconon will suffer irreparable harm if a stay is not granted. Narconon's entire argument on appeal is that the records at issue contain confidential health information. The trial court determined that proper notice had been given to the individuals whose information is contained in the relevant documents and no one appeared to contest disclosure. *Moreover*, a protective order is in place to protect disclosure to non-parties. Narconon waited until two (2) days before the trial court stay expired to file anything with the Supreme Court. Defendant's counsel is not unfamiliar with proper appellate procedures; Plaintiff believes Narconon's unwarranted delay and improper "emergency" request were designed solely to put pressure on the trial court to grant an additional stay when the same relief was not properly sought from this Court (or else hold Defendant in contempt while an ostensible request for emergency relief was

pending before this Court). Defendant's unmistakeable strategy throughout this litigation is to delay as long as possible either to await a ruling on the related declaratory judgment action brought against it by its insurer in *Western World Insurance Co. v. Narconon of Oklahoma Inc., et al.*, United States District Court for the Eastern District of Oklahoma case no. CIV-12-173-JHP, or else to simply delay the progression of this case for the benefit of Defendant. Defendant has cited absolutely no authority that would support the issuance of an extraordinary writ. The trial court was clearly within its jurisdiction to order the records at issue be disclosed, subject to the notice requirements of § 290ee (and 42 C.F.R. § 2.64) and the controlling protective order on file in this case. Defendant's application is frivolous, and Plaintiff should be awarded the fees and costs associated with defending against it as the Real Party in Interest on behalf of the Respondent.

CONCLUSION

Despite Defendant's continued characterization of all of its employee records as "drug and alcohol treatment records," Plaintiff is seeking documents related to previous incidents of employee misconduct. Each of the reports at issue involve a staff member at Defendant's facility. The trial court has reviewed the reports *in camera* and determined good cause existed for their production. Moreover, the individual staff members involved in the reports have been notified of the pending disclosure and have chosen not to object. Defendant's contention that the trial court is without jurisdiction to compel disclosure under these circumstances is frivolous and without merit. Defendant's request for relief should be denied.