
In the Supreme Court of Oklahoma

NARCONON OF OKLAHOMA, INC., d/b/a
NARCONON ARROWHEAD, a Domestic
Not for Profit Corporation; AND
NARCONON INTERNATIONAL, a foreign
Corporation,

Petitioner,

versus

THE HONORABLE JAMES D. BLAND,
Judge of the District Court of Pittsburg
County,

Respondent.

CASE NO. _____

District Court No. CJ-2010-057
Pittsburg County District Court

**NARCONON ARROWHEAD'S
APPLICATION TO ASSUME ORIGINAL JURISDICTION, FOR
WRIT OF PROHIBITION AND REQUEST FOR EMERGENCY STAY
OF TRIAL COURT'S ORDER FOR SUBPOENA PRODUCTION**

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**DEFENDANT / PETITIONER NARCONON ARROWHEAD'S
PETITION FOR WRIT OF PROHIBITION AND REQUEST TO STAY TRIAL
COURT'S ORDER OF SUBPOENA PRODUCTION**

SUMMARY OF THE RECORD

COMES NOW the Defendant, NARCONON ARROWHEAD, by and through counsel who petitions this court to Assume Original Jurisdiction and Petitions for Writ of Prohibition and a Stay of the Trial Court's Order of Subpoena Production. In support of this petition, Defendant would show the Court as follows:

PETITION FOR WRIT OF PROHIBITION

1. The incapacitated Plaintiff, Heather Landmeier, had been through at least 5 drug rehabilitation programs. She had been treated at Narconon at least 3 different times. Heather was readmitted to Narconon Arrowhead on August 25, 2007.
2. Heather **completed the program** on or about January 2, 2008. On January 5, 2008, she began as a "trainee" at Narconon Arrowhead. In that regard, she would be trained to administer drug rehabilitation and counseling to students at the facility and could work toward being hired as an employee.
3. Like most such facilities, use of drugs by the staff, trainees and students is strictly forbidden. Heather signed an agreement acknowledging that: A staff member may be summarily dismissed if found to be using drugs.
4. Unfortunately, on March 04, 2008 Heather tested positive for the drug oxycontin. She was dismissed from her status as a trainee and left the facility on that day.
5. The following day, March 5, 2008, at 10:24 a.m., the police were summoned to a

hotel in Tulsa, Oklahoma. The officer's summary indicates that he was summoned to the hotel for a 23-year-old who was in cardiac arrest. He stated the victim had been shooting heroin the previous night. The following morning the victim was unresponsive.

6. Plaintiff, through her guardian has filed this suit alleging negligence and negligence per se. They claim breach of contract and violation of the Oklahoma Consumer Protection Act. She claims intentional infliction of emotional distress and seeks punitive damages.

7. The heart of the issue for this writ is Plaintiff's Motion to Compel. (*Attached as Exhibit "A" to the Appendix.*) Plaintiff seeks the identity of "any resident" who reported "any injury" (Interrogatory No. 11), all persons who have made complaints regarding alleged abuse or neglect (Interrogatory No. 15) and, the related "write ups" of employees, staff (Request for Production No. 24) regarding this or any incident involving injury at the facility.

8. By "abuse" or "any incident," Defendant was ordered to review the records of employees or students from 2003 through 2008 for any incident involving sexual contact or illegal drug use between employees and students. (*Apparently the Plaintiff never filed the Order for the hearing of April 3, 2012. A copy of the OCDR record is attached as Exhibit "C" in the Appendix*)

9. Defendant has been ordered to produce reports of 3 incidents. *Transcript of proceedings July 26, 2012 attached as Exhibit "D" to the Appendix, hereinafter Tr. at p. 4-5.*

In general, one incident involved 2 former employees who snuck into a trainee's room at the facility for a threesome. Another incident involved an alleged sexual incident between a female student and a staff member. The third incident involved a student that had an affair with a staff member. *Tr. at p. 4-5.*

10. All of these records are contained within both files of the former employees, **and the treatment records of the students.**

11. Defendant has followed the procedure under 42 U.S.C. § § 290-DD-2 and 290-EE-3 as to notification and production. (*Attached is Defendant's Response to Motion to Compel as Exhibit "B" in the Appendix.*) Narconon produced the reports for an "in camera" review by the trial court. Plaintiff then served Narconon with a subpoena for the reports. Notice was given to 2 of the students (patients) at their last known address. (The third patient had filed a court action and their identity was known to the Plaintiff). At the most recent hearing, the students did not appear to contest production of the reports. *Tr. at p. 3.*

12. Nevertheless, Narconon on it's 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.

13. The Court gave Narconon 15 days (from the July 26 hearing) to produce the records. Petitioner seeks a stay of production until after this Honorable Court can decide the issue of production. *Tr. at p. 9.*

Standard of Review: Prohibition is an extraordinary writ and can not be resorted to when ordinary and usual remedies provided by law are available. It will only issue when the trial court 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, 1922 OK 140, ¶ 4, 206 P. 831.

Argument and Authority

Proposition 1: Records of the identity, diagnosis, prognosis, or treatment of any patient involved in drug and alcohol rehabilitation are confidential.

The federal government has written specific guidelines for the production of records of patients involved in drug and alcohol treatment. The restrictions and regulations upon disclosure and use of drug abuse patient records were initially authorized by section 408 of the Drug Abuse Prevention, Treatment, and Rehabilitation Act (21 U.S.C. § 1175) as amended to section 527 of the Public Health Service Act which is codified at 42 U.S.C. § 290ee-3. This statute provides the basis for confidentiality. It reads:

§ 290EE-3 CONFIDENTIALITY OF PATIENT RECORDS

(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, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent

- (1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient . . .
- (2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, 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. In assessing good cause the court shall weigh the public interest and the need for disclosure against injury to the patient, to the physician patient relationship, and to the treatment services. Upon

granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose safeguards against unauthorized disclosure.

In addition, the regulations set forth the procedure a court is asked to follow:

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) *Application.* An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient-identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) *Notice.* The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient-identifying information to other persons: and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) *Review of evidence: Conduct of hearing.* Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient-identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of these regulations. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) *Criteria for entry of order.* An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

Plaintiffs have wholly failed to show “good cause” for the production of the reports.

Good cause means “a fair and honest reason, one that is not trivial, arbitrary, capricious or concocted for the occasion.” Application of Southwestern Bell Telephone, 2007 OK 55 at ¶ 20, 164 P.3d 150. However, Oklahoma law makes clear that such records are confidential and shall only be disclosed by a court upon a showing of “compelling reason” necessary for the protection of a public or private interest. 10 O.S. § 7005 - 1.2 (West Supp. 2009).

The Oklahoma Supreme Court has always taken a strong hand in the protection of privileged records. The Oklahoma Discovery Code specially sets forth the right (and waiver) of a medical privilege:

12 O.S. § 2503 Physician and Psychotherapist-Patient Privilege

B. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient’s physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient’s physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient’s family.

C. The privilege may be claimed by the patient, the patient’s guardian or conservator or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

The statute goes on to described the limited fashion in which the privilege is waived:

D. The following shall be exceptions to a claim of privilege:

3. The privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of the patient’s claim or defense or, after the

patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense is qualified to the extent that an adverse party in the proceeding may obtain relevant information regarding the condition by statutory discovery; 12 O.S. § 2503 [emphasis supplied].

In the present action, the reports of other students are not a defense raised by Narconon. At best, they are only tentatively related to the Plaintiffs' claims. None of these reports deal with employees or students connected to the Plaintiff. In fact, the reports are from 2004, 2006 and 2007. (As a reminder, the Plaintiff was discharged from the facility in March 2008). Plaintiff's theory is that her sexual relationship as a trainee with a staff member lead to her overdose. From there, it is a leap in logic to allow production of other student's records of sexual misconduct.

While our Supreme Court has clearly protected the disclosure of an individual's medical records under HIPPA, Holmes v. Nightingale, 2007 OK 15, 158 P.3d 1039, Oklahoma has no case law directly on point with this issue. Still, Oklahoma law clearly allows for original jurisdiction to address discovery issues which are primarily those of first impression. Heffron v. District Court of Oklahoma County, 2003 OK 75 ¶ 4, 77 P.3d 1069, St. Clair v. Hatch, 202 OK 101 ¶, 62 P.3d 382.

Narconon, on behalf of it's current and former students claims privilege under both state and federal law and asks for this Court's guidance on this issue. One of the key aspects of drug and alcohol treatment is the ability to admit a problem, confront and confess your behavior. Confidential records should not become the focus of third-party discovery. Such production has a chilling effect on all student's and patient's treatment.

Petitioner, would also seek a stay of the trial court's order to respond to the subpoena

production by 13 August 2012. Narconon would ask that such production be stayed until this Court has a chance to consider the present application.

CONCLUSION

Narconon Arrowhead asks this Court to assume original jurisdiction to consider whether a Plaintiff can request production by subpoena of a third-party drug and alcohol treatment records. Such records are not being used as a defense in the case. Additionally, production of the reports is counter to the treatment in any drug and alcohol rehabilitation program.

It appears that this issue is novel to Oklahoma case law. As such, original jurisdiction would provide a guide to the parties and the trial court. Finally, Petitioner seeks a stay of the trial court's order until this Court has the opportunity to consider the issue.

Respectfully Submitted,



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Certificate of Service

Signature below certifies that a true and accurate copy of the foregoing was served by depositing the same in the U.S. Mail, postage prepaid on this 8th day of August, 2012 to:

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