

KEVIN McELWEE, individually as parent	:	IN THE COURT OF COMMON PLEAS OF
to JESSICA McELWEE, deceased, and as	:	LYCOMING COUNTY, PENNSYLVANIA
Administrator of the Estate of JESSICA	:	
McELWEE, deceased; KEVIN McELWEE	:	JURY TRIAL DEMANDED
and JO ANN McELWEE, parents of	:	
JESSICA McELWEE, individually,	:	CIVIL ACTION - LAW
Plaintiffs	:	
	:	
vs.	:	NO. 00-01,795
	:	
PAUL E. LEBER, M.D.; ADAM M.	:	
EDELMAN, M.D.; DONALD E.	:	
SHEARER, M.D.; JEANINE	:	
SINSABAUGH; CINDY KOONS; JUDY	:	PLAINTIFFS' MOTION TO COMPEL
KERSHNER; MUNCY VALLEY	:	RESPONSE OF PAUL E. LEBER, et al
HOSPITAL; SUSQUEHANNA HEALTH	:	
SYSTEM; SUSQUEHANNA PHYSICIAN	:	
SERVICES; and EM CARE and/or WEST	:	
BRANCH EMERGENCY PHYSICIANS,	:	
Defendants	:	

***Date: December 9, 2002***

**OPINION and ORDER**

Before the Court is Plaintiff's Motion to Compel Response of Paul E. Leber, M.D., Adam Edelman, M.D., EM Care, and New Jersey/Pennsylvania EM-1 Medical Services to Plaintiffs' Ninth Request for Production of Documents filed October 31, 2002. This case is a medical malpractice claim regarding the care of Plaintiffs' minor child, Jessica. In seeking discovery to establish that claim, the present dispute arose.

The requests at issue and Defendants' objections were:

A. Plaintiffs' Request 3 states as follows:

All letters, questionnaires or other written documents prepared by any named Defendant or any agent, servant or employee of any named Defendant including documents prepared at the request of or provided to counsel, which refer to, relate to or

contain any factual information regarding this lawsuit or any medical care to Jessica McElwee.

Defendants' objection to Request 3 states as follows:

Objected to as requesting information subject to the attorney-client privilege. Further, it is objected to as overly broad, ambiguous and specifically designed to create an undue burden on Defendants.

B. Plaintiffs' Request 5 states as follows:

Any and all notes, summaries, or other written documents prepared by Defendant Leber or any other named Defendant at any time including, but not limited to, notes, which were prepared by any named Defendant while attending any depositions, conducted in this case.

Defendants' objection to Request 5 states as follows:

Objected to as requesting information subject to the attorney-client privilege. If the Doctor prepares notes and comments regarding depositions for the use of counsel, these notes and comments are subject to the attorney-client privilege and are not discoverable.

C. Plaintiffs' Request 7 states as follows:

To the extent not previously provided, any e-mails or other correspondence by any named Defendant or agent, servant or employee of any named Defendant regarding this lawsuit or any medical care provided to Jessica McElwee.

Defendants' objection to Request 7 states as follows:

Objected to as overly broad and undue invasion of privacy, not calculated to lead to discovery of admissible evidence. Further, it is objected to as requesting items that are subject to the attorney-client privilege.

D. Plaintiffs' Request 8 states as follows:

Any journal, diary or other similar written document prepared by any named Defendant or agent, servant or employee of any named Defendant regarding this lawsuit or any medical care provided to Jessica McElwee.

E. Plaintiffs' Request 9 states as follows:

All letters or other written documents in the possession or control of defense counsel, which refer to, relate to, or contain any factual information regarding this lawsuit or any medical care to Jessica McElwee.

Defendants' objection to Request 9 states as follows:

Objected to as overly broad and requesting items subject to the attorney-client privilege and items not discoverable pursuant to Pa. R.C.P. 4003.3 as the request calls for defense counsel to produce client communication documents containing counsel's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research, legal theories or strategies.

*See*, Plaintiffs' Motion, 2-3.

Plaintiffs contend that Defendants' objections are "canned." The objections are boilerplate assertions of the attorney-client privilege and that the requests create an undue burden because of their breadth and ambiguity. *See*, Plaintiffs' Motion, 3. On the other hand Defendants contend that the objections are valid. The broad language of the request creates an

undue burden by requiring them, in essence, to hand over their entire file. The requests also require Defendants to go through the mountainous amount of documents to try and decipher what Plaintiffs are requesting. Further, the broad nature of the requests is inappropriate because it implicates material that is protected by the attorney-client privilege.

The Court will deny Plaintiffs' Motion to Compel. As to requests 3, 5, 7, and 9, the broad nature of the request creates an unreasonable burden on Defendants. Request number 8 has been sufficiently answered.

Generally, "a party may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party. . . ." *See*, Pa. R.C.P. 4003.1(a). The information sought need not be admissible at trial, but it must appear to be "reasonably calculated to lead to the discovery of admissible evidence." *See*, Pa. R.C.P. 4003.1(b). However, discovery will not be permitted that "(a) is sought in bad faith; (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party; (c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6; or (e) would require the making of an unreasonable investigation by the deponent or any party or witness." *See*, Pa. R.C.P. 4011.

The cited Plaintiffs' requests need not be permitted in discovery as they are too broad and create an undue burden on Defendants. In *Wein v. Williamsport Hospital and Medical Center*, plaintiffs had sent a subpoena to the Pennsylvania Unemployment Compensation Bureau for production of "any and all records in [their] possession and control concerning defendant [doctor]." *See*, No. 96-01,744, at 2 (Lyc. Cty. June 30, 1998). Plaintiffs

filed a Second Motion to Compel seeking compliance with this subpoena. This Court denied that motion because the discovery request violated the “limitations imposed by Pa. R.C.P. 4011(b).” *Id.* at 8. Plaintiffs failed to demonstrate that “the very broad document request would effect a purpose related to the case.” *Id.* at 7. Plaintiffs merely asserted that the unemployment compensation records “may” contain relevant facts to the case. *Ibid.* The broad request was a “fishing expedition without any basis to assert in any way that there were facts relevant to the issues raised in the litigation that would be reflected in the unemployment compensation records.” *Ibid.*

Similar to *Wein*, Plaintiffs’ broad request hints of a fishing expedition. The broad requests would require Defendants to search their extensive file and turn over anything remotely related to this matter in Plaintiffs’ hope that admissible evidence would be revealed. While the information sought may be relevant and lead to admissible evidence, such a sweeping request for any and all documents creates an undue burden on Defendants. As wide as the scope of discovery permitted under Pa. R.C.P. 4003.1 may be, it is not a fishing license permitting Plaintiffs to cast a broad net into the sea of paperwork hoping to snare the evidence needed to establish their claim. Therefore, Plaintiffs’ Request to Compel Discovery is to be denied.

However, the sweeping breath of Plaintiffs’ discovery requests does not relieve Defendants of the obligation to identify the documents not being produced based on privilege and why the document is privileged. *See, Wein, supra*, 12. If a party objects to a discovery request, its answer must contain an identification of “all documents or things not produced or made available because of the objection that they were not within the scope of permissible

discovery under Rule 4003.2 through Rule 4003.6. . . .” *See*, Pa. R.C.P. 4009.12(b)(2). This identification must be done with “reasonable particularity” and include the “basis for non-production.” *See*, Pa. R.C.P. 4009.12(b)(2). Thus, Defendants must identify the documents not being produced and the reason why they are not being produced under the objections as to the following: Requests No. 5 and No. 9 to the extent its response asserts trial preparation material under 4003.3, 4003.4 and 4003.5.

**ORDER**

It is **HEREBY ORDERED** that Plaintiffs' Request to Compel Discovery is denied. Defendants Leber, Edelman, EmCare, and New Jersey/Pennsylvania EM-1 Medical Services must identify the material not being produced and the basis for the non-production as to requests No. 5 and No. 9 within twenty days of this date.

BY THE COURT:

William S. Kieser, Judge

cc: C. Scott Waters, Esquire  
David R. Bahl, Esquire  
C. Edward S. Mitchell, Esquire  
M. David Halpern, Esquire  
P. O. Box 2024; Altoona, PA 16601  
Judges  
Christian J. Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)