

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TAYLOR FAUSNAUGHT,  
Plaintiff,

vs.

UPMC SUSQUEHANNA (FORMERLY  
SUSQUEHANNA HEALTH) and  
TASHA KLOCK,  
Defendants.

: NO. 19 - 1047  
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:  
: CIVIL ACTION - LAW  
:  
: *Preliminary Objections to*  
: *Amended Complaint /*  
: *Motion to Compel /*  
: *Motion to Strike*

**ORDER**

AND NOW, following argument held August 4, 2020, on *Preliminary Objections to Plaintiff’s Amended Complaint, Plaintiff, Taylor Fausnaught’s Motion under Pa.R.C.P. 4019(a)(1) to Compel Discovery from Defendant UPMC, and; Plaintiff’s Motion to Strike Defendants’ Preliminary Objections to Plaintiff’s Amended Complaint for (A) Non-Compliance with Court Order; (B) Lycoming County Local Rule of Civil Procedure L.208.3; and (C) For Violation of 42 Pa.C.S 2503*, the Court hereby issues the following ORDER.

The Amended Complaint, filed May 4, 2020, avers that while Plaintiff Taylor Fausnaught (“Plaintiff”) was employed at what is now known as the Skilled Nursing & Rehabilitation Center at UPMC Susquehanna (“UPMC”), she had to undertake extensive leave in relation to a serious medical incident. The Amended Complaint alleges that Plaintiff’s co-worker, Tasha Klock (“Ms. Klock”), curious about Plaintiff’s extensive absences, made unauthorized access of Plaintiff’s medical records using UPMC’s SOARIAN program, and then disseminated Plaintiff’s confidential medical information to fellow UPMC employees.

The Amended Complaint raises the following five (5) counts against Defendant UPMC: (I) Negligence, (II) Negligent Supervision, (III) Vicarious Liability for Negligence, (IV) Negligence Per Se, and (V) Violation of the Pennsylvania Unfair Trade Practice and Consumer Protection Law (“UTPCPL”). The Amended Complaint raises the following three (3) counts against Defendant Tasha Klock: (VI) Tortious Intrusion upon Seclusion, (VII) Negligence, and (VIII) Defamation.

Defendants UPMC Susquehanna and Tasha Klock (collectively, “Defendants”) filed Preliminary Objections to Plaintiff’s Amended Complaint on May 21, 2020. Plaintiff filed a Reply in Opposition on June 9, 2020. Defendants then filed a Brief in Support on July 6, 2020. Plaintiff filed a Brief in Opposition on July 20, 2020.

Additionally, on May 19, 2020 Plaintiff filed a Motion under Pa.R.C.P. 4019(a)(1) to Compel Discovery from Defendant UPMC (“Motion to Compel”). Plaintiff

specifically seeks to compel UPMC to produce UMPC's HIPAA Compliance/Privacy Officer Andrea Reed for a deposition where she would be subject to questioning regarding not only the foregoing matter, but also as to a separate patient confidentiality breach involving Plaintiff's mother, Lori Fausnaught. Plaintiff further requests that this Court require UPMC to provide full and complete responses to Plaintiff's Request for Production of Documents, which were served on UPMC on March 19, 2020.

By Order dated May 22, 2020, the Court issued a Rule to Show Cause on Defendant UPMC to show why the Motion to Compel should not be granted. UPMC filed a Response to Plaintiff's Motion to Compel Discovery on July 24, 2020, asserting within a subsection entitled "Defendant's Additional Response" that Plaintiff's discovery requests are objectionable to the extent that they could not be reasonably calculated to the lead to the discovery of admissible evidence.<sup>1</sup> Plaintiff filed a Reply in Support of her Motion to Compel on August 3, 2020.

Finally, on July 13, 2020, Plaintiff file a Motion to Strike Defendants' Preliminary Objections to Plaintiff's Amended Complaint for (A) Non-Compliance with Court Order; (B) Lycoming County Local Rule of Civil Procedure L.208.3; and (C) For Violation of 42 Pa.C.S 2503 ("Motion to Strike"). The Court Scheduled argument on Defendants' Preliminary Objections, Plaintiff's Motion to Compel, and Plaintiff's Motion to Strike for August 4, 2020.

### ***Preliminary Objections***

The first four (4) of Defendants' seven (7) Preliminary Objections are in the nature of a demurrer. A demurrer asserts the legal insufficiency of a pleading.<sup>2</sup>

#### **Preliminary Objection 1**

Defendants' Preliminary Objection 1 in the Nature of a Demurrer requests that the Court dismiss Count I for Negligence against UMPC on the basis that Plaintiff's Amended Complaint cites the Pennsylvania Health Care Facilities Act ("PHCFA") to

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<sup>1</sup> Pa.R.C.P. 4003.1(b) ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

<sup>2</sup> Pa.R.C.P. No. 1028(a)(4); *see also Chorba v. Davlisa Enters., Inc.*, 450 A.2d 36, 38 (Pa. Super. 1982) (citations omitted) ("A demurrer admits all relevant facts pleaded in the complaint and all inferences fairly deducible therefrom, but not conclusions of law. A demurrer may not be sustained unless the complaint evidences on its face that the claim cannot be sustained because the law will not permit recovery. In ruling on a demurrer, a court may not consider factual materials not disclosed on the record. The court, moreover, may not take judicial notice of the record of another case, if not pleaded. If there is any doubt, the doubt should be resolved in favor of overruling the demurrer; summary judgment should be entered only in cases which are clear and free from doubt. Judgment should not be entered against a plaintiff if the pleadings indicate that he could state a better case by amendment.").

establish a duty when there is no right of private action or relief for PHCFA violations. Specifically, paragraph 68 of the Amended Complaint identifies UPMC as a “health care provider” as defined under the PHCFA.<sup>3</sup> Paragraph 69 asserts that as a health care provider under the PHCFA, UPMC is required to store records in such a manner that provides protection from loss, damage, and unauthorized use,<sup>4</sup> and further has a duty to treat all patient medical records as confidential, and to make sure that only authorized personnel would have access to the records.<sup>5</sup>

As Defendants note within their Brief in Support, the Pennsylvania Department of Health is granted exclusive jurisdiction over health care providers under the terms of the PHCFA and is also granted enforcement authority over the PHCFA.<sup>6</sup> The courts have generally found that the PHCFA does not provide a private cause of action and is not subject to judicial enforcement.<sup>7</sup> Plaintiff’s Brief in Opposition asserts that the Amended Complaint’s claim under Count I for UPMC’s Negligence is based upon UPMC’s breach of a common law duty to develop and implement policies and procedures to restrict access to protected health information stored by UPMC.

It appears to the Court that Count I of the Amended Complaint pleads the existence of a duty both under the common law and under the PHCFA. As the Court noted in its Opinion & Order of March 4, 2020, ruling on Defendants’ Preliminary Objections to the initial Complaint, a common law duty of care will support Plaintiff’s claim for Negligence. As Plaintiff has pled this common law duty, the Court cannot find that Count I when read as a whole is legally insufficient. Therefore, Defendants’ Preliminary Objection 1 is OVERRULED.<sup>8</sup>

### Preliminary Objection 2

Defendants’ Preliminary Objection 2 in the Nature of a Demurrer requests that the Court dismiss Count II for Negligent Supervision against UPMC on the basis that Plaintiff’s Complaint fails to establish a *prima facie* case for Negligent Supervision. By

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<sup>3</sup> 35 P.S. § 448.103.

<sup>4</sup> 28 Pa. Code § 115.22.

<sup>5</sup> 28 Pa. Code § 115.27.

<sup>6</sup> 35 P.S. § 448.201 (The Department of Health shall have the power and its duties shall be: (1) To exercise exclusive jurisdiction over health care providers in accordance with the provisions of this act. . . . (12) To enforce the rules and regulations promulgated by the department as provided in this act.”).

<sup>7</sup> See *Zaborowski v. Hosp. Care Ctr. of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 497–98 (Mercer Cty. 2002) (quoting *Chalfin v. Beverly Enters., Inc.*, 741 F.Supp. 1162, 1172 (E.D. Pa. 1989)) (“[T]here is no evidence that the Pennsylvania Legislature contemplated judicial enforcement of [PHCFA] or the regulations promulgated thereunder. On the contrary, the comprehensive administrative plan indicates that the legislature intended to have all violations of [PHCFA] enforced by the Department of Health. As such, this court holds that PHCFA does not provide a private cause of action.”)

<sup>8</sup> The Court will address Defendants’ objection to the Amended Complaint’s citation to the PHCFA to establish a duty when ruling upon Defendants’ Preliminary Objection 6.

Order date March 4, 2020, this Court sustained Defendants' Preliminary Objections requesting dismissal of Count II for Negligent Supervision in the initial Complaint, finding that Plaintiff had failed to establish a necessary element of a claim for Negligent Supervision. Specifically, the Court found that to establish a Negligent Supervision claim, the Complaint would need to plead facts demonstrating that Ms. Klock had committed prior acts demonstrating a propensity for the type of harm committed, specifically some form of invasion of privacy. The Court also found that the Complaint would need to plead that UPMC knew, or would have known with the exercise of reasonable care, of this prior conduct.<sup>9</sup>

The Amended Complaint fails to include any averments demonstrating that Ms. Klock had any committed prior acts demonstrating a harmful propensity, and that UPMC knew of these acts, or would have known through the exercise of reasonable care. Therefore, Defendants' Preliminary Objection 2 is SUSTAINED.

### Preliminary Objection 3

Defendants' Preliminary Objection 3 in the Nature of a Demurrer requests that the Court dismiss Count IV for Negligence *Per Se* against UPMC on the basis that Negligence *Per Se* is not a cause of action that exists independent of a Negligence claim, and therefore should not be pled separately. Defendants alternately object that the Negligence *Per Se* claim should be dismissed because it is predicated on UPMC's violation of the PHCFA.

Plaintiff's Brief in Opposition asserts first that because Defendants failed to object to Negligence *Per Se* being pled as a separate claim in the initial Complaint, they should be foreclosed from objecting on this basis to the Amended Complaint pursuant to the rule prohibiting serial objections. Notwithstanding this preclusion of serial objections, Plaintiff asserts that Negligence *Per Se* is a separately recognized cause of action within Pennsylvania. Plaintiff further contends that the Amended Complaint does not allege a cause of action based upon the PHCFA, but only references the PHCFA as establishing the standard of care for the underlying tort of Negligence *Per Se*. Plaintiff finally asserts that the absence of a private statutory cause of action does not preclude a claim of Negligence *Per Se*.

The Court is of accord with Plaintiff that the rule against serial objections forecloses Defendants from raising a demurrer to an Amended Complaint's pleading of Negligence *Per Se* as a separate claim, as this same objection could have been raised

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<sup>9</sup> *Heller v. Patwil Homes, Inc.*, 713 A.2d 105, 108 (Pa. Super. 1998) (quoting *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418, 422 (Pa. 1968)).

in the Preliminary Objections to the original Complaint.<sup>10</sup> The Court will then address Defendants' objections to the substance of the Amended Complaint's count of Negligence *Per Se*, as it is predicated on UPMC's violation of the PHCFA.

"The concept of negligence *per se* establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm. A plaintiff, however, having proven negligence *per se*, cannot recover unless it can be proven that such negligence was the proximate cause of the injury."<sup>11</sup>

To establish a claim for negligence *per se*, the plaintiff must establish: (1) that the purpose of the statute is at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) that the statute clearly applies to defendant's conduct; (3) that the defendant violated the statute; and (4) that the violation was the proximate cause of plaintiff's injuries.<sup>12</sup>

The Amended Complaint cites PHCFA sections 103.22<sup>13</sup>, 108.2,<sup>14</sup> 115.22,<sup>15</sup> and 115.27,<sup>16</sup> as the applicable statutory duties violated. As previously discussed, the PHCFA does not allow for a private cause of action. That a statute does not create a private cause of action does not, in itself, necessarily bar the statute from supporting a Negligence *Per Se* claim. While the Pennsylvania courts have recognized that the "absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm," such absence is only one factor to consider and "does not necessarily preclude [the statute's] use as the

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<sup>10</sup> *Com., Dep't of Transp. (PennDOT) v. Bethlehem Steel Corp.*, 380 A.2d 1308, 1310–11 (Pa. Commw. 1977) (citations omitted) ("The demurrer to count one of the amended complaint is based upon averments in the amended complaint which were contained in the original complaint. Preliminary objections to them should have been made at the same time as the original preliminary objections were made. Preliminary objections to an amended complaint may not include matters which appeared in the original.").

<sup>11</sup> *Cabiroy v. Scipione*, 767 A.2d 1078, 1079 (Pa. Super. 2001) (citation omitted).

<sup>12</sup> *Goda v. White Cliff Leasing P'ship*, 62 Pa. D. & C.4th 476, 481–82 (Mercer Cty. 2003) (citing *Wagner v. Anzon Inc.*, 684 A.2d 570, 575 (Pa. Super. 1996)).

<sup>13</sup> 28 Pa. Code § 103.22(b)(4) ("The following are minimal provisions for the Patient's Bill of Rights: . . . A patient has the right to have all records pertaining to his medical care treated as confidential except as otherwise provided by law or third-party contractual arrangements.").

<sup>14</sup> The Court assumes there was an error in citation, as Title 28 of the Pennsylvania Code does not currently include a Chapter 108.

<sup>15</sup> 28 Pa. Code § 115.22 ("Medical records shall be stored in such a manner as to provide protection from loss, damage and unauthorized access.").

<sup>16</sup> 28 Pa. Code § 115.27 ("All records shall be treated as confidential. Only authorized personnel shall have access to the records. The written authorization of the patient shall be presented and then maintained in the original record as authority for release of medical information outside the hospital.").

basis of a claim of negligence *per se*.”<sup>17</sup> However, other Pennsylvania trial courts have held that the PHCFA does not apply to a particular class of individuals, but instead to the general public, as health care facilities are open to all residents.<sup>18</sup> This Court finds that reasoning persuasive. As stated previously, a Negligence *Per Se* claim requires that the purpose of the statute be, at least in part, to protect the interests of a group of individuals, as opposed to the public generally. As the PHCFA is designed to protect the public generally, a violation of a duty under the PHCFA may not provide a basis for a Negligence *Per Se* claim. Therefore, Defendants’ Preliminary Objection 3 is SUSTAINED.

#### Preliminary Objection 4

Defendants’ Preliminary Objection 4 in the Nature of a Demurrer requests that the Court dismiss Count V for violation of the UTPCPL against UPMC on the basis that Plaintiff has failed to plead the necessary elements for a violation of the UTPCPL, namely that UPMC engaged in “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”<sup>19</sup> Defendants additionally assert that the UTPCPL only allows recovery for an ascertainable loss of money or property, real or personal, resulting from unlawful conduct, and does not allow recovery for emotional distress damages. Defendants finally assert that the UTPCPL is inapplicable to claims involving the provision of medical services.

The Court previously sustained objections to the UTPCPL claim in Plaintiff’s original Complaint, finding that Plaintiff’s citation to certain provisions within UPMC’s Notice of Privacy Practices (“Notice”) was insufficient to establish that UPMC violated the UTPCPL by engaging in “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”<sup>20</sup> In re-pleading this claim, Plaintiff relies on section A, paragraphs 1-11 of the Notice, which provided the limited purposes for which UPMC could legally use and share patient health information without needing to obtain consent.<sup>21</sup> The Notice provides that it applies to “[a]ll of the

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<sup>17</sup> *McCain v. Beverly Health & Rehab. Servs.*, No. CIV.A. 02-657, 2002 WL 1565526, at \*1 (E.D. Pa. July 15, 2002) (quoting *Fallowfield Dev. Corp. v. Strunk*, CIV.A. No. 89-8644, 1990 WL 52745, at \*19 (E.D. Pa. April 23, 1990)).

<sup>18</sup> See *Frantz v. HCR Manor Care Inc.*, 64 Pa. D. & C.4th 457, 468 (Schuylkill Cty. 2003); *Goda*, 62 Pa. D. & C.4th at 487 (“The court does not believe that users of health care facilities constitute a particular class of individuals, since the vast majority of residents of the Commonwealth have utilized or will utilize the services of a health care facility.”).

<sup>19</sup> 73 Pa.C.S.A. § 201-2(4)(xxi).

<sup>20</sup> 73 Pa.C.S.A. § 201-2(4)(xxi).

<sup>21</sup> Amended Complaint (Ex. F – UPMC’s Notice of Privacy Practices pgs. 2-4) (May 4, 2020).

people and places that make up UPMC. . .” including staff within UPMC healthcare facilities.<sup>22</sup>

The Court cannot find that the portions of the Notice cited in Plaintiff’s Amended Complaint are deceptive or misleading, or that the Notice taken as a whole could be considered misleading. The Notice merely comports with the HIPAA Privacy Rule by appraising Plaintiff of the legal restrictions placed upon UPMC and UPMC’s agents and employees in accessing and sharing confidential patient medical information, along with enumerated exceptions to those restrictions. The Notice could not be reasonably interpreted as ensuring that unauthorized access would never occur. Indeed, the Notice contains a section entitled “Violation of Privacy Rights” that explains what occurs in situations when such unauthorized access does occur.<sup>23</sup> The Court finds that Plaintiff has failed to plead the necessary elements to support her claim against UPMC for violation of the UTPCPL. Therefore, Defendants’ Preliminary Objection 4 is SUSTAINED. Ruling on this basis, the Court declines to address Defendants’ other arguments.

#### Preliminary Objection 5

Defendants’ Preliminary Objection 5 in the Nature of a Motion to Strike requests that the Court strike Plaintiff’s demand for the imposition of punitive damages against Defendant UPMC included in the first five counts of the Amended Complaint, as Plaintiff has failed to plead facts demonstrating an evil motive or reckless indifference to the rights of others.<sup>24</sup> The Court had previously sustained objections to Plaintiff’s claim for punitive damages in the original Complaint. The Court notes that while “[m]alice, intent, knowledge, and other conditions of the mind may be averred generally[.]”<sup>25</sup> this Court has required that there be some factual basis for a punitive damages claim even at the pleadings stage.<sup>26</sup> At this point, the allegations in the Amended Complaint that UPMC knew or should have known of Ms. Klock’s propensity to make unauthorized access of Plaintiff’s private medical information are entirely

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<sup>22</sup> *Id.* at 1. The Court notes that the Notice explicitly provides that it does not apply to UPMC as an employer.

<sup>23</sup> Amended Complaint (Ex. F pg. 8).

<sup>24</sup> See *Slappo v. J’s Dev. Assoc., Inc.*, 791 A.2d 409, 417 (Pa. Super. 2002) (quoting *Bannar v. Miller*, 701 A.2d 232, 242 (Pa. Super. 1997) (citations omitted)) (“It is well settled that punitive damages will lie only in cases of outrageous behavior, where defendant’s egregious conduct shows either an evil motive or reckless indifference to the rights of others. Punitive damages are appropriate when an individual’s actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct.”).

<sup>25</sup> Pa.R.C.P. 1019(b).

<sup>26</sup> See *Lutz v. The Williamsport Hosp.*, No. 18-00384, 2018 WL 4940322, at \*5 (Lyco. Cty. Sep. 26, 2018).

conclusory and are unsupported by any of the facts pled. Therefore, Defendants' Preliminary Objection 5 is SUSTAINED. All requests for punitive damages against Defendant UPMC shall be STRICKEN.

#### Preliminary Objection 6

Defendants' Preliminary Objection 6 in the Nature of a Motion to Strike requests that the Court strike all references to duties established under the PHCFA. References to the PHCFA, included in Plaintiff's claims for Negligence and Negligence *Per Se* against Defendant UPMC, are also incorporated by reference in Court VII, paragraph 157 of the Amended Complaint, alleging Negligence against Defendant Tasha Klock. As discussed *supra*, the PHCFA does not provide a private cause of action and therefore cannot establish a duty that would support a Negligence claim. Further, as the legislature did not draft the PHCFA to apply to a particular class of individuals, the statute will not support a Negligence *Per Se* claim. Therefore, Defendants' Preliminary Objection 6 is SUSTAINED. Paragraphs 68 and 69, referencing duties under the PHCFA within Plaintiff's claim for Negligence, shall be STRICKEN. The Court has already sustained a demurrer to Plaintiff's Negligence *Per Se* claim.

#### Preliminary Objection 7

Defendants' Preliminary Objection 7 in the Nature of a Motion to Strike requests that the Court strike vague and all-inclusive language from paragraphs 13, 21, 50, 72, 101, 121, 126, 130, 131, 132, 133, 135, 141, 167, 168, and 171 of the Amended Complaint for failure to clearly and concisely plead the material facts upon which the Amended Complaint is based.<sup>27</sup> Such all-inclusive language includes: "upon information and belief[.]" "Plaintiff believes and therefore avers[.]" "*inter alia*" and similar phrases. Plaintiff's Brief in Opposition contends that Defendants' Preliminary Objection 7 constitute serial objections, as all of the provisions objected to appeared in identical or substantially identical form in the initial Complaint,<sup>28</sup> but were not objected to in Plaintiff's initial Preliminary Objections. The Court is in accordance with Plaintiff on this issue. By failing to object to these clauses as they appeared in the original Complaint, Defendants have waived their right to object to identical or substantially identical clauses in the Amended Complaint. Therefore, Defendants' Preliminary Objection 7 is OVERRULED.

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<sup>27</sup> See Pa.R.C.P. No. 1019(a) ("The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.").

<sup>28</sup> There are two minor exceptions. Paragraph 121 was edited to correct the spelling of "SAMAR" and paragraph 135 was more substantially revised to support Plaintiff's UTPCPL claim.



***Plaintiff, Taylor Fausnaught's Motion under Pa.R.C.P. 4019(a)(1) to Compel Discovery from Defendant UPMC***

There are two discovery issues raised in Plaintiff's Motion to Compel, the first involving a deposition and the second involving a Request for Production of Documents. The Court will address these issues separately.

A. Deposition

In early March of 2020, Plaintiff's mother, Lori Fausnaught underwent an outpatient surgical procedure at a UPMC facility. Following the procedure, Ms. Fausnaught received a file containing 14 pages of another patient's medical records. Ms. Fausnaught contacted UPMC's HIPAA Privacy Officer, David Samar, to notify him that she had received another patient's records and to arrange for their return. Mr. Samar referred Ms. Fausnaught to Andrea Reed, who is UPMC's HIPAA Compliance/Privacy Officer.

Plaintiff's counsel, Paige Macdonald-Matthes, Esquire, sent a letter dated on March 18, 2020 to Defendants' counsel, Austin White, Esquire, explaining the confidentiality breach incident involving Lori Fausnaught and requesting cooperation in the scheduling of the depositions of Mr. Samar and Ms. Reed in late April.<sup>29</sup> By letter dated March 25, 2020, Attorney White responded that he would be willing to produce Mr. Samar for a deposition, but noted that the proposed late April date would need to be postponed due to the COVID pandemic. However, Attorney White objected to the deposition request as applied to Ms. Reed, asserting that the incident involving Lori Fausnaught would be irrelevant to the foregoing matter.<sup>30</sup>

Attorney Macdonald-Matthes sent a letter in reply dated April 13, 2020, asserting that as UPMC's HIPAA Compliance/Privacy Officer, Ms. Reed would be able to provide relevant testimony in the foregoing matter as having firsthand knowledge of UPMC's general practices regarding the safeguarding of patient records. While agreeing to push back the proposed deposition dates to the middle of May in order to comply with Governor Wolf's April 1, 2020 statewide Stay at Home Order, Attorney Macdonald-Matthes indicated that if Attorney White opposed her proposed deposition of Ms. Reed she would file a Motion to Compel.<sup>31</sup> Attorney White responded by letter dated April 24, 2020, agreeing to schedule depositions for both Andrea Reed and David Samar on May 19, 2020. However, Attorney White reaffirmed his objection to the line of inquiry involving Lori Fausnaught and stated that, if necessary, he would file

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<sup>29</sup> See Plaintiff, Taylor Fausnaught's Motion under Pa.R.C.P. 4019(a)(1) to Compel Discovery from Defendant UPMC (Ex. A – March 18, 2020 Correspondence) (May 19, 2020) (“Motion to Compel”).

<sup>30</sup> See Motion to Compel (Ex. C – March 25, 2020 Correspondence).

<sup>31</sup> See Motion to Compel (Ex. D – April 13, 2020 Correspondence).

a motion for a protective order relative to that inquiry.<sup>32</sup> The deposition of Ms. Reed was ultimately scheduled for June 11, 2020.<sup>33</sup> Before this deposition could take place, on May 19, 2020, Attorney Macdonald-Matthes filed the instant Motion to Compel so that the Court could address whether questioning involving the disclosure to Lori Fausnaught would fall within the permissible scope of questioning.<sup>34</sup>

Pursuant to Pa.R.C.P. 4003.1, “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 the party seeking discovery or to the claim or defense of any other party.”<sup>35</sup> “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>36</sup> However, discovery will not be permitted if it would cause “unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party.”<sup>37</sup>

Plaintiff asserts within the Motion to Compel that the improper release of medical records to Lori Fausnaught is relevant to the instant matter because it evinces a systematic deficiency in UMPC’s privacy practices. Defendant UPMC in its response contends that disclosure to Lori Fausnaught is wholly irrelevant to the instant matter, as it occurred at a separate UPMC location (UPMC Muncy rather than Susquehanna), involved different parties, and took place two years after Ms. Klock allegedly made unauthorized access of Plaintiff’s medical records. The Court is of accord with this latter view. While the Court appreciates that UPMC’s alleged negligent supervision or training of its employees relating to the confidentiality of patient medical records could be relevant to the issue of UPMC’s negligence or the appropriateness of punitive damages, this does not render any unauthorized disclosure from a UPMC subject to full discovery. To hold otherwise would not only

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<sup>32</sup> See Motion to Compel (Ex. E – April 24, 2020 Correspondence).

<sup>33</sup> See Motion to Compel ¶ 13.

<sup>34</sup> The Court notes within Plaintiff’s Motion to Compel, Plaintiff argues that Defendant has waived any objection to a line of questioning involving Lori Fausnaught’s receipt of another patient’s medical records by failing to timely file a Motion for Protective Order. See Motion to Compel ¶ 29. However, a party may motion for a protective order during the taking of a deposition. See Pa.R.C.P. 4012(b). Further, nothing precludes counsel from instructing his witness at deposition not to respond to a line of questioning that is irrelevant or prejudicial, after which opposing counsel may apply to the Court to compel such testimony. See *Ecker v. McClimons*, 6 Pa. D. & C.2d 677 (Mercer Cty. 1956). Plaintiff’s Motion to Compel has been filed in anticipation that Defense counsel will file an objection on the record or motion for a protective order. For the sake of expediency, the Court will address this issue as if such an objection had already been filed.

<sup>35</sup> Pa.R.C.P. 4003.1(a).

<sup>36</sup> Pa.R.C.P. 4003.1(b).

<sup>37</sup> Pa.R.C.P. 4011(b).

allow UPMC to be subject to unduly burdensome discovery requests, but would enable Plaintiff to invade the privacy of other UPMC patients to obtain information that is, at best, only tangentially related to the present action.<sup>38</sup>

The Court therefore holds that while Attorney Macdonald-Matthes may question Andrea Reed at deposition regarding UPMC's privacy practices generally, or about any incidents of unauthorized disclosure involving Defendant Tasha Klock, the incident involving the unauthorized disclosure of another patient's medical records to Lori Fausnaught is beyond the permissible scope of discovery.

#### B. Request for Production of Documents

On March 19, 2020, Attorney Macdonald-Matthes served Attorney White with Plaintiff's Request for Production of Documents ("Requests"). Attorney White emailed Attorney Macdonald-Matthes responses to the Requests on May 1, 2020. While providing some limited responsive discovery, Attorney White objected in some manner to all fifteen (15) of the Requests. The objections included that the Requests were overbroad, vague, required an unduly onerous investigation on the part of UPMC, would invade the attorney-client privilege, or would contravene HIPAA privacy rules.<sup>39</sup>

On May 6, 2020, Attorney Macdonald-Matthes wrote Attorney White outlining averred deficiencies in these responses and requesting that Attorney White Supplement the responses.<sup>40</sup> This May 6<sup>th</sup> letter included an attached confidentiality agreement, to ensure that all medical records provided would remain under seal. Attorney White neither responded to the May 6<sup>th</sup> Correspondence nor supplemented the responses prior to Plaintiff's filing of the Motion to Compel on May 19, 2020.

In reviewing Plaintiff's Request for Production of Documents, the Court finds the first five (5) requests fall within the permissible scope of discovery as reasonably calculated to the lead to the discovery of admissible evidence.<sup>41</sup> These requests seek

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<sup>38</sup> The Court does recognize, as noted by Plaintiff in the Motion to Compel, that HIPAA does not *per se* preclude the sharing of this medical information so long as a protective order is in place. See 45 CFR § 164.512(e)(1)(ii)(B). However, the Court also recognizes that in passing HIPAA, that legislature intended to protect patient confidentiality against unreasonable disclosure, and the Court does not find Plaintiff's discovery requests to be reasonable.

<sup>39</sup> See Motion to Compel (Ex. B – Request for Production of Documents).

<sup>40</sup> See Motion to Compel (Ex. G – May 6, 2020 Correspondence).

<sup>41</sup> These requests include:

1. All electronically stored information ("ESI") relating to UPMC's discovery that Defendant Tasha Klock accessed Plaintiff's protective health information, including but not limited to documentation of Plaintiff's medical files/records that were accessed by Defendant Tasha Klock.
2. Copies of all communications (including but not limited to notes, emails, correspondence, text message and I-Messages) sent by or sent to David Samar regarding Defendant Tasha Klock's access of Plaintiff's protected health information.

information specifically relating to Defendant Tasha Klock's purported unauthorized access of Plaintiff's medical information. These five (5) requests are not overbroad, vague, or unduly burdensome upon UPMC. Further, UPMC may duly provide medical records responsive to these five (5) requests while remaining HIPAA-compliant by entering a suitable protective order. However, the Court will not compel that UPMC divulge information protected by attorney-client privilege.

The Court finds that the remaining ten (10) requests are overbroad, vague, unduly burdensome, and unreasonably invasive of the private medical information of other UPMC patients. Requests six through eleven (6-11) specifically request documentation regarding all instances of improper access and dissemination of UPMC patients' confidential health information within the last five (5) years.<sup>42</sup> Requests twelve through fourteen (12-14) are discovery requests relating to the improper dissemination of a patient's private health information to Lori Fausnaught.<sup>43</sup> As

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3. A complete record of all communications (including but not limited to notes, emails, correspondence and disciplinary reports) between Defendant UPMC and Defendant Tasha Klock regarding her improper access of Defendant UPMC's computers.
  4. Copies of all communications received from and sent to Department of Health and Human Services, Office of Civil Rights regarding Plaintiff.
  5. Copies of all communications (including but not limited to notes, emails, correspondence, text messages and I-Messages) exchanged by and between David Samar and Rachel Barto, R.N., concerning or referencing Plaintiff.

<sup>42</sup> These requests include:

6. A complete list of all incidents of improper access of UPMC's patients' confidential health information at UPMC Susquehanna Health facility in the past five (5) years and resulting action(s) taken by the Department of Health and Human Services, Office of Civil Rights.
7. A complete list of all incidents of improper access of UPMC's patients' confidential health information at UPMC Susquehanna Health facility in the past five (5) years and resulting disciplinary action(s) taken by UPMC.
8. A complete list of all incidents of UPMC's patients' confidential health information being improperly disseminated to third parties at UPMC Muncy in the past five (5) years and resulting action(s) taken by the Department of Health and Human Services, Office of Civil Rights.
9. A complete list of all incidents of UPMC's patients' confidential health information being improperly disseminated to third parties UPMC Muncy in the past five (5) years and resulting disciplinary action(s) taken by UPMC.
10. A complete list of all incidents of improper access of UPMC's patients' confidential health information at UPMC Susquehanna Health [sic] facility in the past five (5) years and resulting disciplinary action(s) taken by UPMC.
11. A complete list of all incidents of UPMC's patients' confidential health information being improperly disseminated to third parties at UPMC Susquehanna Health facility in the past five (5) years and resulting action(s) taken by the Department of Health and Human Services, Office of Civil Rights.

<sup>43</sup> These requests include:

12. Copies of all communications (including but not limited to notes, emails, correspondence, text message and I-Messages) sent by or sent to David Samar regarding contact by Lori Fausnaught on or about March 17, 2020 concerning her receipt of another UPMC patient's records in her patient folder from UPMC.

addressed *supra*, the incident involving Lori Fausnaught is outside the scope of permissible discovery in this case. The final request, request fifteen (15), asks for all communications by or to UPMC from any news or media outlets involving the instant case.<sup>44</sup> It is unclear of what relevance most of these communications would have to this case. Further, published news or media reports on this case would be accessible to either party.

Pursuant to the foregoing, the Court will therefore GRANT Plaintiff's Motion to Compel more complete responses to the first five (5) requests within the Request for Production of Documents. The Court will DENY Plaintiff's Motion to Compel more complete responses to the remaining ten (10) requests.

***Plaintiff's Motion to Strike Defendants' Preliminary Objections to Plaintiff's Amended Complaint for (A) Non-Compliance with Court Order; (B) Lycoming County Local Rule of Civil Procedure L.208.3; and (C) For Violation of 42 Pa.C.S 2503***

Plaintiff's Motion to Strike seeks to have Defendants' Preliminary Objections to the Amended Complaint stricken as a sanction for failure of Defendants' counsel, Austin White, Esquire, to timely serve Defendants' Brief in Support of the Preliminary Objections upon Plaintiff's counsel, Paige Macdonald-Matthes, Esquire.<sup>45</sup> The Motion to Strike further seeks counsel fees and costs in an amount not exceeding \$5,000,<sup>46</sup> and asks that the Court direct Defense counsel that all future filings with the Court must be sent simultaneously to opposing counsel via overnight mail and electronically.

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13. Copies of all communications (including but not limited to notes, emails, correspondence, text message and I-Messages) sent by or sent to Andrea Reed regarding contact by Lori Fausnaught on or about March 17, 2020 concerning her receipt of another UPMC patient's records in her patient envelope from UPMC.

14. Copies of all documents and/or communications (including but not limited to notes, emails, correspondence, text message and I-Messages) generated by any employee at Defendant UPMC and/or UPMC Muncy concerning Lori Fausnaught's communication with UPMC on March 17, 2020 regarding her receipt of patient records from UPMC Susquehanna-Muncy Campus involving another UPMC patient.

<sup>44</sup> This request includes:

15. Copies of all communications received by Defendant UPMC (including but not limited to its employees, officers and agents), or sent by Defendant UPMC (including but not limited to its employees, officers and agents), to any local state, national, professional and/or medical industry news and/or social media outlet concerning or relating in any way to the Complaint filed by Plaintiff.

<sup>45</sup> Local Rule 208.3(B) provides: "Briefs may be ordered by the court. . . . All parties shall be served with a copy of the brief contemporaneously with the filing of the brief. Where briefs are required and are not timely filed, the court may treat the request for relief as having been submitted by the defaulting party and proceed ex parte, or impose such other sanction as it shall deem appropriate."

<sup>46</sup> 42 Pa.C.S 2503(7) (allowing the Court to award counsel fees as a sanction "for dilatory, obdurate or vexatious conduct during the pendency of a matter.").

Pursuant to this Court's June 1, 2020 Scheduling Order, Defendants were to file a Brief in Support of their Preliminary Objections at least thirty (30) days prior to the August 4, 2020 hearing, or by Friday, July 3, 2020. As the Court was closed that day for the July 4<sup>th</sup> holiday, Defendants' Brief was to be filed by Monday, July 6, 2020.<sup>47</sup> While Defendants filed their Brief on July 6, 2020, the office of Plaintiff's counsel did not receive a copy of the Brief on that date. On July 9, 2020, having still not received the Brief in Support, Attorney Macdonald-Matthes sent Attorney White an email requesting a copy. After receiving no response, Plaintiff filed this Motion to Strike on July 13, 2020. Attorney White then emailed Attorney Macdonald-Matthes a copy of the Brief on July 14, 2020.

At the August 4<sup>th</sup> hearing, Defendants' counsel, Attorney White, attested that a copy of the Brief in Support had been mailed to the office Attorney Macdonald-Matthes on July 6, 2020, the same that it was filed. Attorney Macdonald-Matthes confirmed by her own testimony that her office did eventually receive a mailed copy of Defendants' Brief in Support with the envelope time-stamped July 6, 2020. Attorney White further averred that his failure to respond to the July 9<sup>th</sup> email was a mere oversight.

The Court finds that this evidence does not support a determination that Attorney White intentionally delayed in providing opposing counsel a copy of the Brief in Support. Rather, such a delay was likely the result of a lag in postal delivery, a well-known and common occurrence. Therefore, Plaintiff's request to strike the Preliminary Objections and Plaintiff's request for counsel fees and costs is DENIED. However, for the purpose of expediency and convenience, the Court directs counsel for both parties that forthwith, all filings with this Court shall be emailed the same day to opposing counsel in addition to being sent via first class mail.

### **Conclusion**

In summary, Defendants' Preliminary Objection 1 in the Nature of a Demurrer requesting the dismissal of Count I for Negligence against UPMC is OVERRULED. Defendants' Preliminary Objection 2 in the Nature of a Demurrer requesting dismissal of Count II for Negligent Supervision against UPMC is SUSTAINED. Defendants' Preliminary Objection 3 in the Nature of a Demurrer requesting dismissal of Count IV for Negligence *Per Se* against UPMC is SUSTAINED. Defendants' Preliminary Objection 4 in the Nature of a Demurrer requesting dismissal of Count V for violation of the UTPCPL against UPMC is SUSTAINED. In all instances where this Court sustained a demurrer, the applicable counts are DISMISSED WITH PREJUDICE.

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<sup>47</sup> Whenever a filing deadline falls on a Saturday, Sunday, or legal holiday within the Commonwealth, the filing deadline extends to the next business day. 1 Pa.C.S.A. § 1908.

Defendants' Preliminary Objection 5 in the Nature of a Motion to Strike Plaintiff's requests for punitive damages is SUSTAINED as to the counts applicable to Defendant UPMC. Plaintiff shall not be precluded from petitioning the Court to reinstate the claims for punitive damages should the discovery process yield an evidentiary basis for such damages.

Defendants' Preliminary Objection 6 in the Nature of a Motion to Strike all references to duties under the PHCFA is SUSTAINED. Defendants' Preliminary Objection 7 in the Nature of a Motion to Strike for failure to plead material facts is OVERRULED. Plaintiff shall have twenty (20) days from the issuance of this Order to file a Second Amended Complaint consistent with this Order.

Regarding Plaintiff's Motion to Compel, the Court finds that the dissemination of another patient's medical records to Lori Fausnaught is outside the scope of permissible discovery in this case. Therefore, while Plaintiff may validly depose Andrea Reed regarding UPMC's privacy practices generally, Defendants may validly object to any line of questioning involving the disclosure to Lori Fausnaught. Addressing Plaintiff's Request for Production of Documents, the Court finds that Defendant UPMC's responses to the first five (5) of Plaintiff's requests are insufficient. The Court therefore directs Defendant UPMC to supplement these responses within thirty (30) days of this Order. However, the remaining ten (10) requests within the Request for Production of Documents exceed the scope of permissible discovery, and require no additional response.

Finally, Plaintiff's Motion to Strike is DENIED. However, the parties are hereby directed that going forward, all documents filed with the Court shall be sent the same day via email to the opposing parties' counsel.

IT IS SO ORDERED this 9<sup>th</sup> day of September 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/cp

cc: Austin White, Esq.  
Paige Macdonald-Matthes, Esq.  
*200 Locust St., Ste. 400, Harrisburg, PA 17101*  
Gary Weber, Esq. (Lycoming Reporter)