IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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VINCENT L. AMMONS,

ORDER

Plaintiff,

06-C-20-C

v.

BRUCE GERLINGER, RENEE ANDERSON, BECKY DRESSLER and RITA ERICSON,

Defendants.

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Plaintiff Vincent Ammons is incarcerated at the Stanley Correctional Institution in Stanley, Wisconsin. In this civil action pursuant to 42 U.S.C. § 1983, plaintiff contends that (1) defendants Renee Anderson and Becky Dressler, both employees of the prison health services staff, concealed his request for medical treatment from the prison doctor and (2) defendant Bruce Gerlinger, a prison doctor, provided inadequate treatment for his wrist injury.

On February 6, 2007, defendants moved the court to order plaintiff to sign a form consenting to the release of his prison medical records. (Plaintiff was refusing to sign the forms because he believed that the release was too broad in scope.) Plaintiff did not respond

to defendants' motion within the 5 day period for doing so specified in the pretrial conference order. Dkt. #32, at 10 ("If your opponent files a discovery motion, you only have five calendar days to file and to serve your written response. You must have your response in the mail stream at the prison within five calendar days.") In an order dated February 12, 2007, Magistrate Judge Stephen. L. Crocker declined to order plaintiff to disclose his medical records, but warned plaintiff that failure to do so would likely result in the dismissal of his medical claims. Because the deadline for disclosing experts was looming, the magistrate provided plaintiff with a February 26, 2006 deadline for deciding whether to disclose his medical records.

Plaintiff chose not to disclose his medical records. Instead, on February 26, 2006, he filed a motion for reconsideration of the magistrate's decision pursuant to Fed. R. Civ. P. 72(a). Under that rule, a district judge may reconsider a pretrial decision rendered by a magistrate judge if the order is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); see also 28 U.S.C. § 636(b)(1)(A).

The main problem with plaintiff's motion is that it has been made too late. Rule 72(a) states explicitly: "Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." Although the magistrate's order was entered on February 12, 2007, plaintiff's

objections are postmarked February 27, 2007—five days after the deadline for objecting to the magistrate's order.

Even if plaintiff's receipt of the order was delayed by the prison mail system, making his motion for reconsideration timely, the motion would be denied. Plaintiff contends that the medical release form defendants have asked him to sign is too broad, covering all of his prison medical records (which date back 20 years), rather than just those records relating to his alleged wrist injury and rectal prolapse.

Under the Federal Rules of Evidence, parties are permitted to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" Fed. R. Civ. P. 26(b)(1). Relevance is construed broadly, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n. 12 (1978), to encompass "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Hickman v. Taylor, 329 U.S. 495, 501 (1947). Thus, discovery is not limited to the issues raised by the pleadings or the merits of a case. Sanders, 437 U.S. at 351.

Although plaintiff states correctly that he has a constitutional interest in protecting the confidentiality of his medical records, Whalen v. Roe, 429 U.S. 589 (1977); Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988), he waived that interest when he filed suit against defendants alleging that they provided him with inadequate medical care. See, e.g.,

Doe v. Marsh, 918 F. Supp. 580, 585 (N.D.N.Y. 1996); Ferrell v. Glen-Gery Brick, 678 F. Supp. 111, 112 (E.D. Pa. 1987) ("both courts and commentators alike have consistently taken the view that when a party places his or her physical or mental condition in issue, the privacy right is waived"); Felder v. Wyman, M.D., 129 F.R.D. 85, 88 (D.S.C. 1991) (where plaintiff filed lawsuit challenging the decedent's quality of medical care, any privilege with respect to decedent's medical condition was waived).

To the extent plaintiff is contending that his medical records are somehow privileged (and therefore not discoverable under Fed. R. Civ. P. 26(b)(1)), he is mistaken. Because this case arises under federal and not state law, it is federal law that governs whether plaintiff is entitled to assert that his medical records are undiscoverable because they are privileged. See, e.g., Fed. R. Evid. 501 (state governs privilege only in case in which state substantive law applies). There is no federal common law physician-patient privilege. Northwestern Memorial Hosp. v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004). Consequently, on that ground alone, plaintiff's medical records are discoverable, sensitive though they may be.

Even if Wisconsin law applied, plaintiff's records would still be discoverable in this lawsuit. Under Wis. Stat. § 905.04, "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, [and] the

patient's registered nurse . . . ." Wis. Stat. § 905.04(2). However,

> [t]here is no privilege . . . as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the 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.

Wis. Stat. § 905.04(4)(c).

In this lawsuit, plaintiff contends that defendants failed to treat a wrist injury he allegedly incurred on May 28, 2005. Defendants contend that plaintiff's wrist problem was a result of an older injury that had healed already (perhaps improperly). Plaintiff does not dispute that records of the medical treatment he received on and after May 28, 2005 are relevant to this lawsuit. However, he assert that there is no reason for defendants to have access to medical records dating back several decades. Although the relevance of plaintiff's older medical records is tenuous, they are nonetheless discoverable. If plaintiff had sustained a wrist injury in the past that defendants were no longer able to treat (rather than a more recent injury that defendants purposely failed to treat), his medical records would likely contain evidence of that old injury. Therefore, under Fed. R. Civ. P. 26(b)(1), plaintiff's medical records are "relevant to the subject matter involved in the pending action" and are discoverable.

Plaintiff takes issue with the magistrate judge's assessment that

> once this court has determined that information contained in [plaintiff's medical records] is directly relevant to material issues in the lawsuit, then a party's decision not to sign a release will have consequences commensurate with the importance of the records. In this case, plaintiff's medical records contain information that likely goes to the heart of plaintiff's claims against the defendants. Therefore, if plaintiff decides that he does not wish to disclose his medical records as part of discovery in this case, then it is likely that this court would dismiss plaintiff's lawsuit. The court would allow the parties to be heard before imposing any sanction.

Dkt. #43, at 2. I see no error in that statement, but will clarify it to provide that plaintiff's refusal to sign a medical release will bar him from relying on any of his medical records at trial or in response to a motion for summary judgment from defendants.

Plaintiff's motion for reconsideration will be denied. Because it may not have been clear to plaintiff what effect his failure to disclose his medical information would have on his lawsuit, I will provide him with one more brief opportunity to release his medical information to defendants. Plaintiff remains free to request a protective order limiting the persons who may view his medical records and the manner in which the records may be used. If, by March 26, 2007, plaintiff has not executed a release, he will be barred from using information from his medical records at trial or on summary judgment and may be subject to further sanctions. The choice is his to make.

## ORDER

IT IS ORDERED that plaintiff Vincent Ammons may have until March 26, 2007, in

which to execute a release of his medical records and, if he chooses, a motion for a protective order limiting the persons who may view his medical records and the manner in which the records may be used. If, by March 26, 2007, plaintiff has not executed a release, he will be barred from using information from his medical records at trial or on summary judgment and may be subject to further sanctions.

Entered this 12th day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge