

No. 47777-7 II

COURT OF APPEALS, DIVISION II

MAUREEN MUGHAL,

RESPONDENT,

V.

COPIN SASTRAWIDJAYA AND
RIANNE MATHEOS,

APPELLANTS

APPEAL FROM THE SUPERIOR COURT OF
COWLITZ COUNTY
THE HONORABLE STEPHAN WARNING
CAUSE NO. 14-2000361-87

BRIEF OF APPELLANTS

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Table of Contents

A.	Assignment of Error.....	4
B.	Issues Pertaining to Assignments of Error.....	4
C.	Statement of the Case	4
D.	Argument.....	5
E.	Conclusion.....	8

Table of Authorities

Constitutional Authority

Canadian Charter of Rights and Freedoms, Constitution Act, 1982..... 7

Health Insurance Portability and Accountability Act of 1996 (HIPAA)..... 7

First Amendment to the United States Constitution7

Cases

Clark v. Vega Wholesale, Inc., 181 F. R. d. 470 (D. Nev 1998).....6

Kent v. Cummings, 2010 WL 2643538 (D. Ariz. 2010).....6

Jones v. Syler, 936 S. W. 2d 805 (Mo. 1997) 6

Other Authority

“A Compelling Situation : Compelling American Letters Rogatory in Ontario,” Pam Pengley (2006).....6

A. ASSIGNMENT OF ERROR

01. The trial court erred in ordering the Appellants to sign the medical authorizations presented by the Respondent for voluntary signing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether an authorization for medical records is a permissible form of discovery under Washington law such that failure to sign is enforceable by a court compelling a litigant to do so.
[Assignment of Error No. 1]
02. Whether the American judge has jurisdiction to effectively order production of a foreign non-party to disclose documents.
[Assignment of Error No. 2]
03. Whether ordering a litigant to sign is a violation of American constitution rights for Americans, or as in this case, a violation of Canadian right under the Constitution Act, 1982, as well as a violation of federal statutes. [Assignment of Error No. 3]
04. Whether the authorizations ordered to be signed in this case were beyond the scope of discovery, if discovery. [Assignment of Error No. 4]
05. Whether the Court can authorize production of medical records to an non-party [Assignment of Error No. 5]

C. STATEMENT OF THE CASE

Appellants, who are Canadian citizens were involved in an automobile accident in Cowlitz County, Washington and alleged personal injuries in a

civil suit in Washington against an American defendant, the Respondent.[CP 1-10]

During discovery, Respondent submitted medical authorizations for Appellants to sign on a voluntary basis. [CP 75-78] They refused.

The Appellants had already given their medical records to the Respondent pursuant to a Request for Production under Rule 34, and defense counsel decided that he wanted the authorizations again, this time directly from the provider for his own satisfaction. The authorizations included language seeking “entire medical records for all dates”; directing that the records be sent to a third party hired by the defense (not counsel); and stating that this was “voluntary” and the signors gave their “authorization.” [CP 75-78]

The Court below ordered the Appellants to sign the authorizations on May 27, 2015. [CP 96]

D. ARGUMENT

01.1 A request to sign a medical authorization is not a permissible form of discovery and cannot be enforceably compelled as such.

Under Washington law, a plaintiff in a personal injury action is not required to sign a medical authorization for production to a defendant as a form of discovery under Rule 26.

To the Court, Respondent contended that the Appellant had violated discovery in the Motion to Compel and sought a discovery violation as a basis at the hearing of her Motion to Compel. [CP9-22]

Washington's discovery rules are modeled after the Federal Rules of Civil Procedure. It has been frequently held that a Plaintiff cannot be compelled to sign a medical release pursuant to rules of discovery to obtain copies of medical records in the possession of non-party medical providers. Clark v. Vega Wholesale, Inc., 181 F. R. D. 470 (D. Nev. 1998); Kent v. Cummings, 2010 WL 2643538 (D. Ariz. 2010, CV-09-1616); and Jones v. Syler, 936 S. W. 2d 805 (Mo. 1997) (for Missouri's Supreme Court analysis).

02.1 The American judge has no jurisdiction to control what a foreign provider releases.

Under these facts, the proper procedure for the Respondent to have followed is to have Letters Rogatory issued by the American court which would thereafter allow issuance of process by a Canadian court so that the Plaintiff might then have a judge who can exercise jurisdiction over the

possessor of the record (here Canadian medical providers) for objections such as privacy or relevancy-related ones, is by Letters Rogatory. See e.g., “A Compelling Situation: Compelling American Letters Rogatory in Ontario”, Pam Pengley (2006) which provides a good overview.

Where discovery of medical records is done by this proper method, or even depositions of foreign doctors is sought by this method, there are built-in protections to prevent impermissible disclosure so that medical patients can object to the discovery of any improper information by the foreign medical providers, namely by a determination on the issue by the foreign court, which sits where the medical provider is based.

03.1 The authorizations state that the Appellants consent when they do not and ordering signing is a violation of Constitutional and statutory rights

The Appellants do not consent and cannot be made to sign something saying they do give “authorization” when they do not give authorization. A recognition by this Court of authority for such to be ordered would erode the rights of these Canadians under the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, and under Canadian federal and provincial law.

As for Americans, adopting a rule that allows a judge in a civil case to order a form to be signed solely because a litigant has filed a personal injury lawsuit, would be a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the First Amendment.

04.1 The authorizations have no limits and are beyond the scope of discovery, if discovery.

Even on analysis by Washington law, the authorizations are limitless, do not lead to the discovery of admissible evidence, and are overly intrusive.

The authorizations seek records, unlimited in time and nature. The absence of any time limits, or any other qualifications means that the Respondent's authorizations are indefensibly broad. This would entitle them to any medical records in its possession since birth, an objectionable scope.

The Respondent is not entitled to all medical records but only those that may lead to discovery of admissible evidence. Here, that means those medical records that relate to the physical conditions at issue under the pleadings.

05.01 The authorization discloses to others than the defense.

The records would not go to defense counsel but rather to its third party agent (who are yet others who may review and communicate private

information in the Appellant's records) .The authorizations direct production to a company hired by the defense for outsource ease and economy. It is known as T-Scan, and these companies have become popular. [CR75-78]. A Plaintiff's privacy cannot be compromised for the defense's ease and economy.

E. CONCLUSION

Medical authorizations are voluntary and cannot be compelled as discovery. Moreover, for documents or witness testimony from foreign non-parties, proper measures must be taken (which depend on the country) to insure that the foreign non-party's disclosure can be reviewable by a court with jurisdiction over the non-party. Moreover, overly invasive authorizations erode the rights protected by law and are not permitted as leading to discovery under Washington, even if these authorizations are determined to be discovery.

DATED this 19th day of January 2016.



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