SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **2**
Justice

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NAOMI WOLF,

Plaintiff,

- v -

WALGREENS BOOTS ALLIANCE, INC., RETAIL PHARMACY USA, INC., DUANE READE, INC., WALGREEN CO., PETER MALKIN MANAGEMENT, INC., ESRT 250 WEST 57TH STREET ASSOCIATES, LLC, C/O EMPIRE STATE REALTY TRUST, INC., 250 WEST 57TH STREET ASSOCIATES, LLC, C/O MALKIN HOLDINGS, LLC

Defendants.

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INDEX NO. 156071/2015

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION, NUMBERED ACCORDING TO THE NEW YORK STATE COURTS ELECTRONIC FILING SYSTEM (NYSCEF) DOCUMENT NUMBERS, UNLESS OTHERWISE INDICATED:

PAPERS	NUMBERED
NOTICE OF MOTION, AFF. IN SUPP., GOOD FAITH AFF. AND EXHIBITS ANNEXED	23-29
11 ENVELOPES OF RECORDS SUBMITTED DIRECTLY TO CHAMBERS FOR IN CAMERA INSPECTION	PER ENVELOPES
AFF. IN OPP. AND EXHIBITS ANNEXED	30-39
REPLY AFF.	42

UPON THE FOREGOING CITED PAPERS, THE DECISION AND ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action, plaintiff claims that, on April 11, 2013, she tripped and fell on "unsecured, loose baseplates or kick plates in front of cashiers' registers" in a Duane Reade/Walgreens store at 250 West 57th Street, New York, NY. Plaintiff moves for a protective order to avoid disclosure of medical records that are "unrelated to any of [her] claimed injuries

resulting from her trip and fall." She submits 11 envelopes filled with medical records and requests that this Court review them, in camera, to determine the extent to which they remain covered by the physician-patient privilege. Defendants oppose. After oral argument, and upon a review of the papers submitted, as well as the relevant statutes and case law, the motion is **denied.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This motion, pursuant to CPLR 3103, has been made prior to plaintiff's deposition. Defendants have demanded that plaintiff produce authorizations, unrestricted by date, for Dr. Dena Harris, plaintiff's aquatic therapy facility, New York University School of Medicine, Basil A. Kocur, M.D., all pharmacies where plaintiff fills her prescriptions, all insurance companies which provide plaintiff medical coverage, New York Spine Medicine, Lenox Hill Radiology and Diagnostic Imaging, Dr. Douglas Schottenstein, Dr. Joseph Carfi, Deborah Coady, M.D., Hospital for Special Surgery, Gramercy MRI and Diagnostic Radiology, any osteopaths with whom plaintiff has treated, any acupuncturists, gym/fitness centers, physicians who have prescribed anti-anxiety medications and/or pain medications, Beth Israel Medical Center, Dr. Aric Hausknecht, Complete Care Medical Services of NY, P.C., the psychiatrist who prescribes plaintiff's ADHD medication and/or any other psychotropic medication, Catherine Jamin, M.D., Susi Vassolo, M.D. and Ramesh Babu, M.D. (Doc. No. 33.)

During discovery conferences, plaintiff orally objected to the inclusion of language ordering her to provide HIPAA-compliant authorizations for her medical records in a status conference order. She indicated that she would not consent to supplying such authorizations without very specific caveats, representing that there was information contained in her records with treating physicians that was both irrelevant to the instant action and embarrassing to her. She

requested that the records either be redacted by this Court or by a medical facility given very specific instructions as to the scope of the redactions in an authorization. Plaintiff requested that this Court conduct an in camera review of 11 envelopes of medical records before issuing an order requiring her to produce authorizations as to those providers. Given that the relief sought by plaintiff was far beyond the scope of what could reasonably be accomplished at a discovery conference, permission was given to plaintiff to make a motion seeking in camera review of the records.

CONCLUSIONS OF LAW

Individuals in this State generally enjoy a right to privacy in their medical information, embodied in the physician-patient privilege set forth in CPLR 4504, which provides that, "[u]nless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Medical information is also protected pursuant to the Health Insurance Portability and Accountability Act, generally referred to as HIPAA, which prohibits the disclosure of such information except in certain circumstances or with the patient's authorization. *See generally Arons v Jutkowitz*, 9 NY3d 393, 413-414 (2007). It is well settled, however, that a plaintiff in a personal injury action "may not claim the physician-patient privilege," because the commencement of such an action affirmatively puts the plaintiff's physical condition at issue. *Hoenig v Westphal*, 52 NY2d 605, 608-609 (1981); *see Arons v Jutkowitz*, 9 NY3d at 409; *Dillenbeck v Hess*, 73 NY2d 278, 287 (1989). Thus, where a plaintiff puts his or her "mental or physical condition . . . in controversy" by commencing a personal injury

action, he or she may be required to produce "duly executed and acknowledged written [HIPAA-compliant] authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals [and other similar entities] relating to such mental or physical condition" (CPLR 3121 [a]), as well as permitting the defendants to speak informally with treating physicians. *See Arons v Jutkowitz*, 9 NY3d at 415.

The instant motion requires this Court to determine the extent to which plaintiff has waived the privilege. The departments of the Appellate Division have diverged as to the rules to be applied to this issue, and the Court of Appeals has not yet resolved the split. The essence of the disagreement between the departments is whether, where, as here, a plaintiff seeks to recover for lost earnings and loss of enjoyment of life in addition to physical injuries, he or she places his or her entire medical history at issue. Since other motion courts have ably documented the divergence between the departments as well as the internal inconsistencies within individual departments (*see e.g. Ciancullo-Birch v Champlain Ctr. N. LLC*, 51 Misc 3d 1230[A], 2016 NY Slip Op 50885[U] [Sup Ct, Clinton County 2016]; *McLeod v Metropolitan Transp. Auth.*, 47 Misc 3d 1219[A], 2015 NY Slip Op 50705[U] [Sup Ct, NY County 2015, Stallman, J.]), this Court limits its analysis to the First Department, and refers the reader to those cases for additional background.

The First Department has most recently held, over vigorous dissent, that pleading loss of enjoyment of life as well as lost earnings, alone, does not place a plaintiff's "entire medical condition in controversy." *Gumbs v Flushing Town Center III, L.P.*, 114 AD3d 573, 574 (1st Dept 2014); *see Diallo v Yunga*, 148 AD3d 438 (1st Dept 2017); *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 (1st Dept 2012). Thus, motion courts whose orders are appealable to the First Department have held that "[d]isclosure of a plaintiff's pre-existing health condition is limited to reasonable parameters, including relevant parts of the body" (*Gomez v Ivory 1150 Concourse*

Corp., Index No. 305029/2015, 2017 WL 1113433 [Sup Ct, Bronx County, February 15, 2017, Douglas, J.] [internal quotation marks and citations omitted]), and that "[a] claim for loss of enjoyment of life by itself does not open the doors to the discovery of medical records unlimited in time, scope and relevance, even in a case alleging a total permanent disability" (*Rohan v Turner Const. Co.*, Index No. 154522/2012, NYSCEF Doc. No. 370, 2017 WL 1422993 [Sup Ct, NY County, April 18, 2017, Coin, J.]; *see also Almonte v 638 West 160 LLC*, Index No. 304912-2011, 2014 WL 3966125 [Sup Ct, Bronx County, August 1, 2014, Douglas, J.]). Indeed, this Court has previously found that, despite a plaintiff's alleged "extensive and severe" physical and psychological injuries resulting from being hit by a falling tree limb in Central Park, obstetrical and gynecological records were not discoverable for defendants to explore plaintiff's "depression and emotional distress as between her gynecological problems and the loss of her daughter and injuries sustained in the incident." *Del Gallo v City of N.Y.*, 43 Misc 3d 1235(A), 2014 NY Slip Op 50929(U) (Sup Ct, NY County 2014, Freed, J.).

It should be noted that other motion courts have found, however, that, where a "plaintiff claims that she may be limited in her activities in her employment and her life based on permanent disabling physical injuries, she is deemed to have waived the physician-patient privilege of her entire medical history." *Stein v Ten Eighty Apt. Corp.*, Index No. 15648/2014, NYSCEF Doc. No. 67, 2016 WL 3272268 (Sup Ct, NY County, June 14, 2016, Cohen, J.); *see McLeod v Metropolitan Transp. Auth.*, 47 Misc 3d 1219[A] at *31-32. As Justice Stallman reasoned in *McLeod v Metropolitan Transp. Auth.*:

> So long as a claim for loss of enjoyment of life or future earnings is considered as affirmatively placing at issue the plaintiff's life expectancy, work life expectancy, and general health, and so long as appellate courts continue to define 'relatedness' as 'material and necessary' or 'relevant', this Court is constrained to conclude that plaintiff in this cause has therefore waived the physician patient privilege as to his entire medical history. It bears repeating that virtually anything in plaintiff's entire

medical history might be relevant to, or reasonably calculated to lead to admissible evidence as to the plaintiff's overall health and work life expectancy. *Id.*

Taking all of the foregoing into account, this Court concludes, based on the weight of the lower court authorities and a reading of the most recent First Department cases on the issue, neither a loss of enjoyment of life nor lost earnings claim opens the door to a plaintiff's entire medical history, and a plaintiff's waiver extends only to pre- and post-treatment records dealing with treatment of the same anatomical parts, organs or members, as well as those body systems or body functions that are alleged to have been affected, with reasonable temporal limitations. *See Marques v Natl. R.R. Passenger Corp.*, 2017 NY Slip Op 30065(U), 2017 WL 119769 (Sup Ct, NY County 2017, Kalish, J.); *McLeod v Metropolitan Transp. Auth.*, 47 Misc 3d 1219[A] at *31-32. Where such a link between the bodily organs or systems is not immediately apparent, a defendant may utilize the assistance of a medical expert to establish such a link. For example, one court recently found that, where a plaintiff does not "withdraw her claims for permanent injury and future damages and [the] defendant's expert's opinion about the necessity and materiality of the information is unopposed," the plaintiff may be required to provide authorizations "allowing disclosure relating to treatment for substance abuse and PTSD" in a personal injury action involving a trip and fall down a staircase. *Barbara v Soo*, 2015 NY Slip Op 32008(U), Index No. 153510/2014, NYSCEF Doc. No. 42, 2015 WL 6508309 (Sup Ct, NY County, July 29, 2015, Schecter, J.).

Turning now to the procedural context of the motion, it is permissible for a plaintiff to submit records to the court for an in camera inspection and request "a determination of the parties' competing claims of physician-patient privilege and waiver." *Carcana v New York City Hous. Auth.*, 47 AD3d 523, 524 (1st Dept 2008); *see James v 1620 Westchester Ave. LLC*, 147 AD3d 575, 576 (1st Dept 2017); *Shamicka R. v City of New York*, 117 AD3d 574, 575 (1st Dept 2014).

While an in camera review procedure has legal support, plaintiff has provided no authority standing for the proposition that this Court must engage in line-by-line redaction, nor has she demonstrated that it is necessary or practicable under the circumstances. Thus, it will not do so.

"[A]n in camera review of the records of plaintiff's [medical records] is not practicable [and entails] the very real risk that some tidbit of information or notation contained in [the] records is directed to be redacted as irrelevant, but a medical expert would actually consider such information relevant" to a complete understanding of plaintiff's medical condition. *McLeod v Metropolitan Transp. Auth.*, 47 Misc 3d 1219(A) n 3. A line-by-line redaction is only appropriate at the time of trial, with the benefit of adversarial attention and medical experts' reports and testimony – not now, before depositions have taken place, and with nothing to aid this Court's analysis of plaintiff's medical records other than a magnifying glass and WebMD. Thus, this Court will conduct a review of the records to determine, in general, the material that they contain, and then direct plaintiff to provide HIPAA-complaint authorizations for the physicians and facilities where plaintiff has treated that have information for which plaintiff has waived the privilege, considering such temporal and other limitations as are necessary to prevent disclosure that is overly burdensome or invasive.

In her bill of particulars, plaintiff, now 54 years of age, claims that:

> [a]s a result of [d]efendants' negligence, [she] has sustained . . . lumbar injury reactivating and aggravating prior condition, and new onset of severe unremitting lower back pain and radiculopathy; L5-S1 foraminal stenosis with L5 nerve root impingement; chronic right L5-S1 radiculopathy; lumbago; sciatica; herniations; bulging discs; nerve damage; cervical radiculitis; lumbar radiculitis; motor weakness; severe pain, swelling, tenderness, limitation of motion and decreased range of motion; decreased weight bearing abilities; plaintiff was caused to undergo extensive and painful physical therapy; plaintiff was caused to require the use of narcotic substances and spinal injections for pain; hematoma; knee injury and bruising; desiccation of the L5-S1 disc with endplate sclerosis; spondylolisthesis; hyperlordosis; lost and decreased enjoyment of life; lost enjoyment of pre-accident social endeavors; and lost enjoyment of pre-accident physical activities.

(Doc. No. 27.)

She further alleges that "[a]ll of the aforementioned injuries are, upon information and belief, permanent and continuing into the future. Additional spinal surgery may be required." (*Id.*) Plaintiff also specifies that:

> Since April 11, 2013, she suffers from constant, relentless pain and was determined to be partially disabled by Dr. Aric Hausknecht. She continues to require strong pain medications, including spinal injections. She is unsteady when she stands and must lean against surfaces for support. She is unable to run. She cannot sit or stand for more than a few minutes at a time. She has trouble dancing, walking downhill and walking down stairs. She cannot drive unless she gets out of the car every 20 minutes. Due to pain, she has trouble concentrating for the long stretches of time required by her profession, and as a result, her ability to write and publish has decreased severely. She has difficulty gardening, and lifting groceries and bags generally. Walking at a fast pace is not possible. Traveling is very painful. She is unable to be a hands-on mother of two children, the way she was before the April 11, 2013 incident. Her ability to cook for her family, do housework, go bicycling, and fall asleep have all been greatly diminished. She has trouble sitting or standing for extended periods of time while lecturing to students.

Contrary to plaintiff's argument, the injuries she alleges were caused by the fall are not merely orthopedic. Indeed, she has claimed a vast array of symptoms impacting nearly every aspect of her life. If her claims for loss of enjoyment of life and lost earnings did not, alone, make more than back-related complaints discoverable, the difficulties she lists as being caused by the fall do. Upon a review of the records submitted to this Court, it is determined that all of them contain information that is either obviously or potentially relevant to the symptoms she has alleged were caused by the fall.

In the envelopes containing records from Beth Israel Medical Center that plaintiff has withheld from defendants, many of the pages contain information involving plaintiff's spine, as well as pelvic and numbness issues. Considering the numerous allegations of pain, including an inability to sit for extended periods of time, this Court is unconvinced that the prior injuries and

complaints related to her pelvic region are irrelevant. Additionally, plaintiff seeks to withhold records concerning her ADHD. Such records are relevant to plaintiff's specific allegation that she "has trouble concentrating for the long stretches of time required by her profession" and are therefore disclosable.

Plaintiff makes many other arguments with respect to particular complaints and notations contained in the records. While some notations in the many pages submitted contain references that are potentially irrelevant, there is no practicable way for this Court to conduct a line-by-line examination and direct the redaction of individual notations without running the serious risk of infringing on defendants' right to review relevant medical information. Thus, plaintiff has failed to establish entitlement to a protective order with respect to the envelopes containing information from Beth Israel Medical Center.

Plaintiff has similarly failed to establish her entitlement to a protective order as to the envelopes containing records of Dr. Douglas Schottenstein, Dr. Aric Hausknecht, Dr. Babu, Dr. Basil and Soho OBGYN. All of the envelopes contain records indicating that plaintiff saw the foregoing doctors for pelvic issues that have a potential neurological basis originating in plaintiff's spine -- not merely for general gynecological care. The potential link between plaintiff's numbness complaints and a neurological condition in her spine, documented by plaintiff's own treating physicians, is sufficient enough that defendants should have an opportunity to have their medical experts review the records and explore that issue.[1] With respect to the OB/GYN records, however,

[1] This Court must also note that plaintiff has published a book in which she speaks, in detail, about the pelvic and nerve issues that she has experienced, the names of the doctors she saw, the medical treatment she obtained, and their explanations as to what was happening to her body. (Doc. No. 38.) Indeed, she spends some time in her book explaining her perceived link between her pelvic injuries and certain nerves in her back. Plaintiff has willfully put that information out into the public domain for scrutiny, so she can hardly claim with any credence that she finds such information embarrassing.

the authorizations provided should indicate that disclosure is limited to records relating to treatment for plaintiff's pelvic injuries and numbness complaints. The other facilities mentioned will be limited only temporally. At the time of trial, information determined to be irrelevant through the remainder of disclosure and following independent medical examinations may be redacted by the trial judge.

Thus, this Court finds that plaintiff is not entitled to a protective order and, concomitantly, defendants are entitled to HIPAA-compliant authorizations covering the conditions, facilities and physicians discussed herein. A period of five years prior to the date of the alleged accident is adequate in this regard and captures the relevant time period without being unduly burdensome or invasive. It is noted, however, that the scope of disclosure may be subject to expansion, particularly considering that plaintiff has alleged exacerbation of a pre-existing condition, based on, among other things, her deposition testimony. *See Rega v Avon Prods., Inc.*, 49 AD3d 329, 329 (1st Dept 2008).

Accordingly, it is hereby:

ORDERED that plaintiff's motion for a protective order is denied in its entirety; and it is further

ORDERED that, within 30 days after service of a copy of this order with notice of entry, plaintiff is directed to provide new responses to defendants' demands for authorizations (Doc. No. 33) by providing HIPAA-compliant authorizations for the release of medical records, as well as permission for defendants to speak informally to plaintiff's medical providers, excluding records

of HIV treatment and alcohol and substance abuse treatment, if any, for the period of April 11, 2008 to the present, in accordance with this decision; and it is further

ORDERED that, following the receipt of authorizations and a reasonable time for processing, the parties shall complete depositions on or before August 11, 2017; and it is further

ORDERED that the parties are directed to appear for a status conference on August 15, 2017 at 80 Centre Street, Room 280, at 2:30 p.m. to discuss remaining discovery issues; and it is further

ORDERED that counsel for plaintiff is directed to contact the Clerk of Part 2 at (646) 386-3852 to arrange to pick up the records submitted to the Court for in camera inspection; and it is further

ORDERED that counsel for defendant is directed to serve a copy of this order with notice of entry on plaintiff within 10 days after it is entered.

This constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

6/5/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	☐	CASE DISPOSED			X	NON-FINAL DISPOSITION	
	☐	GRANTED	X	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE