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2 **UNITED STATES DISTRICT COURT**

3 **DISTRICT OF ARIZONA**

4 **Brandon Lassley,**

5 )  
6 )  
7 **Plaintiff,** )

8 **vs.** )

9 **Secura Supreme Ins. Co.,** )

10 **Defendant.** )  
11 )

**2:14-cv-1677 JWS**

**ORDER AND OPINION**

**[Re: Motions at docs. 26 & 29]**

12 **I. MOTIONS PRESENTED**

13 At docket 26 plaintiff Brandon Lassley (“Lassley”) moves for a protective order  
14 providing that he need not produce an authorization allowing defendant Secura  
15 Supreme Ins. Co. (“Secura”) to obtain Lassley’s drug treatment records. Secura’s  
16 response at docket 29 includes a motion asking the court to order Lassley to provide  
17 the requested medical records authorization, and also to order Lassley to produce  
18 documents relating to Lassley’s contacts with the United States Navy. Lassley’s  
19 combined reply in support of his motion and response to Secura’s motion is at  
20 docket 33. Secura replies in support of its motion at docket 35. Oral argument was  
21 requested, but the motions are well briefed, and oral argument would not assist the  
22 court.  
23

24 **II. BACKGROUND**

25 Lassley was a passenger in an automobile operated by his intoxicated friend  
26 Cody Murphy. Murphy lost control of the vehicle. Lassley was injured in the ensuing  
27 crash. Lassley settled with Murphy for the limits of his insurance policy. In this lawsuit,  
28

1 Lassley seeks additional compensation from Secura pursuant to the under-insured  
2 motorist coverage in the policy Secura issued to Lassley. Lassley seeks damages for  
3 breach of the insurance contract and bad faith in the adjustment of his claim. He seeks  
4 compensatory and punitive damages. The auto accident occurred in Arizona, and  
5 Lassley filed his lawsuit in Arizona state court. Secura removed the litigation to this  
6 court relying on diversity of citizenship jurisdiction.  
7

### 8 III. DISCUSSION

#### 9 **1. Drug Rehabilitation Records Are Privileged**

10 Lassley has a history of drug abuse. He obtained substance abuse treatment on  
11 four occasions, two before the accident and two after the accident. Secura seeks an  
12 authorization that would enable it to review Lassley's substance abuse treatment  
13 records. Lassley is not seeking to recover any damages from Secura that relate to his  
14 substance abuse problems.  
15

16 Lassley claims that the drug rehabilitation records are privileged. Under the  
17 Federal Rules of Evidence, any health-care provider/patient privilege available to  
18 Lassley derives from the law of Arizona.<sup>1</sup> Lassley correctly points out that under  
19 Arizona law, except as otherwise provided by law, a health care provider may not  
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23 <sup>1</sup>Fed. R. Evid. 501's state law proviso: "But in a civil case, state law governs privilege  
24 regarding a claim or defense for which state law applies the rule of decision." As explained in  
25 the Advisory Committee Notes to Rule 501, the rationale underlying the proviso "is that federal  
26 law should not supersede that of the States in substantive areas such as privilege absent a  
27 compelling reason. The Committee believes that in civil actions in the federal courts where an  
28 element of a claim or defense is not grounded upon a federal question, there is no federal  
interest strong enough to justify departure from State policy." Fed. R. Evid. 501, Advisory  
Committee Notes, H.R. Rep. No. 93-650.

1 disclose anything in a patient's medical records without the patient's written consent.<sup>2</sup>  
2 The records Secura seeks are subject to Arizona's health care provider/patient  
3 privilege.  
4

## 5 **2. Protective Order For Drug Rehabilitation Records**

6 To obtain a protective order, Lassley must show "good cause" for sheltering the  
7 drug treatment records from disclosure.<sup>3</sup> The Arizona legislature has concluded that  
8 the contents of health care records such as those Secura seeks are "privileged and  
9 confidential."<sup>4</sup> That being so, Lassley has established the good cause required by  
10 Rule 26(c) for a protective order. As elaborated below, this is evident from the  
11 distinction drawn by Rule 26(b)(1) between privileged and non-privileged information. It  
12 may be added that both parties look to inapposite case law. Both cite *Phillips v. GM*  
13 *Corp.*<sup>5</sup> That case arose in an entirely different context. The question in *Phillips* was  
14 whether information already produced in the course of discovery could be shielded from  
15 disclosure to the public.  
16

17 Secura argues that the burden, nevertheless, remains on Lassley to show  
18 "specific prejudice or harm that would result if no protective order is granted."<sup>6</sup> Secura  
19 has it backwards. Under the Federal Rules of Civil Procedure, a party may obtain  
20 discovery of material which is relevant to any claim or defense if the material sought is  
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22 <sup>2</sup>A.R.S. § 12-2292.

23 <sup>3</sup>Fed. R. Civ. P. 26(c).

24 <sup>4</sup>A.R.S. § 12-2292 A.

25 <sup>5</sup>307 F.3d 1206 (9th Cir. 2002).

26 <sup>6</sup>Doc. 29 at 2.

1 “nonprivileged.”<sup>7</sup> Where a privilege applies, the discovery may be had only upon a  
2 showing of good cause.<sup>8</sup> Lassley having established that the material sought is  
3 privileged, the burden is on Secura to show good cause for its production. A protective  
4 order is appropriate unless Secura is entitled to an order requiring production of the  
5 information, despite its privileged status.  
6

### 7 **3. Request to Compel Production of Drug Rehabilitation Records**

8 The privilege claimed by Lassley is not absolute. It is subject to both statutory  
9 and judicially created exceptions.<sup>9</sup> One commonly recognized exception to the health  
10 care provider/patient privilege arises when the patient has placed his condition at issue  
11 in litigation. However, Lassley makes, and the court relies upon and will enforce, the  
12 following representation:  
13

14 Lassley has *never* asserted his drug treatment expenses form any portion  
15 of his claim—and his complaint certainly does not do so. In short, Lassley  
16 hasn’t ever, is not now, nor ever will assert that his drug-rehabilitation  
17 treatment was necessitated due to the accident, or that those expenses  
should be considered as a portion of his breach-of-contract and bad-faith  
damages.<sup>10</sup>

18 The drug treatment records are subject to discovery in this lawsuit only if they have  
19 probative value relating to an issue before the court, or their production is reasonably  
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24 <sup>7</sup>Fed. R. Civ. P. 26(b)(1).

25 <sup>8</sup>*Id.*

26 <sup>9</sup>*Benton v. Superior Court*, 897 P.2d 1352, 1354 (Ariz. Ct. App. 1994).

27 <sup>10</sup>Doc. 33 at 7 (emphasis in original).



1 Reason, of course, does not exist in a vacuum. Something is reasonably  
2 possible when there is some objective basis for believing it would be true. Here, it is  
3 known from Lassley's deposition testimony that he had shoulder surgery prior to the  
4 accident, took opiate pain relievers as a result, and began to abuse opiate pain  
5 medications.<sup>14</sup> It is also known that he was prescribed pain medications as a result of  
6 the accident and went on to abuse the drugs again. Lassley's testimony shows that he  
7 sought drug treatment both before and after the accident, and that he sought it in  
8 Phoenix, San Diego, and Denver over a period of time. There is nothing else to support  
9 Secura's speculation that the drug treatment records would lead to admissible evidence  
10 relating to issues in the pending lawsuit.  
11

12  
13 The burden is on Secura to show good cause for production of the drug  
14 treatment records. Given what is known about Lassley's drug treatment and the highly  
15 speculative nature of the proposition that the records actually do contain or would lead  
16 to discoverable information, the court concludes that Secura has not carried its burden.  
17 Lassley will not be required to authorize disclosure of the drug treatment records.  
18

#### 19 **4. Request to Compel Production of Navy Recruitment Records**

20 According to Secura, for a substantial period of time, Lassley was contending  
21 that his damages included the loss of his career prospects in the United States Navy,  
22 but Lassley abandoned that proposition when confronted with the fact that persons with  
23 a history of drug abuse are not acceptable to the Navy.<sup>15</sup> Whatever potential relevance  
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26 <sup>14</sup>Deposition of Brandon Lassley, doc. 26-1 at 10-11.

27 <sup>15</sup>Doc. 36 at 9.

1 the Navy recruitment records might have (Secura argues that they bear on Lassley's  
2 credibility), the record reflects that, aside from an undated letter already produced,  
3 neither Lassley nor his mother possess any Navy recruitment records. The record also  
4 discloses that Secura made no Rule 34 request for production of the Navy recruitment  
5 records. The record further reflects that Secura has not provided a certificate showing  
6 that counsel met and conferred regarding Secura's motion to compel production of the  
7 Navy recruitment records.<sup>16</sup>

9 Secura's motion to compel production of the Navy recruitment records lacks  
10 merit for several reasons. First, it is pointless, because Lassley has no such records.  
11 Second, a request for production of documents and an inadequate response to that  
12 request is a necessary predicate to a motion to compel.<sup>17</sup> Finally, the local rules require  
13 a certificate attesting to a personal consultation between counsel before a motion to  
14 compel may be filed.<sup>18</sup>

## 16 **5. Award of Attorneys' Fees**

17 Lassley asks the court to award him his attorneys' fees. Lassley's motion was  
18 brought pursuant to Rule 26(c). That rule contemplates the award of expenses  
19 pursuant to Rule 37(a)(5).<sup>19</sup> When the moving party obtains a protective order,  
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22 <sup>16</sup>Although Secura's certificate ambiguously states that its counsel "conferred or  
23 attempted to confer with" Lassley's counsel, Doc. 29 at 11, Secura does not dispute Lassley's  
24 contention that no personal consultation ever took place.

25 <sup>17</sup>See Fed. R. Civ. P. 37(a)(3)(B)(iv).

26 <sup>18</sup>LRCiv 7.2(j) ("No discovery motion will be considered or decided unless a statement of  
27 moving counsel is attached thereto certifying that after personal consultation and sincere efforts  
28 to do so, counsel have been unable to satisfactorily resolve the matter.").

<sup>19</sup>Fed. R. Civ. P. 26(c)(3).

1 Rule 37(a)(5) requires an award of expenses, including reasonable attorneys' fees.<sup>20</sup>  
2 Lassley also asks for fees relating to Secura's motion to compel. When such a motion  
3 fails, as it has here, the defending party is entitled to recover reasonable attorneys'  
4 fees.<sup>21</sup> Secura will be required to pay Lassley his reasonable attorneys' fees.  
5

### 6 III. CONCLUSION

7 For the reasons above:

8 (1) The motion at docket 26 is **GRANTED** as follows: Lassley shall not be  
9 required to authorize the release of his drug treatment records;

10 (2) The motion at docket 29 is **DENIED**; and

11 (3) Lassley shall file a motion for attorneys' fees within 14 days. It must be  
12 supported as required by the local rules. Secura shall respond within 14 days after the  
13 motion is filed. The response may contest the amount sought, but not Lassley's right to  
14 recover a reasonable amount. No reply may be filed unless requested by the court.  
15

16 DATED this 18<sup>th</sup> day of August 2015.

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19 \_\_\_\_\_ /S/  
20 JOHN W. SEDWICK  
21 SENIOR UNITED STATES DISTRICT JUDGE  
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26 <sup>20</sup>Fed. R. Civ. P. 37(a)(5)(A).

27 <sup>21</sup>Fed. R. Civ. P. 37(a)(5)(B).