



force. Plaintiffs believe certain communications between Defendants' attorneys and their experts needed to be disclosed at an earlier point in discovery, and Defendants maintain that these communications were privileged and did not need to be disclosed at all because they did not fall under the three limited exceptions to the privilege in Rule 26(b)(4)(C)(i)-(iii). The Court agrees for the reasons stated from the bench during the pretrial hearing on May 30.

Moreover, with respect to the medical indexes and summaries that Defendants' attorneys prepared for their experts—which are at the heart of Plaintiffs' request for sanctions—even if the Court assumed that these documents were not privileged, Plaintiffs have not established that they were prejudiced by any failure to produce the documents earlier in the litigation. Defendants have provided the Court with multiple excerpts of defense expert depositions in which the experts all testified that they relied *only* on the medical records in the file in forming their opinions, and that they brought those records with them to their depositions. See Doc. 352-2. Plaintiffs argued in their motion and during the May 30 hearing that these experts must not have been telling the truth about relying only on the source documents, as several of them testified incorrectly about D.M.'s Apgar scores, using scores that appeared in the lawyer-generated medical summaries, rather than the ones that appeared in the medical records themselves. To that argument, Defendants have responded that Plaintiffs had the opportunity to question—and did question—these experts about the Apgar scores, so no prejudice has resulted. See Doc. 325 at 11. Again, the Court agrees.

Finally, with respect to Plaintiffs' argument that sanctions are appropriate due to Defendants having violated the Court's January 9 order, Magistrate Judge Senechal

thoroughly considered this issue in an opinion issued shortly after her hearing in April. The Court endorses Judge Senechal's reasoning and agrees with her ultimate finding that Defendants did not violate the January order. See Doc. 181 at 4-5 ("This court's January 9, 2019 order did not require defendants to produce any additional documents. Rather, it required they produce privilege logs. Though defendants appear to have asserted privilege with a very broad sweep, they timely complied with the order to prepare privilege logs. Accordingly, the failure to obey a Court order is not a valid basis for issuing sanctions in this case.").

For all these reasons and for the reasons stated from the bench during the May 30 hearing, **IT IS ORDERED** that the Motion for Sanctions (Doc. 249) is **DENIED**.

**IT IS SO ORDERED** on this 12<sup>th</sup> day of June, 2019.



TIMOTHY L. BROOKS  
UNITED STATES DISTRICT JUDGE