To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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MARGARET HAYES,

Plaintiff,

-against-

COSTCO WHOLESALE CORP.,

Defendant.

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DECISION & ORDER

Index No. 51013/2016
Motion Date: June 26, 2017
Seq. No. 2

LEFKOWITZ, J.

The following papers were read on plaintiff's motion seeking a protective order pursuant to CPLR 3101 with respect to defendant's demand for (i) all of plaintiff's pharmacy records for two years prior to the date of the subject accident to present; (ii) plaintiff's medical records from Dr. Francis Agbonkpolo ("Dr. Agbonkpolo") for three years prior to the subject accident to present; and (iii) all of plaintiff's social security disability records, three years prior to the subject accident to present, and pursuant to CPLR 3103 an order to compel defendant to disclose its "Confidential Warehouse Incident Report" ("the "incident report"), and for such other and further relief as this court may deem just and proper. Defendant opposes the motion.

Order to Show Cause - Affirmation in Support -Affirmation of Good Faith-
Exhibits A-O
Affidavit in Opposition - Exhibit A

Upon the foregoing papers and the proceedings held on June 26, 2017, this motion is determined as follows:

Relevant Facts & Procedural History:

Plaintiff commenced this action on August 8, 2016 by filing a summons and verified complaint seeking damages for personal injuries which she allegedly sustained when she slipped and fell at defendant's store on December 8, 2015. Among plaintiff's contentions is that she fell on grapes that were on the floor of defendant's store. Defendant served its verified answer on August 15, 2016. On September 28, 2016 plaintiff served her bill of particulars as well as

responses to defendant's initial discovery demands. Plaintiff appeared for her deposition on January 11, 2017. Defendant appeared by Arissa Burnett ("Burnett") for its deposition on January 18, 2017. On or about January 19, 2017, plaintiff received defendant's demand for the following authorizations:

> (i) CVS on North Avenue in New Rochelle, New York for release of plaintiff's pharmacy records from 2013 to the present which authorization must contain initials next to all lines in box 9(a).
>
> (ii) Dr. Francis Agbonkpolo of Abosa Medical Services, 140 Stevens Avenue, Mt. Vernon, New York 10550, for release of plaintiff's medical records for the time period 2012 to the present.
>
> (iii) Social security disability records directed to the office where the plaintiff filed for disability benefits which authorization should permit the release of plaintiff's application for benefits, benefits determination, all medical records submitted in connection therewith, benefit payments and any hearing transcripts in connection therewith (the "January 19 demands").

On February 27, 2017, plaintiff served her responses to the January 19 demands objecting on the grounds, inter alia, that they were overly broad, unduly burdensome, seeking privileged records and not reasonably calculated to lead to discovery of information bearing on plaintiff's claims as the plaintiff has not claimed an exacerbation of a prior back injury, nor has the plaintiff placed her entire medical history at issue by broadly alleging a 'loss of enjoyment of life.' Notwithstanding the foregoing objections, plaintiff did provide an authorization for her pharmacy records from December 8, 2015 to the present. On April 2, 2017, plaintiff served the defendant with post deposition demands, including, inter alia, a demand for a copy of the computer generated incident report created by defendant's employee as a result of the accident. On or about April 21, 2017, defendant served its response to plaintiff's April 2, 2017 discovery demand and objected to the demand for defendant's incident report on the basis that those materials were "prepared solely in anticipation of litigation."

Contentions of the Parties:

Plaintiff brings this motion seeking a protective order with respect to defendant's demands and to compel defendant to produce the incident report. Plaintiff argues that defendant is not entitled to the authorizations as they have no bearing on the injuries at bar. Plaintiff argues that defendant is not entitled to the authorizations because they seek information pertaining to unrelated illnesses and treatment which is confidential and which plaintiff has not waived. Plaintiff avers that Dr. Agbonkpolo has been treating plaintiff for fifteen years for her back problems. Plaintiff states that she began receiving disability benefits in 2012 as a result of her back problems. Plaintiff argues that she is not claiming broad allegations of injuries such as a

total loss of her ability to perform activities of daily living or a loss of enjoyment of life nor is she claiming that her back was injured or that the preexisting back issues were exacerbated by the accident. Plaintiff states, as provided in her bill of particulars, that her claims of pain and suffering are related exclusively to injuries to her left knee caused by the accident. Moreover, plaintiff contends that she has not put anything about her medical history or status in controversy other than the injuries to her left knee. Plaintiff further points out that defendant's physician did not examine plaintiff's back during his examination of plaintiff but focused solely on her left knee. Plaintiff contends that defendant has failed to demonstrate the relevancy of this discovery to plaintiff's knee injury.

Additionally plaintiff seeks the incident report which was created in response to plaintiff's accident. Plaintiff argues that the fact that the incident report is labeled "confidential" does not make it so. Plaintiff notes that Burnett testified that in cases where no witnesses to an accident exist, then the incident report can contain statements made by the person involved in the accident. Plaintiff further argues that accident reports made in the regular course of business by uninsured or self-insured entities such as defendant are generally not privileged from disclosure. Plaintiff contends that the incident report at bar is one that results from the regular internal operations of defendant's business and is discoverable under CPLR 3101(g) even if the sole motive behind the business operation is litigation.

In opposition, defendant argues that the requested pharmacy records, pain management records and social security disability records are relevant to plaintiff's claims. Defendant contends that plaintiff has alleged that she was fully and/or partially disabled as a result of the accident, that she testified that she was taking Oxcontin and Oxycodone for her back pain about four days prior to the accident, and that she was receiving social security disability benefits due to her back condition. Additionally, defendant states that plaintiff has alleged in her bill of particulars that she will require further pain management. Defendant argues that the records it seeks are material and necessary to the extent that plaintiff claims that her knee injury is disabling and requires pain management. It is defendant's contention that plaintiff's back condition and treatment, including pain management, and her claim for disability benefits for her back, overlap with her claims of disability and pain management for her knee injury herein. Defendant states that the authorizations seek the information necessary to discern the allocation of disability and pain management between the prior back injury and the subject knee injury. Defendant cites *Vanalst v City of New York*, 276 AD2d 789 [2d Dept 2000], where the court found the defendant was entitled to all medical report relative to plaintiff's prior back injury because that injury may have an impact on plaintiff's claim for damages in that case. Defendant distinguishes the case of *Noble v Ackerman*, 216 AD2d 140 [1st Dept 1995], relied on by plaintiff, from the present case, because although it is unclear from the *Noble* decision whether the plaintiff in that case was receiving ongoing treatment for her prior injury, plaintiff herein continues to receive treatment for her prior injury.

Defendant argues that plaintiff is not entitled to its incident report which is privileged and confidential. Defendant further argues that in the absence of any demonstrated hardship by

plaintiff the report remains privileged. In support of its opposition, defendant annexes several court decisions, including some from this court,[1] which have held that such reports are not discoverable. Defendant argues that plaintiff is not entitled to production of the incident report because the report was not prepared in the regular course of business, but rather solely in preparation of litigation in the instant matter to advise defense counsel of plaintiff's accident. Defendant argues that this report is prepared exclusively to notify defense counsel of plaintiff's accident. Defendant states it is a self insured entity and relies on its General Liability Department to forward the report to outside counsel, which is defense counsel herein. Defense counsel provides the affidavit of James C. Miller, Esq., who states that he has acted as defendant's legal counsel for twenty years and as such is familiar with the operation of defendant's warehouses and claims department. Additionally, Mr. Miller affirms that he was involved in the design of the form in question and that the "Privileged and Confidential Warehouse Incident Report" is prepared by a manager, and is immediately transmitted to the Home Office General Liability Department. Mr. Miller also states that at the top of the incident report appears, "THIS REPORT IS TO BE PREPARED FOR THE COMPANY'S LEGAL COUNSEL. DO NOT GIVE A COPY OF THIS REPORT TO, OR DISCUSS ITS CONTENTS WITH ANY PERSON EXCEPT AS INSTRUCTED BELOW." Mr. Miller further affirms that "the report is prepared exclusively in anticipation of litigation, that is not motivated by any other business concern, operation, or practice, and that it was not created and is not utilized or intended for any purpose beyond that of litigation, e.g. as an efficiency report, disciplinary record, personnel record, etc." (Miller aff at 12).

Analysis:

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Although CPLR 3101(a) requires full disclosure of all matter material and necessary in the prosecution or defense of an action the principle of "full disclosure" does not give a party uncontrolled and unfettered disclosure. An injured plaintiff waives the physician-patient privilege

[1] The cases from this court include: *Maiolo v Costco Wholesale Corp.*, 25469/09 (Lefkowitz, J), August 27, 2010; *Contreras v Costco Wholesale Corporation*, 9058/09, (Lefkowitz, J), December 21, 2010; *Torre v Costco Wholesale Corporation*, 1567/05 (Natasi, J), November 2, 2006; *Schoenfeld v The Price Company, et al.*, 17897/98 (Colabella, J), August 4, 2000.

with respect to his relevant prior medical history concerning those physical conditions which he has affirmatively placed in controversy (*Romance v Zavala*, 98 AD3d 726 [2d Dept 2012]).

The party seeking to compel production of medical records has the initial burden of making an evidentiary showing that the other party's medical condition has been placed in controversy in the action (Modern New York Discovery, Scope of Disclosure § 23:31). A party affirmatively places his entire medical condition in controversy through broad allegations of physical injury or mental anguish (*O'Rourke v Chew*, 84 AD3d 1193 [2d Dept 2011]; *DeLouise v S.K.I. Wholesale Beer Corp.* 79 AD3d 1092 [2d Dept 2010]). A plaintiff in a personal injury action does not waive her rights to keep information pertaining to unrelated illnesses and treatment confidential *(McLane v Damiano*, 307 Ad2d 338 [2d Dept 2003]).

In the present case, plaintiff has claimed injuries with respect to her left knee. Although plaintiff concedes that she has a pre-existing back injury, plaintiff has affirmatively testified and plaintiff's counsel has reiterated, that plaintiff is not claiming an injury, re-injury or exacerbation of her pre-existing back condition. Nor is plaintiff claiming a diminution or loss of enjoyment of life.

Additionally, defendant's reliance on *Vanalst* is misplaced as the plaintiff in that case, unlike plaintiff herein, was claiming loss of enjoyment of life. The *Vanalst* court stated, "...the nature of plaintiff's previous back injuries may have an impact upon the amount of damages, if any, recoverable for a claimed loss of enjoyment of life because of his current knee injury. Therefore the requested records and reports are material and necessary to the defense" (*Vanalst* at 789).

Insofar as plaintiff's claims of pain and suffering are related exclusively to the injuries to her left knee, defendant has failed to establish the factual predicate to justify the production of authorizations and additional information related to plaintiff's pre-existing back problems (*see Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d 916 [2d Dept 2011], where the court held that the defendant was not entitled to discovery of plaintiff's entire medical history where bill of particulars alleged only specific injuries to plaintiff's left knee and defendant's demands with respect to plaintiff's entire medical history were patently overbroad and burdensome; *Noble v Ackerman*, 216 AD2d 140 [1st Dept 1995], where the court held that defendant's request for medical authorizations pertaining to plaintiff's knee operation which occurred ten years prior to the accident at issue was properly denied by the trial court on the grounds that plaintiff did not claim that his knee was injured in the accident or that his prior knee injury was aggravated).

It is well established that accident reports, unless prepared for the sole purpose of litigation are generally not privileged and are subject to disclosure (*Agovino v Taco Bell 5083*, 225 AD2d 569 [2d Dept 1996]). Here defendant argues that the incident report is immune from disclosure as its was created solely for the purposes of litigation and has submitted decisions from courts which have found that the accident reports in those case were not subject to disclosure as they were determined, after in camera review by the court, to have been produced

solely for litigation purposes. However, unlike the courts in the cases submitted by defendant, this court has not been provided with the report for review.

Accordingly it is:

ORDERED that the branch of plaintiff's motion seeking a protective order with respect to the authorizations sought by defendant's January 19, 2017 demands is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking disclosure of defendant's incident report is granted to the extent that defendant is directed to provide the incident report for in camera review and determination by the court to the Compliance Part Motion Clerk, Room 809, on or before June 30, 2017; and it is further,

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800 on July 18, 2017, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 26, 2017

HON. JOAN B. LEFKOWITZ, J.S.C.

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