IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Janice Kennedy, independent administrator for the estate of Stacey Daniels, deceased,	)	
Plaintiff,	)	
v.	)	
Ronald Stella, M.D., Heart Care Centers of Illinois, S.C., Blue Island Hospital Company, LLC, d/b/a MetroSouth Medical Center; Kurt W. Erickson, M.D.; Richard G. Harris, M.D.; Metro Primary Care Associates LLC; Ravi M. Deshmukh, M.D., and Surgical Care Associates, Ltd.,	)	No. 18 L 158
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Supreme Court rules and the common law interpreting them consistently authorize the discovery of trial admissible evidence as well as information that may lead to the discovery of admissible evidence. The plaintiff here seeks to quash three of the defendants' deposition subpoenas served on persons who may have information material to the plaintiff decedent's damages. Since such discovery is authorized, the motion to quash must be denied.

Facts

In 2009, Lake County, Indiana prosecutors charged the plaintiff's decedent, Stacey Daniels, with murder, battery, and neglect. The charges alleged that Daniels murdered his girlfriend's 21-month-old daughter while in his care. The case had

been scheduled to go to trial on April 24, 2011, but Daniels suffered a major stroke in prison while awaiting trial. The court continued the trial based on Daniels' condition. On August 1, 2012, the prosecutor dropped the charges.

Late in the evening of January 6, 2016, Daniels presented to MetroSouth Medical Center complaining of chest pain. Early the next day, doctors performed on Daniels a left heart catheterization and related procedures. Later the same day, Daniels suffered a retroperitoneal bleed and died. It is that care and treatment that forms the basis of this lawsuit against the defendants.

In January and April 2020, various defendants in this case issued three deposition subpoenas. The first subpoena was issued to Reginald Marcus, the Lake County, Indiana prosecutor in charge of the criminal case against Daniels. The second subpoena went to Casey J. McCloskey, Daniels' criminal defense attorney in that case. The defendants issued the third subpoena to Daniel Small, a Crown Point, Indiana detective who investigated the murder.

On April 24, 2020, Janice Kennedy, the administrator of Daniels' estate, filed a motion to quash the three subpoenas. Kennedy's motion presents various arguments. She first argues that any information elicited from the deponents would be irrelevant and inadmissible because it would unfairly prejudice the jury against Daniels, *see* Ill. R. Evid. 403, and there exists no admissible evidence to impugn Daniels' credibility since he was not convicted, *see* Ill. R. Evid. 609. Second, Kennedy argues that any information McCloskey may have is subject to the attorney-client privilege and not subject to inquiry. Third, Kennedy argues that Small could only testify as to his investigation and, since the prosecutor dropped the charges, Small's testimony would not be reasonably calculated to lead to admissible evidence.

The defendants present a singular argument in response – the deponents' potential testimony may provide relevant information as to the damages claimed by the beneficiaries of

Daniels' estate. Kennedy's interrogatory answers state that the estate will be seeking recovery for the beneficiaries' past and future loss of society, love, companionship, and affection. Such damages extend to loss of instruction, moral training, and superintendence of education that would have been provided by the deceased parent. According to the defendants, Daniels' role as a caregiver to his dependents and his history of child abuse is relevant to any damages claim.

Analysis

The first issue to be resolved concerns the relevancy and admissibility of information that the three subpoenaed witnesses might provide in their depositions. It is a longstanding principle that the scope of information considered relevant under the Supreme Court's discovery rules is expansive and includes trial admissible evidence as well as information that may lead to the discovery of admissible evidence. *See Monier v. Chamberlain,* 31 Ill. 2d 400, 403 (1964); *Kunkel v. Walton*, 179 Ill. 2d 519, 531 (1997); Ill. S. Ct. R. 201(b) comm. cmts. To that end, the Supreme Court rules explicitly provide that, "[a]ny party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action." Ill. S. Ct. R. 202. Further, "[t]he deponent in a discovery deposition may be examined regarding any matter subject to discovery under these rules." Ill. S. Ct. R. 206(c)(1). The breadth of discovery recognized for deposition taking stands in contrast to the limitations imposed on various forms of written discovery. *See, e.g.*, Ill. S. Ct. R. 213(c) (30 interrogatories); 216(f) (30 requests to admit).

Given these discovery principles, Kennedy's argument that the defendants are attempting to smear Daniels' reputation by deposing Marcus, McCloskey, and Small is off point. In a wrongful death case, loss of society is relevant for purposes of establishing dependency and may not be presumed, but must be proven. *See Epstein v. Davis*, 2017 IL App (1st) 170605, ¶¶ 31-32. If Kennedy must introduce evidence to establish dependency, the

defendants certainly have the right to discover facts calling that dependency into question.

Kennedy's citation to two rules of evidence is also off point. Rule 403 says that relevant evidence should be excluded only if its probative value is substantially outweighed by one of the negative considerations set out in the rule. *See* Ill. R. Evid. 403. Yet a trial judge may exclude evidence only if it has first been discovered. Here, no one knows what Marcus, McCloskey, or Small will testify to let alone whether it will be admissible or excludable.

Rule 609 authorizes a witness's felony conviction within the last 10 years to come into evidence for purposes of attacking the witness's credibility. *See* Ill. R. Evid. 609. It is uncontested that the charges against Daniels cannot come into evidence since he was never convicted, but that is not the reason the defendants want to depose Marcus, McCloskey, or Small. Rather, the defendants hope to obtain information as to Daniels' relationship with his estate's beneficiaries so that the defendants may reduce their financial exposure in a settlement or judgment. That sort of discovery is unquestionably permitted given the general discovery principles noted above. Yet if the three provide irrelevant, overly prejudicial, or privileged information, a trial judge jay determine whether all, some, or none of that evidence is admissible.

Marcus prosecuted Daniels' criminal case, Small was the detective assigned to the case, and McCloskey defended Daniels in that case. The defendants have stated a plausible reason for deposing the three – they may have gained information during the course of the criminal investigation and defense of Daniels' alleged murder of a child that could relate to his relationship with his own children. Again, such discovery is permitted and, again, a trial judge will ultimately determine the admissibility of any of the evidence obtain in discovery.

The issue of Marcus's prosecutorial discretion is also not a proper ground for denying his deposition. Marcus may decline to answer any question if he feels it inappropriately peers into the

prosecutor's decision making. It is equally true that Marcus may have information he can disclose that would be relevant to the issue of dependency. Neither of those possibilities can be known without taking Marcus's deposition, and he is certainly in the best position to refuse to answer questions seeking information as to prosecutorial discretion.

Kennedy presents a separate argument in opposition to the defendants' subpoena of McCloskey. Kennedy argues, in essence, that all communications between Daniels and McCloskey are subject to the attorney-client privilege, and that the privilege extends even after the death of the client. *See DeHart v. DeHart*, 2013 IL 114137 ¶ 69 (excepting will contests). Our Supreme Court has stated that: "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived." *Illinois Ed. Ass'n v. Illinois State Bd. of Ed.*, 204 Ill. 2d 456, 467 (citing cases). Since the privilege is a potential bar to the discovery of relevant and material facts, "it is an exception to the general duty to disclose and is narrowly interpreted." *Id.* (citing *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118 (1982).

The central error with Kennedy's attorney-client-privilege argument is that it improperly casts too broad of a net over otherwise discoverable information. "The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981). As the court in *Upjohn* explained:

> The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say to your attorney?' but

> may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Id. at 395-96 (citing *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)). Illinois courts have also recognized this distinction. *See Claxton v. Thackston*, 201 Ill. App. 3d 232, 238 (1st Dist. 1990) (in a corporate setting, "opposing counsel is free to question a member of the control group about the underlying facts which were communicated"). Further, before compelling an attorney to disclose client information, the movant must first establish the non-privileged nature of the information. *Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 42 (citing *In re Marriage of Decker*, 153 Ill. 2d 298, 321 (1992)). Information disclosed to a third party is not privileged, unless the third party is acting as an agent of the attorney or the client. *Adler*, 2013 IL App (1st) 121066 at ¶ 44.

These principles provide substantial guidance to any party seeking to depose a client's attorney. They also instruct the attorney-deponent what may and may not be disclosed. As with the two other subpoenaed witness, McCloskey may or may not have discoverable information legitimately sought by the defendants, but that will never be known unless he is deposed. In each of the depositions, the parties may preserve their objections on the record, and this court or a trial judge will be able to rule on those objections at a later date.

Conclusion

For the reasons presented above,

1. The plaintiff's motion to quash is denied;
2. The defendants will issue, if necessary, new subpoenas to the deponents by July 21, 2020; and

3. The depositions of the three deponents will take place by August 31, 2020.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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