

CIRCUIT COURT OF OREGON
COUNTY OF MULTNOMAH

DOROTHY DEWITT,
Plaintiff,

v.

ELENA VIZZINI, DAN VIZZINI, GAIL
VIZZINI, and GEICO GENERAL
INSURANCE COMPANY, a Maryland
insurance company,
Defendants.

Case No. 0712-14998

**PLAINTIFF'S MOTION TO
QUASH DEFENDANTS'
SUBPOENA DUCES TECUM**

(Oral Argument Requested)

Background Facts

Plaintiff was rearended by a car driven by Elena Vizzini, and owned by Dan and Gail Vizzini, on December 30, 2005, wherein Mrs. DeWitt sustained injuries. A lawsuit has now been filed to seek compensation for her injuries.

Defendants' counsel has advised plaintiff's counsel that he will serve a Subpoena Duces Tecum upon plaintiff's automobile insurance carrier, demanding a copy of the PIP file associated with this accident, as well as the PIP file associated with an accident occurring on February 13, 2004. A copy of defendants' counsel's paralegal's letter dated February 4, 2008, the proposed Subpoena, plaintiff's counsel's letter of February 8, 2008, and defendants' counsel's letter of February 13, 2008 is all attached hereto as Exhibit 1 and incorporated herein and sets out the respective parties' positions.

Motion

Plaintiff moves for an Order Quashing the Subpoena Duces Tecum defendants' counsel wants to issue on the grounds that materials sought to be produced are privileged and/or constitute work product in that they were prepared in anticipation of litigation. Plaintiff further

moves for a Protective Order to prevent defendant from attempting to obtain plaintiff's medical records and other protected information in violation of plaintiff's privileges.

Points and Authorities

Privileged Information

ORS 746.600(25) defines materials prepared by a insurance company in connection with, or in reasonable anticipation of a claim for insurance benefits, or a civil or criminal proceeding involving the individual, as privileged information. Plaintiff's personal injury protection (hereinafter referred as to "PIP") file contains information prepared by both the insurance carrier and by plaintiff in anticipation of trial. Such information includes, but is not limited to, the PIP application, statements made by plaintiff, investigative materials, medical records, medical bills and correspondence to and from plaintiff's attorney. Any and all information which is prepared in anticipation of trial is privileged, non-discoverable information. *Hickman v. Taylor*, 329 US 495, 511 S Ct 385, (1947). See also *Nielson v. Brown*, 232 Or 426, 374 P.2d 896 (1962).

Moreover, the Multnomah County Civil Motion Panel Statement of Consensus 2D provides that an insurance claim file "prepared in anticipation of litigation" is protected by the work-product doctrine regardless of whether the carrier has retained counsel. Defendant here has made no showing of any hardship in suggesting that there is an inability to otherwise get the information to which the defense is entitled.

Moreover, as defense counsel knows, since the primary focus of his practice is defending insurance companies, plaintiff has a contractual responsibility to cooperate with her own carrier. For Mrs. DeWitt to get PIP benefits, she must execute not only an Application for Benefits, but moreover a medical authorization. Some medical authorizations have absolutely no limitation with regard to body parts at issue or time limitations. Mrs. DeWitt did sign medical authorizations for her PIP carrier. Without allowing plaintiff's counsel to first examine the files, it is impossible to know whether there is privileged or protected information contained therein.

Moreover, by allowing defendant the unfettered ability to review plaintiff's PIP file, defendant may be using a back door method to get around the Civil Motion Panel Statement of Consensus 2E concerning medical chart notes. As the Court knows, in Multnomah County, there is a "body part at issue" rule. By issuing subpoenas here, th defense is trying to avail itself of an

opportunity to review medical records to which it is not entitled.

ORCP 36B(3)

ORCP 36B(3) protects against disclosure of “documents and tangible things otherwise discoverable under Rule 36 and prepared in anticipation of litigation or for trial by or for another party or by and for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent). ORCP 36B(3). Such materials may be compelled “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of material by other means.” ORCP 36B(3).

Here, the defendant must show a need for the PIP file, **and** unavailability. Defendant has already been provided the relevant items in the PIP file, including but not limited to the relevant medical bills and medical records via a Response to Request for Production. Defendant is unable to show a substantial need for privileged information (including but not limited to, the PIP application, statements made by plaintiff to her own insurance carrier, correspondence from plaintiff's attorney to plaintiff's PIP carrier, medical records that do not deal with a body part at issue, and the like) within the file. Plaintiff offered to allow defendant to subpoena the PIP file to plaintiff's counsel's office for review. Plaintiff promised to provide the defendant with all relevant, non-privileged information from the file, and moreover, promised to provide a privilege log to the extent anything was withheld or redacted. Defendants' counsel refused plaintiff's offer and instead insisted that he would issue the subpoena which gives rise to this Motion.

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Plaintiff has Not Waived Her Privilege to Her Medical Records

OEC 511 (ORS 40.280) Waiver of Privilege by Voluntary Disclosure.

A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence. (Emphasis added.)

Oregon courts have considered and rejected arguments wherein a defendant states that by having filed a lawsuit, the privilege is waived. *See: State ex rel Calley v. Olsen*, 271 Or 359, 532 P.2d 230 (1975) (privilege not terminated until the patient has intentionally offered or taken testimony of doctor, either on trial or by deposition). *See also: State ex rel Grimm v. Ashmanakas*, 298 Or 206, 690 P.2d 1063 (1984) (holding similarly). Until the plaintiff waives her physician-patient privilege, defendant cannot compel the direct production of records by subpoenaing the PIP file.

Conclusion

Defendants' subpoena should be quashed, and a protective order entered that prevents defendant from attempting to obtain plaintiff's insurer's PIP files because they contain confidential work-product and confidential medical records. Proper discovery of non-privileged information can be had by defendant through the usual discovery methods provided for under the Oregon Rules of Civil Procedure.

DATED this ____ day of February 2008.

Respectfully submitted,

Jon Friedman, OSB 84225
Attorney for Plaintiff
Email: jonfriedman@qwest.net

I hereby certify that I served the foregoing **PLAINTIFF'S MOTION TO QUASH DEFENDANTS' SUBPOENA DUCES TECUM** and **CERTIFICATE OF COMPLIANCE** on February ____, 2008 by mailing a certified true copy thereof and depositing the same in the United States Post Office at Portland, Oregon, contained in a sealed envelope, with postage prepaid, and addressed to the following individual(s) at the address(es) set forth:

Jeffrey W Hansen
Smith Freed & Eberhard
1001 SW 5th Ave Fl 17
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Of attorneys for defendants Vizzini

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Of attorneys for defendant GEICO

Jon Friedman, OSB 84225
Attorney for plaintiff

I hereby certify that the foregoing is a complete and exact copy of the original thereof.

Jon Friedman, OSB 84225
Attorney for plaintiff

CERTIFICATE OF SERVICE