

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INMATES OF THE BUCKS
COUNTY CORRECTIONAL
FACILITY, et al.

: CIVIL ACTION

FILED MAR 14 2003

v.



JC-PA-0019-0001

COUNTY OF BUCKS, et al.

: NO. 02-7377

MEMORANDUM AND ORDER

DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

March 14, 2003

This case is a civil rights action which seeks to remedy alleged, inadequate medical care at the Bucks County Correctional Facility. On February 13, 2003, all defendants except defendant Lenape Valley Foundation filed a motion to quash a subpoena which had been issued by plaintiffs' counsel Anita Alberts on January 24, 2003. The subpoena sought "any and all written summaries, reports, conclusions, and recommendations prepared by Dr. Veronica Urdaneta in September 2002 regarding a review of approximately 22 inmate medical charts she conducted at the Bucks County Correctional Facility (all inmate names may be redacted)." The defendants have moved to quash the subpoena on the ground that Dr. Urdaneta's report is protected by the critical self-analysis privilege. The plaintiffs have since filed a motion to enforce the subpoena and the defendants have responded to it.

On February 26, 2003, the court ordered the defendants to produce a copy of Dr. Urdaneta's report for the court's in camera review. They have done so and the court

will order that the defendants produce a copy of the report to the plaintiff's forthwith.

As the court noted in the February 26 order, the critical self-analysis privilege is evolving. See Myers v. Uniroyal Chemical Co., Inc., 1992 WL 97822, *1 (E.D. Pa. May 5, 1992) ("The critical self-analysis privilege 'remains largely undefined and has not generally been recognized by many authorities.'") (quoting Guardian Life Insurance Co. v. Service Corp. International, 1989 WL 3496, *3 (E.D. Pa. Jan. 17, 1989)).

Nonetheless, two judges in this district have recently identified three factors that should be considered when deciding whether the privilege can apply to bar discovery of a document. The three factors are:

1. The materials must have been prepared for mandatory government reports, or for a critical self-analysis undertaken by the party seeking protection;
2. The privilege extends only to subjective, evaluative materials, but not to objective data in the reports; and
3. The policy favoring exclusion must clearly outweigh [the non-movant's] need for the documents.

Melhorn v. New Jersey Transit Rail Operations, Inc., 2001 U.S. Dist. Lexis 6320, *3 (E.D. Pa. May 15, 2001) (Green, J.); Clark v. Pennsylvania Power and Light, Co., 1999 U.S. Dist. Lexis 5118, *5-6 (E.D. Pa. April 14, 1999) (Dubois, J.).

In order to understand the result the court reaches, it is necessary to recount events that transpired in August 2002. At that time, the court became aware of an outbreak of methicillin-resistant staphylococcus aureus ("MRSA") at the Bucks County Correctional Facility ("BCCF"). On August 23, 2002, the court ordered that Bucks County take several steps to protect the health and safety of inmates and staff at the

BCCF.¹ One of the steps the court ordered was that:

the County Commissioners . . . direct the Bucks County Department of Health to contact the Centers for Disease Control and Prevention of the United States Department of Health and Human Services ("CDC"). The Bucks County Department of Health shall inform the CDC of the existence of confirmed cases of MRSA and the possible outbreak of infectious disease at the BCCF. The Bucks County Department of Health shall request the CDC to immediately investigate the situation at the BCCF, to detect and evaluate the extent of infection at the BCCF, and to recommend strategies for the prevention of further infection and for the treatment of those that are or become infected. The County Commissioners shall insure that the personnel at the BCCF shall fully and immediately implement all strategies recommended by the CDC. Plaintiffs' counsel shall be promptly informed of any reports or recommendations provided by the CDC.

Order of August 23, 2002 at 2-3.

The report the defendants have produced reveals that Dr. Urdaneta works for the Pennsylvania Department of Health. Dr. Urdaneta sent her report to Dr. Lewis Polk, the Director of the Bucks County Department of Health; Dr. Polk is a defendant in this case. In her cover letter, Dr. Urdaneta informs Dr. Polk that she had discussed the recommendations contained in her report with Dr. Matthew Kuehert of the CDC. Dr. Urdaneta's report gives advice to the Bucks County Department of Health concerning "strategies for the prevention of further infection and for the treatment of those that are

¹The August 23, 2002 order was entered in Civil Action Number 79-1785. That case is a class action lawsuit which was filed by inmates against Bucks County and the County Commissioners based upon conditions at the old Bucks County Prison. That case was resolved by a consent decree in 1983. In 1999, the inmates at the BCCF filed a motion charging Bucks County with contempt of the 1983 consent decree. The court has been involved in the ongoing process to resolve that case. It was in the context of performing that work that the court learned of the MRSA problem at the BCCF.

or become infected." This is precisely the reason the court ordered the Bucks County Department of Health to contact the CDC.

Based on Dr. Urdaneta's report and cover letter, the order of August 23, 2002, correspondence the court received from defense counsel² in the days after August 23, 2002 and telephone conference calls with all counsel³ in the days after August 23, 2002, the court finds that the Pennsylvania Department of Health was contacted by the Bucks County Department of Health and that Dr. Urdaneta came to the BCCF as a direct result of the court's August 23 order and not because of the defendants' voluntary desire for critical self-analysis. For this reason, the court rejects the defendants' contention that they voluntarily asked Dr. Urdaneta, or some other official from the Pennsylvania Department of Health, to come to the BCCF and give advice concerning how to best address the MRSA problem at the BCCF. Therefore, the court finds that the defendants cannot demonstrate that Dr. Urdaneta's report was the product of Bucks County's critical self-analysis.

The court has concluded that Dr. Urdaneta's report was produced as a result of the court's August 23, 2002 order. While the defendants do not so argue, this finding might cause one to consider that the report could still be privileged as a mandatory government report. See Melhorn, 2001 U.S. Dist. Lexis 6320, *3; Clark, 1999 U.S. Dist. Lexis 5118, *5. However, the court notes that the August 23, 2002 order instructed

²Bucks County and the County Commissioners are represented by James Downey in Civil Action No. 79-1785. In this case, they are represented by Frank Chernak.

³The plaintiffs are represented by Anita Alberts and Martha Sperling in Civil Action No. 79-1785 as they are in this case.

Bucks County to inform plaintiffs' counsel of any recommendations provided by the CDC. Although the Pennsylvania Department of Health provided the recommendations instead of the CDC, the court sees no reason why that fact should prevent the plaintiffs from receiving the report. Indeed, since the defendants had to expect that whatever report was produced would be shared with plaintiffs' counsel, they can have no legitimate expectation of a privilege to prevent the plaintiffs from learning what is in Dr. Urdaneta's report. Moreover, the court notes that the County Commissioners called a press conference on August 29, 2002 in order to address the MRSA problem at the BCCF. See Sara Larson, Prison Urged to Make Changes, BUCKS COUNTY COURIER TIMES, August 20, 2002, at C1. At this press conference, the County Commissioners revealed that Dr. Urdaneta had been at the BCCF and they revealed some of the recommendations she had made concerning how to address the MRSA problem. Id. at C10. Since the defendants chose to publicize the advice Dr. Urdaneta gave them, they are now in no position to assert that Dr. Urdaneta's report is privileged from discovery.

The court finds that, because the August 23, 2002 order directed the defendants to share the results of Dr. Urdaneta's report with the plaintiffs and because the defendants chose to publicize some of Dr. Urdaneta's recommendations in a press conference, their contention that the report was protected by the critical self-analysis privilege was frivolous. By asserting this frivolous argument, defense counsel has prevented the plaintiffs from learning information that they were entitled to learn, he has wasted the time of plaintiff's counsel and of this court and he has impeded the orderly proceeding of this case. Defense counsel is cautioned to refrain from wasting the court's time and the time of plaintiffs' counsel with further frivolous attempts to impede

discovery. Defense counsel shall cooperate with the plaintiffs' legitimate discovery requests; he is not to raise indefensible obstacles to the plaintiffs' discovery. If defense counsel repeats the approach he has employed with respect to Dr. Urdaneta's report, the court will consider sanctions against him

An implementing order follows.

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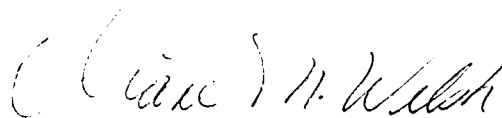
: NO. 02-7377

ORDER

AND NOW, this ¹⁴/₇ day of March, 2003, for the reasons contained in the preceding Memorandum, it is hereby ORDERED that:

1. The defendant's motion to quash the plaintiffs' subpoena duces tecum (Document No. 38) is DENIED;
2. The plaintiff's motion to enforce their subpoena (Document No. 39) is GRANTED;
3. The defendants shall produce a copy of the September 10, 2002 report of Dr. Veronica Urdaneta to the plaintiffs forthwith.

BY THE COURT:



DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE