IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

SUZAN J. MCDOWELL

Plaintiff,

v. **CIVIL ACTION NO.:CV2012-901924**

JOHNSON CONTROLS, INC., CORPORATE PARK LIMITED PARTNERSHIP, CHASE COMERCIAL REALTY, INC.

Defendants.

PLAINTIFF'S REPSONSE TO MOTION FOR RECONSIDERATION

COMES NOW the Plaintiff, by and through undersigned counsel, and responds to Carol Walker's request that she not be required to produce the basic data (*i.e*., the Plaintiff's actual answers) underlying her offered expert opinions. Plaintiff also seeks an Order barring Ms. Walker from presenting any opinions in this case because of her refusal to respond to a valid subpoena and the requirements of the Alabama Rules of Civil Procedure. As grounds in support thereof, Plaintiff states as follows:

1. The non-party Carol Walker (hereinafter "Walker") asserts to this Court that she is "contractually and ethically" prohibited from disclosing information concerning her purported evaluation and treatment of Plaintiff. Specifically, Walker does not want to disclose the very answers marked or written by the Plaintiff. Both purported reasons present unconscionable arguments that, if accepted, would allow one party a

patently unfair and illegal advantage in presenting its position.[1] Both of Walker's arguments are without merit.

2. First, Walker argues she is "contractually" bound to withhold her own patient's data from disclosure pursuant to a valid subpoena. Let's comprehend the truly outrageous nature of that argument. A workers compensation carrier hires Carol Walker and authorizes her to evaluate an injured person. As part of that authorization, the insurance carrier has her agree not to give the injured worker (or a worker's counsel) her full information. Despite the fact that such information is fully discoverable, and should be fully discoverable if our judicial process is to remain fair, the carrier and Walker make a different deal. Instead, she can provide an opinion that may help the carrier knowing the Plaintiff's counsel will never be able to fully explore the basis or foundation of her opinions.

Even if not biased, Walker is basically insulating her opinions and herself from any questions by the opposing counsel or court. Nowhere else and in no other circumstances would any party ever be allowed to offer an expert without disclosing the full basis of his/her opinions. And, it is outrageous that this carrier and Ms. Walker believe it even remotely acceptable to do so in this case. As a result, Walker's opinions should be stricken and the Court should enter an Order requiring production of all data as well as the actual contract by which Walker seeks to conceal information from this Court.

[1] Dr. Walker also initially asserts that she was not properly served but attempted to communicate with counsel's office. This is simply untrue. Ms. Walker did attempt to avoid service initially but was eventually served by Plaintiff's process server. The return of service is available if needed.

3. Walker next argues she cannot "ethically" produce this information. Again, her argument is incorrect. Rather than cite actual rules or legal provisions, Walker simply provides a copy of an "article." Of interest, the article attached by Walker fails to fully cite the applicable rules. Surely, as a licensed professional, Walker knows the full rules.

The gist of Walker's argument is that the American Psychological Association (APA) prohibits disclosure. The APA is not a state or federal authority body but simply a voluntary organization, which a psychologist may or may not choose to join. It has no regulatory or persuasive authority over this Court or any other. Additionally, nowhere in the APA *Principles* does it prohibiting a doctor from releasing test date upon court order. In fact, the APA's *Principles* have been revised to become HIPAA complaint.

Walker's attached article cites Principle 9.04, but only ***partially*** quotes it. Indeed, the article omits key portions of the applicable principle. The principle fully as follow:

> (a) The term test data refers to rare and scaled scores, client/patient responses to test questions or stimuli and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law.
>
> (b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

See, APA Principle 9.04 (This full version is included on the APA website).

The article cited by Walker artfully omits the underlined portions of the rule. Clearly, the revised rule requires the release of raw data in certain situations. Namely, Walker is required to release the data to Ms. McDowell upon presentation of a valid, signed release. Of course, Ms. McDowell has already completed such a release which Walker has ignored in contravention of her own *Principles*. Additionally, Walker is required to release the data where required by law, i.e., a litigated case where she has been presented with a valid HIPPA Order and valid subpoena. Yet, Walker has again ignored her own *Principles*.

In addition, a review of the later APA Fact Sheet instructing neuropsychologists how to comply with HIPPA specifically states:

> Under HIPAA regulations, patients generally now have access to their records, including neuropsychological reports, tests responses and raw data. This is regardless of the referral party (e.g. IME, Workers Compensation) or reason for referral.

See, Health Insurance Portability and Accountability Act (HIPAA): Fact Sheet for Neuropsychologists (Division 40, American Psychological Association). Furthermore, Federal HIPAA law supersedes state law and professional rules. Federal law does not preclude Walker from relearning the raw data to the Plaintiff, but rather, mandates the release in this case.

Medicine is an inexact science. Psychology and psychiatry are perhaps the most inexact fields. Conclusions drawn from psychologists are not based on objective MRIs, CT scans or X-rays. Rather, they are typically based upon comparisons and profiling. The MMPI-2 is an example. It is one of the most commonly administered psychological inventories. It consists of 567 true/false questions and conclusions are not based upon actual answers, but rather, upon comparisons with other individuals who answered these same questions and on whom a diagnosis may or may not have been made. The same sample comparisons are true with certain other psychological batteries.

The administrations and interpretation of psychological testing are rife with potential abuse. There are many ways in which a psychologist can control the ultimate conclusion by manipulating the data. The only way to determine whether or not this manipulation is present is to account for the controls dealing with the administration and interpretations of the test data. [2] The raw data is necessary to:

a. Verify the answers and handwriting;
b. Confirm the answers were not erased; and,
c. Verify the conclusions based on the data.

Claiming that the material can only be forwarded to the Plaintiff's expert as a solution is no solution at all. It requires an injured Plaintiff who cannot work to incur additional costs. Moreover, it precludes Plaintiff's lawyer from reviewing the scores and

[2] The undersigned counsel previously had a case where Dr. Thomas Boll, who Carol Walker describes as her mentor. Testified on direct examination concerning multiple observations he made during test. On cross-examination Boll eventually admitted he was not even present during the actual tests.

printouts which may contain evidence that supports Plaintiff's position. A review of the data by Plaintiff's counsel may reveal the following:

1. Erasure marks.
2. Incorrect scoring.
3. False scoring. Some doctors simply add wrong.
4. Using the wrong tests.
5. Playing with cut-off scores.
6. Giving too many tests.

In addition to the preceding, the Alabama Rules of Evidence warrant a full and complete disclosure of the underlying date. The rules which underpin our entire judicial system allow an adversarial party full access to the data utilized by a testifying expert. Indeed, Rule 705, *Ala. R. Evid*., unequivocally states that while an expert can offer opinions without first testifying to the underlying data, that expert "may in any event be required to disclose the underlying facts or data on cross-examination." This rule is necessary for our legal process to remain open and geared toward finding the truth.

What Carol Walker seeks is not a level playing field where the Court and all parties can discuss and examine her actual data. She does not want this Court to see Plaintiff's own answers. Moreover, it appears that the insurance carrier is, at least, contractually complicit in this suppression of data. Instead, Walker seeks an unfair playing field where she can offer opinions not subject to full cross-examination. This conduct is simply wrong.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this Honorable Court Order Carol Walker to comply fully and completely with the subpoena served upon her and produce all information and data related to the Plaintiff.

Alternatively, Plaintiff requests an Order that Walker be barred from providing any opinions or evidence in this case.

Respectfully submitted,

/s/ Jeffrey G. Blackwell
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all attorneys of record, on this the 2nd day of December, 2013, via Ala-File or by placing the same in the United States Mail, postage prepaid as follows:

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