

SUPERIOR COURT  
Washington Unit

STATE OF VERMONT  
2018 NOV 27 A 7 00

CIVIL DIVISION  
Docket No. 344-6-18 Wncv

In re Darryl R. Montague

FILE

**DECISION**  
**Petition for Pre-Suit Discovery**

Petitioner Darryl R. Montague seeks a court order authorizing pre-suit discovery pursuant to V.R.C.P. 27. Specifically, he seeks the production of all treatment records possessed by Alice H. Silverman, M.D., reflecting the psychiatric care she provided to Veronica M. Lewis. Mr. Montague also seeks to depose Dr. Silverman for the same purpose. Dr. Silverman's patient, Ms. Lewis, shot Mr. Montague multiple times, causing serious injuries.<sup>1</sup> Mr. Montague is clear that he currently does not have any good faith basis to sue Dr. Silverman for liability for the shooting. He asserts that he needs pre-suit discovery specifically to determine whether any such good faith evidentiary basis exists so that he may then bring such a claim (for failure to warn).

Dr. Silverman opposes any such pre-suit discovery. She argues that Rule 27 permits pre-suit discovery for "perpetuation" purposes only, that is, where such evidence otherwise would be at risk of loss, and that is not the case here. She also argues that the information Mr. Montague seeks is protected by HIPAA's "Privacy Rule" and by Vermont's Patient Privilege, which Ms. Lewis has not waived. See 12 V.S.A. § 1612(a); V.R.E. 503(b).

On its face, Rule 27 does not purport to limit pre-suit discovery to situations necessarily involving the potential loss of evidence that would be discoverable once suit is filed. The rule specifically applies to a "person who desires to perpetuate testimony *or to obtain discovery under Rule 34 or 35 regarding any matter that may be cognizable in any court of the state.*" V.R.C.P. 27(a)(1) (emphasis added). It appears on its face therefore to be available for perpetuation *and* other purposes. However, the court need not resolve the Rule 27 dispute in this case. Even if the court were to rule that the discovery Mr. Montague seeks is within the scope of Rule 27, the patient privilege bars access.

Dr. Silverman has invoked the patient privilege. Ms. Lewis has not waived it. The evidence Mr. Montague seeks is squarely within the privilege unless some waiver makes it available to him. Mr. Montague argues that Dr. Silverman may have had a duty to warn as described in *Peck v. Counseling Service of Addison County, Inc.*, 146 Vt. 61 (1985), and a waiver accompanies that duty.

The bulk of the *Peck* decision is dedicated to describing and adopting the duty to warn. The defendant then objected that any such duty would violate the patient privilege. The court then recognized a limited waiver of the privilege as follows:

<sup>1</sup> Criminal proceedings against Ms. Lewis apparently are pending.

Defendant also argues that the therapist could not lawfully have warned the plaintiffs of John's threat because of the physician-patient privilege against disclosure of confidential information. We are aware of the crucial role that confidentiality performs between therapist and patient in establishing and maintaining the "tenuous therapeutic alliance." Defendant points out that the legislature has specified certain "public policy" exceptions to the physician-patient privilege, and that a therapist's duty to disclose the risk of harm posed by his or her patient to a foreseeable victim is not a recognized legislative exception. Given this, defendant argues that this Court is preempted from finding a duty-to-warn exception to the physician-patient privilege. The statutory exceptions to the physician-patient privilege indicate to this Court, however, that the privilege is not sacrosanct and can properly be waived in the interest of public policy under appropriate circumstances. A mental patient's threat of serious harm to an identified victim is an appropriate circumstance under which the physician-patient privilege may be waived. This exception to the physician-patient privilege is similar to that recognized in the attorney-client relationship when a client informs an attorney of his or her intent to commit a crime. However, "the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discretely, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger." In the same manner that due care must be exercised in the therapist's determination of what steps may be necessary to protect the potential victim of a patient's threat of harm, so too must due care be exercised in order to insure that only that information which is necessary to protect the potential victim is revealed.

Thus, we hold that a mental health professional who knows or, based upon the standards of the mental health profession, should know that his or her patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger.

*Peck*, 146 Vt. at 67-68 (citations omitted). In other words, there is a limited waiver that permits the mental health professional to comply with the duty to warn. *Peck* does not describe any more expansive waiver that would grant the mental health patient's victim expansive access to the patient's records in search of a legal claim against the mental health professional, which is what Mr. Montague seeks here.

At the hearing on Mr. Montague's petition, he also argued that there is some kind of waiver due to Ms. Lewis's participation in a court-ordered competency evaluation in the criminal case against her. Rule 503 provides, however, as follows:

If the court orders an examination of the physical, mental, or emotional condition of a patient whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise or unless the

state seeks to admit communications obtained in an examination of the mental or emotional condition of a patient in a criminal case for the purpose of proving the commission of a criminal offense or for the purpose of impeaching the testimony of the patient.


V.R.E. 503(d)(2). This is a limited waiver that applies to “communications made in the course” of the court-ordered examination. It does not broadly waive the privilege for all historical communications with health providers that otherwise may be relevant to the general subject matter of the examination or the events that led to the criminal proceeding that prompted the examination.

Thus, regardless of Rule 27, Ms. Lewis’s communications with Dr. Silverman remain privileged. Mr. Montague’s petition seeking access to them must be denied.

ORDER

For the foregoing reasons, Mr. Montague’s petition for pre-suit discovery is denied.

Dated at Montpelier, Vermont this 26th day of November, 2018.

  
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Mary Miles Teachout  
Superior Judge