IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	§	MDL Docket No. 3:11-MD-2244-K
This Order Relates To: *Aoki* – 3:13-cv-1071-K *Christopher* – 3:14-cv-1994-K *Greer* – 3:12-cv-1672-K *Klusmann* – 3:11-cv-2800-K *Peterson* – 3:11-cv-1941-K	§	

ORDER GRANTING PLAINTIFFS' EXECUTIVE COMMITTEE'S MOTION TO PROTECT MENTAL HEALTH RECORDS

Before this Court are the Plaintiffs' Executive Committee's ("PEC") Motion to Protect Mental Health Records of plaintiffs in the individual matters of *Aoki* (3:13-cv-1071), *Christopher* (3:14-cv-1994), *Greer* (3:12-cv-1672), *Klusmann* (3:11-cv-2800), and *Peterson* (3:11-cv-1941), filed as Docket No. 513 in 3:11-md-2244, and a separate Motion to Protect Mental Health Records of Richard Klusmann, filed as Docket No. 15 in 3:11-cv-2800. For the reasons set forth herein, the motions are GRANTED.

I. Factual and Procedural Background

Pursuant to 28 U.S.C. § 1407, the United States Judicial Panel on Multidistrict Litigation ordered coordinated or consolidated pretrial proceedings in this Court of all actions involving the Pinnacle Acetabular Cup System hip implants

("Pinnacle Device") manufactured by Defendant DePuy Orthopaedics, Inc. ("DePuy"). The DePuy Pinnacle multidistrict litigation ("MDL") involves DePuy's design, development, manufacture, and distribution of the Pinnacle Device. The Pinnacle Device is used to replace diseased hip joints and was intended to remedy conditions such as osteoarthritis, rheumatoid arthritis, avascular necrosis, or fracture, and to provide patients with pain-free natural motion over a longer period of time than other hip replacement devices. Presently there are over eight thousand cases in this MDL involving Pinnacle Devices made with sockets lined with metal, ceramic, or polyethylene. The Plaintiffs in the MDL act through a large group of Plaintiffs' lawyers that form the Plaintiffs' Steering Committee ("PSC"). The PSC is headed by the Plaintiffs' Executive Committee, a small group from the PSC appointed by this Court to conduct discovery and other pretrial proceedings and identify common issues in the MDL.

II. Motions to Protect Mental Health Records

The PEC, on behalf of the Plaintiffs' Steering Committee, filed a Motion to Protect Mental Health Records specific to eight bellwether cases and a second, similar Motion to Protect Plaintiff Richard Klusmann's Mental Health Records. The PEC explained in both motions that the mental health records are privileged under Texas law and thus, undiscoverable. Defendants counter that Plaintiffs waived this privilege, and that, regardless, these records meet the litigation exception to Texas privilege rules. Having considered all of the briefing of the parties, the Court holds

that the mental health records at issue are protected by privilege. The PEC also filed a separate Motion to Modify Case Management Order No. 5 ("CMO 5"), requesting that the Court modify an authorization for release of medical records to exclude mental health records in all cases [Dkt. Nos. 520, 529]. Defendants oppose this modification [Dkt. No. 527]. Because the Motion to Modify CMO 5 relates to all cases in this multi-district litigation, it will be addressed in a separate order.

III. Legal Standard

This Court has broad discretion in determining the appropriate scope of discovery. *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258 (5th Cir. 2011). Federal Rule of Evidence 501 dictates that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. All parties have applied Texas law in their legal arguments, which recognizes a privilege for mental health records and provides that "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing" (1) confidential communications between the patient and a professional and (2) records maintained by the professional regarding the patient's "identity, diagnosis, evaluation, or treatment." Tex. R. Evid. 510(b)(1). Defendants acknowledge this privilege, but assert that two exceptions apply:

> (2) ***Written Waiver***. If the Patient or a person authorized to act on the patient's behalf waives the privilege in writing.
>
> . . .
>
> (5) ***Party Relies on Patient's Condition***. If any party relies on the patient's physical, mental, or emotional condition as a part of the

> party's claim or defense and the communication or record is relevant to that condition.

Id. at 510(d)(2), (5). For the reasons stated below, the Court holds that Plaintiffs have not waived the privilege nor is their mental condition currently part of either parties' claim or defense.

IV. The Waiver Exemption Does Not Apply

Defendants rely on a medical records authorization form found in Case Management Order No. 5 ("CMO 5") to support their position that Plaintiffs waived any claim of privilege. CMO 5 governs various procedures in this multi-district litigation ("MDL") and includes a medical records authorization form ("authorization" or "release") that Plaintiffs must sign when completing a Plaintiff Fact Sheet. Defendants then use the authorization to request and receive records directly from Plaintiffs' health care providers. The release, titled "Limited Authorization," does not expressly list mental health records in the types of information to be produced. Instead, it provides a bulleted list of the types of medical records a plaintiff might expect to produce in a litigation related to hip implants:

- All medical records, including inpatient, outpatient, and emergency room treatment, all clinical charts, reports, documents, correspondence, test results, statements, questionnaires/histories, office and doctors' handwritten notes, and records received by other physicians. Said medical records shall include all information regarding AIDS and HIV status.

- All autopsy, laboratory, histology, cytology, pathology, radiology, CT Scan, MRI, echocardiogram and cardia catheterization reports.

- All radiology films, mammograms, myelograms, CT scans, photographs, bone scans, pathology/cytology/histology/autopsy/immunohistochemistry specimens, cardiac catheterization videos/CDs/films/reels, and echocardiogram videos.

- All pharmacy/prescription records, including NDC numbers and drug information handouts/monographs.

- All billing records including all statements, itemized bills, and insurance records.

While the bulleted list does not reference mental health records, the authorization later cautions Plaintiffs that the medical records and information Defendants request "may [] include information about behavioral or mental health services." While the PEC could have certainly taken further steps to eliminate potential ambiguity in the authorization, the Court does not find that the "Limited Authorization" expressly enumerates mental health records in the list of records to be provided.

The release also provides for "the ability to revoke this authorization at any time." Defendants agree people have the ability to revoke authorization to medical records under the Health Insurance Portability and Accountability Act ("HIPAA") and Texas Health & Safety Code Section 611.007. *See* Tex. R. Evid. 510 (Adv. Comm. Note). Defendants instead assert that the Plaintiffs may not revoke authorization during ongoing litigation. Certainly, Plaintiffs may not unilaterally alter an agreed and court-ordered authorization. Likewise, a Plaintiff precluding access to certain relevant medical records could bar their ability to litigate personal injury claims. However, Plaintiffs have not unilaterally withdrawn consent of

relevant records. Instead, Plaintiffs properly filed these motions to protect a narrow category of records that was not specifically enumerated in the authorization. Thus, the Court's concern is not with waiver, it is concerned with whether Plaintiffs' mental health records are, in fact, protected by privilege.

V. The Reliance Exemption Does Not Apply

Having addressed waiver, the Court turns to the second exception, which makes mental health records discoverable when "any party relies upon the condition as a part of the party's claim or defense." Tex. R. Evid. 510(d)(5). Defendants assert that (1) Plaintiffs rely on their mental condition in asserting claims for mental anguish and future damages and (2) Defendants rely on preexisting mental conditions to refute Plaintiffs' claims that their injuries were caused by Defendants' product.

In order to waive privilege, it is not sufficient that a party's mental condition be merely relevant to a claim or defense. *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994). "[R]elevance alone cannot be the test, because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances." *Id.* Instead, "a mental condition will be a 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself." *Id.* at 843. A court should determine this "on the face of the pleadings, without reference to the evidence that is allegedly privileged." *Id.* at n.7.

Texas courts consistently hold that claims for mental anguish alone do not make a plaintiff's mental or emotional condition a part of their claim. *See In re Whipple*, 373 S.W.3d 119, 123 (Tex. App.—San Antonio 2012, no pet.) (citing *Coates v. Whittington,* 758 S.W.2d 749, 753 (Tex.1988) (orig. proceeding); *In re Williams,* No. 10–08–000364–CV, 2009 WL 540961, at *5 (Tex. App.—Waco Mar. 4, 2009, orig. proceeding); *In re Pennington,* No. 02–08–00233–CV, 2008 WL 2780660, at *4 (Tex. App—Fort Worth July 16, 2008, orig. proceeding) (mem. op.); *In re Toyota Motor Corp.,* 191 S.W.3d 498, 502 (Tex. App.—Waco 2006, orig. proceeding); *In re Nance,* 143 S.W.3d 506, 512 (Tex. App.—Austin 2004, orig. proceeding); *In re Chambers,* No. 03–02–000180–CV, 2002 WL 1378132, at *4 (Tex. App.—Austin June 27, 2002, orig. proceeding); *In re Doe,* 22 S.W.3d 601, 610 (Tex. App.—Austin 2000, orig. proceeding)). Thus, Plaintiffs' claims for mental anguish are not enough to make their mental health "part" of their claim.

Similarly, "[t]he fact that a plaintiff had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a plaintiff as he finds him or her." *In re Nance*, 143 S.W.3d at 512 (citing *In re Doe*, 22 S.W.3d at 606). Although Defendants pleaded preexisting condition as an alternative and affirmative defense, that is not an ultimate issue of fact that has legal significance standing alone. *In re Nance*, 143 S.W.3d at 513. Instead, it is an inferential rebuttal. *Id.* Defendants have also argued that Plaintiffs will present damages for future mental health care treatment and have pled claims for negligent

infliction of emotional distress ("NIED") and intentional infliction of emotional distress ("IIED") in some of the bellwether cases. Plaintiffs have represented that they will not include claims for future mental health care treatment in life care plans used at trial, and that they abandon their claims for NIED and IIED. *See* Dkt. No. 523 at nn. 3, 5. Thus, the issues of whether the life care plans or claims of NIED and IIED invoke the litigation exception are moot.

The Court has reviewed the live complaints and answers of the *Aoki, Christopher, Greer, Klusmann,* and *Peterson* matters and does not find that, as interpreted by Texas courts, the Plaintiffs' mental conditions have currently been made part of a claim or defense. Accordingly, the Motion to Protect Mental Health Records, Docket No. 513 in 3:11-md-2244, and the Motion to Protect Mental Health Records of Richard Klusmann, Docket No. 15 in 3:11-cv-2800, are GRANTED.

SO ORDERED.

Signed January 5th 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE