UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

STEPHANIE TROUTMAN, Plaintiff,

v. Civil Action No. 3:16-cv-742-DJH-CHL

LOUISVILLE METRO DEPARTMENT OF CORRECTIONS, et al., Defendants.

* * * * *

ORDER

Plaintiff Stephanie Troutman brings this civil-rights action on behalf of her father, Charles R. Troutman, Jr., who died of an apparent suicide while he was being held by the Louisville Metro Department of Corrections (LMDC). (Docket No. 28) On June 18, 2018, U.S. Magistrate Judge Colin H. Lindsay granted Plaintiff Stephanie Troutman's motion to compel. (Docket No. 96; *see* D.N. 81) Judge Lindsay ordered Defendant Correct Care Solutions to produce certain documents, including (1) mortality reviews, psychological autopsies, and suicide-prevention reports regarding specific inmate suicides and (2) records regarding all inmate suicide attempts that took place at LMDC within three years of Troutman's death. (D.N. 96, PageID # 662-68) Further, Judge Lindsay ordered the redeposition of Defendant Brown, a nurse employed by Correct Care, after she refused to answer a hypothetical question and a question regarding medications she was taking during her first deposition. (*Id.*, PageID # 668-71) Finally, Judge Lindsay awarded Troutman "costs associated with Brown's second deposition and the costs associated with obtaining Troutman Jr.'s mortality review and the documents underlying it." (*Id.*, PageID # 672)

Pursuant to Local Rule 72.2, Correct Care and Brown object to Judge Lindsay's order to the extent that it requires redeposition of Brown and an award of costs to Troutman. (D.N. 97) In the alternative, Correct Care and Brown request that the Court reconsider its earlier order pursuant

to Federal Rule of Civil Procedure 59(e). (*Id.*) For the reasons set forth below, the objections will be overruled.[1]

I.

Correct Care and Brown invoke both this Court's Local Rule 72.2 and Federal Rule of Civil Procedure 59(e) in seeking relief from the magistrate judge's order. (*See* D.N. 97) However, "Rule 59(e) does not provide an appropriate means to challenge a non-final order." *Colter v. Bowling Green-Warren Cty. Reg'l Airport Bd.*, No. 1:17-CV-00118-JHM, 2018 WL 775366, at *1 n.1 (W.D. Ky. Feb. 2, 2018) (quoting *Saunders v. Ford Motor Co.*, No. 3:14-CV-00594-JHM, 2015 WL 13547825, at *1 (W.D. Ky. Aug. 4, 2015)). Because there has been no final order or judgment in this case, the Court will construe Correct Care and Brown's filing (D.N. 97) as objections to a non-dispositive ruling of a magistrate judge pursuant to Local Rule 72.2.

Federal Rule of Civil Procedure 72(a) provides that the Court must "modify or set aside any part of the [magistrate judge's] order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). "The magistrate judge's factual findings are reviewed under the clearly erroneous standard." *Blackwell v. Liberty Life Assurance Co. of Boston*, No. 3:15-cv-376-DJH, 2017 WL 927239, at *2 (W.D. Ky. Mar. 8, 2017) (quoting *Scott-Warren v. Liberty Life Assurance Co. of Boston*, No. 3:14-CV-00738-CRS-CHL, 2016 WL 5661774, at *3 (W.D. Ky. Sept. 29, 2016)). "Clear error exists 'when the reviewing court is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Max Trucking, LLC v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 810 (6th Cir. 2015)). "On the other hand, the magistrate judge's legal conclusions are reviewed under the 'contrary to law' standard." *Id.* (quoting *Scott-Warren*, 2016 WL 5661774, at

[1] Troutman filed a response to the objections (D.N. 107), which the Court will disregard as it was filed without leave of Court. *See* LR 72.2.

*3). "A legal conclusion is contrary to law when it contradicts or ignores applicable legal principles found in the Constitution, statutes, and case precedent." *Id.* (quoting *Scott-Warren*, 2016 WL 5661774, at *3).

II.

Correct Care and Brown do not object to the entirety of Judge Lindsay's June 18, 2018 order. (*See* D.N. 97, PageID # 675) Rather, they assert two narrow objections. First, they object to redeposition of Brown. (*Id.*) Second, they object to the award of costs. (*Id.*) The Court will address each objection in turn.

A. Redeposition of Defendant Brown

Judge Lindsay ordered that Defendant Brown be redeposed to allow Troutman to ask her a hypothetical question and a question regarding medications she was or is taking that might impair her ability to recall information and testify accurately. (D.N. 96, PageID # 670-71, 673) Correct Care and Brown argue that (1) Brown has already answered Troutman's question regarding any such medications; and (2) requiring Brown to answer the hypothetical question would require her to fabricate a response in violation of public policy. (D.N. 97, PageID # 677-80)

1.

Judge Lindsay's order stated that "Troutman's question regarding whether Brown was on any medication during her deposition is not only relevant in part, but counsel for [Correct Care] improperly prohibited Brown from answering the question." (D.N. 96, PageID # 670) He therefore concluded that at Brown's next deposition, "Troutman will be allowed to inquire into whether Brown is (or was at her first deposition) using any medication or any other substances that could impair or have impaired her ability to recall information and testify accurately." (*Id.*, PageID # 671) Upon closer examination, it appears to the Court that Troutman's counsel asked this

question during Brown's first deposition; Brown responded "no"; and the deposition continued. (D.N. 82, PageID # 510) However, Troutman's counsel asked later in the deposition whether Brown was "taking any medication" at all. (D.N. 82, PageID # 524-25) It was this later question about specific medications that Correct Care and Brown's counsel instructed Brown not to answer on relevance grounds. (*See id.*)

"When examining counsel asks a deponent an irrelevant question, opposing counsel should enter an objection and allow the deponent to answer." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 250 F. Supp. 3d 244, 267 (W.D. Ky. 2017). But that is not what opposing counsel did in this case. (D.N. 82, PageID # 525 (noting that counsel "instruct[ed] [Brown] not to answer")) Judge Lindsay was therefore correct in finding that counsel improperly prohibited Brown from answering the question (D.N. 96, PageID # 670-71), and the Court will overrule the objection to this portion of the magistrate judge's order. As Correct Care and Brown correctly point out (D.N. 97, PageID # 677-78), Brown answered in her first deposition the question Judge Lindsay authorized in his order—namely, whether Brown was using any medication that could have impaired her ability to recall information and testify accurately. (D.N. 82, PageID # 510; *see* D.N. 96, PageID # 671) But as explained below, Brown will be redeposed to allow for a response to a previously unanswered hypothetical question. At this second deposition, Troutman's counsel will again be permitted, in accordance with Judge Lindsay's order, to ask Brown whether she is taking any medication that could impair her ability to recall information and testify accurately. (*See* D.N. 96, PageID # 671)

2.

During Brown's deposition, Troutman's counsel also asked Brown, "[i]f mental health did not follow up [on a report of an at-risk individual], trained as a nurse, hypothetically, . . . what

would you do?" (D.N. 82, PageID # 518-19) Brown responded, "I can't hypothetical," and her counsel objected, arguing that Troutman's counsel did not "like [Brown's] answer" and was "badgering the witness." (*Id.*, PageID # 519) In his order, Judge Lindsay noted that witnesses may be asked hypothetical questions during a deposition so long as the hypothetical is based on facts in the record. (D.N. 96, PageID # 670 (citing *Miller v. Village of Pinckney*, No. 07-CV-10928-DT, 2008 WL 4190619, at *1 (E.D. Mich. Sept. 9, 2008))) He then concluded that the hypothetical question in this case was proper:

> Brown was the one who received the phone call from [the corrections officer] informing [Correct Care] that Troutman Jr. would be placed in a single barred cell. Because [the officer] never received a return phone call from [Correct Care] blocking the transfer, Troutman Jr. was sent back into the individual cell. Troutman alleges that had the medical department properly followed up on the call, they would have discovered that Troutman Jr. was unsuited to be placed in an individual cell. Thus, the question of what Brown would have done if she knew that mental health did not properly follow up with Troutman Jr. is both grounded in the record and highly relevant to Troutman's claims.

(*Id.*)

Correct Care and Brown argue that (1) Brown answered the hypothetical question; and (2) because Brown testified that she did not remember receiving the call, there are no facts of record to support the hypothetical question. (D.N. 97, PageID # 679) Neither argument is persuasive. The deposition transcript reveals that Brown did not answer the hypothetical question. Rather, she responded "I can't hypothetical"; "I can't"; and "I could not." (D.N. 82, PageID # 519) As the magistrate judge noted (D.N. 96, PageID # 670), Brown had answered a hypothetical question asked immediately prior to the one at issue here. (*See* D.N. 82, PageID # 518-19)

Although Brown testified that she did not remember taking the call from the corrections officer (*id.*, PageID # 523), other evidence in the record indicates that she did receive the call (*see id.*, PageID 521-23). This evidence includes testimony from the corrections officer that he told

Brown that Troutman, Jr. was being moved to a single cell and inmate notes showing that Brown was notified that Troutman, Jr. had been moved to a single cell. (*See id.*, PageID # 521-22; *see also* D.N. 82-5, PageID # 568) The Court thus finds that the hypothetical question was based on facts in the record. *See Howard v. Rustin*, No. 06-00200, 2008 WL 1925102, at *3 (W.D. Pa. Apr. 30, 2008) ("The hypothetical question posed must be based upon facts of record (i.e., testimony of another deponent or a document related to the testimony."). In short, Correct Care and Brown have not shown that Judge Lindsay clearly erred or acted contrary to law in ordering that Brown be redeposed (D.N. 96, PageID # 668-71). *See* Fed. R. Civ. P. 72(a). The Court will therefore overrule their objections.

B. Award of Costs

Judge Lindsay also awarded to Troutman the costs associated with Brown's second deposition and with obtaining Troutman, Jr.'s mortality review and underlying documents. (D.N. 96, PageID # 672) Correct Care and Brown argue that the magistrate judge erred in awarding costs because (1) their objections to Troutman's document requests were substantially justified; and (2) they did not conduct Brown's deposition or withhold any documents in bad faith. (D.N. 97, PageID # 680-81)

Federal Rule of Civil Procedure 37(a)(5)(A) provides:

> If the motion [to compel] is granted . . . the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
>
> (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
>
> (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii). Correct Care and Brown do not dispute that Troutman attempted in good faith to resolve the discovery dispute before filing the motion to compel. An objection is substantially justified "if it raises an issue about which 'there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.'" *Doe v. Lexington-Fayette Urban Cty. Gov't*, 407 F.3d 755, 765 (6th Cir. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

Correct Care and Brown merely repeat their arguments in opposition to the redeposition of Brown. (*See* D.N. 97, PageID # 680) But for the reasons explained above, the Court concludes that counsel's objections to the questions at issue were not substantially justified. With respect to the mortality review, Correct Care and Brown argue that they were substantially justified in failing to produce it based on HIPAA and the work-product doctrine. (*Id.*, PageID # 681)

First, Troutman specifically authorized the release of her father's medical records (D.N. 90-4, PageID # 620), pursuant to HIPAA regulations. *See* 45 C.F.R. § 164.508. The Court is therefore unable to conclude that Correct Care was substantially justified in refusing to produce Troutman, Jr.'s mortality review and underlying documents. *Cf. Davis v. Hartford Life & Accident Ins. Co.*, No. 3:14-CV-507-TBR-LLK, 2018 WL 334517, at *7-8 (W.D. Ky. Jan. 9, 2018) (requiring company to produce medical report "as it relate[d] to" the plaintiff).

Second, documents prepared for nonlitigation purposes are not covered by the work-product privilege. *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006). As Judge Lindsay noted (D.N. 96, PageID # 666), Correct Care's policies and procedures state that "mortality reviews are carried out *for the sole purpose* of improving future performance." (D.N.

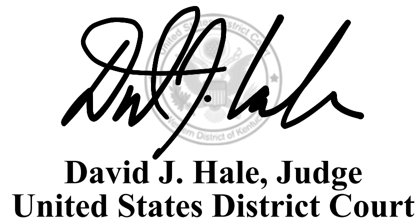
90-1, PageID # 604 (emphasis added)) Again, Correct Care's refusal to produce Troutman, Jr.'s mortality review was not substantially justified.

Correct Care and Brown's final argument that they should not be sanctioned in the absence of bad faith is similarly unavailing. In this circuit, the Court "generally need not make a finding of bad faith before sanctioning a party under Rule 37." *Fausz v. NPAS, Inc.*, No. 3:15-cv-00145-CRS-DW, 2017 WL 1227943, at *3 (W.D. Ky. Mar. 31, 2017) (citing *Youn v. Track, Inc.*, 324 F.3d 409, 421 (6th Cir. 2003)). Because the Court concludes that Judge Lindsay did not clearly err or act contrary to law in awarding costs to Troutman, Correct Care and Brown's objection will be overruled. *See* Fed. R. Civ. P. 72(a).

III.

For the reasons set forth above, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** that Correct Care and Brown's objections (D.N. 97) are overruled.

August 20, 2018



David J. Hale, Judge
United States District Court