

cared for by the parents in other ways not relevant here.

Jeanne Green's Response to Plaintiffs' Motion to Compel Discovery of her Medical Records, p. 3. As will be shown, plaintiffs' use of the word "disinherited" is not the only time the plaintiffs have not been honest with the Court.

A patient's privilege against disclosure of confidential communication between a physician and the patient is provided for in I.C. § 9-203(4) and I.R.E. 503(b)(1). Idaho Code § 9-203(4) provides:

Confidential relations and communications. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

4. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient

I.C. § 9-203(4). While there are exceptions to subsection 4, none of them are applicable to the instant action. Similarly, Idaho Rule of Evidence 503(b)(1) provides:

A patient has a privilege in a civil action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

I.R.E. 503(b)(1). There are exceptions to this privilege, including the following:

(3) Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the *patient* in any proceeding in which he *relies upon the condition as an element of his claim or defense or, after the patient's death*, in any proceeding in *which any party relies upon the condition as an element of his claim or defense*.

I.R.E. 503(d)(3) (emphasis added).

In this case, the plaintiffs claim Jeanne Green has placed her competency at

issue by raising it as an affirmative defense: “Jeanne also asserts her competency as an affirmative defense.¹⁶” Memorandum in Support of Plaintiffs’ Motion to Compel Defendant Jeanne Green’s Production of Discovery, p. 7, n. 16. Footnote 16 reads: “Jeanne Green’s Answer to the Complaint, filed May 28, 2014, p. 3, ¶ A.” *Id.* The misstatement by plaintiff is as follows. Paragraph A of “Jeanne Green’s Answer to Complaint” reads: “Any claims based on allegations, or inference from allegations made in the Complaint, with respect to Defendant’s lack of competency are barred by res judicata or collateral estoppel, or both.” Jeanne Green’s Answer to Complaint, p. 3, ¶ A. Plaintiffs’ claim is a disingenuous misstatement of Jeanne Green’s Answer. By answering, “Any claims based on allegations or inference from allegations made in the Complaint, with respect to Defendant’s lack of competency are barred by res judicata or collateral estoppel, or both”, Jeanne Green in no way raises the issue of her competency as a defense. She is simply informing the plaintiffs that any issue about competency has already been litigated and cannot be litigated in this case.

Moreover, plaintiffs claim: “In addition to being an element of the Plaintiffs’ claim, Jeanne places her competency in dispute in her Answer to the Complaint.” Memorandum in Support of Plaintiffs’ Motion to Compel Defendant Jeanne Green’s Production of Discovery. p. 7. No citation is given by plaintiffs to any portion of Jeanne Green’s Answer to Complaint. This Court has read every word of Jeanne Green’s Answer to Complaint and can find no portion which supports this claim by plaintiffs.

At oral argument on August 20, 2014, counsel for plaintiffs argued repeatedly that Jeanne Green’s denial of plaintiffs’ allegations in their Complaint, put Jeanne Green’s physical and mental health at issue. However, at this time, plaintiffs have produced no evidence and no case law that would connect symptoms of dementia with vulnerability for undue influence. Thus, at this time, the request for medical records of

Jeanne Green is completely lacking in relevance or the likely ability to lead to relevant evidence. At this time, plaintiffs have embarked on nothing more than a fishing expedition with the hopes of finding something in medical records that some undisclosed expert might someday be able to connect. No case law has been cited by plaintiffs that would support their position that Jeanne Green's denial of plaintiffs' allegations constitutes an act by Jeanne Green of putting her medical condition at issue under I.R.E. 503(d)(3). While "competency" is a medical/legal issue (which in this case is not at issue as Jeanne Green simply stated competency is subject to collateral estoppel and/or res judicata), plaintiffs have put forth no evidence that being "vulnerable to undue influence" is a medical issue.

Plaintiffs spend some of their Memorandum in Support of Plaintiffs' Motion to Compel Defendant Jeanne Green's Production of Discovery discussing "competency", but the plaintiffs devote more of their memorandum discussing their claim that Jeanne Green was somehow "susceptible to undue influence" by James Green. *Id.*, pp. 2, 3, 5, 6, 7, 8. "Susceptible to undue influence" is not the same thing as "competency", or lack thereof. Plaintiffs make the oblique, unsupported claim that "Jeanne's medical records make Plaintiffs' allegations regarding their vulnerability to influence because of her declining health more or less probable." *Id.*, p. 6. Simply making that statement does not make it true. Plaintiffs have put forth no medical evidence why such would be true. Plaintiffs have not made any citation to any case law to connect "declining health" with "vulnerability to influence."

Communications made by Jeanne Green to her physician are covered by privilege under both I.C. § 9-203(4) and I.R.E. 503(b)(1). If she placed that condition at issue, for example by filing an action for personal injury or a claim for medical malpractice, that physician-patient privilege would be waived under I.C. § 9-203(4) and

I.R.E. 503(d)(3). But that is not the case here. The plaintiffs alone have attempted to make Jeanne Green's competency an issue. Under I.R.E. 503(d)(3), the plaintiffs attempted reliance on her mental condition as an element of their claim can only bypass Jeanne Green's physician-patient privilege if she has passed away, and she is still living. There is no claim by plaintiffs that she is deceased. As such, the plaintiffs cannot rely on I.R.E. 503(d)(3) to gain access to her medical records.

Plaintiffs are deceptive in arguing, "Idaho Rule of Evidence 503(d)(3) provides an exception to the physician-patient privilege when the medical condition is an element of a claim or defense." Memorandum in Support of Plaintiffs' Motion to Compel Defendant Jeanne Green's Production of Discovery, p. 6. It is misleading as plaintiffs' quoted argument would apply whenever anyone makes anyone else's medical condition an element of a claim or defense, when the rule makes it very clear it is only when *the patient* (in this case Jeanne Green) makes her condition an element of her claim or defense, and Jeanne Green has not made her condition an element of her claim or defense in this case.

It should also be noted that Idaho Rules of Civil Procedure Rule 35(a) governs physical and mental examination of persons. It provides:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, or a qualified mental health professional as defined in section 6-1901, Idaho Code, excluding nurses, *if the mental, emotional, or psychological condition of a party is at issue*, or to produce for examination the person in the party's custody or legal control. *The order may be made only on motion for good cause shown* and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination, including any tests or procedures to be performed, and the person or persons by whom it is to be performed. Upon giving of reasonable notice to the other parties, the party being examined or the person having

custody or legal control of the person being examined, shall have the right to have a representative of his or her choice present.

I.R.C.P. 35(a). However, in this case, good cause has not been shown as to why the “mental, emotional, or psychological condition of a party is at issue”. Before the Court is evidence that in October 2012 Judge Buchannan (at the time a Magistrate Judge) found that Jeanne Green was not incapacitated in Bonner County Case CV 2012 244.

For the reasons set forth above, the Court finds Jeanne Green’s medical records are privileged information and those records have not been placed in issue by Jeanne Green; accordingly, the Court denies plaintiffs’ motion to compel. Reasonable expenses and fees are awarded to the defendant Jeanne Green, against plaintiffs, under I.R.C.P. 37(a)(4), in an amount to be proved at a later hearing if defendant Jeanne Green makes such application.

II. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED plaintiffs’ Motion to Compel Defendant Jeanne Green’s Production of Discovery is DENIED in all aspects.

IT IS FURTHER ORDERED reasonable expenses and fees are awarded to the defendant Jeanne Green, against plaintiffs, under I.R.C.P. 37(a)(4), in an amount proved at a later hearing if defendant Jeanne Green makes such application.

Entered this 20th day of August, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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Deputy Clerk