UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAFINKA STOJCEVSKI, individually
and as Personal Representative of the
Estate of DAVID STOJCEVSKI,

Plaintiff,

v.

COUNTY OF MACOMB, *et al.*,

Defendants.
_____/

Civil Action No. 15-11019
Honorable Linda V. Parker
Magistrate Judge David R. Grand

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL [74]

Before the Court is Plaintiff Dafinka Stojcevski's ("Plaintiff") Motion to Compel the Production of Care Team Meeting and Mortality Review Documents, filed on June 23, 2017. (Doc. #74). The Correct Care Solutions ("CCS") defendants filed a response in opposition to this motion on July 14, 2017. (Doc. #84). No reply was filed.

On June 30, 2017, an Order of Reference was entered referring this motion to the undersigned for a hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). (Doc. #78). A hearing was held on this motion on August 8, 2017, and the matter is now ripe for ruling.

A. Background

This is a federal civil rights action, brought pursuant to 42 U.S.C. § 1983, arising out of the death of Plaintiff's decedent, David Stojcevski ("Stojcevski"), at the Macomb County Jail on June 27, 2014. (Doc. #9). Specifically, Plaintiff asserts that Stojcevski's death resulted from Defendants' deliberate indifference to his serious medical needs.

In the instant motion, Plaintiff indicates that the deposition of CCS' Health Services Administrator, David Arft, was recently taken. (Doc. #74 at 5). During Arft's deposition, he

testified that CCS held both a "Care Team" meeting while Stojcevski was in custody to assess his medical needs, and a "Mortality Review" following Stojcevski's death. (*Id.* at 6-8). However, when Plaintiff's counsel questioned Arft about these meetings, CCS' attorney instructed Arft not to answer any questions regarding what he "may have done at the direction of the Morbidity and Mortality review or Care Team" on the basis that such information is "privileged." (*Id.* at 7). In addition, CCS' attorney objected to producing (a) documents used in the Care Team Meeting or the Mortality Review, and (b) minutes taken of the Care Team Meeting or Mortality Review, on the grounds that such documents are protected by "Michigan's Peer Review Privilege." (*Id.* at 5-8; Doc. #84 at 9).

Plaintiff now seeks an order compelling production of "all documents utilized by Defendants in the Care Team Meetings and Mortality Review meetings involving Plaintiff-Decedent," and compelling all CCS Defendants "to testify about their recollection of, and involvement in, the Care Team Meetings and Mortality Review meetings."[1] (*Id.* at 9). The CCS Defendants oppose Plaintiff's motion, arguing that the requested evidence – both documentary and testimonial – is protected from disclosure by Michigan's peer review privilege, M.C.L. § 333.21515. (Doc. #84).

B. Analysis

Fed. R. Civ. P. 26(b)(1) controls the scope of discovery and provides, in relevant part:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any *nonprivileged* matter

[1] Plaintiff also asks that "in the event that Defendant CCS claims to have destroyed all records and minutes" regarding the Care Team and Mortality Review meetings, "this Court rule on the evidentiary significance of such destruction in the context of a future trial." (Doc. #74 at 15-16). Plaintiff further indicates, however, that she is "cognizant of the fact that such a ruling is not necessary at this time." (*Id.* at 16). The Court agrees and declines to address this issue at this stage of the proceedings. Should the additional limited discovery allowed by this order render such issues pertinent, Plaintiff may file an appropriate motion.

> that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1) (emphasis added). Here, where there is no dispute as to the relevance of the requested information, the burden of establishing that otherwise relevant discovery is privileged is on the party asserting the privilege (here, the CCS Defendants). *See, e.g., United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999).

The CCS Defendants argue that the requested discovery is protected from disclosure by Michigan's peer review privilege, M.C.L. § 333.21515. (Doc. #84 at 15-19). But, where, as here, a claim is grounded in federal law, federal – and not state – privileges apply. *See* Fed. R. Evid. 501. In a fairly recent deliberate indifference/wrongful death case directly on point, *Grabow v. County of Macomb*, 2013 WL 3354505, at *5 (E.D. Mich. July 3, 2013), Judge Cohn rejected the exact argument advanced by the CCS Defendants here, and explained why Michigan's peer review privilege does not apply in a federal civil rights case brought under 42 U.S.C. § 1983:

> Because this is a prisoner civil rights case brought under § 1983, federal law supplies the rule of decision, and Rule 501 applies. Indeed, "[t]he claims made here are federal constitutional claims … It thus appears particularly inappropriate to allow the use of state evidentiary privileges." *Leon v. Cnty. of San Diego*, 202 F.R.D. 631, 636 (S.D. Cal. 2001); *see also Agster v. Maricopa Cnty.*, 422 F.3d 836, 839 (9th Cir. 2005) ("But we are not bound by Arizona law …."). "Where, as here, it is alleged that a defendant acted under color of state law to violate a citizen's rights, '[t]he appropriateness of deference to a state's law of privileged is diminished.'" *Weiss v. Cnty. of Chester*, 231 F.R.D. 202, 207 (E.D. Pa. 2005).
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> Although "Rule 501 has been recognized as allowing the adoption of existing state evidentiary codes to govern federal cases where the state rules are not in conflict with the federal rules," Michigan's medical peer review privilege conflicts with and harms "federal substantive and

> procedural policy" when applied in a § 1983 deliberate indifference case. *See Leon*, 202 F.R.D. at 635 (explaining that California's peer review privilege conflicts with liberal discovery rules applicable in federal courts in § 1983 deliberate indifference case). Indeed, "[t]he absolute bar on discovery provided by [Michigan's peer review privilege] conflicts with the liberal discovery rules applicable in federal courts, and it conflicts with the necessity of finding state action inherent in the federal civil rights law." *Id.* at 836. Accordingly, Michigan's peer review privilege is inapplicable to this case.

Grabow, 2013 WL 3354505, at *5. *Grabow* therefore strongly supports granting Plaintiff's instant motion as her principal claims allege deliberate indifference under § 1983. *See also James v. Hampton*, 2016 WL 1182732, at *2 (E.D. Mich. Mar. 28, 2016) (holding that "when a claim is grounded in federal law, as it is here, federal and not state, privileges apply…the Supreme Court has noted that '[e]videntiary privileges in litigation are not favored.'") (citation omitted).

The CCS Defendants argue that *Grabow* is not binding on this Court, asserting that, instead, the Court is bound by *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 588 (6th Cir. 2014), in which the Sixth Circuit purportedly "indicated that Michigan's Peer Review Privilege applies to claims arising out of federal law." (Doc. #84 at 16). This argument is unpersuasive.

First, contrary to the CCS Defendants' assertion, the *Loyd* court gave no explicit "indication" that Michigan's peer review privilege generally applies to all "claims arising out of federal law." Indeed, the court did not even consider that issue. In *Loyd*, the plaintiff had been employed at the defendant hospital, and filed an employment action against it alleging a wrongful termination under federal law. Loyd lost the case, and on appeal challenged the district court's denial of her motion to compel the hospital to produce certain peer review documents. But Loyd's only argument was "that the [peer review document in question] is not privileged under Michigan law *because the privilege does not extend to reports involving the actions of hospital security guards*." *Loyd*, 766 F.3d at 588 (emphasis added). While the Sixth Circuit

wrote that it "discern[ed] no error in the [federal] district court's discovery order," its only substantive analysis supporting this finding was its statement that "Michigan courts have construed the hospital-peer-review privilege (which is codified at M.C.L. § 333.21515) *to encompass reports involving members who are not physicians or nurses*." *Id.* (emphasis added). In other words, the *Loyd* court never had a reason to analyze (and did not analyze) the arguments in favor of, or against, applying a state privilege to a federal claim. It certainly did not hold that Michigan's peer review privilege applies to any and all "claims arising out of federal law."

Second, although *Grabow* is an unpublished opinion and, thus, does not constitute binding precedent, it is well-reasoned and properly weighs the competing interests at stake in a § 1983 deliberate indifference/wrongful death case. Indeed, in concluding that a peer review privilege should not apply in such a case, Judge Cohn cited favorably a passage from *Jenkins v. Dekalb Cnty. Ga.*, 242 F.R.D. 652 (N.D. Ga. 2007), which applies equally here:

> There are unique considerations at play in a post-death investigation ordered by a county jail that dramatically weaken the case for recognizing the privilege. A review of a deceased inmate is not the straightforward evaluation of medical care that occurs in the civilian context. The generation of postdeath reports, including the one at issue in this case, may include details such as when jail officials notified medical officials of a particular problem, and whether there was a reason for non-medical officials to have monitored a situation more closely. Not only is this type of information "nonmedical," but it also may shed light, or at least raise an inference, of jail customs or policies.

Id. at 660. As both the *Grabow* and *Jenkins* courts recognized, in determining the applicability of a peer review privilege in this context, there is a trade-off between two important and potentially competing interests: allowing full and frank discovery into the underlying facts (in order to ferret out the truth) and encouraging candid reviews of events that have occurred (in order, for example, to bring to the forefront any potential lessons to be learned). This Court agrees with both the *Grabow* and *Jenkins* courts that, at least in Section 1983 federal court

litigation arising out of the death of an inmate, that balance tips in favor of unearthing the truth, rather than shielding any peer review process that may have taken place.[2]

This also highlights an important distinction between the instant case and *Loyd*. *Loyd* involved a claim for wrongful termination, whereas Plaintiff's instant claims arise under § 1983, and allege deliberate indifference resulting in death. Again, by their very nature, the latter category of cases implicate individuals' most paramount rights, and therefore require a unique privilege analysis which favors liberal discovery into the underlying facts over protection of the peer review process.

In sum, *Loyd* is not controlling on the issue of whether Michigan's peer review privilege applies in the context of a § 1983 claim for deliberate indifference resulting in death. For the reasons stated above, that question must be answered in the negative. Accordingly, the requested documents and information sought by Plaintiff are not protected from disclosure.[3]

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[2] Although the CCS Defendants do not explicitly argue in the alternative that a federal common law peer review privilege exists, such an argument would be unpersuasive in any event. A very recent out-of-district decision, *Bost v. Wexford Health Sources, Inc.*, 2017 WL 3084953, at *4 (D. Md. June 19, 2017), is instructive on this point. As the *Bost* court wrote:

> . . . the Supreme Court has yet to recognize a federal medical peer review privilege and there are no circuit court cases recognizing such a privilege. Every circuit court that has addressed the issue of a federal medical peer review privilege has flatly rejected the assertion. *See* [*Virmani v. Novant Health Inc.*, 259 F.3d 284, 292 (4th Cir. 2001)] (refusing to recognize medical review privilege where allegations of discrimination arose from conduct of peer review officials); *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (denying medical review privilege in federal antitrust action); *Agster v. Maricopa Cnty.*, 422 F.3d 836, 840 (9th Cir. 2005) (rejecting peer review privilege for protection of a post-death mortality report following prisoner death at a California county jail)…Furthermore, almost every district court that has addressed the issue of peer review privilege in the specific context of section 1983 litigation brought on behalf of prisoners has rejected the assertion.

This Court, too, declines to find the existence of a federal common law peer review privilege.

[3] At oral argument, counsel for the CCS Defendants cited – for the first time – the Health Care Quality Improvement Act ("HCQIA"), 28 U.S.C. § 11101-11152, as an indication that Congress intended that a peer review privilege apply in federal court. This argument lacks merit. The

C. Conclusion

For the foregoing reasons, Plaintiff's Motion to Compel (**Doc. #74**) is **GRANTED**. By **September 5, 2017**, the CCS Defendants shall produce all documents utilized by, or prepared in conjunction with, any Care Team or Mortality Review meetings related to David Stojcevski. In addition, all CCS employees or agents, whether deposed previously or to be deposed in the future, shall be required to testify about their recollection of, and involvement in, the Care Team and/or Mortality Review meetings pertaining to Stojcevski. Such depositions shall be taken no later than **September 26, 2017**.

IT IS SO ORDERED.

Dated: August 22, 2017
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

The parties' attention is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days from the date of receipt of a copy of this order within which to file objections for consideration by the district judge under 28 U.S. C. §636(b)(1).

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statute merely codified protection from suit for doctors who are sued simply for having participated in a peer review of another doctor. But none of the Defendants here are being sued *because of* their participation in a peer review process. Moreover, the statute in question did not create an evidentiary privilege for materials used in connection with any such peer review. *See, e.g., In re Admin. Subpoena Blue Cross Blue Shield of Mass., Inc.*, 400 F. Supp. 2d 386, 391 (D. Mass. 2005) (recognizing that Congress "chose not to include a medical peer review privilege in the [HCQIA]. The Act was designed to provide 'incentive and protection for physicians engaging in effective professional peer review.' 42 U.S.C. § 11101(5) (2005). As such, Congress extended qualified immunity from suit to those conducting such peer reviews. 42 U.S.C. § 11111(a)(2) (2005). Significantly, ***Congress did not also create a federal evidentiary privilege*** for most documents produced during such a review…") (emphasis added).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on August 22, 2017.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager