IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. 086695

STATE ex rel. LAURIE DEAN,

Relator/Plaintiff,

vs.

THE HONORABLE JON A. CUNNINGHAM, CIRCUIT COURT,
SAINT CHARLES COUNTY

Respondent.

BRIEF OF RELATOR LAURIE DEAN

Respectfully submitted,

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ATTORNEYS FOR RELATOR/PLAINTIFF
LAURIE DEAN

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JURISDICTIONAL STATEMENT

This action is one involving the question of whether Respondent, the Honorable Jon A. Cunningham, can take any further action on this matter other than denying defendant's motion to compel Relator to provide details of her medical history. Relator sued defendants under the provisions of the Missouri Human Rights Act, Section 213.055, RSMo, and in her petition alleged that she had suffered "emotional distress, humiliation, inconvenience, and loss of ability to enjoy life." She stated in interrogatory answers that she had not received medical treatment relating to her claimed damages, and that she does not intend to offer expert testimony relating to her claimed emotional distress. Respondent ordered Relator to produce her mental health counseling information, including physicians, dates of treatment, and records, for her lifetime, and also ordered Relator to execute a blank medical release covering all of her physical and mental medical treatment over her entire lifetime. This is an abuse of discretion relating to a discovery matter, and, accordingly, this Court has jurisdiction to issue a Writ of Prohibition, *State ex rel. Srecher v. Dowd,* 912 S.W.2d 462, 465 (Mo. 1995).

STATEMENT OF FACTS

Relator, Laurie Dean, filed a petition in the Circuit Court of Saint Charles County against her employer, RARE Hospitality International Inc. ("RHI"), and Mark Adams and James Knicos, individually, under the provisions of the Missouri Human Rights Act, Section 213.055, RSMo. She alleges, for her cause of action, that she was subjected to sex discrimination and sexual harassment during the course of her employment at RHI. A copy of the Petition is attached as Exhibit A [Appendix, A1]. Therein, she seeks damages for loss of income, in addition to "emotional distress, humiliation, inconvenience, and loss of enjoyment of life." [Appendix A1, paragraph 12]

Subsequently, defendant RHI propounded discovery requests on Relator. In its Interrogatory 1, defendant RHI asked Relator if she claimed that as a result of the matters alleged in her Petition, she had been "treated or attended by any hospitals, doctors, nurses, psychologists, counselors, or others in the healing arts," and Relator replied, "No." **[**Exhibit B, Appendix A8**]**.

In Interrogatory 2 **[**Exhibit B, A8**],** RHI asked Relator to identify all items of damage sought as a result of the allegations in her Petition, and Relator stated that she sought damage for "Emotional Distress, Embarrassment, and Humiliation – [Relator] is, at this time, seeking only "garden variety" emotional distress damages."

Defendant RHI then asked, in Interrogatory 12, that Relator "State whether you have ever consulted or been treated by a psychiatrist, psychologist, counselor or other health care practitioner for mental distress, emotional suffering or any other mental or emotional condition. If your answer is 'yes,' state as to each hospital, doctor, nurse, psychologist, counselor, or others in the healing arts the name, address and telephone number; the dates of all such treatments or attendances." Relator responded by objection pursuant to the physician/patient privilege, and that the Interrogatory was burdensome, vague, and not calculated to lead to the discovery of admissible evidence. Relator further objected that this Interrogatory was not limited in scope and time. **[**Exhibit C**,** Appendix A9**]**.

Finally, in defendant RHI's Request for Production of Documents, it requested that Relator produce "All medical records, reports, charts or notations of any kind describing or indicating plaintiffs (sic) physical or mental condition prepared by any physician, therapist, or any other person having occasion to treat, examine or care for plaintiff as requested in Interrogatory Number 1, and additionally, plaintiff is requested to execute the medical records release attached hereto to enable defendant [RHI] to acquire such documents." Relator objected to this Request by asserting the physician-patient privilege, and that it was not limited in temporal scope, and not calculated to lead to the discovery of admissible evidence. **[**Exhibit D, Appendix A10**]**.

Defendant RHI attached a document entitled "AUTHORIZATION TO INSPECT AND COPY MEDICAL RECORDS FOR LITIGATION" to its

Request for Production of Documents, and a copy of that Authorization is attached as **[**Exhibit E, Appendix A12**]**.

Following an informal effort at resolving these objections, defendant RHI requested the Respondent to overrule Relator's objections and compel discovery. Respondent heard this motion and on December 14, 2004, ordered Relator to "produce all of her mental health treatment records" and "execute authorization for the production of those records." Respondent also ordered Relator to answer Interrogatory 12. Respondent's "Order Granting Defendant's Motion to Compel" is attached as **[**Exhibit F, Appendix A13**]**.

Respondent petitioned the Eastern District Court of Appeals for this Writ of Prohibition, and was summarily denied without opinion. This petition for a writ of prohibition followed.

POINTS RELIED ON

1. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL RELATOR TO PRODUCE INFORMATION RELATING TO UNRELATED PSYCHOTHERAPY, IN THAT RELATOR HAS NOT WAIVED HER PHYSICIAN-PATIENT PRIVILEGE BY CLAIMING DAMAGES FOR EMOTIONAL DISTRESS THAT DID NOT RESULT IN A MEDICALLY DIAGNOSABLE CONDITION.

Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161 (W.D.Mo 1999)

Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996)

Johnson v. Trujillo, 977 P.2d 152 (Colo. 1999)

Fritsch v. City of Chula Vista, 187 F.R.D. 614 (D.C.S.C. 1999)

2. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL RELATOR TO:

A. IDENTIFY HER MENTAL HEALTH TREATMENT PROVIDERS OVER HER LIFETIME, AND

B. PRODUCE ALL OF HER MENTAL HEALTH TREATMENT RECORDS OVER HER LIFETIME, AND

C. EXECUTE MEDICAL RELEASES IN BLANK, THAT ARE UNLIMITED TO MENTAL AND PHYSICAL TREATMENT, AND COVERING RELATOR'S ENTIRE LIFETIME,

IN THAT SUCH INFORMATION IS PROTECTED BY THE PHYSICIAN-PATIENT PRIVILEGE, AND THE DISCLOSURE OF SAID INFORMATION EXCEEDS THE SCOPE OF PERMISSABLE DISCOVERY.

State ex rel. Stecher v. Dowd, 912 S.W.2d 462 (Mo. 1995)

State ex rel. McNutt v. Keet, 432 SW2d 597 (Mo. Banc 1968)

State ex rel. Jones v. Syler, 936 S.W.2d 805 (Mo. Banc 1997)

Rev. Stat. Mo. Section 491.060(5)

ARGUMENT

I. STANDARD OF REVIEW

Relator seeks this writ on the ground Respondent has misconstrued or misapplied the law with respect to discovery pursuant to Mo. Rev. Stat. § 491.060(5). Where the claim is that the trial court misconstrued or misapplied the law, the appellate court reviews the trial court's decision on a de novo basis. *See, e.g., McGhee v. Dickson*, 973 S.W.2d 847, 848 (Mo. banc 1998).

Prohibition is a discretionary writ that may be issued to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). Prohibition is the proper remedy when a trial court issues an order in discovery proceedings that is an abuse of discretion. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927-28 (Mo. banc 1992), *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 808 (Mo. banc 1997).

II. <u>POINT RELIED ON NUMBER 1:</u> RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL RELATOR TO PRODUCE INFORMATION RELATING TO UNRELATED PSYCHOTHERAPY, IN THAT RELATOR HAS NOT WAIVED HER PHYSICIAN-PATIENT PRIVILEGE BY

CLAIMING DAMAGES FOR EMOTIONAL DISTRESS THAT DID NOT RESULT IN A MEDICALLY DIAGNOSABLE CONDITION.

Before a court can determine the appropriate scope of a release of medical information, it must first determine the nature of the damage alleged in the pleadings. Relator will discuss how, historically, Missouri did not allow the recovery of damages for "emotional distress" in the absence of an impact, in cases of negligence. Then, in *Bass v. Nooney*, 646 S.W.2d 765, (Mo. Banc 1983), the court abandoned the impact rule and held that in a negligence action, with the appropriate foundation of medical testimony relating to causation and diagnosis, a plaintiff would be permitted to recover damages.

In cases of intentional tort, on the other hand, a plaintiff has not been required to adduce medical testimony to recover generalized damages for "emotional distress." Most recently, plaintiffs in civil rights cases under the Missouri Human Rights Act were relieved of the requirement for medical testimony for general "emotional distress."

While these proof requirements for the recovery of "emotional distress" damages is well settled, it appears to be a case of first impression under what circumstances a claim for "emotional distress", without more, operates as a waiver of the physician-patient privilege for discovery purposes. Relator asserts that in circumstances where expert testimony is neither required nor offered, or where a

plaintiff is not claiming damages for cost of treatment, there is no waiver of the privilege.

1. HISTORY OF THE DOCTOR-PATIENT WAIVER IN MISSOURI

In *Bass v. Nooney*, 646 S.W.2d 765, 772-73 (Mo. Banc 1983), Missouri abandoned the impact rule and held that, "Instead of the old impact rule, a plaintiff will be permitted to recover for emotional distress provided: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant."

Shortly thereafter, a series of cases were decided by the Missouri Courts of Appeal, holding that the *Bass* requirement for medical diagnosis did not apply to emotional distress damages from intentional torts. "When an intentional tort is involved, the court ruled there is no need to use the *Bass* standard, and the jury is free to consider such damages as embarrassment, humiliation, disgrace and mental suffering without medical proof thereof." *Fust v. Francois*, 913 S.W.2d 38, 48 (Mo.App. 1995) citing *Signorino v. National Super Markets*, 782 S.W.2d 100, 104 (Mo.App.1989). *Lipari v. Volume Shoe Corp.*, 664 S.W.2d 953, 958 (Mo.App.1983), ("It requires no medical testimony to connect [customer's] conditions—nervousness, anxiety, sleeplessness, tearfulness [sic]--to the arrest and prosecution, and they would in fact be the natural and expected consequences of

the indignity which she suffered"), and *Hupp v. North Hills Lincoln-Mercury,* 610 S.W.2d 349, 356-57 (Mo.App.1980) (plaintiff need not prove such special damages as defamation, shame, humiliation and mental anxiety, which the court noted were not subject to precise measurement in terms of dollar amounts).

The Missouri Court of Appeals held, in *Cline v. Friedman*, 882 S.W.2d 754 (E.D.Mo. 1994), that a prayer for damages for emotional distress in a tort action was a waiver of the psychotherapist-patient privilege, opening the plaintiff's psychotherapy records to discovery by the defendant; however, in *Cline*, the plaintiff offered the testimony of her psychiatrist in support of her claim for damages, then subsequently invoked the privilege as to prior treatment that had been rendered to her by the same psychiatrist. In *Cline*, the plaintiff had identified her psychiatrist and offered his testimony by permitting him to be deposed by the defendant, then attempted to re-invoke her privilege with respect to additional medical information in the psychiatrist's records. The court held that the trial court erred in refusing to allow defendant to depose the psychiatrist and preventing defendant from entering the medical records in evidence. *Cline,* at 761. This holding is consistent with the Relator's position, that when a plaintiff is offering the testimony of her psychiatrist, a waiver occurs.

With *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161 (W.D.Mo 1999), a further refinement of the concept of "emotional distress" damages was articulated. The *Red Dragon* court distinguished damages in civil rights cases from tort damages, holding that

"Constitutional rights are not adequately protected by tort damages because a civil rights claim is not analogous to a tort claim for intentional infliction of emotional distress. *Id.* at 35. '[C]ivil rights claims are intended to 'compensate injuries caused by the ... deprivation' of a plaintiff's civil rights. *Id.* at 34 (quoting *Memphis Community School District v. Stachura*, 477 U.S. 299, 309, 106 S.Ct. 2537, 2544, 91 L.Ed.2d 249 (1986)). Therefore, "[c]ompensatory damages [for civil rights violations] may be awarded for humiliation and emotional distress established by testimony or **inferred from the circumstances**." (Quoting *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir.1991) (emphasis added). The *Red Dragon* court specifically rejected the application of *Bass* requirements for emotional distress damages in civil rights cases, holding that:

> . . . *Bass* is inapplicable to the present case because *Bass* was a tort case and the present case involves the deprivation of civil rights. Although the law in Missouri regarding actual damages for emotional distress as the result of a plaintiff being deprived of his or her civil rights is sparse, we have found no case applying the tort standard for damages. However, as previously noted, federal cases addressing federal anti-discrimination statutes may be employed by this court to guide our inquiry into Missouri's civil rights statutes. (Cases cited).

*Id.*at 170.

In the instant case, Relator had sought no medical treatment for any injuries she claims to flow from the conduct of the defendants. She claims no medically diagnosable injuries, nor does she seek recompense for expenditures related to counseling. Accordingly, Relator had not waived her doctor-patient privileges as far as "emotional distress" damages are concerned, and Respondent exceeded his discretionary authority when he ordered her to identify treating health care providers, execute medical releases, and provide medical records about unrelated therapies.

In other words, a claim for "emotional distress" under the Missouri Human Rights Act would not require a plaintiff to provide any evidence either of medical treatment or causation, but the damages could be inferred from the circumstances by the jury, due to the special qualities of "emotional distress" as it relates to civil rights. This is indeed a new category of damages, akin to tort "emotional distress," and yet significantly different, in that it does not refer to a medically diagnosable condition. To be sure, a civil rights plaintiff is not precluded from a recovery of damages for, say, clinical depression, or hypertension, to use two examples, and in litigating for such damages a plaintiff might well be waiving medical privilege as it relates to the scope of the lawsuit. Likewise, a civil rights plaintiff might announce an intention to use a physician or counselor to establish damages for emotional distress, and thereby waive the physician-patient privilege. In the instant case, however, the Relator has made it plain that she sought no medical treatment for her "emotional distress," and that the relief she seeks is

based upon what the federal courts have characterized "garden variety emotional distress" – or, put another way, "The mental suffering [p]laintiff claims 'does not exceed the suffering and loss an ordinary person would likely experience in similar circumstances,' and constitutes 'matters that are within the everyday experience of the average juror.'" *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 632 (D.C. S.D. California, 1999), citing *Johnson v. Trujillo*, 977 P.2d 152, 157-158 (Colo. 1999).

2. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DIFFERS FROM THE PHYSICIAN-PATIENT PRIVILEGE IN IMPORTANT RESPECTS

Although psychotherapy is performed by health care professionals and is considered a "healing art," it is distinguishable from other healing arts in that it relies not on objective findings for diagnosis and treatment, but rather on the frank, open, and frequently embarrassing and painful communication between the patient and the healer. In order for the treatment to be successful, the patient must feel confident enough to divulge the most intimate and personal details of his or her life to the therapist. Consequentially, psychotherapy communications are more akin to those between husband and wife, or between attorney and client, than to the communications that would take place between a doctor and a patient being treated for a physical injury or disease. This distinction was first noted by the U.S. Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d

337 (1996), with respect to the federal evidentiary claim of privilege as to communications between a psychotherapist and patient.

At the time, there was no evidentiary privilege for psychotherapist communications explicitly set forth in the Federal Rules of Evidence. However, the Supreme Court commenced by reviewing common law principles underlying testimonial privileges, and observed that:

> For more than three centuries it has now been recognized as a fundamental maxim that the public … has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exceptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

Jaffee, 518 U.S. at 9, 116 S.Ct. 1923 (quoting *United States v. Bryan,* 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950) (quoting J. Wigmore, Evidence § 2192, p. 64 (3d Ed. 1940)), and citing *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L. Ed.2d 1039 (1974)).

The court then commented that exceptions to the general rule that the public has a right to "every man's evidence" may be justified by a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Jaffee,* 518 U.S. at 9, 116 S.Ct. 1923 (quoting *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)) (quoting

Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)). The court continued, noting "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Jaffee*, 518 U.S. at 10, 116 S.Ct. 1923 (quoting *Trammel*, 445 U.S. at 51, 100 S.Ct. 906).

The court distinguished treatment for medical problems from psychotherapy, stating that treatment for physical ailments can often proceed successfully on the basis of a physical examination, objective information provided by the patient, and the results of diagnostic tests, while, "[e]ffective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 518 U.S. at 10, 116 S.Ct. 1923. The court further stated that the psychotherapist's ability to help patients, ". . . is completely dependent upon [the patient's] willingness and ability to talk freely. . . . [T]here is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment," and that by protecting confidential communications between the psychotherapist and patient, the privilege serves important public interests. *Jaffee*, at 11, 116 S.Ct. 1923.

Jaffee also notes that as the attorney-client privilege "'encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice,'" and the spousal privilege "'furthers the important public interest in marital harmony,'" the psychotherapist patient privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee*, *supra*, at 11, quoting *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, and *Trammel*, *supra,* at 53, 100 S.Ct. 906). The court concluded that "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee, supra,* at 11, 116 S.Ct. 1923.

The court's opinion was that possible evidentiary benefits which would result from rejection of a psychotherapist-patient privilege would be modest, and warned of a chilling effect on psychotherapy without the privilege. *Jaffee, supra*, at 11-12, 116 S.Ct. 1923. The court then noted, in the context of rejecting the lower court's balancing approach to the privilege, that a privilege subject to a later determination by a trial judge is no privilege at all. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* At 17-18, 116 S.Ct. 1923.

The *Jaffee* court contemplated that there might be circumstances under which a waiver of the psychotherapist-patient privilege would supervene, but did

not specify the circumstances which would constitute a waiver. *Jaffee, Id.* At 18 n. 19, 116 S.Ct. 1923.

After *Jaffee* recognized the psychotherapist-patient privilege, federal courts split into two camps with respect to whether a plaintiff's claim for "emotional distress" would constitute a waiver of that privilege. Of course, federal law is not precedential, but the reasoning process used by the federal courts can be useful. The following section will discuss some of the federal cases that have held that a mere claim for "emotional distress" damages does not waive the psychotherapist-patient privilege for discovery purposes.

3. THE TWO LINES OF CASES RELATING TO DISCOVERY OF PRIVILEGED PSYCHOTHERAPIST-PATIENT INFORMATION

As the federal courts applied this new privilege, they began to tackle the question of discovery relating to claims for "emotional distress." Respondent correctly noted, in his opposition to this writ, that a number of federal cases have ruled that a plaintiff seeking emotional distress damages have waived the psychotherapist privilege but does not point out the clear split in the federal courts, resulting in two lines of cases. The first series of cases generally hold that a plaintiff's claim for damages for "emotional distress" will constitute a waiver (within the scope of the litigation) of the plaintiff's psychotherapist-patient privilege and open the plaintiff's history of counseling for review. Federal law,

while interesting, and perhaps useful if a case is well-reasoned, is not binding, and it is the other line of cases that follows the sounder reasoning process.

The more scholarly cases addressing the waiver issue are *Vanderbilt v. Town of Chilmark,* 174 F.R.D. 225 (D.Mass. 1997), *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999), and *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (D.C.S.C. 1999). These cases hold that merely asking for damages for "emotional distress" is insufficient to waive the psychotherapist-patient privilege; indeed, to accomplish such a waiver, the plaintiff must either intend to offer the testimony of the therapist, or introduce the substance of the therapist-patient communication in evidence.

The *Fritsch* court offers a detailed compendium of cases on both sides of the split, ultimately adopting the *Vanderbilt* approach – that since different courts may come to different conclusions as to when and under what circumstances a patient actually places her mental or emotional state at issue, a patient would have no way of knowing, at the time of her psychotherapy, whether or not her communications with her therapist would be deemed privileged at a later date. This, the *Fritsch* court said, would "eviscerate the effectiveness of the privilege." *Fritsch, supra,* at 626, quoting *Vanderbilt,* 174 F.R.D. at 229 (quoting in part *Jaffee,* 116 S.Ct. at 1932 and *Sarko v. Penn-Del Directory Company,* 170 F.R.D. 127 (E.D.PA.1997)). As to the line of cases finding waiver, the court found that some of them reached the correct result because the plaintiff intended to put the therapist's testimony into evidence, or claimed to suffer from a mental illness, but

were written too broadly. The court concluded that the cases finding a waiver either relied on the overbroad language of those opinions in which there was actual waiver, or relied on pre-*Jaffee* opinions in which the prohibited balancing test was used. *Id.* at 629. The court noted:

> Under the 'mental state at issue' test, whether a litigant's psychotherapist-patient records would be deemed privileged or not would depend on individual judges' determinations of what it means to have put one's mental state 'at issue' – an area in which, as the case law illustrates, there is little agreement. (Cases cited). In addition, a person would have no way of knowing at the time he was undergoing psychotherapy whether, at some time in the future, he might be a litigant in a civil lawsuit with a claim for emotional distress damages, and thereby subject the substance of his psychotherapy sessions to discovery by his adversary.

Id at 630.

The *Fritsch* court agreed with *Vanderbilt's* analogy of the therapist-patient privilege being more akin to the attorney-client privilege, and observed that as the attorney-client privilege is waived when the client sues the attorney for malpractice, similarly, the therapist-patient privilege would be waived under the same circumstance. On the other hand, the act of seeking damages for "emotional distress" is "analogous to the act of seeking attorney's fees in that the fact that a privileged communication has taken place may be relevant, '[b]ut, the fact that a

communication has taken place does not necessarily put its content at issue.'" *Fritsch,* at 626, citing *Vanderbilt,* at 229.

The *Fritsch* court also dispatches the argument that a privilege cannot be used as a shield and a sword, agreeing with the premise but not the manner in which it had been applied in the cases finding a waiver, as long as the plaintiff does not use the substance of her therapist-patient communications, by, for example, calling her therapist as a witness, or testifying to the substance of the communications herself. *Fritsch,* at 626-27, citing *Vanderbilt* at 230.

The *Fritsch* court noted that the *Vanderbilt* court did, in fact, rule that the plaintiff was required to provide the dates of any psychotherapy, and to identify the therapist, from one year prior to the plaintiff's termination through the present date, on the grounds that such limited information was not covered by the privilege. *Fritsch,* at 627 and n. 7.

In *Johnson v. Trujillo*, 977 P.2d 152 (Colo.1999), the question of waiver of privilege was addressed by the Colorado Supreme Court. There, the plaintiff had been rear-ended by the defendant and sued for "mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life." *Johnson*, at 157. The defendant sought plaintiff's psychotherapy records, claiming that plaintiff had waived her psychotherapist-patient privilege by suing for mental anguish, emotional distress and loss of enjoyment of life. *Fritch* at 627, citing *Johnson*, *supra*. The *Johnson* court unequivocally rejected those decisions holding that a generic claim for emotional distress put a party's mental condition at issue and

thus constitutes a waiver of the privilege. While noting that the defendant's most compelling argument for the discovery was that the information sought might be relevant to a determination of the extent to which the plaintiff's mental suffering was attributable to the incident at bar, as opposed to some other cause, that theory was rejected as unpersuasive, because it is "in the nature of evidentiary privileges to 'sacrifice some availability of evidence relevant [sic] to an administration of justice,' and that such sacrifice was warranted by the social importance of the interests and relationships the privileges seek to protect." *Johnson, supra,* at 157.

For example, nothing could be more relevant in a civil action than an admission of liability to counsel, but because the interests of society in free and open communication between the client and the attorney, this privilege is zealously guarded by the courts.

The *Johnson* court found great significance in the fact that the plaintiff was only seeking "generic" damages for emotional distress:

> As it happens, Johnson has sought counseling for some unrelated emotional issues at various times in her life. Johnson has not made any independent tort claims for either intentional or negligent infliction of emotional distress, . . . She did not seek counseling for any emotional issues related to the accident. She does not seek compensation for the expenses incurred in obtaining either psychiatric counseling or marriage counseling. And finally, she does not plan to call any expert witnesses to testify about their

mental suffering. Under these circumstances, we hold that bare

> allegations of mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life are insufficient to inject a plaintiff's mental condition into a case as the basis for a claim where the mental suffering alleged is incident to the plaintiff's physical injuries *and does not exceed the suffering and loss an ordinary person would likely experience in similar circumstances.*

Johnson, supra, at 157, emphasis added.

The *Johnson* court reviews the law in other jurisdictions, and observes in a footnote that the Missouri case of *Cline v. Friedman,* 882 S.W.2d 754, 761 (Mo. App. 1994) (discussed *supra*) holds that a plaintiff initially waives her physician-patient privilege by placing her mental condition in issue in an attempt to recover for "mental anguish." *Johnson, supra,* at 156, n. 3. The *Johnson* court overlooked the facts of *Cline.* Taking the facts of *Cline* into account, that holding is readily consistent with the cases finding no waiver by a claim for general "emotional distress" damages.

In *Cline*, the plaintiff sued her doctor for medical negligence, and claimed "mental anguish" as an element of damage in her petition. However, the plaintiff also intended to offer the testimony of her psychiatrist, identified him in her answers to interrogatories, and produced him for a deposition by the defendants. When the defendants learned that the psychiatrist had previously treated the plaintiff for other mental issues, the plaintiff successfully invoked the physician-

patient privilege at the deposition, and again at trial. *See Cline, supra,* at 760-61. The intention to rely on the treating physician's testimony at trial, and also the fact that the case was a negligence case requiring medical diagnosis for 'mental anguish," makes the *Cline* holding the correct result under both theories and readily distinguishable from the case at bar.

III. <u>POINT RELIED ON NUMBER 2:</u> RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL RELATOR TO:

A. IDENTIFY HER MENTAL HEALTH TREATMENT PROVIDERS OVER HER LIFETIME, AND

B. PRODUCE ALL OF HER MENTAL HEALTH TREATMENT RECORDS OVER HER LIFETIME, AND

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IN THAT SUCH INFORMATION IS PROTECTED BY THE PHYSICIAN-PATIENT PRIVILEGE, AND THE DISCLOSURE OF SAID INFORMATION EXCEEDS THE SCOPE OF PERMISSABLE DISCOVERY.

1. RELATOR'S HEALTH CARE CONSULTATIONS AND MEDICAL RECORDS RELATING TO MENTAL HEALTH CARE COUNSELING AND TREATMENT

Assuming, for the purposes of argument, that the Relator has placed her medical condition into issue by claiming that she suffered "emotional distress" of a general and undiagnosed nature, the Respondent's order concerning discovery of her medical records is still an abuse of discretion.

The physician/patient privilege is codified under § 491.060(5), RSMo 1994. *Brandt v. Pelican*, 856 S.W.2d 658, 661 (Mo. Banc 1993). Under the statute, any information a physician may have acquired from a patient while attending the patient and which was necessary to enable the physician to provide treatment is considered privileged. *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995). This Court has consistently ordered that once plaintiffs put the matter of their physical condition in issue under the pleadings, they waive the physician-patient privilege insofar as information from doctors or medical and hospital records bears on that issue. *See*, *State ex rel. McNutt v. Keet*, 432 SW2d 597, 601 (Mo. Banc 1968), *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995), *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. Banc 1997).

The limitation that this Court has consistently imposed on the lower courts, however, is that the waiver of privilege is limited in scope and time to the physical conditions at issue under the pleadings. In the case at bar, the Respondent's

discovery order compelling the identification of every mental health care professional consulted by a 41-year-old woman over her lifetime is so broad that it constitutes an abuse of discretion, whereas this Court has repeatedly condemned "lifetime" medical discovery. *See, Jones v. Syler,* 936 S.W.2d 805, 808, citing *Stecher, supra,* at 465; see also *State ex rel. Brown v. Dickerson*, 136 S.W.3d 539, 544 (Mo. App. 2004).

Respondent's discovery order would enable defendants to obtain and peruse the underlying conversations that Relator has had with counselors during her entire lifetime, regardless of the subject of the consultation, and communicated in the belief that the conversations were protected by the physician-patient privilege.

Since the Respondent refused to limit this discovery to a reasonable temporal period, he has abused his discretion and this Court's writ should be made absolute.

2. RELATOR'S EXECUTION OF THE RECORDS AUTHORIZATIONS

Respondent's directive that the Relator execute the Authorization attached to the Request for Production of Documents is in direct contravention of this Court's pronouncement in *Stecher*. This Court has repeatedly made clear that medical discovery, and access to a party's medical records, is limited to the issues in the litigation; filing suit for damages does not constitute a blanket waiver of the

physician-patient privilege. Yet Respondent has directed the Relator to execute a medical release in blank authorizing Armstrong Teasdale LLP and its representatives "to inspect and copy all office, medical and hospital records, reports and other medical documents in your possession and relating to illnesses of or injuries, examination, treatment or confinement of the patient." [Exhibit E]. The scope of the authorization "includes but is not limited to records of all examinations, treatments and tests, including in-patient, out-patient and emergency room, whether for diagnostic or prognostic purposes, consultation reports, correspondence, **x-rays,** nurses notes, **bills**, doctors notes, photographs, videotapes, **MRIs, and CT Scans,** workers' compensation records," in addition to psychologists notes and mental health records. (Emphasis added.)

This Authorization clearly exceeds Respondent's discretionary authority in that it, like the authorization in *Stecher*, sets absolutely no limits at all, and is indefensibly broad. *See, Stecher, supra,* at 465. In reaching this conclusion, this Court cautioned that a voluntary limitation by the defendants is inadequate, because such a general release "creates too great a risk that non-relevant and privileged information may be released to the defendants." *Id. At* 465.

The limitless authorization was again denounced by this Court in *Jones v. Syler, supra,* at 807, holding that "unless special circumstances can be shown, the language of defendant's requested authorization should track plaintiff's allegation of injury in the petition. As with other discovery, the narrowness or breadth of the

medical authorization required is directly controlled by the narrowness or breadth of the allegations in plaintiff's petition."

Finally, the law in Missouri has long been that medical authorizations not addressed to any one particular doctor, or "world-wide" authorizations, are overly broad. *Jones,* 936 S.W.2d at 808, citing *State ex rel. Pierson v. Griffin,* 838 S.W.2d 490, 491 (Mo.App. 1992)(authorizations overly broad when addressed "TO:" followed by three blank lines), and *State ex rel. DeGraffenreid v. Keet,* 619 S.W.2d 873, 877 (Mo.App. 1981)(authorization addressed "To Whom It May Concern). Accordingly, the authorizations that Relator was directed to sign are overly broad in the scope of information released, the type of treatment which is covered, and the length of time that is encompassed.

CONCLUSION

The Respondent's discovery order is an abuse of discretion in that it violates the physician-patient privilege, because Relator has not waived her privilege. In addition, even if a waiver took place because of the Relator's assertion that she suffered "emotional distress, humiliation, inconvenience, and enjoyment of life," the discovery order was still an abuse of discretion because it was in no sense limited to the parameters of the case at bar. Accordingly, this Court's preliminary Writ of Prohibition should be made absolute.

Respectfully submitted,

_____

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RULE 84.06(C) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06 (c) and, the undersigned hereby certifies that: (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 6,509 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing (plus one copy on a floppy disk that Relator hereby certifies was scanned for viruses and is virus free) were mailed, postage prepaid, this 23rd day of June, 2005, to:

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RESPONDENT

APPENDIX

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