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.

REPLY BRIEF OF RELATOR LAURIE DEAN

Respectfully submitted,

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LAURIE DEAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original Statements are incorporated here.

POINTS RELIED ON

I. Respondent's argument confuses waiver of "privilege" with the standard for discovery, whether the information sought is reasonably calculated to lead to the discovery of admissible evidence.

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

Hoover Dairy v. Mid-America Dairymen, Inc., 700 S.W.2d 426, 431 (Mo.banc 1985)

Conway, et al. v. Missouri Commission on Human Rights, 7 S.W.3d 571, 575 (E.D.Mo. 1999)

II. Respondent rejected Relator's efforts to limit the scope of discovery.

ARGUMENT

I. Respondent's argument confuses waiver of "privilege" with the standard for discovery, whether the information sought is reasonably calculated to lead to the discovery of admissible evidence.

Respondent, in his Brief, continues to muddle the distinction between tort "emotional distress," where damage is an element of the case, and civil rights "emotional distress," where it is not. This Court vigorously protects medical privilege – for good reason – and a defendant cannot obtain a plaintiff's medical information unless there is a waiver of the privilege by the plaintiff. In claims of privilege, the relevance of the information is not a consideration, nor does it matter the discovered information might lead to the discovery of admissible evidence. Without a waiver of the privilege, there can be no inquiry.

In tort actions, both subsequent and prior to *Missouri Commission on Human Rights v. Red Dragon Restaurant,Inc.*, 991 S.W.2d 161 (W.D.Mo. 1999), Missouri courts have held that a waiver of psychotherapy privilege occurs when the plaintiff asks for damages for "mental anguish" or "emotional distress," as cited in the preceding briefs. However, these cases dealt with negligence claims, and the Relator has been unable to locate a reported case in which Missouri courts have found waiver of the psychotherapist privilege by seeking damages for "emotional distress" in an intentional tort, while examples in claims of negligence abound.

It is noteworthy that in an action for negligence, damage is an element of the tort itself; in an action under the Missouri Human Rights Act, it is not. See, *Hoover Dairy v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo.banc 1985). This, alone, would distinguish the Respondent's citations, as all of the Missouri law cited by him are cases pled in negligence.

In *Red Dragon, supra*, the court chose to label the damages recovered as "emotional distress" damages, while articulating that these damages are different from those previously discussed in reported cases. This conclusion was amplified in *Conway, et al. v. Missouri Commission on Human Rights*, 7 S.W.3d 571, 575 (E.D.Mo. 1999), in which the court cites *Red Dragon* as authority that "emotional distress" damages in a civil rights case are different from "emotional distress" damages in a tort action, and further explains in Footnote 1 that, "The emotional injuries cited by the Commission to support its award could readily have been characterized solely as 'humiliation' which, of course, requires no medical diagnosis."

Thus, the Respondent misses the critical point in the argument – that since the term "emotional distress" in a civil rights case is not the same as in tort, then medical testimony is neither required nor relevant, and by pleading for damages for "emotional distress" under the Missouri Human Rights Act, when not seeking damages for a diagnosable medical condition, a plaintiff is not waiving his or her psychotherapist/patient privilege.

The second level of analysis must be whether, if "emotional distress" means the same thing in civil rights as in tort for purposes of waiver, a review of a plaintiff's psychotherapy records can be "reasonably calculated to lead to the discovery of admissible evidence." If this question is reached, then this Court must consider at what point does a defendant's fishing net become impermissibly broad. The very nature of psychotherapy, unlike regular medical treatment, is that a broad anecdotal history of the patient is obtained. The material sought in obtaining records of psychotherapy is not, of course, what the doctor tells the patient, but rather what the patient relates to the doctor. For example, a doctor might ask a middle-aged patient for background information whether he or she had ever been sexually molested as a child, and receive an affirmative response even though that molestation was not a factor in the situation that brought the patient to the doctor in the first place, was medically ruled out as a factor, and had no medical relevance. Nonetheless, with the production of records, that information which would have no relevance whatsoever would be now in the custody of the defendants. Likewise, individuals might reveal to their therapist matters of sexual dysfunction, concern about weight or body image, childhood emotional trauma, or neurotic fears that they experienced at one time years ago. Psychotherapy is a unique category of medicine in that issues are likely to be revealed in the regular course of treatment that may have been resolved years or decades earlier and have no relevance at the present time.

In a case in which a plaintiff seeks medically diagnosable damages, or damages for medical treatment resulting from a defendant's conduct, of course, an appropriate medical history should be discoverable. Such is not the case here, and the discovery sought is solely a hopeful attempt to mine the Relator's medical history for revelations to health care providers that she imparted under an expectation of absolute confidentiality. The Respondent, in his brief, seems to argue that a plaintiff offering no medical testimony in support of his or her civil rights "emotional distress" damages, and who sought no medical treatment, has nonetheless rendered admissible the plaintiff's own medical records in rebuttal for comparison purposes, akin to a personal injury plaintiff opening the door to allow the defendant to argue that since the left arm healed from a prior injury in three months, the right arm should have healed in the same length of time. This would warp the concept of admissibility beyond comprehension.

II Respondent rejected Relator's efforts to limit the scope of discovery.

In his brief on Point II, the Respondent sets out a litany of alternate proposals, with the implication that the Order before this Court was entered without suggestions, proposals, or alternatives, and that the impermissibly overbroad discovery ordered by Respondent was invited by the Relator's lack of cooperation in the lower court.

Such was not the case, and for clarification purposes, in the hearing on the defendants' motion to compel discovery, after Relator's counsel argued that there had been no waiver of the psychotherapy privilege, she argued in the alternative

that interrogatories and releases should be limited in scope and time. Defendants' attorney advised the Respondent that if Relator had to obtain psychotherapy "because her pet gerbil died when she was 18 but didn't seek counseling because of her sex discrimination and sexual harassment by defendants, then this was a relevant factor for the jury to consider in awarding damages."

Although the motion hearing was not on the record, all of the suggestions now advanced by the Respondent were presented at the time of the hearing. Applicable cases were cited to the Respondent, and the matter was taken under submission before a ruling was made.

The Respondent's Order was an flagrant violation of this Court's prior mandates on discovery of medical records, and this Court's 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 1,391 words, as calculated by the Microsoft Word software used to prepare this brief.

By_____

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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 18th day of August, 2005, to:

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