IN THE SUPREME COURT OF MISSOURI

State ex rel. Laurie Dean,	)	
	)	
Plaintiff/Realtor	)	
	)	
vs.	)	**No. SC 86695**
	)	
The Honorable Jon A. Cunningham,	)	
	)	
Respondent,	)	

Appeal from the Circuit Court of the County of St. Charles

BRIEF OF RESPONDENT THE HONORABLE JON A. CUNNINGHAM

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JURISDICTIONAL STATEMENT

Plaintiff/Relator Laurie Dean filed this original proceeding in prohibition alleging that Respondent, The Honorable Jon A. Cunningham, abused his discretion in ordering the plaintiff to respond to discovery requests seeking medical records relating to her claim for emotional distress damages. Judge Cunningham entered his order on December 14, 2004. The plaintiff filed a Petition for a Writ of Prohibition in the Missouri Court of Appeals for the Eastern District, which was denied on February 4, 2005. The plaintiff then filed a Petition for a Writ of Prohibition in this Court. This Court entered its Preliminary Writ of Prohibition on April 26, 2005.

This Court has jurisdiction of this matter pursuant to Article V, Section 4 of the Missouri Constitution, and Sections 476.070 and 530.020 of the Missouri Revised Statutes.

STATEMENT OF FACTS

Relator/Plaintiff Laurie Dean filed an action against her employer, RARE Hospitality, and two individuals (collectively "RARE"), alleging claims for sexual harassment. The plaintiff seeks compensatory and punitive damages. AA at A7.[1] Her alleged compensatory damages consist primarily of what plaintiff has characterized as "garden variety" emotional distress damages in the amount of $100,000. RA 27-28, 62. In this writ proceeding, the plaintiff claims that Respondent, the Honorable Jon A. Cunningham, exceeded his jurisdiction and abused his discretion in ordering her to produce medical records relating to her mental health treatment. RA 2. She asks this Court to enter a writ prohibiting Judge Cunningham from enforcing his order.

The facts of this case are undisputed. The plaintiff filed her harassment lawsuit in the Circuit Court of St. Charles County. AA at A1. In her petition, plaintiff alleged that she suffered "emotional distress, humiliation, inconvenience, and loss of enjoyment of life." AA at A7.

During discovery, RARE propounded an interrogatory asking the plaintiff to "identify each item of damage" she sustained as a result of the alleged conduct, the dollar

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[1] Appellant's appendix will be cited as "AA" in this brief. Respondent's appendix will be cited as "RA." For the Court's convenience, respondent has included in his appendix the Petition for Writ of Prohibition, the Suggestions in Opposition to the Petition for a Writ, and the Answer to the Petition for a Writ, including the exhibits to each of those pleadings.

amount claimed for each item of damage, and the manner in which she calculated that dollar amount. RA 27. The compensatory damages identified in the plaintiff's response to the interrogatory consisted of one week's lost pay, and damages for "Emotional Distress, Embarrassment, and Humiliation." RA 27. She stated that she was "at this time, seeking only 'garden variety' emotional distress damages," and "calculated her damages from emotional distress, embarrassment, and humiliation at $100,000." RA 27. The plaintiff's calculation was based on her belief that the jury would award her this amount "for emotional distress, embarrassment and humiliation that is not based upon a diagnosable medical condition." RA 28.

RARE sought further information about the plaintiff's alleged emotional damages. In Interrogatory 1, RARE asked whether plaintiff claimed to have been treated by any health care provider as a result of the matters alleged in her petition. AA at A8; RA 11 . The plaintiff responded, "No." AA at A8; RA 11. In Interrogatory 12, RARE also asked whether plaintiff had ever been treated by any health care practitioner for mental distress, emotional suffering, or any other mental or emotional condition. AA at A9; RA 55. The plaintiff objected, asserting that the requested information was protected by the physician-patient privilege, and was burdensome, vague, not calculated to lead to the discovery of admissible evidence, and not limited in scope and time. AA at A9; RA 55. The plaintiff raised a similar objection to RARE's request that she produce medical records relating to her mental health treatment and/or execute medical authorizations permitting defendants to obtain that information. AA at A10-A11; RA 58-59.

RARE moved to compel responses to the discovery requests. RA 35. After hearing both parties' arguments on this issue, Judge Cunningham ordered the plaintiff to respond to Interrogatory 12 and to produce or execute authorizations for the production of her "mental health treatment records." AA at A13; RA 6. Judge Cunningham found that, by pleading for emotional distress damages, the plaintiff had placed her mental and emotional condition at issue, making her mental health treatment history discoverable. AA at A13; RA 6. RARE has agreed to submit a joint protective order to safeguard the records obtained in discovery. RA 3, 33.

The plaintiff petitioned the Missouri Court of Appeals, Eastern District, for a writ prohibiting Judge Cunningham from enforcing his discovery order. The Court denied the petition. RA 12. The plaintiff now seeks a writ of prohibition from this Court.

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO AN ORDER IN PROHIBITION DIRECTING RESPONDENT TO TAKE NO FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL, BECAUSE RESPONDENT DID NOT ABUSE HIS DISCRETION IN ORDERING THE PLAINTIFF TO RESPOND TO DEFENDANTS' DISCOVERY REQUESTS AND PRODUCE HER MENTAL HEALTH TREATMENT RECORDS, IN THAT THE PLAINTIFF WAIVED THE PHYSICIAN/PATIENT PRIVILEGE AS TO THOSE RECORDS BY PLACING HER EMOTIONAL CONDITION IN ISSUE.

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998)

Cline v. Friedman, 882 S.W.2d 754 (Mo. App. 1994)

EEOC v. Danka Indus., Inc., 990 F.Supp. 1138 (E.D. Mo. 1997)

Hancock v. Shook, 100 S.W.3d 786 (Mo. banc 2003)

II. RELATOR IS NOT ENTITLED TO AN ORDER IN PROHIBITION DIRECTING RESPONDENT TO TAKE NO FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL, BECAUSE PLAINTIFF HAS INVITED BROAD DISCOVERY REQUESTS BY HER BROAD PRAYER FOR "GARDEN VARIETY" EMOTIONAL DISTRESS DAMAGES, AND PLAINTIFF, WHO HAS THE BURDEN OF PROVING THAT GOOD CAUSE EXISTS FOR A WRIT, HAS FAILED TO PLACE ANY FACTS IN THE RECORD SHOWING WHY DEFENDANTS' DISCOVERY REQUEST IS OVERLY BROAD, AND WHY JUDGE CUNNINGHAM'S DISCOVERY ORDER EXCEEDED THE BOUNDS OF HIS BROAD DISCRETION.

State ex rel. Health Midwest Development Group, Inc.v. Daugherty, 965 S.W.2d 841, 844 (Mo. banc 1998)

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998)

ARGUMENT

I. RELATOR IS NOT ENTITLED TO AN ORDER IN PROHIBITION DIRECTING RESPONDENT TO TAKE NO FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL, BECAUSE RESPONDENT DID NOT ABUSE HIS DISCRETION IN ORDERING THE PLAINTIFF TO RESPOND TO DEFENDANTS' DISCOVERY REQUESTS AND PRODUCE HER MENTAL HEALTH TREATMENT RECORDS, IN THAT THE PLAINTIFF WAIVED THE PHYSICIAN/PATIENT PRIVILEGE AS TO THOSE RECORDS BY PLACING HER EMOTIONAL CONDITION IN ISSUE.

The plaintiff claims damages for "emotional distress." The respondent trial judge held that the defendants were entitled to conduct discovery relating to the plaintiff's emotional condition, including treatment she may have received. These efforts are certainly reasonably likely to lead to the discovery of admissible evidence. The plaintiff's decision not to use expert medical testimony (or her inability to do so) cannot preclude the defendants from obtaining factual evidence with which to defend the claim.

The respondent trial judge did not abuse his wide discretion in ordering the plaintiff to respond to relevant discovery. The petition for an extraordinary writ should be denied, and the alternative writ should be quashed.

A. Standard of Review

Trial courts have broad discretion over discovery. *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. banc 1998). This Court will not interfere with the trial court's discovery ruling unless there is a clear showi ng that the court abused its

discretion. *Id.*; *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003). "An abuse of discretion occurs when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock*, 100 S.W.3d at 795. If reasonable persons can differ as to the propriety of the court's action, the court has not abused its discretion. *Id.*

"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. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 504 (Mo. banc 2004). A writ of prohibition is extraordinary relief, and is issued sparingly. *Id.; State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). "Prohibition lies only if the facts and circumstances of a particular case demonstrate unequivocally that there exists an extreme necessity for preventative action." *Doe Run*, 128 S.W.3d at 504.

B. <u>The trial court did not abuse its discretion in ordering the plaintiff to produce medical records relating to her mental health treatment.</u>

The plaintiff's argument that her mental health treatment records are not discoverable is based on a single, incorrect premise: because she seeks emotional distress damages caused by an alleged *intentional* tort, deprivation of civil rights, she did not place her emotional condition in issue. The plaintiff notes that, unlike negligence cases, in cases involving intentional torts, plaintiffs need not prove that their emotional damages are medically diagnosable. Relator's Brief at 15. She argues that defendants may not

discover any mental health information that might impact her emotional distress claim because she does not have to prove that her alleged damages are medically diagnosable. Thus, according to the plaintiff, only litigants who seek emotional damages from unintentional torts place their mental health in issue and open the door to discovery on that issue. Litigants who seek the exact same damages from intentional torts – particularly civil rights claims – do not place their mental health in issue and do not open the door to such discovery.

This argument is absurd. It confuses the plaintiff's burden of proof with the defendant's right to discover information relevant to the plaintiff's claim. This writ proceeding has nothing to do with the evidence plaintiff must adduce at trial to prove her case. The issue before this Court is whether RARE has a right to discover information that reasonably relates to the plaintiff's claim for emotional distress damages. As a matter of law, RARE has that right.

A plaintiff's burden of proof does not define the scope of a defendant's discovery. In appeals challenging the discoverability of medical records, this Court has consistently held that the issues raised in the plaintiff's *pleadings* define the scope of discovery. *See Crowden*, 970 S.W.2d at 343 (the permissible scope of a subpoena duces tecum for a deposition is determined by reference to the petition); *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. banc 1997) ("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"). If a plaintiff puts her emotional condition in issue by seeking damages for mental or emotional injuries, she waives the physician-

patient privilege as to records that reasonably relate to those damages. *Crowden*, 970 S.W.2d at 342; *Cline v. William H. Friedman & Assoc., Inc.*, 882 S.W.2d 754, 761 (Mo. App. 1994) (in medical malpractice action against plastic surgeon, it was "beyond question that plaintiff initially waived her physician-patient privilege by placing her mental condition in issue in an attempt to recover for 'mental anguish'"); *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531, 532 (Mo. App. 2002). If the information sought appears reasonably calculated to lead to the discovery of admissible evidence, the plaintiff may not object to the discovery request on the ground that the information will be inadmissible at the trial. Rule 56.01(b)(1). Indeed, a defendant may "obtain discovery regarding *any matter*, not privileged, that is relevant to the subject matter involved in the pending action." Rule 56.01(b)(1) (emphasis added).

The plaintiff seeks $100,000 in emotional distress damages that she has characterized as being "garden variety." Plaintiff waived the physician-patient privilege as to records that relate to her emotional condition. The records plainly relate to the subject matter involved in this action, are not privileged, and are therefore discoverable.

The *Crowden* case refutes the plaintiff's claim of privilege. The plaintiff in *Crowden* filed suit for damages sustained in an automobile accident. *Crowden*, 970 S.W.2d at 341. Among the many injuries alleged, the plaintiff claimed that he "suffered great pain and mental anguish," and that he "partially lost his ability to enjoy life and such loss is permanent." *Id.* at 341. The defendant issued subpoenas duces tecum to the plaintiff's medical providers for discovery depositions, requiring those providers to produce "any and all records in your possession pertaining to" the plaintiff, including

"psychological and/or psychiatric records." *Id.* The defendant also sent a subpoena to the plaintiff's employer, requiring the production of "any and all records in your possession pertaining to" plaintiff, including "all hospital, physician, clinic, psychiatric, nurse, and dental records." *Id.* After the trial court denied the plaintiff's motion for a protective order and to quash the subpoenas, the plaintiff sought a writ from this Court. *Id.* at 342. The plaintiff argued that the trial court exceeded its jurisdiction in enforcing subpoenas duces tecum that violated the physician/patient privilege, violated his privacy, were unlimited in time and scope, requested information not placed in issue by the pleadings, and were otherwise overbroad and oppressive. *Id.* This Court rejected the plaintiff's argument.

The Court noted that plaintiff's second amended petition contained "very broad" allegations of mental, emotional and physical injuries. *Id.* at 342. The plaintiff had "thus waived his privilege" as to records that reasonably related to those damages. And although the subpoenas were broad, the Court found that the plaintiff's pleadings were "as broad as the subpoenas." *Id.* at 343. The plaintiff had "invited defendants' overbroad subpoenas by the language of his petition," and therefore the trial court had not abused its discretion in enforcing the subpoenas. *Id.*; *see also State ex rel. Jones v. Syler*, 936 S.W.2d 805, 808 (Mo. banc 1997).

Crowden applies here. Plaintiff alleged that she suffered "emotional distress, humiliation, inconvenience, and loss of enjoyment of life." AA at A7. She seeks $100,000 in "garden variety" emotional distress damages. RA 27-28. Plaintiff has not only waived the privilege as to records that relate to those alleged damages, but invited

broad medical authorizations by the language of her petition and her response to defendants' interrogatory; it is difficult to imagine a broader claim than that the damages are both substantial and of the "garden" variety. Judge Cunningham did not abuse his discretion in ordering plaintiff to execute the authorizations.

The cases cited by the plaintiff do not aid her argument. *Fust v. Francois*, 913 S.W.2d 38 (Mo. App. 1995), and *Libari v. Volume Shoe Corp.*, 664 S.W.2d 953 (Mo. App. 1983), merely recognize that in cases involving intentional torts, a plaintiff may recover emotional distress damages without medical testimony. Neither case holds that a defendant is barred from discovering medical records relevant to an emotional distress claim.

Cline v. Friedman, 882 S.W.2d 754 (Mo. App. 1994), is *not* "consistent with the Relator's position." Relator's Brief at 16, 28. *Cline* supports RARE's argument that the plaintiff waived the physician/patient privilege by placing her emotional condition in issue. *Cline* was a medical malpractice case in which the plaintiff sought damages for emotional distress against her plastic surgeon. The plaintiff claims, wrongly, that the Court in *Cline* held that the plaintiff waived the physician/patient privilege as to mental health records by offering the testimony of her psychiatrist. Relator's Brief at 16. To the contrary, the court in *Cline* held that it was "beyond question that the plaintiff initially waived her physician-patient privilege by placing her mental condition in issue in an attempt to recover for 'mental anguish.'" *Cline*, 882 S.W.2d at 761. The plaintiff's subsequent disclosure of her psychiatric records and her failure to object to the deposition of her psychiatrist was "consistent with" the waiver. *Id.* *Cline* is therefore consistent

with *Crowden* and every other Missouri case holding that a plaintiff waives the physician/patient privilege as to records that relate to a condition placed in issue by the pleadings.

The plaintiff's reliance on *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 171 (Mo. App. 1999), is also misplaced, for the same reasons that her reliance on *Fust, Libari* and *Cline* is misplaced. The court in *Red Dragon*, a civil rights case, held that the plaintiff could recover compensatory damages for humiliation and emotional distress "established by testimony or inferred from the circumstances." *Red Dragon*, 991 S.W.2d at 171. The court never stated that the defendant was barred from discovering information proving that the alleged emotional damages resulted from causes other than its conduct. The court instead recognized that the severity of the harm and the damages resulting from the harm were questions for the jury: "The severity of the harm suffered by the plaintiff due to the deprivation of . . . her civil rights should not be a criteria for determining if the plaintiff is entitled to recover, *but should be used to determine the amount of the damages.*" *Id.* at 171 (emphasis added). A jury plainly cannot properly ascertain the severity of the plaintiff's emotional harm or her damages unless it hears evidence on that issue from both the plaintiff and the defendant.

Plaintiff has not cited a single Missouri case holding that a defendant may be precluded from discovering information that bears on a claim for emotional distress damages. She provides this Court with a long discussion of *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996), the upshot of which is that in *Jaffe*, the Supreme Court of the

United States recognized the existence of a psychotherapist-patient privilege. Relator's Brief at 23; *Jaffee*, 518 U.S. at 15, 116 S. Ct. at 1931. The Supreme Court did not address the circumstances under which the privilege would be waived; it merely acknowledged that "like other testimonial privileges, a patient may of course waive the protection." *Id.* at 518 U.S. 15 n.14, 116 S.Ct. 1931 n.14. *Jaffee* therefore does not demonstrate that Judge Cunningham abused his discretion in this case. It simply establishes what no party questions: there exists a psychotherapist-patient privilege, and the privilege can be waived.

Plaintiff also relies on three cases from other jurisdictions, *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999), *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997), and a Colorado case, *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999), as support for her claim that Judge Cunningham abused his discretion in this case. These cases merely demonstrate that different courts have adopted different standards for determining when the privilege is waived. Some courts have adopted a narrow view, and have held that the psychotherapist-patient privilege is waived only where the patient either calls her therapist as a witness or introduces into evidence the substance of therapist-patient communications. *See Fritsch*, 187 F.R.D. at 621 (noting that "some courts find that one places one's mental or emotional condition in issue merely by claiming damages for emotional distress," while other courts find waiver "only where the privileged communications themselves are put in issue by the patient-litigant"). Other courts, including this Court, have held that the privilege is waived when the plaintiff puts her emotional condition in issue by pleading damages for emotional suffering. *See, e.g.*,

EEOC v. Danka Indus., Inc., 990 F.Supp. 1138, 1142 (E.D. Mo. 1997); *Crowden*, 970 S.W.2d at 343.

The *Vanderbilt* court, on which the plaintiff relies, adopted the narrow view. The court in *Vanderbilt* held that a plaintiff who pleads emotional injury has not explicitly waived the privilege; "all she has done is make her communication with her psychotherapist potentially relevant." *Vanderbilt*, 174 F.R.D. at 229. Although the court acknowledged that the evidence "may be extremely useful to the finder of fact," it refused to require disclosure of the information. *Id.* The court instead held that that the privilege was not waived "so long as Plaintiff does not call as a witness a person who has provided her with psychotherapy, and does not introduce into evidence the substance of any communication with a person." *Id*. at 230.

The courts in *Johnson* and *Fritsch* likewise adopted the narrow view. In *Johnson*, the Supreme Court of Colorado held that the plaintiff, who was injured in an auto accident, did not waive the physician/patient privilege by seeking damages for "mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life." *Johnson*, 977 P.2d at 153, 157. The court declared that the trial court would have "good reason" to rule that the plaintiff waived the privilege if she endorsed her psychiatrist as a witness. *Id.* at 157, n.5. The court acknowledged that the "undeniable consequence" of its decision was that, if the jury found the defendants liable, "when the jury calculates the amount of damages to award Johnson for items such as the pain and suffering she will experience as a result of having to undergo neck surgery, the jury will not be made aware

of the details of her treatment for depression or her marriage counseling." *Johnson*, 977 P.2d at 158.

Similarly, in *Fritsch*, a case brought under the Americans with Disabilities Act, the District Court for the Southern District of California held that the plaintiff did not place her mental or emotional condition in issue by making a claim for emotional distress damages. *Fritsch*, 187 F.R.D. at 632. The court noted that the plaintiff did "not intend to call her therapist as a witness or to make any other 'offensive use' of the privilege." *Id.* at 633. Under these circumstances, the privilege was not waived.

Unlike the courts in *Fritsch, Vanderbilt*, and *Johnson*, the majority of federal jurisdictions, like Missouri, hold that the plaintiff waives the privilege by placing her emotional health in issue. Indeed, one of the cases that the *Fritsch* court examined, *Sidor v. Reno*, 1998 WL 164823 (S.D.N.Y. 1998), noted that "the greater number of cases" accorded with the view that the plaintiff waives the psychotherapist-patient privilege by claiming mental and emotional damages. The reason for this rule is (as the *Vanderbilt* court acknowledged) that the information is relevant and extremely useful to the fact finder:

> Although plaintiffs do not intend to introduce expert testimony regarding damages due to emotional distress, defendant correctly points out that plaintiffs can establish their emotional distress claim through their own testimony. Defense counsel has a right to inquire into plaintiffs' pasts for the purpose of showing that their emotional

distress was caused at least in part by events and circumstances that were not job related.

Fritsch, 187 F.R.D. at 624; *Sidor*, 1998 WL 164823 at *2, *quoting Lanning v. Southeastern Pennsylvania Transp. Auth.*, 1997 WL 597905 at *2 (E.D. Pa. Sept. 17, 1997).

Courts examining the waiver issue consistently acknowledge the relevance of information relating to the plaintiff's emotional distress claim. In *EEOC v. Danka Industries, Inc.*, 990 F.Supp. 1138, 1142 (E.D. Mo. 1997), a sexual harassment case, the District Court for the Eastern District of Missouri explicitly rejected the narrow view of waiver adopted by the Vanderbilt court. *Id.* at 1142. The court instead held that the plaintiffs' mental condition was "directly related to the issue of damages" because the plaintiffs were "seeking damages for emotional distress resulting from sexual harassment." *Id.* at 1142. The defendant was "entitled to discover to what extent the plaintiffs' mental condition, prior to the alleged harassment, may have contributed to any emotional distress for which they now seek. Accordingly, the existence and content of prior psychotherapist-patient discussions directly relate to whether the plaintiffs' prior mental condition was a contributing factor." *Id.*

In *Sarko v. Penn-Del Directory Co.*, the Pennsylvania district court found that allowing a plaintiff "to hide behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice." 170 F.R.D. 127, 130 (E.D. Pa. 1997). In *Gatewood v. Stone Container Corp.*, a race discrimination case, the district court of Iowa overruled the plaintiff's

objection to a discovery request seeking psychiatric and professional counseling reports. The court reasoned that the discovery request was relevant to the subject matter of the action because the plaintiff had placed his emotional condition in issue by seeking $100,000 in emotional distress damages. 170 F.R.D. 455, 460 (S.D. Iowa 1996). The defendant therefore was "entitled to discover whether there have been other stressors relating to plaintiff's mental and physical health during the relevant time period which may have contributed to the claimed emotional distress." *Id.* The court found that the defendant's right to discover this information was "not diminished by the fact plaintiff has not sought medical or mental health care for the emotional distress resulting from the claimed discrimination." *Id. See also Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (noting that "numerous courts since *Jaffee* have concluded that, similar to attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue"); *Calder v. TCI Cablevision of Missouri, Inc.*, 2001 WL 991459 (E.D. Mo. 2001) (where plaintiff pleads emotional distress damages, "the medical records are discoverable to determine whether the plaintiff's past medical history contributed to her claimed emotional distress."); *Owens v. Sprint*, 221 F.R.D. 657 (D. Kan. 2004)(defendant entitled to mental health records even though plaintiff sought only "garden variety" mental distress damages); *Walker v. Northwest Airlines Corporation*, 2002 WL 32539635 (D. Minn. 2002)("[Defendant] should be allowed to discover whether Plaintiff has suffered from, or been treated for, symptoms similar to those alleged in the Complaint" as such evidence would be relevant to causation and "shed

light on other contributing causes of Plaintiff's emotional distress claims"); *Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131 (E.D. Pa. 2001)(plaintiff is not allowed to make a claim for emotional distress, and then prevent defendant from discovering evidence to show that plaintiff's claim was "either baseless, overblown, or insubstantial").

The above cases from the federal district courts and courts of appeals, like *Crowden* and *Cline*, recognize that principles of fairness and the rules of discovery dictate that a defendant be allowed to discover evidence relevant to its defense and the plaintiff's claim. Plaintiff's records might reveal one of the following scenarios, any of which would be relevant to the fact finder:

- The plaintiff never sought treatment for the emotional injury she alleges in this case, but was undergoing treatment for other stressors in her life. Information relating to the treatment she was receiving is necessary to allow a fact finder to assess the cause of her alleged distress.
- The plaintiff received treatment for emotional injuries in the past, recognized the benefits of treatment, but elected not to seek treatment for her alleged emotional distress in this case. The plaintiff's failure to seek treatment after realizing its potential benefits is relevant to assess the severity of her claims and to determine whether plaintiff made reasonable efforts to mitigate her damages.
- The plaintiff experienced significant emotional distress because of other events. Information relating to these other events is relevant to apportion damages to defendant.

- The plaintiff sought treatment for other emotional injuries, prior or subsequent to the events forming the basis of her petition that may have caused and/or contributed to any purported emotional injuries from which plaintiff now allegedly suffers.

The plaintiff's mental health treatment records are crucial to defendants' ability to defend against plaintiff's claim, and for a judge and jury to assess the validity of that claim.

The plaintiff has given this Court no basis for finding that Judge Cunningham abused his discretion in entering an order that, in accordance with Missouri law, permits such discovery. The plaintiff's mental health treatment records are plainly discoverable.

Finally, the Court should reject the plaintiff's attempt to draw a distinction between psychotherapist records and physician records. "There is no basis in law or logic for such a differentiation. Clearly, physicians' records can contain equally sensitive and/or embarrassing information." *Sidor*, 1998 WL 164823 at *2. Medical records are sensitive, whether they relate to a physical condition or an emotional condition. But a plaintiff waives the privilege when she places that condition in issue.

The plaintiff asks this Court to find that Judge Cunningham abused his discretion in entering a discovery order that accords with Missouri law. She argues that he abused his discretion in refusing to adopt a new, narrow standard for discovery that Missouri (and the majority of jurisdictions that have examined this issue) has never adopted. She seeks an opinion holding that a plaintiff may file a claim alleging emotional distress as her only injury, seek emotional distress damages as her primary or sole basis of recovery, and nevertheless preclude the defendant from discovering any information that might

assist it in defending against the plaintiff's claim. The Court should reject the plaintiff's request.

As discussed above, even the *Vanderbilt* court recognized that a plaintiff who seeks emotional distress damages makes "her communication with her psychotherapist potentially relevant," and that such evidence "may be extremely useful to the finder of fact." *Vanderbilt*, 174 F.R.D. at 229. The potential relevance of this information and its usefulness to the trier of fact are precisely the reasons that other courts have found the information discoverable.

The plaintiff's medical records are subject to discovery. RARE has no intention of making those records public; it has agreed to enter into a protective order to help guard their confidentiality. Judge Cunningham did not abuse his discretion in ordering plaintiff to produce the records.

II. RELATOR IS NOT ENTITLED TO AN ORDER IN PROHIBITION DIRECTING RESPONDENT TO TAKE NO FURTHER ACTION ON THIS MATTER OTHER THAN DENYING DEFENDANTS' MOTION TO COMPEL, BECAUSE PLAINTIFF HAS INVITED BROAD DISCOVERY REQUESTS BY HER BROAD PRAYER FOR "GARDEN VARIETY" EMOTIONAL DISTRESS DAMAGES, AND PLAINTIFF, WHO HAS THE BURDEN OF PROVING THAT GOOD CAUSE EXISTS FOR A WRIT, HAS FAILED TO PLACE ANY FACTS IN THE RECORD SHOWING WHY DEFENDANTS' DISCOVERY REQUEST IS OVERLY BROAD, AND WHY JUDGE CUNNINGHAM'S DISCOVERY ORDER EXCEEDED THE BOUNDS OF HIS BROAD DISCRETION.

The plaintiff argues that, even if she placed her mental condition in issue by seeking emotional distress damages, the trial court still abused its discretion in ordering her to produce, or execute medical authorizations for, the production of her medical records because the order and the authorizations are not limited in scope or time. She claims that the authorizations are "overly broad in the scope of information released, the type of treatment which is covered, and the length of time that is encompassed." Relator's Brief at 33. The plaintiff's argument fails to recognize that she invited the broad request for information by her broad request for $100,000 in "garden variety" emotional distress damages.

Initially, respondent notes that the order and the authorizations are not unlimited in scope. Defendants have made clear that they only seek plaintiff's mental health treatment records. The authorizations are not directed to all of plaintiff's physicians. Rather,

because defendants were unaware of who had treated plaintiff, the "to" line in the authorizations were left blank so that plaintiff could fill in the names and addresses of her treaters.

There are no facts in the record showing that Judge Cunningham abused his discretion in ordering the plaintiff to execute authorizations with no time limit. The plaintiff bears the burden of proving that good cause exists for a writ. *State ex rel. Health Midwest Development Group, Inc.v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998). She must specify why a discovery request or discovery order is overbroad, oppressive, burdensome, or intrusive. *Id.* Plaintiff has not met that burden. She merely makes a general objection that RARE's discovery request and Judge Cunningham's order are not limited in time. She has not provided the defendants or the Court with any information that might give the defendants, or Judge Cunningham, or this Court any guidance with which to determine what time limit to impose. At this point, defendants and Judge Cunningham are unaware of whether plaintiff has ever received any mental health treatment of any kind, because the plaintiff objected and has not yet responded to an interrogatory asking her to state whether she has ever consulted or been treated by a psychiatrist, psychologist, or other health care practitioner for any mental or emotional condition. RA 55. Under these circumstances, Judge Cunningham cannot be faulted for failing to impose a time limit on the records that RARE may discover. *See Daugherty*, 965 S.W.2d at 844 (relator's mere general objections to discovery failed to prove that plaintiff's request for peer review reports for the previous ten years was overbroad and oppressive). If, after plaintiff produces some of her records, or at the very least gives

Judge Cunningham and defendants some clue as to the type of treatment she has received in the past, Judge Cunningham will be in a better position to determine what limitations might be appropriate.

As discussed in Point I, a similar challenge to the breadth of subpoenas duces tecum was made in *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340 (Mo. banc 1998). The plaintiff in *Crowden* had alleged "very broad" mental, emotional and physical injuries, including mental anguish and permanent partial loss of enjoyment of life. *Id.* at 342. This Court acknowledged that subpoenas must generally designate documents "with sufficient description to reasonably exclude evidence that is not relevant to the pending case," but held that the plaintiff's pleadings were "as broad as the subpoenas." *Id.* The plaintiff had "invited defendants' overbroad subpoenas by the language of his petition," and therefore the trial court did not abuse his discretion in enforcing the subpoenas. *Id.* As for the plaintiff's claim that the subpoenas were overbroad because they were unlimited in time, the Court held that there existed procedures that would prevent impermissible disclosure. Counsel would be present at the depositions and could object to the discovery of irrelevant or privileged information; counsel could move to limit the deposition; or the court could conduct an in camera inspection to determine relevance and privilege. *Id.* at 342-43.

Similarly, in *Daugherty*, *supra*, the relator, a hospital, argued that the trial court abused its discretion in ordering it to produce peer review committee documents. 965 S.W.2d at 843. In addition to arguing that the documents were privileged, the hospital argued that the trial court's order was overbroad because it covered a ten-year period. *Id.*

at 844. This Court stated that "a discovery request that covers a ten-year period is not per se objectionable," and noted that the record did not reflect how often any peer review committee met in that ten-year period, or how burdensome the hospital's compliance would be. *Id.* at 844. However, the Court admonished that "the trial court should continue to monitor the discovery process, and may modify any order upon a showing of "good cause." *Id.*

Crowden and *Daugherty* are instructive here. Like the trial court in those cases, the trial court in this case may conduct an *in camera* inspection of the records to determine relevance, and may monitor the discovery process and modify its order upon a showing of good cause. In addition, defendants have already agreed to submit a joint protective order to the trial court, which will further safeguard the privacy of the documents. But at this point, plaintiff has not provided the Court with any facts on which to impose a time limit for the requested discovery.

Defendants are mindful that in *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462 (Mo. banc 1995), this Court held that medical authorizations that contained no time limits were overbroad. 912 S.W.2d 462, 465 (Mo. banc 1995); *see also State ex rel. Jones v. Syler*, 936 S.W.2d 805, 808 (Mo. banc 1997). However, the Court's subsequent opinions in *Crowden* and *Daugherty* indicate that the determination of the relevant time period is an issue best left to the trial court as the discovery process continues. Respondent therefore proposes that, as in *Daugherty*, the Court order Judge Cunningham to continue to monitor the discovery process, and to modify any discovery order upon a showing of good cause. Alternatively, respondent proposes that defendants modify their medical

authorizations by asking plaintiff to execute authorizations for the discovery of her mental health treatment records for the previous fifteen years.

CONCLUSION

The relator/plaintiff waived the physician/patient privilege applicable to her mental health treatment records by placing her emotional condition in issue. She invited broad requests for discovery into her emotional condition by the breadth of her pleadings seeking $100,000 in "garden variety" emotional distress damages. Respondent Judge Cunningham did not abuse his discretion in ordering plaintiff to produce records relating to her mental health treatment. The plaintiff's petition for a writ of prohibition therefore should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Brief of Respondent, and a disk containing this brief were mailed on July 29, 2005, to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,518, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Brief of Respondent and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.

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