IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL., BNSF RAILWAY COMPANY,	)	
Relator,	)	Supreme Court: SC 91706
v.	)	
HONORABLE MARK H. NEILL,	)	
Respondent.	)	

RELATOR'S BRIEF IN SUPPORT OF

PETITION FOR WRIT OF MANDAMUS

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Jurisdictional Statement

This is an original petition for writ of mandamus to the Missouri Supreme Court, requesting this Court to issue a writ to Respondent to vacate two orders, dated February 25, 2011 and March 16, 2011 preventing defendant from obtaining in discovery certain medical records and testimony in a personal injury case which discovery is likely to lead to the discovery of admissible evidence, and thus involves jurisdiction of the Missouri Supreme Court pursuant to Article V, section 4 of the Constitution of this state.

Statement of Facts

A. Identity of persons discussed herein

BNSF Railway Company - Defendant/Relator.

Hanaway, Dr. Joseph - Plaintiff's expert and prescribing neurologist.

Hogan, Dr. Patrick - Defendant's expert neurologist.

Katz, Dr. Harry – Plaintiff's treating and medication-prescribing doctor before the first incident.

Littleton, PhD., Arthur - Plaintiff's expert psychologist.

Margherita, Dr. Anthony - Plaintiff's expert, non-prescribing doctor.

Neill, The Honorable Mark H. - Respondent.

Patton, Michael T. - Plaintiff.

Patwardhan, Dr. Sanjay - Plaintiff's emergency room doctor at the time of the plaintiff's first incident.

Randolph, Dr. Bernard - Defendant's expert physiatrist.

Rao, Dr. Shankararao - Plaintiff's medication-prescribing psychiatrist at the time of plaintiff's second incident whose records plaintiff claims are wholly irrelevant.

Scheperle, Dr. Mark - Plaintiff's emergency room doctor whose prescriptions were photocopied and filled at various pharmacies.

Stromsdorfer, Dr. Steve - Plaintiff's expert and medication-prescribing psychiatrist at the time of plaintiff's first incident.

B. Facts

The underlying lawsuit was filed in the Circuit Court of the City of St. Louis, *Michael Patton v. BNSF Railway Company*, #22042-07474, under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. Plaintiff, Michael Patton, alleges that on two separate occasions—August 7, 2001 and October 8, 2002—he lost consciousness and sustained injuries, including recurring seizures, fainting spells and a seizure disorder. He claims that his injuries resulted from the negligence of the defendant. Among its other defenses, defendant contends that plaintiff's drug use/abuse or withdrawal from drugs caused, or contributed to cause, plaintiff's "losses of consciousness" that resulted in his claimed injuries.

In the August 7, 2001 incident, plaintiff alleges that while at work for BNSF he was injured when he experienced a "loss of consciousness" as a result of heat. He further alleges that the "loss of consciousness" resulted in injury to his head, neck and shoulder. In the October 8, 2002 incident, plaintiff alleges a second "loss of consciousness" while at work which he claims was caused by a seizure disorder that developed as a result of his

alleged heat-related loss of consciousness on August 7, 2001. *See, Plaintiff's First Amended Petition, A130-A136.*

Plaintiff has alleged in Count I, paragraph 8 of Plaintiff's First Amended Petition, that as a result of the incident of August 7, 2001, plaintiff "*lost consciousness and fell to the ground and was caused to suffer injury to his head, neck, a left shoulder separation, and has been caused to suffer recurring seizures and/or fainting spells since this incident…*". *See, Plaintiff's First Amended Petition, A132.*

Plaintiff has alleged in Count II, paragraph 9 of Plaintiff's First Amended Petition, that as a result of the incident of October 8, 2002 that plaintiff "*lost consciousness and was caused to re-injure and aggravate a pre-existing injury to his neck, suffer injury to his head, laceration to his left eye, and has been caused to suffer reoccurring seizures and/or fainting spells since this incident…*". *See, Plaintiff's First Amended Petition, A135.*

Based upon Plaintiff's First Amended Petition, and subsequent discovery, depositions, and evidence in the case, Plaintiff has asserted that these alleged incidents caused plaintiff to have a seizure disorder, among his other injuries, and resulting damages. Seizures, fainting spells, losses of consciousness, and seizure disorder are physical conditions. Defendant asserts that plaintiff has put the physical conditions of seizures, fainting spells, losses of consciousness, and seizure disorder, and the cause of those conditions, at issue in this case as a result of the allegations in Plaintiff's First Amended Petition, and subsequent discovery, depositions, and evidence in the case.

The evidence reveals that on August 7, 2001, plaintiff, Michael Patton, was employed by BNSF as a switchman who worked in BNSF's rail yard assembling railcars for movement and delivery. Unbeknownst to BNSF at that time, plaintiff was, according to his treating doctor and designated expert, Dr. Stephen Stromsdorfer, addicted to drugs, benzodiazepines, and was actively engaged in drug-seeking behavior. *Stromsdorfer, 35:3-15, A268; 9:9-14, A262.* At the time of the August 7, 2001 incident plaintiff had been treated by Dr. Stromsdorfer for almost a year, during which time Dr. Stromsdorfer was prescribing various controlled substances, including Valium, Klonopin, and Xanax. *Stromsdorfer, 30:4-13, A267; 35:15-17, A268; 43:23-44:3, A270.* Also unbeknownst to Dr. Stromsdorfer and to BNSF, another physician, Dr. Harry Katz, was prescribing Valium, Xanax, muscle relaxants, and other controlled substances, including pain medications, at the same time. *Stromsdorfer, 37:2-8, A269.*

On July 11, 2001, less than a month prior to the incident of August 7, 2001, Dr. Stromsdorfer wrote to Dr. Katz, advising him that both he and Dr. Katz could not be prescribing controlled substances to plaintiff. Dr. Stromsdorfer told Dr. Katz that plaintiff had elected that Dr. Stromsdorfer would be the one to prescribe such drugs. Dr. Stromsdorfer also advised that he would deal with plaintiff's drug addiction. *A61*. The controlled substances prescribed by Dr. Katz, were then abruptly discontinued. This discontinuance caused a significant decrease in the amount of benzodiazepines available to plaintiff.

Before the discontinuance of benzodiazepines by Dr. Katz, Dr. Stromsdorfer had prescribed Valium, a benzodiazepine that has anti-convulsive properties. *Stromsdorfer,*

35:15-36:11, A268. After Dr. Katz abruptly discontinued prescriptions for Valium in the time period leading up to the August 7, 2001 incident, Dr. Stromsdorfer changed plaintiff's medication from Valium to Xanax. *Stromsdorfer, 43:23-44:3, A270*. Unlike Valium, Xanax is ineffective as an anti-convulsant. *Stromsdorfer, 73:1-14, A278*. Dr. Stromsdorfer testified that plaintiff was completely off of anti-convulsive benzodiazepines as of August 1, 2001. Dr. Stromsdorfer testified that abrupt withdrawal or suddenly stopping the dosage of benzodiazepines can result in seizures. *Stromsdorfer, 62:18-21, A275; 74:13-16, A278*. Additionally, Dr. Stromsdorfer, who is plaintiff's, not defendant's, designated expert, testified that as a result of Dr. Katz abruptly discontinuing plaintiff's medications, plaintiff's available dosage of benzodiazepines was reduced, *Stromsdorfer, 75:16-76:1, A278*. Defendant maintains that all of these changes regarding the availability, or more accurately, the lack of availability of benzodiazepines, set the stage for plaintiff's loss of consciousness at work on August 7, 2001.

In October of 2001, Dr. Stromsdorfer began to trim down plaintiff's Xanax in an attempt to wean plaintiff off of benzodiazepines by cutting down on his dosage. *Stromsdorfer, 59:20-60:8, A274; Records of Dr. Stromsdorfer, A213* . After several requests for refills due to lost and stolen medications, Dr. Stromsdorfer told plaintiff that if there were any further reports of lost and stolen controlled substances that he would have to be admitted to the hospital for detoxification. *Stromsdorfer, 60:23-62:17, A274-A275; Records of Dr. Stromsdorfer, A219, A218, A215, A214, A211, A210*. Dr. Stromsdorfer told plaintiff that his medications would not be refilled and that he would be at risk for seizures and convulsions from abrupt withdrawal. *Stromsdorfer, 62:18-25,*

A275; Records of Dr. Stromsdorfer, A210. Plaintiff was supposed to see Dr. Stromsdorfer on December 5, 2001, but he did not keep his appointment and wanted more controlled substances. *Stromsdorfer 63:3-9, A275; Records of Dr. Stromsdorfer, A209, A208*. Dr. Stromsdorfer's records indicated that he needed to be brought to the hospital for detoxification and could not have more than a one day supply of Xanax until he presented for admission at the hospital. *Stromsdorfer, 63:10-16, A275; Records of Dr. Stromsdorfer, A209*. After attempts to get a week's supply of Xanax and then a month's supply of Xanax, which Dr. Stromsdorfer refused, Dr. Stromsdorfer saw plaintiff one last time on December 22, 2001 and prescribed Phenobarbital, not Xanax. *Stromsdorfer, 63:17-65:18. A275-A276; Records of Dr. Stromsdorfer, A210, A205, A206*. After Dr. Stromsdorfer cut plaintiff off of Xanax, he never returned to Dr. Stromsdorfer. *Stromsdorfer, 65:14-20. A276; Records of Dr. Stromsdorfer, A205*.

Following plaintiff's cessation of treatment with Dr. Stromsdorfer, plaintiff began receiving prescriptions from and treating with Dr. Rao. From the prescription records obtained by Relator, the earliest known prescription from Dr. Rao was dated April 30, 2002 for Alprazolam, the generic of Xanax. *A256*. This treatment by Dr. Rao occurred following the August 7, 2001 incident and prior to the October 8, 2002 incident. *A256*. Prescription drug records, which plaintiff authorized defendant to obtain in this case, reflect prescriptions from Dr. Rao being filled beginning in April 2002 and continuing into January 2003. *A256*. Thus, Dr. Rao was prescribing medication to plaintiff after the August 7, 2001 incident as well as before, during and after the October 8, 2002 incident. Also, during Dr. Rao's period of treatment, plaintiff was arrested and convicted of two

counts of burglary and stealing medication from a Schnucks pharmacy in search of drugs. Subsequent additional convictions include other attempts to fraudulently obtain controlled substances. In addition, other drug-seeking behavior includes photocopying prescriptions and obtaining unauthorized refills. *See, excerpt of deposition of Dr. Scheperle with exhibit, A97-A109; and incarceration index and entries of sentence and judgment, A302-A310.*

On February 4, 2011 plaintiff named Dr. Stephen Stromsdorfer, plaintiff's first known psychiatrist, as an expert witness. *A200.* Dr. Stromsdorfer was not designated as a rebuttal witness, simply as an expert witness. BNSF had sought to obtain the records of Dr. Rao, a psychiatrist who also had prescribed controlled substances to plaintiff before, during, and after the second incident. Although both Dr. Rao and Dr. Stromsdorfer prescribed controlled substances to plaintiff, plaintiff refused to provide the records of Dr. Rao to defendant and refused to provide an authorization for defendant to obtain those records. However, plaintiff provided the records of Dr Stromsdorfer and had earlier been aware that defendant had obtained a copy of Dr. Stromsdorfer's records.

On February 22, 2011, Defendant served a Notice of Deposition Duces Tecum for the deposition of the custodian of medical records for Psych Care Consultants to occur on March 8, 2011. *A146-A150.* Dr. Rao's records of treatment of plaintiff are maintained by the custodian of records of Psych Care Consultants which Dr. Rao is affiliated with and where Dr. Rao treated plaintiff. On February 22, 2011, the same day on which defendant served the aforesaid notice and subpoena *duces tecum*, plaintiff filed a Motion for Protective Order and to Quash Subpoena Duces Tecum. *A151-162*. On February 23,

2011, Judge Mark H. Neill heard the motion. On February 25, 2011, Judge Neill granted plaintiff's motion per Order stating the records were irrelevant. *A110-A112*. After the February 23, 2011 hearing, on February 25, 2011, defendant deposed Dr. Stromsdorfer. *A259-A285*. At the deposition defendant was provided a report of Dr. Stromsdorfer which was dated more than a month **before** the hearing of February 23, 2011. The report of Dr. Stromsdorfer is dated January 18, 2011. *A86*.

During the hearing on plaintiff's Motion for Protective Order and Motion to Quash on February 23, 2011, plaintiff's counsel represented that any psychiatric records of plaintiff were irrelevant to any issue in the case because plaintiff was not going to pursue any claim for psychiatric or psychological injuries. However, at the deposition of Dr. Stromsdorfer it was discovered that plaintiff's attorneys had contacted Dr. Stromsdorfer in the fall of 2010 to obtain his opinions in this matter, and sent a letter dated October 11, 2010 purporting to set forth those opinions. Plaintiff's attorneys also obtained a report from Dr. Stromsdorfer dated January 18, 2011. The January 18, 2011 report by Dr. Stromsdorfer set forth opinions regarding his treatment of plaintiff, plaintiff's drug usage, plaintiff's drug addiction, the cause or causes of the incident of August 7, 2011 and the relationship or lack thereof to plaintiff's drug usage and opining that plaintiff became addicted to pain medication as a result of the August 7, 2001 incident. *A86*. Of course, the basis of Dr. Stromsdorfer's opinions includes his treatment records. Dr. Stromsdorfer confirmed the opinions in his January 18, 2011 report at the time of his deposition on February 25, 2011.

Following the deposition of Dr. Stromsdorfer, defendant filed a Motion to Reconsider the Court's Order Granting Plaintiff's Motion for Protective Order and to Quash Subpoena Duces Tecum and Motion for Sanctions on March 4, 2011. *A51-A60*. The Motion to Reconsider set forth facts regarding plaintiff's own use of the psychiatric records of Dr. Stromsdorfer in support of his case as contrasted with plaintiff's prior position that plaintiff's psychiatric records were irrelevant. The Motion to Reconsider asserted that the Order of February 25, 2011 will enable plaintiff to use selected psychiatric records in his own case while denying defendant access to other psychiatric records for use in the defense of its case. Defendant moved the circuit court to reconsider the Order of February 25, 2011 and permit defendant to obtain the records of Dr. Rao as those records are likely to contain admissible evidence. The Motion to Reconsider noted and discussed that the medical records of Dr. Rao were relevant to numerous issues in the case, including causation of plaintiff's incidents of loss of consciousness, the nature and extent of his injuries, and damages. The circuit court denied defendant's Motion to Reconsider per Order dated March 16, 2011. *A47-A50*.

In the Order dated March 16, 2011, the circuit court ruled that: "*Plaintiff's psychiatric records held by Dr. Rao are not relevant to those injuries and are not discoverable*." *A50*. The circuit court noted in detail plaintiff's use of his own psychiatric records, yet found no inconsistency with plaintiff's use of psychiatric records, justifying plaintiff's own use as "*rebuttal if necessary*". *A50*. The circuit court also noted that in granting the motion to quash: "*The Court ruled that Plaintiff's mental and psychological condition is not relevant to the damages sought by Plaintiff. That is the position*

consistently taken by this Court throughout discovery." *A48*. Relator asserts that the circuit court limited its consideration of the relevancy of Dr. Rao's records to damages and failed to consider the relevancy of Dr. Rao's records to numerous other issues in the case.

On March 28, 2011 defendant filed a Petition for Writ of Mandamus in the Missouri Court of Appeals, Eastern District: *State ex rel. BNSF Railway Company, Relator, v. Honorable Mark H. Neill, Respondent, ED96504*. On March 31, 2011 the Missouri Court of Appeals, Eastern District, issued a Preliminary Order that directed Respondent to file his answer and suggestions in opposition on or before April 11, 2011 and ordered Respondent to refrain from all actions in the premises until further notice. *A311*. On Friday, April 8, 2011, plaintiff's counsel filed the Answer and Suggestions in Opposition on behalf of Respondent, the Honorable Mark H. Neill, Circuit Judge. On Monday, April 11, 2011, Relator filed its Motion for Leave to file Relator's Supplemental Suggestions in Support of Petition for Writ of Mandamus, along with Relator's Supplemental Suggestions in Support of Petition for Writ of Mandamus, Index of Supplemental Exhibits to Petition for Writ of Mandamus, and Supplemental Exhibits to Writ of Mandamus. On April 12, 2011, the Missouri Court of Appeals filed an Order quashing the Preliminary Order in Prohibition issued on March 31, 2011. *A312*. There was no indication in the docket entries or any order as to whether the Missouri Court of Appeals ruled on Relator's Motion for Leave to file Relator's Supplemental Suggestions in Support of Petition for Writ of Mandamus or reviewed or considered the Motion for Leave or the other materials filed therewith.

On April 21, 2011 Relator filed its Petition for Writ of Mandamus with Suggestions in Support in this Court. *A1-A312*. Respondent filed his Suggestions in Opposition on May 2, 2011. *A313-A360*. On May 6, 2011, Relator filed its Motion for Leave to File Supplemental Suggestions in Support of Petition for Writ of Mandamus. *A363-A369*. The motion was sustained on May 6, 2011. *A477*. Relator's Supplemental Suggestions in Support, with exhibits, were filed that same day. *A370-A436*. Respondent filed his Motion for Leave to File Supplemental Suggestions in Opposition on May 13, 2011. *A437-438*. The Motion was sustained and Respondent's Supplemental Suggestions in Opposition to Petition for Writ of Mandamus were filed that same day. *A439-A445*.

On May 31, 2011, the Supreme Court of Missouri sustained the Petition for Writ of Mandamus and issued its Alternative Writ of Mandamus commanding Respondent to vacate his order of February 25, 2011 and in lieu thereof to overrule said motions, or show cause, by written return, before the Supreme Court of Missouri, on or before June 30, 2011 why he should not do so. *A478*. On June 30, 2011, Respondent filed Respondent's Answer/Return to Petition for Writ of Mandamus in Response to This Court's Order to Show Cause Dated May 31, 2011. *A451-A476*.

Respondent has precluded Relator from obtaining treatment records of Dr. Rao based upon plaintiff's assertion that he is only seeking damages for physical injuries, finding that the records are shielded from discovery on grounds of relevance. The actions being challenged are Respondent's orders of February 25, 2011 and March 16, 2011 quashing Relator's Notice of Deposition and Subpoena *Duces Tecum* of the Custodian of Records of Dr. Shankararao Rao. Relator seeks a writ from this Court ordering

Respondent to vacate the orders quashing the Notice of Deposition and Subpoena *Duces Tecum* of the Custodian of Records of Dr. Shankararao Rao to permit Relator to obtain Dr. Rao's records.

C. Summary of Issues and Positions

Relator has asserted and demonstrated that Dr. Rao's treatment and prescription of medications for plaintiff parallel that of Dr. Stromsdorfer. Dr. Stromsdorfer treated plaintiff before, during and after the first incident of August 7, 2001. Dr. Rao treated plaintiff before, during and after the second incident of October 8, 2002. Both doctors, Stromsdorfer and Rao, prescribed controlled substances. The use of and/or stoppage of the use of controlled substances is relevant to defendant's defense in this case.

Relator has asserted at every step in this matter that records relating to treatment of plaintiff are likely to include, among other things, medical history, history of current complaints, history of medications, prescriptions, ongoing physical complaints and new complaints during the pertinent time period of the allegations of the Plaintiff's First Amended Petition, which things are all relevant to the issues in this case. Relator asserts that nothing highlights the relevance of the treatment records of a medication-prescribing physician more than plaintiff's affirmative use of Dr. Stromsdorfer as an expert and use of his records to support his theory of the case. Plaintiff authorized the production of records from various pharmacies that contained prescriptions written by Dr. Rao but not the production of his treatment records. The circuit court was aware of this contradiction as evidenced by noting that plaintiff had authorized the production of prescription records from numerous pharmacies that included prescriptions of Dr. Rao. *A50*. However, the

circuit court would not permit defendant to obtain the treatment records relating to those same prescriptions.

Relator has asserted that it was an abuse of discretion for the circuit court to preclude defendant from obtaining Dr. Rao's medical treatment records. Relator also maintains that Dr. Rao's medical treatment records are likely to lead to the discovery of admissible evidence relevant to numerous issues in the case. Plaintiff's attorneys argued that plaintiff was not seeking any damages for psychological or psychiatric injuries as a basis for denying defendant access to Dr. Rao's treatment records. Relator asserts that plaintiff's attorneys are intentionally disregarding the relevancy of Dr. Rao's treatment records to other issues in the case and to Dr. Stromsdorfer's opinions. The orders of the circuit court have prevented defendant from obtaining the medical treatment records of Dr. Rao. One of the issues in the case is whether plaintiff and the circuit court may preclude the discovery of Dr. Rao's records based upon plaintiff's proclamation that he is not seeking damages for any psychological or psychiatric injuries.

Despite plaintiff's self-proclaimed limitation of general damages sought, Relator maintains that Dr. Rao's medical treatment records are relevant to numerous issues in the case, including causation of plaintiff's injuries, pre-existing conditions, the nature and extent of injuries, medical treatment, extent of controlled substances prescribed, plaintiff's history of substance abuse, whether plaintiff was experiencing withdrawal symptoms at or near the time of the second incident, mitigation of damages, ability to work, employability, and damages as well as the credibility and character of plaintiff

himself. Accordingly, Relator asserts that the circuit court has abused its discretion by refusing to allow defendant to obtain such records in discovery.

As set forth herein, Relator seeks this writ to remedy the abuse of discretion by the circuit court precluding defendant's attempt to discover documents and information that could lead to admissible evidence.

Points Relied On

I. Relator is entitled to an order permitting it to discover the medical treatment records of plaintiff's treating physician, Dr. Shankararao Rao, under Missouri law because such records are discoverable as they are likely to lead to the discovery of admissible evidence relevant to the facts and issues in this case, including the cause of plaintiff's seizures and seizure condition, plaintiff's damages, plaintiff's credibility and whether plaintiff is experiencing pain or merely seeking drugs, among other issues, and Respondent abused his discretion by precluding Relator from discovering the medical records of Dr. Rao.

Diehl v. Fred Weber, Inc., 309 S.W.3d 309 (Mo.App. 2010)

State ex rel. Dewey & Leboeuf, LLP v. Crane, 332 S.W.3d 224 (Mo.App. 2010)

State ex rel. Plank v. Koehr, 831 S.W.2d 926 (Mo. banc 1992)

II. Relator is entitled to an order permitting it to discover the medical treatment records of Dr. Rao because a personal injury plaintiff may not preclude such discovery by merely asserting that no claim is being made for psychiatric or psychological injuries or damages and/or by arguing that Dr. Rao's records are privileged in order to preclude discovery of medical treatment records which are related to plaintiff's claims of physical injuries and which are likely to lead to admissible evidence relevant to the cause of plaintiff's physical injuries, disability and damages, as well as other issues.

Griggs v. Griggs, 707 S.W.2d 488, 490 (Mo.App. 1986)

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

State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo. banc 1968)

State ex rel. Dean v. Cunningham, 182 S.W.3d 561 (Mo. 2006)

Statutes

§337.055 R.S.Mo. "Privileged communications, when"

§491.060 R.S.Mo. "Persons incompetent to testify – exceptions, children in certain cases"

Rules

Rule 57 of the Missouri Rules of Civil Procedure

III. The standard of review in this petition for writ for mandamus is whether Respondent abused his discretion in denying Relator discovery of the medical treatment records of Dr. Rao and any attempts to argue the merits of the underlying case and serve up red herring to preclude discovery of such records should be disregarded by this Court.

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010)

Kearbey v. Wichita Se. Kan., 240 S.W.3d 175 (Mo.App. 2007)

Regulation

45 CFR §164.534 "Compliance dates for initial implementation of privacy standards [66 FR 12434, Feb. 26, 2001]

Journal Article

"[Im]properly Noticed: The Misuse of the Subpoena Duces Tecum", Journal of the Missouri Bar, Vol. 67, No. 3, p. 166-168 (May-June 2011).

Argument

I. Relator is entitled to an order permitting it to discover the medical treatment records of plaintiff's treating physician, Dr. Shankararao Rao, under Missouri law because such records are discoverable as they are likely to lead to the discovery of admissible evidence relevant to the facts and issues in this case, including the cause of plaintiff's seizures and seizure condition, plaintiff's damages, plaintiff's credibility and whether plaintiff is experiencing pain or merely seeking drugs, among other issues, and Respondent abused his discretion by precluding Relator from discovering the medical records of Dr. Rao.

A. Standard of Review

The standard of review is whether the Respondent abused his discretion in denying Relator the discovery of the medical treatment records of Dr. Rao. "Mandamus is appropriate when a court abuses its discretion in denying discovery because a trial court has no discretion to deny discovery of matters which are relevant to the lawsuit and are reasonably calculated to lead to the discovery of admissible evidence when the matters are neither work product nor privileged. *State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 102 (Mo.App. E.D.1994)." *State ex rel. Dewey & Leboeuf, LLP v. Crane*, 332 S.W.3d 224, 231 (Mo.App. 2010), transfer denied (Mar. 29, 2011), reh'g and/or transfer denied (Feb. 1, 2011). As demonstrated herein, Respondent has abused his discretion in

the instant case by denying discovery of medical records which are not privileged and which may lead to the discovery of admissible evidence.

B. Argument

The central issue before this Court is whether the treatment records of plaintiff's psychiatrist, Dr. Rao, are discoverable. The medical treatment records of Dr. Rao are relevant to plaintiff's allegations that he lost consciousness as a result of the railroad's negligence on two separate occasions and sustained injuries as a result that included "reoccurring seizures and/or fainting spells". The relative weight and merit of what may be contained in the records of Dr. Rao are secondary issues to be determined by judge and jury at trial. The matter before this Court is whether Respondent abused his discretion in preventing Relator from obtaining the medical treatment records of Dr. Rao, a psychiatrist who treated plaintiff before, during and after the second incident of October 8, 2002.

Plaintiff produced the records of a parallel psychiatrist, Dr. Stromsdorfer, who treated plaintiff before, during and after the first incident of August 7, 2001. Plaintiff also named Dr. Stromsdorfer as an expert and obtained a report from Dr. Stromsdorfer in support of his own theories of the case and critical of defendant's theories of the case. Dr. Stromsdorfer's records are relevant to plaintiff's medical history; plaintiff's drug seeking behavior; the prescription of controlled substances, including benzodiazepines; the use and abuse of benzodiazepines and the relationship of these medications to seizures. These issues are already in the case. Likewise, the medical records of Dr. Rao who treated plaintiff before, during and after the second incident of October 8, 2002 are relevant to

those same issues. Despite plaintiff's use of Dr. Stromsdorfer and his medical treatment records in support of plaintiff's case, Respondent allowed plaintiff to prevent the discovery of the medical treatment records of Dr. Rao, by ruling that the records were irrelevant, hence not discoverable.

Respondent abused his discretion by preventing defendant from obtaining the very same type of records from plaintiff's psychiatrist Dr. Rao that plaintiff has already utilized from plaintiff's psychiatrist Dr. Stromsdorfer. As noted by the *Diehl* Court: "Generally, parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or the defense of the party seeking discovery or to the claim or the defense of any other party, as long as the intended discovery appears to be reasonably calculated to lead to the discovery of admissible evidence. Rule 56.01(b)(1)." *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 322 (Mo.App. 2010).

Clearly, the medical treatment records of physicians who are prescribing medications, as well as the records of the pharmacies filling those prescriptions contain pertinent information relevant to various factual issues for the jury. Such medical and pharmacy records are discoverable. Defendant should be permitted to obtain in discovery those medical and pharmacy records relating to issues in the case, including defendant's own theories of defense of the case. The matter of the notice of the deposition of the records custodian of Dr. Rao does not require an evaluation of the weight or credibility of evidence prior to production. Whether such records are discoverable is the threshold issue and Respondent has abused his discretion by denying discovery of the records of Dr. Rao.

Plaintiff is claiming that he lost consciousness and injured himself when he fell on August 7, 2001 while at work at the railroad. Plaintiff has asserted that the heat made him lose consciousness. On a subsequent occasion on October 8, 2002, plaintiff lost consciousness while cleaning out his personal van at the rail yard. On this occasion plaintiff claimed he had a seizure. Plaintiff eventually asserted that the incidents of August 7, 2001 and October 8, 2002 caused him to have "reoccurring seizures and/or fainting spells". However, in plaintiff's case these events were not set in motion by the heat of a summer day.

Long before August 7, 2001 and continuing long after October 8, 2002, plaintiff has been using and abusing various controlled substances. He had sought out various physicians, including Dr. Katz, Dr. Stromsdorfer and Dr. Rao, and obtained prescriptions for various benzodiazepines, including Xanax, Valium, and Klonopin. These benzodiazepines are controlled substances. Not content with the supply from his treating physicians, plaintiff also visited many emergency rooms following the first incident and told stories of various injuries and conditions in order to obtain even more controlled substances. Plaintiff further increased his supply by forging prescriptions and photocopying the prescriptions he had obtained from various treating and emergency room physicians. *A97-A109*. As if all of this were not enough, he also resorted to breaking into a pharmacy, twice, in an effort to get even more controlled substances. Plaintiff was eventually convicted and jailed for twice breaking into the pharmacy. *A302-A310*. One issue with these particular controlled substances is that they are related to seizures in three ways: 1) the mere use of benzodiazepines can cause seizures; 2) the

excessive use of benzodiazepines can cause seizures; and 3) withdrawal from or decreasing the amount of benzodiazepines can cause seizures as well as other physical symptoms.

As a result of plaintiff's loss of consciousness on two occasions, alleged to be the result of the negligence of the railroad in permitting him to work on a summer day, plaintiff claims physical injuries. These physical injuries include "reoccurring seizures and/or fainting spells". Plaintiff would not only have a jury believe that his chronic use and abuse of and addiction to controlled substances had nothing whatsoever to do with the loss of consciousness on two occasions while he happened to be at work at the railroad and with his "reoccurring seizures and/or fainting spells", but would also keep from the jury as much evidence as possible of his drug use, abuse and addiction.

In this adversarial system, defendant is not bound by plaintiff's self-determined theory of causation. Defendant is allowed to dispute plaintiff's theory and offer alternative theories in defense of the case. Accordingly, defendant has sought to obtain the relevant medical treatment records and pharmacy records to refute plaintiff's theory of the case, especially during the relevant time periods surrounding the occurrences of August 7, 2001 and October 8, 2002. As part of its efforts to discover all relevant medical records, defendant sought the records of the psychiatrists who treated plaintiff and prescribed controlled substances before, during and after the two occurrences, Dr. Stromsdorfer and Dr. Rao.

Respondent's rulings denied defendant access to records which may be properly obtained through the discovery process:

> Courts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is "relevant" to the proceedings and subject matter of the case not protected by privilege. *State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan*, 777 S.W.2d 247, 251 (Mo.App.1989). It is not grounds for objection that the information may be inadmissible at trial, but it is sufficient if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Rule 56.01(b)(1).* A trial court is vested with broad discretion in administering the rules of discovery, and an appellate court should not disturb the rulings absent an abuse of discretion. *Klein v. General Electric Co.,* 714 S.W.2d 896, 906 (Mo.App.1986). Nonetheless, when a trial court makes an order in discovery proceedings that is an abuse of discretion, prohibition is the proper remedy. *Kawasaki,* 777 S.W.2d at 251.
>
> *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927-28 (Mo. banc 1992)

It is plaintiff's position that the issues in the underlying case involve, among other things, the cause or causes of both incidents of plaintiff's alleged "loss of consciousness"; whether the incidents were drug-related and/or related to a prior brain injury combined with his drug use. These issues require discovery of information regarding the controlled substances plaintiff was taking prior to and at the time of each incident; whether plaintiff fainted or blacked out; whether plaintiff was undergoing substance withdrawal that

resulted in a seizure; and/or whether plaintiff in fact had a seizure on both occasions—with the latter being a distinct possibility on account of plaintiff's prior lawsuit in which he claimed he sustained seizures as a result of exposure to lead and settled after sustaining the injuries alleged in the instant lawsuit. *See, Petition and Answers to Interrogatories from lead exposure case, A64-85*.

In the lead exposure case filed in 2000, Attachment to Plaintiff's Answer to Interrogatory No. 9 listed all of the symptoms from the lead exposure claim: "*Mild fatigue or exhaustion; Irritability; Difficulty concentrating; Sleep disturbances; Headaches; General fatigue; Muscular exhaustion; Tremors; Respiratory ailments; Asthma; Hearing problems; Nausea; Weight loss; Abdominal pain; Constipation; Diarrhea; Colic (severe stomach cramps);* ***Delirium****;* ***Seizures****; Muscle/Joint Aches; Motor weakness; Neuropathy; Deafness; Memory Loss.*" [Emphasis added.] *See, Attachment to Plaintiff's Answer to Interrogatory No. 9 from lead exposure case, A84.*

In fact, one of plaintiff's physicians, Dr. Patti Nemeth, who saw plaintiff following the incident of August 7, 2001, testified that plaintiff had a seizure on August 7, 2001:

> Q. At this time with the information that you have now and began with on August the 20th of 2001 all the medical information, history, and testing, do you now have an opinion as to what occurred on August 7, of 2001 regarding Mr. Patton?
>
> A. Well, it's likely he had a seizure on that date. I – it's – I can't say absolutely but considering he did have subsequent seizures it's likely that he had a seizure that day.

Q. Okay. And are you able to say within a reasonable degree of medical certainty or it's more likely than not that he had a seizure on August 7 of 2001?

A. It's very possible that he did, yes.

Deposition of Dr. Patti Nemeth, 50:7-22, A258.

Defendant's theory of the case is that the loss of consciousness on August 7, 2001 and October 8, 2002 were due to seizures unrelated to plaintiff's work at the railroad. Plaintiff's medical records indicated a prior penetrating skull fracture. Plaintiff's medical history also contained references to a prior history of seizures and a claim of seizures resulting from exposure to lead. It is also the position of defendant's experts that plaintiff's abuse of and addiction to benzodiazepines also made plaintiff susceptible to seizures. Plaintiff's drug-seeking behavior gave him greater access to benzodiazepines. A reduction in the amount of benzodiazepines around the time of the August 7, 2001 incident left him susceptible to seizures and withdrawal symptoms. *A286-A287*.

There is also the distinct possibility that the medical records of Dr. Rao may contradict plaintiff's own theory of his case. Not all of plaintiff's doctors have initially supported plaintiff's evolving theory of the case. Plaintiff's own physicians have previously testified that a seizure was the cause of plaintiff's loss of consciousness on August 7, 2001. His treating physician, Dr. Patti Nemeth, testified that plaintiff had a seizure on August 7, 2001 and further that epilepsy or seizure disorder is more common with people who have had penetrating injuries to the brain as plaintiff has had. *See, May 31, 2007 deposition of Dr. Patti Nemeth, 50:7-17; 51:2-16, A409-A410.*

Further, plaintiff's expert witness, Dr. Joseph Hanaway, testified that plaintiff had a seizure on both August 7, 2001 and on October 8, 2002. Specifically, he testified that plaintiff had a seizure the second time, so in retrospect it was probably a seizure the first time. *See, June 17, 2009 deposition of Dr. Joseph Hanaway, 120:22-121:10; 124:18-19, A415-A417.* Again, this was plaintiff's own expert! Understandably, Dr. Hanaway subsequently changed his mind.

Even Dr. Patwardhan, the doctor who saw plaintiff at the emergency room following the August 7, 2001 incident said that it was possible that plaintiff had a seizure. *See, March 1 2011 Deposition of Dr. Sanjay Patwardhan, 45:11-46:13, A422-A423*. Additionally, whether plaintiff's "loss of consciousness" on August 7, 2001 was a heat-related loss of consciousness or was caused by the flu or plaintiff's drug abuse are disputed facts as discussed in Relator's Suggestions in Support of Petition for Writ of Mandamus. *A21-A25*. Plaintiff's theories and the facts supporting them have continued to evolve throughout the course of this case. This evolution has required the continuing development of theories of defense and the opinions of the defense experts to respond to new information and materials as they became available.

As noted in the April 1, 2011 report by defendant's expert, Dr. Patrick Hogan:

> "As you know, I have reviewed records that you recently sent to the office regarding Mr. Patton. As you know, it was and is my professional opinion that Mr. Patton had a convulsive seizure in 08/01 at his work. I have read with interest Dr. Margherita's letter to Mr. Cervantes on 03/10/11. I respectfully disagree with Dr. Margherita's summation of the

case. I noted that Dr. Nemeth has indicated in her evaluation of Mr. Patton that there was "tongue-biting." Also the patient had a history of visual obscuration. He was confused and postictal for 2-3 hours. The patient was taken to an emergency room where he was evaluated by Dr. Patwardhan. The patient had an elevated white count which is quite characteristic of an individual who has had a seizure as well as an elevated CPK (muscle enzyme), quite characteristic of muscle enzyme elevation due to tonic clonic activity (seizure).

It should also be noted that the prodome to Mr. Patton's seizure was chills and fever and a feeling of "fluishness." He has stated in his deposition that he appreciated this as a prodome to his seizure. At one point he was cutting his grass when he felt chills and fever (he was alerted to the fact that this would precede a seizure). He went into his house and took some Valium "which helps sometimes with seizures." He laid down on his couch and had a seizure."

See, April 1, 2011 Report of Dr. Patrick Hogan. A286-A287.

Plaintiff attempts to portray the successive reports from Relator's expert witnesses as somehow "contrived". However, Dr. Hogan's April 1, 2011 Report is a comprehensive review of the records, depositions, and opinions of other doctors that were not initially available to Dr. Hogan. Relator and its experts were constrained by plaintiff's incomplete disclosure and production of information and relevant records. Obviously, Dr. Hogan has yet to review the record of Dr. Rao and will need to review Dr. Rao's records in order to

render opinions based upon all the records. As set forth above and in Relator's Supplemental Suggestions in Support of Petition for a Writ of Mandamus, the records of Dr. Rao are likely to lead to the discovery of admissible evidence and are likely to contain highly relevant evidence.

II. Relator is entitled to an order permitting it to discover the medical treatment records of Dr. Rao because a personal injury plaintiff may not preclude such discovery by merely asserting that no claim is being made for psychiatric or psychological injuries or damages and/or by arguing that Dr. Rao's records are privileged in order to preclude discovery of medical treatment records which are related to plaintiff's claims of physical injuries and which are likely to lead to admissible evidence relevant to the cause of plaintiff's physical injuries, disability and damages, as well as other issues.

A. Standard of Review

The standard of review is whether the Respondent abused his discretion in denying Relator the discovery of the medical treatment records of Dr. Rao. "Mandamus is appropriate when a court abuses its discretion in denying discovery because a trial court has no discretion to deny discovery of matters which are relevant to the lawsuit and are reasonably calculated to lead to the discovery of admissible evidence when the matters are neither work product nor privileged. *State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 102 (Mo.App. E.D.1994)." *State ex rel. Dewey & Leboeuf, LLP v. Crane*, 332 S.W.3d 224, 231 (Mo.App. 2010), transfer denied (Mar. 29, 2011), reh'g and/or transfer

denied (Feb. 1, 2011). As demonstrated herein, Respondent has abused his discretion in the instant case by denying discovery of medical treatment records which are not privileged and which may lead to the discovery of admissible evidence.

B. Argument

Not once before the circuit court did plaintiff assert that the records of Dr. Rao were privileged, nor was Respondent's ruling based upon privilege. Only in response to petitions for writ of mandamus to obtain the records of Dr. Rao has plaintiff belatedly asserted privilege to justify his non-disclosure of the records of Dr. Rao. Plaintiff thus has waived any privilege to prevent discovery of the records of Dr. Rao. Privilege was never a basis for the rulings of Respondent and would not apply to the facts of this case in any event.

In his answer to the petition for writ of mandamus, Respondent asserts: "*Any communications Plaintiff had with Dr. Shankar Rao, his psychiatrist, are privileged under Section 337.055 R.S.Mo. without exception*." However, Respondent cites the wrong statute. By its own terms, §337.055 deals with any communication made by any person to a "***licensed psychologist*** *in the course of professional services rendered by the licensed psychologist*". A psychiatrist is a physician and the statutory physician/patient privilege is §491.060 (5) R.S.Mo., which applies to a psychiatrist as a physician. *Griggs v. Griggs*, 707 S.W.2d 488, 490 (Mo.App. 1986). Dr. Rao is a psychiatrist and, in any event, plaintiff has waived the privilege.

At issue in this case is whether plaintiff has put at issue injuries or conditions which waive any physician/patient privilege. As the court set forth in *State ex rel. Dean v. Cunningham*:

> The physician-patient privilege is **not** absolute. The patient can waive the statutory privilege either by express or implied waiver. '[O]nce the matter of plaintiff's physical condition is **in issue under the pleadings**, plaintiff will be considered to have **waived the privilege** under [section] 491.060(5) so far as information from doctors or medical and hospital records bearing on that issue is concerned.' *State ex rel. McNutt v. Keet,* 432 S.W.2d 597, 601 (Mo. banc 1968). *State ex rel. Stecher v. Dowd,* 912 S.W.2d 462, 464 (Mo. banc 1995). *State ex rel. Dean v. Cunningham,* 182 S.W.3d 561, 567 (Mo. 2006). [Emphasis added.]

Plaintiff has asserted in his First Amended Petition that he "*has been caused to suffer reoccurring seizures and/or fainting spells*" as a result of the negligence of defendant on both occasions when he lost consciousness. A seizure is a physical phenomenon with origins in the chemistry and structure of the brain. Accordingly, plaintiff has put his physical condition at issue. The physical health of the brain, any prior injuries to or conditions of the brain, and any physical reactions to the use and abuse and addiction to certain controlled substances are all relevant. Any medical treatment that affects the brain, its structure and chemical composition is relevant and discoverable in a case in which plaintiff has claimed seizures and seizure disorder as physical injuries. Such medical treatment includes any medications that may be related to the cause or

prevention of the physical condition of seizures, whatever the source – whether obtained by prescription, over the counter, legally or illegally. Additional relevant information may also be contained in the medical records of plaintiff's treating physicians. Psychiatrists are physicians.

Plaintiff attempts to limit discovery of pertinent medical records by repeatedly asserting that he has not claimed psychological injuries in this case. Accordingly, plaintiff asserts that any treatment by psychiatrists is privileged without exception. Plaintiff asserts that any treatment with controlled substances and any history of injuries and related conditions are privileged and protected from discovery merely because he has seen psychiatrists. Actually, plaintiff seeks to assert a claim of privilege to only **one** of his psychiatrists, Dr. Rao. After having named Dr. Stromsdorfer as an expert witness in his case and relying on his records and opinions to support his theory of the case, plaintiff could hardly assert a claim of privilege regarding Dr. Stromsdorfer. Even if plaintiff could have asserted a claim of privilege for the records of Dr. Rao, plaintiff has opened the door to the production of the records of Dr. Rao by his endorsement of Dr. Stromsdorfer as an expert and plaintiff's reliance upon Dr. Stromsdorfer's records and opinions.

Plaintiff's belated assertion of privilege is misplaced. Dr. Rao prescribed controlled substances and treated plaintiff before, during and after the second occurrence of October 8, 2002. Plaintiff has put his physical condition at issue by alleging that he suffered "loss of consciousness" on two occasions and suffered injuries, including "reoccurring seizures and/or fainting spells". At issue are the causes of the "loss of

consciousness" on both occasions and the cause, nature, history, extent, and severity of his seizures and seizure condition and any medical treatment and medications related thereto.

The medical treatment records of Dr. Rao relate to the physical injuries set forth in Plaintiff's First Amended Petition and plaintiff's pleadings and are likely to lead to the discovery of admissible evidence. Accordingly, Relator may use the discovery process to obtain the medical treatment records of Dr. Rao:

> Parties may use discovery in order to obtain relevant information, which means material reasonably calculated to lead to the discovery of admissible evidence. *Rule 56.01(b)(1).*[1] Privileged information—including medical records covered by the physician-patient privilege—is not subject to discovery. *Id* ; *Brandt v. Pelican,* 856 S.W.2d 658, 661 (Mo. banc 1993); *State ex rel. Benoit v. Randall,* 431 S.W.2d 107, 109 (Mo. banc 1968). A party, however, waives this privilege by placing his physical condition in issue under the pleadings, but this "patient-litigant" waiver only extends to medical records bearing on that issue. *State ex rel. McNutt v. Keet,* 432 S.W.2d 597, 601 (Mo. banc 1968); *Brandt,* 856 S.W.2d at 672.
>
> [1] All references are to *Missouri Rules of Court 1998.*
>
> *State ex rel. Crowden v. Dandurand,* 970 S.W.2d 340, 342 (Mo. 1998)

Respondent's narrow view of the relevancy of Dr. Rao's medical treatment records is a product of plaintiff's argument that no claim is being made for psychological or psychiatric injuries. Nevertheless, the relevancy of plaintiff's psychiatric records is

readily evident in the Order of March 16, 2011. Respondent noted in detail plaintiff's use of his own psychiatric records, yet he found no inconsistency with plaintiff's use of psychiatric records--justifying plaintiff's own use as "*rebuttal if necessary*". *See, Exhibit A, Order of March 16, 2011, A50*. Whether the treatment records of plaintiff's medication-prescribing psychiatrists are used by either party in the case, they are relevant to the issues in the instant case.

The medical treatment records of Dr. Rao contain information relevant to multiple issues. Medical treatment records are not only relevant to the issues of causation and the nature and extent of plaintiff's injuries, but are also relevant to issues related to general damages. Medical records often contain evidence of other injuries, diseases or medical conditions that affect one's ability to perform activities of daily living, the ability to work and life expectancy. As Dr. Rao had been treating plaintiff before and after the incident of October 8, 2002, the medical records of Dr. Rao are clearly relevant to demonstrate the health and physical condition of plaintiff both before and after the incident of October 8, 2002. As stated in *Friese v. Mallon*, 940 S.W.2d 37, 42 (1997):

> In an action for personal injuries, the health and physical condition of the injured person both prior and subsequent to the occurrence is material. *Spalding v. Monat,* 650 S.W.2d 629, 632 (Mo.App.1981). Any competent evidence tending to prove or disprove the nature and extent of the alleged injuries received is admissible. *Id.*

Medical treatment records are also discoverable to the extent that they are likely to lead to admissible evidence of prior injuries:

> Evidence of prior injuries is probative in a personal injury case not only on the issue of whether there was an accident but also on the nature and extent of injuries. *Eickmann v. St. Louis Public Service Co.*, 323 S.W.2d 802, 806 (Mo.1959).
>
> *Rowe v. Norfolk & W. Ry. Co.*, 787 S.W.2d 751, 755 (Mo. Ct. App. 1990).

Dr. Rao's records involve the prescription of benzodiazepines. Just as evidence of alcoholism would be, plaintiff's use and abuse of and addiction to benzodiazepines is relevant to plaintiff's claims of permanent injuries:

> Evidence of alcoholism is also admissible in claims involving permanency of injury. *Spencer,* 687 S.W.2d at 246. In his petition, Mr. Johnston alleged "permanent and disabling injuries" to his lower back, leg, and heel, resulting in his present and future physical disability. Thus in addition to being relevant to his credibility as a witness, Mr. Johnston's possible alcoholism was relevant to determining the permanency of his injuries.
>
> *Johnston v. Conger*, 854 S.W.2d 480, 484 (Mo. Ct. App. 1993)

The extent to which plaintiff was using or abusing benzodiazepines is at issue in this case. Plaintiff has claimed that he suffered a seizure as a result of the negligence of defendant and that he has ongoing seizures. Defendant has asserted that plaintiff suffered seizures as a result of a prior brain injury and of his use and abuse of benzodiazepines. Clearly, the records of Dr. Rao, who prescribed benzodiazepines, are discoverable. The issues related to drug use are relevant to the injuries complained of and evidence of such

drug use is admissible. In a diversity jurisdiction case decided under Missouri law, the Eighth Circuit Court of Appeals noted:

> Bennett argues that the court erred by allowing Hidden Valley to introduce deposition testimony in which she described her experimental drug use and to refer to it in opening. This evidence was relevant, however, because of the damages Bennett was seeking for brain injuries. Her own medical expert admitted that the use of narcotics can lead to cognitive difficulties like those which she claimed resulted from her accident. The district court did not abuse its discretion by admitting the evidence under these circumstances or by overruling her objection to a reference to it in Hidden Valley's opening statement.
>
> *Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868, 878 (8th Cir. 2003)

Likewise, in *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993) evidence of plaintiff's cocaine and marijuana usage was admitted as relevant to plaintiff's damages. As the Eighth Circuit noted:

> The Dillons attempted to prove that Vernon Dillon suffered emotional injuries, becoming explosive and unable to control his rage. Nissan attempted to refute or diminish these claims by showing that Dillon used drugs and that drug use may cause aggressive and hostile behavior. The district court, therefore, did not abuse its discretion in allowing the drug use and possession evidence

Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 270 (8th Cir. 1993)

In the underlying case, plaintiff has asserted that his seizures and ongoing seizure disorder were due to the negligence of defendant. There is evidence that plaintiff's use and abuse of and addiction to benzodiazepines caused or contributed to cause his seizures and ongoing seizure condition. Clearly, such evidence is relevant and admissible to the issue of causation and damages. In *Fletcher v. City of New York*, 54 F.Supp.2d 328 (S.D.N.Y. 1999) evidence of plaintiff's past drug use was admitted for the purpose of proving that plaintiff's injuries were caused by past drug use, not by defendants' conduct.

Plaintiff has further asserted in the underlying case that his subsequent addiction to benzodiazepines and subsequent addiction to pain killers are part of his damages. Clearly, evidence of prior and ongoing use and abuse of and addiction to benzodiazepines is relevant on the issue of damages. In *Burke v. Spartanics, Ltd.*, 252 F.3d 131 (2d Cir. 2001) evidence of plaintiff's prior use of cocaine and marijuana was admitted to refute plaintiff's contention that his increased use of marijuana and alcohol was due to his injuries.

From the prescription records, it is known that Dr. Rao prescribed controlled substances for plaintiff. The medical records of Dr. Rao will contain more information regarding the reasons for these prescriptions and whether plaintiff sought the medications himself. Plaintiff cannot eliminate the relevancy of the records of Dr. Rao by his self-limiting assertions that he is not pursuing a claim for psychological or psychiatric injuries such as mental anguish, emotional distress, or depression. The records of Dr. Rao are relevant to numerous other issues beyond any "psychological or psychiatric injuries" and

other general damages which plaintiff has abandoned in an attempt to limit discovery of relevant information, materials and evidence that he considers deleterious to his case and would rather not disclose.

It is noteworthy that Respondent's order contains an inaccurate conclusion. The statement that defendant has "*obtained all of Plaintiff's medical records related to the [physical] injuries alleged in the petition*" is inaccurate. Records which describe the treatment of Plaintiff by a doctor prescribing medications which could have affected plaintiff's physical condition at the time of the incidents claimed by plaintiff are in the hands of the custodian of records of Dr. Rao. Respondent has denied defendant access to those records that will undoubtedly refer to Plaintiff's injuries, whether they are seizures or other physical complaints. There is no plausible distinction as to why Dr. Stromsdorfer's records are relevant and accessible, but Dr. Rao's are irrelevant and inaccessible regarding the same issues in this case. *See, Order of March 16, 2011, A47-A50*.

For the Respondent to allow plaintiff to preclude the discovery of the medical records of Dr. Rao, another medical doctor who treated plaintiff during the relevant time period and who prescribed controlled substances, but allow plaintiff the opportunity to use Dr. Stromsdorfer's testimony and psychiatric treatment records is clearly an abuse of discretion. Respondent's Order shields the medical records of plaintiff's psychiatrist at the time of the second alleged incident from possible use by defendant in this case, in part, based upon plaintiff's election to not pursue a claim for psychological or psychiatric injuries such as mental anguish, emotional distress, or depression and his self-serving

assertion that Dr. Rao's records are irrelevant. *See, Order of March 16, 2011, A47-A50.* Respondent's Order is particularly erroneous given plaintiff's use of the records and the testimony of Dr. Stromsdorfer.

Plaintiff argues on the one hand that the records of Dr. Stromsdorfer and Dr. Rao are irrelevant, but uses Dr. Stromsdorfer's records and testimony to support his theory of the case. Plaintiff uses his arguments regarding privilege as both a shield and a sword. This practice has been disapproved by the Missouri Supreme Court in a number of contexts, including waiver of the medical privilege. Respondent's orders demonstrate a classic maneuver of "permitting plaintiff to use the privilege both as 'a shield and a dagger at one and the same time' (which we do not believe the legislature intended)". *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. banc 1968). Obviously, medical treatment records from every physician who either prescribed medications during the relevant time periods or treated plaintiff for withdrawal from medication are likely to contain relevant evidence. The viability of the evidence supporting the defense theory is a question for the jury. Defendant is entitled to those records which bear on plaintiff's drug use and treatment, and which are likely to contain other relevant information as well, as previously noted.

Plaintiff's argument that Dr. Rao's medical treatment records are protected by the physician-patient privilege is simply untenable. Respondent ruled that the records of Dr. Rao were not relevant and, therefore, not discoverable. Plaintiff did not assert the physician-patient privilege as a basis for the Respondent's ruling quashing the deposition of the records custodian for Dr. Rao and has waived any privilege that may have existed.

In any event, it would be impossible for plaintiff to successfully argue that the privilege applies when plaintiff has used the records of his psychiatrist, Dr. Stromsdorfer to support his theory of the case. Plaintiff has: 1) given defendant access to records of pharmacies filling Dr. Rao's and Dr. Stromsdorfer's prescriptions for medications, including controlled substances; 2) endorsed Dr. Stromsdorfer as an expert and solicited his opinions regarding the cause or causes of plaintiff's loss of consciousness and his risk of becoming addicted to pain medications as a result of the incidents of August 7, 2001 and October 8, 2002; and 3) placed the cause or causes of plaintiff's losses of consciousness and seizures at issue in the instant case.

State ex rel. Dean v. Cunningham, *supra*, supports defendant's position that medical treatment records relating to plaintiff's seizures and loss of consciousness are relevant due to the allegations of plaintiff's First Amended Petition. Plaintiff has put the physical conditions of loss of consciousness and seizures at issue in the instant case. Accordingly, plaintiff has waived any privilege as to any medical treatment records in which seizures are likely to have been discussed, including the cause or causes of seizures, current complaints, history of seizures, use of medications related to seizures, including benzodiazepines, and whether the withdrawal from medications could cause seizures--whether the medical treatment records are those of a primary care physician, a specialist, or a psychiatrist.

The cause or causes of plaintiff's physical condition, his loss of consciousness or seizures are at issue, which causes involved plaintiff's drug use. In any event, plaintiff cannot selectively assert that the physician-patient privilege applies to the medical

treatment records of Dr. Rao, plaintiff's second medication-prescribing psychiatrist, while he uses the records, report, and testimony of plaintiff's first medication-prescribing psychiatrist, Dr. Stromsdorfer for his own purposes.

III. The standard of review in this petition for writ for mandamus is whether Respondent abused his discretion in denying Relator discovery of the medical treatment records of Dr. Rao and any attempts to argue the merits of the underlying case and serve up red herring to preclude discovery of such records should be disregarded by this Court.

A. Standard of Review

The standard of review is whether the Respondent abused his discretion in denying Relator the discovery of the medical treatment records of Dr. Rao. "Mandamus is appropriate when a court abuses its discretion in denying discovery because a trial court has no discretion to deny discovery of matters which are relevant to the lawsuit and are reasonably calculated to lead to the discovery of admissible evidence when the matters are neither work product nor privileged. *State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 102 (Mo.App. E.D.1994)." *State ex rel. Dewey & Leboeuf, LLP v. Crane*, 332 S.W.3d 224, 231 (Mo.App. 2010), transfer denied (Mar. 29, 2011), reh'g and/or transfer denied (Feb. 1, 2011). As demonstrated herein, Respondent has abused his discretion in the instant case by denying discovery of medical records which are not privileged and which may lead to the discovery of admissible evidence.

B. Argument

1. Plaintiff's attempts to argue the merits of the underlying case and serve up red herring do not preclude discovery of Dr. Rao's records.

In Respondent's Answer, attorneys for plaintiff have abandoned any pretense of defending respondent judge's ruling in this matter in favor of arguing the merits of plaintiff's underlying case. Additionally, attorneys for plaintiff persist in seeking to divert attention from the real issues by making baseless assertions that are nothing more than red herrings.

a. Limited disclosure of limited information about Dr. Rao's records

For the first time in any of these proceedings, Respondent's Answer purports to disclose limited information about the medical records of Dr. Rao, including the number of visits over a particular time period, and hints at what may be contained in the records. Again, Respondent's answer departed from defending Respondent judge's ruling by setting forth information that would not and could not have been known to Respondent. The records of Dr. Rao were not produced in any of the proceedings and were not provided to the Respondent for in camera review. In fact, during the hearings on the production of the records of Dr. Rao, Respondent indicated that there would be no in camera review of the medical records of Dr. Rao. There is no way that Respondent could have known of any of the supposed content of the records. The records of Dr. Rao were never produced and never reviewed by anyone except plaintiff's attorneys. Obviously Relator is unable to refute any claims made about the contents of the medical treatment records of Dr. Rao.

Plaintiff's attorneys have cast themselves as the arbiters of what is relevant and discoverable and would deny discovery of Dr. Rao's medical treatment records because they assert that they have not pleaded psychological damages. Plaintiff's attorneys ignore their own pleadings in which they alleged the physical conditions and injuries of "loss of consciousness" and "reoccurring seizures and/or fainting spells" and the additional assertions by plaintiff's experts that plaintiff's latest addiction to pain killers is a result of his injuries.

The medical treatment records of Dr. Rao are discoverable because they are likely to lead to the discovery of admissible evidence. Information relevant to this case, including plaintiff's history of injury, history of seizures, physical condition, prior drug abuse, current medications, drug-seeking behavior, and prescriptions, are all likely to be contained in the "*9 pages of handwritten notes, … copies of telephone messages, patient information sheet, insurance information, consent for treatment, medication log, etc.*" as the medical treatment records are described on page 20 of Respondent's Answer. *A470*. Yet paragraph 45 of Respondent's Answer states, in pertinent part: "*Respondent denies that records containing medical history, history of current complaints, history of medications, prescriptions, ongoing physical complaints and new complaints during the pertinent time period of the allegations of the Plaintiff's First Amended Petition are all relevant to the issues in this case*." *A463-A464*. These enumerated items are precisely the information and materials sought from the medical treatment records of Dr. Rao that are likely to lead to the discovery of admissible evidence.

b. Allegations of potential embarrassment do not preclude discovery.

Plaintiff's attorneys now assert another reason for the non-disclosure of these records. Plaintiff's attorneys allude to "*other matters contained in the records which are highly sensitive and potentially embarrassing*". See Respondent's Answer, page 20, *A470*. This tactic is a last ditch effort to prevent disclosure of relevant information. With no disclosure of the records, no review by any tribunal, and no way to verify this self-serving suggestion of sensitive materials, plaintiff's attorneys would still have this Court prevent disclosure of medical treatment records highly relevant to plaintiff's allegations of **physical** injuries at issue in this case: "loss of consciousness" and "reoccurring seizures and/or fainting spells".

The supposed embarrassing content of the records of Dr. Rao was never the basis for plaintiff's objection to the production of the medical treatment records of Dr. Rao. The content of the medical records and possible embarrassment of plaintiff was never raised before the circuit court and was never the basis for the circuit court's ruling that the medical records of Dr. Rao were not discoverable. Embarrassment is no bar to the production of the records. Further, the production of the medical records of Dr. Rao does not necessarily mean disclosure of all of their contents to the public. If there is some aspect of the records that is not relevant and may embarrass plaintiff, the proper mechanism to deal with such issues is a motion for protective order or a proper motion at time of trial. The trial court can limit use of the records to limit any possible embarrassment to plaintiff.

No doubt that plaintiff is embarrassed by his history of drug abuse, drug seeking behavior and related criminal record, including convictions for felonies and

misdemeanors. Nonetheless these matters are relevant and admissible as evidence. Embarrassment does not prevent discovery or admissibility of medical records. The medical treatment records of Dr. Rao are likely to lead to the discovery of admissible evidence. Whatever is contained in the medical treatment records may be relevant to numerous matters in the case, including causation of the physical injuries and conditions alleged by plaintiff, the prior history of seizures, plaintiff's history of medications, use and abuse and impeachment. There is a broad range of matters that may be relevant on the issue of impeachment.

c. Credibility is always an issue.

In all cases, the credibility of a witness is always at issue. In the instant case there is a great deal of evidence bearing on the character, credibility and veracity of plaintiff. This evidence includes various items pertaining to plaintiff's perception of his injuries and the incidents at issue, such as evidence of prior inconsistent statements, multiple felony and misdemeanor convictions, injury and pain complaints indicating drug-seeking behavior, including multiple emergency room visits to several hospitals on the same day. For example, Dr. Scheperle testified that he had seen plaintiff thirteen times at the emergency room at St. Luke's Medical Center in St. Louis County and other doctors had seen plaintiff at St. Luke's emergency room another forty-five times. Dr. Scheperle had seen plaintiff enough that he could picture him in his mind. *Scheperle, 19:3-9; 24:4-20. A101-A102*. While much of this evidence is relevant and admissible as to other issues in the case, such as the cause of plaintiff's injuries, passing out, and seizures, all of this evidence is relevant to the issue of plaintiff's credibility as a witness. The medical

treatment records of Dr. Rao are very likely to contain evidence relevant to plaintiff's credibility. Credibility issues provide additional reasons for the discovery of the medical treatment records of Dr. Rao. As this Court noted in the recent case *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010), the credibility of a witness is always at issue, and evidence related to credibility may be used to impeach the witness in numerous ways. As this Court noted:

> "As a general proposition, **the credibility of witnesses is always a relevant issue in a lawsuit**." *State v. Smith*, 996 S.W.2d 518, 521 (Mo.App.1999). **Impeachment provides a tool to test a witness's perception, credibility, and truthfulness**, which is essential because a jury is free to believe any, all, or none of a witness's testimony. *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999); *Talley v. Richart*, 353 Mo. 912, 185 S.W.2d 23, 26 (1945) (a party impeaches a witness to discredit the witness in the eyes of the fact-finder). For this reason, as this Court noted in *Sandy Ford Ranch, Inc. v. Dill:*
>
> > It has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character. **He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge**.

449 S.W.2d 1, 6 (Mo.1970).

Mitchell v. Kardesch, 313 S.W.3d 667, 675 (Mo. banc 2010) [Emphasis added.]

In the instant case, there is extensive evidence that may be used to impeach plaintiff's testimony, character and credibility. While some of this evidence is relevant and admissible on other grounds, it is also relevant and admissible as impeachment.

In *Kearbey v. Wichita Se. Kan*., 240 S.W.3d 175 (Mo.App. 2007) prior inconsistent statements about marijuana use were contained in medical questionnaires. Although plaintiff in *Kearbey* claimed that one of the questionnaires was completed by his wife and did not constitute a prior inconsistent statement, defendant was allowed to cross-examine plaintiff regarding the statements and both questionnaires were admitted into evidence. The court noted that the inconsistent statements in the medical records were relevant to the issue of credibility even if marijuana use was not an issue in the case. The court of appeals decided *Kearbey, supra*, prior to *Mitchell, supra*, and the opinion of the court of appeals was cited favorably in the opinion of this Court. The medical treatment records of Dr. Rao contain history provided by plaintiff for purposes of treatment. To the extent that the history contains inconsistent statements, it may be used for impeachment purposes, even if it dealt with the use and abuse of benzodiazepines or other drugs.

The medical treatment records of Dr. Rao likely contain evidence of plaintiff's medication and drug abuse at the time of the occurrence of October 8, 2002. However, even in the absence of direct evidence of intoxication and impairment at the time of the occurrences his drug abuse raises the inference that his perception, memory and behavior

were affected by his use of drugs. Plaintiff's use of drugs and drug-seeking behavior deeply affect his credibility and capacity for telling the truth.

Additionally, the effect of such medications on plaintiff's ability to accurately recall the facts and circumstances surrounding the occurrences alleged in plaintiff's First Amended Petition will also be at issue in the case. Evidence of plaintiff's prescription drug use, his drug abuse and his drug-seeking behavior are relevant to plaintiff's perception, memory and behavior. No doubt plaintiff may be embarrassed by some of his conduct, but his conduct is relevant to his credibility and other issues in the case. To the extent that the medical treatment records of Dr. Rao contain more of the same, the records will also be relevant to plaintiff's credibility.

Plaintiff's limited disclosure of information from the records of Dr. Rao is a belated self-serving attempt to limit ultimate disclosure of the records to in camera review. Plaintiff would have this Court order plaintiff to produce the records of Dr. Rao for in camera inspection by Respondent to determine what portions may be relevant to BNSF's defenses or claims. This is an illusory remedy. Given the multitude of issues in this case, Dr. Rao's medical treatment records could relate to, defendant is entitled to its own review of the medical treatment records.

Plaintiff further asserts that because this Court does not know what is contained in Dr. Rao's records that "*it would be improper for the Supreme Court to order Respondent Judge Neill to produce Dr. Rao's records carte blanche*". *See, Respondent's Answer/Return to Petition for Writ of Mandamus in Response to This Court's Order to Show Cause Dated May 31, 2011, p. 25, A475*. Once again, plaintiff equates

discoverability with admissibility in an attempt to prevent discovery. Production of the documents in discovery does not mean that the documents will be admissible at trial. The trial court can still remedy any situation where there may be irrelevant materials by applying the myriad rules on the admissibility of evidence. The medical treatment records need only lead to the discovery of admissible evidence to be discoverable. Plaintiff's attorneys assert an impossible "Catch-22" standard that is not the law in Missouri. Plaintiff's attorneys would foreclose an order for the production of documents unless the court knew what was in the documents, yet the court cannot know what is in the documents unless they are produced. At a minimum, plaintiff's proposed procedure would require in camera review of all documents in every instance when discovery is opposed by any party. There is nothing improper about an order to produce materials that are relevant and not privileged and likely to lead to the discovery of admissible evidence. Such is the normal course of discovery.

2. Red Herring Served Here

At the risk of diverting this Court's attention from the true issues at hand, Relator must address several of Respondent's attempts to impede the pursuit of potentially admissible evidence with red herring.

a. Dr. Stromsdorfer is a rebuttal expert only.

It matters not whether, when or how plaintiff intended to use Dr. Stromsdorfer as an expert witness, either in his case in chief or in rebuttal. He was and is endorsed as an expert in plaintiff's case, not merely as a rebuttal expert. *A200*. Plaintiff named Dr. Stromsdorfer as an expert, solicited his opinions and prepared a letter with his opinions

that was the basis for his report. *A87-A89*. Plaintiff obtained and produced Dr. Stromsdorfer's complete records. The substance and relevancy of Dr. Stromsdorfer's records and opinions are not changed by plaintiff's characterization of him as a "rebuttal expert". Dr. Stromsdorfer's opinions are still part of plaintiff's case and are offered to support plaintiff's theories of the case and attack defendant's theories of the case. Plaintiff's characterization of Dr. Stromsdorfer as a "rebuttal expert" is a transparent attempt to hide the obvious contradiction of plaintiff using Dr. Stromsdorfer's records and testimony in plaintiff's case, while denying defendant the discovery of Dr. Rao's medical treatment records.

b. Notorious experts with contrived opinions and inaccurate interpretations

Perhaps not content with their own explanations of plaintiff's seizures and seizure condition, plaintiff's attorneys have lashed out at defendant's experts and mischaracterized their opinions and theories as contrived and have asserted that they "inaccurately interpreted" the medical records. Plaintiff's attorneys have argued, unencumbered by the facts, that Relator's experts, Drs. Hogan, Randolph, and Wetzel, "**contrived**" a theory that plaintiff stopped taking anti-anxiety medications (actually a benzodiazepine, Valium, that had anti-convulsive properties). *See, Respondent's Suggestions in Opposition to Petition for Writ of Mandamus, page 25 of Suggestions, (filed in this Court) A337; and Respondent's Answer/Return to Petition for Writ of Mandamus in Response to This Court's Order to Show Cause Dated May 31, 2011. ¶¶11, 36, 38, 39, 44, 54, pages 3-17 of Answer, A453-A467.* These arguments are simply an

effort, through false innuendo, to have this Court make a discovery decision based on the sufficiency of the evidence to be presented to the jury.

Plaintiff's attorneys have also asserted with cut-and-paste repetition in Respondent's Answer that in rendering their opinions defendant's experts "**inaccurately interpreted**" Dr. Stromsdorfer's medical treatment records. *See, Respondent's Answer/Return to Petition for Writ of Mandamus in Response to This Court's Order to Show Cause Dated May 31, 2011. ¶¶11, 21, 36, 38, 39, 44, 54, pages 3-17 of Answer, A453-A467.* Whether defendant's experts accurately interpreted Dr. Stromsdorfer's medical records is question of fact for the jury to decide. Plaintiff's attorneys again attempt to shift the focus to the weight and credibility of expert opinions rather than properly focusing upon the discoverability of medical records of a treating physician.

The credibility and viability of the facts supporting the defense theory is a question for the jury, and Relator is entitled to the production of those medical treatment records which bear on plaintiff's drug use, as they may lead to the discovery of admissible evidence—just as Dr. Stromsdorfer's records have done. Respondent has neither ruled nor found that Relator's theory of defense is "**contrived**", that Relator's experts "**inaccurately interpreted**" medical treatment records or that Drs. Hogan, Randolph, and Wetzel are "**notorious**" witnesses who are not credible.

These baseless assertions by plaintiff's attorneys have been addressed in more detail in Relator's Supplemental Suggestions in Support of Petition for Writ of Mandamus, pages 7 through 12, filed May 6, 2011, which are incorporated herein by reference. *A376-A381.*

c. Violations of HIPAA

Despite Respondent's assertions, defendant did not violate HIPAA in obtaining Dr. Stromsdorfer's records. Simply put, in 2001 BNSF properly obtained the medical records of Dr. Stromsdorfer in the process of the defense of a lead exposure case that had been filed in 2000. As was the custom in the pre-HIPAA days, a blank authorization was provided by plaintiff's attorneys so that it could be utilized as additional records were needed during the course of legal proceedings. The letter from BNSF to Dr. Stromsdorfer in the lead exposure case was dated October 31, 2001 – long before HIPAA compliance was required. HIPAA compliance was not required until April 14, 2003. 45 CFR §164.534 "Compliance dates for initial implementation of privacy standards" [66 FR 12434, Feb. 26, 2001]. *A482*. Thus, HIPAA did not even apply to Dr. Stromsdorfer's compliance with BNSF's records request in the lead exposure case. In the instant case, Dr. Stromsdorfer provided his complete records to plaintiff's attorneys who produced them to defendant's attorneys shortly before the deposition of Dr. Stromsdorfer. *See, Letter dated February 23, 2011, from Phillip A. Cervantes to Cynthia A. Masterson, A483.*

This matter was addressed more extensively in Relator's Supplemental Suggestions in Support of Petition for Writ of Mandamus, filed May 6, 2011, pages 2 through 7, filed May 6, 2011, which is incorporated herein by reference. *A371-A376.*

d. BNSF Improperly Obtained Dr. Stromsdorfer's Records

Contrary to plaintiff's repeated and unfounded assertions, defendant properly obtained Dr. Stromsdorfer's records in the lead exposure case and produced those

medical records in its possession in response to plaintiff's discovery requests in the underlying case. Plaintiff complains that BNSF's 2000 lead exposure case counsel somehow improperly released Dr. Stromsdorfer's records to BNSF's counsel in the instant case—a complaint that is simply preposterous. The records became part of the legal file. The client owns a legal file—not its attorney. Relator produced these records to plaintiff in the underlying case and had every right to provide these records to its own experts. Once again, plaintiff has made attempted arguments using revisionist history without regard to the actual facts.

Even more ironic is that in the instant case, plaintiff sought discovery of all medical records in the possession of Relator, including "**psychologists** and **psychiatrists**, or other health care providers, concerning medical care or treatment or examination or consultation, as to any prior or subsequent injuries or ailments, including **any mental or emotional illness** sustained by Plaintiff…." *See, Plaintiff's First Request for Production Regarding Count II of Plaintiff's Petition. Request No. 4*. [Emphasis in original.] [**Emphasis added**.] *A400-A402*. In response to that request, Relator provided plaintiff the records obtained in the prior lead exposure case—including Dr. Stromsdorfer's. Yet, plaintiff now asserts that Relator improperly obtained and provided records to its experts. These assertions have no basis in truth or fact!

The circuit court apparently labored under the mistaken impression, reinforced by plaintiff's errant assertions, that Relator improperly obtained the records of Dr. Stromsdorfer. Contrary to any possible inference by the circuit court in its Order of March 16, 2011, the "complete" medical records of Dr Stromsdorfer were actually

obtained by **plaintiff**. Relator had only received partial medical records from Dr. Stromsdorfer from plaintiff's prior seizure case involving lead exposure. As set forth above, Relator produced these records to plaintiff in compliance with plaintiff's request for production in this case. *A400-A402*. When Relator sought to obtain updated and complete records from Dr. Stromsdorfer in the instant case, he advised Relator that Mr. Patton's files had been destroyed per standard protocol. *See, Letter, undated, from Steve Stromsdorfer, M.D. to William Brasher, A403*. However, at plaintiff's request, Dr. Stromsdorfer resurrected plaintiff's entire medical treatment record file and provided them to plaintiff. The complete medical treatment record file of Dr. Stromsdorfer was then produced to Relator by plaintiff's counsel shortly before Dr. Stromsdorfer's deposition. These medical treatment records obtained by plaintiff from Dr. Stromsdorfer contained entries and materials previously unavailable to Relator from the lead exposure case file. Relator did nothing improper in obtaining Dr. Stromsdorfer's medical treatment records, in producing them to plaintiff or in producing them to Relator's experts.

Contrary to plaintiff's assertions, Relator did not have any inappropriate *ex parte* communication with Dr. Stromsdorfer regarding details of the care and treatment of plaintiff. Relator merely communicated with Dr. Stromsdorfer in order to set up his deposition and ultimately to obtain authentication of medical treatment records obtained in the defense of the lead exposure case. This later contact was made after Dr. Stromsdorfer advised that plaintiff's medical records had been destroyed. Any communications regarding such administrative matters do not rise to the level of any inappropriate *ex parte* communication with Dr. Stromsdorfer.

e. "Misuse" of the Discovery Process

Yet again, attorneys for plaintiff insinuate that there was something improper about defendant's efforts to obtain relevant medical records, especially those of Dr. Rao. In Respondent's Answer, page 25, plaintiff's attorneys state: "*BNSF's quest to obtain Dr. Rao's records has been a misuse of the discovery process in this case. Recently, there has been commentary on the misuse of the discovery process. See, "[Im]properly Noticed: The Misuse of the Subpoena Duces Tecum", Journal of the Missouri Bar, Vol. 67, No. 3, p. 166-168 (May-June 2011).*" *A275*. However, a review of the cited article and Rule 57 of the Missouri Rules of Civil Procedure does not merit such a conclusion in this case. The article deals with two situations of misuse of the subpoena duces tecum: 1) a subpoena duces tecum being sent to a custodian of records without notice of deposition and 2) a notice of deposition being sent with subpoena duces tecum but informing the custodian of records, without the consent of the opposing party, that if records are sent, no deposition is necessary. These circumstances are **not** present here. *See, "[Im]properly Noticed: The Misuse of the Subpoena Duces Tecum", Journal of the Missouri Bar, Vol. 67, No. 3, p. 166-168 (May-June 2011),* Appendix, *A479-A481*.

In Respondent's Answer, page 4, in response to paragraph 15 of the Petition for Writ of Mandamus, Respondent admitted that a notice of deposition duces tecum was served: "*Respondent admits that on February 22, 2011, Defendant served a Notice of Deposition Duces Tecum for the deposition of the custodian of medical records for Psych Care Consultants to occur on March 8, 2011*." *A454*. Further, in response to paragraph 17, Respondent admitted that on the same day the notice and subpoena duces tecum were

served plaintiff filed a motion to quash: "*Respondent admits that on February 22, 2011, the same day on which defendant served the aforesaid notice and subpoena duces tecum, plaintiff filed a Motion for Protective Order and to Quash Subpoena Duces Tecum*." *A455*. Further, there was never any communication that records could be provided in lieu of a deposition. Defendant sought to proceed with the deposition until prevented by plaintiff's motion to quash and respondent's rulings of February 25, 2011 and March 16, 2011. Any insinuation of "misuse" of the discovery process is without merit. See, Rule 57 of the Missouri Rules of Civil Procedure. Relator complied fully with the Missouri Rules of Civil Procedure. Any suggestion by attorneys for Respondent of "misuse" of the discovery process is an unfounded diversion designed to deflect attention from plaintiff's own attempt to withhold discoverable documents under a specious claim of privilege, embarrassment and other red herring assertions.

Conclusion

This petition for writ of mandamus is not about whether the records of Dr. Rao are admissible in their entirety, or whether the weight or probative value of the medical treatment records of Dr. Rao are sufficient to support a jury verdict for defendant, or whether plaintiff's theory of the case has more merit that defendant's theory of the case. The issue is simply whether the medical treatment records of Dr. Rao are discoverable. The Respondent's rulings cannot be justified by weighing the merits of the case as plaintiff has urged in the past.

Plaintiff asserts, and the Respondent has ruled, that the records of Dr. Rao are irrelevant to any issues in the case. This ruling is illogical, contradictory, and unsupported by any case law. Respondent's denial of the discovery of the medical treatment records of Dr. Rao is unsupported by the facts and the law and must not stand. This discovery matter should be resolved favoring full disclosure, not only to prevent a potential issue on appeal in the event of an adverse verdict to defendant, but also to affect the proper application of the Missouri Rules of Civil Procedure and Missouri case law. There can be no doubt that discovery of Dr. Rao's medical treatment records may lead to admissible evidence.

Plaintiff has alleged that he lost consciousness on two occasions and suffered injuries as a result of the negligence of the railroad. Among the injuries plaintiff has pleaded in this case are "reoccurring seizures and/or fainting spells". By soliciting and offering portions of the medical treatment records, report, and testimony of his psychiatrist, Dr. Stromsdorfer, in support of his experts' theories, plaintiff acknowledges that the cause of plaintiff's "loss of consciousness" and drug use and abuse as well as his pleaded injuries of seizures and fainting spells are all issues in the instant case as has been opined by experts for both parties. It is simply inconceivable that Dr. Stromsdorfer's treatment and records are relevant, but Dr. Rao's treatment and records are not. Both are physicians who prescribed medications to and treated plaintiff at critical times before, during and after the alleged incidents. Therefore, the medical treatment records of Dr. Rao are discoverable. Those records are likely to contain relevant evidence on numerous issues in the case--just as Dr. Stromsdorfer's did. The records of Dr. Rao's treatment of

plaintiff must be made available to defendant, just as they are already available to plaintiff.

Plaintiff is desperately seeking to keep the medical treatment records of Dr. Rao from scrutiny by defendant and its experts. There can be no other inference but that the records are detrimental to plaintiff's case. Otherwise plaintiff would have used the medical treatment records of Dr. Rao in the same manner as he used Dr. Stromsdorfer's, i.e., to address whether plaintiff had seizures, the cause of his loss of consciousness or seizures, the impact of plaintiff's drug-seeking behavior, the impact of plaintiff's addiction to benzodiazepines, the impact of plaintiff's addiction to pain medication and the causation of plaintiff's addiction to pain medication. Plaintiff has demonstrated no prejudice or harm that would befall him when defendant obtains the medical treatment records of Dr. Rao. In any event, an appropriate protective order can be entered into by agreement or court order to preclude any unnecessary disclosure.

Defendant respectfully believes that Respondent abused his discretion by denying defendant access to the records of Dr. Rao, plaintiff's psychiatrist who prescribed medications for plaintiff, based upon plaintiff's assertion that he was not seeking damages for psychiatric or psychological damages, which purportedly rendered the records of Dr. Rao were irrelevant. The treatment and medications provided by Dr. Rao are relevant to numerous issues involving the physical injuries pleaded by plaintiff. This abuse of discretion resulted from a failure to give credence to the relevancy of the records of such a physician to numerous issues in the case, and Respondent's orders must be vacated.

Relief Requested

Relator seeks from this Court Preliminary and Permanent Writs of Mandamus, an order that the Respondent deny plaintiff's Motion For Protective Order and to Quash Subpoena Duces Tecum, an order that permits defendant to depose the custodian of records for Dr. Rao, an order that plaintiff also produce the records of Dr. Rao to defendant and such further relief to which the Court believes defendant to be entitled.

Respectfully submitted,

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COUNSEL FOR RELATOR

Dated: August _____, 2011

Certificate of Compliance

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. Per Rule 84.06(c), the word count of this brief is 15,358, as determined by Microsoft Word 2003.

4. The CD-ROM served with the briefs filed in this Court and the CD-ROM served with the briefs to the Respondent and Attorneys for Respondent have been scanned for viruses and are virus free.

5. The brief was prepared using “Times New Roman” font in 13 point size, in Microsoft Word 2003.

_____

Certificate of Service

The undersigned hereby certifies that the foregoing Brief was served by placing a true copy of the same, along with a digital copy on CD-ROM, in the United States mail, first class, postage prepaid, on this 12th day of August, 2011 to each of the addresses set forth below:

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IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL., BNSF RAILWAY COMPANY,	)	
Relator,	)	Supreme Court: SC 91706
v.	)	
HONORABLE MARK H. NEILL,	)	
Respondent.	)	

APPENDIX TO

RELATOR'S BRIEF IN SUPPORT OF

PETITION FOR WRIT OF MANDAMUS

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Respondent.	)	

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STATE OF MISSOURI, EX REL., BNSF RAILWAY COMPANY,	)	
Relator,	)	Supreme Court: SC 91796
v.	)	
HONORABLE MARK H. NEILL,	)	Circuit Court City of St. Louis Case No. 22042-07474
Respondent.	)	

INDEX OF APPENDIX TO RELATOR'S BRIEF

IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Comes now BNSF Railway Company, Relator herein, and sets forth the following as its Index of Appendix to its Petition for Writ of Mandamus:

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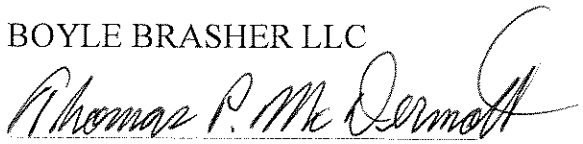
Respectfully submitted,

BOYLE BRASHER LLC



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