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 REPLY BRIEF IN SUPPORT OF

PETITION FOR WRIT OF MANDAMUS

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I. A summary of Relator's Reply to Respondent's arguments is necessary to clarify the history of the case and the numerous issues involved.

This proceeding involves a discovery dispute. The issue is whether numerous matters in dispute should permit defendant to discover medical records of treating physician, Dr. Shankararao Rao, who treated and prescribed drugs to plaintiff following the August 7, 2001 incident, and before, during and after the October 8, 2002 incident. These disputed matters include plaintiff's theory of liability, the alleged injuries and damages sustained in the incidents described in plaintiff's First Amended Petition, and/or the theories of defense asserted by defendant, including, among other things, the cause or causes of plaintiff's "loss of consciousness" or "seizure disorder". Defendant has the burden to establish that the records are discoverable by showing they are likely to lead to admissible evidence. Like the records of plaintiff's expert, Dr. Stephen Stromsdorfer, the records of Dr. Rao are relevant or likely to lead to admissible evidence relevant to numerous issues in the case.

Plaintiff alleges in his First Amended Petition that on August 7, 2001 he "lost consciousness", suffered a heat-related syncope and collapsed striking his head, neck and left shoulder. Thus, one of the issues in this case is the cause or causes of plaintiff's "lost consciousness". Plaintiff asserts his loss of consciousness was heat related. Defendant asserts that plaintiff's loss of consciousness was related to plaintiff's use of, and/or withdrawal or cessation of

benzodiazepines being prescribed by two different psychiatrists, Dr. Harry Katz and Dr. Stephen Stromsdorfer.

The second incident of October 8, 2002, is closely related to the first incident as plaintiff asserts that he developed a seizure disorder as a result of the August 7, 2001 incident, which in turn caused plaintiff to have a seizure during the second incident. Defendant asserts that plaintiff's seizure disorder predated the August 7, 2001 incident and that the "lost consciousness" and subsequent seizure were also related, in part, to plaintiff's drug usage.

In support of that theory of defense, defendant has obtained the testimony of medical professionals, who have opined that plaintiff's loss of consciousness was the result of a seizure caused, in whole or in part, by his use, abuse or cessation of the benzodiazepines, and his prior history of seizures.

These opinions are supported by plaintiff's history of drug abuse, his answers to interrogatories in his prior lead case that his seizures were caused by exposure to lead and other toxic substances for which he was compensated and, by his admissions against interest, that among other things, he first had seizures following his 1974 brain injury.

Similarly, it is defendant's theory of defense that plaintiff's seizure on October 8, 2002 was not caused by the incident of August 7, 2001 as asserted by plaintiff, but was related to his prior and ongoing drug use and abuse as well as his withdrawal or reduction in drug use as documented by his psychiatrist, Dr. Stromsdorfer. The evidence is undisputed that prior to August 7, 2001 and

thereafter, plaintiff was being weaned off his abuse of benzodiazepines by Dr. Stromsdorfer. Dr. Stromsdorfer intervened to stop plaintiff from simultaneously obtaining benzodiazepines from Dr. Katz. Dr. Stromsdorfer documented his concern about seizures and plaintiff's abuse of drugs. Plaintiff chose not to follow Dr. Stromsdorfer's plan to wean him off benzodiazepines, but rather continued to seek other sources of drugs from numerous other physicians. His search for more drugs shortly following the October 8, 2002 incident resulted in his burglary of a pharmacy and the forging of prescriptions for which he was convicted. Also shortly following the October 8, 2002 seizure, he was being treated for drug withdrawal at St. John's Hospital.

Dr. Stromsdorfer's records revealed relevant and admissible information regarding plaintiff's drug use and abuse, including Dr. Stromsdorfer's admission that withdrawal, cessation or reduction in drug use can result in a seizure, as well as his testimony that overuse of drugs can result in a seizure. Dr. Stromsdorfer also testified that prior to plaintiff's loss of consciousness on August 7, 2001, he had stopped plaintiff's supply of drugs from Dr. Harry Katz, thus reducing the amount of drugs available to plaintiff. It is likely that Dr. Rao's records will also contain admissible evidence.

Indisputably, Dr. Stromsdorfer's records are at least relevant to disprove defendant's theory of the case and support plaintiff's theory, but plaintiff has doggedly has sought to preclude discovery of the records of Dr. Rao who provided the same treatment and medications.

Nonetheless, plaintiff however continues to insist, and the trial court accepted the argument, that Dr. Rao's medical records were not relevant. Apparently the court believed, plaintiff's assertion that he was not seeking any damages for any psychiatric or psychological injuries and accordingly, Dr. Rao's records were not discoverable. However, Dr. Stromsdorfer's records revealed that the records of Dr. Rao are, in fact, likely to lead to admissible evidence.

Dr. Rao's records will likely have a medical history, as well as a history of plaintiff's prior head injury of 1974 as well as his prior alleged injury of August 7, 2001, and a history of his seizure of October 8, 2002. No competent psychiatrist would prescribe benzodiazepines without taking such a history. The history would also reasonably be anticipated to have information related to the cause or causes of plaintiff's loss of consciousness or seizure on both occasions. Those records will also reveal the drugs being prescribed to plaintiff and why – all of which are likely to confirm or refute the parties' theories regarding liability, the cause or causes of plaintiff's loss of consciousness, his seizures and damages, including plaintiff's employability and life expectancy.

Additionally, it has also been established that less than thirty days following the October 2, 2002 incident, plaintiff was diagnosed with drug withdrawal syndrome/drug abuse/drug dependency at St. John's Hospital with Dr. Rao listed as one of his physicians. (A435-A436, Relator's Brief). Later that same day he was admitted to Missouri Baptist Hospital with an admitting diagnosis of recurrent seizure, a seizure plaintiff relates to the incidents in this case. (A433-

A434, Relator's Brief). Defendant is entitled to Dr. Rao's records which would likely lead to admissible evidence that plaintiff's loss of consciousness and seizures were in fact drug related rather than related to heat or either of the incidents alleged in his Amended Petition, among other admissible evidence.

Despite plaintiff's position in this proceeding, plaintiff has provided medical authorizations from each of his treating physicians and/or pharmacy authorizations for the period of time predating the August 7, 2001 incident and before, during and after the October 2, 2002 incident. The authorizations include the pharmacy records for the prescriptions by Dr. Rao. The authorization he has refused to provide however is that of Dr. Rao, who treated and provided prescriptions for benzodiazepines to plaintiff after the August 7, 2001 incident through and after the October 8, 2002 incident.

Furthermore, all of plaintiff's drug history and the records of those physicians prescribing drugs are relevant as plaintiff's experts have included as one of the claims in the case, at plaintiff's request, that plaintiff's drug usage and drug seeking behavior are related to the incidents of August 7, 2001 and October 8, 2002. See, January 18, 2011 Report of Dr. Stephen Stromsdorfer, (A86, Relator's Brief) and February 2, 2011 Report of Dr. Hanaway (A94-A96, Relator's Brief).

Instead of explaining why Dr. Rao's records, unlike Dr. Stromsdorfer's records, would not provide any support for plaintiff or defendant's theories of the cause or causes of plaintiff's loss of consciousness/seizures, from which both

plaintiff and defendant could argue will support its position, plaintiff's Brief consists of a lengthy argument on the merits of the case attacking defendant's theory of defense as not credible as its experts are not believable or that they are biased, or that they misinterpreted the records. However, this court is not the trier of fact, and if there is any evidence to support defendant's theories as to liability causation, damages to refute plaintiff's theories, defendant is entitled to submit that defense to the jury and thus is entitled to Dr. Rao's records.

The only question before this Court is whether Respondent abused his discretion by concluding that Dr. Rao's records were not relevant and not discoverable, because plaintiff was not claiming damages for psychiatric or psychological injuries. However, with all due respect for Respondent, one of the key issues for discovery purposes is the cause or causes of plaintiff's "lost consciousness," the cause or causes of plaintiff's seizures on both occasions and whether Dr. Rao's records or opinions are likely to lead to admissible evidence, as did Dr. Stromsdorfer's records. Dr. Rao's records are also likely to lead to admissible evidence regarding other issues in the case, including plaintiff's employability, pain and suffering, damages and life expectancy. Plaintiff did not argue below, nor did Respondent find, that Dr. Rao's records were protected by any patient/physician privilege.

In fact, there is no precedent cited by plaintiff, nor can any be found, that would permit a plaintiff to preclude discovery of relevant information or medical records likely to lead to admissible evidence of causation of physical injuries and

other core issues, by strategically omitting certain items of recoverable damages or categories of injury.

II. The purpose of this proceeding is not to try the underlying case on the merits, but rather to determine whether Respondent abused his discretion in precluding the discovery of the medical records of Dr. Rao as irrelevant.

The trial court did not find that defendant's theories of defense were false, unfounded, or unsupported by the evidence. Nor did the trial court determine the records were privileged. In fact, plaintiff did not argue that the records were privileged. The trial court ruled that the medical records sought were irrelevant despite plaintiff's theory of liability and causation and defendant's theory of defense. Nonetheless, Respondent has sought to use this writ process to argue the relative merits of the case and further disparage defendant's experts. Plaintiff's attempt to argue the merits of the underlying case and the opinions and reports of defendant's experts are clear evidence that the cause or causes of plaintiff's loss of consciousness and seizures are questions of fact for a jury in the trial court and not subject to resolution in this court. The reliability, credibility and weight of the witnesses' testimony are for the fact finder to determine. *State v. Sumowski*, 794 S.W.2d 643, 645 (Mo. banc 1990).

Plaintiff's complaints about the updated reports by defendant's experts were made necessary by the trickle of documents and information reluctantly produced by plaintiff and the ongoing investigation of matters by defendant. Much

of what defendant uncovered by its own investigation should have already been produced by plaintiff in response to discovery. Had the information been timely produced, the additional updates would not have been necessary. Defendant's experts had the expertise but initially lacked the essential medical history, facts and other information to render some of their later opinions. Far from concocting theories, defendant's experts sought to clarify their opinions and reports on the basis of newly-found or belatedly-produced medical and pharmaceutical records that contained further evidence of the true cause of the incidents made the basis for plaintiff's claims.

Counsel for plaintiff and respondent are attempting to try the underlying case in this court rather than confine the discussion to discovery issues and defense of Respondent's orders, which have allowed plaintiff to withhold the records of Dr. Rao while using the records of Dr. Stromsdorfer in plaintiff's own case. Counsel's efforts to disprove defendant's theory of the case actually demonstrate the fact that the records of Dr. Rao are likely to lead to the discovery of admissible evidence relevant to plaintiff's history of seizures; plaintiff's history of medical treatment; plaintiff's history of medications and plaintiff's history of use, overuse and abuse of benzodiazepines. Evidence is relevant if it tends to prove or disprove a fact that is of consequence and makes that fact more or less probable than it would be without the evidence. *Reasons v. Payne*, 793 S.W.2d 471, 477 (Mo.App. 1990). All of these matters are likely contained in the records

of Dr. Rao. Counsel's efforts to argue the merits further prove that Dr. Rao's records are discoverable.

This matter boils down to whether plaintiff's self-limiting assertions that his case does not include a claim for "psychological/psychiatric injuries" can be used to preclude discovery of the medical records of Dr. Rao, which are likely to lead to the discovery of admissible evidence regarding plaintiff's physical conditions and alleged injuries. These alleged physical conditions and injuries include seizures, seizure condition, loss of consciousness and recurring seizures. The records of Dr. Rao include treatment with various benzodiazepines, a category of medications with known complications, including seizures. Benzodiazepines can cause seizures from their use, overuse, abuse and withdrawal. Benzodiazepines can also prevent seizures.

Seizures are a physical condition with physical causes. At issue are the cause of plaintiff's loss of consciousness, whether he had a seizure or heat related incident on August 7, 2001, and the cause or causes of his seizure condition and recurring seizures. Plaintiff's medical history of seizures and treatment with medications that can both prevent and cause seizures are relevant. Plaintiff has used testimony and medical records of Dr. Stromsdorfer in support of his allegations that plaintiff's working conditions caused his seizures and seizure condition. As set forth in more detail in Relator's brief, Dr. Stromsdorfer's records indicate that he prescribed benzodiazepines and caused the discontinuation of benzodiazepines simultaneously being prescribed by Dr. Katz. The medical

records of Dr. Rao also contain medical history and treatment with medications related to seizures and are also discoverable as they are likely to lead to the discovery of admissible evidence.

The causation of plaintiff's drug-seeking behavior was put at issue by plaintiff's experts, Dr. Stromsdorfer **and** Dr. Hanaway. In separate reports with remarkably similar language, both Dr. Stromsdorfer and Dr. Hanaway opined that plaintiff developed a tolerance to anti-anxiety medications, which resulted in plaintiff taking the anti-anxiety medications more frequently. This past history of drug-seeking behavior put him at increased risk for misuse of pain medications. However, Dr. Stromsdorfer stated that plaintiff was at increased risk for misusing anti-anxiety medications prescribed for physical injuries suffered in the August 7, 2001 incident, only. As Dr. Stromsdorfer stated in his January 18, 2011 report:

> Based upon Mr. Patton's treatment history with me, it is my opinion that he was at increased risk for misusing anti-anxiety and/or pain medications. As a result, it is my opinion that he was/is likely to misuse and develop a dependency on the pain medications prescribed for physical injuries suffered in the August 7, 2001 incident.
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> See, *January 18, 2011 Report of Dr. Stromsdorfer*, (A86, Relator's Brief)

However, Dr. Stromsdorfer's opinion only stated that plaintiff was likely to misuse and develop a dependency on pain medications prescribed for only the

August 7, 2001 incident. Dr. Stromsdorfer's opinion did not cover the October 8, 2002 incident. Accordingly, just over two weeks later Dr. Hanaway picked up on these same themes and addressed both incidents in yet another report. In addition to including the October 8, 2002 incident, Dr. Hanaway went further and blamed plaintiff's drug-seeking behavior following these work-related incidents solely on the work related incidents. Dr. Hanaway ignored prior and ongoing drug-seeking behavior for benzodiazepines and focused only on drug-seeking behavior for pain medications prescribed as a result of the work-related incidents. As Dr. Hanaway noted in his February 2, 2011 report:

> The patient's drug seeking behavior for pain medication as described by Dr. Hogan and Dr. Randolph in their reports, is consistent with the patient becoming dependent to the pain medications that he was prescribed to treat the injuries he suffered in the 08/08/01 and 10/8/02 work incidents, which resulted in his drug seeking behavior following these incidents.
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> See, *February 2, 2011 Report of Joseph Hanaway, M.D.*, page 3, (A96, Relator's Brief).

However, plaintiff's drug-seeking behavior immediately following the occurrences of August 7, 2001 and October 8, 2002 was the same drug-seeking behavior that preceded these incidents. Plaintiff's illegal conduct in seeking benzodiazepines on November 16 and 17, 2002 at a closed pharmacy in a Schnuck's store in St. Louis County resulted in his arrest and conviction and

eventual incarceration for burglary. Plaintiff put the cause, nature and extent of plaintiff's drug-seeking behavior at issue. Plaintiff's experts asserted that plaintiff was at risk for misuse of pain medications due to developing a tolerance for benzodiazepines and taking them more frequently. However, Dr. Stromsdorfer also admitted that plaintiff had shown signs of drug-seeking behavior and drug abuse during the time he treated plaintiff, which was before, during and prior to the occurrence of August 7, 2001. This history and plaintiff's theory that his drug-seeking behavior was caused by the incidents in this case merely demonstrate the relevancy of Dr. Rao's records.

Plaintiff and his experts have asserted that defendant's negligence was the cause of his drug-seeking behavior and abuse of pain medications. However, plaintiff would preclude discovery of any records pertaining to plaintiff's prior drug-seeking behavior and use, misuse and abuse of benzodiazepines. Plaintiff's abuse of benzodiazepines occurred prior to the incidents of August 7, 2001 and October 8, 2002 and continued during and after these incidents. Dr. Stromsdorfer prescribed benzodiazepines before, during and after the incident of August 7, 2001 and Dr. Rao prescribed benzodiazepines before, during and after the incident of October 8, 2002. Plaintiff has used Dr. Stromsdorfer as an expert witness in his case to prove his theories of causation and damages relating to abuse of pain medications, yet has denied discovery of Dr. Rao's records for these same issues.

Dr. Stromsdorfer's records contained information and materials that led to the discovery of admissible evidence, including plaintiff's medical history,

plaintiff's prescription medications, plaintiff's use and abuse of benzodiazepines, Dr. Stromsdorfer's correspondence related to plaintiff's also seeking benzodiazepines from Dr. Katz, Dr. Stromsdorfer's warnings about benzodiazepines and the risk of seizures, Dr. Stromsdorfer trying to wean plaintiff off of benzodiazepines, Dr. Stromsdorfer ordering plaintiff to admit himself to the hospital for detoxification from benzodiazepines and plaintiff seeking another doctor after Dr. Stromsdorfer refused to continue prescribing benzodiazepines.

Just as the records of Dr. Stromsdorfer proved to be a source of relevant and admissible evidence, so also are the records of Dr. Rao. At the time of the October 7, 2002 incident plaintiff was no longer seeing Dr. Stromsdorfer. Plaintiff was seeing Dr. Rao before, during and after the second incident of October 7, 2002. Dr. Rao was treating plaintiff and prescribing benzodiazepines. At a minimum, the medical records of Dr. Rao contain plaintiff's medical history, his history of medications, his physical condition and medical treatment. Given what Dr. Stromsdorfer's records contained, the medical records of Dr. Rao likely contain additional facts regarding plaintiff's history of seizures, use of benzodiazepines and pain medications, drug-seeking behavior, and other information and materials relevant to the disputed issues in this case. Causation of plaintiff's loss of consciousness, plaintiff's seizures, plaintiff's drug-seeking behavior and drug abuse are all disputed matters put at issue by plaintiff and his experts.

III. Plaintiff is seeking to use the medical records of Dr. Stromsdorfer to prove that conditions at work caused plaintiff to have seizures, a seizure condition and recurring seizures. Whether plaintiff seeks to label Dr. Stromsdorfer as a "rebuttal" expert is immaterial. The medical records and treatment of Dr. Rao parallel those of Dr. Stromsdorfer and are likewise discoverable.

To be clear, plaintiff is using Dr. Stromsdorfer as an expert in his own case to opine that the plaintiff's seizure and seizure condition were caused by conditions at the railroad. Dr. Stromsdorfer treated plaintiff before, during and after the first incident of August 7, 2001. Plaintiff obtained a report from Dr. Stromsdorfer in support of his own theories of the case and critical of defendant's theories of the case. On February 4, 2011 plaintiff named Dr. Stephen Stromsdorfer, plaintiff's first known psychiatrist, as an expert witness. Contrary to plaintiff's repeated assertion that Dr. Stromsdorfer is only a rebuttal witness, there is no such limitation on this designation. Plaintiff's designation of Dr. Stromsdorfer was titled: "Plaintiff's Third Supplemental Designation of Expert Witnesses/Rebuttal Witnesses". (A200, Relator's Brief) Nowhere in the designation did plaintiff limit Dr. Stromsdorfer's role as an expert witness to rebuttal only. The use of his medical records and opinions is not limited to rebuttal. Indeed, plaintiff has used Dr. Stromsdorfer to prove points in his case in chief, including that plaintiff's seizures and seizure condition were caused by

various factors related to plaintiff's railroad work and that the work incidents caused plaintiff's drug-seeking behavior and drug abuse.

Again, 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.

IV. Respondent asserts that Relator is precluded from demonstrating to this court why the medical records of Dr. Rao are likely to lead to the discovery of admissible evidence while asserting that physician-patient privilege precludes the discovery of the medical records of Dr. Rao. Privilege was never the basis of Respondent's orders denying discovery of Dr. Rao's records. Respondent solely held that the records of Dr. Rao were irrelevant. The proper standard for discovery is whether the medical records are likely to lead to the discovery of admissible evidence, and Relator is allowed to show how Dr. Rao's medical records are discoverable.

The trial court ruled that the records of Dr. Rao were not discoverable because the records were not relevant, not that the medical records of Dr. Rao were privileged. Relator is allowed to demonstrate to this court the variety of reasons why the records of Dr. Rao are indeed likely to lead to the discovery of admissible evidence in this case. Contrary to respondent's assertions, Relator's discussions of the discoverability of Dr. Rao's medical records are properly before this court.

It should be noted that plaintiff neither asserted nor argued, and Respondent did not rule, that the records of Dr. Rao were protected from discovery as privileged in the hearings before the trial court. Respondent denied defendant discovery of the medical records of Dr. Rao because they were not relevant, not on the basis of any privilege. Yet plaintiff subsequently asserted privilege in response to this writ to justify the trial court's ruling. Plaintiff should be precluded from any such assertion or reliance on privilege before this court. The proper standard for the discoverability of the records of Dr. Rao is whether they are likely to lead to the discovery of admissible evidence.

Plaintiff seeks to further muddy the waters by his discussion of various cases that assertion of various cases on the issues of relevancy and privilege that do not apply to the facts herein. Plaintiff seeks to rely on *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848, 864 (Mo.App. 2000) to prevent the discovery of the medical records of Dr. Rao by asserting that BNSF's efforts to obtain the medical records of Dr. Rao were an untrammeled use of a factual dragnet or fishing expedition. Closer scrutiny shows that *Misischia* does not apply to the facts herein. In *Misischia*, there was a lawsuit brought by an oral surgeon following suspension of medical and dental staff privileges and termination of contracts. The plaintiff attempted to obtain discovery of evidence of purported improper and illegal activities and practices in the form of various hospital, medical and billing records of numerous patients but was limited by the trial court

to an exhibit that consisted of approximately 1,300 pages of medical records contained in six volumes. *Misischia, supra at 865, 866*.

The facts in *Misischia*, supra, did not involve the production of medical records for one individual whose physical condition was put at issue by the injuries pleaded in the petition. Rather it involved voluminous hospital, medical and billing records of numerous individual patients treated by another doctor to determine issues related to the plaintiff's medical practice, staff privileges and contracts. In *Misischia*, the court of appeals held that there was no showing that plaintiff was prejudiced by being limited to discovery of 1,300 pages of medical records and that there was no abuse of discretion.

In the instant case, there is no "factual dragnet or fishing expedition". Discovery is focused specifically on the medical records of Dr. Rao who treated plaintiff before, during and after the second incident of October 8, 2002 and who prescribed benzodiazepines, a drug known to be related to seizures. As set forth in Relator's brief and this reply brief, benzodiazepines are known to be related to seizures, a physical condition that plaintiff claimed was an injury caused by his work at the railroad. Diagnosis, treatment and causation of seizures are core issues in this case, not just peripheral questions.

Likewise, counsel for Respondent has cited *State ex rel. Crowden v. Dandurant*, 970 S.W.2d 340, 342 (Mo. banc 1998) for the proposition that: "*The permissible scope of a subpoena duces tecum for a deposition is determined by*

reference to the petition." While this is true as far as it goes, this court went further in defining the scope of a subpoena duces tecum:

> Crowden argues that this Court should compare the subpoena not only to the petition but also to his interrogatory and deposition answers, which narrow his claims of physical injuries to his head, neck, shoulder, back and arm. **True, pleadings in addition to the petition may limit the issues for trial, and thus the scope of discovery**. *State ex rel. Williams v. Buzard,* 354 Mo. 719, 190 S.W.2d 907, 910 (1945); *Silver v. Westlake,* 248 S.W.2d 628, 634 (Mo.1952); *State ex rel. Pierson v. Griffin,* 838 S.W.2d 490, 492 (Mo.App.1992). **In this case, the amended petition was filed after the interrogatories and deposition, and makes additional allegations that remain in dispute. Crowden's allegations of mental, emotional and physical injuries are very broad: continuing great pain and mental anguish, permanent partial loss of enjoyment of life, and permanent impairment of his "ability to sleep, rest, work, and engage in physical activity." He has thus waived his privilege as to records that reasonably relate to the damages claimed**. *McNutt,* 432 S.W.2d at 602.
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> *State ex rel. Crowden v. Dandurant*, 970 S.W.2d 340, 342 (Mo. banc 1998) [Emphasis added.]

In the underlying case, plaintiff has alleged that his working conditions caused him to lose consciousness and fall on one occasion on August 7, 2001, that this first incident caused plaintiff to have a seizure condition, that the loss of consciousness and fall during the first incident, when combined with working conditions on October 8, 2002, caused plaintiff to have a seizure and now plaintiff has recurring seizures as a result of the two incidents. Clearly, the pleadings and responses to discovery have further expanded the issues for trial regarding the physical condition of seizures, their cause and their relationship to work as well as an element of damages.

Nor can Respondent rely on *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006) for the proposition that discovery is limited by plaintiff's self-limiting declaration that he is not seeking damages for "psychological/ psychiatric injuries". Seizures are physical phenomena with physical causes. In *State ex rel. Dean v. Cunningham*, plaintiff limited the scope of inquiry by limiting damages. In the instant case, plaintiff cannot so limit the scope of inquiry because the medical records relate to more than damages. The records of Dr. Rao are pertinent to the mechanism of causation of the injuries and conditions alleged and put at issue by plaintiff and his experts. Medications and their effect on brain chemistry are relevant. Plaintiff's loss of consciousness, seizures and their cause are at issue in this case. It is disputed whether plaintiff's loss of consciousness on August 7, 2001 was a seizure and whether the loss of consciousness was related to work. It is disputed whether plaintiff's seizure on October 8, 2002 was related to

work. It is disputed whether plaintiff's recurring seizures and seizure condition are related to work or related to his prior brain injury, alcohol abuse and history of use, overuse, abuse and addiction to benzodiazepines. (Benzodiazepines can both cause and prevent seizures by their use, overuse and withdrawal.) All of these are disputed issues in the underlying case.

Any medical records containing medical history, treatment and prescriptions for medications known to be related to seizures and their causes are discoverable as they may lead to the discovery of admissible evidence. The records of Dr. Rao contain such information during the relevant time period before, during and after the second incident of October 8, 2002 and are likely to lead to the discovery of admissible evidence. Accordingly, the records of Dr. Rao are discoverable.

Respondent abused his discretion by precluding discovery of the medical records of Dr. Rao on the basis that they were not relevant. The proper determination was whether the medical records were likely to lead to the discovery of admissible evidence. Whether any information or materials contained in the records of Dr. Rao are admissible at trial is a separate determination to be made if and when such matters are offered in evidence at trial. The test for relevancy is whether the material offered tends to prove or disprove a fact in issue or corroborates other evidence. *Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173, 186 (Mo.App. 1998).

Plaintiff has attempted to bootstrap his self-limiting assertion that he was not seeking "psychological/ psychiatric injuries" with a belated claim of physician-patient privilege and seeks to rely on case law involving the application of physician-patient privilege in workers' compensation cases. In *State ex rel. Maloney v. Allen*, 26 S.W.3d 244 (Mo.App. 2000) the court held that the physician-patient privilege did apply in workers' compensation cases. The court also held that there was no waiver of the physician-patient privilege in a worker's compensation case involving injuries from a head-on collision with a tractor-trailer while at working on December 9, 1996. On May 20, 1997 decedent died of a self-inflicted gun shot wound. Decedent's widow did not seek damages for depression that may have been the result of the traffic accident. Because the death was self-inflicted, it was not covered under worker's compensation. The employer sought to obtain the records and deposition of the psychiatrist treating decedent for depression in support of its defense that the injuries suffered from the head-on collision with the tractor-trailer were self-inflicted. The claimant asserted the physician-patient privilege for the records and testimony of the psychiatrist and a protective order by the Chief Administrative Law Judge prevented production of the records and the testimony of the psychiatrist. **The relator-employer merely asserted that physician-patient privilege did <u>not</u> apply in worker's compensation proceedings**. The relator-employer did **not** assert that the treatment of the psychiatrist was related to any condition for which plaintiff sought

compensation. In affirming the judgment preventing the testimony, the Court of Appeals noted:

> Relator's **only** claim on appeal is that the physician-patient privilege does **not** apply in workers' compensation proceedings. As discussed, the privilege is applicable, although the **filing of a workers' compensation claim waives the privilege to the extent that medical information or testimony relates to the condition for which the employee seeks compensation. Relator does not argue on appeal that the records in Dr. Anderson's possession concerning Mr. Hay are discoverable because they relate to the injuries suffered by Mr. Hay for which Mrs. Hay sought compensation, and we therefore do not reach that issue**. For these reasons, Relator's point is denied, and the judgment is affirmed.
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> *State ex rel. Maloney v. Allen*, 26 S.W.3d 244, 248 (Mo.App. 2000).
>
> [Emphasis added.]

The facts in *Maloney*, *supra*, do **not** match those in the instant case, in which the psychiatric records of Dr. Rao deal with the physical conditions of seizure and seizure disorder which are alleged as injuries in the case. Additionally, the records of the psychiatrists in the instant case are relevant to the **physical** condition of plaintiff, the nature and extent of injuries, use and abuse of drugs related to seizures, addiction to benzodiazepines, addiction to pain medications and the extent of damages sought by plaintiff.

Relator has sought to demonstrate the applicable standard for discovery of the records of Dr. Rao – whether such information and materials are likely to lead to the discovery of admissible evidence. Respondent failed to follow this standard, ruling instead on a standard of relevancy which would determine admissibility of Dr. Rao's medical records at trial. Rather than address the issue of the proper standard, counsel for Respondent has instead asserted privilege, which was never the basis of the Respondent's ruling and which plaintiff waived by his assertion of loss of consciousness and seizure. Counsel for Respondent should be precluded from asserting privilege when it was never asserted, considered or ruled upon in the trial court.

V. Contrary to numerous accusations by counsel for Respondent, Relator has acted in good faith in seeking to obtain the medical records of Dr. Rao as such records are likely to lead to the discovery of admissible evidence on numerous issues in the underlying lawsuit.

Because counsel for Respondent have asserted that defendant has been dilatory or purposely tried to delay trial of this case, Relator must respond to those accusations. Relator has always acted in good faith in seeking discovery of the medical records of Dr. Rao. Relator has not sought to harass plaintiff or to delay the trial of this matter or acted out of any other base motive. Defendant has the right to seek discovery of matters necessary to its defense of this case and has done so in a timely manner. Plaintiff has been less than accommodating in his responses to discovery and has sought to preclude defendant from discovery of

numerous matters. There are incomplete medical records, pharmaceutical records, arrest records, criminal records and other matters that plaintiff has not timely produced and has sought to prevent defendant from discovering. The medical records of Dr. Rao are just part of the matters plaintiff has tried to keep from discovery in this case.

This writ is not the product of defendant's supposed "*creative evolution of medical theories*", but rather is a result of plaintiff's numerous efforts to limit defendant's legitimate inquiry and discovery based on plaintiff's self-serving assertion that he was not seeking "psychological/ psychiatric injuries". Plaintiff has sought to preclude legitimate discovery by his own convoluted assertion that he has somehow limited inquiry into his allegations that conditions at work caused seizures, a physical condition with physical causes and consequences.

Such assertions in Respondent's brief are just a continuation of a series of arguments and attacks on the motives and character of defendant and its witnesses. Respondent would have this court ignore the reasons and basis for the discovery of the medical records of Dr. Rao. Given the testimony of defendant's experts and plaintiff's experts, the role of plaintiff's drug use is highly relevant to the issues of causation and damages, including the cause of plaintiff's loss of consciousness, seizures and seizure condition; the nature and extent of plaintiff's alleged injuries, plaintiff's employability; plaintiff's allegations of disability; plaintiff's allegations of pain and suffering; and plaintiff's allegations of the need for future medical treatment and life expectancy. Dr. Rao's records are likely to lead to the discovery

of admissible evidence relevant to these issues, just as Dr. Stromsdorfer's records have led to relevant evidence.

Plaintiff's drug-seeking behavior and other conduct relating to obtaining benzodiazepines and pain medications are relevant to the issues in this case. Plaintiff has put the cause of his drug-seeking behavior and abuse of medications at issue in this case through the reports of his experts, Dr. Stromsdorfer **and** Dr. Hanaway. Defendant has not sought to embarrass plaintiff by seeking discovery of the records of Dr. Rao. However, counsel for Respondent selectively quoted Relator's brief and attributed the "real" reason for defendant seeking to obtain the records of Dr. Rao as the embarrassment of plaintiff. See, Respondent's Brief, page 58. However, as Relator noted in the paragraph immediately preceding, embarrassment was never presented to the trial court as the basis for plaintiff objecting to the production of Dr. Rao's records and steps could be taken by the trial court to limit any possible embarrassment. See Relator's brief, pages 41-42.

Whether defendant was acting in good faith was never considered by the trial court. Yet counsel for Respondent appears determined to question defendant's motives before this court. Counsel for plaintiff and Respondent state in Respondent's brief: "*We will not engage in 'trash talk' or 'mud slinging' to defend the actions of the Honorable Mark Neill…*". Respondent's Brief, page 57. However, in the same section counsel for Respondent accuse BNSF of numerous attempts to "*flout the Court's orders denying discovery of psychiatric records*". Respondent's Brief, page 57. Counsel for Respondent continued to attack

defendant's expert witnesses, including Dr. Bernard Randolph, Dr. Patrick Hogan, and Dr. Richard Wetzel. See Respondent's Brief, 59-60.

Indeed, there is an accusatory tone throughout Respondent's brief. After plaintiff's attack on the testimony, reports and opinions of plaintiff's medical experts, counsel for Respondent noted: "*The foregoing recitation and description of BNSF's medical experts [sic] numerous reports and creative evolution of medical theories over many years demonstrates that BNSF has attempted to abuse the discovery process*." Respondent's Brief, 48-49. Counsel for Respondent have questioned whether BNSF "*was acting in good faith in pursuit of relevant information*". Respondent's Brief, 50. Counsel for Respondent have accused BNSF of harassment and delay:

> The St. Louis Circuit Court was in a far better position than this Court to understand that BNSF has continued to **harass Patton with unreasonable discovery requests**. The conduct of BNSF has **delayed this case for seven years**, while Patton, a disabled worker, has yet to see his day in court.
>
> Respondent's Brief, 50.

At best, this is a disingenuous attempt to deflect attention from plaintiff's own steadfast refusal to produce discoverable information and materials in the underlying case. Further, delays in the underlying case can also be attributed to plaintiff's own conduct. The significant time plaintiff spent in prison due to his convictions related to his drug abuse and drug-seeking behavior delayed this case.

Counsel for Respondent have gone far afield and in fact have sought to "trash" BNSF for vigorously defending this case and pursuing evidence related to plaintiff's physical condition; the cause of his loss of consciousness; the causes of his seizures and seizure condition; his use, overuse, his abuse of benzodiazepines and pain medications; his drug-seeking behavior; the nature of any disability; the nature and extent of damages and plaintiff's credibility.

Plaintiff has asserted that "*BNSF has continued to harass Patton with unreasonable discovery requests*" and further that "*[t]he conduct of BNSF has delayed this case for seven years*". Respondent's Brief, 50. However, the case has been continued due to plaintiff's failure to meet his ongoing obligation to timely supplement his answers to discovery concerning his physical condition, subsequent injuries, medical treatment and additional medical providers. On more than one occasion, as soon as defendant thought it had completed its investigation and determined who plaintiff's medical providers were and obtained plaintiff's medical and pharmaceutical records, it found more medical providers plaintiff had seen with more complaints of injuries to the same and additional areas of the body and even more pharmacies where plaintiff sought to wrongfully obtain multiple prescriptions and refills of benzodiazepines and pain medications.

Obtaining pertinent information and medical records has not been an "eleventh hour" effort. Defendant has struggled throughout this case to obtain the pertinent medical records. Defendant has had to resort to motions to compel to

obtain court orders to comply with discovery only to be followed with the need for additional motions to compel compliance with prior court orders.

On December 19, 2006 defendant filed Defendant's Motion to Compel Answers to Interrogatories and Responses to Request for Production. (A1-A3, Reply Brief). Defendant sought names of pharmacies where plaintiff had prescriptions filled. Per Order of Judge Donald McCullin, dated January 9, 2007, plaintiff was "ordered to provide authorization and records from 1974 to present from pharmacies and limited to anti-seizure medication." (A4, Reply Brief).

As discovery progressed, it appeared that plaintiff had been less than forthcoming in the supplementation of interrogatories and requests already served on plaintiff, requiring plaintiff to provide information regarding medical providers and medical treatment and authorizations to obtain medical records. On August 3, 2009 defendant filed a Motion to Compel plaintiff to provide authorizations necessary to obtain medical records. (A5-A7, Reply Brief) This motion was heard on August 11, 2009 and taken under submission. Per the September 22, 2009, Order of Judge Edward Sweeney, plaintiff was required to provide authorizations to defendant to allow defendant to obtain pertinent medical records and update its discovery. (A8-A13, Reply Brief).

However, plaintiff still failed to provide the necessary authorizations and defendant filed its Motion to Compel Compliance with Court Order and Motion to Compel Medical Authorizations and Motion for Sanctions on October 23, 2009. (A14-A16, Reply Brief). Defendant's motion was heard on October 30, 2009. The

trial court ordered plaintiff to provide authorizations for and listed ten hospitals, three doctors' offices and various pharmacies. The October 30, 2009 Order also provided: "*Plaintiff shall provide additional authorizations upon discovery of additional providers*." See, October 30, 2009 Order of Judge David Dowd. (A392-A393, Relator's Brief).

However, even the October 30, 2009 Order was not sufficient to assure plaintiff's compliance as there were delays in obtaining authorizations for newly-discovered medical providers. Finally, it became necessary to seek and obtain another court order compelling plaintiff to provide supplemental discovery responses and fully executed medical authorizations, including pharmacy authorizations, "*[w]ithin ten (10) days of the date of any treatment involving his head, left shoulder, neck, seizures and loss of consciousness or for any subsequent injury to aforesaid same parts of the body*". See Order of Judge David Dowd dated October 7, 2010. (A17-A23, Reply Brief).

However, even this was not sufficient. Defendant had filed its Fourth Supplementary Interrogatories Directed to Plaintiff on April 22, 2010, seeking, among other things, additional information regarding incarceration and confinement, additional injuries, additional medical treatment and additional medical providers. After plaintiff initially objected to each interrogatory and provided less than complete information subject to objection, defendant was eventually forced to file a motion to compel plaintiff to answer interrogatories that dealt with imprisonment or incarceration since October 2002 and whether plaintiff

had been involved in any accident since October 2002 which resulted in any injuries for which he sought treatment. The trial court ruled to compel plaintiff to answer those interrogatories:

> Interrogatory #3 seeks the dates Plaintiff was imprisoned or incarcerated since October 2002. At the motion hearing defendant argued this information is relevant to Plaintiff's claim for damages for lost wages. The Court agrees, and Plaintiff is ordered to answer this interrogatory.
>
> …
>
> Interrogatories #16 and #18 seek to discover whether Plaintiff has been in any accidents since October 2002 which resulted in any injuries for which he sought treatment, and if so, the identity of any health care providers use, and whether Plaintiff has been in any accidents since October 10, 2002, which resulted in injuries to Plaintiff's head, neck or left shoulder. This information is relevant to the injuries alleged and is discoverable. Plaintiff is directed to answer these interrogatories.
>
> See, Order Judge Mark Neill dated December 17, 2010. (A24-A27, Reply Brief).

Indeed, there were repeated visits to various emergency rooms with complaints of new injuries from various activities to the same areas of the body involved in the lawsuit. There were also corresponding pharmaceutical records

indicating plaintiff was attempting to obtain inordinate amounts of benzodiazepines and pain medications. This additional medical treatment raised questions as to causation and severity of the injuries alleged in the underlying lawsuit, the nature and extent of the alleged injuries, plaintiff's damages and plaintiff's credibility. Further, these additional reports of injuries were woven into plaintiff's pre-existing pattern of drug-seeking behavior and abuse of benzodiazepines and pain medications. Pharmaceutical records indicated that plaintiff was receiving treatment from Dr. Rao, including prescription medications, during the relevant time period before, during and after the incident of October 8, 2002. Thus, the medical records of Dr. Rao are all the more likely to lead to the discovery of admissible evidence.

Plaintiff would ignore the occasions when he sought continuances of trial for his own purposes, yet complain to this court when his own conduct forced defendant to seek a continuance. In the fall of 2010, defendant was faced with the prospect of going to trial while plaintiff persisted in withholding discoverable information and materials that he had been ordered to produce. Rather than allow plaintiff to play the clock, defendant was forced to seek a continuance to allow for production of information that was being withheld by plaintiff. The court recognized the necessity for the continuance and the motion was granted.

Conclusion

What is telling in Respondent's brief is that counsel for plaintiff do **not** argue that:

- There is nothing in Dr. Rao's records about plaintiff's prior medical or seizure history;
- There is nothing in Dr. Rao's records regarding plaintiff's drug abuse;
- There is nothing in Dr. Rao's records regarding plaintiff's admission for drug withdrawal syndrome the day he apparently had a seizure;
- There is nothing in Dr. Rao's records regarding the cause or causes of plaintiff's seizures.

However, what can be inferred from plaintiff's adamant opposition to the release of Dr. Rao's records is that they must contain relevant information inconsistent with plaintiff's theory of the case.

As set forth herein, it is clear that Respondent abused his discretion in denying Relator the opportunity to discover the medical records of Dr. Rao as they are likely to lead to the discovery of admissible evidence – both on the issue of plaintiff's alleged injuries and of their cause, i.e., the reason for his seizures and/or loss of consciousness.

Accordingly, 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, permit defendant to depose the custodian of records for Dr. Rao, and that plaintiff also produce the records of Dr. Rao to defendant; and such further relief to which this Court believes defendant to be entitled.

Respectfully submitted,

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COUNSEL FOR RELATOR

Dated: October 26, 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 7,749, as determined by Microsoft Word 2003.

4. The brief and appendix filed electronically have been scanned for viruses and are virus free.

5. The CD-ROM served with the brief to the Respondent has been scanned for viruses and is virus free.

6. The brief was prepared using "Times New Roman" font in 13 point size, in Microsoft Word 2003.

/s/ William A. Brasher

Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing Brief and Appendix thereto were served on this 26th day of October, 2011, along with a digital copy on CD-ROM, by hand delivery to the address set forth immediately below:

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The undersigned hereby certifies that the foregoing Brief and Appendix thereto were filed electronically with the Clerk of the Supreme Court on this 26th day of October, 2011 and sent electronically, to the attorneys set forth below:

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