IN THE MISSOURI SUPREME COURT

STATE ex rel. BNSF RAILWAY COMPANY,	)	
	)	
Relator,	)	
	)	
v.	)	No. SC91706
	)	
THE HONORABLE MARK H. NEILL,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF MANDAMUS

CERVANTES & ASSOCIATES
Leonard P. Cervantes, #25043
Phillip A. Cervantes, #44742
Jennifer Suttmoeller, #49910
1007 Olive Street, 4th Floor
St. Louis, MO 63101
(314)621-6558
(314)621-6705 (fax)
leonard_cervantes@sbcglobal.net
philcervantes@sbcglobal.net
jenny_suttmoeller@sbcglobal.net
Attorneys for Respondent

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STATEMENT OF FACTS

Rule 84.04(c) MRCP provides that the Statement of Facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument. The Statement of Facts in Relator BNSF's Brief does not comply with Rule 84.04(c) MRCP in that it contains argument and thus Respondent objects to BNSF's Statement of Facts. Additionally, Respondent is dissatisfied with the accuracy and completeness of the Statement of Facts contained in BNSF's Brief and pursuant to Rule 84.04(f) includes the following Statement of Facts.

Plaintiff Michael Patton ("Plaintiff" or "Patton") worked for the Burlington & Northern Santa Fe Railway Company ("Relator" or "BNSF") as a switchman for approximately 24 years. Patton suffered a skull fracture in 1974, 27 years before the first incident complained of in his lawsuit. On July 15, 2004, Plaintiff filed the instant FELA lawsuit against BNSF for injuries suffered on August 7, 2001. On August 22, 2005, Plaintiff filed a two Count First Amended Petition against BNSF for injuries he sustained at work, including the August 7, 2001 claim and adding a claim for injuries sustained on October 8, 2002. (Respondent's Appendix, A89-A95, First Amended Petition).

COUNT I – AUGUST 7, 2001 INCIDENT

In Count I, Patton alleged that on August 7, 2001, BNSF negligently required Patton to perform heavy manual labor outdoors in extremely dangerous and hazardous heat in temperatures ranging between 90 and 95 degrees. Patton alleges that he called in sick the night before and asked BNSF to be excused but was told that he was required to report to work; and approximately an hour and a half after he reported to work, he lost

consciousness, suffered a heat related syncope and collapsed, striking his head, neck, and left shoulder. Patton alleges that striking his head in the area of the old 1974 injury produced a ***subsequent*** seizure disorder. (Respondent's Appendix, A89-A95, First Amended Petition).

On August 22, 2001, Patton underwent an Open Repair of a Grade 3 AC left shoulder separation performed by Dr. Ronald Hertel.

COUNT II – OCTOBER 8, 2002 INCIDENT

In Count II, Patton alleged that on October 8, 2002, co-employees negligently filled Patton's vehicle with garbage as a prank causing him to become so angry that the newly acquired seizure disorder was triggered causing him to suffer a seizure and collapse to the ground, causing further injury to his head, neck and shoulder, and producing recurring seizures. (Respondent's Appendix, A89-A95, First Amended Petition). Dr. Patti Nemeth, Patton's treating neurologist, testified that the anger and stress of that prank caused Patton to suffer his first reported seizure on October 8, 2002.

Patton has limited his claims for injuries in this lawsuit to his "head, neck, left shoulder separation, seizures and/or fainting spells". (Respondent's Appendix, A89-A95, First Amended Petition).

Patton specifically denied that he was claiming psychological/psychiatric injuries as a result of his work injuries. (Respondent's Appendix, A10, Plaintiff's Answers to Defendant's Interrogatories).

Concerning the first incident, the St. Joseph Hospital emergency room records of August 7, 2001 report that Patton suffered chills and fever the night before. Lab tests

performed at the hospital support that Patton may have been suffering from the flu when he reported to work.

Dr. Sanjay Patwardhan, the emergency room doctor, testified that Patton had a heat-related fainting spell (syncope) due in combination to his underlying illness and exposure to heat. (Respondent's Appendix, A82, Deposition of Dr. Patwardhan, p. 63, lines 19-24).

Q. Okay. ***And, Doctor, given the history that Mr. Patton gave to you, do you have an opinion based on reasonable medical certainty as to whether he suffered a heat-related syncope at work as he described to you?***

A. ***From based on my own medical records, that's what my diagnosis was.***

(Respondent's Appendix, A81, Deposition of Dr. Patwardhan, p. 39, lines 2-7).

* * *

Dr. Patwardhan explained that the laboratory data he obtained indicated that Patton's white cell count was abnormally elevated and that his hemoglobin, hematocrit and creatinine kinase were unusually high, suggesting that Patton was suffering from a viral infection which may have caused him to suffer the fever or chills he reported the night before. (Respondent's Appendix, A80, Deposition of Dr. Patwardhan, p. 26, line 16 – p. 27, line 20).

Dr. Nemeth testified that Patton had the flu on August 7, 2001, suffered a heat-related syncope while working for the railroad and developed a seizure disorder as a result of striking his head. Dr. Nemeth did not, as BNSF contends, state that Patton suffered a seizure on August 7, 2001. BNSF's excerpt of Dr. Nemeth's testimony cited in

its Brief is taken completely out of context. Dr. Nemeth testified that Patton had suffered a syncope rather than a seizure in the August 7, 2001 incident:

Q: Did you on that day reach any conclusion about what had occurred on August 7 of '01?

A: Well, based on what I wrote in my note, I said that I would send him for an urgent EEG and if it was abnormal I would send him for a brain MRI. If it was normal, then – I'm sorry. If he had a seizure disorder I would then follow him; otherwise, I would just see him back as-needed.

So I don't have any record of this but I certainly told him that ***it looks like it was probably syncope and not a seizure*** and to see me back as-needed. I didn't order an MRI at that time.

Q: And what is syncope?

A: Loss of consciousness due to not getting enough blood flow to the brain and that can be from cardiac problems or ***dehydration*** or medical illnesses. (Respondent's Appendix, A85-A86, Deposition of Patti Nemeth, M.D., p. 14, line 13 – p. 15, line 3).

* * *

Q: Do you have an opinion based on reasonable medical certainty as to whether Mr. Patton's loss of consciousness on August 7, 2001 was related to his exposure to heat while he was working outside on that date and recalling also that he had complained of suffering fever and chills the night before?

A: *So the question is whether I felt that his episode of loss of consciousness was related to the temperature outside and his medical condition of having had chills and fever?*

Q: *Yes.*

A: *I – I believe they were related because – Yes.* (Respondent's Appendix, A87, Deposition of Patti Nemeth, p. 84, line 15 – p. 85, line 11).

Moreover, Dr. Nemeth testified that the fall on August 7, 2001 triggered a seizure disorder. She explained that most likely Patton struck his head at the site of the thin temporal bone in his skull caused by the old 1974 injury and that could have pushed on the cortex of his brain causing him to develop a seizure disorder. (Respondent's Appendix, A88, Deposition of Patti Nemeth, p. 95, line 23 – p. 97, line 25).

Dr. Nemeth opined that the prank played by co-employees 14 months later on October 8, 2002 caused Patton to suffer a seizure on that day. (Respondent's Appendix, A88, Deposition of Patti Nemeth, p. 95, lines 7-14).

Patton had reported back to work after the first incident. However, after the second incident, Dr. Nemeth issued a report to BNSF on February 10, 2004, advising that Patton could no longer return to work because of his seizure disorder. (Respondent's Appendix, A181-A182, Deposition of Patti Nemeth, p. 103 -107). Dr. Hertel testified that Patton suffered a Class III AC separation of his left shoulder which required surgery and a neck injury as a result of the work incident of August 7, 2001. Dr. Hertel testified that Patton could not return to his old job at the railroad on the basis of his physical injuries. (Respondent's Appendix, A185, Deposition of Ronald Hertel, p. 33, lines 10-

21). None of Patton's treating doctors have suggested that Patton had a seizure on August 7, 2001 due to taking or withdrawing from anti-anxiety medications.

BNSF'S INTRODUCTION OF PATTON'S PSYCHOLOGICAL TREATMENT INTO THE CASE.

BNSF introduced Patton's psychological treatment, including use of medications, with Dr. Steve Stromsdorfer, a treating psychiatrist, through BNSF's hired defense experts Dr. Patrick Hogan [Dr. Hogan issued seven reports with varying opinions beginning December 2006 with the last report dated April 1, 2011], Dr. Bernard Randolph [Dr. Randolph testified in his first deposition of September 30, 2009, that he did not feel qualified to offer opinions concerning the cause of Patton's collapse but believed it to be a heat-related syncope; He then issued additional reports and gave a subsequent deposition claiming -- despite admitting that he was unqualified to express an opinion --- that he now had an opinion that Patton had suffered a seizure in the incident of August 7, 2001 due to withdrawal from certain anti-anxiety medicines based on his reading of the record from Dr. Steve Stromsdorfer] and Dr. Richard Wetzel [Dr. Wetzel is a psychologist who testified that ethically, he could not express an opinion about Patton's condition because he had not examined him. Despite that, he offered opinions based on Dr. Stromsdorfer's records.]

BNSF's experts opined that shortly before the August 7, 2001 incident Patton had reduced the use of anti-anxiety medications prescribed by Dr. Stromsdorfer and that a reduction in Patton's anti-anxiety medicines caused him to suffer a seizure on August 7, 2001; the implication of these opinions being that BNSF's working conditions did not

cause a heat-related fainting spell but rather that Patton suffered a spontaneous seizure due to a sudden reduction in his anti-anxiety medicines.

More than five years after the filing of this lawsuit, Dr. Hogan issued a third report dated October 23, 2009 expressing, for the first time, the theory that Patton had a seizure on August 7, 2001 due to abruptly stopping his anti-anxiety medications. Upon receipt of the report, Plaintiff's counsel contacted Dr. Stromsdorfer and confirmed that no such stoppage occurred. Thereafter, Plaintiff endorsed Dr. Stromsdorfer as a ***rebuttal expert*** witness. In the event that BNSF were permitted to introduce evidence from its experts that Patton suffered a seizure on August 7, 2001 because he stopped taking his anti-anxiety medications, Patton planned to introduce the ***rebuttal*** testimony of Dr. Stromsdorfer that no such stoppage occurred and that Dr. Stromsdorfer's testimony undermined the very foundation upon which the defense experts' opinions were premised. Dr. Stromsdorfer established that BNSF's experts assumed a fact which was untrue and which rendered their opinions inadmissible. He explained that, in fact, Patton continued to take medicines which possessed ***anti-seizure properties*** at the time that he lost consciousness.

THE TRIAL COURT'S NUMEROUS ORDERS REGARDING DISCOVERY OF PSYCHOLOGICAL/PSYCHIATRIC RECORDS

The trial court has issued numerous orders regarding discovery specifically medical authorizations, subpoenas for medical records and independent medical examinations sought by BNSF regarding Plaintiff's psychological/psychiatric condition including alcohol/drug treatment.

In an Order dated September 22, 2009 ruling on BNSF's motion to compel 66 medical authorizations, Judge Edward Sweeney found that the Plaintiff had already provided the great majority of the authorizations sought by BNSF and that the largest part of the authorizations sought were excessive and unnecessary. The Court also found that Plaintiff was not objecting to executing medical authorizations for the Defendant to update medical and pharmacy records for healthcare providers who provided treatment relevant to the injuries alleged – that is, head, neck, a left shoulder separation, seizures and fainting spells and ordered Plaintiff to provide medical authorizations for relevant treatment. (Respondent's Appendix, A96-A101, Order dated September 22, 2009).

In the Court's Order issued by Judge Sweeney dated June 30, 2010 granting Plaintiff's Motion to Quash subpoenas issued by BNSF to Choices Treatment Program of St. Louis County and St. Anthony's Medical Center/Hyland Behavior Health Services seeking alcohol and drug treatment records, the Court found that the records of Plaintiff's substance abuse treatment "were not reasonably related to the injuries for which Plaintiff seeks to recover". The Court also found:

> When considered in this context, it is apparent that defendant's attempt now late in this lawsuit's history, to interject further the issue of Plaintiff's treatment at the Hyland and Choices Programs is meant to annoy, harass, embarrass, oppress and unduly burden Plaintiff, and is not reasonably calculated to the discovery of admissible evidence. Defendant has failed to show that the records sought are reasonably related to the injuries of which Plaintiff complains in this lawsuit, and has failed to show that there is any connection beyond mere speculation between

Plaintiff's treatment for substance abuse and his life expectancy and his employability. This court further finds that Defendant has failed to establish any connection between the conditions for which Plaintiff sought treatment in the two programs and the injuries of which he complains in this lawsuit. Although Defendant made the argument that the treatment provided in these two programs should be discoverable because it could be reasonably related to the specific issues of Plaintiff's damages because such treatment might bear on Plaintiff's employability and life expectancy, Defendant has failed to show that there is a reasonable likelihood that such treatment would have a significant impact on Plaintiff's employability or life expectancy. Therefore, Defendant's suggestion that the records of these two treatment programs should be discoverable is not grounded in a sufficient basis to overcome the rule, that a defendant is entitled to discover medical records only of treatment for injuries related to those for which Plaintiff is seeking to recover. (Respondent's Appendix, A102 – A107, Order dated June 30, 2010).

In the Court's Order issued by Judge Mark Neill dated July 9, 2010, denying BNSF's Motion for Order regarding Independent Medical Examination wherein BNSF sought to compel Plaintiff to see a licensed psychological, Dr. Richard D. Wetzel, the Court found that "***Plaintiff has not alleged any mental, psychological, or psychiatric injury in the present lawsuit.***" BNSF argued that a psychological exam was necessary because Plaintiff's injuries were caused by a psychological disorder, namely addiction to prescription drugs. "The Court believes that Defendant's argument regarding potential

substance abuse puts Plaintiff's conduct (drug use), rather than his mental condition (addiction), ' in controversy'. Defendant, therefore, has not established that Plaintiff's mental condition was 'in controversy' such that an examination by a psychologist would be properly ordered under Rule 60.01." (Respondent's Appendix, A108-A111, Order dated July 9, 2010).

In the Court's Order issued by Judge Mark Neill dated December 17, 2010, which ruled on BNSF's motion to compel answers to various interrogatories, the trial court denied BNSF's interrogatory seeking the identity of any psychiatrist seen by Plaintiff and ruled "***Plaintiff is not seeking damages for any psychiatric or psychological injuries or costs related thereto, if any.***" The trial court also denied BNSF's interrogatory seeking the identity of any healthcare provider, counselor, psychologist or other professional Plaintiff has ever talked with about the incident or injuries involved in this lawsuit. BNSF's interrogatory was not limited to the injuries claimed by Plaintiff (head, neck, left shoulder, seizures and/or fainting spells). The court ruled "***Plaintiff is not seeking damages for any mental or psychological injuries. To the extent this interrogatory seeks information from or about any drug or alcohol treatment Plaintiff may have participated in, the Court fails to see that it is either relevant or likely to lead to the discovery of admissible evidence.***" (Respondent's Appendix, A112 – A115, Order dated December 17, 2010).

BNSF'S ATTEMPTS TO OBTAIN PATTON'S PSYCHIATRIC RECORDS MAINTAINED BY DR. RAO – THE ISSUE BEFORE THIS COURT

On April 30, 2002, ***eight months after the first incident***, Patton began treatment with Dr. Shankaro Rao, a psychiatrist. Patton ceased treating with Dr. Rao on February 20, 2003.

On February 21, 2011, BNSF served on Dr. Rao's office, Psych Care Consultants, a subpoena and notice of deposition by subpoena duces tecum. In the subpoena, BNSF requested the production of:

> "***Any and all medical records, reports & other medical documents & billings in your possession which relate to treatment rendered to Michael T. Patton***".

On February 22, 2011, Patton filed a Motion for Protective Order and to Quash Subpoena Duces Tecum. (Relator's Appendix, A113-A124). The motion was argued on February 23, 2011 – BNSF argued that the medical history taken by Dr. Rao might contain information about Plaintiff's physical condition that would be relevant to this case and admissible at trial. The motion was taken under submission by the trial court.

ORDER OF 2/25/11

In the Court's Order dated February 25, 2011, the trial court granted Plaintiff's Motion for Protective Order and quashed the subpoena duces tecum and deposition notice issued by BNSF to Dr. Rao. The Court found:

> The parties have previously presented this Court with discovery disputes in this area at least twice. ***The Court has previously ruled that Plaintiff's mental condition is not "in controversy" purposes of an examination by a psychologist***

under rule 60.01, see Order of July 9, 2010, and not relevant to the damages claimed by Plaintiff or to any affirmative defenses pleaded, in part because Plaintiff is not making any claim for psychological injuries, see Order of December 17, 2010, regarding interrogatories directed to Plaintiff. Defendant argues it should nevertheless be allowed to obtain the records held by Dr. Rao because the medical history taken by the psychiatrist might contain information about Plaintiff's physical condition at the time of his psychiatric treatment that would be relevant to this case and admissible at trial.

This strikes the Court as an attempt to obtain through the back door psychiatric records Defendant was denied at the front door. The Court reiterates that Plaintiff's mental/psychological condition is not relevant to the damages claimed by Plaintiff. (Respondent's Appendix, A116-A118, Order dated February 25, 2011).

ORDER OF 3/16/11

In the Court's Order of March 16, 2011, the trial court denied BNSF's Motion to Reconsider its Order of February 25, 2011 holding:

In the present motion to reconsider Defendant charges counsel for Plaintiff with falsely representing to the Court that the psychiatric medical records of Dr. Rao are not relevant to this lawsuit, while at the same time Plaintiff was soliciting the opinion of Plaintiff's other psychiatrist, Dr. Stromsdorfer, as to the cause of Plaintiff's loss of consciousness on August 7, 2001. Defendant vigorously argues Plaintiff is seeking "to have his cake and eat it too" by using the medical records

of one treating psychiatrist for his own purposes while denying to Defendant discovery of medical records of his other psychiatrist. Defendant argues Plaintiff should be sanctioned for taking this inconsistent position.

This Court sees no deception on the part of counsel for Plaintiff. It appears that even though Plaintiff's medical records kept by Dr. Stromsdorfer were destroyed after several years had elapsed per standard protocol, Defendant has nevertheless obtained the doctor's office notes. . . . Counsel for Plaintiff states at the motion hearing that the psychiatric records are not relevant to Plaintiff's injuries and that he obtained Dr. Stromsdorfer's report for use only in rebuttal if necessary. ***This is not inconsistent with Plaintiff's earlier representations to the Court. . . . The Court is not persuaded that counsel for Plaintiff misled the Court in arguing his motion to quash, or that the Court erred in granting Plaintiff's motion. Defendant has already obtained all of Plaintiff's medical records related to the injuries alleged in the petition, which are physical, not psychiatric. Plaintiff's psychiatric records held by Dr. Rao are not relevant to those injuries and are not discoverable.*** (Respondent's Appendix, A119-A122, Order dated March 16, 2011).

Respondent agrees with the history and procedure of the Petition for Writ of Mandamus discussed on page 10 and 11 of Relator's Brief and therefore does not repeat that discussion.

POINTS RELIED ON

I.

RESPONDENT DID NOT ABUSE HIS DISCRETION IN PRECLUDING BNSF FROM DISCOVERING THE MEDICAL RECORDS OF DR. RAO BECAUSE PATTON HAS CONSISTENTLY MAINTAINED THAT HE IS MAKING NO CLAIM FOR PSYCHIATRIC INJURIES. AT THE MOTION HEARING, BNSF ARGUED THAT IT SHOULD NEVERTHELESS BE ALLOWED TO OBTAIN THE RECORDS HELD BY DR. RAO BECAUSE THE MEDICAL HISTORY TAKEN BY THE PSYCHIATRIST MIGHT CONTAIN INFORMATION ABOUT PATTON'S PHYSICAL CONDITION AT THE TIME OF HIS PSYCHIATRIC TREATMENT THAT WOULD BE RELEVANT TO THIS CASE AND ADMISSIBLE AT TRIAL.

Sheedy v. Missouri Highways & Transportation Comm'n, 180 S.W.3d 66(Mo.App.S.D. 2005)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66(Mo.App.S.D. 1997)

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

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

II.

RESPONDENT DID NOT ABUSE HIS DISCRETION IN PRECLUDING BNSF FROM DISCOVERING THE MEDICAL RECORDS OF DR. RAO BECAUSE BNSF IS NOT ENTITLED TO THE RECORDS OF DR. RAO FOR THE REASON THAT (1) PATTON HAS MADE NO CLAIM FOR PSYCHOLOGICAL OR

PSYCHIATRIC INJURIES, AND (2) DR. RAO'S RECORDS ARE PRIVILEGED BECAUSE PATTON'S CLAIM FOR PHYSICAL INJURIES DOES NOT WAIVE THE PRIVILEGE.

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

State ex rel. Maloney v. Allen, 26 S.W.3d 244(Mo.App.W.D. 2000)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66(Mo.App.S.D. 1997)

Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848(Mo.App.E.D. 2000)

III.

RESPONDENT DID NOT ABUSE HIS DISCRETION IN PRECLUDING BNSF FROM DISCOVERING THE MEDICAL RECORDS OF DR. RAO BECAUSE BNSF IS NOT ENTITLED TO THE RECORDS OF DR. RAO BECAUSE (1) PATTON HAS MADE NO CLAIM FOR PSYCHOLOGICAL OR PSYCHIATRIC INJURIES, AND (2) DR. RAO'S RECORDS ARE PRIVILEGED BECAUSE PATTON'S CLAIM FOR PHYSICAL INJURIES DOES NOT WAIVE THE PRIVILEGE. PATTON DOES NOT ATTEMPT TO ARGUE THE MERITS OF THE UNDERLYING CASE ON BEHALF OF RESPONDENT.

Sheedy v. Missouri Highways & Transportation Comm'n, 180 S.W.3d 66(Mo.App.S.D. 2005)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66(Mo.App.S.D. 1997)

Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848(Mo.App.E.D. 2000)

ARGUMENT

I.

RESPONDENT DID NOT ABUSE HIS DISCRETION IN PRECLUDING BNSF FROM DISCOVERING THE MEDICAL RECORDS OF DR. RAO BECAUSE PATTON HAS CONSISTENTLY MAINTAINED THAT HE IS MAKING NO CLAIM FOR PSYCHIATRIC INJURIES. AT THE MOTION HEARING, BNSF ARGUED THAT IT SHOULD NEVERTHELESS BE ALLOWED TO OBTAIN THE RECORDS HELD BY DR. RAO BECAUSE THE MEDICAL HISTORY TAKEN BY THE PSYCHIATRIST MIGHT CONTAIN INFORMATION ABOUT PATTON'S PHYSICAL CONDITION AT THE TIME OF HIS PSYCHIATRIC TREATMENT THAT WOULD BE RELEVANT TO THIS CASE AND ADMISSIBLE AT TRIAL.

STANDARD OF REVIEW

When a relator seeks a writ of mandamus, the Court of Appeals reviews the circuit court's failure to act under an abuse of discretion standard. State ex rel. City of Blue Springs, Missouri v. Schieber, 343 S.W.3d 686 (Mo.App. W.D. 2011).

A trial court is allowed broad discretion in the control and management of discovery. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997). It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. Id. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. citing State ex rel.

Metro Transp. Servs., Inc. v. Meyers, 800 S.W.2d 474, 476(Mo.App. 1990). If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864(Mo.App.E.D. 2000). [Discovery of medical records]. The evidence requested must appear relevant and material, or tend to lead to the discovery of admissible evidence. The discovery provisions were not designed or intended for untrammeled use of a factual dragnet or fishing expedition. It is the affirmative duty and obligation of the trial judge to prevent subversion of pre-trial discovery into a "war of paper" for whatever reason. Misischia at 864.

ARGUMENT

This FELA case involves two work related incidents, the first of which occurred nearly eleven (11) years ago on August 7, 2001 and the second which occurred nearly ten (10) years ago on October 8, 2002. Suit was filed on July 15, 2004 more than seven (7) years ago. This case has been continued numerous times, most recently by BNSF. Extensive discovery has been conducted and on the eleventh hour BNSF asked for records of Dr. Rao. On February 21, 2011, BNSF served on Dr. Rao's office, Psych Care Consultants, a subpoena and notice of deposition by subpoena duces tecum. In the subpoena, BNSF requested the production of:

> "***Any and all medical records, reports & other medical documents & billings in your possession which relate to treatment rendered to Michael T. Patton***".
>
> (Relator's Appendix, A146-149).

Judge Mark Neill properly quashed the subpoena duces tecum for Dr. Rao's records on February 25, 2011.

ORDER OF 2/25/11

In Respondent's Order of February 25, 2011, the trial court granted Patton's Motion for Protective Order and quashed BNSF's subpoena duces tecum and deposition notice to Dr. Rao finding:

> The parties have previously presented this Court with discovery disputes in this area at least twice. ***The Court has previously ruled that Plaintiff's mental condition is not "in controversy" purposes of an examination by a psychologist under rule 60.01, see Order of July 9, 2010, and not relevant to the damages claimed by Plaintiff or to any affirmative defenses pleaded, in part because Plaintiff is not making any claim for psychological injuries, see Order of December 17, 2010, regarding interrogatories directed to Plaintiff.*** Defendant argues it should nevertheless be allowed to obtain the records held by Dr. Rao because the medical history taken by the psychiatrist might contain information about Plaintiff's physical condition at the time of his psychiatric treatment that would be relevant to this case and admissible at trial.
>
> ***This strikes the Court as an attempt to obtain through the back door psychiatric records Defendant was denied at the front door. The Court reiterates that Plaintiff's mental/psychological condition is not relevant to the damages claimed by Plaintiff.*** (Respondent's Appendix, A116-A118, Order dated February 25, 2011).

BNSF argued to Respondent in the trial court that it sought information about Plaintiff's physical condition at the time of his psychiatric treatment. It is clear from Judge Neill's Order that BNSF sought Dr. Rao's records because "the medical history taken by the psychiatrist might contain information about Plaintiff's ***physical condition at the time of his psychiatric treatment*** that would be relevant to this case and admissible at trial." (Respondent's Appendix, A117).

Now, BNSF seeks, for the first time, before the Supreme Court to expand the reasons for obtaining Dr. Rao's records to include "***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***". See Points Relied On, Points I & II, page 15-16, Relator's Brief. BNSF is bound by the theory that it argued to the trial court. Sheedy v. Missouri Highways & Transportation Comm'n, 180 S.W.3d 66, 70(Mo.App.S.D. 2005). An issue not presented to the trial court is not preserved for appellate review. Thus, a party is bound by the position he or she took in the trial court and the appellate court can review the case only upon those theories. On review, an appellate court will not convict a trial court of error based on an issue that was not put before it to decide. Sheedy at 70-71. Review for abuse of discretion must be based upon "the logic of the circumstances ***then before the court***". State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997). The issues raised by BNSF before the Supreme Court were not "***then before the court***" when presented at the trial level to Respondent.

Patton has continuously maintained that he is making no claim for psychological/psychiatric injuries in this case. (Respondent's Appendix, A89-A95, First Amended Petition; A10, Answers to Defendant's Interrogatories).

Despite this, BNSF has attempted to make Patton's psychiatric care relevant by having its hired experts, Dr. Bernard Randolph, Dr. Patrick Hogan and Dr. Richard D. Wetzel offer the theory after reviewing the records of Patton's psychiatrist, Dr. Steve Stromsdorfer that Patton abruptly stopped taking his anti-anxiety medications which caused him to suffer a seizure on August 7, 2001. BNSF obtained Dr. Stromsdorfer's records from a prior lawsuit, involving a different incident, filed by Patton in 2001. Following receipt of BNSF's expert's opinions in this case, Patton's counsel contacted Dr. Stromsdorfer who explained and testified that BNSF's experts misinterpreted his records – Patton did not abruptly stop taking his anti-anxiety medications before August 7, 2001 and he did not have a seizure on August 7, 2001.

BNSF contends that Respondent abused his discretion in denying it access to Dr. Rao's records because Patton produced the records of a "parallel" psychiatrist, Dr. Stromsdorfer and then named Dr. Stromsdorfer as an expert. First, Patton did not produce the records of Dr. Stromsdorfer; instead, BNSF obtained them from Patton's prior 2001 lawsuit and had provided them to their experts to review. Second, Plaintiff only contacted Dr. Stromsdorfer and obtained a report from Dr. Stromsdorfer ***after*** receiving BNSF's experts opinions misinterpreting Dr. Stromsdorfer's records.

The following shows how BNSF's defenses have evolved in this case which required Patton to name Dr. Stromsdorfer as a rebuttal expert witness in response to the opinions of Dr. Hogan, Dr. Randolph and Dr. Wetzel.

DR. PATRICK HOGAN

Dr. Patrick Hogan, a neurologist, has in a series of reports and depositions offered various theories that Patton suffered a seizure unrelated to work in the accident of August 7, 2001.

THEORY NO. 1 – SEIZURE DUE TO 27 YEAR OLD CAR CRASH

Dr. Hogan wrote a report and gave a deposition to the effect that Patton suffered a skull fracture and a serious head injury in a 1974 car crash which made Patton at risk to later suffer seizures. Despite never having had a seizure or ever being prescribed anti-seizure medication before the BNSF incident of August 7, 2001, Dr. Hogan expressed the opinion in his ***first*** report that Patton suffered a seizure due to the injuries suffered 27 years earlier in the automobile collision.

> I believe that the brain injury that occurred in the left temporal region in 1974 which required dural suturing and the removal of the injured brain in the temporal lobe is the cause of his convulsive disorder. Although it is unusual to have seizures secondary to such a wound three decades after the incident, it is certainly possible and has been reported. (Respondent's Appendix, A123-A128, Hogan Report dated December 12, 2006).

In his ***second*** report written nearly three years later on September 23, 2009, Dr. Hogan stated:

As I have stated in the past, I do not feel the records of Dr. Nemeth and Dr. Riew are correct in that this man had a heat-related incident. I believe that he had a convulsive seizure at the time of 8/7/01 and has had seven to eight convulsive seizures since that time. I believe that this man has a convulsive disorder secondary to his left temporal malacia and cerebral laceration that he suffered in 1974. (Respondent's Appendix, A129, Hogan Report dated September 23, 2009).

THEORY NO. 2 – SEIZURE DUE TO ABRUPT STOPPAGE OF ANTI-DEPRESSANTS

In his *third* report dated October 23, 2009, Dr. Hogan for the first time addressed Plaintiff's psychological conditions and commented on Dr. Stromsdorfer's records that had been provided for his review by defense counsel, and stated, among other things:

On 10/23/09, I had the opportunity to review records sent to this office on 10/22/09. They include records of Dr. Stromsdorfer and Dr. Katz. The records of Dr. Stromsdorfer indicate that Mr. Patton was addicted to Xanax and Valium and was receiving the prescription for Valium from Dr. Stromsdorfer and Xanax from Dr. Katz. . . .

On 11/20/01, Dr. Stromsdorfer indicates that he is afraid that if the medication is discontinued abruptly, he might have seizures and that when he continues to seek care from him, he will be seen in the office and possibly undergo detoxification. (Respondent's Appendix, A130-A131, Hogan Report dated October 23, 2009).

It should be noted that on October 22, 2009, BNSF did not have any authorization to obtain Plaintiff's psychological records from Dr. Stromsdorfer.

In his second deposition taken on January 5, 2011, Dr. Hogan testified about the additional reports he generated after his first deposition on September 28, 2009 and testified that he believed Patton suffered a seizure in the incident of August 7, 2001 due to withdrawal from certain anti-anxiety medicines based on his reading of the records from Dr. Steve Stromsdorfer.

Q: (By Mr. Cervantes) The last sentence in Paragraph 4, you discuss: I believe the patient has had seizures for a considerable period of time and the reduction of his Valium and Xanax medication probably contributed to the seizure that he had on August 7, '01 and possibly 10/08/02, correct?

A.: Yes. (Respondent's Appendix, A142, Deposition of Dr. Patrick Hogan taken on 1/5/11, p. 64, lines 19-25).

* * *

Q: Now, if we look at your October 23, 2009 report further, what does the second paragraph of that report indicate?

A: ***Indicates that he's afraid if the medication is discontinued abruptly, he might have a seizure.*** And he wants him to undergo detoxification. Informed him of misuse of medication will not be tolerated and require no further controlled substance be prescribed. He was again cautioned for seizures.

Q: ***And you're referring to Dr. Stromsdorfer?***

A: *Yes*. . . .

Q: Do you have any evidence that Dr. Stromsdorfer abruptly discontinued the medication that he was prescribing to Mr. Patton?

A: I don't know.

Q: Do you have any evidence that Mr. Patton abruptly discontinued the medication that was being prescribed by Dr. Stromsdorfer?

A: I believe in the records, it indicated he was trying to wean himself off the medication.

Q: What medical records are you referring to?

A: I think Stromsdorfer's records indicated he wanted him to decrease and discontinue the medication.

Q: It's your testimony that Dr. Stromsdorfer was discontinuing the medication that he was prescribing to Mr. Patton?

A: It's my testimony that Dr. Stromsdorfer felt that this man was abusing medication, Xanax and Valium, and he wanted to taper him down on the medication and cautioned against him having seizures.

Q: Well, here's my question to you: Do you have any evidence that Dr. Stromsdorfer abruptly discontinued the medication that he was prescribing to Mr. Patton?

A: No.

Q: Do you have any evidence that Mr. Patton abruptly discontinued the medication that he was being prescribed by Dr. Stromsdorfer?

A: No.

Q: Do you have any evidence of there being a sudden stoppage in Mr. Patton taking his medications that were being prescribed by Dr. Stromsdorfer?

A: No. (Respondent's Appendix, A140-A141, Deposition of Patrick Hogan taken 1/5/11, p. 55, line 19 – p. 57, line 15).

THEORY NO. 3 – SEIZURE DUE TO DRUG AND ALCOHOL ABUSE

On November 6, 2009, Dr. Hogan revised his theory and attributed the BNSF incident of August 7, 2001 to a convulsive disorder due to Patton's drug seeking behavior or substance abuse. Dr. Hogan wrote in his ***fourth*** report that he had reviewed numerous records of Patton, stating:

> Once again, these records strongly suggest drug seeking behavior and go along with the rest of his records. (Respondent's Appendix, A132, Hogan Report dated November 6, 2009).

In his ***fifth*** report issued on December 21, 2009, Dr. Hogan stated:

> ***Also there are records that indicate this patient has had substance abuse (drugs and alcohol) for numerous years and could have contributed to an individual who has severe brain damage from an auto accident in the 1970s . . . All of these things contribute to this person's convulsive disorder which he had prior to the incident of falling in the rail yard of 8/7/01.*** (Respondent's Appendix, A133, Hogan Report dated December 21, 2009).

In his ***sixth*** report of August 27, 2010, Dr. Hogan opined:

He also, in my opinion, has had seizures shortly after the incident in 1974 where his left temporal skull was crushed in an automobile accident. . . . ***In my opinion, this patient had an epileptic seizure on 8/7/01 and fell to the ground and had a separation of his left shoulder either from the fall due to the seizure or from the clonic activity of the seizure . . . He had obvious drug seeking behavior*** . . . I think more than likely that Mr. Patton's engagement in drug seeking treatment (sic) indicated that he has an addiction to prescription medication. (Respondent's Appendix, A134-A135, Hogan Report dated August 27, 2010).

The St. Joseph Hospital emergency room records from August 7, 2001 reveal no mention of suspicion of drug or alcohol use and Dr. Patwardhan testified that there were no lab results revealing the presence of drugs or alcohol. Moreover, numerous witnesses gave depositions concerning the first incident and no one testified that Patton was under the influence of drugs or alcohol.

Undaunted, after Dr. Stromsdorfer's rebuttal testimony, Dr. Hogan issued a ***seventh*** report on April 1, 2011 again changing his theory and stating, among other things, "Also the patient most probably had seizures for many years and either did not recognize or intentionally denied the presence of a seizure disorder." (Relator's Appendix, A424-A425). This opinion was offered despite the fact that not a single medical record predating the first incident indicates that Patton suffered any seizure or seizure activity.

DR. BERNARD RANDOLPH

Dr. Bernard Randolph, a physical medicine doctor, testified in his first deposition of September 30, 2009, that he did not feel qualified to offer opinions concerning the cause of Patton's collapse but believed it to be a heat-related syncope.

Q: *Are you going to be offering any opinions in this case with respect to the cause of Mr. Patton losing consciousness on August 7th, 2001?*

A: *Not within a reasonable degree of medical certainty, no, I'm not.* (Respondent's Appendix, A147, Deposition of Bernard Randolph taken 9/30/09, p. 86, lines 11-15).

* * *

Q: *. . . Do you intend on offering any opinions in the future as to the cause of Mr. Patton's loss of consciousness on August 7th, 2001?*

A: *No. I don't think it would be appropriate for me to offer opinions as an expert in that area. . . . That's really kind of outside the scope of my expertise.* (Respondent's Appendix, A147, Deposition of Bernard Randolph taken 9/30/09, p. 87, lines 5-13).

Dr. Randolph offered opinions only on Patton's physical injuries and expressed that he believed that Patton was capable of returning to work on the basis of his physical injuries but could not return to work for the railroad because of his seizure disorder.

Dr. Randolph then issued additional reports and gave a subsequent deposition claiming -- despite admitting that he was unqualified to express an opinion --- that he now had an opinion that Patton had suffered a seizure in the incident of August 7, 2001

due to withdrawal from certain anti-anxiety medicines based on his reading of the record from Dr. Steve Stromsdorfer.

Q: Doctor, let me ask you this: Are you now able – are you – as we sit here today, are you now able to state, to a reasonable degree of medical certainty, the cause of Mr. Patton's loss of consciousness on August 7th, 2001?

A: I think I already stated that based on my review of the record, it was likely a seizure disorder. (Respondent's Appendix, A151, Deposition of Bernard Randolph taken 1/10/11, p. 53, lines 1-10).

* * *

Q: . . . *Are you now able to say to a reasonable degree of medical certainty what the cause was of Mr. Patton's loss of consciousness on August 7th, 2001?*

A: I think that I've already answered that question. I think that I already said that taking everything into consideration at this point, ***I think the loss of consciousness was due to a seizure as opposed to simply dehydration***. I think I said that earlier. . . .

Q: *Why are you now able to offer an opinion regarding the cause of Mr. Patton's loss of consciousness on August 7th, 2001?*

A: *Because I am more aware currently of his pattern of drug use prior to the incident, August 7th, 2001, and how that potentially factored or how that factored into potentially the development of a syncopal episode. . . .*

(Respondent's Appendix, A152, Deposition of Bernard Randolph taken on 1/10/11, p. 54, line 6 – p. 55, line 5).

* * *

Q: Do you have any evidence of there being a sudden stoppage of Mr. Patton taking his medications that were being prescribed by Dr. Stromsdorfer?

A: I don't know that I have any evidence about specific use patterns at the time of the incident in August, 2001.

Q: Okay.

A: Specific. I mean, ***I don't know specifically that he suddenly stopped. But certainly there was erratic use of these medications and there may have been fluctuations in blood levels that certainly could have contributed to a loss of consciousness and/or a seizure.***

Q: You have no specific evidence of there being a sudden stoppage in Mr. Patton taking his medications that were being prescribed by Dr. Stromsdorfer, correct?

A: As I sit here today, I don't recall specifically but, again, there's a lot of records in this case and there may -- there may be some indication in the record that he -- Dr. Stromsdorfer, that is, was concerned about his erratic use or non-compliant use of the medication. I know that at one point he had indicated that he wanted to perhaps put him in the hospital for a controlled detox, so as to avoid a potential seizure. (Respondent's

Appendix, A153, Deposition of Bernard Randolph, p. 90, line 5 – p. 91, line 7).

DR. RICHARD WETZEL

Defendant's expert, Dr. Richard Wetzel is a psychologist who practices clinical psychology and neuropsychology. Dr. Wetzel did not examine Patton but reviewed his medical records. Dr. Wetzel testified that he could not testify as to what Patton suffers from, but could only base his opinions on medical records:

> ***Ethically, psychologists cannot talk about what people have who they have not examined.*** What I can talk about is what the records indicate or suggest to me, without saying that Mr. Patton definitely has these -- I would say that's what the records show, is that he has these problems. But I'm not going to say more than what the records show or suggest. (Respondent's Appendix, A156, Deposition of Richard Wetzel, p. 8, line 23 – p. 9, line 5).

Based on Dr. Stromsdorfer's records, Dr. Wetzel opined that Patton suffered a seizure on August 7, 2001 because he suddenly stopped taking his anti-anxiety medications.

> Q: All right. It sounds to me like, as we sit here today, the only thing they've asked you to do is review the materials and give opinions as to whether he suffered from substance abuse problems in the past and whether he continues to suffer from them, is that true?
>
> A: Yeah. But I did tell them why I thought he had seizures, yeah.
>
> Q: Why don't you tell me that.

A: Well, I found Dr. Stromsdorfer's notes particularly interesting and compelling. Mr. Patton was taking an enormous amount of tranquilizers that would affect the seizure threshold shortly before his first incident or syncope or whatever you want to call it, and Dr. Stromsdorfer was very concerned about that and wanted to taper them and then he pointed out in his notes that he was -- if he stopped taking those drugs rapidly or, you know, just cut it off, he was at very high risk for having a seizure. And then if you look at what scripts he was filling, he stopped filling those scripts about two weeks before the first incident when he had a syncope or seizure or whatever it is he had. ***But it seems to me that it is just as likely that he had that because he stopped taking these drugs that raised the seizure threshold, which then let the seizure threshold drop and made it much more likely that he would have a seizure.*** The other things that affects seizures is your sleep cycle, if he'd been sick that day, and, you know, the night before and uncomfortable, didn't sleep well, that would also increase the probability of a seizure. So I think it's these behavioral things that have something to do with developing that first seizure.

Q: Let me ask you a little bit more about that. The medications that he was taking that were prescribed by Dr. Stromsdorfer were anti-anxiety anti-depressive medicines?

A: Yes, typically reduce/stop seizures or raise the seizure threshold.

Q: That's a property of the medications but they weren't being prescribed by Dr. Stromsdorfer to stop seizures?

A: No, but he said very clearly in his notes that if you stop taking this amount of drugs, you're at risk for it, and that's why he wanted to put him in the hospital to detox him.

Q: Actually, though, the medications, if he's taking them, have anti-seizure properties, isn't that true?

A: Yes.

Q: So if someone was taking the medicines you wouldn't expect them to have seizures?

A: But if you stop suddenly.

Q: ***But we don't know whether or not he stopped suddenly.***

A: ***That's true.*** We just know he stopped filling the prescriptions because of what Stromsdorfer did.

Q: If we look at the prescriptions and saw the amount of the medications that was being prescribed -- I don't know if you did that or tried to calculate it.

A: I certainly did.

Q: Does it appear to you as though he still had enough medicine prescribed for him that he would have still been taking the medicines at the time of his seizure or I'm not even calling it a seizure, at the time of the incident, the first incident the syncope?

A: He was taking about three grams a month at that time and he was using three grams a month, he probably wouldn't have had it left for two weeks, but ***I don't know at what rate he was using it, so I can't say what he was doing. I can just say it looks like there's a very strong probability that that event had something to do with stopping getting more of that medication.*** (Respondent's Appendix, A157, Deposition of Richard Wetzel, p. 26, line 14 – p. 29, line 17).

* * *

Q: So in order to really give an informed opinion or an opinion based on, we'll say, reasonable certainty, you would have to have that information?

A: Well, I can give an opinion now based on reasonable certainty but it would be much more than that if I could, you know, ***it's more likely than not that he stopped suddenly given how much he was using but I don't know that with complete confidence.*** (Respondent's Appendix, A158, Deposition of Richard Wetzel, p. 30, lines 11-20)

It was only after having received BNSF's experts' reports referring to Dr. Stromsdorfer's records that Plaintiff's counsel contacted Dr. Stromsdorfer and confirmed that BNSF's experts ***assumptions were false.*** Thereafter, Plaintiff's counsel listed Dr. Stromsdorfer as a ***rebuttal witness*** in compliance with the scheduling order as follows:

PLAINTIFF'S THIRD SUPPLEMENTAL DESIGNATION OF EXPERT WITNESSES/REBUTTAL WITNESSES

In addition to Plaintiff's Retained and Non-Retained Expert Witnesses and those witnesses previously identified in Plaintiff's Second Supplemental Designation of Expert Witnesses, Plaintiff may call the following:

Stephen Stromsdorfer, M.D.

777 Craig Road, Suite 125

St. Louis, Missouri 63141

Dr. Stromsdorfer is a psychiatrist who treated Plaintiff. Defendant's retained experts Dr. Patrick Hogan, Dr. Bernard Randolph and Dr. Richard Wetzel have relied on Dr. Stromsdorfer's medical records in rendering their opinions that a reduction in Plaintiff's medications prescribed by Dr. Stromsdorfer contributed to Plaintiff having a seizure on August 7, 2001.

Dr. Stromsdorfer is expected clarify his medical records regarding Plaintiff and to testify concerning his treatment of Plaintiff, Plaintiff's medical history, the nature, extent and cause of Plaintiff's injuries, the medications he prescribed to Plaintiff at or near the time of the incidents alleged in Plaintiff's Petition. ***Dr. Stromsdorfer may also comment on any opinions rendered by Defendant's experts, including but not limited to Dr. Hogan's, Dr. Randolph's and Dr. Richard Wetzel's opinions that alcoholism, Plaintiff's use of prescription or non-prescription drugs may have contributed to Plaintiff having a seizure disorder and/or a seizure on August 7, 2001 and that Plaintiff has had a history***

of drug seeking behavior. (Respondent's Appendix, A160-A162, Plaintiff's Third Supp. Designation of Experts).

On February 25, 2011, Dr. Stromsdorfer gave rebuttal deposition testimony clarifying the notation in his records and explaining that while his note indicated that he was concerned that Patton could suffer a seizure if he was abruptly withdrawn from anti-anxiety medications; that, in fact, Patton was not abruptly withdrawn from the medicines.

Q: . . . In relying upon your office notes, Doctor, the defendant's experts, Dr. Wetzel, Dr. Hogan and Dr. Randolph have made assumptions in offering their opinions in this case that Mr. Patton abruptly stopped taking the medications that you were prescribing him before the August 7th, 2001, work incident when he lost consciousness. Based upon your treatment of Mr. Patton and review of the records, it's your opinion, as you've expressed in your report, that he did not abruptly stop taking his medications before this incident; correct?

A: I don't -- ***I don't see any evidence that he stopped medications suddenly. I did not abruptly discontinue his medicines at any time.*** And he obviously with his pattern of extensive drug-seeking behaviors would not be likely to be stopping medications on his own.

Q: And that's an opinion that you expressed in your report --

A: Yes.

Q: -- of January 18th, 2011; correct?

A: That's correct.

Q: So that assumption made by the defense experts, Dr. Wetzel, Dr. Hogan and Dr. Randolph, that would be an inaccurate assumption; correct, Doctor?

A: Well, as I said, I don't believe -- ***regardless of what these other professionals said, I don't believe the medication was discontinued or that that would be a factor here.***

Q: And in relying on your office notes, Doctor, the defendant's experts have made the assumption that Mr. Patton had a seizure on August 7th, 2001, as a result of his abrupt withdrawal of these medications. In your opinion, is that assumption inaccurate?

A: ***I do not believe that benzodiazepine discontinuation or withdrawal caused this medical situation where he apparently passed out.*** (Respondent's Appendix, A166-A167, Deposition of Steve Stromsdorfer, p. 85, line 22 – p. 87, line 20).

Dr. Stromsdorfer testified that he had renewed Patton's prescription days before the work incident and had confirmed that Patton filled the prescription.

Q: ***In fact, Dr. Stromsdorfer, the medications that you were prescribing, for example, Xanax, that medication was refilled on August 1st, 2001; correct?***

A: ***That's correct.*** (Respondent's Appendix, A167, Deposition of Steve Stromsdorfer, p. 87, lines 21- 24).

There was no reason to believe that Patton was not taking his medicines. Moreover, the medicines in question had the additional effect of being anti-seizure medicines. Dr. Stromsdorfer expressly stated that Patton could not have had a seizure due to withdrawal of medicines on August 7, 2001.

Q: ***And it's your opinion that Mr. Patton did not suffer a seizure on August 7th, 2001; correct?***

A: ***Based on my review of those records for the physician assessing him, I do not see evidence of a seizure.*** (Respondent's Appendix, A166, Deposition of Steve Stromsdorfer, p. 83, line 23 – p. 84, line 4).

It was noted by the trial court in this case as early as 2009 that Patton was not making a claim for any psychological/psychiatric injury. BNSF has continually attempted to obtain Patton's medical records concerning psychological/psychiatric injury. The trial court has consistently held that records concerning Patton's psychological/ psychiatric conditions are not relevant to the injuries claimed by Patton in his petition. BNSF now contends that the trial court has abused its discretion in denying its request for Dr. Rao's records.

The trial court has issued six (6) Orders since September 22, 2009 addressing various BNSF discovery requests attempting to obtain Patton's psychological/ psychiatric records. (See Respondent's Appendix, A96-A122). In the six Orders that the trial court has issued, the trial court shows careful consideration of BNSF's multiple requests to obtain Plaintiff's psychological/psychiatric records and has ruled consistently that Plaintiff is not making a claim for psychological/psychiatric injuries and therefore any

records for psychological/psychiatric treatment are not relevant to the injuries claimed in the petition and are not discoverable.

In the Court's Order dated February 25, 2011, which addressed BNSF's request for Dr. Rao's records, the trial court granted Plaintiff's Motion for Protective Order and quashed the subpoena duces tecum and deposition notice issued by BNSF to Dr. Rao. The Court found:

> The parties have previously presented this Court with discovery disputes in this area at least twice. ***The Court has previously ruled that Plaintiff's mental condition is not "in controversy" purposes of an examination by a psychologist under rule 60.01, see Order of July 9, 2010, and not relevant to the damages claimed by Plaintiff or to any affirmative defenses pleaded, in part because Plaintiff is not making any claim for psychological injuries, see Order of December 17, 2010, regarding interrogatories directed to Plaintiff.*** Defendant argues it should nevertheless be allowed to obtain the records held by Dr. Rao because the medical history taken by the psychiatrist might contain information about Plaintiff's physical condition at the time of his psychiatric treatment that would be relevant to this case and admissible at trial.
>
> ***This strikes the Court as an attempt to obtain through the back door psychiatric records Defendant was denied at the front door. The Court reiterates that Plaintiff's mental/psychological condition is not relevant to the damages claimed by Plaintiff.*** (Respondent's Appendix, A116-A118, Order dated February 25, 2011).

This Court has historically protected the rights of patients and injured parties by its holdings regarding patient-physician privilege, psychotherapist-patient privilege and prohibition of ex parte communications between a non-party physician and defendant's attorney. The following line of cases illustrate the discussion and evolution of the issue of physician-patient privilege and its waiver. Once the matter of plaintiff's physical condition is in issue under the pleadings, plaintiff will be considered to have waived the privilege ***only to the extent*** that information from doctors, medical or hospital records have bearing on that issue. The cases establish a rule or bright line that pleadings (e.g. interrogatory answers) in addition to the petition may limit the issues for trial and thus the scope of discovery.

The physician-patient privilege will be waived as soon as plaintiff undertakes to prove his allegations of damages. Once 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).

> ***Nothing we say herein deprives the trial court of its authority to issue protective orders under Rule 57.01(c), upon proper showing, limiting the production of such records to those which reasonably relate to the injuries and aggravations claimed by the plaintiffs in the present suit. The waiver which we today recognize does not mean that it automatically extends to every doctor or hospital***

a party has had since birth regardless of the bearing or lack of bearing, as may be on the matters in issue. McNutt at 602.

In State ex rel. Stecher v. Dowd, 912 S.W.2d 462(Mo.banc 1995), the Supreme Court issued a writ of prohibition and held that the trial court abused its discretion in ordering plaintiff to sign medical authorizations which were overly broad and unlimited in scope, despite the fact that plaintiff's allegations did not set precise limits on his physical complaints. In relying on the McNutt holding, the Supreme Court stated:

> It must be emphasized that under this rule, ***defendants are not entitled to any and all medical records, but only those medical records that relate to the physical condition at issue under the pleadings.*** It follows that ***medical authorizations must be tailored to the pleadings, and this can only be achieved on a case-by-case basis.*** Stecher at 464.

In State ex rel Crowden v. Dandurand, 970 S.W.2d 340(Mo.banc 1998), defendant issued 13 subpoenas duces tecum for depositions for plaintiff's medical records. The Supreme Court ruled that "The permissible scope of a subpoena duces tecum for a deposition is determined by reference to the petition." Crowden at 342. "True, pleadings in addition to the petition may limit the issues for trial and thus the scope of discovery." Crowden at 342. "Trial courts have broad discretion in administering rules of discovery which this court will not disturb absent an abuse of discretion." Crowden at 343. "A subpoena must designate documents 'with sufficient description' to reasonably exclude evidence that is not relevant to the pending cause." Crowden at 343.

In State ex rel Dean v. Cunningham, 182 S.W.3d 561(Mo.banc 2006), plaintiff Dean brought action against employer for sex discrimination and harassment and claimed damages for emotional distress and humiliation. However, she asserted that she was not seeking recovery for any medically diagnosable injury, but was seeking recovery only for "garden variety" emotional distress damages, which was claimed to be what an ordinary person would experience in her circumstances. Plaintiff claimed that she did not place her mental or physical condition in controversy and thus had not waived the physician-patient privilege. Nevertheless, defendant sought discovery concerning "whether you have ever consulted or been treated by a psychologist, psychiatrist, counselor or other healthcare practitioner for mental distress, emotional suffering or any other mental or emotional condition" including authorizations for medical records. Dean claimed that she had not placed her mental or physical condition in controversy and thus had not waived the physician-patient privilege. Dean at 564.

In evaluating whether Dean had waived the physician-patient privilege, the Supreme Court looked first at the pleadings and then at her responses to discovery.

> ***The first look is to the pleadings, which set forth the ultimate facts Dean intends to prove.*** . . . She seeks damages . . . for "emotional distress, humiliation, inconvenience, and loss of enjoyment of life." A petition, however, usually does not disclose what evidence a plaintiff will seek to introduce, nor is it required to do so. For that, the discovery rules allow the parties to obtain information regarding any matter "relevant to the subject matter involved in the pending action" so long as the matter is not privileged. . . . Dean's discovery responses, as noted, represent

that she has sought no treatment for emotional distress, that she has no dollar amount for any item of emotional damage, and that she is "at this time, seeking only 'garden variety' emotional distress damages." Dean at 567.

After looking at the pleadings and the discovery responses, the Supreme Court held that plaintiff did not put her mental or physical condition in controversy by seeking emotional distress damages and thus did not waive the physician-patient privilege:

> ***By her discovery responses***, Dean has precluded herself from offering any evidence that she sought treatment for emotional distress and any evidence that she has any diagnosable condition allegedly resulting from the acts of discrimination or harassment. She may, however, seek damages for emotional distress of a generic kind – that is, the kind of distress or humiliation that an ordinary person would feel in such circumstances. . .
>
> * * *
>
> In these circumstances, evidence of Dean's medically or psychologically diagnosable mental or physical condition is irrelevant to the question of whether she suffered "garden variety" emotional distress as a result of the incidents pleaded in her sex discrimination and sexual harassment claims. Her particular past or present mental condition, in that respect, is not in controversy. Dean at 568.

In State ex rel. Stinson v. House, 316 S.W.3d 915(Mo.banc 2010), a wrongful death and negligent entrustment case, plaintiff requested that defendant Stinson execute medical authorizations permitting disclosure of all medical and psychological records pertaining to treatment Stinson had received for alcohol, drug and substance abuse

problems preceding the date of the accident. Plaintiff sought these records because she alleged that Stinson's parents knew or should have known that Stinson was addicted to alcohol and drugs that impaired his driving ability, that he had received medical treatment for his addictions and that he had been charged and convicted of numerous alcohol-related driving offenses prior to this collision. The trial court, Honorable Ted House, ordered Stinson to execute medical authorizations and Stinson filed a petition for writ of prohibition.

The Missouri Supreme Court made the preliminary writ of prohibition permanent holding that the trial court abused its discretion in ordering Stinson to execute a medical authorization.

> By its terms, the request seeks access to records containing information used to evaluate, diagnose, and treat Mr. Stinson. Such records assuredly would include information acquired from Mr. Stinson by a physician or psychologist to prescribe and provide treatment and, therefore, fall within the scope of the physician-patient privilege.
>
> * * *
>
> ***Additionally, there is no evidence in the record that Mr. Stinson placed any of his medical conditions in issue or took any other steps to affirmatively waive the privilege.***
>
> * * *
>
> Despite the applicability of the physician-patient privilege, Ms. Young argues that the trial court did not abuse its discretion by ordering Mr. Stinson to execute the

medical records authorization because the requested records are relevant to her claim against Mr. Stinson's parents for negligent entrustment. Ms. Young claims the records are relevant because they help prove that Mr. Stinson's parents knew or should have known that he was incompetent to drive a motor vehicle.

The mere fact that the privileged medical records may be relevant to Ms. Young's claim for negligent entrustment does not mean that the medical records are discoverable. The very nature of an evidentiary privilege is that it removes evidence that is otherwise relevant and discoverable from the scope of discovery. See Rule 56.01(b)(1). Therefore, the fact that the medical records might be relevant to Ms. Young's claim for negligent entrustment does not alter the conclusion that the records are undiscoverable. Stinson at 918-919.

In evaluating whether Patton has waived the physician-patient privilege in the instant case, this Court should following its reasoning in the Dean case. This Court should first look at the pleadings in this matter – wherein Patton has alleged injury to his "head, neck, left shoulder separation, seizures and/or fainting spells". Plaintiff has not made any allegation of psychological or psychiatric injury as a result of these incidents. (Respondent's Appendix A89-A95, First Amended Petition). Then, in looking at Plaintiff's Responses to Defendant's Discovery, Patton was asked the following Interrogatory:

15. State whether you are making a claim for mental or emotional distress or psychological injury in this action, and if so, state whether you have

been treated for, placed under observation, or received a recommendation for treatment for any mental condition (such as depression), and state:

a. The name and address of each person or institution rendering treatments, observing you, or making the recommendation;

b. The date of the treatment, observation or recommendation;

c. The condition for which you were treated, observed or received a recommendation.

ANSWER:

No. (Respondent's Appendix, A10).

Based on the pleadings and discovery responses, Patton has not put his psychological/psychiatric condition at issue in this case and therefore has not waived physician-patient privilege as to Dr. Rao. Therefore, Relator is not entitled to an authorization for Dr. Rao's medical records.

"Trial courts have broad discretion in administering rules of discovery which this court will not disturb absent an abuse of discretion." Crowden at 343. The real question is whether Judge Mark Neill abused his discretion in prohibiting discovery of Dr. Rao's records. The answer is Judge Neill was in the best position to determine whether or not BNSF was attempting to flout the discovery rules and "do an end run" or "***attempt to obtain through the back door psychiatric records Defendant was denied at the front door".***

The foregoing recitation and description of BNSF's medical experts numerous reports and creative evolution of medical theories over many years demonstrates that

BNSF has attempted to abuse the discovery process. Doctors Hogan, Randolph and Wetzel are well known in the St. Louis legal community as defense medical experts who testify almost exclusively in defense of injury cases. The fact that they have continued to change their theories and claimed to have expertise in areas where they previously denied such expertise should make clear to this Court the lengths to which these so-called expert witnesses will go to defend a case.

If this Court grants BNSF's request for a Writ of Mandamus compelling Respondent to issue an order requiring production of Dr. Rao's psychiatric records, this case will set a dangerous precedent – it will allow a defendant to contrive and interject a medical issue into a case – where none was pled by plaintiff -- by having its experts offer an opinion on an issue which was not raised by plaintiff in its pleadings or discovery. This would lead to an abuse of the discovery process by allowing future defendants in bodily injury cases to obtain psychiatric records of a plaintiff -- merely on the say so of retained defense experts -- who opine that there is a psychiatric component to a case where no non-retained treating physicians believe that their patient's mental health has any bearing on his physical injuries. Psychiatric records typically contain embarrassing and prejudicial information – which has no real bearing on the issues raised in the bodily injury lawsuit. A ruling in favor of BNSF would allow future defendants to obtain and use such information to harass and discourage a plaintiff from pursuing a legitimate cause of action with the threat that this information could be used against plaintiff in court to "trash" plaintiff on collateral issues.

In the instant case, Judge Mark Neill was in the best position to determine whether Dr. Rao's records were relevant to the issues presented in this case and whether BNSF was acting in good faith in pursuit of relevant information. Patton has consistently maintained that he is not pursuing a claim for psychological/psychiatric damages and Respondent has time and again ruled that Patton is not pursuing a claim for psychological/psychiatric damages. Moreover, Judge Edward Sweeney who preceded Respondent consistently barred BNSF from obtaining Patton's psychiatric records and records for drug and alcohol treatment. 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 has not abused his discretion in denying BNSF access to Dr. Rao's records for psychiatric treatment.

A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997) citing State ex rel. Metro Transp. Servs., Inc. v. Meyers, 800 S.W.2d 474, 476(Mo.App. 1990). If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864(Mo.App.E.D. 2000).

For the foregoing reasons and authorities, this Court's preliminary Writ of Mandamus should be dissolved and Respondent's Order of February 25, 2011 quashing the subpoena duces tecum of Dr. Rao's records and deposition notice should be allowed.

II.

RESPONDENT DID NOT ABUSE HIS DISCRETION IN PRECLUDING BNSF FROM DISCOVERING THE MEDICAL RECORDS OF DR. RAO BECAUSE BNSF IS NOT ENTITLED TO THE RECORDS OF DR. RAO FOR THE REASON THAT (1) PATTON HAS MADE NO CLAIM FOR PSYCHOLOGICAL OR PSYCHIATRIC INJURIES, AND (2) DR. RAO'S RECORDS ARE PRIVILEGED BECAUSE PATTON'S CLAIM FOR PHYSICAL INJURIES DOES NOT WAIVE THE PRIVILEGE.

STANDARD OF REVIEW

When a relator seeks a writ of mandamus, the Court of Appeals reviews the circuit court's failure to act under an abuse of discretion standard. State ex rel. City of Blue Springs, Missouri v. Schieber, 343 S.W.3d 686 (Mo.App. W.D. 2011).

A trial court is allowed broad discretion in the control and management of discovery. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997). It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. Id. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. citing State ex rel. Metro Transp. Servs., Inc. v. Meyers, 800 S.W.2d 474, 476(Mo.App. 1990). If

reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864(Mo.App.E.D. 2000). [Discovery of medical records]. The evidence requested must appear relevant and material, or tend to lead to the discovery of admissible evidence. The discovery provisions were not designed or intended for untrammeled use of a factual dragnet or fishing expedition. It is the affirmative duty and obligation of the trial judge to prevent subversion of pre-trial discovery into a "war of paper" for whatever reason. Misischia at 864.

ARGUMENT

Patton has limited his claim for injuries in this case to his "head, neck, left shoulder separation, seizures and/or fainting spells". (Respondent's Appendix, A89-A95, First Amended Petition). Patton has never claimed psychological/psychiatric injuries as a result of his work injuries. (Respondent's Appendix, A10).

BNSF spends a great deal of time talking about Dr. Stromsdorfer and Patton's endorsement of him as an expert witness, even arguing that Patton has "opened the door" to the production of Dr. Rao's records by his endorsement of Dr. Stormsdorfer as an expert and reliance on his records and opinions. Patton's Answer to BNSF's Interrogatories makes clear that Dr. Stromsdorfer was only intended to be used as a ***rebuttal*** witness:

> Dr. Stromsdorfer is a psychiatrist who treated Plaintiff. ***Defendant's retained experts Dr. Patrick Hogan, Dr. Bernard Randolph and Dr. Richard Wetzel have relied on Dr. Stromsdorfer's medical records in rendering their opinions that a***

reduction in Plaintiff's medications prescribed by Dr. Stromsdorfer contributed to Plaintiff having a seizure on August 7, 2001.

Dr. Stromsdorfer is expected clarify his medical records regarding Plaintiff and to testify concerning his treatment of Plaintiff, Plaintiff's medical history, the nature, extent and cause of Plaintiff's injuries, the medications he prescribed to Plaintiff at or near the time of the incidents alleged in Plaintiff's Petition. ***Dr. Stromsdorfer may also comment on any opinions rendered by Defendant's experts, including but not limited to Dr. Hogan's, Dr. Randolph's and Dr. Richard Wetzel's opinions that alcoholism, Plaintiff's use of prescription or non-prescription drugs may have contributed to Plaintiff having a seizure disorder and/or a seizure on August 7, 2001*** and that Plaintiff has had a history of drug seeking behavior. (Respondent's Appendix, A160-A162, Plaintiff's Third Supp. Designation of Experts).

Dr. Stromsdorfer would never be called in Patton's case-in-chief at trial. Patton intends to call Dr. Stromsdorfer only if BNSF presents expert testimony purporting to rely on Dr. Stromsdorfer's records. Patton would present rebuttal testimony that BNSF's experts' suppositions -- that Patton discontinued certain anti-anxiety medicines causing him to suffer a seizure on the date of the first incident -- are erroneous. Dr. Stromsdorfer has made it clear that Patton did not discontinue the anti-anxiety medicines, as assumed by BNSF's experts, and that Patton did not suffer a seizure due to such discontinuance on August 7, 2001. Patton has never opened the so-called "door".

Despite BNSF's contention that Respondent cites the wrong statute, Patton's communications with Dr. Rao are indeed privileged under Section 337.055 R.S.Mo. Section 337.055 R.S.Mo. deals with communication made by any patient to a "licensed psychologist . . .". Dr. Rao is a psychiatrist. The case of Jaffee v. Redmond, 518 U.S. 1, 15(1996) holds that the psychotherapist privilege applies to confidential communications made to licensed psychiatrists as well.

However, Section 491.060(5) R.S.Mo, also applies to the instant case. The physician-patient privilege, Section 491.060(5) R.S.Mo. applies to medical records and all aspects of discovery. State ex rel. Dean v. Cunningham, 182 S.W.3d 561, 567(Mo.banc 2006). The purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communication between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information. Id. citing State ex rel. Woytus v. Ryan, 776 S.W.2d 389, 392(Mo.banc 1989).

In State ex rel. Maloney v. Allen, 26 S.W.3d 244(Mo.App.W.D. 2000), a worker's compensation action, employee was involved in a vehicle collision, suffering severe injuries to both legs and depression. Employee died of a self-inflicted gunshot wound. Widow filed workers compensation claim, seeking benefits for the injuries employee sustained to his legs. Widow did not seek compensation for depression. Employer sought to take the deposition of employee's psychiatrist, claiming that employee's injuries resulting from the collision were intentionally self-inflicted. Widow objected and the

Administrative Law Judge ("ALJ") granted her Motion for Protective Order, precluding employer from deposing employee's psychiatrist. Employer sought a writ of prohibition to prevent enforcement of the ALJ's order. The Court of Appeals denied the petition, finding that the physician-patient privilege is only waived to the extent that medical information or testimony relates to ***"the condition for which the employee seeks compensation"***. Maloney at 248. The Court of Appeals further discussed the applicability of the physician-patient privilege:

> Once a party places the matter of his physical condition in issue under the pleadings, the party's physician/patient privilege is waived insofar as information from doctors or medical and hospital records bears on that issue. ***In any such case, the opposing party is not entitled to any and all medical information. Rather, the opposing party may discover only those medical records that relate to the physical conditions at issue under the pleadings. Waiver of the privilege does not 'automatically extend to every doctor or hospital record a party has had from birth regardless of the bearing or lack of bearing, as may be, on the matters in issue.'*** Maloney at 247-248.

Patton has not waived his claim to physician-patient privilege or psychiatrist-patient privilege. Nor has he "opened the door" to the discovery of Dr. Rao's records by endorsing Dr. Stromsdorfer as a rebuttal witness.

A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State ex rel. Dixon v.

Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997) citing State ex rel. Metro Transp. Servs., Inc. v. Meyers, 800 S.W.2d 474, 476(Mo.App. 1990). If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864(Mo.App.E.D. 2000).

For the foregoing reasons and authorities, this Court's preliminary Writ of Mandamus should be dissolved and Respondent's Order of February 25, 2011 quashing the subpoena duces tecum of Dr. Rao's records and deposition notice should be allowed.

III.

RESPONDENT DID NOT ABUSE HIS DISCRETION IN PRECLUDING BNSF FROM DISCOVERING THE MEDICAL RECORDS OF DR. RAO BECAUSE BNSF IS NOT ENTITLED TO THE RECORDS OF DR. RAO BECAUSE (1) PATTON HAS MADE NO CLAIM FOR PSYCHOLOGICAL OR PSYCHIATRIC INJURIES, AND (2) DR. RAO'S RECORDS ARE PRIVILEGED BECAUSE PATTON'S CLAIM FOR PHYSICAL INJURIES DOES NOT WAIVE THE PRIVILEGE. PATTON DOES NOT ATTEMPT TO ARGUE THE MERITS OF THE UNDERLYING CASE ON BEHALF OF RESPONDENT.

STANDARD OF REVIEW

When a relator seeks a writ of mandamus, the Court of Appeals reviews the circuit court's failure to act under an abuse of discretion standard. State ex rel. City of Blue Springs, Missouri v. Schieber, 343 S.W.3d 686 (Mo.App. W.D. 2011).

A trial court is allowed broad discretion in the control and management of discovery. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997). It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. Id. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. citing State ex rel. Metro Transp. Servs., Inc. v. Meyers, 800 S.W.2d 474, 476(Mo.App. 1990). If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864(Mo.App.E.D. 2000). [Discovery of medical records]. The evidence requested must appear relevant and material, or tend to lead to the discovery of admissible evidence. The discovery provisions were not designed or intended for untrammeled use of a factual dragnet or fishing expedition. It is the affirmative duty and obligation of the trial judge to prevent subversion of pre-trial discovery into a "war of paper" for whatever reason. Misischia at 864.

ARGUMENT

The seven year length of this case and the numerous attempts by BNSF to flout the Court's orders denying discovery of psychiatric records demonstrates the contentiousness of this litigation. We will not engage in "trash talk" or "mud slinging" to defend the actions of the Honorable Mark Neill who was in the best position to determine whether Dr. Rao's records were relevant to the issues presented in this case and whether BNSF was acting in good faith in pursuit of relevant information. BNSF's original reason

advanced for the obtaining of Dr. Rao's records was to see if there was information which would support its expert's theories that Patton experienced a seizure on August 7, 2001. It is important to note that Dr. Rao's treatment of Patton did not occur until April 30, 2002, ***eight months after the first incident*** and that Patton ceased treating with Dr. Rao on February 20, 2003. BNSF has offered no explanation as to how treatment occurring 8 months after the first incident would have any medical bearing on whether or not Patton suffered a seizure on August 7, 2001. The real reason for obtaining such records is revealed by the statement contained at page 42 of BNSF's brief: "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."

For the first time, BNSF argues in Point III, subpart c. that "Credibility is always an issue". BNSF is bound by the theory that it argued to the trial court. Sheedy v. Missouri Highways & Transportation Comm'n, 180 S.W.3d 66, 70(Mo.App.S.D. 2005). An issue not presented to the trial court is not preserved for appellate review. Thus, a party is bound by the position he or she took in the trial court and the appellate court can review the case only upon those theories. On review, an appellate court will not convict a trial court of error based on an issue that was not put before it to decide. Sheedy at 70-71. Review for abuse of discretion must be based upon "the logic of the circumstances ***then before the court***". State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997). The issue raised by BNSF before the Supreme Court in Point III of its Brief – credibility was not "***then before the court***" when presented at the trial level to Respondent.

BNSF refers to the deposition of Dr. Mark Scheperle, taken on March 17, 2011. Clearly, the deposition ***postdates*** Judge Neill's Orders of February 25, 2011 and March 16, 2011. Respondent could never have considered the testimony of Dr. Scheperle in issuing its Orders. Nevertheless, BNSF refers to matters outside the record by stating that "Dr. Scheperle testified that he had seen Plaintiff 13 times at the emergency room in St. Luke's Medical Center" to suggest that Patton has engaged in drug seeking behavior.

Moreover, BNSF states at page 45 of its Brief, that "The medical records of Dr. Rao likely contain evidence of Plaintiff's medication and drug abuse at the time of the occurrence of October 8, 2002", despite the fact that BNSF is aware that Patton's emergency room records on that day clearly reveal no evidence of medication and drug abuse! The cases cited by BNSF in Point III including Mitchell v. Kardesch, 313 S.W.3d 667(Mo.banc 2010) were never intended to give a party *carte blanche* discovery over an opposing party's history of mistakes, indiscretions or bad behavior not resulting in criminal convictions.

Dr. Bernard Randolph who initially denied having the expertise to offer an opinion as to whether Patton suffered a seizure in the first incident and later professed to have acquired such expertise -- offering an opinion which he previously said he could not offer – admitted that he that he has performed as many as 275 independent medical examinations per year and that approximately 99% of them were done on behalf of the defense. (Respondent's Appendix, A148, Deposition of Bernard Randolph, M.D., taken on 9/30/09, p. 111, lines 7-10; lines 20 - p. 112, line 14).

Dr. Patrick Hogan testified that he sees approximately 140-160 patients per year involved in litigation and that 85-90% of his examinations are performed for lawyers representing the defendant or the employer. (Respondent's Appendix, A139, Deposition of Patrick Hogan, M.D. taken on 1/5/11, p. 32, lines 11-15).

Dr. Richard Wetzel acknowledged previously working on cases for BNSF and the Brasher Law Firm. (Respondent's Appendix, A159, Deposition of Richard Wetzel, p. 62, lines 12-25; p 63, line 1-20). In the majority of cases where he has been hired to serve as an expert witness, 70% of the cases were for the employer and defendant. (Respondent's Appendix, A159, Deposition of Richard Wetzel, p. 64, lines 6-15).

Despite BNSF's contention, neither Patton nor his attorneys have any appetite for "red herring". "Trial courts have broad discretion in administering rules of discovery which this court will not disturb absent an abuse of discretion." Crowden at 343. The real question is whether Judge Mark Neill abused his discretion in prohibiting discovery of Dr. Rao's records. The answer is Judge Neill was in the best position to determine whether or not BNSF was attempting to flout the discovery rules and "do an end run" or "***attempt to obtain through the back door psychiatric records Defendant was denied at the front door***". Respondent has not abused his discretion in denying BNSF access to Dr. Rao's records for psychiatric treatment.

A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68(Mo.App.S.D. 1997) citing State ex rel. Metro Transp.

Servs., Inc. v. Meyers, 800 S.W.2d 474, 476(Mo.App. 1990). If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864(Mo.App.E.D. 2000).

For the foregoing reasons and authorities, this Court's preliminary Writ of Mandamus should be dissolved and Respondent's Order of February 25, 2011 quashing the subpoena duces tecum of Dr. Rao's records and deposition notice should be allowed.

CONCLUSION

Respondent, Honorable Mark H. Neill, has not abused his discretion in denying BNSF access to Dr. Rao's psychiatric records. Respondent's rulings show that the court carefully considered BNSF's request and Judge Neill's rulings are not clearly against the logic of the circumstances before the court or so arbitrary and unreasonable as to shock the sense of justice.

Therefore this Court's preliminary Writ of Mandamus should be dissolved, BNSF's Petition for Writ of Mandamus should be denied and Respondent's Order of February 25, 2011 quashing the subpoena duces tecum of Dr. Rao's records and deposition notice should be allowed. This Court should issue such further Orders as are just and reasonable under the circumstances.

CERVANTES & ASSOCIATES
Leonard P. Cervantes - #25043
Phillip A. Cervantes - #44742
Jennifer Suttmoeller - #49910
1007 Olive Street, Fourth Floor
St. Louis, MO 63101
(314)621-6558;(314)621-6705(fax)
Attorneys for Respondent The Honorable Mark H. Neill

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's Brief and Appendix was filed electronically with the Clerk of the Supreme Court on the 16th day of October 2011 and sent electronically to Mr. William Brasher, Ms. Cynthia Masterson, Mr. Thomas McDermott, Boyle Brasher, One Metropolitan Square, Suite 2300, St. Louis, Missouri 63101, Attorney for Relator on October 16, 2011 and a copy was hand-delivered to the Honorable Mark H. Neill, Civil Courts Building, Division 5, 10 N. Tucker Boulevard, St. Louis, Missouri 63101, Respondent on October 17, 2011.

CERTIFICATE REQUIRED BY RULE 84.06(C)

The undersigned hereby certifies:

1. This brief complies with the information contained in Rule 55.03;
2. This brief complies with the limitations contained in Rule 84.06(b);
3. Per Rule 84.06(c), the number of words in the brief is 14,529.

Leonard P. Cervantes - #25043
Jennifer Suttmoeller - #49910
CERVANTES & ASSOCIATES
1007 Olive Street, Fourth Floor
St. Louis, MO 63101
(314) 621-6558; (314) 621-6705(fax)
Attorneys for Respondent