

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-CV-01177-LTB-NYW

**DAKOTA TYLER MCGRATH,**

Plaintiff,

v.

**FORT COLLINS POLICE SERVICES OFFICER NICK RODGERS,** in his individual  
capacity,

Defendant.

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**PLAINTIFF DAKOTA McGRATH'S BRIEF REGARDING INVOCATION OF  
PSYCHOTHERAPIST-PATIENT PRIVILEGE**

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Plaintiff Dakota McGrath, by and through counsel, Anthony Viorst of the Viorst Law Offices, P.C., hereby submits the following brief regarding his invocation of the psychotherapist-patient privilege in the above-referenced case:

**Factual Background**

1. This case concerns a baton strike inflicted by Fort Collins Police Officer Nick Rogers, the Defendant, which broke the leg of Dakota McGrath, the Plaintiff.
2. In his complaint, at paragraph 19, Mr. McGrath averred that this incident and injury had caused him to suffer emotional distress. Thereafter, in his initial discovery responses, in response to Interrogatory Number 6, Mr. McGrath indicated that he had suffered emotional distress, and mental health treatment, related to Officer Rogers' conduct.

3. Based upon the allegations made in the complaint and in Mr. McGrath's discovery responses, Defendant now seeks to discover the medical records related to Mr. McGrath's mental health treatment.

4. Having now received copies of his mental records, and having realized the personal and private entries contained in those records, and wishing to uphold the sanctity of his psychotherapist-patient privilege, Mr. McGrath agrees to waive any scintilla of an emotional-distress damages claim in the instant case. Specifically, **Mr. McGrath hereby waives any and all claims of emotional distress, and likewise waives any and all claims for compensation related to emotional distress, and agrees not to present any medical records, testimony, or other evidence which touches on the issue of emotional distress in any way.**

#### Legal Argument

Federal Rule of Evidence 501 authorizes federal courts to define new privileges by interpreting "common law principles ... in the light of reason and experience." In *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), the United States Supreme Court recognized a psychotherapist-patient privilege under F.R.E. 501, based upon the following rationale:

[T]he psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." (Citation omitted). Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the

mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The Supreme Court went on to state that “The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” *Joffe, supra*, 518 U.S. at 11. With regard to the evidentiary value of denying the privilege, the Court noted that “[i]n contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest.” *Id.* The Court held further that the contours of this newly-recognized federal privilege would be determined on a case-by-case basis. *Id.* at 18.

The Tenth Circuit has adhered to *Jaffee*, and has also recognized a psychotherapist-patient privilege. *United States v. Glass*, 133 F.3d 1356, 1360 (10<sup>th</sup> Cir. 1998). However, the Tenth Circuit has held that in civil cases in which emotional distress damages are sought by the plaintiff, the psychotherapist privilege is implicitly waived. *Fisher v. Southwestern Bell Telephone Co.*, 361 Fed.Appx. 964 (10<sup>th</sup> Cir. 2010) (“We agree with the district court that Ms. Fisher's request for emotional-distress damages placed her psychological state in issue and entitled SWBT to discover her therapy records.”). At least one Federal District Court in Colorado has reached the same conclusion. *See Fox v. Gates Corp.*, 179 F.R.D. 303, 306 (D. Colo. 1998) (“[P]laintiff has waived her psychotherapist-patient privilege with respect to any communications between her and her psychotherapist during the applicable time period as those communications may lead to the discovery of admissible evidence regarding plaintiff's present claim for emotional distress damages”).

However, as set forth above, Plaintiff has agreed to waive any claim for emotional distress damages, and to uphold the sanctity of the psychotherapist-patient relationship, rather than disclose his personal and private psychotherapy records. No Colorado Court has addressed whether waiver of an emotional distress claim serves to maintain the psychotherapist-patient privilege. However, other courts that have addressed the issue have found that the psychotherapist-patient privilege remains intact when the plaintiff voluntarily limits his or her emotional distress claim. *See Doyle v. Gonzales*, 2011 WL 1584345 (E.D. Wash. 2011) (“[I]n light of the asserted claims and Plaintiff’s self-imposed limitation that he will not rely on medical records or medical testimony [concerning the issue of emotional distress], the Court determines the psychotherapist privilege has not been waived and Plaintiff need not produce the requested medical records”); *Santelli v. Electro-Motive*, 188 F.R.D. 306, 309 (N.D. Ill. 1999) (finding no waiver of psychotherapist-patient privilege where plaintiff “limited the scope of her emotional distress claim”; “[A]s a result of plaintiff’s self-imposed limitations . . . plaintiff’s claim has been narrowed to such an extent that she has successfully avoided waiver of her psychotherapist-patient privilege,” because “plaintiff’s communications to her psychotherapist are no longer relevant”).

These rulings are consistent with the language of Federal Rule of Civil Procedure 26(b), which provides that the scope of permissible discovery is as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery

outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Here, the discovery in question **is** privileged, it is not relevant to any issue in the case, and the burden to Mr. McGrath in disclosing his privileged records outweighs any benefit that the defense will realize by forcing him to do so.

In light of the societal importance of the psychotherapist-patient privilege, as well as Mr. McGrath's affirmative waiver of any scintilla of an emotional-distress damages claim, Mr. McGrath hereby asks this Court to find that his psychotherapist-patient privilege remains intact, and that he is not obligated to disclose his psychotherapy records.

Dated this 15<sup>th</sup> day of February, 2018.

THE VIORST LAW OFFICES, P.C.

*[Original signature on file at Viorst Law Offices, P.C.]*

*s/ Anthony Viorst*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of February, 2018, I sent a true and correct copy of the foregoing **PLAINTIFF DAKOTA McGRATH'S BRIEF REGARDING INVOCATION OF PSYCHOTHERAPIST-PATIENT PRIVILEGE** was transmitted to the following via e-mail:

Matthew J. Hegarty, Esq.  
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*[Original signature on file at Viorst Law Offices, P.C.]*

*s/ Michelle Spadavecchia*

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Legal Assistant