

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-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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**RESPONSE TO PLAINTIFF’S BRIEF REGARDING INVOCATION OF  
PSYCHOTHERAPIST-PATIENT PRIVILEGE FROM DEFENDANT**

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Defendant Fort Collins Police Services Officer Nick Rogers,<sup>1</sup> through his counsel, Thomas J. Lyons and Matthew J. Hegarty of Hall & Evans, L.L.C., respectfully submits this Response to Plaintiff’s “Brief Regarding Invocation of Psychotherapist-Patient Privilege” (“Brief”), stating in support as follows:

**I. INTRODUCTION**

Plaintiff’s Brief seeks relief from the otherwise complete disclosure of his mental health records by (1) invoking the federal psychotherapist-patient privilege in ***Jaffee v. Redmond***, 518 U.S. 1 (1996), and by (2) simultaneously appearing to abandon a claim for emotional distress, his ability to seek compensation for same, and his ability to present any evidence on same. For the reasons set forth below, however, Plaintiff’s attempted abandonment of his claim for emotional distress, ability to seek compensation for same,

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<sup>1</sup> Incorrectly identified in the Complaint as “Nick Rodgers.”

and ability to present any evidence on same is insufficient to prevent Defendant's disclosure of, and conducting of discovery upon, his mental health records. Only if Plaintiff broadly waives claims for mental pain and suffering and claims for loss of enjoyment of life in addition to, in conjunction with, and to the same degree as the waiver set forth in ECF No. 25 at p. 2 ¶ 4, will Defendant consider Plaintiff's mental health records able to be shielded from disclosure or discovery pursuant to the privilege explicated in *Jaffee*.

## **II. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTUAL BACKGROUND**

1. Defendant agrees this case involves a baton strike by Defendant that had the effect of causing a fracture to Plaintiff's lower right tibia, but states this case is also about Plaintiff's refusal to comply with the reasonable requests and directives of Defendant.

2. Defendant agrees ECF No. 1 ¶ 19 alleged Plaintiff suffered emotional distress and states such allegation also was made in ¶ 25 and the "WHEREFORE" clause of ECF No. 1. However, Plaintiff's responses to Defendant's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission greatly muddied the waters on this issue as follows:

a. in a spreadsheet containing Plaintiff's answer to Defendant's Interrogatory No. 6, Plaintiff alleged a plethora of alleged mental and emotional injuries he attributes solely to his encounter with Defendant, including: attempted suicide; increased depression that allegedly affects a host of areas of his life; increased anxiety that affects "all activity"; increased insomnia; decreased ability to concentrate; alleged nightmares of the time he allegedly was tortured while in jail, which indisputably was occasioned by somebody other than Defendant; and alleged severe police phobia [see **Exh. A** to this Response at 15-16];

b. in a spreadsheet containing Plaintiff's answer to Defendant's Interrogatory No. 11, Plaintiff alleged that following his encounter with Defendant, and on top of his physical limitations, he gained weight from being in a wheelchair which made him "too ashamed and embarrassed to swim," indisputably an alleged mental injury, and that this "weight gain has left [him] with zero self-confidence," also indisputably an alleged mental injury [see **Exh. A** at 18-19];

c. in a spreadsheet containing Plaintiff's original answer to Defendant's Interrogatory No. 14, Plaintiff stated he would be seeking one million dollars each for the alleged damages categories of "pain and suffering," "loss of enjoyment of life," and "emotional stress" [see **Exh. A** at 21]; and

d. in Plaintiff's supplemental answer to Defendant's Interrogatory No. 14, Plaintiff stated, "I am seeking noneconomic damages for, among other things, pain and suffering, loss of enjoyment of life, emotional distress, and permanent impairment/disfigurement. These damages are related to the pain and suffering from the baton strike and the subsequent surgery, as well as the functional limitations I now experience on a daily basis" [see **Exh. A** at 25].

3. Defendant agrees that due to the alleged interrelatedness of Plaintiff's mental health with his alleged emotional distress and alleged pain and suffering and alleged loss of quality of life, he seeks to discover records related to Plaintiff's mental health treatment.

4. Defendant, along with the Court, does not know the contents of Plaintiff's mental health records and thus is not in a position to agree with Plaintiff's apparent recognition of the personal and private entries Plaintiff states are contained therein. But Defendant does state that while Plaintiff's apparent abandoning of his claim for emotional

distress, his ability to seek compensation for same, and his ability to present any evidence on same is greatly appreciated, due to the interrelatedness of Plaintiff's mental health with his alleged pain and suffering and alleged loss of quality of life along with his alleged emotional distress, Defendant contends the abandonment in ECF No. 25 at p. 2 ¶ 4 is not sufficient to prevent disclosure of and discovery upon Plaintiff's mental health records.

5. After Plaintiff submitted ECF No. 25 to the Court, the Court entered a Minute Order requiring Defendant to "specifically identify any case authority that permits him to continue to seek mental health records of Plaintiff in light of Plaintiff's waiver of any claim for emotional distress in this action." [ECF No. 27.] Defendant endeavors to do so below.

### **III. ARGUMENT**

#### **A. Governing Law on Assertion of Federal Psychotherapist-Patient Privilege**

Consistent with the recognition that federal privilege law governs in cases where a federal statute such as 42 U.S.C. § 1983 provides the rule of decision, see Fed.R.Evid. 501, the United States Supreme Court recognized a federal psychotherapist-patient privilege exists in such cases. See generally *Jaffee*, 518 U.S. 1. However, this privilege is not absolute but can be waived, see *id.* at 15 n.14, which waiver in the Tenth Circuit is accomplished where the plaintiff's mental condition is in issue due to asserting damages for alleged emotional distress. See *Fisher v. Sw. Bell Tel. Co.*, 361 F. App'x 974, 978 (10th Cir. 2010); *Fox v. Gates Corp.*, 179 F.R.D. 303, 305-06 (D. Colo. 1998). In this District, such waiver also occurs where the plaintiff asserted in discovery responses that he suffers from a specific psychological condition and offers his therapist as an expert. See *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 364 (D. Colo. 2004); cf. *LeFave v. Symbios, Inc.*, 2000 U.S. Dist. LEXIS 22278, at \*10 (D. Colo. Apr. 12, 2000) ("[T]he law

in the Tenth Circuit does not distinguish between a plaintiff who intends to rely on the testimony of a treating psychotherapist in support of her case and one who does not.”).

Further, a plaintiff’s alleged pain and suffering and alleged loss of quality of life are so inseparable from alleged emotional distress, both generally and specifically in regard to the federal psychotherapist-patient privilege, that the waiver of the privilege in **Jaffee** is accomplished not only where garden-variety emotional distress damages are asserted, but also where “suffering of reputation,’ humiliation, mental anguish, and loss of enjoyment of life” are asserted along with emotional distress. **Carbajal v. Warner**, 2013 U.S. Dist. LEXIS 36864, at \*11, 14-15 (D. Colo. Mar. 18, 2013) (citing **Jaffee**); see **Fox**, 179 F.R.D. at 304 (privilege waived with damages for “emotional distress, pain and suffering, humiliation, embarrassment and anguish”); see also **EEOC v. Peters’ Bakery**, 301 F.R.D. 455, 457-59 & nn.4-24 (N.D. Cal. 2014) (privilege waived with damages for “emotional pain and suffering, inconvenience, loss of enjoyment of life and humiliation”); **Bell v. U.S. Dep’t of Interior**, 2013 U.S. Dist. LEXIS 117303, at \*7, 23-25 (E.D. Ca. Aug. 19, 2013) (privilege waived with damages for, *inter alia*, “[l]oss of enjoyment of life,” “anxiety,” “loss concentration,” “severe depression,” “nightmares,” “[loss of] self-esteem,” “weight gain,” and “embarrassment”); **Gaines-Hanna v. Farmington Pub. Schs.**, 2006 U.S. Dist. LEXIS 21506, at \*41-47 (E.D. Mich. Apr. 7, 2006) (discussing and applying **LeFave** and **Fox**); *cf.* **Dixon v. Lawton**, 898 F.2d 1443, 1450 (10th Cir. 1990) (pre-**Jaffee**) (damages for “mental pain and suffering” put mental condition at issue).

Moreover, the District Court must “decide any preliminary question about whether ... a privilege exists.” Fed.R.Evid. 104(a). In the context of mental health records, this directive cannot be carried out without *in camera* review of each purported mental health

record so the Court can determine for itself whether the privilege applies. *E.g.*, ***Leadholm v. City of Commerce, Colo.***, 2017 U.S. Dist. LEXIS 198802, at \*8-12 (D. Colo. Dec. 4, 2017) (*in camera* review of mental health records for claim of alleged excessive force).

**B. As Currently Constituted, Plaintiff’s Stated Waiver of Claimed Damages for “Emotional Distress” Alone Is Insufficient to Prevent Waiver of the Privilege**

Under the governing law, certainly Plaintiff’s abandonment of any and all claims of emotional distress, claims for compensation related to emotional distress, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of emotional distress in any way [see ECF No. 25 at 2 ¶ 4] is an incremental step towards the prevention of the disclosure of or discovery on his mental health records.

However, because Plaintiff simultaneously claims entitlement to assert damages for mental “pain and suffering,” “[shame],” “embarrass[ment],” “zero self-confidence,” and “loss of enjoyment of life” [see **Exh. A** at 15-16, 18-19, 21, 25], and because Plaintiff has not also waived claims for those matters, claims for compensation related to those matters, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of those matters in any way, Plaintiff’s mental condition still is in issue and Defendant cannot at this juncture consider Plaintiff’s mental health records to be beyond the reach of discoverable information under Fed.R.Civ.P. 26(b) such that entry of a protective order against their disclosure is warranted under Fed.R.Civ.P. 26(c). Nor has Plaintiff, as the party seeking prevention of the discovery of the records at issue, provided the Court with any copies of the records at issue for the Court’s *in camera* review so the Court can be satisfied each such record is within the scope of the psychotherapist-patient privilege. See ***Leadholm***, 2017 U.S. Dist. LEXIS 198802, at \*8-12.

On the other hand, if perchance Plaintiff were to file with the Court a pleading similar in form to ECF No. 17 in this matter, in which Plaintiff waived and abandoned any claim to past lost earnings and future loss of earning capacity, that sets forth the following:

- Plaintiff hereby notifies the Court that he is withdrawing any and all claims of emotional distress, claims for compensation related to emotional distress, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of emotional distress in any way; and
- Plaintiff hereby notifies the Court that he is withdrawing any and all claims of mental pain and suffering, claims for compensation related to mental pain and suffering, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of mental pain and suffering in any way; and
- Plaintiff hereby notifies the Court that he is withdrawing any and all claims of loss of enjoyment of life, claims for compensation related to loss of enjoyment of life, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of loss of enjoyment of life in any way,

then Defendant would be able to accept such a pleading as being an avoiding of the waiver of his psychotherapist-patient privilege. [A proposed form is attached as **Exh. B.**]

Plaintiff's reliance on *Doyle v. Gonzales*, 2011 U.S. Dist. LEXIS 47623 (E.D. Wash. Apr. 27, 2011), is misplaced because *Doyle* contains little to no analysis of the breadth of potential components of claims for mental damages like *Fox*, *LeFave*, and *Carbajal*, which are cases in this District, and because footnote 2 observed emotional distress "is not 'garden variety' if it results in a specific psychiatric disorder or disables one from working," which by contrast Plaintiff claims as true here. [See **Exh. A** at 15-16.]

Plaintiff's reliance on ***Santelli v. Electro-Motive***, 188 F.R.D. 306 (N.D. Ill. 1999), is misplaced because, unlike the plaintiff in ***Santelli***, *id.* at 309, Plaintiff did not acquiesce in being unable to testify about, present evidence on, or seek remuneration for symptoms of mental conditions suffered, on diagnosis of mental conditions obtained, on alleged mental pain and suffering, or on alleged loss of enjoyment of life. Only if Plaintiff totally waives any and all claims, claims for compensation, and ability to offer at trial any medical records, testimony, or other evidence which touches on issues as set forth above, would Defendant consider ***Santelli*** to inform the Court's decision on Plaintiff's Motion.

#### **IV. CONCLUSION**

In conclusion, for the foregoing reasons, Defendant Fort Collins Police Services Officer Nick Rogers respectfully requests that this Court reject Plaintiff's Brief and hold Plaintiff's mental health records are discoverable and not shielded from disclosure, unless Plaintiff files a formal pleading similar in form to ECF No. 17 in the above-captioned case that notices the complete withdrawal and waiver of the following: any and all claims of emotional distress, claims for compensation related to emotional distress, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of emotional distress in any way; any and all claims of mental pain and suffering, claims for compensation related to mental pain and suffering, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of mental pain and suffering in any way; and any and all claims of loss of enjoyment of life, claims for compensation related to loss of enjoyment of life, and any ability to offer at trial any medical records, testimony, or other evidence which touches on the issue of loss of enjoyment of life in any way.

Respectfully submitted this 23rd day of February, 2018.

*s/ Matthew J. Hegarty*

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Matthew J. Hegarty, Esq.

Thomas J. Lyons, Esq.

Hall & Evans, L.L.C.

1001 17th Street, Ste. 300

Denver, CO 80202

T: 303-628-3300

F: 303-628-3368

E: lyonst@hallevans.com

hegartym@hallevans.com

**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that, on this 23rd day of February, 2018, I electronically filed the foregoing **RESPONSE TO PLAINTIFF'S MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 36(b) TO PERMIT ADMISSIONS TO BE WITHDRAWN OR AMENDED FROM DEFENDANT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email address:

Anthony Viorst, Esq.  
VIORST LAW OFFICES, P.C.  
tony@hssspc.com  
***Attorneys for Plaintiff***

s/ Marlene Wilson, Legal Assistant to  
Matthew J. Hegarty, Esq.  
Thomas J. Lyons, Esq.  
Hall & Evans, L.L.C.  
1001 17th Street, Ste. 300  
Denver, CO 80202  
T: 303-628-3300  
F: 303-628-3368  
E: lyonst@hallevans.com  
hegartym@hallevans.com  
**ATTORNEYS FOR DEFENDANT**