

66408-5

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No. 66408-5

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JAMES WOODBURY,

Plaintiff/Appellant/Cross-Respondent,

v.

CITY OF SEATTLE,

Defendant/Respondent/Cross-Appellant,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
No. 09-2-22704-7 SEA
(Hon. Michael C. Hayden)

SUR-REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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~~GENERAL APPEALS DIV I
STATE OF WASHINGTON~~

ORIGINAL

I. INTRODUCTION

Pursuant to Commissioner Verellen's July 27, 2011 ruling, Appellant/Cross-Respondent Chief James Woodbury ("Chief Woodbury") submits this Sur-reply limited to the "medical records" issues raised in Respondent/Cross-Appellant City of Seattle's Reply Brief of Respondent.

RCW 5.60.060(4) establishes a privilege for communications between a physician and his or her patient. The rule is intended to ensure confidentiality of physician-patient communications in order to promote proper treatment and protect the patient from the embarrassment that results when intimate details of medical treatment are revealed. The 90 day waiver provision of RCW 5.60.060(4)(b) applies only to actions for personal injury or wrongful death. Had the legislature intended the waiver provision to apply to all tort claims, or all claims involving emotional distress damages, it would have used language to that effect. However, if that were the legislative intent, the privilege would be effectively meaningless. The statutory waiver provision does not apply in the employment discrimination context where no bodily injury is claimed.

The City argues that Chief Woodbury's emotional distress damages are not "garden variety" because they include diagnosable conditions such as depression. As previously noted, Chief Woodbury does

not intend to rely on any medical records at trial to prove his emotional distress damages, to call any expert witnesses related to emotional distress, and does not assert a claim for intentional infliction of emotional distress. Although the issue of whether a claim for “garden variety” emotional distress damages serves as a waiver of the physician-patient or psychotherapist-patient privilege is a matter of first impression in Washington, other courts, including courts in the Western District of Washington, have considered similar symptoms to be “garden variety.”

The City also suggests that the release of “records relating to harm allegedly caused by the defendant’s actions,” rather than all medical records, strikes an appropriate balance between the patient’s privacy and the defendant’s need to investigate the claims. This argument fails to address the fact that the privilege has not been waived and also does not take into account logistical problems with having a healthcare provider determine what records are or are not relevant to an emotional distress claim. Chief Woodbury’s physical health records are not relevant to this litigation. His mental health records may be relevant, but they are privileged. Chief Woodbury has not waived the privilege by asserting a claim for “garden-variety” emotional harm damages.

II. ARGUMENT

A. The City's Argument Is Contrary To *Bunch* and The City Seeks To Convert Non-Medical Damage Terms Like Anxiety And Depression Into Terms Linked To Mental Diseases Or Defects Which Require Expert Testimony

Washington Patterned Jury Instruction Number 330.81(4)

describes the range of emotional harm a plaintiff may recover if the harm is proximately caused by the wrongful acts of the defendant in an employment case: “emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.” Chief Woodbury utilized a series of charts to express, as a lay person, the intensity of his emotional harm within the context of that instruction, some of which are in the record of these proceedings. CP 687-690.

In *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005), the Court held that emotional distress damages were properly awarded to a plaintiff in a discrimination case brought under state law, even though the plaintiff did not have medical testimony supporting the award. The Court stated:

The county argues that Bunch never consulted a healthcare professional, and no one close to him testified about his anxiety. That is true, but such evidence is not strictly required; our cases require evidence of anguish and

distress, and this can be provided by the plaintiff's own testimony.

Bunch, 155 Wn.2d at 181. As stated before, like Mr. Bunch, Chief Woodbury intends to prove his emotional distress damages without the use of medical records or medical testimony.

But the City argues that "he suffers *from* harm that exceeds the category of 'garden variety' emotional distress, including stress, anxiety, and depression." City's Reply Brief at 4. The City goes on to note that some of the terms like anxiety may be found in the DSM IV and that they are mental disorders. *Id.* In fact, at the trial court, the City retained Patricia Lipscomb, Ph.D. to review the charts and express her view that the charts and terms used in the charts like anxiety did not meet the standards of the mental health profession. CP 658-670. She said the charts lack "content validity," "construct validity," and "internal validity." CP 661, 663. At one point, she focused on the Chief's lay expression of his anxiety:

Taking anxiety as an example, this is an experience that is generally understood by psychiatrists and psychologists to be multidimensional and even its identification (and, more so, its quantification) depend on an examination and assessment of its components, not just some global impressionistic rating.

A psychiatrist or psychologist assessing a patient for anxiety will not just ask, "Are you anxious?" or, "Were you anxious?" or, "How anxious are/were you?" Instead the psychiatrist or psychologist typically inquires as to the possible presence and severity of various typical components of anxiety.

CP 662. Dr. Lipscomb's testimony demonstrates that Chief Woodbury's expression of his damages are those of a lay person, and that the words he uses such as anxiety and depression are lay terms, consistent with the WPI, not medical terms that would escalate his damages to those requiring medical testimony. In fact, Dr. Lipscomb's main complaint is that Chief Woodbury's lay testimony does not meet medical standards. Thus, the City's expert is the best evidence that Chief Woodbury is presenting lay evidence of garden-variety emotional harm within the parameters provided by *Bunch* and WPI 330.81 (4). The City's argument, if accepted, would overrule the holding in *Bunch*, because no plaintiff could describe his or her damages without fear of using a term in a lay context that the defendant would then misconstrue as being in a medical context, thus justifying medical and expert testimony and waiver of the physician-patient privilege. This is not the law, nor is it the intent of the law.¹

B. Chief Woodbury Did Not Waive His Physician-Patient Privilege By Asserting "Garden-Variety" Emotional Distress Damages

In *Smith v. Orthopedics International, Ltd.*, PS, 170 Wn.2d 659, 244 P.3d 939 (2010), the Supreme Court recently discussed the purpose

¹ The City also argues that, "Woodbury testified that his medical records support his claim of emotional distress damages. CP 2067-2076 and 2080-2092." City's "reply" brief at 4. The clerk paper's referenced do not support this statement in the context it is used. In fact, Chief Woodbury never claimed that he intended to use medical records to prove his case.

behind the physician-patient privilege in RCW 5.60.060(4). The Court stated that the purpose was twofold: “(1) to ‘surround patient-physician communications with a ‘cloak of confidentiality’ to promote proper treatment by facilitating full disclosure of information’ and (2) ‘to protect the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment.’” *Id.* at 667 (internal citations omitted). The purpose behind the privilege would be lost if the mere assertion of a claim for emotional distress damages, without affirmative reliance on medical records, expert testimony, or some type of extreme emotional distress, waived the privilege.

The 90-day mandatory waiver provision of RCW 5.60.060(4)(b) applies only in the personal injury and wrongful death context. Additionally, RCW 18.83.110 protects “confidential communications between a client and a psychologist” from “compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client.”

Under circumstances similar to the instant case, the United States District Court for the Western District of Washington in *Sims v. Lakeside Sch.*, 2007 U.S. Dist. LEXIS 18675 (W.D. Wash., Sept. 20, 2007) not only adopted the narrow approach discussed in *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. CA. 2003), but also found mental health records by a physician,

rather than a licensed psychologist, were subject to the psychotherapist-patient privilege. Here, the operative fact appeared to be that the records were mental health records, rather than the title of doctor. The court stated:

This Court is persuaded that the narrow approach discussed in *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-40 (N.D. Cal. 2003) should be applied here. Mr. Sims has asserted “garden variety” emotional distress symptoms, including depression, anger, irritability, sleep loss, discouragement, withdrawal, relived experience and low self esteem. He has not asserted a bodily injury claim, he is not relying on any provider or other expert to prove emotional distress symptoms, and he has not pled a cause of action for intentional or negligent infliction of emotional distress.

Sims v. Lakeside Sch., 2007 U.S. Dist. LEXIS 18675, *3 (W.D. Wash., Sept. 20, 2007).

Like the plaintiff in *Sims*, Chief Woodbury is asserting “garden variety” claims for emotional distress, including depression, anxiety, and stress. Chief Woodbury was treated by his physician at Group Health, but his mental health records should be protected to the same extent as those of a psychotherapist. Lastly, Chief Woodbury has not asserted a claim of bodily injury or intentional infliction of emotional distress and does not intend to rely on medical records or expert medical testimony at trial to prove his emotional distress damages. See also *EEOC v. Wyndham Worldwide Corp.*, 2008 U.S. Dist. LEXIS 83558, *15-16 (W.D. Wash.,

Oct. 3, 2008) (adopting the reasoning of *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. CA. 2003)).

C. The Case Law Cited by The City Concerns Cases Where the Plaintiff's Physical Or Mental Condition Was "At Issue"

Chief Woodbury argues that the assertion of a "garden variety" claim for emotional distress damages does not place his mental state "at issue" in the litigation. The City's statement that "[a] plaintiff asserting a physical or mental condition in a judicial proceeding 'waives the privilege with respect to the information relative to that condition'" is taken out of context and read too broadly. Reply Brief of Respondent at 6, quoting *Carson v. Fine*, 123 Wn.2d 206, 213-14 (1994). *Carson* was a medical malpractice case. The entire quote reads: "Other authorities agree that a *patient voluntarily placing his or her physical or mental condition in issue* in a judicial proceeding waives the privilege with respect to information relative to that condition." *Carson*, 123 Wn.2d at 213-14. In the whistleblower retaliation, employment discrimination context, a plaintiff does not place his or her mental state in issue by asserting a "garden variety" claim for emotional distress damages. Likewise, in *Maday v. Public Libraries of Saginaw*, 480 F.3d 815, 820-21 (6th Cir. 2007), the

plaintiff put her mental state at issue when she introduced her mental health records into evidence as proof of her emotional distress damages.²

D. The City’s Suggestion that Release of “Relevant” Medical Records Strikes an Appropriate Balances Ignores the Issue of Privilege and is Impractical

The City cites to *Johnson v. Chevron*, a King County case also involving Appellant’s counsel, to suggest that it struck an appropriate balance between the plaintiff patient’s right to privacy and the defendant’s right to discover all relevant information. First, *Johnson v. Chevron* involves a disability discrimination claim where the plaintiff’s physical health records were relevant. Second, even if mental health records were the only records at issue, the release of “relevant” records still ignores the fact that the records are privileged. Although they may be relevant to a plaintiff’s claim for emotional distress damages, the records are protected from disclosure by the physician-patient or psychotherapist-patient privilege when the plaintiff alleges only “garden variety” emotional distress damages. Third, the City’s suggestion ignores the practical problem of having a medical record provider responding to a subpoena determine what records are or are not “relevant” to an emotional distress damages claim. For example, Chief Woodbury sought treatment at Group

² *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006) and *Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000) adopt the broad approach to waiver as discussed in *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. CA. 2003) and Appellant’s Opening and Reply briefs.

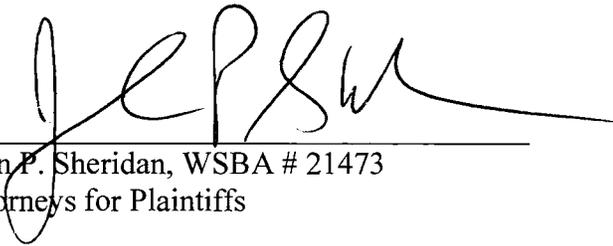
Health for a number of medical issues. It is unclear whether a medical records center responding to a subpoena would disclose only those “relevant records.” In the instant case, Chief Woodbury submitted all of his medical records for *in camera* review. Judge Hayden reviewed the records and required disclosure of medical records related to mental health; however, Chief Woodbury maintained his objection to the release of even “relevant” medical records based on the physician-patient privilege.

III. CONCLUSION

Chief Woodbury respectfully requests that this Court adopt the narrow approach to waiver of the physician-patient and psychologist-patient privilege and determine that his medical records are protected from disclosure.

Respectfully submitted this 26th day of August, 2011.

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