

66408-5

66408-5

No. 66408-5

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

JAMES WOODBURY,

*Appellant/Cross-Respondent,*

vs.

CITY OF SEATTLE,

*Respondent/Cross-Appellant,*

---

**REPLY BRIEF OF RESPONDENT**

---

PETER S. HOLMES  
Seattle City Attorney

Fritz E. Wollett, WSBA #19343  
Assistant City Attorney  
(206) 684-0374  
Email: fritz.wollett@seattle.gov

Erin L. Overbey, WSBA #21907  
Assistant City Attorney  
(206) 684-8283  
Email: erin.overbey@seattle.gov

Attorneys for Respondent

600 Fourth Ave., 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769

2011 JUN -6 PM 3:29  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

ORIGINAL

**TABLE OF CONTENTS**

	<u>Page(s)</u>
I. INTRODUCTION .....	1
II. ARGUMENT.....	2
A. Woodbury Should Respond To a Subpoena for Medical Records from Doctors Who Treated Him For Emotional Harm He Says Was Caused By the City .....	2
1. Woodbury’s testimony provides a direct correlation to medical diagnosis and elevates this beyond a claim of “garden variety” emotional harm .....	3
2. A plaintiff claiming personal injury in a complaint waives medical record privilege under Washington law .....	5
B. The Ninth Circuit Agrees That Whistleblower Rights Are Limited to Specific Provisions In the Statute .....	9
III. CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

*Carson v. Fine*,  
123 Wn.2d 206 (1994) ..... 5, 6

*Doe v. City of Chula Vista*,  
196 F.R.D. 562 (S.D.Cal. 1999) ..... 8

*Doe v. Oberweis Dairy*,  
456 F.3d 704 (7th Cir. 2006) ..... 6, 7

*Fitzgerald v. Cassil*,  
216 F.R.D. 632 (N.D.Cal. 2003)..... 3, 4

*Maday v. Public Libraries of Saginaw*,  
480 F.3d 815 (6th Cir. 2007) ..... 6

*Sanchez v. U.S. Airways, Inc.*,  
202 F.R.D. 131 (E.D.Pa. 2001)..... 7

*Schoffstall v. Henderson*,  
223 F.3d 818 (8th Cir. 2000) ..... 7

*State v. Tradewell*,  
9 Wn. App. 821, *review denied*, 83 Wn.2d 1005 (1973)..... 6

*Tides v. Boeing*,  
--- F.3d. ---, 2011 WL 1651245 (9th Cir. 2011)..... 9, 10

**STATUTES**

RCW 5.60.060 ..... 3

RCW 5.60.060(4)..... 5

## I. INTRODUCTION

Woodbury asserts that he has not waived any confidentiality attached to his medical information, and downplays his attempt to collect a million dollars in emotional distress damages without having to submit to a targeted evaluation of his emotional distress by a qualified doctor. Woodbury testified to medically diagnosable conditions that support his claim for emotional harm, and therefore elevates his claim beyond a “garden variety” claim of emotional harm. Indeed, Washington’s law creating the privilege upon which he relies clearly provides for exception to that privilege 90 days after a plaintiff files suit for personal injuries.

Whether this statutory waiver language applies specifically to a claim for emotional distress suffered by a local government whistleblower is a matter of first impression. There is significant authority from other jurisdictions supporting disclosure. In balancing privacy interests against the broad disclosure requirements of civil discovery rules, the logical approach is to allow for the disclosure, unless the plaintiff chooses not to seek emotional distress damages. If Woodbury agreed to withdraw his \$1 million injury claim for emotional distress damages, the City would agree that disclosure of the medical records is not appropriate.

This reply relates specifically to the issue of whether a plaintiff

seeking emotional distress damages, treated for such damage by a healthcare provider, may withhold the relevant records from the defendant. Additionally, the City wishes to call the Court's attention to supplemental authority on interpretation of whistleblower rights, published after the City filed its opposition brief.

## **II. ARGUMENT**

### **A. Woodbury Should Respond To a Subpoena for Medical Records from Doctors Who Treated Him For Emotional Harm He Says Was Caused By the City**

The City subpoenaed medical records directly from Woodbury's healthcare provider after he testified that his medical records would support his claim for emotional distress damages. CP 624-627. The trial court quashed the subpoena, based on Woodbury's assertion that he had not waived confidentiality of his medical records. CP 729-730. The City noted this singular issue in a cross-appeal. CP 1669-1674. In his opening brief, Woodbury argued that he had not waived the confidentiality attached to his medical records, thereby responding to the City's noted issue on appeal. The City filed its opposition brief, providing factual information on all issues pertaining to medical records, and primarily argued that its CR 35 examination was proper and consistent with legal authority. Opposition at 6-7, 37-43. Now, the City provides its detailed

rebuttal to the claim that Woodbury can seek one million dollars in emotional harm, identify medical records directly related to that harm, and prevent the City from obtaining unedited medical records directly from the provider.<sup>1</sup> Woodbury's claim that he is entitled to hide portions of his record from review is contrary to legal authority and fundamental fairness.

**1. Woodbury's testimony provides a direct correlation to medical diagnosis and elevates this beyond a claim of "garden variety" emotional harm**

Woodbury claims that he seeks only "garden variety" emotional distress damages, and therefore has not waived any privilege associated with his medical records. Appellant's Opening Brief at 39. In support of that claim, he relies on the statutory physician-patient privilege in RCW 5.60.060, and a federal district court decision from California discussing federal common law privilege. *Id. Fitzgerald v. Cassil*, 216 F.R.D. 632

---

<sup>1</sup> Prior to submission of this brief, Woodbury's counsel delivered a letter asking that the City's reply brief be stricken and oral argument set in July of 2011. The basis for this claim is that the City should not be afforded any further briefing on the issue of medical privilege waiver because it was not fully briefed in its opposition brief. This is not completely correct, as there are several paragraphs of factual information relating to this issue. The request also ignores Woodbury's improper attempt to provide multiple briefs on this issue. Since he agreed with the trial court order quashing the medical subpoena, he did not appeal and had no basis for briefing that issue in his opening brief. He is not prejudiced by being limited to a single brief on this issue, since that is precisely what would have occurred if he had addressed the issue where he should have, in a reply brief. As the briefing stands, he has provided over six pages of argument and authority on his position that he is entitled to assert the physician-patient privilege in this context. The City's reply brief responds to Woodbury's waiver arguments as provided by RAP 10.3 (c).

(N.D.Cal. 2003), cited by Woodbury, analyzes Federal Rule of Evidence 501, the federal counterpart to RCW 5.60.060. The federal rule, like our state statute, creates a privilege between patient and physician that may be waived. In *Fitzgerald*, the plaintiffs sought emotional distress damages arising from alleged discriminatory conduct, but conceded that they did “not allege that the discrimination by [D]efendants caused any specific disabilities or mental or medical abnormalities.” *Fitzgerald*, 216 F.R.D. at 636. Even if one were to adopt the reasoning in this federal case, the concessions made by Woodbury differ, rendering *Fitzgerald* inapplicable.

First, Woodbury testified that his medical records support his claim of emotional distress damages. CP 2067-2076 and 2080-2092. Second, Woodbury testified that he suffers from harm that exceeds the category of “garden variety” emotional distress, including stress, anxiety, and depression. CP 2069-2076 and 2080-2092. According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV), “anxiety” is a diagnostic term that includes several diagnosable disorders, including two that are specific to stress: post traumatic stress disorder and acute stress disorder. See American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. Washington, DC, American Psychiatric Association, 1994, p. 424-432 (anxiety disorders). Depression is also a diagnosable disorder. *Id.*, p. 317-327,

339-344. Indeed, Woodbury even graphed some of his diagnosable medical conditions and related symptoms. He proposes to testify that on any given day, he suffered anguish, humiliation, anxiety and stress, which he rates on a scale of one to ten. CP 2067, CP 2092, CP 687-689, and CP 760-764. Thus, it is disingenuous at best for him to claim that he seeks no recovery for any psychological disorder or mental abnormalities. Opening Brief, p. 40. Since Woodbury seeks something more than “garden variety” damages, he must be prepared to provide any medical records relevant to his claims of anxiety, stress and depression.<sup>2</sup>

**2. A plaintiff claiming personal injury in a complaint waives medical record privilege under Washington law**

In Washington, RCW 5.60.060(4) provides for waiver of the physician-patient privilege 90 days after a plaintiff files suit for personal injuries. Taken together, Woodbury’s complaint and testimony make clear that he seeks recovery for harm causing him to suffer diagnosable medical conditions. CP 2069-2076, CP 2080-2092, CP 2067, CP 2092, CP 687-689, and CP 760-764. This fully waives the physician-patient

---

<sup>2</sup> The City sought medical records from the provider identified by Mr. Woodbury at his deposition, beginning in 2005. Woodbury reported, as one example, that his anxiety levels were at or below “1” in 2007, and the City sought comparative information for use by its expert in determining medical information before and after the City’s alleged retaliation. *See* CP 687-690.

privilege with respect to the medical records he withheld. A waiver of this privilege as to one of plaintiff's physicians also constitutes a waiver as to other physicians who attended the plaintiff with regard to the disability or ailment at issue. *Carson v. Fine*, 123 Wn.2d 206, 214 (1994); *State v. Tradewell*, 9 Wn. App. 821, 824, *review denied*, 83 Wn.2d 1005 (1973). The records subpoenaed from his treating physician relate to his claim of emotional distress. Woodbury testified:

Q: Other than the charts that you produced on our first day of deposition, do you have any documents that support your claims for damages for emotional harm?

A: I have medical records from my personal physician. CP 695.

When Woodbury identified the physician providing such treatment the City sought records from that physician. CP 624-627.

A plaintiff asserting a physical or mental condition in a judicial proceeding "waives the privilege with respect to the information relative to that condition." *Carson v. Fine*, 123 Wn.2d at 214. Plaintiff offers federal authority in support of his claim that he is entitled to maintain privilege for the records, so long as he only seeks general, emotional distress damages. Opening Brief, 39. Although no Washington Court has ruled on this specific issue, Woodbury's position has been rejected by a number of jurisdictions. See *Maday v. Public Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (plaintiff employee waived any

psychotherapist-client privilege by putting her own mental state at issue, and court admitted records subject to 403 balancing); *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) (in claim of sexual harassment, plaintiff by seeking damages for emotional distress puts her psychological state at issue, and the defendant is entitled to recover any records of that state);<sup>3</sup> *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (claims alleging emotional distress caused by sex discrimination, retaliation, and harassment placed plaintiff's mental condition in issue, waiving her psychotherapist-client privilege.)

The practical problem with preventing the defendant from accessing the records was explained by one court as follows:

To allow Plaintiffs to make a claim for emotional distress, but shield information related to their claim, is similar to shielding other types of medical records. For instance, if the injury at issue were to the knee, and Plaintiff had sustained a subsequent knee injury requiring treatment, Plaintiffs would not be able to hide the details of the subsequent knee injury because of privilege or privacy considerations.

*Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131 (E.D.Pa. 2001).

---

<sup>3</sup> Although the plaintiff in *Oberweis* also included a claim for intentional infliction of emotional distress, the Seventh Circuit did not rest its holding on that claim. Instead, the Court noted that CR 35 “would entitle the defendant to demand that the plaintiff submit to a psychiatric examination,” such results would be available for use by the defendant in discovery and at trial; and therefore, “there is no greater invasion of privacy by making existing records available to the defendant.” *Doe v. Oberweis Dairy*, 456 F.3d at 718.

The resistance to Woodbury's theory is rooted in common sense. In supporting his claim for damages, the plaintiff must show that the damage was proximately caused by the defendant's unlawful conduct, while the defendant is entitled to show that other factors contributed to the plaintiff's damages. *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D.Cal. 1999) (citations omitted). Here, the City must be entitled to discover if any other factors contributed to harm that Woodbury attributes to actions by the City. This can only be done by review of medical records during the relevant time period.

The relevancy of such records cannot be questioned. Even *Fitzgerald*, upon which Woodbury heavily relies, acknowledges the relevancy of medical records with respect to emotional distress claims. *Fitzgerald* at 634. The issue is: what is a reasonable approach to allowing for disclosure of relevant information, while avoiding unnecessary disclosure of private information unrelated to the claim. This balance can be achieved.

In an unrelated and recent case at King County, the Court struck a balance by requiring disclosure of medical and mental health records "that pertain to Plaintiff's general claim of emotional distress." CP 684-685, *Johnson v. Chevron*, King County Cause No. 07-2-20155-6SEA. The obligation for disclosure applied "as long as the claim for emotional

damages remains.” *Id.* This strikes precisely the correct balance between the competing interests of privacy and disclosure of relevant information. If the plaintiff chooses to seek recovery, particularly in the range of \$1 million for his emotional harm, he must allow his medical provider to respond to lawful subpoenas on his records relating to harm allegedly caused by the defendant’s actions. If the plaintiff wants to protect his or her privacy, they can seek other compensatory damages and withdraw or refrain from seeking emotional distress damages. This approach puts the plaintiff in control of whether any private medical information is subject to disclosure.

Since Woodbury’s briefing makes clear that he intends to seek emotional distress damages, he must also be prepared to accept disclosure of medical records directly related to the harm he describes in his complaint and his testimony.

**B. The Ninth Circuit Agrees That Whistleblower Rights Are Limited to Specific Provisions In the Statute**

A month after the City filed its opposition brief regarding the trial court jurisdiction and damages available to a local government whistleblower, the Ninth Circuit issued an opinion adopting the City’s analysis with respect to federal whistleblower statute. Because this authority was unavailable on the date of the City’s opposition, the City

supplements pursuant to RAP 10.8.

*Tides v. Boeing*, --- F.3d. ---, 2011 WL 1651245 (9th Cir. 2011) rejected the whistleblower claims of two Boeing employees who reported the alleged misconduct to the local newspaper, rather than the three categories of whistleblower recipients identified in the Sarbanes-Oxley Act. The Ninth Circuit found the language of the Act clearly identifies three potential recipients, which does not include the media, and that “the plain meaning of the statutory language excludes the expansive interpretation advanced by the plaintiffs.” *Id.* at \*6. In reaching its conclusion, the Court compared the language in Sarbanes-Oxley to another federal whistleblower statute, and concluded that the absence of “expansive language” in the Sarbanes-Oxley Act lends support to the conclusion that Sarbanes-Oxley does not protect employees making disclosure to the media. *Id.*, \*5. This is consistent with the City’s plain language analysis at 15-16 of its opposition brief, and its comparative analysis of state and local whistleblower laws at 17-20 of its opposition brief.

### **III. CONCLUSION**

If Woodbury is allowed to seek emotional distress damages, despite the absence of authority for such damages in the whistleblower code, he must be obligated to stop interference with the City’s attempt to

obtain relevant information from his doctors that is directly related to the damages he asserts in this case. In the event that the Court remands the case for further proceedings, the City requests reversal of the Order quashing its subpoena, so that it can obtain the full record directly from the healthcare provider.

DATED this 6th day of June, 2011.

PETER S. HOLMES  
Seattle City Attorney

By:

  
Fritz E. Wollett, WSBA #19343  
Erin L. Overbey, WSBA #21907  
Assistant City Attorneys

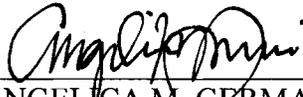
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner(s) indicated:

John P. Sheridan Sheridan Law Firm, PS 1200 Hoge Building 705 Second Ave. Seattle, WA 98104 jack@sheridanlawfirm.com	<input type="checkbox"/> U.S. MAIL <input checked="" type="checkbox"/> LEGAL MESSENGER <input type="checkbox"/> FACSIMILE <input type="checkbox"/> E-MAIL <input type="checkbox"/> HAND DELIVERY
---	--

DATED this 6th day of June, 2011, at Seattle, King County, Washington.

  
\_\_\_\_\_  
ANGELICA M. GERMANI

FILED  
COURT OF APPEALS, CIV. #1  
2011 JUN -6 PM 3:29