Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RANDY LIEBICH,	)	
	)	**No. 20 C 2368**
Plaintiff,	)	
	)	**Magistrate Judge M. David Weisman**
v.	)	
	)	
JOSEPH DELGIUDICE, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants ask the Court to enter an order pursuant to the Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.512(e), the Illinois Mental Health and Developmental Disabilities and Confidentiality Act, 740 Ill. Comp. Stat. 110/10, and state and federal drug and alcohol treatment confidentiality statutes, 20 Ill. Comp. Stat. 301/30-5, 42 U.S.C. § 290dd-2, and 42 C.F.R. § 2.64. For the reasons set forth below, the Court grants the motion [96].

Discussion

In this suit, plaintiff alleges that defendants successfully framed him for killing a child, in part by "psychologically manipulat[ing] him into giving a false confession." (ECF 98 at 3 (citing ECF 1 ¶¶ 44-66).) Plaintiff says he suffered "severe trauma" from being falsely imprisoned for sixteen years, and that defendants' "misconduct continues to cause [him] physical and psychological pain and suffering, humiliation, constant fear, nightmares, anxiety, depression, despair, and other physical and psychological effects." (ECF 1 ¶ 93; *see id.* ¶¶ 100, 106, 111, 116, 122 (alleging that defendants' constitutional violations caused plaintiff "great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages"); ¶¶ 128, 132, 136, 141 (alleging the same damages for his state-law malicious prosecution, intentional infliction of emotional distress, willful and wanton conduct, and conspiracy claims).) Not surprisingly, given these allegations, defendants want to obtain plaintiff's mental health records. Moreover, they argue that because plaintiff has put his mental state at issue, he has waived any psychotherapist-patient privilege that might otherwise apply. *See Jaffee v. Redmond*, 518 U.S 1, 9-10 (1996) (recognizing a federal common law psychotherapist-patient privilege); 740 Ill. Comp. Stat. 110/10 (state psychotherapist privilege).

Plaintiff admits that at least some of his psychotherapy records are relevant, but he argues that his request for emotional distress damages does not constitute a waiver of privilege. (ECF 98 at 3.) The only time the Seventh Circuit has addressed this issue, it said: "If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discover any records of that state." *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006). Despite the breadth of this statement, district courts have variously interpreted *Oberweis*

as endorsing a broad, a narrow, and a middle ground/garden variety approach to waiver. *Laudicina v. City of Crystal Lake*, 328 F.R.D. 510, 513 (N.D. Ill. 2018).

> Under the broad application, the plaintiffs waive the privilege by merely seeking damages for emotional distress. Under the narrow application, the plaintiffs must place an affirmative reliance on the psychotherapist-patient communication to waive the privilege. The middle ground finds that no waiver occurs if the plaintiffs are only seeking garden variety damages.

Id. (citations and quotation marks omitted); *see Coleman v. City of Chi.*, No. 17 C 8696, 2019 WL 7049918, at *1 (N.D. Ill. Dec. 23, 2019) (same); *Taylor v. City of Chi.*, No. 14 C 737, 2016 WL 5404603, at *2 (N.D. Ill. Sept. 28, 2016) (same).

In the Court's view, it is impossible to reconcile the narrow approach with the Seventh Circuit's "straightforward and unequivocal" statement in *Oberweis. Taylor*, 2016 WL 5404603, at *3 (noting that the *Oberweis* court was aware of the three approaches when it issued the opinion) (citing *Oberweis*, 456 F.3d at 718) (citing Beth S. Frank, Note, *Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages Under the Civil Rights Act of 1991*, 79 Wash. U. L.Q. 639, 651–57 (2001)). Thus, the Court declines to apply it here.

The *Oberweis* holding seems to leave room for the garden variety approach, but as the *Taylor* court noted, that approach is problematic for other reasons:

> First, it is difficult to define precisely what falls within the basket of garden-variety emotional distress. For example, must a plaintiff limit her testimony at trial to a plain and simple statement that she "suffered emotional distress"? *See, e.g., Santelli v. Elctro-Motive*, 188 F.R.D. 306, 309 (N.D. Ill. 1999) (limiting plaintiff's testimony to "[b]are testimony of humiliation or disgust"). Or can she testify that she suffered "severe" or "horrible" emotional distress? *See, e.g., Langenfeld v. Armstrong World Indus., Inc.*, 299 F.R.D. 547, 553 (S.D. Ohio 2014) (holding that the plaintiff's testimony that the defendant's conduct caused her to feel stressed and lose sleep were sufficiently severe to fall outside the category of garden-variety damages). Can she testify that the defendant's actions caused her to feel "sad" or "miserable" or "bummed out"? How about "depressed" (which often is used in common parlance to mean feeling "sad," "miserable," or "downhearted")? . . . .
>
> Aside from the definitional ambiguity, the garden-variety approach could also raise practical difficulties at trial. For example, if the plaintiff chooses to testify at trial only that he "suffered emotional distress," does the defendant have to take that answer (which hardly seems fair), or can the defendant cross-examine the plaintiff and ask in what way the plaintiff believes he was emotionally harmed? And, if the plaintiff answers that question with specific examples (*e.g.*, he suffers from depression, loss of appetite, and isolation), has he then waived the privilege (thereby providing the defendant with an opportunity to obtain discovery from his psychotherapist before the trial can proceed), or has he not, because the defendant

> has opened the door? At least one commentator has noted the difficulties that the garden-variety approach would produce at trial. *See* Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 Geo. Mason L. Rev. 117, 143 (2013).

Taylor, 2016 WL 5404603, at *4.

While recognizing the issues raised by the *Taylor* court without necessarily fully endorsing these concerns, the Court need not decide whether the broad or garden variety approach controls because plaintiff's allegations clearly fall outside the realm of garden variety emotional distress. Plaintiff alleges that: (1) he "lost 16 years of his life because he was wrongfully convicted of a supposed crime he did not commit"; (2) as a result of his incarceration, he "missed out on . . . the lives of his family and his friends," "was robbed of opportunities to gain an education, to engage in meaningful labor, to develop a career, to raise his daughter, and to pursue his interests and passions," and was unable to spend time with his dying mother or attend her funeral; (3) he was imprisoned in "harsh and dangerous conditions" and "lived in constant emotional anguish, never knowing whether . . . he would ever be exonerated"; and (4) he continues to have "physical and psychological pain and suffering, humiliation, constant fear, nightmares, anxiety, depression, despair, and other physical and psychological effects" from the allegedly wrongful imprisonment and being "labeled a child murderer." (ECF 1 ¶¶ 1, 90-93.) In addition, he asserts a claim for intentional infliction of emotional distress, which requires proof that defendants' alleged conduct "cause[d] [him] severe emotional distress." *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 605 (7th Cir. 2006) (quotation omitted). Having put his mental state squarely at issue in this case, the Court holds that plaintiff has waived any psychotherapist-patient privilege that might otherwise apply.[1]

Even if he has waived the privilege, plaintiff contends the waiver does not extend to "every single mental health record, no matter how irrelevant or remote." (ECF 98 at 6.) While that is true, plaintiff seeks to recover for harm allegedly inflicted on him from 2002 to the present, so the temporal window of relevancy is quite large. That said, the Court will, of course, entertain any reasonable relevance objections plaintiff may raise.

SO ORDERED. **ENTERED: February 12, 2021**

M. David Weisman

M. David Weisman
United States Magistrate Judge

[1] Though the parties do not address the issue, the Court also finds that there is good cause for the disclosure of any records of plaintiff's substance abuse treatment. Defendants need those records to defend against plaintiff's claims and allegations, they have no other way of obtaining them, and the need for disclosure outweighs any potential injury it may cause to plaintiff's relationship with his medical providers. *See* 20 Ill. Comp. Stat. 301/30-5(bb); *see also* 42 U.S.C. § 290dd-2(b)(2)(C); 42 C.F.R. § 2.64(d).