

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

In re: WATTS COORDINATED
PRETRIAL PROCEEDINGS

)
) Master Docket Case No. 19-cv-1717
)
) Judge Franklin U. Valderrama
)
) Magistrate Judge Sheila M. Finnegan
)

**DEFENDANTS' JOINT MOTION FOR ENTRY OF QUALIFIED HIPAA AND
MENTAL HEALTH PROTECTIVE ORDER FOR ALL LOEVY & LOEVY
PLAINTIFFS IN THE WATTS' COORDINATED PRETRIAL PROCEEDINGS**

Defendants City of Chicago (the "City"), Philip Cline, Terry Hillard, Dana Starks, Debra Kirby, Karen Rowan, Edward Griffin, Jerrold Bosak, ("Supervisory Officers"), Brian Bolton, Miguel Cabrales, Darryl Edwards, Robert Gonzalez, Alvin Jones, Manuel Leano, Douglas Nichols, Jr., Calvin Ridgell Jr., Elsworth J. Smith, Jr., Kenneth Young, Lamonica Lewis, Frankie Lane, Katherine Moses-Hughes, Nobel Williams, Curtis Ivy, and Gerome Summers, Jr. ("Defendant Officers") and Defendants Michael Spaargaren, Matthew Cadman, Kallatt Mohammed, and Ronald Watts (collectively "Defendants"), through their respective undersigned counsel, jointly move this Honorable Court to enter Defendants' proposed Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and Mental Health Protective Order so Defendants may obtain Plaintiffs' medical and mental health records along with any rehabilitation records related to drug and alcohol use directly from various medical professionals to ascertain the extent and true nature of their purported injuries.

BACKGROUND

All Loevy & Loevy Plaintiffs in the above proceedings bring actions under 42 U.S.C. § 1983 alleging they were wrongfully arrested, convicted and jailed and/or incarcerated as a result of Defendants' alleged misconduct. Plaintiffs claim physical and/or emotional injuries as a result of the alleged wrongful arrests and convictions, thereby placing their physical and mental health condition at directly at issue in this case. *See generally* Plaintiffs' complaints in these proceedings. See also as representative examples of emotional injuries, Plaintiff Phillip Thomas' answer to Defendant Elsworth Smith Interrogatory No. 25 and Plaintiff Henry Thomas' answer to Defendant Gerome Summers' Interrogatory No. 25. *See Ex. A and B.* Plaintiffs have also informed Defendants they will seek damages related to mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages. In addition to alleging claims for intentional infliction of emotional distress, Plaintiffs claim they suffered "incalculable damage, including psychological damage, anguish, and humiliation, which were caused by their wrongful conviction, the destruction of their reputations, the disruption of their life and intimate relationships, and the suspension of their ability to pursue a career and raise a family." *See Ex. C, Plaintiffs' Rule 26(a)(1) Disclosure.* Plaintiffs make further claims for emotional distress that they allege resulted from the Defendants' supposed misconduct, including depression, anxiety and continued psychological damages *and* will continue to suffer emotional and physical manifestations well into the future. *See Ex. A and B.*

Consequently, Defendants need to obtain Plaintiffs' medical and mental health records to obtain information that may support their defenses and to assess and determine the true nature and cause of Plaintiffs' purported damages. The parties agree there is good cause for a Qualified HIPAA and Mental Health ("Protective Order"), but disagree whether the order should allow

Plaintiffs' counsel to conduct an initial privilege review of all of their medical records to determine which documents may be subject to a psychotherapist/psychiatric patient privilege. *See* Ex. D, Defendants' proposed Protective Order for Phillip Thomas; Ex. E, Plaintiffs' redline edits of Defendants' proposed Protective Order. Plaintiffs' position is that they need to review materials in advance of the Defendants in order to make a determination as to whether they will assert or waive the privilege. Plaintiffs also proposed that they would conduct the privilege review within seven days of receiving the documents. Defendants oppose Plaintiffs' gatekeeper proposal as not warranted or necessary in these proceedings. If Plaintiffs seek to assert a psychotherapist-patient privilege as to any specific subpoenaed records, they can object to the specific subpoena as allowed under Rule 45. *See Simon v. Nw. Univ.*, 2017 WL 66818, at *2 (N.D. Ill. Jan. 6, 2017) ("A party has standing to quash a subpoena issued by another party to the litigation and directed to a non-party in two instances: if the movant has a claim of privilege attached to the information sought or the subpoena implicates the movant's privacy interests."). Plaintiffs cannot use the privilege as both a sword and a shield to get a preview of the records subpoenaed by Defendants in order to pick and choose what records they will assert are privileged and what records are not privileged.

Pursuant to Local Rule 37.2, counsel for individual defendants from Hale & Monico and Plaintiffs' counsel have spoken numerous times and exchanged written correspondence in effort to reach an agreement concerning Plaintiffs' asserted protection over the mental health and substance abuse treatment records. Defendants maintain Plaintiffs waived this protection when they filed their respective complaints and in later answers to written discovery with claims of severe and devastating mental and emotional damages, thereby placing their mental and emotional health directly at issue in the case. Plaintiffs proposal that any medical records including but not limited to mental health and substance abuse treatment records should be first reviewed and filtered

by Plaintiffs' counsel to determine whether any are subject to privilege is not warranted based on the claims and damages alleged in these Watts Coordinated Pretrial Proceedings. Therefore, Plaintiffs' proposal to filter information and delay the production of documents on matters Plaintiffs themselves have put directly at issue in these proceedings should be rejected by this Court.

LEGAL STANDARD

District courts have broad discretion to manage the discovery process and the authorization to order discovery of any material relevant to the litigation and to enter a protective order concerning certain discovery upon a showing of good cause. *See Geiger v. Aetna Life Ins. Co.*, 845 F.3d 357, 365 (7th Cir. 2017); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(c)(1). During discovery, relevancy is construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). "Because the requested discovery seeks information that relates to plaintiff's claims for damages, the discovery is relevant under Rule 26(b)(1)." *Laudicina v. City of Crystal Lake*, 328 F.R.D. 510, 518 (N.D. Ill. 2018). Although the requested discovery may be protected by the psychotherapist-patient privilege, that privilege is subject to waiver. *Jaffee v. Redmond*, 518 U.S. 1, 15 n.14 (1996). By extension, "[i]f 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). Federal and Illinois statutes protect the confidentiality of medical and mental health information. *See* HIPAA ("Health Insurance Portability and Accountability Act of 1996 codified primarily at 18, 26 and 42 USC (2002)), the Illinois Mental Health and Developmental Disabilities and Confidentiality Act ("IMHDDCA" codified at 740 ILCS 110/1 et seq.), and drug and alcohol

treatment/rehabilitation confidentiality statutes (20 ILCS 301/30-5; 42 USC 290dd2; and 42 CFR Part 2). All these confidentiality statutes have exceptions that allow disclosure pursuant to Court order when the information contained in the records is relevant to a lawsuit. *See* HIPPA 45 C.F.R. § 164.512(e); IMHDDCA 740 ILCS 110/10(d); 20 ILCS 301/30-(bb)(2)(E); and 42 USC 290dd-2(b)(2)(C) and 42 C.F.R. 2.61-2.65.

ARGUMENT

A. Plaintiffs’ Emotional Damages Claims Firmly Place Their Psychological State at Issue.

Here, Plaintiffs waived their psychotherapist-patient privilege when they put their purported emotional and psychological injuries at the forefront of their damages claims. All Plaintiffs have alleged some form of emotional damages and claims against Defendants with descriptions of these injuries as “incalculable mental anguish and emotional pain,” and “great mental anguish, humiliation, degradation, physical and emotional pain and suffering.” See generally Plaintiffs’ complaints.

Plaintiffs clearly intend to rely on their emotional and psychological injuries to influence the amount in damages a jury may award. Consequently, they have placed their mental state at issue in the case and have waived their psychotherapist-patient privilege. *See* Ex. F, Order from *Kluppelberg v. Burge, et al*, Case No. 13 C 3963, Dkt. 136, p. 2 (N.D. Ill. April 10, 2014) (Valdez, J.) (“Plaintiff misunderstands that, by putting his psychological history at issue, he has *already* waived any such privileges related to his psychological records.”) (emphasis original). . *See also* Ex. G, *Liebich v. DelGuidice* No. 20 C 2368 (N.D. Ill. Feb. 12, 2021)(holding in a reversed conviction case that the breadth and scope of Plaintiff’s alleged damages undermines his claims that his psychotherapist-patient privilege exists as to some unidentified mental health care).

B. Courts Broadly Construe Waiver of the Psychotherapist-Patient Privilege.

“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.” *Oberweis*, 456 F.3d at 718. Several district courts have determined that *Oberweis* stands for a broad waiver of the psychotherapist-patient privilege, in that *any* claim for damages based on psychological or emotional injury puts the plaintiff’s mental state at issue in the case and results in a broad waiver of the privilege.¹ See *Laudicina*, 328 F.R.D. at 514 (“The broad language [of *Oberweis*] hedges no bets...[i]ndeed, the *Oberweis* opinion did not even use qualifying words or phrases that courts often use, such as ‘generally’, ‘under these facts’ and ‘in this particular case’ to allow wiggle room in the analysis.”); *Taylor*, 2016 WL 5404603, at *2-4 (“[T]he *Oberweis* court adopted the words reflecting the broad approach...[and] is binding precedent on this issue, [so this court] will apply the broad approach.”); *Hardy v. City of Milwaukee*, 2014 WL 12651233, at *1 (E.D. Wisc. May 19, 2014) (“Based on the Seventh Circuit’s clear statement of the law in *Oberweis Dairy*, Defendants’ motion to compel will be granted because Hardy seeks damages for ‘emotional distress, humiliation, and trauma’ independent of his ‘physical pain.’”); *Price v. Wrencher*, 2014 WL 5035096, at *2 (N.D. Ill. Jan. 21, 2014) (“By alleging she has suffered ‘extreme’ and ‘severe’ emotional harm and trauma...[plaintiff] has brought her psychological state at issue in this suit, such that defendants are entitled to discovery with respect to her [mental health information].”). This broad waiver mandates that Defendants are entitled to Plaintiffs’ mental health and substance

¹ Since *Oberweis*, district courts have analyzed three approaches to determining when and to what extent a plaintiff waives his psychotherapist-patient privilege: (1) the broad approach, discussed *infra*; (2) the narrow approach, which instructs the privilege is waived only when the plaintiff “affirmatively relies on her communications with the psychotherapist or calls the therapist as a witness,” *Taylor v. City of Chicago*, 2016 WL 5404603, at *2 (N.D. Ill. Sept. 28, 2016); or (3) the middle ground, which finds the privilege remains intact if the plaintiff seeks only “garden-variety” emotional/psychological damages. *Flowers v. Owens*, 274 F.R.D. 218, 224-25 (N.D. Ill. 2011).

abuse treatment records directly from any third parties without Plaintiffs first reviewing them for privilege because no privilege remains.

C. Even “Garden-Variety” Emotional Damages Waive the Privilege.

Plaintiffs have not limited any of their damages claims or even make a claim for “garden-variety” psychological damages. Regardless, *any* claim of mental health damages, “garden-variety” or not, places at issue the Plaintiffs’ mental health and waives the psychotherapist-patient privilege. *See Laudicina*, 328 F.R.D. at 515-18 (finding garden-variety damages still place the plaintiff’s mental health at issue). The precedential holding in *Oberweis* provides a clear, unambiguous directive that when a plaintiff puts his mental state at issue in the case, defendants are entitled to the records of that mental state. 456 F.3d at 718. *See also Hardy*, 2014 WL 12651233, at *1 (“[Plaintiff] continues to cite to federal district court cases for the proposition that a plaintiff who elects to limit his emotional distress claim to ‘garden-variety’ emotional damages rather than psychological injuries has not waived the psychotherapist-patient privilege. Controlling Seventh Circuit precedent [*Oberweis*] holds otherwise.”).²

Any limitation on access to mental health records would be impractical and hinder Defendants’ ability to determine the true nature and cause of any purported injuries. *See Taylor*, 2016 WL 5404603, at *2-4 (discussing the ambiguity and practical difficulties of pursuing “garden-variety” emotional damages without a finder of waiver); *Laudicina*, 328 F.R.D. at 515-18 (same).

Finally, Plaintiffs cannot use the privilege as both a sword and a shield. *See Flowers*, 274 F.R.D. at 225. To the extent the Plaintiffs produce psychotherapist records for their own benefit in this litigation, they cannot now invoke the privilege to shield Defendants from discovering other

² *See also Laudicina*, 328 F.R.D. at 515; *Taylor*, 2016 WL 5404603, at *3 (finding other district courts’ decisions unconvincing where they minimize or ignore the holding in *Oberweis* due in part because the *Oberweis* discussion on waiver was brief and succinct.)

records touching on the same subject matter. *See Laudicina*, 328 F.R.D. at 513 (“[D]efendants have the right to defend themselves. If plaintiffs claim damages because of defendants' actions, then defendants should be allowed to discover the bases and relative merits of those damage claims. It is a matter of fundamental fairness.”); *see also Kronenberg*, 747 F. Supp.2d at 989 (“[W]aiver is based upon the obvious principle of fairness that a party cannot inject his or her psychological treatment, conditions, or symptoms into a case and expect to be able to prevent discovery of information related to those issues.”) (citation omitted). As these courts found, allowing for “garden variety” emotional damages without a finding that the psychotherapist patient privilege has been waived is unsound, unfair and contrary to Seventh Circuit precedent.

D. Good cause exists to enter Defendants’ proposed protective order.

In summary, because Plaintiffs have placed their respective physical and emotional conditions at issue, good cause exists for Defendants to obtain health information and other records to determine the cause, nature, extent and duration of Plaintiffs’ claimed injuries and conditions. Plaintiffs’ medical and mental health providers will need a protective order addressing HIPAA (45 CFR § 162 and 164) and the Illinois Mental Health and Developmental Disabilities Act (740 ILCS 110/3) in order to release Plaintiffs’ medical and mental health records to the Defendants. Defendants’ proposed draft Protective Order addresses Plaintiffs’ privacy concerns and limits the disclosure to persons involved in this litigation including the parties and their respective counsel. *See Ex. D.*

WHEREFORE, Defendants respectfully request the Court enter the Proposed HIPAA and Mental Health Protective Order pursuant to Federal Rule of Civil Procedure 26(b)(1), which would allow Plaintiffs’ medical and mental health providers to release copies of all of Plaintiffs’ records, and for such further relief as this Court deems appropriate.

Dated: May 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Bazarek, an attorney, hereby certify that, on the date stamped on the margin above, I caused to be filed with the Clerk of the Court's CM/ECF system a copy of this motion, which simultaneously served copies on all counsel of record via electronic notification.

/s/ William E. Bazarek