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

	)	**Master Docket Case No. 19 CV 1717**
	)	
	)	
In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	**Judge Frank U. Valderrama**
	)	
	)	**Magistrate Judge Sheila M. Finnegan**
	)	
	)	

DEFENDANT CALVIN RIDGELL'S MOTION FOR PROTECTIVE ORDER

NOW COMES Defendant Calvin Ridgell, by and through his attorneys, Timothy P. Scahill and Steven B. Borkan of BORKAN & SCAHILL, LTD. and moving for a Protective Order under Fed. R. Civ. P. 26(c), states as follows:

INTRODUCTION

Defendant Calvin Ridgell, Jr. ("Defendant Ridgell") is scheduled to proceed with his deposition in the above-captioned consolidated "test cases" on January 25, 2024. In advance of this deposition, Defendant Ridgell attempted to discuss various matters regarding the intended scope of this deposition with Plaintiffs' counsels. This included, in pertinent part, Defendant Ridgell's position that any deposition in this case should not be permitted to probe into any matters regarding any counseling or other mental health treatment or services obtained by Defendant Ridgell (including, but not limited to, those that precipitated his rescheduling of his deposition in this case) and any inquiry into his attorney's legal conflict resulting in his change of counsel. *See* Ex. 1.

The attorneys for the parties exchanged written correspondence on this matter in November and December 2023, spoke over the phone in detail about these matters in November and December 2023, and discussed the dispute over these matters in open court on the record with Your Honor on December 20, 2023. *See* Ex. 1. This Court ordered any motion on this matter to be filed by January 11, 2024 so that these issues could be addressed prior to the commencement of Defendant Ridgell's

deposition on January 25, 2024. Accordingly, pursuant to Local Rule 37.2, after consultation by telephone and good faith attempts to resolve differences, the parties were unable to reach an accord on the subject matter of this motion.

In a nutshell, as articulated in open court, Defendant Ridgell has no objection to answering standard deposition questions regarding whether there is anything about his current physical or mental condition that might interfere with his current ability to understand questions asked of him, to answer such questions truthfully and honestly, and to recall any details about the incidents at issue in this litigation. However, any further inquiry into any other matters pertaining to his mental health should be entirely off limits at his deposition, including but not limited to, any communications with his treater(s), questions regarding the nature of any mental health conditions he has currently or had in the past, any diagnoses or treatment currently or in the past, or the facts, incidents, or circumstances for which any such treatment was necessitated. These subjects are clearly privileged under *Jaffee v. Redmond*. Moreover, given the claims and allegations in these cases, Defendant Ridgell's mental health treatment is not discoverable under Fed. R. Civ. P. 26 even if it were not privileged, including, but not limited to, any questions about the conditions which necessitated the prior delays of his deposition.

Similarly, Plaintiffs seek to invade the province of the attorney-client privilege by inquiring into his knowledge of his attorney's conflict. They have no basis to do so as this information is clearly privileged and non-discoverable.

ARGUMENT

I. Defendant Ridgell's Mental Health Information Is Privileged And Non-Discoverable.

First, as set forth below, Defendant Ridgell still remains entirely unclear as to any purported relevance of Defendant Ridgell's treatment, which began over a decade after the event at issues in this

litigation.[1] Defendant Ridgell has not and has no plans to rely on any evidence related to his treatment in defending against the claims in this litigation. Despite Defendant Ridgell's counsel inquiring on numerous occasions, Plaintiffs' counsel still have not provided any cogent explanation for exactly why they believe any mental health treatment is relevant to proving their claims. *See* Ex. 1. This Court need not even address this issue, however, because it does not matter whether any such evidence is relevant because it is clearly privileged under *Jaffee v. Redmond* and, thus, non-discoverable. Indeed, the present case is a much more persuasive set of circumstances than even *Jaffee* itself.

Fed. R. Civ. P. 26(b)(1) specifically exempts from discovery matters which are subject to an evidentiary privilege. *See* Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense…") (emphasis added). In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized the existence of a psychotherapist-patient privilege that shielded information related to such counseling from discovery in civil litigation. *Id.* at 10, 15. Like the present case, *Jaffee* involved a civil rights action brought against a police officer pursuant to Section 1983. In that case, a police-involved shooting, the plaintiff became aware that the defendant officer was undergoing counseling by a social worker immediately following the defendant officer's involvement in the police shooting and sought to obtain discovery into the details of this counseling for use in cross-examining the defendant officer at trial. *Id.* at 4-6. The trial court held that such information was discoverable. *Id.* The defendant officer and the treating psychotherapist nonetheless resisted such discovery and refused to provide any such information either in discovery or at trial despite the trial court's order. *Id.* After an adverse verdict, the defendant officer appealed. *Id.* The verdict was reversed by the Seventh Circuit Court of Appeals and affirmed later by the Supreme Court. *Id.*

[1] Defendant Ridgell assumes this Court's familiarity with the matters previously submitted to the Court with a Confidential and Attorney's Eyes Only designation and, thus, does not attach such materials again. However, to the extent this Court requires further information, Defendant Ridgell will provide this if further ordered by this Court subject to protections over the confidentiality of any such information.

The affirmance of the Seventh Circuit by the Supreme Court was premised entirely upon the privileged and non-discoverable nature of the counseling information of the defendant officer. In recognizing the existence of the psychotherapist-patient privilege and rejecting the trial court's contrary ruling, the Supreme Court explained:

> [T]he psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.' Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment… The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

Id. at 10-11.

The Court also noted that "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* at 11. The Court explained:

> If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Id.

Indeed, in holding that the trial court committed reversible error in ordering the disclosure of confidential treatment information, the Supreme Court went even further than the Seventh Circuit. The Seventh Circuit had engaged in a balancing test which purported to balance the importance of the information contained within the counseling records with the strength of the privacy interests at stake. *Id.* The Court held that any analysis that purported to assess the possible relevance of the

privileged information as a consideration for disclosure was wholly untenable and inappropriate. *Id.* at 17-18. The Court explained:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege….[I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Id.

The present case is an even more persuasive case than *Jaffee*. Just as in *Jaffee*, Plaintiffs bring civil rights claims under Section 1983 against a police officer and apparently seek to probe into the defendant officer's counseling information. Unlike *Jaffee*, however, Plaintiff has no evidence whatsoever that the Defendant Ridgell's treatment relates in any way to any of the incidents at issue in the above-captioned cases. Indeed, Defendant Ridgell's treatment began approximately ten years or more after the relevant incidents at issue in this litigation. While relevance of counseling information has no bearing whatsoever on discoverability under *Jaffee*, it bears noting that Plaintiffs have not remotely articulated any specific relevance of Defendant Ridgell's counseling to any of the claims and allegations in this lawsuit despite being asked several times to provide it. *See* Ex. 1. Stated simply, there is absolutely no basis under Supreme Court precedent to permit Plaintiff to probe into anything beyond standard questions about Defendant Ridgell's current ability to answer understand questions, formulate answers, and recall information.

Nor has Defendant Ridgell waived any privilege regarding the details of his treatment. In fact, the exact opposite is true, both in fact and under the law.

First, Defendant Ridgell's disclosure of the fact of his treatment and certain basic details was not voluntarily disseminated but rather was ordered by this Court, was marked confidential and attorney's eyes only for the specific purpose of maintaining the confidentiality of this information after

Defendant Ridgell's request for these protections. *See* Dckt. No. 438 at ¶¶ 3-4; Dckt. No. 446; Dckt. No. 449; Dckt. No. 474 at 1-2; Dckt. Nos. 483-484.

The law is clear that waiver based on disclosure only applies to a voluntary relinquishment of a known right as opposed to a compelled one. "[A] waiver is a voluntary relinquishment of a known right." *United States v. Blagojevich*, 614 F.3d 287, 291 (7th Cir.2010); *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 995–96 (N.D. Ill. 2010). In this regard, disclosures which are accompanied by an agreement designed to protect confidentiality do not waive any privilege. *See Awalt v. Marketti*, 287 F.R.D. 409, 420 (N.D. Ill. 2012) *citing Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (holding that litigant's disclosure of protected information to Social Security Administration did not waive privilege because of confidentiality and redisclosure agreement on such disclosure; "A person who discloses privileged information to a third-party waives the privilege *in the absence of an agreement to keep the information confidential*."); *Lawrence E. Jaffe Pension Plan v. Household, Intern., Inc.*, 244 F.R.D. 412 (N.D. Ill. 2006) (disclosure of information to the Securities and Exchange Commission pursuant to a confidentiality agreement did not waive applicable privileges).

Indeed, per Illinois statute, the release of otherwise protected mental health information for a limited purpose such as the present one *does not* operate as a general waiver of confidentiality for any other purposes and a subsequent consent is *expressly required* for any additional disclosure for any other purpose. *See McGreal v. Ostrov*, 368 F.3d 657, 689 (7th Cir. 2004) ("The release of information for a limited purpose under the consent provision does not operate as a general waiver of the confidentiality privilege."); *Norskog v. Pfiel*, 197 Ill.2d 60, 79 (Ill.,2001); *Johnson v. Lincoln Christian College*, 150 Ill.App.3d 733, 744 (4th Dist. 1986) *see also* 740 Ill. Comp. Stat. 110/5(d)("No person or agency to whom any information is disclosed under this Section may redisclose such information unless the person who consented to the disclosure specifically consents to such redisclosure."). Indeed, if any protected information is redisclosed without Defendant Ridgell's express consent, there are very serious

consequences both civil and criminal under Illinois law. *See* 740 Ill. Comp. Stat. 110/15, 740 Ill. Comp. Stat. 110/16.

Here, Defendant Ridgell disclosed limited information solely in response to this Court's Order that he do so and, moreover, did so only after demanding various protections against any further dissemination for any other purpose. The law is clear that the fact and dates of treatment and other basic details does not operate as a waiver even if voluntarily disclosed without the protections at issue in this case. *Gomes v. Lake Cnty., Ill.*, 2013 WL 2156042, at *2 (N.D.Ill. 2013); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 531 (N.D. Ill. 1999) ("[T]he fact of plaintiff's consultations with psychotherapists either before or after his arrest, and the dates of those consultations, is not privileged."); *Mukes v. City of Milwaukee*, 2015 WL 3823887, at *2 (E.D.Wis.,2015); *United States v. Moore*, 970 F.2d 48, 50 (5th Cir.1992) (*quoting In re Zuniga*, 714 F.2d 632, 640 (6th Cir.1983) ("the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege."); *see also Langenfield v. Armstrong World Indus., Inc.*, 299 F.R.D. 547, 551 (S.D.Ohio 2014) ("The privilege does not ... cover the patient/psychotherapist's identity, the time of treatment, and/or the fact that any such treatment took place."); *United States v. Sturman*, 1998 WL 126066, at *4 n. 6 (S.D.N.Y. 1998) (the psychotherapist-patient privilege "does not extend to information regarding the occurrence of treatment, including "whether a psychotherapist treated [him], the dates of such treatment, and the length of treatment on each date.").

Finally, even if none of the above were so, the law is clear that it is Defendant Ridgell (and no one else) who gets to decide whether he will interject his mental condition into this case. And he gets to make this election even if he has already disclosed privileged information in the context of the lawsuit (which he has not). He has no plans to assert his mental health treatment into his defense of these claims.

Waiver by interjection into the case is determined solely by whether the holder of the privilege intends to specifically rely on this information *at trial as part of their claims or defense*. *See Noe v. R.R. Donnelley & Sons*, 2011 WL 1376968, at *1 (N.D. Ill. 2011) ("As a number of courts in this Circuit have recognized, however, the psychotherapist-patient relationship is not waived when a plaintiff does not intend at trial to offer evidence of consultations with a psychotherapist or rely on expert testimony concerning the distress allegedly caused by a defendant's actions."); *Kronenberg*, 747 F.Supp.2d at 995–96 (holding no waiver; "Mr. Kronenberg has said over and over that he is not relying on any mental health issue to make his case or to support any damage claim. Nothing on the present record, therefore, even hints at any 'affirmative steps [by Mr. Kronenberg] to inject privileged materials into the litigation.' The record reveals precisely the opposite.").

To this end, a privilege holder like Defendant Ridgell gets to ultimately decide whether he will or will not interject his mental condition at trial as an element of a claim or defense and this election must control even if previously put at issue in the litigation. *See Caine v. Burge*, 2012 WL 6720597, at *4 (N.D. Ill. 2012)(holding that in deciding whether to interject mental condition as part of a claim that "the choice of how to proceed is the plaintiff's."); *Awalt*, 287 F.R.D. at 418-19 (relying on Plaintiff's proffer restricting damages and finding privilege not waived); *Noe*, 2011 WL 1376968, at *2 (same); *Santelli v. Electro-Motive,* 188 F.R.D. 306, 309 (N.D. Ill. 1999)(discussing the plaintiff's decision to limit her damages and noting that, even though limiting damages might "prevent her from fully recovering for her alleged emotional distress …. [t]he choice, however, is hers"); *EEOC v. DHL Exp.*, 2011 WL 6825497, *5-6 (N.D. Ill. 2011) (finding that plaintiffs protected privilege by abandoning claims asserted earlier in the case that could have resulted in a damages claim that went beyond "garden variety); *Flowers v. Owens*, 274 F.R.D. 218, 228-29 (N.D. Ill. 2011)(noting that, even after deposition testimony that arguably went into issues of PTSD and agoraphobia, the "choice of how two proceed" remained with plaintiff).

Once this election is made, an opposing party cannot overcome this election by asserting that they intend to rely upon a privilege holder's removal of this issue because mental health information cannot be put at issue by an opposing party. *See Kronenberg*, 747 F.Supp.2d at 995 ("[W]aiver can only result from action of the plaintiff, not from that of the defendant."); *In re Sims*, 534 F.3d 117, 134 (2d Cir. 2008)(noting that a litigant "may withdraw or formally abandon" previous interjection of privileged information "in order to avoid forfeiting his psychotherapist-patient privilege; and that a party's psychotherapist-patient privilege is not overcome when his mental state is put in issue only by a another party."); *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Ct. App. 2007)("a plaintiff does not put his mental state in issue merely by acknowledging he suffers from depression, for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff's mental state in issue.").

Indeed, as this Court is no doubt aware, the typical scenario where this issue is litigated is where a plaintiff seeks to maintain his or her privilege in a litigation while also attempting to affirmatively seek compensation for things such as emotional distress damages. In such scenarios, the plaintiff is allowed to voluntarily cabin in his or her damages in order to maintain a privilege. In fact, Plaintiffs routinely are permitted to affirmatively cabin their own damages in cases where they might otherwise be argued to have waived their privilege in order to maintain the confidentiality of this information. *See Flowers*, 274 F.R.D. at 225; *Santos v. The Boeing Co.*, 2003 WL 23162439, at *2 (N.D. Ill. 2003) (in employment discrimination case, plaintiff did not waive privilege by alleging garden variety emotional distress); *Noe*, 2011 WL 1376968; *DHL Exp.*, 2011 WL 6825497; *Nolan v. Int'l Bhd. of Teamsters Health & Welfare and Pension Funds, Local 705*, 199 F.R.D. 272 (N.D. Ill. 2001); *Doe v. Oberweis Dairy*, 2004 WL 1146712 (N.D. Ill. 2004); *E.E.O.C. v. Area Erectors, Inc.*, 247 F.R.D. 549 (N.D. Ill. 2007); *Kronenberg*, 747 F. Supp. 2d at 994; *Taylor v. ABT Electronics, Inc.*, 2007 WL 1455842, at *2 (N.D. Ill. 2007); *Santelli*, 188 F.R.D. 306; *Awalt*, 287 F.R.D. at 420 (no waiver of privilege where plaintiff in

wrongful death case against jail personnel sought only garden variety emotional damages for her husband's loss); *Hucko*, 185 F.R.D. 526 (plaintiff alleging misconduct during the course of his arrest did not waive privilege by seeking damages for "humiliation, emotional distress, [and] pain and suffering."). With the exception of *Jaffee* (which explicitly overturned a jury verdict for improperly ordering disclosure of a defendant's mental health information), it appears virtually unprecedented for a court to order the disclosure of a *defendant's* mental health information under these or any remotely similar circumstances. In a group of cases with so many moving parts and many parties, it would be a grave misstep to potentially taint these cases by improperly allowing Plaintiffs' counsel to invade Defendant Ridgell's sacred privilege.

Finally, while all the above reasons are more than sufficient to grant this Motion, it bears noting that Plaintiff's attempt to invade Defendant Ridgell's psychotherapist-patient privilege by relying upon Defendant Ridgell's reliance on his treatment to merely continue his deposition fails for another independent reason. Specifically, Rule 26 does not permit "discovery on discovery" in the first place. *See, e.g.*, *LKQ Corporation v. Kia Motors America, Inc.*, 2023 WL 4365899, at *3–4 (N.D. Ill. 2023)(Harjani, J.) ("Discovery on discovery concerns the process by which a party engaged in its discovery obligations. To be clear, the Federal Rules of Civil Procedure do not explicitly permit this type of discovery…Nothing in the Federal Rules directly enables a party to serve interrogatories, document requests, or conduct depositions about a party's procedures to comply with its discovery obligations. The Court appreciates that courts have broad authority to manage discovery, and courts may surmise that this inherent authority allows them to authorize exploration of the process by which a party conducts its discovery obligations. In this Court's view, however, the text of the Federal Rules of Civil Procedure governs, and without an applicable rule, discovery on discovery should not be permitted."). Despite past delays, Defendant Ridgell will be sitting for his deposition and answering

questions under oath about the cases at issue. However, inquiry into the circumstances of his prior delays not only invades a privilege but is off limits under the ordinary rules of discovery as well.

Here, Defendant Ridgell's mental health information is privileged and strictly off limits and, thus, non-discoverable under Fed. R. Civ. P. 26(b)(1). Defendant Ridgell does not intend to rely upon any such information at trial in this case. Thus, he has not placed at issue in any way for the purposes of the waiver analysis.

II. Plaintiff Should Not Be Permitted To Attempt To Invade Defendant Ridgell's Attorney Client Privilege With His Prior Attorneys.

Plaintiff has also indicated an intent to attempt to inquire into the circumstances preceding the withdrawal of his prior attorneys in this case. This subject matter is similarly improper.

Defendant Ridgell changed counsel in September 2023 as a result of a conflict by his prior attorneys. *See* Dckt. No. 585 at ¶ 9 ("In response to Plaintiffs' counsel's request for an explanation, Attorney West informed counsel that she had learned information in the last 15 minutes that called into question whether she could continue to represent Defendant Ridgell and that there may be a conflict."); Dckt. No. 589 ("Information has recently come to light that creates a conflict for Hale & Monico LLC to continue its representation of Officer Ridgell in the Coordinated Pretrial Proceedings.").

As this Court is well-aware, an attorney's conflict is a concept that grows out of the rules of professional conduct governing attorney ethics and behavior. Defendant Ridgell is not an attorney nor is he the one who withdrew from this case based on a conflict.

Any communications with his prior attorneys or any attempt to obtain information derived from such communications regarding the circumstances preceding his prior attorney's withdrawal is clearly not permissible despite the fact that a conflict arose. *See Simon v. Northwestern University*, 321 F.R.D. 328, 335 (N.D. Ill. 2017) ("A lawyer who has gathered information under the attorney-client relationship and later is conflicted from the representation continues to have an obligation to protect

the privileged information she has gathered. A later arising conflict does not 'strip away' the privileged nature of pre-existing information obtained during the course of the representation."); ABA Model Rules of Prof'l Conduct R. 1.9(c) ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter ... reveal information relating to the representation except as these Rules would permit or require with respect to a client."); *United States v. Williams*, 698 F.3d 374, 392 (7th Cir. 2012)("Rule 1.6 imposes no time limits on the duty of confidentiality, and paragraph 18 of the comment makes explicit that the duty of confidentiality continues after termination.").

WHEREFORE Defendant Calvin Ridgell prays this Court enter a protective order in advance of Defendant Ridgell's deposition consistent with the above and for whatever other relief this Court deems fit.

Respectfully submitted,

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