

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO. 02-01159A

MARCIA RHODES, HAROLD RHODES, )  
INDIVIDUALLY, HAROLD RHODES, )  
ON BEHALF OF HIS MINOR CHILD )  
AND NEXT FRIEND, REBECCA )  
RHODES, )  
Plaintiffs )

-v-

CARLO ZALEWSKI, DRIVER )  
LOGISTICS, PENSKE TRUCK LEASING )  
CORP., AND BUILDING MATERIALS )  
CORP. OF AMERICA, D/B/A GAF )  
MATERIALS CORP. )  
Defendants. )

-v-

JERRY McMILLAN'S )  
PROFESSIONAL TREE SERVICES, INC. )  
AND TOWN OF MEDWAY )  
Third-Party Defendants. )

PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF ITS OPPOSITION TO  
MOTION TO COMPEL PLAINTIFF  
MARCIA RHODES TO PRODUCE  
MENTAL HEALTH RECORDS

**I. INTRODUCTION**

The Plaintiffs, Marcia Rhodes, Harold Rhodes individually, and on behalf of his minor child and next friend, Rebecca Rhodes (collectively, "the Plaintiffs"), oppose the Defendant's, Building Material Corporation of America d/b/a GAF Materials Corporation ("GAF"), motion to compel the production of Marcia Rhodes' medical records relating to her mental health history ("Motion").

GAF inappropriately asserts that Mrs. Rhodes waived the psychotherapist-patient privilege under G.L. c.233 and G.L. c.112 because of non-psychiatric documents produced, responses to GAF's request for production of documents and Plaintiffs' claim for damages. Therefore, GAF asserts the "interests of justice" require production of Mrs. Rhodes' mental health medical records because "the stakes involved in this case" are so substantial. Motion, at p. 8.

GAF's Motion is misplaced for several reasons. There has been no waiver of the psychotherapist-patient privilege. GAF misleads this Court as to the Plaintiffs' responses to GAF's requests for documents. Further, GAF attempts to equate a claim for severe personal injuries (including "garden variety" emotional distress<sup>1</sup>) with those few cited cases where the psychiatric damage was at the heart of the claim. Further, medical records which were produced were non-psychiatric, and do not constitute a waiver. Mrs. Rhodes has no intention of either introducing psychiatric records or testimony as part of her affirmative

case. Therefore, the interests of justice are best served by preserving the statutory privilege so that Mrs. Rhodes does not have to disclose the variety of issues she has confided to her therapist about both before and after the accident. The Motion should be denied.

## II. BACKGROUND<sup>2</sup>

As GAF stated in its Motion, Mrs. Rhodes responded to GAF's first set of document requests on April 10, 2003. Motion, at p. 2. What GAF did not state in its Motion is that Mrs. Rhodes expressly incorporated by reference into each response an objection to "any request for documents that are protected by any recognized privilege against disclosure." Affidavit of Carlotta M. Patten, 4 and Exhibit A, at p. 3 ("Patten Aff., ¶4 and Ex. A, at p. H). Mrs. Rhodes also stated that should any privileged or confidential documents be produced inadvertently or intentionally, Mrs. Rhodes shall not waive any right to decline to produce similar-documents on privilege grounds. Patten Aff., ¶4 and Ex. A. at pp. 2-3.

Mrs. Rhodes also supplemented her response to Document Request No. 8, which requested the production of Mrs. Rhodes' medical records including her mental health history, asserting the psychotherapist-patient privileges as set forth in G.L. c. 233, §20B and G.L. c. 112, §135B. Patten Aff., ¶5 and Ex. B, pp. 2-3. Noticeably absent from GAF's Motion and Affidavit of Grace C. Wu ("Wu Affidavit") is Mrs. Rhodes' supplemental response to Request No. 8. Motion, at p. 2. GAF's failure to cite to these portions of Mrs. Rhodes' responses is understandable since those portions eradicate GAF's waiver argument. Motion, at pp. 8-9.

Mrs. Rhodes never agreed to produce all documents responsive to Request No. 8 as GAF asserts in its Motion and numerous exhibits to the Wu Affidavit. Rather, the letters between counsel clearly establish that the issue has been in dispute since April 2003 as evidenced by Mrs. Rhodes' responses and production of documents. See Motion, at pp. 2-4; Wu Affidavit, Exs. E-I.

Finally, the medical records relied upon by GAF do not translate into Mrs. Rhodes waiving the psychotherapist-patient privilege as GAF suggests in its Motion. Motion, at p. 5. Exhibit J to the Wu Affidavit is a report prepared by Dr. Roaf just 40 days after the crash in which Dr. Roaf states that Mrs. Rhodes "appear[ed] depressed." Exhibit L is another medical record of Dr. Roaf which makes no mention of depression, ADHD or bipolar disorder, but rather simply states "Mental Status: Her mood appears good." See Wu Affidavit, Ex. L. It is difficult to fathom how the fact that Mrs. Rhodes was in a good mood on a particular day translates into Mrs. Rhodes waiving the psychotherapist-patient privilege. The other medical records cited to by GAF reference the fact that Mrs. Rhodes was depressed and sought therapy, but there is no mention of any private discussions with any mental health professionals in these records. Wu Affidavit, Exs. K, N, and O.

### III. ARGUMENT

#### A. Mental Health Records Are Protected From Disclosure Where Only Garden Variety Emotional Distress Damages Are At Issue.

Massachusetts law is clear that communications between a psychotherapist and a patient are privileged. G.L. c. 233, §20B (patient shall have the privilege of refusing to disclose and of preventing a witness from disclosing, any communications, wherever made, between said patient and a psychotherapist); G.L. c. 112, §135B (same). Only if the patient makes a claim for "psychiatric disorder or psychic injury" that necessitates psychiatric treatment will a court find that the patient waived the psychotherapist-patient privilege and order production of records relating to mental health. Sorenson v. H&R Block, Inc., 197 F.R.D. 199,204 (D. Mass. 2000) (allegations of mental anguish, humiliation, severe emotional distress in complaint "'do not denote the type of psychic or psychological injury which would trigger a waiver"); cf. Jacobs v. Vachon, No. 96-1506,2000 Mass. Super LEXIS 35, at \*5 (Mass. Super. Jan. 28, 2000) (records ordered produced because plaintiff suffered irreparable mental and emotional damage at the hands of a mental health professional). To determine whether the patient made such a claim, courts look to the allegations in the complaint and whether the patient intends to call a psychological expert witness to prove such psychic injuries. Sorenson, 197 F.R.D. at 204. Stated another way, courts will not order disclosure of mental health information unless the Plaintiff makes affirmative use of the privileged material in prosecution of the case. Booker v. City of Boston, 97-CV-12534-MEL, 1999 U.S. Dist. LEXIS 14402, at \*3-5 (Mass. Super. Sept. 10, 1999) (psychological records not produced because only emotional distress claims).

In contrast, when a party makes a "garden variety" claim for emotional distress, there is no waiver of psychotherapist-patient privilege because such a claim does not require expert testimony to establish damages. Sorenson, 197 F.R.D. at 204; Sabree v. United Brotherhood of Carpenters & Joiners, 126 F.R.D. 422, 425 (D. Mass. 1989) (emotional distress claim in racial discrimination suit did not pierce psychotherapist-patient privilege because no claim for psychic injury as a result of the discrimination); Donovan v. Prussman, No. 99-175D, 2000 Mass. Super. LEXIS 403, at \*2-3 (Mass. Super. Aug. 1,2000) (no production of mental health records required because plaintiff did not seek to call psychiatrist as witness at trial or offer substance of any conversations at trial to prove damages). Indeed, tort law permits a plaintiff who has suffered physical injuries to recover for emotional and mental pain and suffering in addition to See Donovan, 2000 Mass. Super. LEXIS 403, at \*8-11 (discussing pain and suffering damages) compensation for the physical injuries without waiving the psychotherapist-patient privilege.

#### B. Mrs. Rhodes Has Not Placed Her Mental Health At Issue And Thus Has Not Waived The Psychotherapist-Patient Privilege.

This is a personal injury case where Mrs. Rhodes seeks compensation for her physical and emotional injuries caused by the Defendants when Defendant Zalewski drove a tractor trailer into her stopped Toyota Corolla. This is not a case where the plaintiff's claim for damages arises from severe psychological or psychic injuries caused by the

defendants. The Third Amended Complaint supports this conclusion, where Mrs. Rhodes alleged only that she suffered damages for which the Defendants are liable. Patten Aff., ¶6 and Ex. C, 25, 34, 38, 42, 49. The only mention of non-physical injuries comes in Mrs. Rhodes' first claim for relief, where she seeks damages for "pain and suffering." Patten Aff., ¶6 and Ex. C, at p. 8.<sup>3</sup> Indeed, Mrs. Rhodes' claims for relief did not even approach those in Sorenson, where the court found that plaintiff's allegations of mental anguish, humiliation and severe emotional distress in complaint do not trigger waiver of the privilege. Sorenson, 197 F.R.D. at 204.

Mrs. Rhodes' allegations are unlike the plaintiffs in Jacobs, a case heavily relied upon by GAF. Ms. Jacobs brought a medical malpractice action against a mental health professional, alleging that she suffered "irreparable mental and emotional damage" and "extreme impairment of her mental health." Jacobs, 2000 Mass. Super. LEXIS 35, at \*6. The Jacobs case also is distinguishable because there, the only injuries alleged by the plaintiff were related to her emotional and mental condition as a result of the defendant's malpractice. rd. at \*1,4; see also Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 229 (D. Mass. 1997) (privilege would be waived if patient sued mental health professional for malpractice). Here, in contrast, as set forth above, Mrs. Rhodes' claims for damages result from Defendant Zalewski slamming into her stopped Toyota Corolla, causing it to careen into a tree and resulting in her permanent paraplegia and other injuries. Nowhere in the pleadings has Mrs. Rhodes alleged irreparable mental damage or extreme impairment of her mental health similar to the plaintiff in Jacobs. Cf. Rankin v. Liberty Mutual Ins. Co., No. 94-1850, 1995 U.S. App. LEXIS 6150, at \*4-6 & n.2 (1<sup>st</sup> Cir. Mar. 27, 1995) (mental health records relevant because (1) plaintiff alleged that discrimination caused "permanent psychological injury" that disabled her from all work and required psychiatric care and (2) plaintiff listed psychiatrist as a witness).

Nor does the second case cited by GAF in support of its position, Hodes v. Quinsig Automotive Warehouse, Inc., advance its cause. There the court ordered an in camera review of mental health records because the defense to plaintiffs breach of contract and fraud complaint was that the plaintiff was mentally unable to work prior to retiring, and thus plaintiff was estopped from claiming that he relied on an agreement to be paid for his shares upon retirement. 1997 Mass. Super. LEXIS 19, at \*3-5 (Mass. Super. Dec. 16, 1997). This case is distinguishable because unlike the defendant in Hodes, GAF is not claiming that Mrs. Rhodes is estopped from asserting a claim for negligence due to her conditions of ADHD and bipolar disorder. Rather, GAF claims that because Mrs. Rhodes waived the psychotherapist-patient privilege by placing her mental condition at issue, her mental health records must be produced.

GAF's contentions of waiver are further extinguished by the fact that Mrs. Rhodes does not intend to call any mental health professional to prove her damages at trial. Indeed, none are listed on the Joint Pre-Trial Memorandum. Patten Aff., ¶7, and Ex. D, at pp. 9-11. It is settled law that where a plaintiff does not seek to prove severe psychological injury by-way of expert testimony, mental health records must remain private. Vanderbilt, 174 F.R.D. at 228-230 (defendants'

motion to compel mental health records denied because plaintiff did not intend to introduce evidence from therapist to further her damage claim). The language from Vanderbilt is instructive:

So long as Plaintiff does not call as a witness a person who has provided her with psychotherapy, and does not introduce into evidence the substance of any communication with such a person, the communication between her and her psychotherapist is privileged ... Plaintiff, here, is not using the privileged communication as a sword. Were she to introduce evidence regarding the substance of her conversations with her psychotherapist in order to further her claim of emotional damage, this court would agree that she could not shield the communication from others. She has, however, done no such thing.

Vanderbilt, 174 F.R.D. at 230 (emphasis added); Donovan, 2000 Mass. Super. LEXIS 403, at \*2-3; cf. Perrin v. S&A Enterprises, 97-2742B, 1999 Mass Super LEXIS, at \*3-4 (Mass. Super Jan. 13, 1999) (requiring production of psychiatric records because plaintiffs specifically alleged psychological injury which necessitated psychiatric treatment and presumably will offer the testimony of a mental health professional at trial to prove such injuries).

While it is true that Mrs. Rhodes intends to call her treating medical doctors as witnesses at trial, it is undisputed that these doctors do not treat (and have never treated) Mrs. Rhodes for mental health related issues. Dr. Donna Krauth is Mrs. Rhodes' primary care physician and is expected to testify regarding Mrs. Rhodes' medical issues arising from her spinal cord injury. Patten Aff., ¶9 and Ex. F, at p. 4. Dr. Krauth testified at her deposition that she does not treat Mrs. Rhodes for ADHD or bipolar disorder. Patten Aff., ¶10 and Ex. G, at pp. 37-38. Dr. Elizabeth Roaf is Mrs. Rhodes' physiatrist who treats Mrs. Rhodes for spinal cord-related rehabilitation only. As such, Dr. Roaf will not testify regarding any purported psychic injury. Patten Aff., ¶9 and Ex. F, at p. 3. Dr. Beisaw is the orthopedic surgeon who will testify regarding her spinal cord injury. Patten Aff., ¶9 and Ex. F, at p. 3.

GAF claims that psychiatric testimony is needed at trial because Mrs. Rhodes' conditions of "depression and bipolar disorder are psychiatric disorders that need to be treated by a psychiatrist." Motion, at p. 5. However, as stated above, it is not left to GAF to ascertain whether such testimony is needed. Indeed, GAF cannot dictate how Mrs. Rhodes will present her case at trial. The inquiry is not whether Mrs. Rhodes is under the care of a mental health professional, but rather whether Mrs. Rhodes intends to "use the privileged communication as evidence herself" by calling an expert witness on the issue of damages. Vanderbilt, 174 F.R.D. at 228, 230; see also Donovan, 2000 Mass. Super. LEXIS 403, at \*2-3 (no waiver because no expert testimony to be introduced by the plaintiff).

The fact that the medical records produced to GAF contain references to Mrs. Rhodes' mental status also does not translate into waiver. Motion, at pp. 5, 9. Motions concerning psychiatric data by non-psychotherapist medical professionals "do[] not require a conclusion that the entire hospital record is within the scope of G.L. c. 233, §20B." Petitions of the Dep't of Social Services to Dispense With

Consent to Adoption, 399 Mass. 279, 288 (1987). Rather, records are privileged only if they contain communications or notes of communications between a patient and psychotherapist. Id. at 287.

As set forth above, none of the medical records produced by Mrs. Rhodes reveal the substance of any communications between Mrs. Rhodes and her mental health providers. See Section II, supra. Rather, they contain only references to Mrs. Rhodes' mood and conditions. Such information is discoverable and not subject to any psychotherapist-patient privilege. Sorenson, 197 F.R.D. at 205 (identity of therapist in addition to dates, times and costs associated with therapy sessions are not protected); Vanderbilt, 174 F.R.D. at 230 ("Facts regarding the very occurrence of psychotherapy ... are not privileged ... if Plaintiff was seeing a psychotherapist before any actionable emotional injury allegedly occurred ... the substance of the psychotherapist patient communication is privileged [but] [t]he fact that such communication took place is not."). Thus, GAF's argument that Mrs. Rhodes' disclosure of such information constitutes waiver of the privilege is misplaced.<sup>4</sup>

Defendants are not entitled to unfettered access to records that detail her private discussions with her therapist. Otherwise, every plaintiff injured in an automobile accident who has ever sought therapy would be required to produce records relating to their mental health history, whether or not even remotely connected to injuries resulting from an automobile accident.

Mrs. Rhodes' expected testimony regarding the impact Defendants' actions have had on her life also does not give rise to waiver. Motion, at pp. 5, 6. GAF points out that Mrs. Rhodes has "self-diagnosed" herself with depression. Motion, at p. 5. GAF further argues that Mrs. Rhodes waived the psychotherapist-patient privilege by testifying about "the pain and suffering and devastating emotional impact caused by her injuries." Motion, at p. 6; Wu Affidavit, Ex. P. However, Mrs. Rhodes is not claiming severe psychological or psychic injury for which she expects to be compensated by money damages. She will not be calling an expert to substantiate any such damages. Rather, she is seeking damages that flow naturally from her claim for physical injuries: garden variety emotional distress and pain and suffering. As such, Mrs. Rhodes' testimony regarding any pain and suffering due to Defendants' actions will not waive the privilege.<sup>5</sup>

**C. The Interest of Justice Requires That Mrs. Rhodes' Mental Health Records Remain Private.**

The interests of justice require that Mrs. Rhodes' mental health history remain protected. Mrs. Rhodes has long sought help from mental health providers for a variety of issues, and to force her to reveal the substance of her communications with those trusted professionals will impede her therapy. GAF's rationale for compelling these records is that "Mrs. Rhodes' claim for damages is in the multi-million dollar range." Motion, at p. 8. The fact that Mrs. Rhodes recover millions of dollars to compensate her for the fact that she has no motor control or sensation below her waist is of no relevance whatsoever to the issue of whether Mrs. Rhodes must be forced to reveal her mental health history to GAF. Motion, at p. 8; see Sorenson, 197, F.R.D. at 202 (defendant's argument that plaintiffs claims of emotional distress are sufficiently

severe based on plaintiff's value of \$5M in damages on each count inappropriate). In short, Mrs. Rhodes' interest in privacy clearly outweighs GAF's need to delve into Mrs. Rhodes' past and must be protected.

#### **IV. CONCLUSION**

GAF has not shown that Mrs. Rhodes has waived the psychotherapist patient privilege or that she has asserted anything but a garden-variety claim for emotional distress, which is buttressed by the fact that Mrs. Rhodes does not intend to call any mental health professionals as witnesses as evidenced by the Joint Pre-Trial Memorandum. Based on the foregoing, Plaintiffs respectfully request that GAF's Motion be denied.

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES  
INDIVIDUALLY and HAROLD RHODES ON  
BEHALF OF HIS MINOR CHILD AND NEXT  
FRIEND, REBECCA RHODES

DATED: June 1, 2004

- <sup>1</sup> The phrase "garden variety" is a term of art used in cases cited below, notwithstanding the severity of physical injuries to Mrs. Rhodes and the attendant pain and suffering.
- <sup>2</sup> GAF has described for the Court in its Motion the numerous letters exchanged by counsel in which the parties set forth their positions on the psychotherapist-patient privilege. Thus, Plaintiffs will focus only on those facts that GAF failed to mention in its Motion.
- <sup>3</sup> GAF also cites Mrs. Rhodes' Second Supplemental Answers to Interrogatories in support of its position that Mrs. Rhodes waived her privilege. Motion, at pp. 7-8. Mrs. Rhodes' answers here do not give rise to waiver because although Mrs. Rhodes states that she has experienced emotional trauma since the crash and that she feels that her Attention Deficit Hyperactivity Disorder ("ADHD") and bipolar conditions have worsened since the crash, Mrs. Rhodes is not calling any mental health providers to testify regarding such issues. Patten Aff., ¶7 and Ex. D, at pp. 9-11. Moreover, the crux of Mrs. Rhodes' Second Supplemental Answer to Interrogatory No. 13, which is approximately two pages long, relates to her paraplegia and physical complications arising there from and not her mental stability, as GAF would have the Court believe. Patten Aff., 8 and Ex. E, at pp. 10-12. Rather, Mrs. Rhodes states, in two sentences, that she has been depressed since becoming a permanent paraplegic and that she thinks her pre-existing conditions may have become worse since the crash.
- <sup>4</sup> GAF also states that Mrs. Rhodes waived the psychotherapist patient privilege because Adele Pollard, a life care planner that Mrs. Rhodes will be calling as an expert witness, is expected to base her analysis on Mrs. Rhodes' "psychological state." Motion, at p. 6. Ms. Pollard is not a mental health professional, nor did Mrs. Rhodes hire her to opine on any

purported psychic injuries. Moreover, GAF is free to call a competing life care planner in its defense to refute any testimony of Ms. Pollard.

- 5 Even if the Court finds that Mrs. Rhodes placed her mental condition at issue, which Mrs. Rhodes denies, GAF is still not entitled to review her mental health records because Mrs. Rhodes does not intend to call any expert to testify regarding any such damages. Donovan, 2000 Mass. Super. LEXIS 403, at \*24-25.