

Re: FLYGARE

POINTS, AUTHORITIES & ARGUMENTS

Re: MOTION TO QUASH SUBPOENAS DUCES TECUM

In the Motion to Quash:

- 1- Set forth the names of each custodian of each objectionable SDT.

- 2- Identify each subpoena [or identify a group of identical subpoenas, e.g., those directed to hospitals and health care providers] that you are attacking. Set forth the objectionable language from the subpoena, e.g., *any and all medical records for any type of illness, medical condition and /or injury.*”

For the court’s reference, attach an exemplar of the many subpoenas as an Exhibit.

- 3- Summarily say why you believe the subpoenas are objectionable because of being irrelevant, overbroad both in the breadth of the inquiry and/or the time period covered, invading your client’s privacy rights, etc. And,
- 4- Then begin your substantive arguments,

- 5- At the end attached your exhibits, e.g., your & adverse counsel’s meet and confer letters, an exemplar of the SDT [one for meds, one for employments records, etc.]

POINTS, AUTHORITIES & ARGUMENTS

In his Complaint, Plaintiff alleged he suffered: “significant bodily injuries.” *Complaint*, Point 9. Specifically his crash injuries are: tri-level spinal sprain/strain; right shoulder surgery, permanent right shoulder damage and right hip pain. The SDT in question request that Plaintiff’s medical providers produce “all records in any way” and any records of prior or subsequent substantial

injuries and treatment of the same,ö further, they request, öspeech pathology records, occupation therapy records, letters from other healthcare providers (which would include mental health) and any other document of any kind regardless of the date,ö The records are replete with demands for additional records that are simply not relevant.

Plaintiff objects that the subpoenas are overbroad in:

- A- The breadth of the records requested, and in,
- B- the request for **all** past records i.e., some 38 years into the past.

ONLY RELEVANT MEDICAL RECORDS ARE PROPERLY SUBJECT 2 SUBPOENA

Utah Rules of Evidence 506 governs whether a Defendant is entitled to the Plaintiff's Medical Records. Rule 506 states that **öOnly relevant medical records are properly subject to subpoena.**ö Obviously, in seeking öall of Plaintiff's medical records over the past 38 yearsö the subpoena violates the basic rules of relevancy. Only certain medical records have relevancy to the instant lawsuit, i.e., **1-** records of injuries and medical conditions, and/or injury care and treatment and treatment costs for the injuries or medical conditions Plaintiff alleges he suffered from the underlying crash and, **2-** records of prior similar injuries [like/similar medical conditions] he suffered within a relevant time before the crash or those subsequent to the crash

Plaintiff believes that records going back 10 years prior to the underlying collision is a örelevant periodö for the proper disclosure of records addressed to the same or similar injuries or medical conditions and/or for records reflecting the care and/or treatment of prior or similar injuries, or other medical conditions when said prior injuries or medical conditions are similar to the injuries Plaintiff claims to have suffered in the underlying crash.

Records going beyond 10 years are remote and in being remote are irrelevant and thus, not discoverable, or reasonably calculated to lead to the discovery of admissible evidence. Likewise, records addressing injuries, and the care and treatment for injuries or medical condition unlike the injuries Plaintiff suffered in his October 26, 2007 crash are also irrelevant.

1- TO REQUEST RECORDS WITHOUT A REASONABLE LIMITATION ON THE SCOPE OF THE RECORDS REQUESTED IS AN UNWARRANTED INVASION OF THE PLAINTIFF'S PRIVACY RIGHTS.

The SDTs at bar violate Plaintiff's privacy in that they cover 1- some 38 years and, 2- include *öAll inpatient records, speech pathology records, occupation therapy records, social worker's records, letters to and from health care providers, correspondence and any other document of any kind regarding treatment provided to patient regardless of the date of the same and not merely those that pertain to any one accident or injury.ö*

Clearly, in seeking all inpatient records in custodian's possession, including letters and correspondence or any document from medical providers, social worker's records, speech pathology and occupation therapy records, the production of these records will result in the production of records on issues/facts: 1- Plaintiff has not put into contest, 2- are unrelated to his instant claims and, 3- could be highly confidential and private records not addressed to any matters in issue in this lawsuit.

In addition, speech pathology records are protected by *U.C.A.* §58-41-16. The phrase *öall documents of any kindö* for over 38 years can easily include mental health records in violation of *U.C.A.* §58-60-113. Thus, such requests are an unwarranted invasion of Plaintiff's personal life.

Importantly, the defense has made no showing the records requested are relevant to the claims in contest or to any specific defenses to any of the Plaintiff's crash claims.

I. THE SUBPOENAS VIOLATE THE PHYSICIAN – PATIENT PRIVILEGE

The doctor-patient relationship is a special, legal privilege designed to protect confidential patient information. The doctor-patient privilege may not be overcome by an opposing party's demands in the absence of an express or implied waiver by the party holding the privilege.

Hoffman v. Brookfield, 87 P.3d 858, 862-863 (Colo. 2004). *Rule 506 of the Utah Rules of Evidence*, however, provides for an exception to the general doctor-patient privilege. It states: **No privilege exists under this rule if the condition is an element of a claim or defense.**

Defendant has failed to show that all the records requested are a part of Plaintiff's claims or a specific defense.

To request **all medical records** over one's lifetime encompasses records not a part of any claim or defense. This court interpreted this "confidential communication" exception in **Debry v. Goates**, 999 P.2d 582, 586 (UT. App., 2000) wherein the court said: Generally, no privilege exists as to:

“a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding ***in which that condition is an element of any claim or defense.***”

Before defense counsel can secure the records demanded, he needs to show that the records demanded are an element of the Plaintiff's claim or of a specific defense. But when the request is so over-

broad, one cannot make such a showing. One cannot argue in favor of securing records when the records request is so broad that one cannot identify what documents will be produced. And when one cannot affirmatively assert what documents will be produced, the plaintiff's constitutional rights of privacy are invaded without justifiable reason. Plaintiff's request to limit production is the only remedy. Without the mandated showing, the defense's SDT are simply fishing for records in the "hopes" of finding some records detrimental to Plaintiff's claims or personally embarrassing to him. But the law requires more. The law requires a clear nexus between the records requested and the claims or defenses. Utah has specifically rejected "fishing expeditions" as an approach to discovery.

"The use of **DISCOVERY SHOULD NOT BE EXTENDED** to permit ferreting unduly in detail, nor have the effect of cross-examining the opposing party or his witnesses, **NOR SHOULD IT BE DISTORTED INTO A "FISHING EXPEDITION."**
State v. Petty, 17 UT 2nd, 382; 412 P2d. 914 [1966]

The discovery process is not intended to allow adversaries to pry into individual's personal information when it is irrelevant to the present legal proceedings. Beyond **Debry**, in Utah, the law is legion that for an adverse party to "get a chance" to review "privileged communications" an adverse party must show that:

1. The records sought do exist, and,

2. There is a **reasonable certainty the records contain evidence favorable to the defense**. See, Utah v. Worthen, 177 P.3d 664, 673, [Ut. Ct. App., 2008] citing Utah v. Blake, 63 P.3d 56, [UT., 2002]; State v. Wengreen, 167 P.3d 516, [Ut. Ct. App., 2007]; State v. Cardall, 982 P.2d [UT., 1999]

At 62, the court **Blake** court introduced the whole privilege issue by stating:

Rule 506 cloaks in privilege confidential communications between a patient and her therapist in matters regarding treatment. The very nature of all privileges means that they will sometimes “interfere with the establishment of the whole truth.” Nevertheless the various rule of privilege are recognized as “reflecting good policy choices, fostering candor in important relationships by promising protection of confidential disclosures.” See also Wengreen, at 521.

In counseling about privileged matters, the Wengreen, court, at 520, said:

Rule 506 of the Utah Rules of Evidence protects, as privileged, any information communicated in confidence for the purpose of treating or diagnosing a patient.

At 520

In addressing Rule 506, the Cardall Court quoted it by saying:

A patient has a privilege, during the patient’s life to refuse to disclose and to prevent any other person from disclosing 1- diagnosis made, treatment provided, or advice given by a physical or mental health therapist, 2- information obtained by examination of the patient.

Blake later continued to dictate about the required showing, stating that:

This is a stringent test, necessarily requiring some type of extrinsic indication that the evidence within the records exists and will, in fact, be exculpatory. The difficulty in meeting this test is deliberate and prudent in light of the sensitivity of these types of records and the worsening of under-reporting problems in the absence of a strong privilege. Id. at 62

Continuing it noted:

It is unlikely, that impeachment evidence qualifies as an element of a claim or defense...Accordingly, the mere speculation ... that counseling records may contain exculpatory evidence useful to his case is clearly not enough to warrant an in camera inspection. Id at 62.

In approving the release of records for review, **Blake** also said that the defendant was denied access to the records because he failed to identify any evidence he wished to have admitted. It went on to say, when a request for records is a general one, the court ought not to grant in camera review. And that when a request for records is made, at a minimum, specific facts must be alleged justifying production [an in camera review] then the court is much more likely to find the required reasonable certainty. *Id.* At 63. Similarly, in **Wengreen**, at 521, the court denied access to the requested records because the:

defendant did not meet the reasonable certainty test because there is no proof the records defendant seeks exists, and even if they did, defendant does not demonstrate, with reasonable certainty, that the records would be exculpatory

í At best, the defendant is optimistic that the evidence he seeks would be favorable, but he fails to establish that fact in accordance with the reasonably certainty test.

The only exception to these legal mandates protecting privileged communications is when an adverse party seeking the records can show that the records sought are relevant to the physical, mental or emotional condition of the patient in any proceeding in which that condition is an element of a claim or defense. Instantly, Plaintiff makes no mental or emotional condition claims. Only records of physical injuries or medical conditions like or similar to those physical injuries or medical conditions Plaintiff has alleged in his Complaint are relevant. ***U.R.E. Rule 506(d)(1)***. But even when it is established that a plaintiff has put his/her mental state in issue or it is validly raised by the defense:

access to the [plaintiff's] medical records is still constrained. A non-patient “does not have the right to examine all of the confidential information or to search through [psychological] files without supervision. [citing Pa. v. Ritchie, 480, U.S.39, 1987]. Rather a party must show with reasonable certainty that some evidence favorable to his or her claim exists. If such a showing is made, then the party may request that the court review the otherwise confidential records “to determined if they contain material evidence.”

Debry, at 588.

Reverting back to the question of a privileged communication or a waiver of a protected right the *Hoffman* Court in Colorado clarified a critical distinction in this same area:

“An implied waiver may not be found based on nothing more than the privilege holder’s act of filing a pleading in a case in which his physical or mental condition may be an issue.” **Hoffman v. Brookfield**, 87 P.3d 858 at 862 [CO - 2004]

In this case, as in *Hoffman*, Plaintiff is seeking general damages for PHYSICAL pain and suffering directly caused by the collision and its resulting physical injuries. Therefore, medical records not addressed to Plaintiff’s *physical* crash injuries are not relevant to present claim. Moreover, since Plaintiff is thirty-eight years old, there is a high probability that he has numerous medical records unrelated to his collision injuries and resulting medical conditions.

Other jurisdictions have similarly held that the filing of a lawsuit does not necessarily constitute the Plaintiff’s waiver of his/her privilege with respect to **any and all medical records**. In **Johnson v. Trujillo**, 97 CV 3316 [1999] the Colorado Supreme Court said that merely filing a personal injury claim does not open the door to discovery of marriage counseling records and prior psychiatric records. Even a mental distress claim does not impliedly waive the privilege.

Here we do not know what records will be produced. But to seek all records clearly violates the discovery parameters of the **Johnson** court. Additionally, in **Brit v. Superior Ct.**, 143 Cal. Rptr. 695 [Cal. 1978], in citing its decision in **Lifschutz**, 2 Cal. 3rd 415, 85 Cal. Rptr. 829, 467 P.2d 557, the court reviewed the waiver of privilege encompassed by the patient-litigant exception and reasoned that injured plaintiffs must disclose relevant medical information but have **no obligation to disclose unrelated medical treatment.**

As we have already indicated, our court addressed this identical question in **Re Lifschutz**, the defendant in **Lifschutz**, like the defendant in the present case, asserted that under the patient-litigant exception as construed in earlier cases, a patient, by instituting a claim for physical or mental injury, automatically waived his statutory privilege as to all protected communications. In **Lifschutz**, however, we emphatically rejected such a broad rendition of the statutory exception. Noting that such an expansive construction "might effectively deter many" patients from instituting [legitimate lawsuits] out of fear of opening up all past communications to discovery, "we concluded that such a result would clearly be an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision and would create opportunities for harassment and blackmail." Id. at 435.

Accordingly, we held in **Lifschutz** that "the "automatic" waiver of privilege contemplated by [the patient-litigant exception] must be construed not as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception. Under section 1016, disclosure can be compelled only with respect to those mental conditions the patient-litigant has "disclosed" by bringing an action in which they are in issue (citation); communications which are not directly relevant to those specific

conditions do not fall within the terms of section 1016's exception and therefore remain privilege. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be relevant to the substantive issues of the litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court. In **Roberts v. Sup. Ct.**, 9 Cal 3rd 330, 337-339, 107 Cal. Rptr. 309, 508 P2d 309 [Cal. 1973]

Our holding in **Lifschutz** and **Roberts** support plaintiffs' contention that the discovery order in the instant case is impermissibly overbroad. As **Lifschutz** explains, plaintiffs are not obligated to sacrifice all privacy to seek redress for a specific (physical) mental or emotional injury; while they may not withhold information which relates to any physical or mental condition which they have put in issue by bringing this lawsuit. they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past. The trial court thus obviously erred in ordering plaintiffs to disclose to the defendant their entire lifetime medical

histories and this aspect of the challenged discovery order must
also be vacated. [underscore added]

Since there is no obligation to disclose, "unrelated medical records" because they are unrelated, there is no obligation to disclose other records that are also "unrelated." Thus, the Plaintiff need not disclose the requests for any and all medical records, nor requests for, social work, speech related or occupational therapy records because such records are "unrelated." Instantly, Plaintiff is not making a claim for occupational, social, or speech pathology injuries. Thus, such records are not in issue nor relevant. In not being relevant, they are not discoverable.

In a situation substantially similar to the case at bar, our Supreme Court, in **Debry**, supra, set forth a three element analysis to determine whether or not the qualified privilege is waived. The **first element** of the analysis to overcome a qualified privilege for withholding confidential information is that the party seeking the information:

**must show with reasonable certainty that some
evidence favorable to his or her claim exists.**

Debry at 587.

Instantly, Defendant has made no such showing to get beyond this first element. Defendant's subpoenas are overbroad in that they seek medical information both prior to and subsequent to the subject collision that would allow them to obtain information conceivably going back thirty-eight years. Likewise, the subpoenas also demand pre and post crash records for injuries unrelated to the instant claims. Defendant has made no demonstration that said information is reasonably calculated to lead to the discovery of admissible evidence. The defense has not made any showing that said records exist or are relevant to any claim or defense. *The defense has not*

made any reasonably certain showing that the records contain some favorable evidence.

Without the Debry mandated showings, the subpoenas are overbroad in both time and in the breadth of the records sought. Thus, they are not relevant and invade the Plaintiff's rights to privacy and her health care provider's patient privilege. Properly this Court should quash them.

Here the defendant's effort to obtain a complete copy of any and all of Plaintiff's records is impermissibly overbroad, oppressive and an intrusion into Plaintiff's constitutional right to privacy and, accordingly, fails at the first element **required under Debry**. There is no evidence in this claim to support the discovery of all of Plaintiff's health records for a thirty-eight year period, nor is there any evidence to support the discovery of any records other than those directly related to his collision injuries. All of the Plaintiff's collision related records have been provided to Defendant through Plaintiff's Initial Disclosures and in his Responses to Defendant's Request for Production of Documents.

The discovery process is designed to allow each party to the case to discover relevant facts so the parties may accurately represent their clients. The discovery process is not intended to allow adversaries to pry into an individual's personal past life when such information is irrelevant to the proceedings. **The Utah Rules of Civil Procedure** provides safeguards by putting limits on the scope of discovery. **Rule 26(b)(1)** in relevant part states:

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”

Thus, in the case at bar, in order for a records subpoena to be valid, it must request only that information which is relevant to the subject collision/claim. Defendant has not made any showing of relevance and thus, the Court should quash the SDTs.

Additionally, under the Health Insurance Portability and Accountability Act of 1996 (öHIPPAö), Plaintiff is afforded the protection of the physician/patient privilege **unless** he does not object to the disclosure on the basis that Defendant's subpoenas exceed the scope of discovery. This Plaintiff now voices his objections!

IN CAMERA REVIEW

Under **DeBry, Worthen, Blake, and Cardall**, *supra*, once an adverse party establishes that **1-** the records sought actually exists and, **2-** that there is a reasonable certainty that the records contained evidence favorable to that party, then the adverse party still has no rights to review the records unsupervised. Rather, it is the duty of the trial judge, in camera, to review the records at issue for materiality. The materiality standard is defined as ***“where there is a reasonable probability that, if the evidence is disclosed the result of the proceeding will be different.”*** **Blake**, at 63, **Cardall** at 86. This mandate was first announced by the U.S.S.C. decision in the **Penn. v. Ritchie** case at 57. [480 U.S.39, 1987] Accordingly, Utah courts follow **Ritchie**, where it said:

the mere possibility that an item of undisclosed information might have helped the defense ... does not establish “materiality” in the constitutional sense! Ritchie must first establish a basis for his claim that it contains material evidence. “He must at least make

some plausible showing of how the testimony would have been both material and favorable to his defense. Id. at 58.

Beyond **Debry** and **Sorenson**, the cases cited in support of Plaintiff's position are criminal cases whereas this is a civil case. The **Debry** court commented on the distinction saying:

In the criminal context... due process concerns limit the extent of the Evidentiary privilege because a criminal defendant has a constitutional right to a fair trial. Privilege must give way to the discovery of exculpatory information... with some protection for confidentiality. Arguably, Rule 506 could be more narrowly construed in a civil context, when personal liberty is not at stake... Thus we feel constrained to apply similar measures in the civil arena, though the need for the information may be less compelling.

CONCLUSION

Without the mandated showings, Plaintiff and this Court can assume Defendant is on a fishing expedition, hoping to find relevant, embarrassing or otherwise damaging evidence. But Utah law does not permit "fishing." For the reasoned arguments stated above, supported by the governing legal authorities, Plaintiff respectfully requests this Honorable Court issue an order to quash the Defendant's subpoenas served on all of the before listed custodians of records.

Respectfully submitted;

Date:

JOHN F. FAY