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MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY

ROB QUIST, and BONNI QUIST,
wife,

Plaintiffs

v.

ROCH R. BOYER, M.D.,

Defendant.

Cause No. DV-94-526A

**PLAINTIFFS' MOTIONS
IN LIMINE AND FOR PROTECTIVE
ORDER TO EXCLUDE EVIDENCE
CONTAINED IN CONFIDENTIAL
RECORDS**

I. MOTION

Plaintiffs move the Court for an Order in Limine ordering the Defendant, his attorney, and his witnesses not to directly or indirectly mention, comment, question, argue, or by any other reference whatsoever attempt to convey to the jury information pertaining to the matters listed below. The Plaintiff further moves this Court for an Order directing the Defendant's attorney to warn and caution his client and each of his witnesses to strictly follow any Order entered by this Court in connection with this Motion.

This Motion is made because the facts listed below would be inadmissible in the trial of this suit, and permitting the interrogation of witnesses or comments to jurors or offers of

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proof concerning these matters would prejudice the jury, and the sustaining of objections to such questions, comments, or offers would not cure that prejudice, but would rather have the effect of reinforcing such prejudicial matters in the minds of the jurors. The irrelevant matters are:

1. Information contained in confidential counselling records re: marijuana usage;
2. Information in confidential medical records re: genital herpes;
3. Information contained in confidential medical records re: TB tests.

Pursuant to Rule 26(c) and Rule 35(b)(2), M.R.Civ.P., Plaintiffs ask that an order be issued precluding Defense Counsel from mentioning such subjects solely for the purpose of prejudicing Rob Quist in front of witnesses. Private medical and psychological records are not relevant to the issues in the pending action. None of the foregoing matters are material or probative to the issues in this case and are outweighed by the danger of unfair prejudice. See Rule 403 of Montana Rules of Evidence.

II. BRIEF IN SUPPORT

A. INTRODUCTION

Plaintiffs brought this medical negligence action against Dr. Boyer because, during a routine gallbladder removal in April, 1992, the latter cut the wrong duct leading from Rob Quist's liver instead of the proper one leading from his gallbladder. In

the perpetuation deposition of Dr. Hart, a physician in Seattle who partially repaired the injury, it became obvious that the Defendant's strategy is to question witnesses about Rob Quist's use of marijuana, his condition of genital herpes, and possible positive results on a Tuberculosis test. None of these matters are relevant or material to the issues in this case, i.e. whether Dr. Boyer was negligent in cutting the wrong duct, the medical problems that he has had since that time, and the damage it caused to his musical career. These issues will only serve to unfairly prejudice the Plaintiffs and allow the Defendant to place inflammatory information in front of the jury which is irrelevant to any of the issues in this case. As more fully explained below, Plaintiffs' confidential counselling and medical records containing private information should not be admitted at trial.

B. SPECIFIC MATTERS CONTAINED IN CONFIDENTIAL COUNSELING RECORDS ARE PRIVILEGED AND NOT SUBJECT TO DISCLOSURE.

Some information contained in confidential counselling records of the Quist family should be excluded. During discovery, the Plaintiffs allowed Defense Counsel to review the counseling records of Kathleen Hayden.

The Quists sought marital and family counseling because of their attempt to cope with the emotional problems caused by Rob's illness. The Quists sought out counseling to try to save a "failing marriage." Rob suffers from depression, stress, loss

of self-esteem, and marital relationship problems because of his physical injuries and the harm caused to his musical career because of those injuries. In spite of the stress the illness has placed on his family, they have tried to cope and stay together. As part of these efforts, the Quists sought family counseling.

During discovery, Plaintiffs allowed Defense Counsel to review the counseling records of Kathleen Hayden. In the intake form, there is a question concerning past use of drugs and Rob responded, "marijuana, two or three times a month." Plaintiffs specifically reserve their right to object to disclosing these records absent of court order. Defense counsel agreed:

MR. RILEY: What I had in mind is that a copy of the records would be attached to the original deposition, which will be sent to me, and that information will not be introduced at the time of trial unless I advise Monte that we may use that information, and he would have an appropriate time to make an argument or motion if he felt that was appropriate. I will want a copy attached to my copy of the deposition, however. I need to use that for evaluation purposes, and I may need to have an expert look at that. That would be with the understanding, if I had an expert looking at it, that that would be the only person. They won't be disseminated to anyone else.

MR. BECK: Right. I agree with that. Only him and his experts will look at the records here. It won't be distributed to anybody else.

(Exhibit 1, Hayden Depo, p. 35, ln. 13 to p. 36, ln. 5.) Defense counsel, however, without obtaining a court order, or notifying Plaintiffs, asked Dr. Hart, Rob's treating doctor, about the issue of marijuana usage. Dr. Hart responded that they were

irrelevant or immaterial to any of the injuries Rob suffered.

The marijuana usage has nothing to do with any of the issues in this case. Introducing such highly prejudicial evidence in comparison to its probative value would constitute clear error. See, Krueger v. General Motors, Corp., 240 Mont. 266, 783 P.2d 1340, 1346 (1989). Attorney Riley's discussion of information he obtained from private counseling records, without first disclosing that he intended to bring up the subject, violates the agreement he put on the record.

Moreover, Montana law recognizes that counseling records should be accorded the highest privilege:

The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client. Nothing in any act of the legislature shall be construed to require such privileged communication to be disclosed.

Mont Code Ann. § 26-1-807. Patients must be able to disclose their innermost private thoughts and feelings to their counselor in order to receive effective counseling. Public disclosure of their records can only have the most chilling effect on patient's willingness to do so. This Court has discretion to enter "...any order which justice requires to protect a party or person from annoyance, embarrassment, [or] oppression." M.R.Civ.P. 26(c). That discretion should be exercised to prevent the Defendant from trying issues unrelated to Dr. Boyer's negligence, or the injuries suffered by the Plaintiffs. The prejudicial nature of the counseling records far outweigh any probative value and

should be excluded pursuant to Rule 403 Montana Rules of Evidence. See also, Kramer v. J. I. Case Mfg. Co., 815 P.2d 798, 807 (Wash. 1991); Mankey v. Bennett, 38 Fed.3d 353, 360 (7th Cir. 1994).

Certain psychological records which are unrelated to the injuries for which they seek compensation should be protected as privileged. In Mapes v. District Court, 250 Mont. 524, 530, 822 P.2d 91, 95 (1991), the Montana Supreme Court stated:

Defendant's right to discover plaintiff's mental or physical condition is based on fairness where that mental or physical condition is placed in issue by a claim for damages. However, defendant's need for that discovery must be balanced by the plaintiff's constitutional right to privacy found in MT Const. Art. II, Sect. 10. Defendant's needs must also be balanced against a plaintiff's statutory right to confidential relations with his psychologist. §26-1-807, M.C.A., places plaintiff's relations with the psychologist "on the same basis as provided by law for those between an attorney and his client." Once confidential communications have been disclosed or publicized, the damage cannot be undone on appeal.

* * *

However, in balancing plaintiff's right to confidentiality against the defendant's right to defend itself in an informed manner, we conclude that the waiver is not unlimited. Defendant is entitled to discover prior physical or mental conditions, which may relate to the damages being claimed in the current action, but is not entitled to unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters. *Id.* at 95.

In this case, Rob and Bonni Quist's psychological records regarding marijuana do not pertain to their claim for damages. These records are highly confidential and private communications made between the Plaintiffs and their therapist unrelated to the

accident in question. The slight notation relating to the marijuana usage has nothing to do with the medical negligence of Dr. Boyer. Allowing Defense Counsel to ask witnesses and introducing such matters at trial "would unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters." Mapes, Id. at 95.

The court in this case is requested to excise those portions of the records and preclude the Defendant from discussing only those topics which are deemed relevant under the guidelines of the Montana Supreme Court, the statutes, and Plaintiffs' constitutional protection of privacy.

C. MEDICAL PRIVILEGE RE: GENITAL HERPES/TB TESTS

Defense Counsel, in another attempt to introduce irrelevant and immaterial matters before the jury, provided Dr. Hart with information concerning Rob Quist's history of genital herpes. This information was found in the records of Rob Quist's personal family physician, Dr. Winkel, in a notation of August 11, 1982 wherein the following appears: "Has positive TB tine test since grade school and has history of genital herpes."

Defense Counsel in the same colloquy with Dr. Hart asked him about Rob's TB test and genital herpes.

Nothing in Rob Quist's case has anything to do with a pre-existing condition of genital herpes. The Defendant is not entitled to discuss every personal, confidential, and private

medical matter without the consent or waiver of Rob.

Pursuant to Mont. Code Ann. §26-1-805 (1991), a licensed physician cannot be examined without the consent of his patient. Except as provided in Rule 35 of the M.R. Civ. P., the medical privilege applies. According to Rule 35, a plaintiff makes a partial waiver of the doctor/patient privilege by "commencing an action or asserting a defense which places in issue the mental or physical condition of a party to the action." However, the pertinent section of Rule 35 states:

. . . But such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motions seasonably made, and upon notice and for good cause shown, the court in which the action is pending may make an order prohibiting the introduction in evidence of any portion of the medical record of any person as may not be relevant to the issues in the pending action." Rule 35(b)(2).
(Emphasis added.)

This rule was applied in Linton v. Great Falls, 45 St.Rptr. 68, 749 P.2d 61, 62 (Mont. 1988). There, the Montana Supreme Court held that waiver "does not apply to any treatment or condition not related to the action." Medical services and treatment "which is relevant to the subject matter involved in the claim" is waived. 749 P.2d at 62-63.

In addition, § 50-16-535, M.C.A., states:

- (1) Health care information may not be disclosed by a health care provider pursuant to compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless:
 - (a) the patient has consented in writing to the release of the health care information in response to compulsory process or a discovery request;

(b) the patient has waived the right to claim confidentiality for the health care information sought;
(c) the patient is a party to the proceeding and has placed his physical or mental condition in issue; . . .
(Emphasis added.)

Thus, health care information between a physician and a patient is clearly protected.

Plaintiff Rob Quist has not waived the right to claim the privilege. He has not placed his genital herpes condition at issue in this action, and therefore any testimony directed at his medical records should be stricken. See also, State ex. rel. Mapes v. District Court, 250 Mont. 524, 822 P.2d 91 (1991). Plaintiff specifically moves the Court to strike such statements from the videotape deposition of Dr. Hart.

D. EVIDENCE OF THE TUBERCULOSIS IS IRRELEVANT AND IMMATERIAL.


The foregoing arguments apply with equal force to the reference in Dr. Winkel's notes pertaining to positive tests for Tuberculosis. TB has nothing whatsoever to do with this case. The Defendant only seeks to introduce such evidence to possibly prejudice the witnesses or jury. Such questioning by the Defendant on this topic was improper.

II. CONCLUSION

For the reasons stated above, the Plaintiffs respectfully request the Court to grant their Motion in Limine and Protective Order.

DATED this 2nd day of February, 1996.

BECK LAW OFFICES



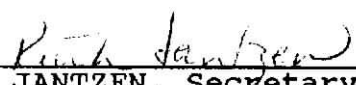
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CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of February, 1996, a true and accurate copy of the foregoing was mailed postage prepaid, by U.S. Mail, to the following:

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