23 November 2023

Honorable Judge James Johnson
Judge of The Superior Court of Warrow County
123 Middle Avenue, S.W.
Anywhere, GA 12345

Re: Plaintiff's Motion in Limine to Exclude Mental Health Records and Testimony
Totem v. Precise Transport
Civil Action File No. 12AB345678

Dear Judge Johnson,

As Your Honor is aware, on November 9, 2023, Your Honor held proceedings via Zoom video conference to address various Motions in Limine for the above-referenced case, one of which being Plaintiff's Motion in Limine to Exclude Plaintiff's Mental Health Records and testimony from neuropsychologist Dr. Anderson. During the hearing, Your Honor characterized Plaintiff's injury as a hybrid "physical injury that also results in mental health complications." (Transcript of Hearing, November 9, 2023, hereinafter "Hearing Transcript" 42:4-7). Your Honor reasoned that Plaintiff waived her privilege in her mental health records because Plaintiff's treating neurologist would testify to Plaintiff's mental health condition. (Hearing Transcript 58:15-18) ("But the doctor is going to testify to it. And once you start testifying as to the mental condition and what you've based it on, then it's a waiver.") Before Your Honor issues an order on this Motion, Plaintiff would like to emphasize that Georgia precedent does not allow for a waiver of the mental health privilege simply by putting one's mental health at issue in a civil dispute. *See Plunkett v. Ginsburg*, 217 Ga. App. 20, 21-22 (1995); *Cooksey v. Landry,* 295 Ga. 430 (2015). Additionally, Georgia appellate courts have routinely and unanimously held that there are only two waivers to the mental health privilege: when a privilege holder expressly waives the privilege, and when Plaintiff calls his treating mental health care provider to testify – neither of which Plaintiff has any plans to do.

In *Mincey v. Ga. Dep't of Cmty. Affairs* (308 Ga. App. 740), the Georgia Court of Appeals faced a question of a new potential waiver to the mental health privilege. Namely, the court was presented with the question of whether a plaintiff's "arguably misleading responses to opposing counsel's questions regarding a previous diagnosis of depression amounted to a 'decisive' and 'unequivocal' waiver of her mental-health privilege." *Mincey v. Ga. Dep't of Cmty. Affairs*, 308 Ga. App. 740, 746 (2011). Basing its decision on firmly established "precedential strictures," the court held that this action by the Plaintiff did not constitute a waiver of the mental health privilege. *Id.*

> As a matter of public policy, this state has long provided for the confidentiality of communications between a mental-health professional and patient. Thus, in order to encourage a patient to speak freely to his or her mental-health professional, we declare such communications "absolutely privileged," and protect them from discovery in the absence of an affirmative waiver by the patient.

Id. at 745 (internal citation and punctuation omitted). Three years later, in *Cooksey v. Landry* (295 Ga. 430), the Supreme Court of Georgia refused to create a waiver to the psychiatrist-patient privilege for a deceased patient's representative. *See Cooksey v. Landry*, 295 Ga. 430, 432-33 (2014). In fact, in the past *sixty years*, Georgia courts have consistently refused to expand waivers of the mental health privilege beyond the two that we recognize today – the unequivocal action on the part of the plaintiff to waive the privilege, and the act of calling one's psychiatrist/psychologist as a witness to testify regarding one's mental health (arguably nothing more than an example of the first waiver). *See Fields v. State*, 221 Ga. 307 (1965); *See also Mincey v. Ga. Dep't of Cmty. Affairs*, 308 Ga. App. 740, 746 (2011); *Griggs v. State*, 241 Ga. 317, 318 (1978); *Trammel v. Bradberry*, 256 Ga. App. 412, 424 (2002).

Particularly relevant to the instant dispute, Georgia courts have routinely recognized that a plaintiff putting his mental health "at issue," does not constitute a waiver. (Hearing Transcript 58:15-18). "Our legislature […] has determined that the public policies supporting the creation of a mental health privilege necessitated enactment of a nearly absolute privilege, one without exception if the patient is deceased or the nature of the patient's mental condition is put at issue." *Cooksey*, 295 Ga. at 435-36.

In *Plunkett v. Ginsburg* (217 Ga. App. 20), the Court of Appeals addressed a case in which the plaintiff suffered "severe and great pain of body and mind" after she was injured in a car accident. *Plunkett v. Ginsburg*, 217 Ga. App. 20, 20 (1995). The plaintiff sought care from an orthopaedist who found that her physical suffering was mainly caused by "major psychosocial dysfunction" and the "magnitude of her subjective complaints [were] not substantiated by objective clinical findings." *Id*. The defendant sought to discover plaintiff's psychiatric records from before and after the accident. Even though the plaintiff in *Plunkett* contended that her mental pain and suffering was directly caused by the physical trauma that she suffered, the court still held that she had not waived her privilege in her mental health records.

> In *any* action, the actual communications between a psychiatrist and a patient would be relevant to the patient's mental state and would constitute the most objective evidence thereof. Nevertheless, the legislature has clearly expressed its intent that, as a matter of public policy, psychiatrist-patient communications are to be privileged and are to remain privileged even though the patient's 'care and treatment or the nature and extent of his injuries (have been put) at issue in any civil or criminal proceeding.

Id. at 21-22 (1995) (emphasis in original). "The psychiatrist-patient privilege is not waived when a party who claims it is seeking to recover damages for injuries of a mental and emotional nature." *Id.* (internal citations and punctuation omitted).

A non-Georgia case that is also particularly relevant to the issue at hand is Supreme Court of Alabama case *Ex Parte Pepper* (794 So. 2d 340). In *Ex Parte Pepper*, the Supreme Court of Alabama addressed a case where the plaintiff brought suit after being rear-ended. The plaintiff sought medical treatment from an orthopedic surgeon who referred her to a neuropsychologist. The neuropsychologist administered a psychological evaluation and prepared a report of his findings to give to the orthopedic surgeon. "The report addressed potential psychological causes of the pain [the plaintiff] claimed to be suffering." *Ex Parte Pepper*, 794 So. 2d 340, 341 (Ala. 2001). In the report, the neuropsychologist opined that the

plaintiff suffered from attention/concentration deficits that were the result of distracting effects of pain, depression, and anxiety, but that she had no cognitive deficits suggestive of mild brain injury. *Id*. The defendant obtained a copy of the neuropsychologist's report during the deposition of the orthopedic surgeon. The defendant sought to depose the neuropsychologist on the basis that the plaintiff had put her mental condition at issue and argued that the neuropsychologist's testimony was relevant to the question of whether the plaintiff had been injured in the car accident and to what extent. The plaintiff sought to protect the psychological consultation and treatment in relation to her physical pain.

Upholding the trial court's denial of the defendant's motion to compel the neurologist's deposition, the Supreme Court of Alabama stated the following:

> We do not believe that Pepper's competing interest outweighs the public policy on which the psychotherapist-patient privilege is based, nor do we find any implication that the Legislature intended an exception to the psychotherapist-patient privilege to be applied where a party seeks information relevant to the issue of the proximate cause of another party's injuries. Thus, we are unwilling to adopt such an exception.

Id. at 344.[1]

The issue addressed by the *Pepper* court is very similar to the issue at hand. Like Ms. Totem, the plaintiff in *Pepper* presented a hybrid "physical injury that also result[ed] in mental health complications." (Hearing Transcript 42:5-7). Just like *Pepper*, a physician referred Ms. Totem to a neuropsychologist. Like the neuropsychologist in *Pepper*, Dr. Anderson found no evidence of a mild traumatic brain injury. Like the instant case, the physician in *Pepper* relied on the neuropsychologist's report to treat the plaintiff.[2] Like the defendant in *Pepper,* Defendant in the instant case seeks Plaintiff's mental health records as evidence of the extent of Plaintiff's injury. Despite the hybrid of physical and mental health symptoms presented by the plaintiff in *Pepper*, the Supreme Court of Alabama held steadfast to the legislative intent to create an absolute privilege in mental health records.

The type of hybrid case before the Court now is factually and legally comparable to *Plunkett*, *Pepper*, and a plethora of other personal injury cases in which the plaintiffs presented mental health issues arising from physical injuries. In all of these cases, testimony from the physician treating the physical injuries was necessarily discoverable, whereas the communications between the mental health care provider and the plaintiff were not – this

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[1] Importantly, Alabama's mental health privilege is substantively identical to Georgia's. *See* Ala. Code § 34-26-2: "For the purpose of this chapter, the confidential relations and communications between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed." Like the Alabama Legislature, Georgia's General Assembly likewise enacted O.C.G.A. § 43-39-16 to give communications between a psychologist and client the same protection as those between an attorney and client. Also like Georgia, Alabama only recognizes two waivers to the mental health privilege – calling a mental health provider as a witness and or when the holder of the privilege "objectively manisfest[s] a clear intent not to rely upon the privilege." *Ex Parte United Service Stations, Inc.*, 628 So. 2d 501, 505 (Ala. 1993).

[2] While the case doesn't outright say that the orthopedic surgeon relied on the neuropsycholgist's report, the implication is that there was reliance because the surgeon referred the plaintiff to the psychologist to determine alternative reasons for her pain, and he brought the report to refence during his deposition.

holds true even though these plaintiffs sought recovery for both physical and mental health ailments. *See Wilson v. Bonner*, 166 Ga. App. 9, 16 (1983) ("The psychiatrist-patient privilege is not waived when a party who claims it is seeking to recover damages for injuries of a mental and emotional nature.")

While Plaintiff respects the Court's nuanced approach to this issue, she believes that public policy, legislative intent, and established legal precedent demand that her privilege in her mental health documents be upheld in this circumstance. Mental health symptoms resulting from physical injuries are common in the context of personal injury lawsuits, and Georgia courts have never recognized a waiver when presented with this issue. Plaintiff urges Your Honor to follow the plain language of the statute and exclude these records as inadmissible.

Thank you.