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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

CONNIE CURRY,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

No. 2:16-cv-2898-JAM-CMK

ORDER

_____ /
Pending before the court is Defendant’s motion to compel (Doc. 12). A hearing on the motion to compel was held on November 29, 2017, before the undersigned in Redding, California. Attorney Desiree Papendick appeared on behalf of plaintiff; attorney Lynn Ernce appeared on behalf of defendant. The parties were provided time to attempt resolve the discovery dispute; no resolution has been presented to the court.

Defendant has filed a motion to compel pursuant to Federal Rule of Civil Procedure 37. Defendant moves to compel plaintiff to produce documents and answer interrogatories related to her mental health, which she objected to in her response to the requests.

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1 **MOTION**

2 Defendant propounded both a request for production of documents pursuant to
3 Rule 34, and interrogatories pursuant to Rule 33, related to plaintiff’s medical records including
4 her mental health condition. Defendant argues that plaintiff has put her mental health at issue by
5 claiming substantial emotional distress damages. Plaintiff contends her mental health is not at
6 issue in this case as she is only claiming “garden variety” type of emotional distress.

7 Federal Rule of Civil Procedure 26(b)(1) establishes the scope of discovery and
8 states, in relevant part, as follows:

9 Parties may obtain discovery regarding any nonprivileged matter
10 that is relevant to any party's claim or defense—including the
11 existence, description, nature, custody, condition, and location of
12 any documents or other tangible things and the identity and
13 location of persons who know of any discoverable matter. For good
14 cause, the court may order discovery of any matter relevant to the
15 subject matter involved in the action. Relevant information need
16 not be admissible at the trial if the discovery appears reasonably
17 calculated to lead to the discovery of admissible evidence.

18 Thus, discovery is appropriate of any matter relevant to the subject matter involved in the action.
19 “The party who resists discovery has the burden to show that discovery should not be allowed,
20 and has the burden of clarifying, explaining, and supporting its objections.” Oakes v. Halvorsen
21 Marine Ltd., 179 F.R.D. 281, 283 (C.D. Cal. 1998); Nestle Foods Corp. v. Aetna Casualty &
22 Surety Co., 135 F.R.D. 101, 104 (D.N.J. 1990).

23 The parties agree the controlling case over the issue of mental health records is
24 Jaffe v. Redmond, 518 U.S. 1 (1996). In Jaffe, the Supreme Court recognize that confidential
25 communications between a patient and a psychotherapist are privileged. The Court did state that
26 the psychotherapist-patient privilege could be waived, but did not clarify in what circumstances
such a waiver is applicable. The Ninth Circuit has not specifically addressed the issue. Several
District Courts have analyzed the waiver issue, and two basic approaches have been used. Under
the broad approach, psychotherapist-patient privilege is waived whenever the plaintiff places his
mental condition at issue. See EEOC v. Cal. Psychiatric Transitions, 258 F.R.D. 391, 399 (E.D.

1 Cal. 2009) (applying the broad approach at least in part due to the only remedy sought was
2 emotional distress damages); Sarko v. Penn-Del-Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997)
3 (taking a broader approach by holding that the privilege is waived if the plaintiff, who claimed
4 she was disabled by clinical depression, places her mental condition directly at issue in the
5 action). Under the narrower approach, courts have concluded that the privilege is waived only if
6 the plaintiff places the contents of the communications at issue, which does not happen where the
7 plaintiff claims only generic “garden variety” emotional distress damages. Rather, the waiver
8 only occurs where the patient relies on the advice or findings of her psychotherapist. See Cal.
9 Psychiatric Transitions, 258 F.R.D. at 399; Fitzgerald v. Cassil, 216 F.R.D. 632 (N.D. Cal. 2003)
10 (applying the narrow approach to waiver of the psychotherapist-patient privilege where a couple
11 alleged harassment by their landlord which caused them emotional distress but stipulated they
12 did not intend to rely on a treating psychotherapist or other expert to prove emotional distress
13 damages).

14 “Garden variety” emotional distress has been described in a
15 number of ways, such as “ ‘the distress that any healthy,
16 well-adjusted person would likely feel as a result of being so
17 victimized;’ ” “ ‘the generalized insult, hurt feelings and lingering
18 resentment which anyone could be expected to feel’ given the
19 defendant’s conduct;” and general pain and suffering that is not
20 serious enough to require psychological treatment or to disrupt or
21 affect the claimant’s life activities. Flowers v. Owens, 274 F.R.D.
[218, 225-226 (N.D. Ill. 2011)] (internal citations omitted).
“[S]ince garden variety emotional suffering involves those feelings
that would likely be experienced by anyone who experienced what
the plaintiff alleges occurred, prohibiting a party’s access to []
privileged information, does not compromise the ability of the
opponent to contest the evidence of emotional damage and thus
does not offend notions of fairness.” Id. at 226.

22 Redon v. Ruiz, 2015 WL 13229500 (S.D. Cal. 2015) (finding plaintiff’s symptoms, as expressed
23 in his deposition testimony, exceeded a “garden variety” claim of emotional damages in that he
24 testified he suffered from severe anxiety on a daily basis, could not leave his home without a
25 high level of fear, and continued to get depressed about the incident three years after it
26 happened).

1 The question before the court is whether plaintiff’s emotional distress damages
2 are “garden variety” and thus insufficient to waive the psychotherapist-patient privilege. If more
3 than just “garden variety,” under either approach the records would be discoverable. If not more
4 than “garden variety,” under the narrow approach the records would not be discoverable, and the
5 court would need to determine which approach is appropriate in this case. However, as discussed
6 below, the court finds the emotional distress damages in this case are more than simple “garden
7 variety” given plaintiff’s history. Therefore, under either approach the records are discoverable.

8 Plaintiff alleges in her complaint that she obtained an Access Pass through her
9 status as permanently disabled. On July 23, 2014, plaintiff was injured when she fell as she
10 descended a step at the Whisky Creek Courtesy Docks restroom area. As a result of the fall,
11 plaintiff alleges she suffered significant physical injuries including a right intertrochanteric
12 femoral fracture, which required surgery and placement of permanent nails and screws into her
13 right hip. Her claims include general negligence, premises liability, negligence per se. She
14 alleges she has suffered medical expenses and general damages. She prays for *inter alia*, general
15 and compensatory damages, attorney fees, medical and related expenses. There are no specific
16 claims for emotional distress, nor are there any specific damage requests for emotional distress.

17 However, through the discovery process, plaintiff has informed the defendant that
18 she is seeking non-economic damages for mental suffering, anxiety, humiliation, and emotional
19 distress. In her Rule 26 initial disclosures, she states she is seeking non-economic damages of
20 \$250,000 for “past and present physical pain” as well as “mental suffering, loss of enjoyment of
21 life, physical impairment, inconvenience, grief, anxiety, humiliation and emotional distress.” In
22 addition, she has disclosed that her permanently disabled status is based on Post Traumatic Stress
23 Disorder (PTSD) and anxiety disorder, not on any physical disabilities.

24 Defendant argues that in alleging she is disabled in her complaint, and claiming
25 significant non-economic damages for mental suffering, grief, anxiety, humiliation and emotional
26 distress, she has put her mental disabilities of PTSD and anxiety at issue. Plaintiff contends that

1 all she has done is allege garden variety mental suffering, the kind of mental suffering that would
2 happen to anyone, which is insufficient to act as a waiver of her psychotherapist-patient
3 privilege. She argues she did not seek out mental health professional nor was she diagnosed with
4 a mental health condition as a result of her suffering. She further argues that the majority of the
5 non-economic damage claim is for pain and suffering, not emotional distress.

6 As stated above, the underlying issue herein is whether the emotion distress
7 damages claim is of the “garden variety” type. Plaintiff is correct in her assertion that not having
8 sought out mental health treatment or being diagnosed with a mental health condition as a result
9 of the subject incident weighs in her favor. Similarly, the emotional distress injuries are not the
10 only or major injury she claims to have suffered. Plaintiff has also offered not to present expert
11 testimony concerning mental suffering beyond “garden variety suffering.” However, weighing
12 against her argument are her pre-existing conditions of PTSD and anxiety disorder. Defendant
13 has a strong and persuasive argument that the United States should be allowed to determine
14 whether and to what extent her PTSD and anxiety may be responsible for her ongoing emotional
15 distress. In addition, plaintiff disclosed two additional falls after the subject incident. Defendant
16 contends these subsequent falls may be contributing to plaintiff’s mental suffering. This is
17 especially true considering she claims ongoing anxiety and a pre-existing diagnosis of an anxiety
18 disorder.

19 The emotional distress damages claim in this case do not closely align with the
20 cases the parties cite to. Plaintiff’s damages as a whole consist of more than just emotion distress
21 damages. Plaintiff has alleged significant physical injuries as well as emotional distress, unlike
22 the plaintiff in Haight v. City of Anderson, 2:11-cv-1653-JAM-CMK (E.D. Cal). However, the
23 emotional distress asserted herein are more than the typical “garden variety” emotion distress.
24 Given plaintiff’s pre-existing conditions of PTSD and anxiety, there is at least the possibility that
25 her on-going emotional distress is due to her past diagnosis as well as her subsequent falls.
26 Without information as to her PTSD and anxiety disorder, it would be difficult for the defendant

1 to determine plaintiff's symptoms, or the severity thereof, are the result of the subject incident or
2 her pre-existing conditions. Defendant's argument that "it is not possible to measure the 'garden
3 variety' distress she claims to have suffered from her Whiskeytown fall without having a baseline
4 of plaintiff's mental condition before the incident from which to measure those damages" is
5 persuasive. As the burden is on the plaintiff to show that discovery should not be allowed, she
6 has not met her burden.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. Defendant's motion to compel (Doc. 12) is granted;
- 9 2. Plaintiff shall produce her mental health records in response to, or
10 otherwise comply with, defendant's requests for production of documents (numbers 1, 5, 6, 12)
11 within 30 days of the date of this order; and
- 12 3. Plaintiff shall respond to the interrogatories (numbers 1, 16, 18) to the best
13 of her ability within 30 days of the date of this order.

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15 DATED: January 8, 2018

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17 **CRAIG M. KELLISON**
18 UNITED STATES MAGISTRATE JUDGE
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