





1 to an interrogatory plaintiff stated that, unrelated to her fall,  
2 she has Lupus and arthritis, which affect her ability to ambulate.  
3 Id at 18. Additionally, other injuries or conditions that affected  
4 plaintiff's ability to ambulate at the time she attempted to switch  
5 planes are relevant to causation and may be relevant to Northwest's  
6 duty to provide a wheelchair or plaintiff's contributory  
7 negligence.

8           After sustaining these injuries, plaintiff visited a  
9 number of healthcare providers, including SFGH and SFCHN. Doc #14,  
10 Exh B at 14. These providers treated plaintiff for her injuries  
11 related to this action and for a variety of other medical issues.  
12 Doc #33 at 8-13.

13           In the course of discovery, Northwest issued subpoenas  
14 duces tecum to multiple healthcare institutions, including SFGH and  
15 SFCHN, seeking plaintiff's medical records. Doc #8-2, Exh A.  
16 While Northwest argues that the records from SFGH and SFCHN "do not  
17 date back any further than a year or so before the July 9, 2005  
18 accident," the subpoenas did not limit their subject by date and  
19 there are a few records from SFCHN that date back to 2000. Doc  
20 #33, Exh A at 12. According to plaintiff's documentation, the  
21 subpoenaed medical records include treatment for the injuries  
22 plaintiff sustained related to this lawsuit as well as unrelated  
23 medical issues pertaining to, for example, "internal medicine."  
24 Doc #33, Exh A at 8-13.

25           The subpoenaed medical records have been at the center of  
26 considerable dispute. Plaintiff moved on June 13, 2008 to narrow  
27 the scope of Northwest's medical record subpoenas. Doc #7. At the  
28 hearing on plaintiff's motion, the court ordered that the medical

1 records be produced to plaintiff's counsel and for plaintiff's  
2 counsel to produce to Northwest all medical records to which  
3 plaintiff's counsel did not object. Doc #19. On October 2, 2008,  
4 plaintiff submitted to Northwest a list of documents from the  
5 subpoenaed medical records that had "no conceivable relevance to  
6 the matters" plaintiff tendered in this lawsuit. Doc #27-2, Exh 1.  
7 At a case management conference held on October 9, the court  
8 directed plaintiff's counsel to "amplify" his objections to  
9 Northwest's document requests. Doc #24. Northwest submitted a  
10 letter contesting the adequacy of plaintiff's amplified privilege  
11 log on November 7, 2008. Doc #27. After reviewing plaintiff's  
12 privilege log, the court found that plaintiff had made an  
13 inadequate showing that the medical records were privileged and  
14 ordered plaintiff to show good cause for withholding production or  
15 objecting to production of the medical records in dispute. Doc  
16 #29. Plaintiff responded to the court's order on December 3, 2008.  
17 Doc #31. At the court's request, plaintiff submitted the disputed  
18 medical records for ex parte, in camera review and both parties  
19 submitted memoranda on how the court should proceed. Doc ## 33,  
20 34.

21  
22 II

23 The Federal Rules of Civil Procedure allow parties to  
24 "obtain discovery regarding any non-privileged matter that is  
25 relevant to any party's claim or defense \* \* \* ." FRCP 26(b)(1).  
26 The United States Supreme Court has defined relevance broadly  
27 within the context of discovery to include "any matter that bears  
28 on, or that reasonably could lead to other matter that could bear

1 on, any issue that is or may be in the case." Oppenheimer Fund,  
2 Inc v Sanders, 437 US 340, 351 (1978). Although the burden on  
3 parties requesting discovery is low, they must meet a threshold of  
4 relevance that is beyond speculation; "litigants seeking to compel  
5 discovery must describe with a reasonable degree of specificity the  
6 information they hope to obtain and its importance to their case."  
7 Aumann Auctions, Inc v Phillips, 2008 US Dist LEXIS 66540 (D Neb  
8 Aug 21, 2008), citing Cervantes v Time, Inc, 464 F2d 986, 994 (8th  
9 Cir 1972).

10 Under the Federal Rules of Evidence, when federal courts  
11 preside over civil claims based on state law, state law provides  
12 the rule of decision for issues of privilege. FRE 501. Rule 501  
13 is a rule of evidence, but applies to all stages of proceedings,  
14 including discovery proceedings. FRE 1101(c).

15 Because plaintiff filed this action in California, but  
16 the incident that gave rise to the suit occurred in Minnesota,  
17 there is a potential dispute about the state that supplies the law  
18 with respect to privilege. Federal courts sitting in diversity  
19 look to the law of the forum state, here California, in making a  
20 choice of law determination. Klaxon Co v Stentor Electric  
21 Manufacturing Co, 313 US 487, 496 (1941); Sparling v Hoffman  
22 Construction Co, 864 F2d 635, 641 (9th Cir 1988).

23 Under California's choice of law rules, California will  
24 apply its own rule of decision unless a party invokes the law of a  
25 foreign state that "will further the interest of the foreign state  
26 and therefore that it is an appropriate one for the forum to apply  
27 to the case before it." Hurtado v Superior Court, 11 Cal 3d 574,  
28 581 (1974). See also Paulsen v CNF Inc, 2009 United States App

1 LEXIS 5852 at \*46-47 (9th Cir 2009). Neither party has invoked a  
2 foreign law such as Minnesota law in the present case, so the court  
3 applies California law. The court notes, however, that California  
4 and Minnesota courts have similar rules with respect to the medical  
5 records privilege. See Minn Stat § 595.02, subd 1(d); Cal Evid  
6 Code §§ 990-994; Muller v Rogers, 534 N W 2d 724, 726 (Minn Ct App  
7 1995) (“[In Minnesota a] party who voluntarily places his or her own  
8 medical condition in controversy is deemed to have waived medical  
9 privilege.”); Palay v Superior Court, 18 Cal App 4th 919, 928  
10 (1993) (“[The California patient litigant exception] precludes one  
11 who has placed in issue his physical condition from invoking the  
12 privilege.”).

13 California law recognizes a medical records privilege  
14 that allows a patient to refuse to disclose, or prevent another  
15 from disclosing, confidential communications with a physician in  
16 the course of the patient-physician relationship. Cal Evid Code §§  
17 990-994.

18 There are two exceptions to the medical records privilege  
19 at issue here. First, the patient-litigant exception “precludes  
20 one who has placed in issue his physical condition from invoking  
21 the privilege.” Palay v Superior Court, 18 Cal App 4th 919, 928  
22 (1993); see Cal Evid Code § 996 (“[t]here is no privilege \* \* \* as  
23 to communication relevant to an issue concerning the condition of  
24 the patient if such issue has been tendered by \* \* \* [t]he  
25 patient”). The California Supreme Court has made clear that the  
26 patient litigant in a personal injury case does not waive her  
27 privilege with regard to her entire medical history; she only  
28 waives her privilege to “those medical conditions the patient-

1 litigant has disclose[d] \* \* \* by bringing an action in which they  
2 are in issue." Britt v Superior Court of San Diego, 20 Cal 3d 844,  
3 863-64 (1978) (alterations and emphasis in original).

4           The second relevant exception to the medical records  
5 privilege is waiver. If the holder of the medical records  
6 privilege, the plaintiff in this case, discloses or consents to the  
7 disclosure of "a significant part of the communication," the  
8 privilege with respect to that communication is waived. Cal Evid  
9 Code § 912.

10           While the scope of the patient-litigant exception and the  
11 waiver of a privileged communication are governed by California  
12 law, federal law sets the procedural requirements of asserting  
13 privilege as a bar to discovery. See DeNeui v Wellman, 2008 US  
14 Dist LEXIS 57340 (D SD July 16, 2008) (FRCP 26(b)(5)(A) outlines  
15 the procedural requirements placed on the parties asserting a  
16 privilege). A party asserting a privilege must "(i) expressly make  
17 the claim; and (ii) describe the nature of the documents,  
18 communications, or tangible things not produced or disclosed — and  
19 do so in a manner that, without revealing information itself  
20 privileged or protected, will enable other parties to assess the  
21 claim." FRCP 26(b)(5)(A).

22           After an ex parte, in camera review of the medical  
23 records in dispute, the court finds that plaintiff's disclosures to  
24 date and plaintiff's privilege log are both inadequate. The court  
25 first observes that the medical records at issue are very difficult  
26 to read and seem to require expertise in the medical field to  
27 understand fully. This is true in part because the records contain  
28 photocopies of the handwriting of doctors, which are at times

1 indiscernible, and in part because they contain medical terms and  
2 doctors' shorthand that are meaningless to the inconvertant. The  
3 court is therefore, at the outset, concerned that the lay reader  
4 may have great difficulty accurately redacting the irrelevant from  
5 the relevant.

6           The court's concern deepened following a comparison of  
7 the complete disputed medical records with plaintiff's privilege  
8 log. Plaintiff claims injuries to her right hip, wrist, back and  
9 knee. She also claims that her injuries have affected her ability  
10 to ambulate, but she also has suffered from Lupus and arthritis  
11 prior to the accident. In claiming these injuries, according to  
12 the patient-litigant exception, plaintiff has put at issue the  
13 health of her right hip, wrist, back and knee as well as her  
14 ability to ambulate both before and after the incident that gave  
15 rise to this action. Nevertheless, several of the documents  
16 plaintiff's counsel has claimed as privileged mention plaintiff's  
17 "back," "left foot injury," "Lupus," "neck pain," "ambulation" and  
18 "exercise tolerance."

19           Additionally, plaintiff, while objecting to the  
20 disclosure of medical records from SFGC and SFCHN, did not object  
21 to the disclosure of similar records by Nancy Carteron, MD in this  
22 lawsuit. Doc #35 at 2, ¶5; 35-2, Exh D at 41-43. The records  
23 disclosed by Dr Carteron contain many identical documents to those  
24 for which plaintiff claims a privilege with respect to SFGC and  
25 SFCHN's disclosure. See, e g, Doc #35-2, Exh H (comparing  
26 unredacted version of Dr Carteron's notes produced without  
27 objection by Dr Carteron to copy of identical notes heavily  
28 redacted by plaintiff's counsel when subpoenaed from SFCHN).

1 Moreover, a significant number of plaintiff's afflictions have  
2 already been discovered as part of Dr Carteron's disclosures. See,  
3 e g, Doc #35-2, Exh D at 42 (detailing numerous afflictions  
4 suffered by plaintiff). By not objecting to the disclosure of  
5 these afflictions when they were requested from Dr Carteron,  
6 plaintiff has waived her privilege to object to disclosure of these  
7 afflictions by SFGC and SFCHN. This waiver of privilege is not  
8 reflected in plaintiff's privilege log and numerous documents in  
9 the disputed medical records, for which privilege is claimed,  
10 relate to afflictions that have already been disclosed without  
11 objection. See Doc #35-2, Exh I at 56-60. The indecipherability  
12 of some of the records may account for this waiver, but the burden  
13 of establishing the privilege rests with plaintiff, nonetheless.  
14

15 III

16 The disclosure of medical records involves important  
17 privacy concerns, as recognized by California law. The court's  
18 review of the medical records in dispute reveals that at least some  
19 of the documents contained therein have not been tendered by  
20 plaintiff in this action and the privilege has not been waived.

21 Nevertheless, this is not a case, as in Britt v Superior  
22 Court of San Diego, 20 Cal 3d 844 (1978), in which the defendant  
23 has subpoenaed the entirety of plaintiff's medical history. The  
24 disputed medical records here are from two health care providers  
25 who treated plaintiff for the injuries she sustained as a result of  
26 the incident giving rise to this lawsuit. While some of the  
27 subpoenaed records date back as early as 2000, Northwest's counsel  
28 has indicated that they only seek records dating back to July 9,

1 2004, a year before the incident.

2           Plaintiff's counsel has now had an opportunity to perform  
3 the difficult task of filtering the discoverable from the non-  
4 discoverable, but has not done so adequately. Given the court's  
5 lack of expertise and training in medicine, there is no reason to  
6 believe the court would do much better.

7           Accordingly, plaintiff shall produce all of the disputed  
8 medical records to Northwest, with a few limitations. Issues  
9 relating to OB/GYN and dental records have not been tendered by  
10 plaintiff, are not discoverable and should be sorted or redacted  
11 from the other documents. Additionally, plaintiff's health earlier  
12 than one year prior to the incident at issue has not been tendered  
13 and documents dated earlier than July 9, 2004 should also be  
14 sorted.

15           The disputed medical records, with the above limitations,  
16 shall be produced within 15 days hereof, subject to a protective  
17 order. The court trusts that counsel will agree on the provisions  
18 of such an order; if not, they should submit their respective  
19 proposals to the court. In the meantime, plaintiff's medical  
20 records may be seen by attorneys only and any consultants employed  
21 by them who shall subscribe to the limitations of any protective  
22 order hereafter entered.

23  
24           IT IS SO ORDERED.

25  
26 

27 VAUGHN R WALKER  
28 United States District Chief Judge