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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DISTRICT OF NEVADA	
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LYDIA VASQUEZ-BRENES, *et al.*

Plaintiff,

vs.

2:12-cv-001635-JCM-VCF

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, *et al.*

Defendants.

**ORDER**

Before the court is Defendants Las Vegas Metropolitan Police Department and Officers Sean Miller's Motion to Compel (#27).<sup>1</sup> Plaintiffs Lydia Vasquez-Brenes and Richardo Brenes filed an Opposition (#29); and, Defendants filed a Reply (#31).

Also before the court is Defendant Las Vegas Metropolitan Police Department's Motion to Extend Time (#35). Plaintiffs filed an opposition (#37); and, Defendants replied (#39).

**BACKGROUND**

This matter involves Plaintiffs Lydia Vasquez-Brenes and Richardo Brenes' various tort and 42 U.S.C. § 1983 claims against the Las Vegas Metropolitan Police Department ("LVMPD") and Officers Sean Miller, Jeffrey Chamberlin, and Theodore Snodgrass regarding the fatal shooting of Anthony Brenes. (Compl. (#1) at 4-5).

On November 15, 2010, Anthony Brenes was walking with his wife, Lydia Vasquez-Brenes, near the intersection of Desert Inn Road and the Pecos-Mcleod Interconnect in Las Vegas, Nevada. (*Id.*

<sup>1</sup> Parenthetical citations refer to the court's docket entry number.

1 at 5:4). According to Plaintiffs, the events culminating in Anthony's death began when Anthony  
2 "walk[ed], at a slow pace, in the direction" of Officer Miller. (Pl.'s Opp'n (#29) at 2:25-26). According  
3 to Defendants, the events began when Anthony approached the Officers holding and swinging a stick  
4 like a weapon and yelling at the Officers "to go ahead and shoot" him. (Def.'s Mot. Compel (#27) at  
5 3:11-13). The parties are in agreement with what happened next: in an effort to subdue Anthony, the  
6 Officers deployed their Tasers twice, shot Anthony with bean-bag rounds, and then fatally shot Anthony  
7 with a firearm in the chest. (*See id.* at 3:14-18); (Compl. (#1) at 5:4-9). On September 11, 2012, Lydia  
8 (Anthony's wife) and Richardo (Anthony's father) filed suit. (*Id.*)

9 The parties are currently in the midst of discovery. Defendants have propounded interrogatories,  
10 requests for admissions, and requests for production of documents. Relying on the psychotherapist-  
11 patient privilege recognized by the U.S. Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 116 (1996),  
12 (*see* Pl.'s Opp'n (#29) at 4), Plaintiffs refuse to answer four interrogatories and one request for  
13 production of documents.<sup>2</sup> In response, Defendants move to compel, arguing that Plaintiffs' complaint  
14 impliedly waived the psychotherapist-patient privilege by putting Anthony, Lydia, and Richardo's  
15 psychological states "in issue." (Def.'s Mot. to Compel (#27) at 3:7-8; 10:23-24; 11:1-2).

16 Plaintiffs' complaint alleges four causes of action under section 1983 and various state law  
17 claims for false arrest, battery, and negligence. (Compl. (#1) at 6-21). Plaintiffs' third section 1983  
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19 \_\_\_\_\_  
20 <sup>2</sup> The substance of the interrogatories and request for production, though immaterial to the merits of Defendants'  
21 motion, are as follows: "Interrogatory No. 4: Set forth the name and address of each physician consulted by  
22 decedent concerning the condition of his health during the last five years, specifying as to each occasion the  
23 purpose of which the physician was consulted"; "Interrogatory No. 10: Describe in detail any other mental and  
24 physical ailments that may have resulted from or directly chargeable to the alleged incident"; "Interrogatory No.  
25 11: Identify all medical records which support the injuries you allege in your Complaint including in  
chronological order, the name and address of each doctor and or hospital or clinic which you attended regarding  
your alleged injuries and any doctor's bills, and/or pharmaceutical bills in which you incurred, if any";  
"Interrogatory No. 12: State the name, address and treatment procedure of any and all healthcare facilities with  
whom you have treated and/or consulted within the last five (5) years to the present"; "Request for Production No.  
9: Please produce a signed original of the attached medical release, attached hereto as Exhibit 1." (*See* Def.'s Mot.  
Compel. (#27) at 5-8).

1 claim, which is a substantive due process claim, seeks damages for, *inter alia*, Lydia and Ricardo's  
2 "extreme and severe mental anguish and pain." (*Id.* at 11:10). In the negligence claim, Plaintiffs allege  
3 that the LVMPD and Officers negligent acts include, *inter alia*, "the negligent tactics and handling of  
4 mentally ill individuals." (*Id.* at 20:26).

5 Between March 29, 2013, and July 3, 2013, the parties unsuccessfully met and conferred.  
6 (*See* Exhibit F (#27-1)). Consequently, on August 13, 2013, Defendants filed the instant motion to  
7 compel. (Def.'s Mot. Compel (#27)). On October 9, 2013, the court held a hearing on Defendants'  
8 motion. (Mins. Proceedings (#40)). During the hearing, Plaintiffs expressed their intent to amend  
9 portions of the operative complaint and their expert report. (*Id.*) According to Plaintiffs, these  
10 amendments would remove all allegations that predicate Defendants' negligence on their failure to  
11 appropriately handle mentally ill individuals. (*Id.*) On October 16, 2013, the parties filed a joint interim  
12 status report. (Joint Interim Status Report (#41) at 1). In pertinent part, the Status Report reiterated  
13 Plaintiffs intent to file an amended complaint and an amended expert report. (*Id.*)

#### 14 LEGAL STANDARD

15 Federal Rule of Civil Procedure 26(b)(1) articulates the appropriate scope of discovery and  
16 generally permits liberal discovery of relevant information. *See* FED. R. CIV. P. 26(b)(1); *Seattle Times*,  
17 *Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). Discovery requests are permissible under Rule 26(b)(1) "if the  
18 discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P.  
19 26(b)(1).  
20

21 Rule 26, however, does not permit discovery of privileged information. FED. R. CIV. P. 26(b)(1).  
22 In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the U.S. Supreme Court recognized the psychotherapist-patient  
23 privilege under Federal Rule of Evidence 501. The Court specifically held that "confidential  
24 communications between a licensed psychotherapist and her patients in the course of diagnosis or  
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1 treatment are protected from compelled disclosure.” *Jaffee*, 518 U.S. at 5. The Court also recognized  
2 that this privilege, like the attorney-client privilege, may be waived. *Jaffee*, 518 U.S. at 15, n. 14.

3 If, as here, a party believes the privilege was waived, Federal Rule of Civil Procedure 37 permits  
4 that party to compel disclosure of the discoverable information. *See* FED. R. CIV. P. 37(a)(3)(A). The  
5 party asserting the privilege and resisting discovery bears the burden of establishing both the existence  
6 of the privilege and the absence of waiver. *See Fisher v. United States*, 425 U.S. 391 (1976).

7 Neither the U.S. Supreme Court nor the Ninth Circuit have delineated when exactly a party  
8 waives the psychotherapist-patient privilege by claiming emotional distress damages or putting their  
9 psychological state “in issue.” *See, e.g., E.E.O.C. v. Wal-Mart Stores, Inc.*, 276 F.R.D. 637, 640 (E.D.  
10 Wash. 2011) (discussing this problem). However, this court’s review of federal case law<sup>3</sup> has revealed  
11 four instructive tests for determining when the psychotherapist-patient privilege is waived. First, the so-  
12 called “narrow” approach finds the privilege waived only when a patient places the substance of  
13 psychotherapeutic advice, or communications with a psychotherapists, directly at issue. *See Vanderbilt*  
14 *v. Town of Chilmark*, 174 F.R.D. 225, 229 (D. Mass. 1997); *Koch v. Cox*, 489 F.3d 384, 390 (D.C. Cir.  
15 2007); *Fitzgerald v. Cassil*, 216 F.R.D. 632, 638 (N.D. Cal. 2003).

16  
17 Second, the so-called “broad” approach finds the privilege waived at any point that the plaintiff  
18 makes any claim for emotional distress. *See Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130  
19 (E.D. Pa. 1997); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 567 (S.D.Cal.1999).

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22 <sup>3</sup> Federal Rule of Evidence 501 governs privileges. The rule does not specify which law of privilege should apply  
23 when, as here, the privilege is asserted to both federal question and supplemental state tort claims. *See* FED. R.  
24 EVID. 501. The federal courts have, however, consistently held that the federal law of privilege applies to all  
25 claims in a federal question case. *See Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992); *Vanderbilt v. Town*  
*of Chilmark*, 174 F.R.D. 225, 226–27 (D. Mass. 1997) (citing cases from the 2nd, 3rd, 6th, 7th, and 11th circuits  
so holding); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 618 (S.D.Cal.1999) (citing and agreeing with  
*Vanderbilt* ).

1 Third, the so-called “middle ground” approach holds that where a plaintiff merely alleges  
2 “garden variety” emotion distress—and does not allege a separate tort for the distress, any specific  
3 psychiatric injury, or unusually severe distress—the plaintiff has not placed her or his mental condition  
4 at issue to justify a waiver of the privilege. *See, e.g., Koch*, 489 F.3d at 390; *Flowers v. Owens*, 274  
5 F.R.D. 218, 223–226 (N.D.Ill.2011) (giving a detailed account of waiver of the psychotherapist-patient  
6 privilege, and describing the contours of the doctrine that make the nature of the damages sought  
7 relevant to the issue of waiver). If, however, the party alleging emotional distress plans to introduce  
8 evidence of psychological treatment in support of their damages claim at trial, then the weight of  
9 authority holds that the privilege is waived *See, e.g., Noe v. R.R. Donnelley & Sons*, No. 10 C 2018,  
10 2011 WL 1376968, \*1 (N.D.Ill. April 12, 2011) (collecting cases).

11 Finally, a minority of courts, *see, e.g., Gaines–Hanna v. Farmington Public Schools*, No. 04-cv-  
12 74910, 2006 WL 932074, \*8 (E.D. Mich. April 7, 2006), have analogized the inquiry of whether the  
13 psychotherapist-patient privilege is waived to the inquiry under Federal Rule of Civil Procedure 35(a),  
14 which requires a party to submit to a mental examination if their mental or physical condition is “in  
15 controversy.” *See* FED. R. CIV. P. 35(a). In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), the U.S.  
16 Supreme Court concluded that Rule 35 “requires discriminating application by the trial judge . . .  
17 whether the party requesting [an examination] has adequately demonstrated the existence of the Rule’s  
18 requirements of ‘in controversy.’” *Id.* at 118–19. The Court added that Rule 35’s requirements “are not  
19 met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an  
20 affirmative showing by the movant that each condition as to which the examination is sought is really  
21 and genuinely in controversy.” *Id.* at 118.

## DISCUSSION

1  
2 Defendants' assert the following four arguments in support of their motion to compel. First,  
3 Defendants contend that Anthony, Lydia, and Richardo's medical and psychotherapeutic records are  
4 relevant and, therefore, discoverable. (*See* Def.'s Mot. to Compel. (#27) at 9–10); (Def.'s Reply (#31) at  
5 3–4). Second, Defendants assert that Anthony's medical and psychotherapeutic records should be  
6 produced because Plaintiffs' negligence claim is predicated on Defendants' "failure to appreciate  
7 [Anthony's] altered mental state due to mental illness." (*See id.* at 3); (Def.'s Reply (#31) at 4). Third,  
8 Defendants assert that Lydia and Richardo's medical and psychotherapeutic records should be produced  
9 because Plaintiffs seek damages for "intense physical and emotional pain, anguish, distress and despair,  
10 and death, including the loss of enjoyment of . . . life." (*See* Def.'s Mot. Compel (#27) at 3:7–8, 10:23–  
11 24, 11:1–2). Fourth, Defendants argue Anthony's medical and psychotherapeutic records should be  
12 produced because "there are facts suggesting [Anthony] engaged in conduct designed to take his own  
13 life by suicide by cop." (*Id.* at 11:3–4). The court addresses each argument below.

### 15 *A. Defendants' Relevancy Arguments are Unpersuasive*

16 Defendants' first argument contends that Anthony, Lydia, and Richardo's medical and  
17 psychotherapeutic records are discoverable because they are relevant. (*See id.* at 9–10); (Def.'s Reply  
18 (#31) at 3–4). With regard to the psychotherapeutic records, Defendants' relevancy argument is correct  
19 but insufficient. Federal Rule of Civil Procedure 26 makes relevancy a necessary condition to compel  
20 the disclosure of medical records. *See* FED. R. CIV. P. 26(b)(1). But where, as here, a privilege is asserted,  
21 relevancy alone is insufficient. *See id.* (defining the scope of discoverable information as relevant and  
22 nonprivileged information). Accordingly, because psychotherapeutic records are privileged under *Jaffee*,  
23 518 U.S. at 1, Defendants' relevancy arguments alone are not enough to justify an order compelling  
24 disclosure of privileged information.  
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1 By contrast, there is no physician-patient privilege under federal law that would protect the  
2 disclosure of records regarding Plaintiffs' physical condition. *Walen v. Roe*, 429 U.S. 589, 602 n. 28  
3 (1977). Accordingly, the court's inquiry regarding the discoverability of Plaintiffs' general medical  
4 records is governed by Rule 26's relevancy standard. Relevancy is broadly construed. *City of Rialto*  
5 *v. U.S. Dept. of Defense*, 492 F. Supp. 2d 1193, 1202 (C.D. Cal. 2007) (defining discoverable  
6 information as information that has any possibility that the information sought may be relevant to the  
7 claim or defense of any party"). Nonetheless, the court is not persuaded by Defendants' argument that  
8 Plaintiffs' general medical records are relevant. Neither Lydia nor Richardo allege to have been  
9 physically touched, hurt, or affected. (*See generally* Compl. (#1) at 1-22). Similarly, neither Lydia nor  
10 Richardo made any claim for compensatory damages relating to their physical condition. (*Id.*) Plaintiffs  
11 have also not argued that Anthony's medical records are relevant or needed. The court concludes,  
12 therefore, that Plaintiffs' general medical records are irrelevant to the parties' claims and defenses.

13  
14 **B. *Plaintiffs Waived Anthony's Psychotherapist-Patient Privilege***

15 Defendants next argue that Anthony's psychotherapeutic records should be produced because  
16 Plaintiffs' negligence claim is predicated on Defendants' "failure to appreciate [Anthony's] altered  
17 mental state due to mental illness." (Def.'s Mot. to Compel (#27) at 3); (Def.'s Reply (#31) at 4);  
18 (*see also* Compl. (#1) at 20:26) ("the negligent tactics and handling of mentally ill individuals"). The  
19 court agrees.

20 As discussed above, four tests govern waiver of the psychotherapist-patient privilege. Only under  
21 the second test, the so-called "broad" approach, could the court conclude that Plaintiffs did not waive  
22 Anthony's privilege. Under the "broad" approach, waiver occurs whenever a plaintiff makes a claim for  
23 emotional distress. *See City of Chula Vista*, 196 F.R.D. at 567. Here, the complaint does not assert a  
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1 claim for Anthony's emotional distress because he died in the underlying altercation. (*See generally*  
2 Compl. (#1) at 6-22).

3 The court, however, finds that the inquiry into whether Plaintiffs waived Anthony's privilege is  
4 best answered by the three other tests. Under the "broad" approach, which the court rejects, a plaintiff  
5 would be subjected to waiver whenever the text of a plaintiff's complaint states a *prima facie* claim for  
6 emotional distress. *See City of Chula Vista*, 196 F.R.D. at 567. The court is not persuaded that  
7 adjudicating every emotional distress claim requires prying into private matters. As articulated by  
8 Justice Stevens, the purpose of the psychotherapist-patient privilege is to protect the "atmosphere of  
9 confidence and trust in which the patient is willing to make a frank and complete disclosure of facts,  
10 emotions, memories, and fears." *Jaffee*, 518 U.S. at 11. If the parties' dispute does not require the  
11 court's inquiry to intrude into that zone of confidence and trust, then the court should not consider the  
12 privilege waived merely because the text of the complaint alleges a claim for emotional distress. The  
13 court, therefore, finds that the psychotherapist-patient privilege is waived only when it becomes clear  
14 that the plaintiff's action brings communications that were divulged within the "atmosphere of  
15 confidence and trust" into the courtroom. The so-called "narrow" approach, "middle ground" approach,  
16 and inquiry under Rule 35(a) meet this requirement.

18 Applying these tests, the court finds that Plaintiffs' waived Anthony's privilege because they  
19 predicated a negligence claim on Defendants "negligent tactics [for] handling . . . mentally ill  
20 individuals." (*See* Compl. (#1) at 20:26). Plaintiffs make two arguments in opposition. First, Plaintiffs  
21 assert that their negligence claim does not waive Anthony's privilege because Plaintiffs will stipulate to  
22 not: (1) testify that Plaintiffs sought or obtained psychological treatment for emotional distress suffered  
23 as a result of Defendants' conduct; (2) rely on the testimony of a treating psychotherapist or any other  
24 expert to establish the emotional distress suffered by Plaintiffs; (3) allege that the conduct by Defendants  
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1 caused any specific disabilities or mental or medical abnormalities; or (4) claim that Plaintiffs had any  
2 pre-existing conditions that were exacerbated by Defendants' conduct. (*See* Pl.'s Opp'n (#29) at 6-7).

3 The court, however, is not persuaded that the stipulation prevents Plaintiffs from waving  
4 Anthony's privilege. Plaintiffs cannot claim that Defendants should have known how to handle  
5 Anthony's mental illness without first introducing privileged information demonstrating that Anthony  
6 was, in fact, mentally ill and that his condition would have affected the conduct of a reasonable officer.  
7 Plaintiffs' claim, therefore, brings communications that Anthony made within the "atmosphere of  
8 confidence and trust" into the courtroom. *See Vanderbilt*, 174 F.R.D. at 229 (discussing the "narrow"  
9 approach and holding that waiver occurs when the "substance of psychotherapeutic advice" is at issue);  
10 *Koch*, 489 F.3d at 390 (discussing the "middle ground" approach and stated that waiver occurs when  
11 evidence of psychological treatment is introduced).

12 Additionally, the court is not persuaded that Plaintiffs' proposed stipulation would fairly or  
13 adequately resolve the discovery dispute because the stipulation permits Plaintiffs to use Anthony's  
14 privilege as both a sword, which alleges that Defendants should have known better in light of the  
15 illness, and a shield, which prohibits Defendants from accessing information regarding Anthony's  
16 psychological condition. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing  
17 *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (stating that privileges cannot be used as  
18 both a sword and a shield)).

19 Plaintiffs' second argument against waiver arose during the court's October 9, 2013, hearing.  
20 (Mins. Proceedings (#40)). Plaintiffs stated that they intend to amend their complaint and remove all  
21 allegations relating to the Defendants' negligence in handling mentally-ill individuals. (*Id.*); (*see also*  
22 Joint Interim Status Report (#41) at 1) (reiterating Plaintiffs intent to amend). According to Plaintiffs,  
23 discovery has revealed that this action is in essence an excessive force action under the Fourth  
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1 Amendment. (Mins. Proceedings (#40)). The only issue, therefore, is the objective “reasonableness” of  
2 the force deployed by Officer Miller when faced with an individual carrying a cane. *See Graham*  
3 *v. Connor*, 490 U.S. 386, 396 (1989) (discussing the objective standard of reasonableness under the  
4 Fourth Amendment). This inquiry, Plaintiffs argue, does not bring Anthony’s condition into the  
5 courtroom.

6 The court agrees with Plaintiffs’ argument, but only theoretically. The issue that Plaintiffs raise  
7 is nonjusticiable because the amended complaint has not been filed and is not ripe for review. *See Abbott*  
8 *Lab. v. Gardner*, 387 U.S. 136, 148–149 (1967); *accord, Ohio Forestry Assn., Inc. v. Sierra Club*, 523  
9 U.S. 726, 732–733 (1998) (“Ripeness is a justiciability doctrine designed ‘to prevent the courts, through  
10 avoidance of premature adjudication, from entangling themselves in abstract disagreements’”). The  
11 court, therefore, rejects Plaintiffs’ second argument against waiver because it is not properly before the  
12 court.

13 Accordingly, the court reserves judgment on the question of whether Plaintiffs waived  
14 Anthony’s psychotherapist-patient privilege. As discussed below, Plaintiffs have thirty days to amend  
15 their complaint. If Plaintiffs do not amend within thirty days or if the amended complaint still predicates  
16 Defendants’ negligence on Anthony’s mental illness, Defendants may renew their motion to compel at  
17 that time.

18  
19 **C. Plaintiffs Did Not Waive Lydia or Richardo’s Psychotherapist-Patient Privilege**

20 Defendants’ third argument asserts that Lydia and Richardo’s medical and psychotherapeutic  
21 records should be produced because Plaintiffs seek damages for “intense physical and emotional pain,  
22 anguish, distress and despair, and death, including the loss of enjoyment of . . . life.” (*See Def.’s Mot.*  
23 *Compel* (#27) at 3:7–8, 10:23–24, 11:1–2); (*Compl.* (#1) at 18:22–26). In response, Plaintiffs argue that  
24 Lydia and Richardo are merely seeking “garden variety” emotional distress damages and that neither  
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1 Lydia nor Richardo allege to have required psychological treatment as a result of Defendants' conduct.  
2 (Pl.'s Opp'n (#29) at 4-9); (*see also* Mins. Proceedings (#40)).

3 As discussed above, under the "broad" approach, waiver occurs whenever a plaintiff makes a  
4 "claim" for emotional distress. *See City of Chula Vista*, 196 F.R.D. at 567. Here, although Lydia and  
5 Richardo have not stated a cause of action of emotional distress, both seek damages "intense physical  
6 and emotional pain, anguish, distress and despair, and death, including the loss of enjoyment of . . . life."  
7 (Compl. (#1) at 18:22-26). Under this test, Lydia and Richardo arguably waived their psychotherapist-  
8 patient privilege. *See BLACK'S LAW DICTIONARY* (9th ed. 2009) (defining claim as "the aggregate of  
9 operative facts giving rise to a right enforceable by a court").

10 Nonetheless, the court is not persuaded that every emotional distress claim warrants prying into  
11 privileged matters. The contours of the court's inquiry, and not the text of the plaintiff's complaint,  
12 determine whether the privilege is waived. *See, e.g., Vanderbilt*, 174 F.R.D. at 229; *Koch*, 489 F.3d at  
13 390. Using the so-called "narrow" approach, "middle ground" approach, and inquiry under Rule 35(a) as  
14 guideposts, the psychotherapist-patient privilege is waived only when it is clear that the plaintiff's action  
15 brings communications that were divulged within the "atmosphere of confidence and trust" into the  
16 courtroom.

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18 The court finds that Lydia and Richardo have not brought such communications into the  
19 courtroom. Although the text of Plaintiffs' complaint states that Lydia and Richardo seek damages for  
20 "extreme and severe mental anguish and pain," the court finds that these damages are "garden variety"  
21 emotional distress damages. *See id.* (stating that a plaintiff does not waive the privilege if s/he does not  
22 allege a separate tort for the distress, any specific psychiatric injury, or unusually severe distress).  
23 Extreme and severe mental anguish is, after all, foreseeable and typical for family members who have  
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1 lost a husband or son. (Compl. (#1) at 11:10). Neither the court nor Defendants need to examine Lydia  
2 or Richardo's private records to determine whether they are suffering from such distress.

3 ***D. Defendants' Affirmative Defense Cannot, as a Matter of Law, Waive Plaintiffs'***  
4 ***Privilege***

5 Defendants' final argument contends that Anthony's medical and psychotherapeutic records are  
6 discoverable because "there are facts suggesting [Anthony] engaged in conduct designed to take his own  
7 life by suicide by cop." (Def.'s Mot. Compel (#27) at 11:3-4). Because the court found that Plaintiffs'  
8 waived Anthony's psychotherapist-patient privilege by predicating a negligence claim on Defendants'  
9 "negligent tactics and handling of mentally ill individuals," (see Compl. (#1) at 20:26), this argument is  
10 moot.

11 The court notes, however, that this argument is also meritless. It is well settled that only the  
12 privilege-holder can waive the privilege. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Fisher*  
13 *v. United States*, 425 U.S. 391 (1976). If the court accepted Defendants' argument, privileges would be  
14 worthless and parties could discover confidential information by merely pleading a cause of action or  
15 affirmative defense that is relevant to the privileged information.

16 ACCORDINGLY, and for good cause shown,

17 IT IS ORDERED that Defendants Las Vegas Metropolitan Police Department and Officers Sean  
18 Miller's Motion to Compel (#27) is DENIED in part and DENIED AS UNRIPE in part. Defendants'  
19 motion to compel Plaintiffs' medical records is DENIED. Defendants' motion to compel Anthony  
20 Brenes' psychological records is DENIED AS UNRIPE. Defendants' motion to compel Lydia Brenes  
21 and Richardo Brenes psychological records is DENIED.  
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1 IT IS FURTHER ORDERED that Defendant's Motion to Extend the Discovery Cutoff Date by  
2 90 Days (#35) is GRANTED. The discovery cutoff date is extended from October 1, 2013, until January  
3 15, 2014.

4 IT IS FURTHER ORDERED that Plaintiffs have until November 18, 2013, to seek leave to file  
5 an amended complaint.

6 IT IS SO ORDERED.

7 DATED this 17th day of October, 2013.  
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12 CAM FERENBACH  
13 UNITED STATES MAGISTRATE JUDGE  
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