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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUSSEL H. DAWSON, Personal
Representative of the Estate of Damaris
Rodriguez, et al.,

Plaintiffs,

v.

SOUTH CORRECTIONAL ENTITY
("SCORE"), a Governmental Administrative
Agency, et al.,

Defendants.

CASE NO. C19-1987RSM

ORDER GRANTING MOTION FOR
PROTECTIVE ORDER AND
DENYING CROSS-MOTION TO
COMPEL

This matter comes before the Court on Plaintiffs' Motion for Protective Order as to certain medical records, and Defendants' Cross-motion to Compel the same records. Dkts. #91 and #94. The Court has determined that the parties have satisfied LCR 37's meet and confer requirement and that oral argument is unnecessary.

Plaintiffs in this case are Russel Dawson, personal representative of the estate of Damaris Rodriguez, Ms. Rodriguez's husband Reynaldo Gil, and their children. Dkt. #49. Defendants are South Correctional Entity Jail ("SCORE"), NaphCare, Inc., and roughly two dozen individuals associated with the jail and/or NaphCare. *Id.*

1 On December 30, 2017, Ms. Rodriguez had a mental health emergency while at her
2 home in SeaTac. *Id.* Her husband, Reynaldo Gil, called 911 and requested medical assistance.
3 The police arrived and, due to a confrontation of some kind, arrested Ms. Rodriguez.

4 Ms. Rodriguez was taken directly to SCORE. SCORE's medical personnel were
5 provided by NaphCare, a for-profit, in-custody, medical contractor.

6 The Amended Complaint alleges that Ms. Rodriguez was severely mistreated at the
7 hospital and denied adequate medical care. The details of this treatment, while central to
8 Plaintiffs' claims, are not central to the instant Motion. Ms. Rodriguez allegedly developed
9 ketoacidosis and died in custody four days later. *Id.* The Amended Complaint seeks damages
10 for wrongful death beneficiaries for "mental and physical emotional distress, anguish, anxiety
11 and loss of Damaris Rodriguez's love, care, comfort, society, and companionship and for
12 services and support..." Dkt. #49 at ¶ 287.

13 On March 5, 2020, Defendant NaphCare made the following discovery requests:

14 INTERROGATORY NO. 2: For each minor plaintiff, please state
15 the following: ...(g) The name and address of each provider,
16 including pediatricians, mental health specialists and counselors,
seen in the five years preceding the death of Damaris Rodriguez
and in the years since.

17 REQUEST NO 23: Please produce a copy of all medical and
18 counseling records for each of Damaris Rodriguez's children for
the five years prior to her death and for each year since her death.

19 Dkt. #95 at 6-7. On April 6, 2020, Plaintiffs objected to Interrogatory 2(g) as follows:

20 Objection. Plaintiff objects to subsection "g" because the medical
21 records of decedents children are not reasonably related to any
22 claim or defense. Plaintiff further objects to subsection "g" based
on the physician-patient privilege and the mental health
counselor/clinical social worker/family therapist privilege...

23 *Id.* at 12. Plaintiffs responded to Request No. 23 as follows:
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1 Plaintiff objects to RFP No. 23 because the medical records of the
2 decedent's children are not reasonably related to any claim or
3 defense. Plaintiff further objects to RFP No. 23 based on the
physician-patient privilege and the mental health counselor/clinical
social worker/family therapist privilege.

4 *Id.* at 17. The parties have brought the instant Motions for the Court to determine whether
5 Defendants get these records.

6 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
7 party's claim or defense and proportional to the needs of the case, considering the importance of
8 the issues at stake in the action, the amount in controversy, the parties' relative access to
9 relevant information, the parties' resources, the importance of the discovery in resolving the
10 issues, and whether the burden or expense of the proposed discovery outweighs its likely
11 benefit." Fed. R. Civ. P. 26(b)(1). Information within this scope of discovery need not be
12 admissible in evidence to be discoverable. *Id.* "District courts have broad discretion in
13 determining relevancy for discovery purposes." *Survivor Media, Inc. v. Survivor Prods.*, 406
14 F.3d 625, 635 (9th Cir. 2005) (citing *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)). If
15 requested discovery is not answered, the requesting party may move for an order compelling
16 such discovery. Fed. R. Civ. P. 37(a)(1). The party that resists discovery has the burden to
17 show why the discovery request should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418,
18 429 (9th Cir. 1975).

19 "A party or any person from whom discovery is sought may move for a protective order
20 in the court where the action is pending..." Fed. R. Civ. P. 26(c)(1). "The court may, for good
21 cause, issue an order to protect a party or person from annoyance, embarrassment, oppression,
22 or undue burden or expense..." *Id.* "The decision to issue a protective order rests within the
23 sound discretion of the trial court." *Seiter v. Yokohama Tire Corp.*, 2009 WL 2461000, *1
24 (W.D. Wash. 2009).

1 Because NaphCare has requested *all* of the children’s medical records for the last five
2 years and going forward, there are two types of records at issue: “pure” medical records, and
3 psychological/psychiatric records. Any medical records involving physical conditions tied to
4 emotional distress or mental health are considered psychological or psychiatric records for the
5 purposes of this motion. *See Equal Employment Opportunity Comm’n v. Big Five Corp.*, No.
6 C17-1098RSM, 2018 WL 2317613, at *3 (W.D. Wash. May 22, 2018). All the remaining
7 records are considered “pure” medical records. *Id.* With respect to “pure” medical records,
8 Plaintiffs have not requested any damages for bodily injury. *See* Dkt. #1 at 50. For that reason,
9 “pure” medical records are irrelevant and not subject to discovery. This leaves the remaining
10 issue of the children’s psychological/psychiatric records.

11 NaphCare contends that the children’s mental condition will be an issue at trial because
12 Plaintiffs have disclosed anticipated trial testimony with “severe” emotional distress extending
13 “far beyond ‘garden variety damages.’” Dkt. #94 at 2. NaphCare points to four exhibits of
14 “anticipated testimony” from the children’s teachers—lay witnesses—with observations like
15 “[s]he separated herself from the rest of the class and became extremely shy,” “[h]e is easily
16 distracted and appears to be medicating himself with video/computer games,” and across-the-
17 board declines in academic performance after the death of the children’s mother. *See id.* at 6–7
18 (citing Dkt. #95). NaphCare argues that Plaintiffs have thus waived any applicable privilege.
19 *Id.* at 2.

20 Plaintiffs say they are pursuing mere “garden variety” emotional distress, which does
21 not waive the physician-patient privilege under applicable federal law. Dkt #91 at 6. They seek
22 non-medical emotional harm damages related to stress, loss of enjoyment of life, humiliation,
23 fear, anxiety, and anguish/grief as a result of the death of their mother. *Id.* Plaintiffs state the
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1 children will “not seek to use their medical records at trial, and will not seek their medical
2 expenses as damages.” *Id.*

3 Privileged communications are not subject to discovery. Fed. R. Civ. P. 26(b)(1).
4 Confidential communications made to a licensed psychiatrist, psychologist, or social worker
5 during the course of treatment are afforded privilege protection under Fed. R. Evid. 501. *Jaffee*
6 *v. Redmond*, 518 U.S. 1, 15 (1996). For purposes of this motion, the children’s medical and
7 counseling records regarding their emotional state are considered mental health records
8 protected by the physician-patient privilege. *See Equal Employment Opportunity Comm’n.*, No.
9 C17-1098RSM, 2018 WL 2317613, at *3 (W.D. Wash. May 22, 2018) (considering medical
10 records involving physical conditions tied to emotional distress/mental health as
11 psychological/psychiatric records); *see also Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154,
12 1158 (9th Cir. 2001) (extending the psychotherapist-patient privilege to communications with
13 unlicensed counselors).

14 When a plaintiff seeks certain emotional distress damages, the psychotherapist-patient
15 privilege may be waived. *See Santelli v. Electro-Motive*, 188 F.R.D. 306, 308 (N.D.Ill.1999).
16 This is because “[f]or each item of damages, whether economic or non-economic, the plaintiff
17 must show that the damage was proximately caused by the defendant’s unlawful conduct.” *Doe*
18 *v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D.Cal.1999). If there is evidence to show that a
19 plaintiff’s emotional distress may have been caused by something besides the injury, fairness
20 dictates that the defendant should be permitted access to that evidence. *See id.*

21 Without Ninth Circuit consensus on waiver of psychotherapist-patient privilege, district
22 courts have adopted different approaches on how to determine whether the patient has waived
23 the privilege. *Carrig v. Kellogg USA Inc.*, Case No. 12–837–RSM, 2013 WL 392715, at * 2
24 (W.D. Wash. Jan. 30, 2013) (collecting cases and describing alternative approaches). This

1 Court has previously applied a “middle ground” approach to waiver, finding that a plaintiff
2 waives the privilege by asserting more than “garden-variety” emotional distress. *See id.* at * 3.
3 *See also Ginter v. BNSF Ry. Co.*, No. C13-00224-RSM, 2014 WL 294499, at *3 (W.D. Wash.
4 Jan. 24, 2014).

5 Courts adopting the middle ground approach to waiver define “garden variety”
6 emotional distress as “ordinary or commonplace,” meaning that which is “simple or usual.”
7 *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (citing *Ruhmann v. Ulster County*
8 *Dep't of Soc. Servs.*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000)). A plaintiff waives the privilege
9 by alleging more complex distress, including “any specific psychiatric injury or disorder, or
10 unusually severe distress.” *Jackson v. Chubb Corp.*, 193 F.R.D. 216 (D.N.J. 2000). The
11 *Jackson* court grounded its logic in Federal Rule of Civil Procedure 35(a), which allows court
12 orders for physical or mental examinations when a party’s physical or mental condition is “in
13 controversy.” Fed. R. Civ. P. 35(a).

14 The Court finds that the minor children are only alleging “garden variety” emotional
15 distress. They seek non-medical emotional harm damages related to stress, loss of enjoyment of
16 life, humiliation, embarrassment, fear, anxiety, and anguish/grief as a result of Defendant’s
17 conduct. These terms are not medical diagnoses, but merely lay observations of harm that
18 Plaintiffs claim the children experienced as a result of Defendants’ alleged actions. *See Rollins*
19 *v. Traylor Bros.*, No. C14-1414-JCC, 2017 WL 1756576, at *6 (W.D. Wash. May 5, 2017).
20 Although NaphCare presents proposed testimony that the children have struggled in school or
21 seem depressed, these observations were by lay witnesses and do not strike the Court as
22 unusually “severe” given the loss of their mother or otherwise outside the scope of garden
23 variety emotional distress. Plaintiffs have stated they will not seek to use medical testimony or
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1 records at trial and will not seek medical expenses as damages. Given all of the above, the
2 Court will grant the protective order and deny the motion to compel.

3 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
4 finds and ORDERS that Plaintiffs' Motion for Protective Order, Dkt. #91, is GRANTED and
5 Defendants' Cross-motion to Compel, Dkt. #94, is DENIED. Defendants are prohibited from
6 obtaining the medical records of Jose Marte, A.R, I.R, S.R. and D.R. by discovery request to
7 plaintiffs or through subpoena.

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9 DATED this 20th day of May, 2021.

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13 RICARDO S. MARTINEZ
14 CHIEF UNITED STATES DISTRICT JUDGE
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