

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT OF THE
TRIAL DEPARTMENT
CIVIL ACTION NO. 02-01159A

MARCIA RHODES, HAROLD RHODES,
INDIVIDUALLY, HAROLD RHODES,
ON BEHALF OF HIS MINOR CHILD
AND NEXT FRIEND, REBECCA
RHODES,

Plaintiffs

-v-

CARLO ZALEWSKI, DRIVER
LOGISTICS, PENSKE TRUCK LEASING
CORP., AND BUILDING MATERIALS
CORP. OF AMERICA, D/B/A GAF
MATERIALS CORP.

Defendants.

-v-

JERRY McMILLAN'S
PROFESSIONAL TREE SERVICES, INC.
AND TOWN OF MEDWAY

**JOINT EMERGENCY MOTION OF BUILDING MATERIALS CORPORATION OF
AMERICA d/b/a GAF MATERIALS CORPORATION, CARLO ZALEWSKI, AND
DRIVER LOGISTICS SERVICES, INC. FOR *IN CAMERA* REVIEW OF PLAINTIFF
MARCIA RHODES' MENTAL AND EMOTIONAL HEALTH RECORDS AND TO
COMPEL DEPOSITION TESTIMONY RELATING TO PLAINTIFF MARCIA
RHODES' MENTAL AND EMOTIONAL HEALTH**

Defendants Building Materials Corporation of America d/b/a GAP Materials Corporation ("BMCA"), Carlo Zalewski ("Mr. Zalewski"), and Driver Logistic Services, Inc. ("DLS") (collectively "the Defendants") jointly submit this Emergency Motion for an *in camera* review of Plaintiff Marcia Rhodes' ("Ms. Rhodes") mental and emotional health records, and request a hearing prior to August 25, 2004 (the second day of Ms. Rhodes' deposition). Defendants also jointly move to compel deposition testimony relating to Ms. Rhodes' mental and emotional health, and request a hearing prior to August 25, 2004. This Motion is necessary because of new facts obtained during the first day of Ms. Rhodes' deposition. The motion is submitted on an emergency basis because the parties failed to resolve the case in Mediation on August 11th, and trial is scheduled for September 7, 2004.

Introduction

The issue of Ms. Rhodes' mental and emotional health records was the subject of BMCA's June 2004, Motion to Compel. While denying the motion, this Court (Judge Chernoff) ordered that the "defendants be allowed to discover a post-accident summary of mental health conditions

which alludes to her mental state prior to the accident if such exists." More importantly, Judge Chernoff stated that "the Court may well require an in camera inspection of plaintiff's medical records." See Tab A. In response to this Order, Ms. Rhodes produced a barely legible one page handwritten document which did not summarize Ms. Rhodes' mental condition. See Tab B. In addition, Ms. Rhodes redacted a portion of the one-page document without explanation. The redacted portion may well contain the information the Court ordered Ms. Rhodes to produce.

Subsequently, on August 4, 2004 (after the entry of the Order), Ms. Rhodes was deposed. During this deposition, she admitted several facts concerning her mental and emotional health which put the nature and extent of her emotional condition pre- and post-accident at issue. Based on these admissions, the Defendants move that this Court inspect Ms. Rhodes' mental health records, *in camera*, to determine whether the mental health records are relevant to the causation or damages phases of the case and should be produced. Defendants also respectfully request a ruling on their motion to compel deposition testimony prior to August 25, 2004.

Argument

The court in Vanderbilt stated that a privilege "cannot and should not at once be used as a shield and a sword." Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D. Mass. 1997). Ms. Rhodes cannot both shield the records and seek damages for injuries detailed in the mental and emotional health records. In her Opposition to BMCA's June 2004, Motion to Compel, Ms. Rhodes argued that "only if the patient makes a claim for 'psychiatric disorder or psychic injury' that necessitates psychiatric treatment will a court find that the patient waived the psychotherapist-patient privilege and order production of records relating to mental health." See Tab C, p. 4. In support, Ms. Rhodes argued that "this is not a case where the plaintiff's claim for damages arises from severe psychological or psychic injuries caused by the defendants." See Tab C, p. 5. After Ms. Rhodes' deposition, however, it is abundantly clear that this statement is simply not true.

Implicit in Ms. Rhodes' Opposition is the position that her mental health records should be produced if she sought psychiatric treatment for psychological injuries that were allegedly caused by the Defendants as a result of the January 9, 2002, accident. Ms. Rhodes is seeking recovery for her grief, frustration, and depression related to her physical condition. See Tab D, p. 133. Indeed, during her deposition, Ms. Rhodes admitted that her "profound depression" arose solely as the result of Defendants, actions and that she sought psychiatric treatment for this type of depression after the accident. See Tab D, p. 186.

Specifically, Ms. Rhodes testified that:

the depression I have now, I consider it to be two depressions. I separate them; there's the normal depression that I have from Bipolar disorder; then I have a profound depression that I have because of this accident and because 1- - you know, what's happened in my life.

See Tab D, pp. 181-182. Ms. Rhodes began seeing Dr. McNulty for her psychological problems after the accident. Dr. McNulty treated her for

"coping with depression frustration and grief that [she felt] because of the injuries [she] suffered in the accident." See Tab D, pp. 23-25. Dr. McNulty did not treat her for any other psychological conditions other than the "profound depression" that arose as a result of the accident. See Tab D, p. 25. The symptoms of the self diagnosed "profound depression" include profound desperation, despair, and hopelessness. See Tab D, p. 186. Ms. Rhodes also asserted that there were no medications that could alleviate the symptoms of the "profound depression." See Tab D, p. 186.

For the reasons specified above, Defendants respectfully request that this Court compel Ms. Rhodes to answer questions relating to her mental and emotional health during her second day of deposition, scheduled for August 25, 2004. During day one of her deposition, Ms. Rhodes' counsel instructed her not to answer these types of questions:

Q: Does Mr. McNulty (sic) treat you for your Bipolar or ADHD?

MR. PRITZKER: I instruct you not to answer.

Q: Does Dr. McNulty (sic) treat you for issues related to your grief, frustration, or depression because of your physical condition?

MR. PRITZKER: I instruct you not to answer.

See Tab D, p. 133. There are other instances in which Ms. Rhodes' counsel instructed her not to answer questions relating to her mental and emotional health that resulted from the accident. The answers to these questions are central to Ms. Rhodes' claim for psychological damages from the accident and critical to Defendants' defense against these claims.

The position that Ms. Rhodes' depression is the result of defendants' actions is also supported by the testimony of Dr. Norman Beisaw ("Dr. Beisaw"). Dr. Beisaw testified that Ms. Rhodes "went into a profound depression that had to be treated" after the accident and that "every patient who has undergone anything of this nature goes through this depression." See Tab E, pp. 69-70. According to Dr. Beisaw, Ms. Rhodes' "profound depression," was a result of the accident.

There are also several documents which suggest that Ms. Rhodes is claiming mental and emotional damages for these psychological injuries. First, Adele Pollard ("Ms. Pollard"), her life care planner, intends to testify at trial. Ms. Pollard intends to testify on how she calculated Ms. Rhodes' damages analysis which is based, in part, upon Ms. Rhodes' mental and emotional health condition. Ms. Rhodes' damage claims include costs for psychiatrist follow-up visits with Dr. Kelly J. Clark, with a cost of \$1,500 per year; and medication for her psychological conditions, e.g. Prozac (anti-depressant) will cost \$2,430.90 per year; Welbutrin (anti-depressant) will cost \$1,365.10 per year; and Zyprexa (anti-psychotic, muscular-skeletal pain) will cost \$3,533.20 per year. See Tab F, at Exhibit A. Ms. Pollard also included the cost for couples and family counseling, which totals \$3,600 over 24.4 years. See id.

By asserting privilege, Ms. Rhodes expects the Defendants to just blindly agree to her damages demand. There are, however, exceptions to

the privilege. By seeking damages for her "profound depression" that resulted solely as the result of the accident, she waived any privileges she could have claimed. See M.G.L. c. 233, §20B and M.G.L. c. 112, §135B (privilege is waived when patient introduces his mental or emotional condition as an element of his claim or defense). These mental and emotional health records are also critical to Defendants' defense in this case. The jury will be required to assess the amount of harm suffered as a result of this accident when compared to her pre-existing condition and without these records, Defendants' defense on damages is prejudiced. See Higgins v. Delta Elevator, 45 Mass. App. Ct. 643 (1998) (a jury should be instructed that a defendant's liability with respect to an aggravation of a pre-existing condition is the "difference between what plaintiffs condition would have been absent the accident and what the plaintiffs condition is or will be because of the accident").

Ms. Rhodes' Opposition was premised upon the assertion that her mental and emotional condition are separate and apart from the damages she is claiming in this case - - that her condition is similar to other garden variety emotional distress cases. Nevertheless, she conceded in her deposition that a new psychological condition, "profound depression," arose as a result of the accident. The proof is in the pudding - - she only sought treatment after the accident and is claiming mental and emotional damages for this illness. Thus, by her own reasoning set in her Opposition, Ms. Rhodes' mental and emotional health records should be produced. However, Defendants are only asking the Court to review, *in camera*, the records and make the determination of whether they should be produced. Furthermore, the Defendants are willing to enter into a protective order that mental and emotional health records can only be used in this litigation and must be returned to Ms. Rhodes thereafter.

Conclusion

The interest of justice is better served if Ms. Rhodes' mental and emotional records are disclosed, *in camera*, so the defendants will have an opportunity to properly defend themselves at trial.

WHEREFORE, BMCA respectfully request that this Court:

- (1) Inspect, *in camera*, Ms. Rhodes' mental health records from Dr. McNulty, Dr. Aspel, Dr. Clark, and other mental and emotional counselors;
- (2) Compel Ms. Rhodes to answer questions relating to her mental and emotional health at her deposition on August 25, 2004;
- (3) Grant a hearing on these issues; and
- (4) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

BUILDING MATERIALS CORP. OF AMERICA
CARLO ZALEWSKI AND DRIVER LOGISTIC SERVICES, INC.

DATED: August 18, 2004