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**SECOND DISTRICT COURT
WEBER COUNTY, STATE OF UTAH**

PATRICIA M. GOMEZ,

Plaintiff,

vs.

PEDRO A. DELGADO,

Defendant.

**STATEMENT of FACTS &
MEMORANDUM OF POINTS,
AUTHORITIES & ARGUMENTS &
REQUEST FOR SANCTIONS**

**Re: Plaintiff's Motion To Quash
Subpoena to Weber State University**

Case No: 07-0904092 PI

Judge: W. BRENT WEST

STATEMENT of FACTS-

- 1- On July 12th, 2007, Plaintiff filed a complaint against Defendant for injuries suffered in a MVC on 06/06/05.
- 2 Defendant Answered on/about 10/23 and subsequently, the parties filed a scheduling order.
- 3- Recently, defendant issued a subpoena duces tecum on Plaintiff's employer, Weber State University. Pursuant to her **U.R.C.P., Rule 37's**, to meet and confer obligations, Plaintiff notified defense counsel of her objections to the breadth of the SDTs. See **Exhibit "A"** Defense counsel responded. **Exhibit "B"** Plaintiff again wrote defense counsel, **Exhibit "C"**. Defense

counsel has refused to accommodate Plaintiff's objections. Thus again, Defendant forces Plaintiff to move this Court to Quash the SDTs and request sanctions.

4- The subpoena duces tecum is attached hereto as **Exhibit "D."** The records Defendant wants produced are:

- 1- ***Employment applications,***
- 2- Employment contracts,
- 3- Complete payroll records,
- 4- Records that show rate of pay,
- 5- Time cards,
- 6- Records of days worked,
- 7- Records of days not worked,
- 8- Records that show sick days,
- 9- Records that show vacation days,
- 10- Records of days off requests,
- 11- ***Medical claims,***
- 12- ***Insurance claims,***
- 13- ***Worker's compensation records,***
- 14- ***Disciplinary records,***
- 15- ***Performance evaluations,***
- 16- ***Records of promotions,***
- 17- ***Records of demotions,*** and,
- 18- Tax records ***and any other documentation...***

Exhibit "..."

Plaintiff objected to the production of records categorized under Points 11 through 17 and any other documents under point 18. Plaintiff objected that such records were irrelevant to the instant claim and/or defenses to Plaintiff's claims.

POINTS, AUTHORITIES & ARGUMENTS-

In her Complaint, Plaintiff alleged she suffered:

1 significant **bodily injuries** and incurred medical bills of approximately \$15,000. **Complaint, Points 12 & 13**
She also alleges some past lost wages.

The SDT commands the production of: complete copies of any and all employment records including:

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- 11- *Medical claims,*
 - 12- *Insurance claims,*
 - 13- *Worker’s compensation records,*
 - 14- *Disciplinary records,*
 - 15- *Performance evaluations,*
 - 16- *Records of promotions,*
 - 17- *Records of demotions, and,*
 - 18- *Tax records and any other documentation...*

The subpoena ends with demanding the production of:

.... all other documents in your possession, custody or control from June 2000 to current regarding Patricia M. Gomez

The records requested under categories 11 through 18 are simply not relevant to any claims or defense.

**ONLY RELEVANT RECORDS ARE
PROPERLY SUBJECT TO DISCOVERY**

RULE 26 (b)(1)– U.R.C.P.

Rule 26 (b)(1) of the U.R.C.P. defines what is discoverable :

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any party

It continues to say the: *“information sought [must] appear reasonably calculated to lead to the discovery of admissible evidence.”*

Obviously, in seeking *“all of Plaintiff’s employment records”, “all other employment file documents”* and *all medical and insurance claims, all worker’s compensation records, all disciplinary and performance evaluation records, and all promotions and demotion records,*

the subpoena violates the basic rules of relevancy. Only certain employment records have relevancy to the instant lawsuit, i.e., records of wages, time lost from work since the crash and other records reasonably related to the Plaintiff's lost wage claim.

Records addressing performance and promotion evaluations and discipline and demotion records are both irrelevant and improperly invade Plaintiff's privacy rights. Likewise, to request all workers' compensation records and all medical and insurance records involves the production of records not relevant to Plaintiff's instant injury/lost wage claims.

Relevant evidence means any evidence having a tendency to make the existence of any fact that is of consequence to a determination of the action more or less probable than it would be without the evidence.

Rule 402, U.R.E.

If the information sought is irrelevant it is not discoverable. Clearly, in seeking all employment records, promotion evaluations and discipline and demotion records the SDT seeks both irrelevant records and improperly invade Plaintiff's privacy rights. Likewise, to request all workers' compensation records and all medical and insurance records in the Plaintiff's file will result in the production of records on issues/facts that: **1-** Plaintiff has not put into contest, **2-** are unrelated to her instant claims and, **3-** could include highly confidential records not addressed to any matter in issue in this lawsuit.

Thus, such requests are an unwarranted invasion of Plaintiff's personal life. Importantly, though requested to do so, the defense has made no showing the records requested are relevant to the claims in contest.

To request ***all employment records, [and all other employment file documents, all medical, insurance claim and worker's compensation records, all disciplinary and performance***

*evaluation records, and promotions and demotion records, will encompass records not a part of any instant claim or defense. Our court has interpreted the question of discovery limits in Debry v. Goates, 999 P.2d 582, 586 (UT. App., 2000) wherein the court said: Generally, no privilege exists to discover all communications/records. Generally a communication [record] is discoverable if relevant to an issue in any proceeding ***in which that communication, condition or record is an element of any claim or defense.****

Consequent to Debry, before defense counsel can secure the objected-to records demanded, she needs to show that the records demanded are an element of the plaintiff's claims or of the defendant's defense. Moreover, when one cannot affirmatively assert what documents will be produce under a request, the plaintiff's right of privacy is invaded without justifiable reason.

Without the mandated showing of relevancy, we find the defense SDT is simply fishing for records in the hopes of finding some records detrimental to Plaintiff's claims or personally embarrassing to her. But the law requires more. The law requires a clear nexus between the records requested and the claims or defenses.

Utah has specifically rejected "fishing expeditions" as an approach to discovery.

The use of **DISCOVERY SHOULD NOT BE EXTENDED** to permit ferreting unduly in detail, nor have the effect of cross-examining the opposing party or his witnesses, **NOR SHOULD IT BE DISTORTED INTO A "FISHING EXPEDITION."**

State v. Petty, 17 UT 2nd, 382; 412 P2d. 914 [1966]

Defendant is "fishing" when it requests production of discipline and demotion records, and evaluations and performance records. Defendant is fishing for records that would paint the Plaintiff in an unfavorable light, or so embarrass her that she will surrender her claims.

The discovery process is not intended to allow adversaries to pry into an individual's personal information when it is irrelevant to the present legal proceedings.

In Hoffman, the Colorado court addressed the question of a waiver of a protected right:

An implied waiver may not be found based on nothing more than the privilege holder's act of filing a pleading in a case in which his physical or mental condition may be an issue.

Hoffman v. Brookfield, 87 P.3d 858 at 862 [CO - 2004]

In this case, as in Hoffman, Plaintiff is seeking general damages for physical pain and suffering and lost wages directly caused by the 06/06/05 collision. Thus, all medical records, insurance records and workers' compensation records and performance, demotion and discipline records not addressed to Plaintiff's crash injuries or her lost wage claim are not relevant. Moreover, there is a probability that she has medical, insurance claim and/or worker's compensation [performance, disciplinary and/or demotion] records that are unrelated to her collision injuries and/or wage loss.

Other jurisdictions have similarly held that the filing of a lawsuit does not necessarily constitute the Plaintiff's waiver of his/her privilege with respect to any and all medical [and other irrelevant] records, i.e., the workers' compensation, medical, insurance, discipline, demotion, performance records. In Johnson v. Trujillo, 97 CV 3316 [1999] the Colorado Supreme Court said that merely filing a personal injury claim does not open the door to discovery of marriage

counseling records and prior psychiatric records. Even a mental distress claim does not impliedly waive the privilege.

Here we don't know what workers' compensation records, nor what other employment records will be produced. But to seek all employment records and all workers compensation records and the other objected-to records clearly violates the discovery parameters of the ***Johnson*** court.

Additionally, in ***Brit v. Supior Ct.***, 143 Cal Rptr 695 [Cal. 1978], in citing its decision in ***Lifschutz***, 2 Cal. 3rd 415, 85 Cal Rptr 829, 467 P.2d 557, the court reviewed the waiver of privilege encompassed by the patient-litigant exception and reasoned that injured plaintiffs must disclose relevant medical information but have no obligation to disclose unrelated medical treatment. Likewise, there is no obligation to produce unrelated employment, workers compensation performance and other file records.

IF THE REASON IS THE SAME THE RULE SHOULD BE THE SAME.
CA. Civil Code 3527

Since there is no obligation to disclose, "unrelated medical records" because they are unrelated, there is no obligation to disclose other records that are also "unrelated." Thus, defendant has no right to demand disclosure of other "unrelated records." And the request for all employment records, all workers' compensation records and all other file documentation in the Plaintiff's employer's files likewise contain other "unrelated" information and thus are not subject to disclosure.

In a situation substantially similar to the case at bar, our Supreme Court, in ***Debry***, supra, set forth a three element analysis to determine whether or not the qualified privilege is waived. The

first element of the analysis to overcome a qualified privilege for withholding confidential information is that the party seeking the information:

A party does not have a right to examine all of the confidential information or to search through files without supervision. *Penn v. Ritchie*, 480 U.S. 39,59 [1987] Rather a party MUST SHOW WITH REASONABLE CERTAINTY THAT SOME EVIDENCE FAVORABLE TO HIS/HER CLAIM EXISTS.....

Debry at 587.

Though Plaintiff has made two written requests to defense counsel to show ***Debry's*** reasonable certainty that some favorable evidence to the defense exists in the objected-to records, [Exhibits “ & “”...]counsel has made no such showing. **Without the mandated showings, the subpoena is simply “fishing” with the breadth of the records sought.** Thus, they are not relevant and invade the Plaintiffø's rights to privacy. Properly this Court should quash them.

Defense counsel has made no demonstration under **Rule 26 (b)(1)** that the requested discovery is *reasonably calculated to lead to the discovery of admissible evidence*. The defense has not made any showing of: 1- that the requested documents would lead to the discovery of admissible evidence or, 2- that said records are relevant to any claim or defense.

Here the defendantø's effort to obtain a complete copy of any and all of Plaintiffø's employment records is impermissibly overbroad, oppressive and an intrusion into Plaintiffø's constitutional right to privacy and, accordingly, fails at the first element ***Debry*** mandates. There is no evidence in this claim to support the discovery of all of Plaintiffø's employment and workerø's compensation records, and the other objected-to records, nor is there any evidence to support the discovery of any records other than those directly related to her collision injuries. Thus, the

demand for production of: *medical, insurance and workers compensation records, disciplinary, performance, promotions and demotion records, and tax records and any other documentation* are also irrelevant and improperly invade Plaintiff's constitutional privacy rights.

The discovery process is designed to allow each party to the case to discover relevant facts so the parties may accurately represent their clients. The discovery process is not intended to allow adversaries to pry into an individual's personal past life when such information is irrelevant to the proceedings.

The Utah Rules of Civil Procedures provides safeguards by putting limits on the scope of discovery. **Rule 26(b)(1)** in relevant part states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

Thus, in the case at bar, in order for a records subpoena to be valid, it must request only that information which is relevant to the subject collision/claim. Defendant has not made any showing of relevance and thus, the Court should quash the SDT.

REQUEST FOR SANCTIONS-

Plaintiff believes that a party has a right to demand discovery and that legitimate and substantially different positions can be both valid and arguable. But here this court has already ruled that defense counsel has no right to all of Plaintiff's medical and insurance records. Yet, instantly, in ignoring the court's earlier order, defense counsel again seeks irrelevant all medical records, insurance claim records and all workers' compensation records. And she forced this Motion while blatantly ignoring

Plaintiff two meet and confer requests to show some basic relevancy and to *show that some favorable evidence exists* in the records Plaintiff objected-to.

Because the objected-to records have no relevancy to Plaintiff's claims or the defenses to said claims, and because defense counsel has made no showing that some favorable evidence exists and because she forced this Motion while disregarding this Court's earlier order, Plaintiff believes she should be sanctioned for forcing this totally unnecessary Motion.

Plaintiff respectfully requests the Court the opportunity to file an appropriate affidavit declaring the costs and reasonable attorney's fees provoked in making this Motion when all such costs and fees are known after Plaintiff's Reply to the defense opposition and after oral argument, if any.

CONCLUSION-

Without the mandated showings of relevancy and the reasonable certainty of favorable evidence in the objected-to records, Plaintiff and this Court can assume Defendant is on a fishing expedition, "hoping to find irrelevant but embarrassing or otherwise damaging evidence. But Utah law does not permit "fishing." For the reasoned arguments stated above, supported by the governing legal authorities, Plaintiff respectfully requests this Honorable Court issue an order to quash the Defendant's subpoenas served on the Custodians of Records at Weber State University in accordance with the objections made hereinabove.

Since this is the second time defense counsel has forced Plaintiff to file a motion to quash, in this instance, Plaintiff believes defense counsel's position was totally without merit and thus, this Court should sanction her for the costs and reasonable fees Plaintiff incurred in bring this Motion.

28, April 2008

Respectfully submitted;

Ps&As-Objctns2Mplyer-SDT-4-28-8

JOHN F. FAY