JOHN F. FAY, USB No. 5691
Attorney for Plaintiff

IN THE SECOND DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

PATRICIA M. GOMEZ, **Plaintiff,** **vs.** **PEDRO A. DELGADO,** **Defendant.**	**R E P L Y:** **STATEMENT of FACTS & MEMORAN-DUM OF POINTS, AUTHORITIES & ARGUMENTS** **Re: Plaintiff's Motion To Quash Subpoenas** **Case No: 07-0904092 PI** **Judge W. BRENT WEST**

Comes now Plaintiff and in reply opposes: **Defendant's Opposition To Plaintiff's Motion To Quash Subpoenas Duces Tecum.**

P O I N T S, A U T H O R I T I E S & A R G U M E N T S-

Point 1-

Defendant served his SDT by mail on 12/12. Record production was due on 01/ 02. Plaintiff filed this Motion on 01/03.

Defendant argues the Motion is õlateö and thus, should be dismissed. Importantly, Defendant cites no authority indicating the Motion is tardy. Rules 26 and 45 of the Utah Rules of Civil Procedure talk of motions to object to discovery but neither Rule says when such a motion must be filed.

Equally important, Defendant does not allege any prejudice for the õtardyö filing. Assuming arguendo, the motion is a day tardy, given that Defendant cannot show prejudice, to dismiss the

Motion would be an unfair and excessive penalty. Given that he cites no authority for his position nor suffered any prejudice, this court should not dismiss this motion for any reason Defendant proffered.

Point 2-

The appellate court in ***Debry v. Goats,*** 999 P.2d 582 [Utah Ct. App., 2000] outlined certain mandatory guidelines for a trial court to follow in a discovery dispute like this. This case involved a patient-therapist privilege and the disclosure of Plaintiffø mental health records. It said:

> Rule 506 defines the physician-patient privilege and mental health therapist-patient privileges, but also delineates exceptions:
> í ..
> See Utah Code Ann. 78-24-8(4) (1996) (providing physician-patient privilege is waived only when patient puts condition in issue.
>
> [there is no privilege] As to a communication relevant to an issue of the physical, mental or emotional condition of the patient ***in any proceeding in which that condition is an element of any claim or defense.***
>
> ***Debry,*** @ 586-587

Continuing it said:

> A non-patient õdoes not have the right to examine all of the confidential information or to search through [psychological] files without supervision.ö ***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.** If such a showing is made, then the party may request that the court review the otherwise confidential records õto determine if they contain material evidence.ö If after review, the court determines the records contain material evidence, the records should be exposed only to the extent necessary to present the evidence, thereby striking a balance between the important interests of physician-patient confidentiality and the pursuit of a claim or defense. ***Id.*** @ 588

Defendant ignores the mandates of ***Debry***.

Instead of the required showing to a reasonable certainty that some favorable evidence to a certain defense exits, Defendant has only asserted:

1- ***Oftentimes***, medical records contain referencesí í .. **Opposition**, page 3

2- í the entire source of her pain ***could be*** í í . **Opposition**, page 4

3- These items ***often contain…..*** **Opposition,** page 4

4- Defendant should be able to explore this ***possibility***í .. **Opposition**, page 4

5- í and ***often results in*** the identification ofí í . **Opposition,** page 5

6- It is ***possible*** that subpoenaing í í .. **Opposition,** page 5

7- Likewise, subpoenaing a specialist ***may lead to*** í .. **Opposition,** page 5

8- The issue is ***we don't know*** at this juncture í .. **Opposition,** page 5

9- ***If*** these medical records lead Defendant to í í **Opposition,** page 6

10- í records ***which may be relevant*** í . **Opposition**, page 7

11- í or which ***may reasonably lead*** í í í **Opposition**, page 7

12- This is ***not necessarily true***í .. **Opposition,** page 7

13- í which all ***could be relevant*** í í .. **Opposition,** page 7

14- ***What if*** a carrier identified í .. **Opposition,** page 7
And,

15- í and ***could lead*** to the discovery í . **Opposition,** page 7

õWhat ifs,ö õcould besö and õmay lead,ö õis possible,ö õoftentimesö and õoften resultsö fall far short of the ***DeBry*** mandated **"reasonable certainty showing"**

DeBry also clearly stated that:

> **A non-patient "does not have the right to examine all of the confidential information or to search through a party-patient's files without supervision."**

Yet, Defendant repeatedly refuses to recognize this rule. In defiance to this ruling, Defendant has stated:

A- Defendant asserts they are entitled to inquire into Plaintifføs pastí **Opposition**, page 3

B- Defendant is entitled to review these medical recordsí **Opposition**, page 3

C- Defendant canøt restrict too much initially without risking overlooking relevant information. **Opposition**, page 6

D- Defendant is entitled to review those medical recordsí . **Opposition**, page 7

Debry denies Defendant a right to review all medical records not relevant, or similar to, the injuries Plaintiff claimed in her Complaint. In her Complaint, Plaintiff alleged she suffered:

> í significant **bodily injuries**ö í í ..
>
> **Complaint**, Points 12 & 13

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Point 3-

WHERE IS THE DEFENSE CLAIM TO GET ANY and ALL MEDICAL RECORDS.

The Opposition makes no specific defense why it needs all 44 years of Plaintifføs past medical records. In concludes the records may be relevant, it concludes it needs all the records going back 44 years to make a defense against Plaintifføs injury claims.

Recently, our Supreme Court approved ***Debry***. In ***Sorenson v. Barbuto***, 2008 UT 8, the Court said:

> A physician is permitted to provide information, interviews, reports, Records, statements, memoranda or other data relating to the patientøs medical condition ***when a patient places A medical condition at issue in a court proceeding***.
>
> ***Sorenson***, Page 3

Defendant wants all records of any kind or nature for Plaintifføs entire life. ***Sorenson*** said, however, the patient-physician privilege:

> í . specifically exempts õa communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceedings ***in which THAT CONDITION is an element of any claim or defense***.ö

Sorenson continued:

> Furthermore, a plain reading of rule 506(d)(1) clearly limits the breadth of the exception to the confines of the court proceeding. Further, a waiver under rule 506(d)(1) does not mean that the patient has consented to the disclosure of his entire medical history. Rule 506 is only broad enough to allow disclosure of information relevant to an element of any claim or defense. Therefore, rule 506 (d)(1) is a limited waiver of privilege, ***confined to court proceedings, and RESTRICTED TO THE TREATMENT RELATED TO THE CONDITION AT ISSUE.***
>
> í .. While the rule 506(d)(1) provides a judicial exception to the privilege that ***permits disclosure of confidential information THAT HAS BEEN PLACED AT ISSUE IN LITIGATION***.
>
> ***Sorenson***, @ page 4

What are the specific conditions Plaintiff has put in issue that are relevant to all her 44 years of medical records? What is the specific defense the defendant is claiming to each specific Plaintifføs complaint he needs to defend by gathering any and all of Plaintifføs medical records for 44 years? From the Oppositionøs conclusions unsupported by any factual foundation, we are left to guess! Given the sanctity of the patient-physician privilege, the law requires far more than self-serving conclusions of õrelevancyö and õneedö.

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C O N C L U S I O N-

In her Complaint, Plaintiff alleged she suffered:

> í significant **bodily injuries**ö and incurred medical bills of approximately $15,000.
>
> **Complaint**, Points 12 & 13

Plaintiff has a ***"right to confidential medical information that has no relevance to the civil action."*** While Defendant ***"has access to information that is relevant to a condition placed in issue in the case.***ö **_Sorenson_**, @ page 9

The defendant states Plaintiff has complained about a õshoulder injuryö, and that records reflect a õcystö in that shoulder and that another note reflects a õprior shoulder injury.ö **Opposition,** page 4 Plaintiff agrees the defendant can get all õshoulderö medical records going back 10 year from the date of the injury. Thatøs the law. Plaintiff also offers that if there is a relevant prior injury/medical condition entry in the prior 10 years, defendant can get records dating back 10 years from the date of that prior shoulder injury.

Plaintiff also suffered injury to her tri-level spine and left elbow. Plaintiff offers that defendant is entitled to records going back 10 years addressed to any medical condition or prior injury to her cervical, thoracic and/or lumbar spines together with left-elbow medical records

But clearly, in seeking all medical records, in seeking all correspondence and all other records in the Plaintifføs 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 be **highly confidential** and private records not addressed to matters in issue in this lawsuit.

Thus, such requests are an unwarranted invasion of Plaintifføs personal life. Importantly, the defense has made no showing the records requested are relevant to the claims in contest nor that favorable evidence exists.

Without the mandated showings, Plaintiff and this Court can assume Defendant is on a fishing expedition, õhopingö to find relevant, embarrassing or otherwise damaging evidence. But Utah law does not permit õfishing.ö For the reasoned arguments stated above, supported by the governing legal authorities, Plaintiff respectfully requests this Honorable Court issue an order to quash the Defendantøs subpoenas served on all of the before listed Custodians of Records.

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13, February 2008

Respectfully submitted;

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JOHN F. FAY

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