

ITEM 8.01 | OBTAINING PSYCHOLOGICAL RECORDS WHEN PAIN AND SUFFERING ARE AT ISSUE

Chapter 90, Florida Statutes, codifies the psychotherapist-patient privilege¹ and provides in pertinent part:

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.²

(4) There is no privilege under this section:

(b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.³

Moreover, pursuant to section 394.4615, Florida Statutes (2015), clinical records maintained by psychotherapists are shielded by a broad cloak of confidentiality; the statute carves out specific instances wherein disclosure of information from patient records shall or may be released. The intent behind the enactment of the psychotherapist-patient privilege is to encourage individuals suffering from mental, emotional, or behavioral disorders to seek out and obtain treatment without fearing public scrutiny and enable those individuals experiencing such problems to obtain proper care and assistance.⁴



Section 90.503(4)(c), Florida Statutes (2015), one of the statutory exceptions to the privilege, stems from the notion that a party should be barred from using the privilege as both a sword and a shield, that is, seeking to recover for mental and or emotional damages on the one hand, while hiding behind the privilege on the other.⁵ For example, when a plaintiff seeks recovery for mental anguish or emotional distress, Florida courts generally hold that the plaintiff has caused his or her mental condition to be at issue and the psychotherapist privilege is therefore, waived.⁶ The statutory privilege is also deemed waived where a party relies on his or her post-accident mental or emotional condition as an element of a claim or defense.⁷ Failure to timely assert the privilege does not constitute waiver, so long as the information already produced does not amount to a significant part of the matter or communication for which the privilege is being asserted.⁸ The waiver provision contained in section 90.507, Florida Statutes (2015) will apply, however, when information previously produced in discovery is considered a substantial part of the patient's claim of privilege.⁹ Limited voluntary disclosure of some aspects of the psychotherapist-patient privileged matters or communications will not constitute a waiver.¹⁰

The exception to the privilege does not apply merely because the patient's symptoms accompanying a physical injury are of a type which might arguably be associated with some separate mental or emotional condition.¹¹ In addition, a claim for loss of enjoyment of life, "without more, does not place the mental or emotional condition of the plaintiff at issue so as to waive the protection of section 90.503."¹²

The party seeking to depose a psychotherapist or obtain psychological records bears the burden of showing that the patient's mental or emotional condition has been introduced as an issue in the case.¹³ What is more, if a plaintiff has not placed his or her mental condition at issue, the defendant's sole contention that the plaintiff's mental stability is at issue will not overcome the privilege.¹⁴

The privilege does not protect from discovery any relevant medical records of a psychiatrist or other medical provider made for the purpose of diagnosis or treatment of a condition other than mental or emotional ailments.¹⁵ Thus, relevant medical records that do not pertain to the diagnosis or treatment of a mental, emotional or behavioral disorder are not privileged and should be produced even

if they are maintained by a psychiatrist. On the other hand, records made for the purpose of diagnosis or treatment of a mental, emotional or behavioral conditions that may contain other medical information, such as physical examinations, remain privileged and are not subject to disclosure.¹⁶

Florida law recognizes that a plaintiff who has incurred a physical injury may allege and prove physical pain and suffering as an element of a claim for monetary damages.¹⁷ The term "pain and suffering" has not been judicially defined, however, Florida courts have provided a number of factors that may be considered by the trier of fact in awarding damages for pain and suffering.¹⁸ These factors recognize that pain and suffering has a mental as well as a physical component. Physical pain and suffering, absent mental anguish, can impair the enjoyment of life.¹⁹

Section 90.503(2) specifically applies to communications and records "including alcoholism and other drug addiction." In the cases noted below, the trial court allowed discovery of defendant driver's treatment for drug addiction post-accident, inasmuch as the complaint alleged that the defendant driver was under the influence of drugs and alcohol at the time of the accident, other discovery supported that allegation, and defendant's answer denied being under the influence. On review, the appellate courts stated that the defendant did not abrogate the privilege by denying the allegations of the complaint, the plaintiff did not establish the existence of any of the other exceptions to the privilege, and they granted certiorari, and quashed the orders.²⁰

It is worth noting that in *David J. Burton, D.M.D., P.A. v. Becker*, 516 So. 2d 283 (Fla. 2d DCA 1987) the court held that medical records of the physician's treatment for drug abuse were subject to disclosure in a medical malpractice case, because section 397.053(2), Florida Statutes (1985), permitted a court to order disclosure of drug treatment records when good cause is shown.

However, Section 397.053 was repealed effective October 1, 1993. The 2009 amendment to Chapter 397 contains section 397.501, which provides for the rights of clients receiving substance abuse services. Subsection 397.501(7)(a)5, provides for the confidentiality of records, with the following exceptions:

(a) The records of service providers which pertain to the identity, diagnosis, and prognosis of and service provision to any individual are confidential in accordance with this chapter and with applicable federal confidentiality regulations and are exempt from

s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution. Such records may not be disclosed without the written consent of the individual to whom they pertain except that appropriate disclosure may be made without such consent:

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5. Upon court order based on application showing good cause for disclosure. In determining whether there is good cause for disclosure, court shall examine whether the public interest and the need for disclosure outweigh the potential injury to the individual, to the service provider and the individual, and to the service provider itself.

Consider *Brown v. Montanez*, 90 So. 3d 982, (Fla. 4th DCA 2012) where the Court held that where the criminal defendant was sent to drug related treatment as a result of his bond and not as a negotiated criminal plea agreement with the Court, there had been no Court ordered examination of the mental or emotional condition of the patient under § 90.503(4)(b), Fla. Stat. (2011).

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Footnotes

¹ A psychotherapist is defined by section 90.503(1), Florida Statutes (2015) and includes any person authorized to practice medicine or reasonably believed by the patient so to be, that is “engaged in the diagnosis or treatment of a mental or emotional condition.” A medical doctor is a psychotherapist for purposes of the statute if he or she is engaged in treating or diagnosing a mental condition, however, other health care professionals, such as psychologists, are only considered psychotherapists if they are “engaged primarily in the diagnosis or treatment of a mental or emotional condition...” Compare § 90.503(1)(a)1., with § 90.503(1)(a)2., Fla. Stat. (emphasis added). In 2006, the Legislature amended section 90.503(1)(a), Florida Statutes, to include advanced registered nurse practitioners within the ambit of the statute. See § 90.503(1)(a)5., Fla. Stat. (2006) (effective July 1, 2006).

² § 90.503(2), Fla. Stat. (2015).

³ § 90.503(4)(c), Fla. Stat.(2015).

⁴ *Segarra v. Segarra*, 932 So. 2d 1159, 1161 (Fla 3d DCA 2006) (citing *Cedars Healthcare Group, Ltd. v. Freeman*, 829 So. 2d 390, 391 (Fla. 3d DCA 2002)); *Attorney Ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 305-306 (Fla. 4th DCA 2001); *Carson v. Jackson*, 466 So. 2d 1188, 1191 (Fla. 4th DCA 1985); see also *Jaffee v. Redmond*, 518 U.S. 1, 10-12 (1996) (In 1996, the United States Supreme Court held that the psychotherapist privilege serves the public interest and, if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled.).

⁵ *Nelson v. Womble*, 657 So. 2d 1221, 1222 (Fla. 5th DCA 1995) (citing *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 469 (Fla. 4th DCA 1993)).

⁶ See *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1476 (11th Cir. 1984) (applying Florida law to a claim for mental anguish due to medical malpractice); *Belmont v. North Broward Hosp. Dist.*, 727 So. 2d 992, 994 (Fla. 4th DCA 1999) (no privilege after patient’s death in proceeding in which party relies upon condition as element of claim or defense); *Nelson*, 657 So. 2d at 1222 (psychotherapist-patient privilege did not preclude discovery in personal injury action seeking loss of consortium and infliction of mental anguish); *Scheff v. Mayo*, 645 So. 2d 181, 182 (Fla. 3d DCA 1994) (mental anguish from rear-end motor vehicle accident); *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 468 (Fla. 4th DCA 1993) (emotional distress from sexual battery); *F.M. v. Old Cutler Presbyterian Church, Inc.*, 595 So. 2d 201, 202 (Fla. 3d DCA 1992) (allegations of sexual, physical and emotional abuse of a minor placed her mental state at issue and waived her right to confidentiality concerning her mental condition); *Arzola v. Reigosa*, 534 So. 2d 883 (Fla. 3d DCA 1988) (post-accident mental anguish damages arising out of an automobile/bicycle collision barred the plaintiff from invoking the psychotherapist-patient privilege). Compare *Nelson*, 657 So. 2d at 1222 (determining loss of enjoyment of life as a claim for loss of consortium) with *Partner-Brown v. Bornstein, D.P.M.*, 734 So. 2d 555, 556 (Fla. 5th DCA 1999) (“The allusion to loss of enjoyment of life, without more, does not place the mental or emotional condition of the plaintiff at issue so to waive the protection of section 90.503.”).

⁷ *Arzola*, 534 So. 2d 883; *Connell v. Guardianship of Connell*, 476 So. 2d 1381 (Fla. 1st DCA 1985); *Helmick v. McKinnon*, 657 So. 2d 1279, 1280 (Fla. 5th DCA 1995) (In the context of personal injury actions, pre-accident psychological and psychiatric records are relevant to determine whether the condition existed before the accident).

⁸ See *Palm Beach County Sch. Bd. v. Morrison*, 621 So. 2d 464, 469 (Fla. 4th DCA 1993) (rejecting the argument that the plaintiff waived the psychotherapist-patient privilege because it was not timely asserted and reasoning that because it was asserted before there was an actual disclosure of the information for which the patient claimed the privilege, section 90.507, Florida Statutes was not applicable).

⁹ Id.; *Garbacik v. Wal-Mart Transp., LLC*, 932 So. 2d 500, 503-504 (Fla. 5th DCA 2006) (citing *Sykes v. St. Andrews Sch.*, 619 So. 2d 467, 469 (Fla. 4th DCA 1993)).

¹⁰ *Commercial Carrier Corp. v. Kelley*, 903 So. 2d 240, 241 (Fla. 5th DCA 2005) (no waiver of privilege recognized, even though patient voluntarily disclosed some aspects of the privileged matters or communications during her deposition by admitting that she had been prescribed anti-depressants for her post-traumatic stress disorder following the horrific traffic crash at issue, since the plaintiff never placed her mental state a material element of any claim or defense); *Olson v. Blasco*, 676 So. 2d 481, 482 (Fla. 4th DCA 1996) (A defendant's listing of therapists' names in response to a criminal discovery request does not waive the privilege in a wrongful death action stemming from the same facts when there is no showing that there will be a defense based on a mental condition.); see also *Bandorf v. Volusia County Dept. of Corrections*, 939 So. 2d 249, 250 (Fla. 1st DCA 2006) (worker's compensation plaintiff claiming fatigue and neurological symptoms from physical injuries does not place emotional or mental condition at issue); *Segarra v. Segarra*, 932 So. 2d 1159, 1160 (Fla. 3d DCA 2006) (The psychotherapist-patient privilege is not waived in joint counseling sessions).

¹¹ *Bandorf*, 939 So. 2d at 251 (upholding the privilege in a worker's compensation action involving an employees' repetitive exposure to mold, toxic substances and chemicals in the workplace which led the employee to suffer fatigue and neurological symptoms).

¹² *Byxbee v. Reyes*, 850 So. 2d 595, 596 (Fla. 4th DCA 2003) (quoting *Partner-Brown v. Bornstein*, 734 So. 2d 555, 556 (Fla. 5th DCA 1999)).

¹³ *Garbacik*, 932 So. 2d at 503; *Morrison*, 621 So. 2d at 468; *Yoho v. Lindsley*, 248 So. 2d 187, 192 (Fla. 4th DCA 1971).

¹⁴ *Weinstock v. Groth*, 659 So. 2d 713, 715 (Fla. 5th DCA 1995) (plaintiff able to assert privilege because she had not placed her mental condition at issue in her defamation action); *Cruz-Govin v. Torres*, 29 So. 3d 393, 396 (Fla. 3d DCA 2010) ("The statutory exception applies when the patient, not the opposing party who seeks the privileged information, places his mental health at issue.").

¹⁵ *Oswald v. Diamond*, 576 So. 2d 909, 910 (Fla. 1st DCA 1991) (reversing in part a trial order granting a motion to compel discovery of medical records to the extent that medical testimony and reports not pertaining to the diagnosis and treatment of a mental or emotional disorder may exist).

¹⁶ *Byxbee*, 850 So. 2d at 596.

¹⁷ *Grainger v. Fuller*, 72 So. 462, 463 (Fla. 1916) (allowing recovery of damages for future pain and suffering as a direct effect of a physical injury caused to the plaintiff); *Parrish v. City of Orlando*, 53 So. 3d 1199, 1203 (Fla. 5th DCA 2011) ("[W]here evidence is undisputed or substantially undisputed that a plaintiff has experienced and will experience pain and suffering as a result of an accident, a zero award for pain and suffering is inadequate as a matter of law.").

¹⁸ *Tampa Electric Co. v. Bazemore*, 96 So. 297, 302 (Fla. 1923) (In determining the measure of damages, the court embraced various elements when considering pain and suffering, including, physical and mental pain and suffering, resulting from the character or nature of the injury, the inconvenience, humiliation, and

embarrassment the plaintiff will suffer on account of the loss of a limb, the diminished capacity for enjoyment of life to which all the limbs and organs of the body with which nature has provided us are so essential, and the plaintiff's diminished capacity for earning a living.); *Bandorf*, 939 So. 2d at 251 (observing that, "[i]t should be apparent that physical pain and suffering, absent mental anguish, can impair the enjoyment of life").

¹⁹ *Id.*

²⁰ See *Cruz-Govin v. Torres*, 29 So. 3d 393 (Fla 3d DCA 2010) and *Brown v. Montanez*, 90 So. 3d 982 (Fla. 4th DCA 2012).

