

Trial Law TIPS

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TIP #40

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Recovery of Psychic Damages Without Waiver of Psychologist/Patient Privilege— Walking the Tightrope

Introduction

Defendants frequently seek to lower the settlement value of cases and otherwise generally antagonize plaintiffs' lawyers by seeking discovery of our clients psychiatric records, including taking depositions of mental health experts who have treated mental and emotional conditions which have absolutely nothing to do with the litigation at hand. Sometimes the defense seems intent on simply prejudicing the plaintiff in the eyes of the jury by painting a picture of the plaintiff as some sort of "nut case." Other times confidential information within psychiatric records—such as marital discord, substance abuse, and so on—is offered into evidence by the defense in an attempt to muddy the waters and

divert the jury's attention from the issue of the damages caused by the defendant.

Plaintiffs often are reacting to such defense tactics by abandoning any and all claims for mental anguish, emotional suffering, loss of capacity for the enjoyment of life and other "psychic" damages. Where the injuries are severe enough, the remaining intangible damage element of physical pain and suffering may be enough to support a decent verdict. However, before you automatically react to attempts to discover and introduce psychiatric evidence by dropping all claims for psychic damages, consider the authorities which permit some such elements of damage to survive without waiving the psychotherapist-patient privilege.

Recovery of Damages for Psychic Damages Without Waiving Privilege

Section 90.503, Fla. Evid. Code, creates a psychotherapist-patient privilege which entitles the patient "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 . . . [including] any diagnosis made, and advice given, by the psychotherapist in the course of that relationship." However, that privilege is not absolute and can be waived by certain positions taken in the course of litigation.

Defense attorneys frequently attempt to establish such waivers by arguing the applicability of Subsection (4)(c), which states that no privilege exists "[f]or 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" (Emphasis added).

Under the usual scenario, the defense attorney will send out discovery requests for information about treatment rendered by the plaintiff's psychiatrist or psychologist, prompting a motion for protective order asserting the privilege under this statute. Then the defense will argue that the privilege has been waived by the plaintiff's claim for psychic damages such as mental anguish,

emotional distress and so on. There are cases which hold that such claims amount to a waiver of the privilege. *See, e.g., Nelson v. Womble*, 657 So. 2d 1221 (Fla. 5th DCA 1995).

The frequent response to that position is for the plaintiff's attorney (after consultation with the client) to simply withdraw all claims for psychic damages, including mental anguish. That usually is an effective tactic. *See, e.g., Sykes v. St. Andrews School*, 619 So. 2d 467 (Fla. 4th DCA 1993)(abandonment of originally-pled claims for emotional distress reinstates privilege). *See also generally Olges v. Dougherty*, 856 So. 2d 6, 10 (Fla. 1st DCA 2003)("Once Mr. Olges abandoned his original efforts to recover damages for mental anguish, emotional distress and other emotional damages, his mental condition ceased to be 'in controversy'" for purposes of mental examination under Rule 1.360). You may want to consider lesser steps before abandoning all such psychic damages.

Before you rule out the possibility of pleading a claim for "mental anguish" damages, consider the holding of the Third District in *Morowitz v. Vistaview Apartments, Ltd.*, 613 So. 2d 493 (Fla. 3d DCA 1993). That was a case in which the defendant introduced evidence concerning the plaintiff's psychiatric condition, including the videotaped deposition of her psychiatrist, successfully convincing the trial court that the Plaintiff's claim for mental anguish put her mental and emotional condition at issue and waiving the privilege.

In reversing that ruling and ordering a new trial, the Third District used language which may permit you to maintain your claim for mental anguish without waiving the psychotherapist-patient privilege. The Court held that the privilege was not waived because "Morowitz only sought damages for ***mental anguish as a result of her physical injuries*** and did not claim an aggravation of her psychiatric condition which would have put that condition directly in issue." 613 So. 2d at 494 (emphasis added). Thus, you may want to think about tailoring your damages request to say something to the effect that you are seeking damages for "mental anguish resulting from the physical injury," and disavowing any claim for "mental anguish from any pre-existing condition."

“Loss of Enjoyment of Life” Damages Recoverable Without Waiving Privilege

One approach which you may consider in anticipating a defendant’s intention to poison the well with prejudicial psychiatric testimony is to plead claims for physical pain and suffering and *loss of capacity for enjoyment of life*, but no claim for “mental anguish” or “emotional distress.” Some trial lawyers believe that the measure of damages they can expect from a jury will not be significantly different if the jury is simply instructed as to the “loss of enjoyment of life” element of psychic damages without the other elements.

Think about it: if you have a claim for loss of capacity for enjoyment of life, but no claim for mental anguish, aren’t you going to ask the same questions at trial about how your client feels when she cannot do chores for her family like she used to and when she thinks about her friends meeting for their Tuesday tennis match that she no longer can participate in?

There is some very direct and strong authority for the proposition that seeking damages for “loss of enjoyment of life” will not constitute a waiver of the psychotherapist-patient privilege. That case is *Partner-Brown v. Bornstein*, 734 So. 2d 555 (Fla. 5th DCA 1999). In that case, the plaintiff had tailored the original complaint to include a claim for “great pain and suffering” and loss of the “enjoyment of life,” but without including any claim for “mental anguish.” See *id.* at 556. The defense attorney persuaded the trial court that the plaintiff had placed her mental or emotional state at issue because of the claim for loss of “enjoyment of life” damages and obtained a discovery order allowing access to the Plaintiff’s mental health records.

The Fifth District on certiorari review quashed that discovery order, holding as follows:

If we were to adopt the position asserted here by the respondent, it would render the above statute a nullity and inject the issue of mental anguish into virtually every personal injury case. That is not the law and it is not what we held in *Nelson*. It should be apparent that physical pain and suffering, absent

mental anguish, can impair the enjoyment of life. If mental anguish is not pled, evidence thereof is inadmissible at trial—and discovery directed to it is not available to the defense.

Id. Using that case as a guide, you can tailor your trial strategy to introducing proof of the “lost enjoyment” of being injury-free, as contrasted to proof of the “anguish” from being injured. They are two sides of the same coin which you may be able to flip in a “heads-I-win, tails-you-lose” manner to get the same verdict.

Inadmissibility of Psychotherapy Evidence as Unfairly Prejudicial

While most of the effort involved in litigating the issue of the discoverability and admissibility of psychotherapy records pertains to the applicability of the statutory privilege, there are other bases for keeping out such evidence even in the situation where the privilege has been waived. You may decide to maintain your claims for all elements of psychic damage and risk a ruling that the privilege has been waived, where you can envision a different objection to the admissibility of psychotherapy evidence.

For example, in the *Morowitz* case, in addition to finding that the plaintiff had not put her psychiatric condition in issue by pleading mental anguish, the court also held that the evidence introduced there was unfairly prejudicial. The court reversed the judgment in favor of the defendant in *Morowitz*, holding that it was error to admit the detailed psychiatric evidence, including the videotaped deposition of the psychiatrist, stating as follows:

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. §90.403 Fla. Stat. (1991); *State v. McClain*, 525 So. 2d 420, 421 (Fla. 1988). While the fact that Morowitz suffered from a psychiatric condition may have been relevant, it was not necessary that the jury receive this information through the detailed deposition of her psychiatrist. ***The deposition of the psychiatrist unfairly prejudiced the jury against Morowitz, by making her mental condition, rather than her broken hip, the***

focus of the jury's attention. . . . Under these circumstances, the prejudice of Morowitz substantially outweighed the probative value of the deposition, and its admission was error. *See Pier 66 Co. v. Poulos*, 542 So. 2d 377, 380 (Fla. 4th DCA) (psychiatric testimony regarding plaintiff's suicidal thoughts prejudicial to defense), review denied, 551 So. 2d 462 (Fla. 1989); *Arroyo v. City of New York*, 171 A.D. 2d 541, 567 N.Y.S. 2d 257, 259 (N.Y. App. Div. 1991)(introduction of hospital records showing plaintiff's psychiatric treatment unduly prejudicial to plaintiff); *Sedgewick v. Kawasaki Cycleworks, Inc.*, 71 Ohio App. 3d 117, 593 N.E. 2d 69, 75 (Ohio Ct. App.) (psychiatrist's notes regarding plaintiff properly excluded because of potential of prejudice).

Morowitz, supra, at 494-95(emphasis added).

Don't stop if the judge holds that the privilege has been waived by your claim for psychic damages. Look for ways to keep out the harmful evidence.

Conclusion

Even if you believe that the jury is going to return the same verdict for your client, whether or not you abandon your typically-pleaded claims for mental anguish and other psychic damages, you may want to consider keeping some or all of those claims in the case by citing authorities like those referenced above, in order to keep the pressure on the defense. The defense attorney and claims adjuster may view the withdrawal of psychic damage claims as reducing the value of the case for settlement purposes, even if you do not attach such significance to that issue. Be careful how you plead such claims in light of the foregoing authorities, and you may realize a better recovery for your injured client.

Keep Tryin!

Roy