

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID HANSON,

Plaintiff,

v.

ORDER

08-cv-58-bbc

DANE COUNTY, DANE COUNTY
SHERIFF'S DEPARTMENT, DAWN
BARGER, TIM RICHTER and
STEVE WITTMANN,

Defendants.

On November 19, 2008, this court held a telephonic hearing on plaintiff's motion for a protective order, dkt. 20. Both sides were represented by counsel. Plaintiff opposes defendants' request for production of specified mental health treatment records. Defendants claim these records are relevant to plaintiff's claim for emotional distress damages; plaintiff responds that he is making a garden variety mental anguish claim and that his mental health records are irrelevant to this and maintain their confidentiality under *Jaffee v. Redmond*, 518 U.S. 1 (1996).

I am not convinced that plaintiff is correct. The Seventh Circuit has ruled, perhaps more broadly than it intended, that a plaintiff waives the privilege by claiming emotional distress damages. *See Doe v. Oberweiss Dairy*, 456 F.3d 704, 718 (7th Cir. 2006). Even so, we will proceed incrementally. Not later than December 15, 2008, plaintiff must provide to the court for confidential *in camera* review the disputed mental health records. The court, cognizant of defendants' January 23, 2009 deadline for disclosing expert witnesses, will determine whether these records are sufficiently relevant to a defense of plaintiff's emotional distress claims as to warrant disclosure to defendants. If the court rules that the records are disclosable, plaintiff

retains the option of withdrawing his emotional distress damages claim rather than allow disclosure of his records.

Phase II would be *in limine* motions: plaintiff would retain the right to move *in limine* to forbid admission or use of these records at trial. After hearing from defendants, the court would rule on admissibility. Again, plaintiff would have an option: if the court ruled that the records were admissible or otherwise fair game for use at trial, plaintiff would have the option of withdrawing his claim for emotional distress rather than allow the use of his records at trial.

Entered this 20th day of November, 2008.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge