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**IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**MEMORANDUM IN SUPPORT OF
MOTION FOR CONFIDENTIAL AND
PRIVILEGED PHYSICIAN
CONTACT WITH PATIENT
[Filed Under Seal]**

Case No. 081500526

Judge James L. Shumate

INTRODUCTION

Utah recognizes a patient-mental health professional privilege that is comprehensive and applies so that the Defendant Warren Jeffs may speak to physicians and mental health professionals retained by the defense and those communications are absolutely privileged and may not be obtained by the State. In addition, under the attorney-client privilege doctrine, counsel for the Defendant may be privy to these communications, either in person or by obtaining a report from the physicians and mental health professionals employed by the defense.

I. THE PHYSICIAN-PATIENT PRIVILEGE APPLIES BECAUSE THE DEFENDANT IS A PATIENT COMMUNICATING IN CONFIDENCE WITH A PHYSICIAN FOR THE PURPOSE OF GETTING TREATMENT, AND THESE COMMUNICATIONS ARE NOT USED AS AN ELEMENT OF A CLAIM OR A DEFENSE.

Under Rule 506(b) of the Utah Rules of Evidence, "a patient has a privilege to prevent disclosure of 'diagnoses made, treatment provided, or advice given,' as well as information obtained or disseminated as a result of an examination." *Burns v. Boyden*, 133 P.3d 370, 374 (Utah 2006) (quoting Utah R. Evid. 506(b)). As well, the privilege extends to mental health therapists, defined as "a person who is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker...or professional counselor." Utah R. Evid. 506(a)(3). In addition, the "patient may claim the privilege and...the treating physician 'is presumed to have authority ... to claim the privilege on behalf of the patient.'" *Burns*, 133 P.3d at 374-75 (quoting Utah R. Evid. 506(c)). Moreover, "a privilege applies regardless of the 'stage' of the proceedings...[and] in deciding preliminary questions, a court must still respect valid privileges." *Id.* at 375-76. For either a physician or a patient to claim the privilege, they must prove "that the information at issue was (1) 'communicated in confidence,' (2) to or from a physician or mental health therapist, and (3) 'for the purpose of diagnosing or treating the patient.'" *Id.* at 378 (quoting Utah R. Evid. 506(b)).

A. The Physician-Patient Privilege Applies Because The Defendant Is A Patient Under Rule 506 And His Communications With A Mental Health Professional Are For The Purpose Of Diagnosis And Treatment

The Defendant meets Rule 506's definition of a patient, and communications he makes with a mental health professional will be for the purpose of diagnosis and

treatment. In *Debry v. Goates*, the Utah Court of Appeals considered the definition of "patient" and whether a patient who did not subjectively believe she was in a physician-patient relationship was protected by the privilege. *Debry v. Goates*, 999 P.2d 582, 585 (Utah Ct. App. 2000).

The court first noted that "Rule 506 defines 'patient' as 'a person who consults or is examined or interviewed by a physician or mental health therapist.'" *Id.* (quoting Utah R. Evid. 506(a)(1)). However, the court further determined that the definition of "patient" should be read in conjunction with Rule 506's general definition of privilege, that "[i]f the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege ... to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, [and] (2) information obtained by examination of the patient." *Id.* (quoting Utah R. Evid. 506(b) (emphasis in original)). Thus, the court held that "by reading the definition of 'patient' in conjunction with the general rule of privilege, for the privilege to attach the consultation or examination must be for the purposes of receiving personal diagnosis or treatment from the doctor." *Id.*

The *Debry* court looked to other jurisdictions and concluded that, reading the two elements to Rule 506 in conjunction, "a physician-patient relationship was established even though the patient did not consider himself a patient at the time of treatment." *Id.* at 586 (citing *State v. Pitchford*, 697 P.2d 896, 900 (Kan Ct. App. 1985)). Thus, "even though the patient was unwilling, a therapeutic relationship was formed because treatment was the goal, and thus was within the scope of the physician-patient privilege." *Id.* (citing *Pitchford*, 679 P.2d at 900). In other words, "the 'controlling fact' in

such a determination is whether the encounter is "for the purposes of treatment." *Id.* (quoting *Pitchford*, 679 P.2d at 900).

In the instant case, like *Debry*, the controlling fact is that the consultation with a mental health professional is for the purposes of treatment, because this triggers the physician-patient privilege and any communications the Defendant makes with a mental health professional may not be disclosed to the State or another third party.

B. The Physician-Patient Privilege Applies Because The Communications Between The Defendant, Physicians, And Mental Health Professionals Will Be Made In Confidence

The physician patient privilege attaches when the communication between the patient and the physician or mental health professional is made in confidence. Commentators have noted that the "confidentiality requirement of the physician-patient privilege conforms with the same requirement for the husband/wife, clergyman-penitent, and lawyer-client privileges." *Mangrum and Benson on Utah Evidence Rule 506*, (2006-07 ed.). Thus, the confidentiality requirement for physician-patient privilege is the same as that established under Rule 504(6) of the Utah Rules of Evidence, which recognizes the attorney client privilege and notes that a "communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Utah R. Evid. 504(6).

In this case, the communication between the Defendant, all physicians, and mental health professionals will be confidential because any disclosures the Defendant

makes will not be intended to be revealed to third persons other than those to whom disclosure will help further his diagnosis and treatment.

In addition, Utah courts have held that the "purpose of the privilege is to encourage the patient to make a full and complete disclosure to a physician in order to receive effective medical treatment, free from the embarrassment and invasion of privacy that might result from the physician's disclosure of the information." *State v. Anderson*, 972 P.2d 86, 89 (Utah Ct. App. 1998). Thus, in this case, it would be inappropriate and unfair for the State or the Jail to insist that their representatives participate in a meeting between the Defendant and a mental health professional, since the purpose of the meeting will be for the Defendant to obtain treatment, and that purpose will not be achieved if he cannot make full disclosures and his privacy is being invaded. The Defendant, for obvious reasons, believes he is being persecuted by the State. Permitting the State to have a jail representative and/or a jail nurse to be present when a physician or mental health professional present will hinder the free flow of candid communication between the patient and the physician.

Thus, the communications between the Defendant and his physicians and mental health professionals will be made in confidence and the physician-patient privilege will be triggered.

C. The Physician-Patient Privilege Applies Because None Of The Explicit Exceptions To Rule 506 Pertain To This Case

Rule 506 "contains only three explicit exceptions" and none apply in this case. *Burns v. Boyden*, 133 P.3d 370, 377 (Utah 2006). Under Rule 506, no privilege exists where (1) the patient's physical, mental or emotional condition is used as an element of

a claim or defense; (2) the mental health therapist determines that the patient is in need of hospitalization; or (3) the communications are made during a court-ordered exam. Utah R. Evid. 506 (d)(1)-(3).

In this case, the Defendant's physical, mental, and emotional condition are not being used as an element of a claim or defense. The consultation with a mental health professional is solely to diagnose and provide treatment to the Defendant. Moreover, although the Utah Supreme Court held that "the language of Rule 506 is broad enough to permit any party in a proceeding to raise the mental state of a patient" as a claim or defense, a nonpatient "does not have the right to examine all of the confidential information or to search through [psychological] files without supervision." *Debry v. Goates* 999 P.2d 582, 587 (Utah Ct. App. 2000) (quoting *State v. Cardall*, 982 P.2d 79, 85-86 (Utah 1999)). Rather, in order to have access to patient's medical records, "a party must show with 'reasonable certainty' that some evidence favorable to his or her claim exists." *Id.* After "such a showing is made, then the party may request that the court review the otherwise confidential records to determine if they contain material evidence." *Id.* Finally, "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." *Id.*

In the instant case, the Defendant does not raise a claim or defense relating to his mental or physical condition, and, as addressed above, the entire purpose for the consultation with a mental health professional is for diagnosis and treatment. In addition, if the State determines that it has a claim against the Defendant relating to his physical or mental condition, this does not guarantee access to his communications with

the mental health professional; rather, in order to access any information, the State must establish with reasonable certainty that some evidence favorable to its claim exists. Since the purpose of the communications with the mental health professional have nothing to do with the claims against the Defendant, the State cannot establish that any part of the communications, diagnosis or treatment will include evidence favorable to its claims.

In addition, the two other exceptions to Rule 506 are inapplicable. First, the communications with the mental health professional are not for the purpose of hospitalizing the Defendant, and the consultation with the mental health professional are not court-ordered.

Thus, the Defendant's communications with a mental health professional, and that professional's diagnosis and treatment, are privileged under Rule 506 and no exceptions to that privilege apply.

II. THE COMMUNICATIONS BETWEEN THE DEFENDANT AND THE MENTAL HEALTH PROFESSIONAL MAY BE DISCLOSED TO DEFENDANT'S COUNSEL UNDER THE ATTORNEY-CLIENT PRIVILEGE DOCTRINE.

Any communications the Defendant makes with the mental health professional that are then disclosed to the Defendant's counsel are protected under the attorney-client privilege. The attorney-client privilege "is intended to encourage candor between attorney and client and promote the best possible representation of the client." *Gold Standard, Inc. v. American Barrick Resources (USA), Inc.*, 801 P.2d 909, 911 (Utah 1990). The attorney-client privilege is recognized in Rule 504 of the Utah Rules of Evidence. Under Rule 504, "a client has a privilege to refuse to disclose and to prevent

any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, [and] lawyer's representatives." Utah R. Evid. 504(b).

In this case, the confidential communications between the Defendant and the mental health professional and the subsequent communication to Defendant's counsel about his medical records, diagnosis and treatment are protected by the attorney-client privilege because the medical information will be used to counsel the Defendant. The Utah Supreme Court has noted that "the practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent." *Utah State Bar v. Summerhayes & Hayden, Public Adjusters*, 905 P.2d 867, 869 (Utah 1995). Moreover, "[i]t not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities." *Id.* at 869-70.

The *Utah State Bar* court determined that the Appellants, third-party adjusters, were engaging in the unauthorized practice of law because they were representing people who were injured in accidents, by investigating "their clients' injuries and damages by taking pictures of the accident scene; requesting medical records and statements; requesting police reports; conducting personal interviews with clients; investigating officers, witnesses, and other claims adjusters; and researching similar cases." *Id.* at 869. Because the Appellants were viewing their clients' medical records

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and advising them about their legal rights, duties and relationships with other parties, the court determined that they were engaged in the unauthorized practice of law.

In the instant case, disclosure of Defendant's medical records, diagnosis and treatment is protected by the attorney-client privilege for the same reasons that the Utah Supreme Court found the use of medical records problematic by non-lawyers: these records will help the Defendant's counsel in advising their client on his legal rights, duties and obligations.

Thus, the Defendant's diagnosis, treatment and medical records are protected by the attorney-client privilege because they are "confidential communications made for the purpose of facilitating the rendition of professional legal services." Utah R. Evid. 504(b).

CONCLUSION

Therefore, any communications between the Defendant and his physicians and mental health professionals are protected under the physician-patient privilege because they will be made confidentially for the purpose of facilitating diagnosis and treatment. Moreover, these communications are also protected under the attorney-client privilege because they are being used by Defendant and counsel for the purpose of facilitating the rendition of professional legal services. Thus, neither the State nor any representatives of the Jail may be privy to the communications.

DATED this 11th day of February, 2007.

BUGDEN & ISAACSON, L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 7th day of February, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Brock R. Belnap
Washington County Attorney
178 North 200 East
St. George, UT 84770

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE:

