UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

GLENDA ROBERTSON,

Plaintiff-Intervenor,

v.

COCA-COLA ENTERPRISES, INC. D/B/A MIDWEST COCA-COLA BOTTLING CO.,

Defendant.

CIVIL NO. 03-3296 (DSD/JSM)

ORDER

JANIE S. MAYERON, U.S. Magistrate Judge

The above matter came on before the undersigned on July 12, 2004, upon Coca-Cola Enterprises, Inc.'s ("CCE") Renewed Motion to Compel Signed Authorizations, to Compel Responses to Discovery Requests, to Compel IME, and for Sanctions [Docket No. 40].

Jordan Kushner, Esq. appeared on behalf of plaintiff-intervenor Glenda Robertson ("Robertson"). Todd Presnell, Esq. appeared on behalf of CCE.

The Court, upon all of the files, records, and proceedings herein, now makes and enters the following Order.

IT IS HEREBY ORDERED that:

1. CCE's Renewed Motion to Compel Signed Authorizations, to Compel Responses to Discovery Requests, to Compel IME, and for Sanctions [Docket No. 40] is GRANTED in part and DENIED in part as follows:

   a. CCE's Motion to Compel Signed Authorizations is GRANTED. Robertson shall provide the signed authorizations sought by CCE, as set forth in the Memorandum below.

   b. CCE's Motion to Compel Responses to Discovery Requests is GRANTED. Robertson shall provide supplemental responses to Interrogatory Nos. 7 and 8, and Requests for Production Nos. 12 and 13, as set forth in the Memorandum below.

   c. CCE's Motion to Compel an IME is DENIED.

   d. CCE's Motion for Sanctions is GRANTED.

2. Robertson shall produce to CCE the information, documents and releases discussed in this Order on or before December 31, 2004.

Dated: December 15, 2004

s/ Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

Robertson filed a Complaint in the instant action alleging that CCE Coca Cola Enterprises Inc. discriminated against her on the basis of her race and gender when she was not hired in October 2001.[1] In this Complaint, Robertson indicated that she had suffered damages including emotional distress, humiliation and embarrassment. Complaint, ¶ 13. In response to CCE's Interrogatory No. 16, which sought information

[1] The parties stipulated to Robertson's intervention in the instant case on July 2, 2003.

concerning financial losses, Robertson claimed $200,000 for embarrassment, humiliation, and emotional distress. Affidavit of Patrick R. Martin ("Martin Aff."), Ex. C (Answer to Interrogatory No. 16).

On March 5, 2004, CCE filed a Motion to Compel Discovery, to Compel Signed Authorizations, to Compel IME, and to Modify the Pre-Trial Schedule [Docket No. 26]. This Court denied CCE's request that Robertson submit to an independent medical examination ("IME") and for disclosure of information related to Robertson's medical history and medical records pursuant to CCE's Document Request Nos. 12 and 13 and CCE's Interrogatory Nos. 7 and 8. However, the Court noted that it would entertain a renewed request by CCE after Robertson had been deposed. The Court also permitted CCE to ask Robertson at her deposition general questions regarding her past medical and mental health history (e.g., the types of illnesses and injuries for which she has sought treatment in the past; the dates of these treatments; the types of medical or mental health providers she has seen in the past; and the nature of the emotional distress she claims she has experienced in connection with her treatment by CCE, Pepsi Bottling Group, and ABC Bottling).

Robertson was deposed on May 25, 2004. During the deposition, Robertson stated that she had been seeing a psychologist, Dr. BraVada Garnett-Akinsanya ("Dr. BraVada") for mental stress that Robertson had been going through since November 2003, including for CCE not hiring her. Second Affidavit of Patrick R. Martin ("2d Martin Aff."), Ex. A (Robertson Dep. 45, 220-222). Specifically, when CCE asked Robertson if she was seeing Dr. BraVada for emotional or mental-type injuries that she claims as a result of CCE not hiring her, Robertson testified:

> I am seeing Dr. Bravada, not because Coca-Cola did not hire me, but to be rejected from Coca-Cola as just being who I am as a person, as a woman, as an individual. To be, for rights to be taken away from me, to be denied, to be degraded, to be pushed away just as far as—just knowing that Coca-Cola treat people the way they do is just a little bit too much to handle. Just knowing that they're an enterprise or corporation that serves the community that uses black women for advertisement to the black community, and yet when a black woman come to get a job, they can't even get a job to provide welfare for their families, but it's quick to go in the paper about how minority, how many minorities are not working and don't have jobs because we're denied the chance and the opportunity. Yes, I am seeking emotional stress.

Id., (Robertson Dep. 222-223). This testimony contradicted statements made by Robertson before the deposition that she had not sought and was not going to seek mental health treatment in connection with this lawsuit. See Martin Aff. Ex. B (March 15, 2004 Declaration of Glenda Robertson, ¶ 2).

After taking Robertson's deposition, CCE renewed its Motion to Compel Signed Authorizations, to Compel Responses to Discovery Requests, to Compel IME, and sought sanctions.

I. Independent Medical Evaluation

CCE believes it is entitled to an IME of Robertson. In support of its motion to compel, CCE claims that Robertson has placed her medical condition in controversy under Rule 35 by potentially demanding $600,000[2] in damages for mental anguish, and by seeing a psychologist since November 2003 and discussing with this psychologist her mental anguish regarding CCE's failure to hire her. In addition, CCE claims that it

[2] Robertson claimed in her interrogatory answers (Answer to Interrogatory No. 16) and at her deposition (2d Martin Aff., Ex. A (Robertson Dep. at 220)) that her damages for embarrassment, humiliation and mental distress amounted to $200,000. CCE then trebled this amount to arrive at the figure of $600,000 because Robertson is seeking treble damages under the Minnesota Human Rights Act. See CCE's Memorandum in Support of Motion to Compel Discovery, to Compel Signed Authorizations, to Compel IME, and to Modify the Pre-Trial Schedule [Docket No. 27], 5.

will suffer prejudice if not given the opportunity to explore Robertson's claim or defend itself against the damages Robertson requested. In this regard, CCE claims that there may be other causes for Robertson's mental anguish. CCE further argues that an IME is appropriate because expert testimony is appropriate if an issue presented is not within common knowledge.

In response, Robertson asserted that CCE cannot show that her mental condition is "in controversy" and CCE has not presented "good cause" to warrant an IME, as required by Rule 35. Robertson asserted that her case against CCE remains a "garden variety" emotional distress claim that does not justify her to submit to an IME. In support of this contention, Robertson stated that while she discussed her lawsuit against CCE with her psychologist, that alone does not justify requiring her to submit to intrusive psychological testing and a psychiatric examination. Moreover, Robertson states that she is not claiming that CCE's refusal to hire her caused her need for therapy and states that she will not submit any evidence of treatment or expert testimony at trial regarding emotional distress.

Before a court will order a claimant to submit to an IME, the defendant must show that her physical or mental condition is "in controversy" and that there is "good cause" for the examination. According to Rule 35(a) of the Federal Rules of Civil Procedure,

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown . . . .

Fed. R. Civ. P. 35(a). The "in controversy" and "good cause" elements are not met by "mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964). This Court must decide, by making a "discriminating application," whether the "in controversy" and "good cause" requirements have been adequately demonstrated by sufficient information. Id. at 118-19; Ali v. Wang Laboratories, Inc., 162 F.R.D. 165, 167 (M.D. Fla. 1995).

In determining whether the "in controversy" and "good cause" requirements have been met, one or more of the following factors must be present:

1. a cause of action for intentional or negligent infliction of emotional distress;

2. an allegation of a specific mental or psychiatric injury or disorder;

3. a claim of unusually severe emotional distress;

4. the plaintiff's offer of expert testimony to support a claim of emotional distress; and/or

5. the plaintiff's concession that her mental condition is 'in controversy" within the meaning of Rule 35.

O'Sullivan v. Minnesota, 176 F.R.D. 325, 328 (D. Minn. 1997).

Robertson has not alleged a cause of action for intentional or negligent emotional distress nor has she alleged that she suffers from any specific psychiatric disorder. Further, she has not conceded that her mental condition is in controversy and she has affirmatively stated that she will not offer any expert testimony to support her claim of

mental distress. Thus, under O'Sullivan, the only possible basis for ordering an IME is if Robertson is making "a claim of unusually severe emotional distress." O'Sullivan, 176 F.R.D. at 328.

While Robertson seeks a substantial amount of money for emotional distress damages ($200,000 and possibly more), that alone is not sufficient information to support the assertion that her mental condition is "in controversy" and order her to submit to an IME. See Turner v. Imperial Stores, 161 F.R.D. 89, 97 (S.D. Cal. 1995) (concluding that even though plaintiff sought damages in excess of one million dollars for "humiliation, mental anguish, and emotional distress," without more, the amount did not alter the court's conclusion that plaintiff's claim for damages for emotional distress was a "garden-variety" claim, and therefore did not warrant an independent mental examination). Here, there is nothing in the record to suggest that Robertson is either claiming or suffering from unusually severe emotional distress as a consequence of CCE's refusal to hire her. Therefore, the third factor of O'Sullivan does not apply to Robertson and cannot provide the basis for an IME. Accordingly, this Court denies CCE's motion to compel Robertson to submit to an IME.

II. Responses to Discovery Requests and Signed Authorizations

CCE's Interrogatory Nos. 7[3] and 8[4] and CCE's Requests for Production Nos. 12[5] and 13[6] sought information and records regarding Robertson's medical history and mental health history.

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[3] CCE's Interrogatory No. 7 stated: "Since you were eighteen (18) years old, have you ever been admitted to any hospital, clinic or other medical institution, or been under the care and treatment of any physician? If so, please identify each such hospital, clinic, or other medical institution and each such physician; inclusive dates of confinement at each hospital, clinic or medical institution and the dates of such

In support of the motion to compel, CCE argued that for all the same reasons it is entitled to an IME, it is also entitled to Robertson's medical and mental health history. CCE also argued that its experts need access to Robertson's medical and mental health records in order to have a fair opportunity to determine whether any alleged mental

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treatment by any such physician; and state the reason for such confinement in each such hospital, clinic or medical institution, and the condition or conditions for which you were treated by such physician." In response to this request, Robertson stated: "Plaintiff-Intervenor objects to this Interrogatory as requesting information that is neither relevant nor reasonably calculated to lead to relevant evidence. Without waiving any objection, Plaintiff-Intervenor responds as follows: Plaintiff-Intervenor has not sought any treatment related to the occurrences underlying this action."

[4] CCE's Interrogatory No. 8 stated: "If you have ever been examined psychologically, received any kind of psychological or psychiatric care and/or treatment, or have been admitted to any psychiatric institution at any time in your life, please identify all psychologists, psychiatrists, counselors, psychiatric institutions, or similar mental health care providers, who or which rendered services to you; the date or dates of examination, care, or treatment by each such psychologist, psychiatrist, or counselor, and the date or dates of admission and discharge as to each psychiatric institution; and the nature of the care or treatment rendered by each such psychologist, psychiatrist, counselor, or psychiatric institution, and the reason or reasons for such treatment or hospitalization." In response to this request, Robertson stated: "Plaintiff-Intervenor objects to this Interrogatory as requesting information that is neither relevant nor reasonably calculated to lead to relevant evidence. Without waiving any objection, Plaintiff-Intervenor responds as follows: Plaintiff-Intervenor has not sought any treatment related to the occurrences underlying this action."

[5] CCE's Request for Production No. 12 sought the following: "Produce any and all records pertaining to the treatment, diagnosis, or consultation of Glenda Robertson by any mental health care provider, including, but not limited to, records of psychologists, psychiatrists, therapists, counselors, or any other mental heath provider." Robertson responded: "Plaintiff-Intervenor objects to this Request as overly broad, and neither relevant nor reasonably calculated to lead to relevant evidence."

[6] CCE's Request for Production No. 13 sought the following: "Produce any and all medical records of any healthcare provider that has seen, treated, or consulted with Glenda Robertson at any time from 1985 through the present, including, but not limited to, nurses' notes, doctors' notes, x-ray reports, lab reports, pharmacological prescriptions, or any other document of any kind pertaining to the medical condition of Glenda Robertson." Robertson responded: "Plaintiff-Intervenor objects to this Request as overly broad, and neither relevant nor reasonably calculated to lead to relevant evidence."

anguish or suffering by Robertson is related to other sources of physical and emotional distress, and to address Robertson's claim for lost wages. In addition, CCE argued that Robertson should be required to sign authorizations to allow CCE to obtain medical documents immediately.

In response, Robertson asserted that her case against CCE remains a "garden variety" emotional distress claim that does not justify disclosure of her mental health records. In support of this contention, Robertson stated that she discussed her lawsuit against CCE with Dr. BraVada, but that alone does not justify requiring her to disclose her treatment records. Robertson also claims she talked to Dr. BraVada about legal issues she had discussed with her attorney, and asserts that is is not appropriate for CCE to discover these communications because they are governed either by the attorney-client privilege or work product doctrine. See Hearing Transcript, July 17, 2004, ("TR"), pp. 37, 38, 41-44. Additionally, Robertson argued that such information is irrelevant because she is not claiming that CCE's refusal to hire her caused her to need therapy and she will not submit any evidence of treatment or expert testimony at trial. Robertson further argued that any possible relevance of the requested documents is outweighed by her privacy interest in the confidentiality of her medical records.

A. Relevancy of Medical and Mental Health Records

Federal Rule of Civil Procedure 26 does not contain the "in controversy" and good cause" requirements contained in Rule 35(a), making Rule 26 less stringent. See Schlagenhauf, 379 U.S. at 117 ([I]n none of the other discovery provisions is there a restriction that the matter be 'in controversy,' and only in Rule 34 is there Rule 35's

requirement that the movant affirmatively demonstrate 'good cause.'").[7] Rule 26 provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." FED. R. CIV. P. 26(b)(1). "Generally, discovery may inquire into all information, not otherwise privileged, that is relevant to the subject matter of the action, provided that it is reasonably calculated to lead to the discovery of admissible evidence." Minnesota Specialty Crops, Inc. v. Minnesota Wild, 210 F.R.D. 673, 675 (D. Minn. 2002) (citing FED. R. CIV. P. 26(b)(1)); see also Burns v. Hy-Vee, Inc., 2002 U.S. Dist. LEXIS 23662, at *2 (D. Minn. 2002). In addition, the Court has discretion to limit relevant discovery considering the circumstances of the case. See FED. R. CIV. PRO. 26(b)(2).

"[E]ven if the plaintiffs' physical or mental conditions are not 'in controversy,' the medical records can still be relevant under Rule 26." Burrell v. Crown Central Petroleum, Inc., 177 F.R.D. 376, 383 (E.D. Tex. 1997). See also Walker v. Northwest Airlines, Civil No. 00-2604, at 7 (D. Minn. Oct. 28, 2002) (finding that "simply because the 'in controversy' standard of Rule 35 [for an IME] is not satisfied, it does not follow that the medical records are undiscoverable.") Therefore, regardless of whether Robertson's mental or emotional condition has been placed in controversy, her mental health records may nonetheless be relevant if they shed light on other contributing causes of her claims of emotional distress. Id. at p. 8.

A plaintiff puts her mental condition at issue if she intends to seek anything more than nominal damages for any alleged emotional distress. See Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) (finding that employee's claim of sex

[7] In fact, since 1970, the "good cause" standard was removed from Rule 34. See Fed. R. Civ. P. 34 advisory committee's note (1970).

discrimination and emotional distress placed her medical condition at issue, making her medical records relevant, and, absent a showing of bad faith, discoverable); Walker, at p. 9 (finding that if plaintiff intended to seek anything more than nominal damages for any alleged emotional distress, then she has placed her mental condition into issue in the case, and defendant is entitled to explore any evidence, including plaintiff's medical records, which may be relevant to such a claim); Doverspike v. Chang O'Hara's Bistro, Inc. et al., Civil No. 03-5601 (D. Minn. July 13, 2004) (same); Mary Briel v. Chang O'Hara's Bistro, Inc. et al., Civil No. 03-6549, at 5 (D. Minn. July 13, 2004) (same). Furthermore, "[d]efendant is entitled to discover to what extent the plaintiffs' mental condition, prior to the alleged harassment, may have contributed to any emotional distress for which they now seek." E.E.O.C. v. Danka Industries, Inc., 990 F.Supp. 1138, 1142 (E.D. Mo. 1997).

Here, Robertson is seeking more than nominal damages, and therefore her emotional condition is at issue. While Robertson does not intend to present medical or mental health records at trial, a significant source of her damages are based on her claim of emotional distress, and are therefore, relevant and discoverable. See Doverspike and Briel, at p. 5 (finding that since plaintiffs' mental conditions were at the crux of the case, their mental health records were discoverable); Burrell, 177 F.R.D. at 384 (finding that "[w]ithout showing that the mental condition of a plaintiff is somehow the crux of the case, records reflecting the mental condition are not relevant so as to fall under mandatory disclosure of Rule 26(a)(1)(B).").

Further, Robertson may not hide behind a claim of privacy to keep her medical records from CCE. "The right of privacy as to plaintiff's personal history that a plaintiff

may otherwise have must be balanced against the defendant's right to a fair trial." Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 298 (D.C. Pa. 1983); J.J.C. v. Fridell, 165 F.R.D. 513, 517 (D. Minn. 1995). If Robertson contends that she has suffered from emotional distress, "defendant is entitled to present evidence that other stressful situations in her past personal history have contributed to her emotional distress. Lowe, 101 F.R.D. at 298. Here, in order for CCE to have a fair trial, it must have the opportunity to discover and present other reasons for Robertson's mental distress.

In summary, this Court concludes that Robertson's mental health records are relevant to the claims in her Complaint. Robertson has alleged emotional distress caused by CCE's failure to hire her. Other reasons for mental distress could bear on CCE's defense. Accordingly, this information could lead to the discovery of admissible evidence, such as information bearing on other causes of Robertson's emotional distress, and is discoverable, unless Robertson prevails on her argument that certain portions of Dr. BraVada's records should not be produced because they reveal attorney-client advice and attorney work product. See TR, pp. 37, 38, 41-44. On the other hand, with respect to CCE's request that it be permitted to discover all of Robertson's medical history and records, this Court finds that it is entitled to discover only those records that reflect physical ailments and treatments that either (1) lead Robertson to seek mental health treatment or which she addressed in her therapy (e.g. the hysterectomy which was performed in September or October 2003), or (2) bear on her claim of lost wages (e.g. medical conditions or treatment that caused plaintiff to miss work since November 2001 to the present). CCE is not entitled to obtain information and records for any other treatments Robertson may have received for physical ailments or injuries predating her

rejection of employment by CCE, because CCE has not established that Robertson's general medical treatment has any relevancy to her mental and emotional health or her claim for lost wages.

B. Waiver

Robertson argues that communications with Dr. BraVada about communications with her attorney and other litigation issues are protected by the attorney-client privilege or the work product doctrine, and that to the extent Dr. BraVada's records reflect such communications, they should not be produced. In support of this contention, Robertson analogizes her situation to that of a person who described attorney-client communications in a diary, which would be protected by the attorney-client privilege. Robertson argues that if entries in personal diaries are protected, then confidential attorney matters discussed in a confidential therapeutic setting deserve even greater protection.

In response, CCE argues that Robertson has waived the psychotherapist-patient privilege and that the attorney-client privilege and the work-product doctrine do not apply to Robertson's communications with her psychologist.

It is true that the Supreme Court recognized a federal psychotherapist-patient privilege in Jaffee v. Redmond, 518 U.S. 1, 15 (1996). However, where a plaintiff has waived the privilege by placing her mental condition directly at issue, she may not hide behind a claim of privilege. See Schoffstall, 223 F.3d at 823; see also Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997). This Court has already found that Robertson's mental condition is at issue and therefore, Robertson may not assert

the psychotherapist-patient privilege to protect communications she had with her psychologist regarding communications she had with her attorney.

Further, the attorney-client privilege applies to situations in which a communication is made to an attorney or an attorney's agent for the purpose of facilitating the rendition of legal advice to the client. In re Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994). Here, Dr. BraVada was not retained to assist Robertson's attorney with trial preparation and could not be considered an agent of Robertson's attorney. Therefore, Robertson's communications with Dr. BraVada about conversations she had with her attorney are not covered by the attorney-client privilege, or were waived by her disclosure to Dr. BraVada, a third party. Accordingly, CCE is entitled to review Dr. BraVada's records in their entirety.

In conclusion, this Court concludes that Robertson's objections to Interrogatory No. 8 and Document Request No. 12 are unfounded and shall be answered in their entirety. In addition, Robertson shall supplement her responses to Interrogatory No. 7 and Document Request No. 13 by providing the requested information and documents for any medical treatments which lead to or were discussed by her in any mental health therapy, or which are related to any time lost from work from November 2001 to the present. Further, CCE shall present Robertson with and Robertson shall sign (1) a new authorization form which authorizes the release of records reflecting the treatment or diagnosis of a mental, emotional, or psychological condition, and (2) an authorization form which shall be directed solely to those medical providers who afforded treatment to Robertson for any illness, injury or condition which lead to or was discussed in mental health therapy, or which are related to any time lost from work from November 2001 to

the present. Robertson shall also produce records of Dr. BraVada's treatment in their entirety. Finally, Robertson shall make herself available for another deposition regarding mental health treatment and information disclosed in the medical or mental health records required to be produced in this Order.

III. Sanctions

CCE argues that it is entitled to sanctions. In support of this contention, CCE argues that Robertson misled the Court and opposing counsel on three separate occasions: (1) when she responded to Interrogatories Nos. 7 and 8 and Request for Production Nos. 12 and 13; (2) when she stated in her declaration that she had not sought or obtained any mental health treatment in response to CCE's refusal to hire her, and did not intend to do so; and (3) when Robertson's counsel stated in court that Robertson had not been treating with a psychologist or mental health care physician. Contrary to these statements, CCE asserts that on May 25, 2004, Robertson admitted that she had been treating with Dr. BraVada since November 2003 and that one purpose for her treatment was for CCE not hiring her and for the mental stress that she has been suffering within the past two years. CCE argues that this contradictory testimony and failure to cooperate in discovery warrant sanctions.

In response, Robertson argues that CCE has failed to present evidence that she misrepresented her prior statements. In support of this contention, Robertson stated that she began seeing a psychologist in September 2003 in connection with her cancer surgery. In February 2004, she began seeing a psychologist for work-related problems at American Bottling Company ("ABC"). Robertson Dep. at 55-55, 221. In the course of treatment for problems with ABC, the psychologist asked her why she did not go to work

for another bottling company. Id. at 221. Robertson then discussed her lawsuit against CCE. Id. at 221-222. According to Robertson, her treatment records do not indicate any discussion about CCE until March 25, 2004, which is after Robertson's responses to the interrogatories, requests for production of documents, and her declaration. Kushner Decl., dated June 16, 2004, ¶ 3. Robertson further argued that the treatment records indicate that Robertson discussed anxiety arising out of the litigation process rather than CCE's refusal to hire her.

The Court may issue sanctions based on a party's failure to cooperate in discovery. See Fed. R. Civ. P. 37. Here, the Court finds that sanctions are appropriate, not because Robertson misled the Court at the first motion to compel, but rather because she did not timely supplement her responses to discovery and her declaration to this Court prior to her deposition on May 25, 2004. A review of Dr. BraVada's treatment documents shows that while the first mention of CCE was on March 25, 2004, the day of the hearing on CCE's first motion to compel, the fact is that Robertson discussed CCE with Dr. BraVada on several more occasions after that date, in direct contradiction to her interrogatory answers and declaration to this Court.[8] Had Robertson apprised CCE of those events, CCE could have made a decision to seek

[8] In her privilege log submitted to the Court with Dr. BraVada's records, Robertson characterizes the various entries in Dr. BraVada's records regarding CCE as "discussion of communications with attorneys and litigation issues," "discussion of settlement negotiations, communications with attorneys and litigation issues," and "discussion of litigation issues." These characterizations may or may not be accurate descriptions of what was discussed by Robertson with Dr. BraVada regarding CCE. The point is that Robertson did, by her own testimony, state that she had been seeing Dr. BraVada for mental stress that she had been going through since November 2003, including for CCE not hiring her. CCE is entitled to question Robertson regarding these consultations.

relief from this Court prior to her deposition, and avoided the costs of re-deposing her after bringing this motion. For that reason, in the event that CCE chooses to re-depose Robertson regarding (1) her mental health treatment with Dr. BraVada or any other mental health provider, or (2) treatment with any other medical provider who saw Robertson for any illness, injury or condition which lead to or was discussed in mental health therapy, or which are related to any time lost from work from November 2000 to the present, this Court will assess Robertson with the attorneys' fees and costs incurred by CCE to re-depose her.[9]

J.S.M.

[9] Following the re-deposition of plaintiff, CCE shall submit an affidavit to this Court setting forth the attorneys' fees and expenses incurred by it in connection with this deposition. This affidavit shall describe the services rendered and itemize the hours spent and hourly rate charged for these services, and all costs incurred.