CIRCUIT COURT OF ILLINOIS
THIRD JUDICIAL CIRCUIT
MADISON COUNTY

JOHN Q. SMITH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16-L-0000
	)	
ABC BARGE Co.,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL (with MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL AND MOTION FOR SANCTIONS BELOW)

COMES NOW Plaintiff, by and through his undersigned attorney, Gary Burger and Burger Law, and submits this Memorandum in Support of Plaintiff's Motion to Compel.

This is a Jones Act case in which the Plaintiff was injured on the Mississippi River in the course and scope of his employment.

Plaintiff has propounded Interrogatories and Request for Production to Defendant. Defendant has objected to and not produced certain documents. Pursuant to Illinois Supreme Court Rule 201(k) counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences (in Missouri: Plaintiff has attempted to resolve these discovery disputes, in good faith, but has been unable to do so). The specific requests are addressed below.

1. <u>Defendant Must Produce Surveillance Video of Plaintiff</u>

It is well established in Illinois that video surveillance of the Plaintiff must be produced. *Shields v. Burlington Northern & Santa Fe Ry. Co.*, 353 Ill. App. 3d 506 (1st Dist. 2004). In *Shields*, the First District Appellate Court reasoned that there is little to no distinction between video surveillance and other recorded statements which are discoverable. Both are statements, made by a party, and neither reveal an attorney's mental impressions or litigation plans for trial.

Illinois Supreme Court Rule 201(b)(1) sets out the state's expansive view of discovery:

> Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts...

For purposes of discovery in Illinois, only "opinion work product" matter which discloses the theories, mental impressions or litigation plans of a party's attorney is protected from discovery. See *Mlynarski v. Rush Presbyterian St. Luke's Medical Ctr.*, 213 Ill. App. 3d 427, 432 (1st Dist. 1991).

Missouri similarly holds that video surveillance is typically considered a "statement" made by the party being filmed and is therefore discoverable. See *Feltz v. Bob Sight Ford, Inc.*, 341 S.W.3d 863-869 (Mo. App., 2011).

2. <u>Defendant Must Produce Photographs of the Accident Scene</u>

According to longstanding Illinois Law, relevant photographs of the scene must be produced by the defendant. "[T]he obligation to produce photographs and statements does not depend on how the photographs are used. In fact, Supreme Court Rule 201(b)(1) requires full disclosure of any matter relevant whether it relates to a claim or defense." *Scales v. Benne*, 355 Ill.Dec. 350, 354 (Ill. App., 2011) (citing trial court opinion). It is important to note that there are two types of "work product" in Illinois: "work product" which includes things such as statements, photographs, and memoranda which has been obtained in anticipation of trial, and "opinion work product" which includes mental impressions, conclusions, opinions, and strategies of the attorney. See *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc*., 189 Ill.2d 579 (2000), *Mlynarski v. Rush Presbyterian-St. Luke's Medical Center*, 213 Ill.App.3d 427 (1st Dist. 1991). As discussed above in *Mlynarski*, opinion work-product is the only type which is protected.

Under Missouri law, photographs which constitute trial preparation materials under the law are not absolutely privileged as work product. Instead, the photographs are subject to discovery if a sufficient showing is made. See *Porter ex rel. Aylward v. Gottschall*, 615 S.W.2d 63, 64-65 (Mo. Banc 1981). In *Gottschall,* the Court held that an inability to obtain a substantial equivalent equates to a sufficient showing per Supreme Court Rule 56.01(b)(1), and these types of photographs have to be produced. *Id.* For example, if the defendant has the only photos showing the scene then those are typically ordered to be produced. However, if the defendant takes photos of the scene after the incident, then these will usually not be ordered to be produced unless they are to be used at trial.

3. Defendant Must Produce Accident Reports Prepared by the Captain

Under Illinois law, the accident reports generated by the Captain of the ship must be produced by the Defendant. Most recently this was confirmed by a U.S. District Court in Northern Illinois in 2013. Applying Illinois privilege law, the judge ruled that accident reports prepared by hotel employees when a guest was injured did not qualify as protected material under attorney-client privilege or the work product doctrine. *Nelson v. Intercontinental Hotels Group Operating Corp.*, 2013 WL 5890612 (N.D. Ill. Nov. 1, 2013). See *Shere v. Marshall Field & Co.*, 327 N.E.2d 92, (Ill. App. 1 Dist., 1974).

Missouri Courts have long held that accident reports need not be produced. However, in *Porter v. Gottschall, Inc.*, 615 S.W.2d 63 (Mo. banc 1981), the Supreme Court ruled that reports may be produced "if substantial need for the items and an inability to obtain the substantial equivalent without undue hardship are shown." Id. at 65. In *May Dept. Stores Co. v. Ryan*, 699 S.W.2d 134 (Mo. App. E.D., 1985) the court noted that the rule does not usually apply to accident reports. It then stated:

"We have not hesitated to order the production of employee prepared incident reports where the record shows such reports to have been made for purposes other than anticipated litigation, and where the transmittal of such reports to an insurance company is unrelated to the insurance coverage and the defense of a potential lawsuit. In *State ex rel. Little Rock Hospital v. Gaertner*, 682 S.W.2d 146 (Mo.App.1984), we held an incident report prepared by an employee and forwarded to an insurance company was subject to discovery. However, as opposed to the facts in the instant case, the report in Little Rock Hospital, was prepared as part of a computerized future loss prevention program, not with a view toward potential litigation. The report form expressly stated that it was "not a notice of loss." Rather, it was made and used in the ordinary course of the hospital's business as a means of accident prevention. Therefore, the report was neither privileged, as it was not prepared or transmitted pursuant to the insurance or indemnity agreement, nor was it work product, as it was not made in anticipation of litigation."

So, under Missouri law, if an incident report is truly made in anticipation of litigation it is not producible, but if it is not, then it may be produced.

4. <u>Defendant Must Produce Crewmember Statements</u>

Defendant must produce the Crewmember statements. Because the crewmembers were low level employees and the statements were taken by a supervisor, they were not "top management" as required for work product protection in Illinois. Illinois uses the control group test. The Illinois Supreme Court describes this test as:

> [T]he only communications that are ordinarily held privileged under this test are those made by top management who have the ability to make a final decision, rather than those made by employees whose positions are merely advisory. We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group.

Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257-258 (Ill., 1982). Consequently, the statements made by crewmembers of John Q. Smith must be produced under the control group test. See also *Mlynarski*, *supra*.

In Missouri, statements of witnesses are typically included within the protections of work product and are usually not discoverable. See *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 554 (Mo. banc 1995). In order to protect the crewmember statements from discovery in Missouri, the Defendant must "establish, through competent evidence, that the materials sought to be protected are documents or tangible things prepared in anticipation of litigation or for trial, and were prepared by or

for a party or a representative of that party." *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 323-324.

5. Statements made from the Claims Adjuster to the Captain about the Accident

Under Illinois law, statements made from the claims adjuster to the Captain would likely be analyzed under the control group test. Because neither the claims adjuster nor the captain are likely considered "top level management," and these statements are not considered "mental impressions" of an attorney. Statements by the claims adjuster to the Captain are discoverable.

Under Missouri law, because the claims adjuster would likely be considered to be a "representative" of the defense, statements made from the claims adjuster in anticipation of litigation would likely be protected by Missouri work product. See supra *Diehl* at 323-324. Note also that if the claims adjuster is from an outside insurance agency, the insurer-insured privilege can be invoked with further protection from discovery.

6. Statements made from the Claims Adjuster to the Nurse Case Manager

Under Illinois law, statements made from the claims adjuster to the nurse case manager would also likely be analyzed under the control group test. As neither are likely considered "top level management," and these statements would likely not be considered "mental impressions" of an attorney, the statements made by the claims adjuster to the nurse case manager are discoverable.

In Missouri, statements made from the claims adjuster to the nurse case manager would likely consist of medical care which was rendered to the Plaintiff and would not be considered work product made in anticipation of litigation. Consequently, these statements

are also likely discoverable in Missouri. But if the claims representative is from an outside insurance company, there may be additional protection from discovery.

7. <u>Statements made from the Claims adjuster to the Defense Attorney</u>

There have been statements made by the claims adjuster to counsel for defendant regarding the incident at issue. If the claims adjuster is in house with the defendant then this communication should be protected by the attorney-client privilege.

If the adjuster is from an insurance company this should also be protected. As discussed previously, in Illinois the attorney-client privilege extends to communications between an insured and an insurer when the insurer is under an obligation to defend his insured. See *Claxton*, 201 Ill.App.3d 232 (1st Dist. 1990). Likewise, "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." *People v. Ryan*, 30 Ill. 2d 456, 461 (1964); *Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, 992 N.E.2d 43, (Ill. App., 2013).

To establish the insurer-insured privilege in Illinois, the party asserting the privilege must prove: 1) the identity of the insured; 2) the identity of the insurance carrier; 3) the duty to defend a lawsuit; and 4) that a communication was made between the insured and an agent of the insurer. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill.App.3d 541, 551 (1st Dist. 2004). As in-house counsel for the insured, ABC Barge Co., the statements made to the defense attorney by the claims adjuster regarding the claim of John Q. Smith are probably privileged under Illinois law.

Under Missouri law, the communication between an insured and its liability insurer generally are privileged. See *State Ex Rel. Cain v. Barker*, 540 S.W.2d 50 (Mo. 1976). This insurer-insured privilege is limited to communications rather than facts or business records. See *State ex rel Day v. Patterson*, 773 S.W.2d 224, 227-230 (Mo. App. E.D. 1989). Consequently, these statements are likely protected in Missouri as well.

8. **Email from claims adjuster to defense counsel with copies to insurance adjuster and port captain.**

As discussed previously, statements made by the claims adjuster to the in-house defense attorney are likely protected by attorney-client and insurer-insured privilege in both Illinois and Missouri. Under Illinois law however, privilege is something that is held by a client, and only a client can waive it. See *In re Marriage of Decker*, 153 Ill.2d 298, 606 N.E.2d 1094, 1101 (1992). But, assuming the port captain is not employed by the defendant, they attorney-client privilege has been destroyed. Any time a non-client is included in a communication such communication loses the cloak of privilege.

9. **Personnel file of the Crewmembers must be Produced.**

In the State of Illinois, personnel files that are relevant to a claim are typically discoverable. See *Sloan v. Jasper County Community Unit School Dist. No. 1*, 522 N.E.2d 334, 167 Ill.App.3d 867, 118 Ill.Dec. 879 (Ill.App. 5 Dist., 1988). However, the court may issue a protective order that secures confidential information from dissemination to the general public. See *id* at 335. In this case, the personnel files are necessary to assess the negligence of the co employees and to assess plaintiff's negligent hiring and retention claims. For example, if the co-workers are repeatedly written up for the same conduct that injured

plaintiff, and not adequately counseled, disciplined, trained or fired, then this is key liability evidence in this case. Personnel files of tortfeasors are routinely produced in these types of cases. Here, the crew members direct negligence injured plaintiff and these files should be produced. If there is any concern for their privacy, plaintiff will agree to be bound by a confidentiality order.

In Missouri, relevant personnel files are discoverable, but any discovery that is permitted of confidential personnel records must be "limited to information that relates to matters put at issue in the pleadings, especially in relation to sensitive personal information." *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999); see also *State ex rel. Crowden*, 970 S.W.2d at 343 ("subpoena for employment records must be limited to the issues raised in the pleadings.").

10. <u>Insurance Adjusters notes taken in Anticipation of Litigation</u>

Under Illinois law, the insurance adjuster's notes would likely be discoverable as long as they did not contain statements made to the adjuster by the insured in anticipation of litigation. See *Pietro* supra.

"Subject to the provisions of Rule 56.01(b)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including an attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship

to obtain the substantial equivalent of the materials by other means." *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42 (Mo. App., 2008).

11. <u>Medical Records of a crew members who Contributed to the Accident</u>

Plaintiff seeks the production of medical records of crewmembers immediately post incident to show they received some substantially similar injuries as the plaintiff to rebut defendant's assertion there was insufficient force trauma to injure plaintiff.

Illinois has defined the physician-patient relationship by statute: "[n]o physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient. . . ." 735 ILCS 5/8-802. Therefore, medical records of non-parties are generally protected by the physician-patient privilege. See *In re D.H., v. Chicago Housing Auth.*, 319 Ill.App. 3d 771, 774 (1st Dist. 2001), *Tomczak v. Ingalls Memorial Hospital*, 359 Ill. App. 3d 448, 452 (2005). The non-party privilege is not absolute however, and discovery depends on whether the information which is sought is general information or treatment information that is necessary to enable a physician to serve a patient. See *Tomczak*, 359 Ill. App. 3d at 453. So despite the fact that a crewmember was intoxicated at the time of the accident and subsequently contributed to the accident on the barge, his medical records are likely not discoverable unless he has been made a party to the action against the barge company.

In Missouri the physician-patient privilege is also not absolute. *State ex. Rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. Banc 2006). "The circumstances, facts and interests of justice determine the applicability of the physician-patient privilege to a particular

situation." *State ex rel. Lester E. Cox Med Ctr. V. Keet*, 678 S.W.2d 813, 815 (Mo. Banc 1984). In *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407 (Mo. Banc 1996), the Missouri Supreme Court held that the compulsory production through discovery of a nonparty's medical records is limited in two important respects. First, a judge can only order discovery of a nonparty's medical records if they are relevant to the pending claim, and adequate safeguards are provided to protect the nonparty as much as possible. Id. at 410. Second, the only proper procedure to compel discovery of such records is by subpoena duces tecum. Id. at 408l see also *State ex rel. Williams v. Lohmar*, 162 S.W. 3d 131, 134 (Mo.App.2005); *State ex rel. Dixon Oaks Health Cerner, Inc. v. Long*, 929 S.W.2d 226, 228 (Mo.App.1996). The Missouri Supreme Court has also previously ruled that a trial judge should review nonparty records *in camera* and to protect them from "humiliation, embarrassment or disgrace." See *State Ex Rel. Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813 (1984).

MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL DISCOVERY FROM PLAINTIFF

1. The Plaintiff's Psychiatric Records are Privileged and Must be Protected

Under longstanding Illinois law, the statutory privilege which protects mental health records from disclosure is largely more broad than the traditional physician-patient privilege. See *People v. Kaiser*, 239 Ill. App. 3d 295, 301 (Ill. App. 2nd Dist. 1992). The Illinois Mental Health and Developmental Disabilities Confidentiality Act can be found in 740 ILCS 110/1. Section 4 of the Act provides which persons are entitled to access mental health records without a court order or consent of the patient. However, in order for an

attorney to compel discovery of a party's mental health records, the party must have introduced their mental condition "as an element of his claim or defense." And even when a party has introduced his or her mental condition "as an element of his claim or defense," the court must conduct an *in camera* examination of the evidence and find that the records: 1) are relevant, 2) probative, 3) not unduly prejudicial or inflammatory, 4) are otherwise admissible, 5) other evidence demonstrably unsatisfactory, and 6) that disclosure is more important to the interests of justice than harming the recipient or the therapist-recipient relationship. 740 ILCS 110/10(a)(1).

In the current case, the Plaintiff, John Q. Smith has not placed his mental condition as an element of his claim or defense. The Plaintiff has claimed damages for pain and suffering, but Illinois courts have already ruled that merely filing a suit based on negligence is insufficient to place mental condition in issue. See *D.C. v. S.A.*, 178 Ill. 2d at 570. Plaintiff is only claiming mental distress attendant to his physical injuries and not emotional distress or psychological injury. Therefore, the Defendant has failed to satisfy the requirements of the Illinois statute and therefore his motion should be denied.

Similarly, under Missouri law, "where a party has not alleged psychological injury (beyond "garden variety" emotional distress), the party's psychological records are not relevant to the issue of damages and are not discoverable." *State ex rel. Phillips v. Hackett*, 469 S.W.3d 506, 510 (Mo. App., 2015). Again, the Plaintiff has not alleged a psychological injury "beyond 'garden variety' emotional stress," and therefore the Plaintiff's psychiatric records are not discoverable in this case. *Id.*

2. <u>The Plaintiff's Private Facebook Posts and Photographs are not Relevant</u>

The Defendant is not entitled to discovery from the Plaintiff's private Facebook posts and photographs because this material is not relevant or likely to lead to relevant information in this case. In order for evidence to be discoverable in Illinois, the material must be considered relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence." See Illinois Rules of Evidence 401. An Illinois Federal Judge limited the discovery While there is little Illinois case law which discusses the parameters of Facebook specific discovery, in 2016 a U.S. Northern District of Illinois judge, applying Federal law, limited a Defendant's Facebook production request when it was not sufficiently relevant or limited in scope. See *Maochun Ye v. Cliff Veissman*, (1:14-cv-01531). Because the Defendant has failed to narrow the scope of his request, and the request itself is not relevant, the Defendant's Motion to Compel the Plaintiff's Facebook posts and photographs should be denied.

In Missouri, a court may compel production of a party's information if the request is not overly broad and burdensome. See *State ex rel. Upjohn Co. v. Dalton*, 829 S.W.2d 83 (Mo. App. E.D., 1992). In this case, the defendant has failed to narrowly confine his requests to specific dates, times, and subject matter. In essence, the Defendant's request "goes beyond a mere fishing expedition, it seems designed to 'drain the pond and collect the fish from the bottom.'" See *In re IBM Peripheral EDP Devices Antitrust Litigation*, 77 F.R.D. 39, 42 (N.D.Cal.1977) (citing *Dalton* at 85). Consequently, the Plaintiff should not be forced to produce extensive information from his Facebook account.

3. **Plaintiff should not have to produce Cell phone records**

Plaintiff's cell phone use is not at issue in this case and is likely irrelevant. Personal and private information, while discoverable, must be relevant. There is no allegation that such use caused or contributed to the injuries at issue. It is undisputed his cell phone was in his locker at the time of the incident and not on his person. This is a fishing expedition and not reasonably calculated to lead to the discovery of admissible evidence.

PLAINTIFF'S MOTION FOR SANCTIONS

Plaintiff requests sanctions against Defendant as defendant has, on the third day of trial, produced the accident report and statement of a crew mate in cross examination of that mate. This was never produced to Plaintiff before and it was not disclosed to Plaintiff that Defendant had even taken a recorded statement of this mate. It was not used by Defendant in the deposition of the mate. Defense counsel intentionally sandbagged Plaintiff. Our discovery rules are specifically designed to prevent trial by ambush like this.

Under Illinois Supreme Court Rule 219, Plaintiff requests that the testimony of the Defenses first set of witnesses be denied, their pleading struck and trial proceed on damages only. See *Mason v. Village of Bellwood*, 346 N.E.2d 175, 37 Ill.App.3d 543 (Ill.App. 2 Dist., 1976).

Under Missouri Supreme Court Rule 61.01(d), Plaintiff requests that the Defense pleadings be stricken from the record. See *Anderson v. Arrow Trucking Co.*, 181 S.W.3d 185 (Mo. App.W.D., 2005).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing was emailed on this _____ day of August 2016 to:

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