

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

**PLAINTIFF JANET JENKINS’S SUPPLEMENTAL RESPONSE TO
DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN, AND RESPONSE
UNLIMITED, INC.’S MOTION TO COMPEL**

Plaintiff Janet Jenkins, through undersigned counsel, notifies the Court and the parties that she seeks only “garden variety” emotional distress damages, so as not to waive or forfeit the psychotherapist–patient privilege, and that she abandons her damages claim for lost business as to all defendants in this case. These clarifications moot several of the disputes raised in the RUL Defendants’ motion to compel that relate to Jenkins’s mental and medical health and to her business history.

BACKGROUND

Jenkins raises two claims arising from the kidnapping of her daughter Isabella: the Vermont tort of intentional interference with parental rights (“the tort claim”), *see* Revised Second Am. Compl. (“Compl.”) ¶¶ 64–65, ECF 223, and the federal cause of action under 42 U.S.C. § 1985(3) for conspiracy to prevent or hinder state authorities from giving or securing to all persons within such state the equal protection of the laws (“the hindrance clause claim”), *id.* ¶¶ 66–67. In the latest complaint, she seeks damages for loss of companionship, mental anguish, and emotional distress, *id.* ¶ 68, lost business and legal fees incurred in order to pursue her

remedies in family court and in this action, *id.* ¶ 69, fines that Lisa Miller was ordered to pay in the state proceedings in the amount of \$100 per day from September 25, 2009, to September 27, 2009, and since January 1, 2010, *id.*, and punitive damages for the intentional interference with her parental rights and for violations of her civil rights, *id.* ¶ 72.

Isabella raises only one claim—the hindrance clause claim.¹ She seeks damages for loss of companionship, mental anguish, and emotional distress, *id.* ¶ 70, loss of emotional and financial support from Jenkins, *id.* ¶ 71, deprivation of educational opportunities and access to medical, dental, and other health care available to her in the United States, *id.*, and punitive damages for violations of her civil rights, *id.* ¶ 72.

The RUL Defendants have served Jenkins a number of discovery requests related to these claims for damages. *See* RUL Defs.’ Mot. to Compel Ex. B, ECF 352-3. Related to Jenkins’s claim for emotional distress, the RUL Defendants seek her medical records since 2004, *see id.* at 18 (Request to Produce 2), and information about her mental health history, *see id.* at 5 (Interrogatory 4); *id.* at 17 (Interrogatory 25). She specifically objected to these discovery requests as, among other things, irrelevant, *see id.* at 5 (Interrogatory 4); *id.* at 18 (Request to Produce 2), as requesting privileged information, *see id.* at 18 (Request to Produce 2), and as requesting confidential information in the absence of an appropriate protective order, *see id.* at 5 (Interrogatory 4); *id.* at 17 (Interrogatory 25). She also expressly incorporated her general objections on the basis of relevance and privilege. *Id.* at 1, 3.

Related to Jenkins’s claim for lost business, the RUL Defendants seek information about the daycare center and its lost business, *see id.* at 17 (Interrogatories 26 and 27), as well as the

¹ The Court dismissed Isabella’s tort claim. *See Jenkins v. Miller*, No. 2:12-cv-184, 2017 WL 4402431 (D. Vt. Sept. 29, 2017) (ECF 277).

business's financial statements, tax returns, and balance sheets since 2000, *see id.* at 19 (Request to Produce 4), and the business's closure records, *id.* at 21 (Request to Produce 13). Jenkins objected to these discovery requests for reasons not relevant to this supplemental response.

On June 20, 2019, the RUL Defendants moved to compel Jenkins to, among other things, supplement her answers to the interrogatories about her mental health history (Interrogatories 4 and 25) and to produce documents responsive to the requests for documents about her medical and mental health history (Request to Produce 2) and about her daycare center (Requests to Produce 4 and 13).

SUMMARY OF ARGUMENT

For two reasons, the Court should deny the RUL Defendants' motion to compel Jenkins to supplement her answers to the interrogatories about her mental health history and to produce all nonprivileged documents responsive to the requests for documents about her medical and mental health history and about her daycare center:

First, Jenkins's mental health is not at issue in this case. She has not waived the psychotherapist–patient privilege by seeking damages for only the “garden variety” emotional distress that any ordinary person would experience in a similar situation. The RUL Defendants are not entitled to irrelevant and privileged information.

Second, Jenkins explicitly abandons her damages claim for lost business as to all defendants in this case. Because information and documents about her daycare center are not relevant to any other claim or defense and would be disproportional to the needs of the case, the RUL Defendants are not entitled to it.

ARGUMENT

The RUL Defendants’ motion to compel Jenkins to supplement her answers to the interrogatories about her mental health history, and to produce documents responsive to the requests for documents about her medical and mental health history and about her daycare center, should be denied because Jenkins does not seek the type of emotional distress damages that would waive the privilege protecting her medical and mental health history and because she abandons her damages claim for lost business as to all defendants in this case.

I. Jenkins’s Medical and Mental Health History and Records Are Irrelevant and Privileged Because She Seeks Only “Garden Variety” Emotional Distress Damages

Jenkins’s medical and mental health history and records are irrelevant and privileged. “[C]onfidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.” *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). Although “[i]mplied waiver can occur where a plaintiff places his mental condition directly at issue in the litigation, . . . [t]he Second Circuit has adopted a narrow view of implied waiver, requiring that the plaintiff’s claim extend beyond more than a ‘garden variety’ claim for emotional distress . . . damages.” *Gabriel v. Albany Coll. of Pharmacy & Health Scis.–Vt. Campus*, No. 2:12-cv-14, 2014 WL 3378629, at *2 (D. Vt. July 10, 2014) (Sessions, J.) (citing *Sims v. Blot*, 534 F.3d 117, 133–35 (2d. Cir. 2008)); *see also Sims*, 543 F.3d at 138, 141 (“[W]e reject respondents’ contention[] . . . that any claim of ‘even “garden variety” injury waives the psychotherapist-patient privilege.’”).

Jenkins only claims she suffered “garden variety” emotional distress. Such claims refer to “compensation for nothing more than the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized,” as opposed to claims for more severe distress

which involve “the inducement or aggravation of” a specific psychiatric disorder. *E.E.O.C. v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 121 (W.D.N.Y. 2009). Some courts have used a five-factor test to determine whether a plaintiff’s claims are only for “garden variety” or for more severe emotional distress. These include “(1) the presence of 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) a proffer of expert testimony to support a claim of emotional distress; and/or (5) a concession by the plaintiff that his or her mental condition is ‘in controversy.’” *Porter v. Pinkerton Gov’t Servs., Inc.*, 304 F.R.D. 24, 30–31 (D.D.C. 2014).

None of these factors is present here. Jenkins does not claim intentional or negligent infliction of emotional distress, she does not allege she suffers from a specific mental or psychiatric disorder, she does not intend to rely on any such disorder to support her claim of generic emotional distress, she does not claim she suffered emotional distress more severe than any ordinary person would experience in a similar situation,² she does not intend to offer expert testimony to support her claim, and she has never conceded that her mental condition is “in controversy.”

The RUL Defendants argue that Jenkins has put her mental health at issue in this case, opening the door to discovery of Jenkins’s mental health history and records, solely by seeking emotional distress damages. *See* RUL Defs.’ Mot. to Compel Ex. B at 6, ECF 352-3. They rely

² Jenkins’s use of the modifier “extreme,” Compl. ¶ 68, ECF 223, is not intended to claim Jenkins suffered “unusually severe” emotional distress but instead to emphasize the severity of Defendants’ conduct. The kidnapping of a child is an incredibly serious offense that would cause any parent emotional distress. Jenkins did not experience emotional distress any more “extreme” than any other parent would in a similar situation. Jenkins hereby disclaims any damages claim for “unusually severe” emotional distress to the extent the Complaint so reads.

on *Rose v. Vermont Mutual Insurance Co.*, No. 1:06-CV-211, 2007 WL 3333394 (D. Vt. Nov. 8, 2007) (Murtha J.), in which Judge Murtha applied a broad approach to waiver less than a year before the Second Circuit adopted the narrow approach in *Sims*. Since the Second Circuit’s decision in *Sims*, courts within the Second Circuit have followed the narrow approach. *See, e.g., Jacobs v. Conn. Cmty. Tech. Colls.*, 258 F.R.D. 192, 195–96 (D. Conn. July 15, 2009) (acknowledging that before *Sims* two different views of waiver existed within the Second Circuit but now the Second Circuit only follows the narrow approach). *Sims*, not *Rose*, is the law in this Court; the narrow view is the proper approach to implied waiver of the psychotherapist–patient privilege.

Because Jenkins seeks damages for only the “garden variety” emotional distress that any ordinary mother would experience if her child were kidnapped to a foreign country—preventing her from receiving any information about her daughter’s well-being and precluding any contact between mother and daughter—documents and information relating to Jenkins’s mental health history are both protected by the psychotherapist–patient privilege and irrelevant to any party’s claim or defense.³

II. Jenkins’s Daycare Is Irrelevant Because She Abandons Her Damages Claim for Lost Business

Because Jenkins abandons her damages claim for lost business as to all defendants in this case, discovery regarding that daycare center is irrelevant to any party’s claim or defense and is

³ Federal law of privilege applies to this case. *See von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987) (holding that federal law of privilege applies in federal question cases and to accompanying state law claims). Nonetheless, Vermont state law would likely provide the same outcome. Although the Vermont Supreme Court has not considered the issue, several Vermont trial courts have adopted the “garden variety” distinction. *See, e.g., Buker v. King*, No. 523-11-05WRCV, 2008 WL 7414617 (Vt. Super. Ct. May 30, 2008).

disproportional to the needs of the case. The daycare center's dates of operation, licenses, complaint history, gross and net income, financial statements, tax returns, balance sheets, and closure records have no tendency to make the generic emotional distress Jenkins and Isabella suffered from the kidnapping more or less probable. *See* Fed. R. Evid. 401. Nor would that evidence have any tendency to make Isabella's loss of emotional and financial support from Jenkins or her deprivation of educational opportunities and access to medical, dental, and other health care available to her in the United States more or less probable. *See id.* Isabella seeks only that lost financial support from Jenkins that the family court in Rutland, Vermont would have considered when calculating Lisa Miller's child support responsibility after transferring custody of Isabella to Jenkins.

CONCLUSION

The RUL Defendants' motion to compel Jenkins to supplement her answers to the interrogatories about her mental health history (Interrogatories 4 and 25) and to produce documents responsive to the requests for documents about her medical and mental health history (Request to Produce 2) and about her daycare center (Requests to Produce 4 and 13) should be denied.

September 30, 2019

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record through the Court's CM/ECF system:

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September 30, 2019

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