

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

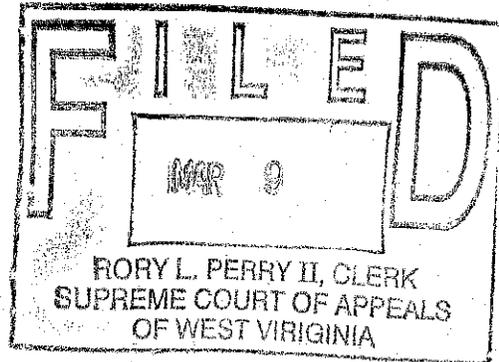
KMART CORPORATION,
A Michigan Corporation,
JOSEPH SHERRARD,
and MARK MULLINS,
Petitioners – Defendants Below,

v.

THE HONORABLE JEFFREY B. REED,
Judge of the Circuit Court of Wood County, WV

and

SHARON DYE, BERTHA BONAR,
BARBARA COOPER, EVELYNN HAINES,
CAROLE LOFTY, SHIRLEY MONDAY,
MARY PIERCE, ELAINE RICHARDSON,
CARLA SARTOR, LINDA THOMPSON,
PATTY WAGONER, JANET WESTBROOK,
FAITH WHEELER, KAREN YEAGER,
WANDA YEATER, and BRENDA GRAHAM,
Respondents – Plaintiffs below.



**PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION**

Wood County Circuit Court
Civil Case No. 06-C-121
The Honorable Jeffrey B. Reed Presiding

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Now come the Plaintiffs by and through MICHELE RUSEN and WALT AUVIL their counsel, and in response and opposition to the "*Petition for Writ of Mandamus and/or Prohibition*", hereby submit the following "*Memorandum of Law*."

I. PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

In this wrongful discharge and wage and hour action, all sixteen Plaintiffs are former female employees of the Kmart Corporation. All had twenty years plus of work experience in the Wood County, West Virginia Kmart Stores before their collective terminations on January 4, 2006. (*Exhibit 1, Amended Complaint at ¶20, 21.*)¹ Following the terminations of Plaintiffs by Kmart in January, 2006, Plaintiffs filed suit against the Defendants alleging age and gender discrimination in violation of the West Virginia Human Rights Act as well as violations of the Wage Payment and Collection

¹ Numbered exhibits are contained within the Appendix submitted by the Defendants.

Act. *Id.* at ¶¶ 26, 27. In this action, Plaintiffs seek “damages for lost wages, the value of lost benefits, damages for mental and emotional distress, punitive damages, costs and attorney’s fees.” *Id.* at p. 5. No medical conditions or physical injuries were alleged by any Plaintiff in this action, nor are any such matters relevant to the allegations brought by Plaintiffs.

Discovery began almost immediately. On or about April 21, 2006, Plaintiffs were each served with *Interrogatories* and *Requests for Production* by Defendants. (See, *Exhibit 2.*) Plaintiffs’ initial discovery responses were served on Defendants on May 22, 2006. While other disagreements pertaining to the responses given by Plaintiffs to these *Interrogatories* and *Requests for Production* were ultimately resolved, at issue herein are Plaintiffs’ responses to *Interrogatories* 10, 20 and 21 and *Requests for Production* Numbers 5, 10, 11 and 17.² Dealing first with the disputed *Interrogatories*, the following questions were propounded by Defendants to each Plaintiff:

Interrogatory No. 10: State the name address and principal telephone number of each medical care provider who examined, diagnosed, treated, or otherwise provided medical care to you at any time during the preceding ten year period.

Interrogatory No. 20: State each and every medical condition (physical, mental or emotional) you have had diagnosed by a physician or other healthcare provider, or for which you have been treated, counseled, or have had prescribed any drug or medication from January 1, 1996 to the present. With respect to each medical condition described, please identify the person making the diagnosis, state with particularity the date each such medical condition was diagnosed, the particular diagnosis, and the date you were notified thereof, and specify every documents [sic] showing such information.

Interrogatory No. 21: Identify each and every physician, physician’s assistant, nurse or other healthcare provider from whom you have sought a diagnosis or treatment for a medical condition (physical, mental, or emotional and including workers compensation injuries) from January 1, 1996 to the present date allegedly caused by or relating to your employment at Kmart or your departure from employment at Kmart, and for each state the date of the diagnosis or treatment sought, whether a diagnosis or treatment was provided, and if not explain why, and the resulting diagnosis given or treatment provided.

² There were also disagreements as to the adequacy of answers Defendants served in response to the Plaintiffs’ discovery requests which were discussed and eventually resolved.

With regard to *Interrogatories* 10, 20 and 21, each Plaintiff responded as follows to all three of these *Interrogatories* :

Answer: In a garden variety emotional distress case, the Defendant is not entitled to a fishing expedition through all private, personal medical records of the Plaintiff. The Plaintiff's right to privacy outweighs any marginal, tangential interest the Defendants might have in exploring ten (10) years of Plaintiff's medical records.

Without limitation to the foregoing, **if Defendants have specific issues regarding a particular Plaintiff's pre-existing medical or psychological condition upon which the Defendants can articulate a reasonable basis for needing specific medical information, the Plaintiff will certainly consider providing that limited information.** However, the Plaintiff is unwilling to provide a blanket ten (10) year release for all medical records, given the fact that the Plaintiff does not intend to present any expert testimony on the issue of emotional or psychological injury. (See, *Exhibit 3 at pages 4, 5, 7 and 8, emphasis added.*)

Similarly, the disputed *Requests for Production* sought medical information from the Plaintiffs as follows:

Request for Production No. 5: Please produce all documents, notes, bills, records, or medical reports that relate in any way to your claims for damages in the Complaint in its action, including the Prayer for Relief in your Complaint.

Request for Production No. 10: Produce any documents relating to any medical treatment you may have received since January 1, 1996 including, but not limited to, treatment for substance abuse, or workers compensation injuries or illnesses, non-work related injuries or illnesses, emotional, psychological, cognitive, behavioral, or mental illnesses.

Request for Production No. 11: All documents relating to prescription medications that have been prescribed in the preceding five years.

Request for Production No. 17: Please produce all health insurance benefits documents that you have prepared or received relating to any claims for benefits that you have made for the period of January 1, 2002 to present.

Plaintiffs objected to Request No. 5: "As Plaintiffs understand this request, literally complying with it would invade attorney/client privilege. Without limitation to the foregoing, *no Plaintiff seeks reimbursement for medical treatment due to termination.*" As to Requests No. 10 and 11, Plaintiffs reiterated the objections set forth

above to the medical information sought in the disputed *Interrogatories*. As to *Request No. 17*, Plaintiffs responded that they were not certain if they understood what was being sought, but “[i]f the Defendants are requesting records of all payments by the Plaintiffs’ health insurance, then the Plaintiffs object upon the same basis as Plaintiffs’ objection to *Request for Production No. 10 and 12.*”

A. Defendants’ First Motion to Compel

In an effort to resolve this and other disputes as to the written discovery responses, counsel began corresponding about these matters. With regard to the matters at issue in this proceeding, Defendants’ counsel pressed for the production of all the medical information sought in its written discovery, while Plaintiffs’ counsel continued to suggest a more limited response and production tailored to the specific circumstances of each Plaintiff. (*Plaintiffs’ Exhibits A, B, C, and D hereto.*)

When efforts to resolve this dispute failed, on August 3, 2006 the Defendants filed their first “*Motion to Compel.*” (*Exhibit 4.*) In their motion, Defendants asserted that Plaintiffs should be required to “adequately” respond to *Interrogatories 10, 20 and 21* and *Requests for Production 5, 10, 11 and 17* as such requests were propounded and without any limitations. (*Exhibit 4, Defendants’ Memorandum of Law in Support of Defendants’ First Motion to Compel, pages 4-6; 11- 12.*) A lengthy hearing on the *Defendants’ First Motion to Compel* was held before Judge Jeffrey B. Reed on August 14, 2006.³

As Plaintiffs’ counsel argued below, “they’ve requested in most cases ten years worth of information. We just view that request as completely overbroad, or as we put in one of our letters, overboard. I think both apply in this particular situation.” (*Exhibit 5 at p. 6.*) Counsel noted that the only emotional distress alleged by Plaintiffs pertained specifically to the Plaintiffs’ termination from employment by Kmart. Counsel for the Plaintiffs also stressed the importance of protecting the privacy interests of the Plaintiffs as to medical records and information that was completely unrelated to the issues in this case. (*Id. at 6- 7.*) As counsel summarized, “it’s just way overbroad and there has to be a way to narrow it down to something that is more relevant to the issues

³ As the transcript of this hearing reflects, Plaintiffs relied upon various letters written by Plaintiffs’ counsel to Defendants’ counsel to present their legal position on these issues. (*Exhibit 5 at p. 6; and Plaintiffs’ Exhibits A, B, C, and D hereto.*)

in this case.” (*Id.* at 7.) Plaintiffs’ counsel once again pointed out that if specific information pertaining to a specific issue in the case was sought, that request could be addressed, but “to just hand over everything at this stage of this litigation from the past ten years is burdensome, it’s expensive and it’s unnecessary.” (*Exhibit 5 at p. 7.*)

In response, Defendants argued that “the rules do allow for the discovery of all medical records over the past ten years...” but conceded that “[o]n the medical records, again, there’s not a West Virginia state court opinion on point.” (*Id.* at 11.) While Defendants argued that production could come first, and privacy interests could be protected later by filing a *Motion in Limine* prior to trial, the court-below continued to be concerned about the production of medical information that might prove embarrassing, yet have at best “a tenuous connection” to the Plaintiffs’ claims. (*Exhibit 5 at p. 21.*)

As Plaintiffs asserted, “the bulk of the case law in both federal and state court [establishes that] the privacy interests of the medical records protects plaintiffs from a generalized inquiry into all of their records of every description when they are not putting on evidence from any of those providers, as we’ve stipulated in our correspondence we do not – are not going to do. We’re not calling any psychologist, we’re not calling anybody, we’re not claiming any medical bills, we’re not claiming any prescriptions as caused by this, so all that’s out the window.” (*Exhibit 5 at p. 24.*)

After argument and discussion the Court suggested:

Why don’t you take depositions, see what it reveals. I suspect – I’m not blaming you all, but I suspect that I am just delaying the inevitable in terms of having to do something, but maybe the depositions will help maybe take some of the issues off the table or allow you all to agree on some of them and maybe it will narrow the issues that I’ll have to decide, because at this point it’s awful broad. (*Id.* at 29-20.)⁴

Upon further discussion and upon the suggestion of Plaintiffs’ counsel, it was determined that the Plaintiffs would supplement their answers to *Interrogatories* No. 5 and 21, and disclose medical treatment received in the five years prior to termination. Further, Plaintiffs would also disclose every mental or emotional condition diagnosed in the last five years in response to *Interrogatory* No. 20. (*Id.* at 33-36.) As to

⁴ The Court was referring to the depositions of two Plaintiffs (Sharon Dye and Karen Yeager) which were scheduled for the following day. See *Exhibit 5 at 27.*

Defendants' Requests for Production, the Court stated that it would defer ruling upon the motion to compel until after the supplemental responses to interrogatories were served and the two plaintiffs were deposed. The Court also *Ordered* that no medical records were to be subpoenaed. (*Id. at 38.*) The parties were instructed to come back to "revisit" the issues if further rulings were needed. (*Id. at 39.*)

B. Defendants' Second Motion to Compel

Following the depositions of Plaintiffs Sharon Dye and Karen Yeager, counsel for both parties again corresponded concerning the disclosure of medical information of the Plaintiffs. Defendants now pressed for the execution of broad and open-ended "blanket medical releases" for the complete medical records of all sixteen Plaintiffs. To that end, Defendants' counsel forwarded proposed Medical Authorizations for each Plaintiff to sign. These authorizations contained ***no limitation as to the time or dates of treatment and records sought whatsoever.*** Defendants continued to assert "we believe we are entitled to discovery of medical information related to Plaintiffs."

(*Exhibit 10; Plaintiffs' Exhibit E hereto, Authorization for Release of Medical Records.*) Defendants further contended that "we firmly believe that the ten-year time period for the requests is more than reasonable." (*Exhibit 12.*)

Notwithstanding the broadening of the demands for medical records made by Defendants, Plaintiffs continued to offer to consider more limited requests for information, hoping to achieve some sort of compromise, noting that "if the Defendants have specific issues which they believe either Plaintiff's deposition to date (Dye or Yeager) give rise to, the Plaintiffs are willing to consider specific releases for specific items. The blanket release of all medical records sought by the Defendants is not acceptable." (*Exhibit 11.*) Inexplicably, the Defendants never requested any particular records for any of the Plaintiffs. Again unwilling to compromise and agree upon a reasonable resolution of this ongoing controversy, Defendants filed a "*Second Motion to Compel.*"

In the *Second Motion to Compel*, Defendants requested that "the Court enter an order compelling Plaintiffs to "adequately" respond to *Request for Production Numbers 5, 10, 11 and 17* from *Defendants' First Request for Production of Documents*, or alternatively, an Order compelling Plaintiffs to sign and return to Defendants' counsel

the Medical Authorizations that were furnished to Plaintiffs' counsel." Citing deposition testimony from two Plaintiffs indicating that each had been prescribed anti-depressants for a number of years, the Defendants reasoned that this testimony somehow formed a credible basis for obtaining all the medical information for all of the Plaintiffs. Thus, Defendants expanded the scope of medical information sought from the Plaintiffs at the second hearing before the Court.

In their "*Memorandum in Response to Defendants' Second Motion to Compel*," Plaintiffs yet again stated:

If a specific need is shown for specific medical information - as opposed to a general inquiry into all of the Plaintiffs' medical records - Plaintiffs would certainly be willing to consider a more limited release for specific information from a specific health care provider which may be particularly relevant. Plaintiffs do not foreclose the possibility that such a situation might arise. However, Defendants are either unwilling or unable to be specific in their requests that the Court to force the Plaintiffs to disclose their entire medical record to the Defendants. They make no link between the Plaintiffs' claims for "garden variety" emotional distress stemming from their termination and the information in the Plaintiffs' medical records. It is reasonable to infer from the Defendants' inability or unwillingness to be specific as to what it is that is relevant to the Plaintiffs' "garden variety" emotional distress claims that Defendants seek a classic "fishing expedition" to determine whether there is some information in the Plaintiffs' medical records with which they can discredit or embarrass them. The law does not support the invasion of the confidential fiduciary relationship between a patient and a physician on such flimsy grounds. (*Plaintiffs' Exhibit F at pp. 6-7.*)

After a brief hearing on December 19, 2006, the *Defendants' Second Motion to Compel* was denied by the Court. Following court's entry of the *Order* from that hearing, counsel for the Defendants wrote directly to Judge Reed, rearguing the *Motion* and attempting to present new information in support of Defendants' position to the court-below within this letter.⁵ Rather than filing a new motion and presenting this additional information to the court-below in an appropriate manner at a hearing, the

⁵ In that letter, Defendants raised the reports of Vocational Expert Erol Sadlon for the first time. These reports were disclosed to Defendants on or about December 11, 2006. Exactly what action the court-below was expected to take based upon receipt of such a letter from counsel which contained matters not properly before the Court is puzzling. Plaintiffs assert that it was incumbent upon the Defendants to seek further hearing if there were additional matters to be brought to the trial court's attention. Defendants warned Judge Reed "we are left with no option other than to seek a writ of mandamus and/or prohibition allowing us full access to Plaintiffs' medical records" *Exhibit 15.*

Defendants now rely on information never considered by the trial court to support the relief sought in this Court. Now, ten months after Plaintiffs' first discovery responses were filed, over six months after the filing of their original motion, and two-and-one half months after the circuit court's ruling, Defendants now ask this Court to issue a *Writ of Mandamus or Prohibition*.

II. Argument

A. Mandamus and/or Prohibition Are Not Appropriate Remedies in This Case.

Generally, writs of prohibition and mandamus will lie in cases where the lower court has usurped and abused its power, or when the inferior court or tribunal has exceeded its jurisdiction or its legitimate powers. West Virginia Code §53-1-1. Judge Reed has not acted beyond his jurisdiction, and has not exceeded his legitimate authority in the ruling issued on December 19th in this discovery dispute.

In determining whether to entertain and issue the writ of prohibition or mandamus in cases where it is claimed that the lower tribunal exceeded its legitimate powers, five factors are to be examined:

- (1) whether the party seeking the writ has other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law;
- (5) and whether the lower tribunal's order raises new and important problems or issues of law of first impression. *State ex rel. Parsons v. Zakaib*, 207 W.Va. 385, 532 S.E.2d 652, *Syl Pt. 2* (2000), *citing Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

These five factors are considered general guidelines that serve as a useful starting point, and although all five factors need not be satisfied, it is clear that the third factor, the existence of clear legal error as a matter of law, should be given substantial weight. *Id.* Further, only clear-cut, legal errors plainly in contravention of clear

statutory, constitutional, or common-law mandate will be corrected, not a simple abuse of discretion. State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 625 (1977). Such extraordinary relief may be obtained only to correct substantial abuses of discretion tantamount to a clear misapplication of applicable law. State Farm Mutual Auto Insurance Company v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992). Thus, in cases where rulings regarding discovery are in dispute, prohibition has been used sparingly, such as cases where discovery was denied entirely, or where an overly broad discovery Order has been granted. State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 652 (2000) (directing that discovery be considered in a habeas corpus action); State v. Cookman, No. 33095 (W.V. 12-1-2006) (reversing trial court's Order requiring disclosure of the appraisal reports of experts not retained in absence of specific findings.) Those unique circumstances are not present in the instant case.

B. The Circuit Court Acted within its Discretion and Correctly Denied Defendants' Request to Order the Production of All Medical Information for All Plaintiffs.

Turning first to the critical issue of whether the ruling of the Circuit Court was clearly erroneous, the sole issue presented to Judge Reed for resolution by the Defendants in their *Second Motion to Compel* was whether the Circuit Court should order all Plaintiffs to execute "blanket medical releases" enabling the Defendants to obtain all medical records of all Plaintiffs. Defendants contend that not only should the Circuit Court have compelled such relief, but that the Circuit Court was clearly wrong in not doing so, so wrong in fact that they urge this Court must act to direct the Circuit Court to do so. This position ignores the clearly enunciated principles of this Court imposing "tight restraints on the extraordinary writ of prohibition" and mandamus, which is to be used "to correct only substantial, clear-cut legal errors plainly in contravention of a clear statutory, constitutional, or common-law mandate. State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 366, 532 S.E.2d 654 (2000).

C. The Defendants Are Not Entitled to "Full Access" to All Medical Information From All Plaintiffs Simply Because An Element of Damages is Alleged to be Emotional Distress.

With regard to the discovery dispute leading to the *Defendants' First Motion to Compel* and in all correspondence exchanged since the Court's ruling upon the *Defendants' First Motion to Compel*, Plaintiffs have noted that the filing of a claim for wrongful termination under the West Virginia Human Rights Act and the demand for "garden variety" emotional distress damages associated therewith, does not, standing alone, justify the Defendants' request for disclosure of all Plaintiffs' medical records. Nevertheless, Defendants have continued to seek complete disclosure of all of Plaintiffs' medical records, and have never responded in any manner to the Plaintiffs' repeated offers to consider executing more tailored releases for medical records with regard to specific issues or physicians or treatment which might be relevant to the Plaintiffs' claims. Instead, Defendants have reiterated and broadened their demand for all of the medical records of all the Plaintiffs, apparently seeking all-or-nothing.

The sole justification asserted by Defendants for the need for this information asserted in the *Defendants' Second Motion to Compel* argued below was information culled from the depositions of two of the Plaintiffs -- Sharon Dye and Karen Yeager. However, the testimony cited from Plaintiff Dye's and Plaintiff Yeager's depositions does not support the Defendants' position that all of the medical records of these two Plaintiffs must be produced, let alone the Defendants' request for "full access" to all of the medical records of all the rest of the Plaintiffs.

At her deposition, Plaintiff Dye answered questions put to her regarding her past treatment without restriction, limitation or objection. As Defendants correctly observe, Ms. Dye testified that she had been prescribed anti-anxiety and/or anti-depressant medication for approximately fifteen years preceding her termination. She testified that she had suffered from migraine headaches for about fifteen years before her termination from Kmart, and that that fifteen years ago, she tried anti-depressants as a medication to aid with her migraine headaches at her doctor's suggestion. Ms. Dye had not, however, ever been prescribed medication for depression before termination from Kmart. (*Exhibit 8*).

Ms. Dye, who continues to be gainfully employed at Blue Cross and Blue Shield, also discussed her feelings of distress after termination:

I have experienced tremendous emotional ... distress. Like I said, I was devastated when I heard it, when I actually heard I was being terminated, and my father was in the hospital at the time, and so that kind of added to everything as far as his illness, and I was just very emotional, and it took over my life.

It – it just made me feel like, If – if they don't want me, then who other employer is going to want me? You know, when I was dependable. I missed very, very few days of work in 28 and a half years, and you know, I was a single mother, and I wanted my job, and I needed my job, but more so. (*Exhibit 8 at pp. 105-106*).

Ms. Dye testified that she was previously prescribed anti-depressants and why. The circumstances leading to that prescription occurred “probably back in 1980”, thus it is difficult to determine how that information may be relevant to her state of mind after being terminated in 2006. However, if that specific matter is of concern to Defendants, then why haven't they asked for those particular records concerning Sharon Dye instead of insisting upon her complete medical history? Further, assuming Defendants elect to cross examine Sharon Dye about these matters at trial, she has already admitted those facts relevant to any legitimate inquiry the Defendants could make.

Similarly, Plaintiff Karen Yeager testified that she was prescribed Prozac over a decade before her termination. It is difficult to surmise the relevance of that prescription or the circumstances leading her physician to prescribe that medication, done a decade before her termination, to any emotional distress stemming from Yeager's termination. She obviously makes no claim that her Prozac prescription was caused by her termination. What she does claim about the emotional distress she experienced after being fired is this:

...I did not feel that I – you know, I --- that I did anything to deserve to have to walk into the unemployment office and stand with 16 other of you coworkers to try to get some kind of income and be – be treated as if you were – you know, that it was your fault, that you had done something wrong, and so I had a hard time convincing myself that I had done nothing wrong, that I need not feel ashamed, or – or feel badly about that, and I think that's what we all felt you know. It's like you gave 25 years of that, you know your capabilities...

It was hard to go to the doctor's office and write "no insurance". It was hard to go fill out forms and write "no employer." And it was humiliating, it was degrading.... it made me feel completely terrible about myself, and I spent probably three days in bed, and I probably spent the next two weeks up, but not dressed, and just contemplating what I needed to do, and trying to deal with the anger that I had towards those that had made that decision and trying to understand why... (*Exhibit 7 at pp. 139-140.*)

As Plaintiffs have repeatedly emphasized since this action was filed, they do not intend to introduce evidence of medical treatment or medications prescribed to support their claims for emotional distress. The Plaintiffs do not claim that the emotional distress caused by their terminations was permanent or that it requires long-term treatment or medication. Plaintiffs have made the tactical decision to abandon any such claims that could have been asserted. Accordingly, what is the need for all of her medical records? Those records certainly will not refute or undermine Dye's claim of "garden variety" emotional distress she experienced described at her deposition. How can anything in Karen Yeager's medical history refute or diminish or impact her description of the emotional distress she suffered? The fact that she has taken antidepressants for twenty years, if admissible at trial, has been admitted. And again, if this particular matter is of such importance to Defendants, why has no request for these specific records been made versus demanding every record?

Notwithstanding these facts, Defendants cite the deposition testimony of these two Plaintiffs to support their assertion that "the document requests seeking medical records are not overly broad . . . because, as evidenced by Plaintiffs' own deposition testimony, such requests are clearly reasonably calculated to lead to the discovery of admissible evidence." Indeed, it is very questionable at best that Defendants would be permitted to cross examine any Plaintiff at trial about medical conditions occurring as remotely in time as ten or twenty years ago. Plaintiffs assert that the testimony of these two Plaintiffs does not support the conclusion that anything in their own medical records is properly discoverable by Defendants, let alone the medical information of other Plaintiffs.

As the West Virginia Supreme Court noted in Keplinger v. Virginia ELC & Power Co., 208 W. Va. 11, 23, 537 S.E.2d 632, 644 (2000), "[a] fiduciary relationship exists between a physician and a patient. . . . [I]nformation is entrusted to the doctor in the

expectation of confidentiality and the doctor has a fiduciary obligation in that regard.” (Citations omitted). While noting that “a person who has filed a civil action that places a medical condition at issue has impliedly consented to the release of medical information,” the Keplinger Court observed, however, that “this implied consent involves only medical information related to the condition placed at issue.” (emphasis in original.) Id., 208 W.Va. at 23, 537 S.E.2d at 644. However, filing a lawsuit “does not efface the highly confidential nature of the physician-patient relationship” and “a person should not be deterred from filing a civil suit that places a medical condition into issue for fear that unrelated private or embarrassing medical information may be disclosed.” Id. “Because of the highly personal and confidential nature of medical records, they should be subject to special consideration to assure that, in the process of discovery, there will be no unnecessary disclosure of medical information that is outside the scope of litigation.” Id.

Defendants herein have posed no reasonable basis for a full-scale invasion of the fiduciary physician-patient relationship between every Plaintiff and every one of their healthcare providers. However, to support their position, Defendants cite federal cases holding that by merely alleging emotional distress, a Plaintiff’s entire medical and psychiatric record becomes available to the defense. The West Virginia Supreme Court of Appeals has stated in similar contexts, under the West Virginia Human Rights Act, it will not generally adhere to the “restrictive-approach” taken in a number of federal cases limiting the presentation of a Plaintiff’s claim, such as a disability discrimination claim. Stone v. St. Joseph’s Hospital, 208 W. Va. 91, 105-107, 538 S.E.2d 389, 403-405 (2000). Likewise, this Court is obviously not bound by “the diverse” and extremist body of federal jurisprudence in this regard.⁶

There is support for Plaintiffs’ position in jurisprudence from other states which articulates logical and cogent reasons for prohibiting the wholesale disclosure of a plaintiff’s medical information based solely on a claim of emotional distress as an

⁶ Attached as an Exhibit to the *Plaintiffs’ Memorandum in Opposition to the Defendants’ Second Motion to Compel* is a copy of an article authored by Plaintiffs’ counsel Walt Auvil titled “Medical Records Discovery”, American Bar Association Tort and Insurance Practice Committee News, Summer 2000. (*Exhibit G hereto.*) The article collects cases dealing with the issue of the scope of medical records discovery currently available in a “garden variety” emotional distress case. The cases collected therein further support the Plaintiff’s position that the scope of discovery which Defendant seeks is far too broad.

element of damages. For instance, in State ex rel. Dean v. Cunningham, 182 S.W.3d 561 (Mo. 2006), the Missouri Supreme Court addressed the question of the discoverability of a plaintiff's medical records in a discrimination case. The Court framed the issue as follows: does the physician-patient privilege apply to an action seeking damages for emotional distress under the Missouri human rights act for alleged sex discrimination and sexual harassment, or does such an action always waive the privilege? That Court - after an exhaustive analysis of the authority from around the United States concluded, "[a] person claiming emotional distress damages for sex discrimination and sexual harassment under the Act is protected by the physician-patient privilege where: (1) her claim is only for such emotional distress and humiliation that an ordinary person would experience under the circumstances or that may be inferred from the circumstances, and (2) is not to be supported by any evidence of medical or psychological treatment for a diagnosable condition."

Similarly, in Burrell v. Crown Central Petroleum, 177 F.R.D. 376 (E. D. Tex. 1997), the plaintiffs alleged race and sex discrimination and sought damages for mental anguish. The Defendant filed a motion to compel production of medical records citing plaintiffs' claims for damages incident to mental anguish plaintiffs suffered. That court denied defendant's request for plaintiffs' medical records, holding that the mental anguish at issue was incident to work-related, economic damages like lost wages. The court concluded that requesting damages for mental anguish did not place plaintiffs' physical or mental conditions in controversy. Additionally, it was noted that neither medical records nor testimony was required to support a claim of mental anguish in a civil rights action. Accordingly, the mere assertion of a "garden variety" claim for mental anguish damages did not place the plaintiff's mental condition "in controversy" thereby foreclosing the Defendant's request for medical information. Id. at 383.

In a non-employment case asserting abusive police conduct, a New York Court rejected the Defendant's request to examine the Plaintiff's counseling records. Greenberg v. Smolka, 03-CIV-8572 (S.D. N.Y., April 25, 2006). The court noted that Plaintiff's emotional distress claim which included "anger for several weeks after the incident, fatigue, distrust and fear of police, humiliation, frustration, [and] degradation . . ." did not open the door to access to Plaintiff's records where she also stated that she did "not have any permanent emotional distress or damage from the

event.” The Defendant’s argument that access to the Plaintiff’s medical records might in some way be helpful to the Defendant in preparing to rebut the Plaintiff’s damages claim was not, by itself, sufficient to outweigh Plaintiff’s privacy interests in the records. The New York court concluded that such a holding would be inconsistent with the demanding standards required for waiver of other important legal privileges and therefore refused to require the production of such records.

D. The Defendants Have Refused to Reasonably Limit Their Request for Medical Information and Have Never Asked the Court-Below to Consider Any Request Except One for “Full Access” to All of Plaintiff’s Medical Records.

In seeking review and a “revisiting” by the Circuit Court of whether Plaintiffs’ medical information should be produced, the *Defendants’ Second Motion to Compel* again sought the “whole enchilada” – everything from everyone. Not surprisingly, the court-below quickly denied the Defendants’ requests for documents, requests that were of an even broader scope than those presented at the first hearing on August 14, 2006. Not a peep was heard from Defendants about limiting or narrowing their requests for Plaintiffs’ medical information in any respect.

In evaluating whether the Defendants have other adequate means of relief available to them to resolve the issues herein, the first and most obvious solution at hand is for the Defendants to make specific requests for information that Plaintiffs have invited them to make since May 22, 2006 when the initial responses to the Defendants’ discovery were filed. Yet another avenue of relief is for the Defendants to present the information now being presented to this Court to the trial court for consideration and ruling, information that the court-below was not given at the December 19, 2006 hearing.

In that regard, the Plaintiffs are referring to Exhibits 16, 17 and 18 *in Defendants’ Appendix*, the Vocational Reports of Erol Sadlon, served upon Defendants on or about December 11, 2006. Some of these reports were inexplicably submitted to the court-below by Defendants **after** the December 19, 2006 hearing by attaching them to a letter to Judge Reed dated February 6, 2007. (*Exhibit 15.*) These reports were not submitted to the trial court for consideration in conjunction with a “*Motion to Reconsider the*

Defendants' Second Motion to Compel" at a properly noticed hearing on the matter. Instead, these reports were submitted with counsel's letter, the purported purpose of which was to request findings of fact and the entry of an amended or corrected Order reflecting the court's rulings from the December 19, 2006 hearing.

Obviously, there was nothing the trial court could properly do with these reports in that context at that point in time. These reports had not been submitted to the Circuit Court at the December 19, 2006 hearing and the contents of those reports were not, as far as counsel can recall, brought to the attention of the trial court in argument. Further, it was not Judge Reed's duty to schedule a hearing on this issue to allow proper consideration of this new and additional information in this discovery dispute – that duty was solely that of Defendants' counsel. Accordingly, it is inappropriate and unfair for the Defendants to ask this Court to substitute its judgment for that of Judge Reed's by considering and relying upon the reports of Mr. Sadlon before the trial court has had an opportunity to do so.

Setting aside for the moment the impropriety of the procedure undertaken in this regard by the Defendants, and turning to the arguments made to this Court, it is important to note that each Plaintiff has a different set of medical records, a different vocational evaluation, and a different calculated wage loss. Each Plaintiff had a different emotional response to the sudden termination of her job. That being the case, a blanket medical authorization or a "one fits all ruling" as to what should be produced in terms of medical records in this matter is simply not appropriate or reasonable.

For instance, Mr. Sadlon notes that Plaintiff Sharon Dye has returned to the workforce and is able to work. While it is true that Mr. Sadlon observes that Ms. Dye has "suffered significant psychological difficulties due to the incident", he is not a psychologist or psychiatrist, and would not be permitted to testify concerning those observations at trial. Additionally, those observations were not used in any manner to decrease Ms. Dye's earning capacity or calculation of lost wages and benefits. In fact, the evidence at trial will be that Ms. Dye has largely mitigated her economic damages, notwithstanding her emotional distress.

By contrast, the report of Wanda Yeater indicates that she "may" be suffering from psychological problems which have prevented her from returning to the workforce. (*Exhibit 17.*) She has not, however, sought treatment for these problems. Accordingly,

at this point, there are no medical records concerning emotional distress for Defendants to request. Ms. Yeater's other medical conditions include an asthmatic condition for which she is prescribed medication and arthritis. Again, why do Defendants need the medical information about Mrs. Yeater's arthritis and her asthma when it has no connection whatsoever to the allegations in this case?

Plaintiff Elaine Richardson was noted to be suffering from depression by Mr. Sadlon. According to Mr. Sadlon, she too has "considerable psychological difficulties" for which she sought treatment beginning in 2005. (*Exhibit 18.*) However, once again, Ms. Richardson's wage loss has been calculated assuming that she re-enters the workforce in March, 2007 after being retrained to perform medical office procedures, with no reduction in the estimated damages for the psychological problems noted by Mr. Sadlon.

As is evident from this brief discussion of a the specific evidence and circumstances of several of the Plaintiffs, each person presents a different set of facts as to what, if any, medical information is relevant and discoverable in each particular case. Those particular circumstances of each Plaintiff have not been considered by the court-below, nor has Judge Reed been presented with an opportunity to consider the matters set forth above at any hearing conducted to date. Accordingly, the Defendants' *Petition* herein is premature at best, and completely unwarranted by the facts and the law.

VI. CONCLUSION

In their application to this Court for extraordinary relief, the Defendants attempt to avoid their obligation to justify the need for the production of all of the medical records for each Plaintiff by asking this Court to substitute its discretion for that of the trial court. Obviously, the trial court is in the best position to consider the particular circumstances of each Plaintiff as well as the scope of the production of medical information warranted given those circumstances. However, the trial court has not been afforded an opportunity to consider all the information submitted by Defendants to this Court. Accordingly, it is mystifying as to how Defendants can believe that invoking this Court's original jurisdiction based upon a claim of abuse of discretion is proper or fair when the court-below has not been permitted to consider all of the facts

cited herein, or to exercise its discretion with regard to the facts now argued to this Court.

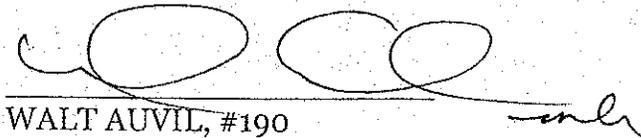
Instead, Defendants ask this Court to approve their all or nothing approach to discovery of Plaintiffs' medical records. However, as Plaintiffs have demonstrated herein, the circumstances for each Plaintiff vary far too much to allow Defendants completely unfettered "full access" to each Plaintiff's medical records. Judge Reed recognized this fact at the August 14, 2006 hearing. While Defendants presented additional information and argument at the second hearing, not all of the information before this Court was presented to the trial court at that time. Additional facts relevant to this dispute will likely be unearthed as the case progresses, which can and should be argued to the trial court.

Despite the differences in each Plaintiff's situation, not a single request from the Defendants has ever been made for specific medical information. The Circuit Court properly rejected this shot-gun approach by Defendants. The Plaintiffs assert that this Court should likewise refuse to assist the Defendants in obtaining medical records completely unconnected to this allegations made by Plaintiffs.

For all these reasons, the Plaintiffs respectfully request that the Court dismiss this Petition.

SHARON DYE, *et al.*,
Plaintiffs

By Counsel,


WALT AUVIL, #190


MICHELE RUSEN, #3214
Rusen and Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-6360
Counsel for the Plaintiffs

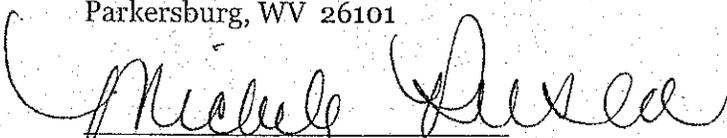
CERTIFICATE OF SERVICE

This 7th day of March, 2007, the undersigned certifies that the enclosed "*Plaintiffs' Memorandum of Law in Opposition to Defendants' Petition for Writ of Mandamus and/or Prohibition*" in *Sharon Dye et al., v. Kmart Corporation et al.*, 06-C-121 was served upon the following persons, by mailing, first class postage prepaid, a true and accurate copy thereof to:

Barbara Arnold
MacCorkle Lavender Casey & Sweeney
300 Summers Street
Suite 800
Charleston, WV 25332-3283

David A. Hughes
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
600 Peachtree Street, Suite 2100
Atlanta, GA 30308

The Honorable Jeffrey B. Reed
Wood County Judicial Building
#2 Government Square
Parkersburg, WV 26101

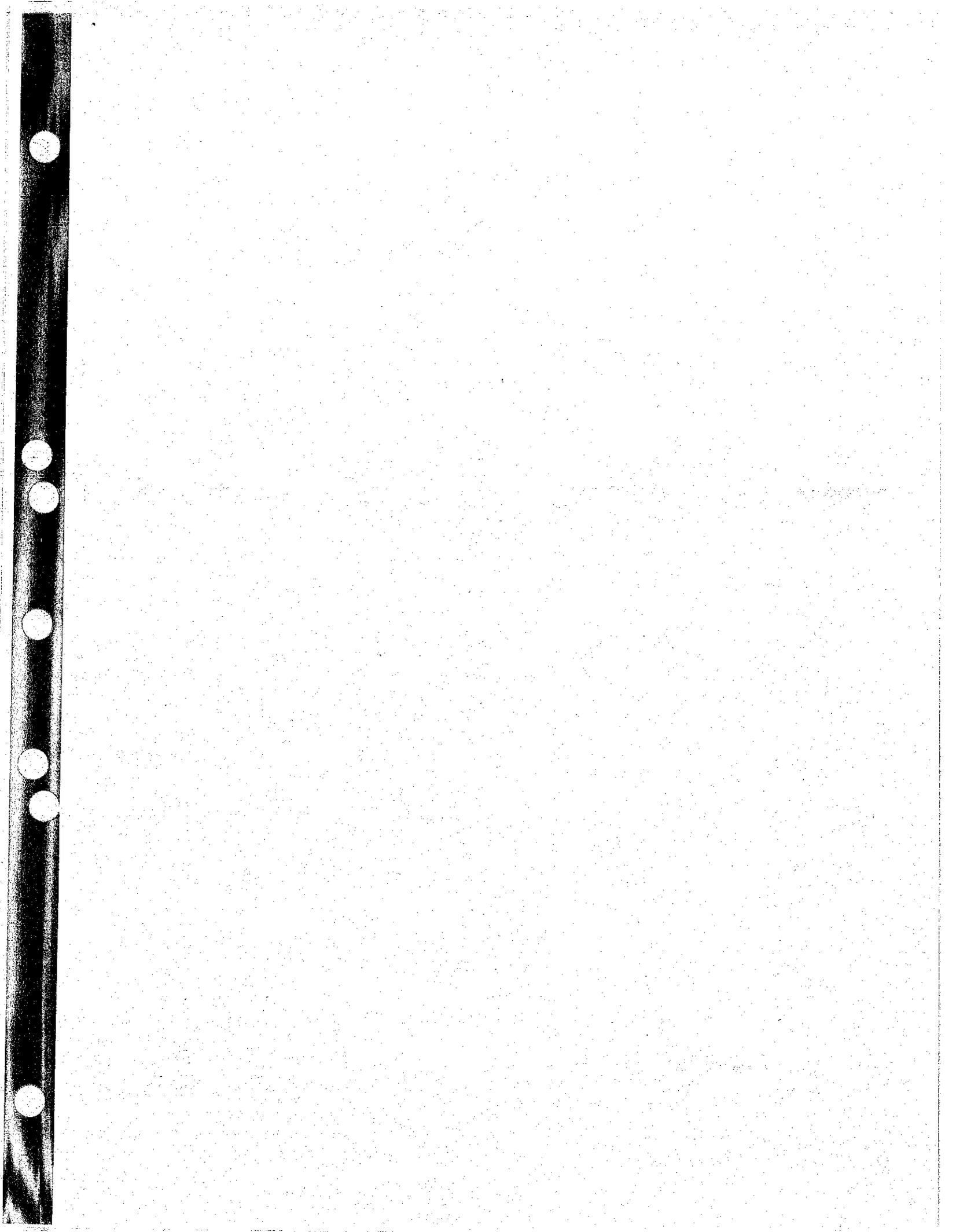

MICHELE RUSEN, # 3214
1208 Market Street
Parkersburg, WV 26101
(304) 485-6360

PLAINTIFFS' EXHIBITS

- Exhibit A June 14, 2006 Letter from David Hughes to Walt Auvil
- Exhibit B June 30, 2006 Letter from Walt Auvil to David Hughes
- Exhibit C July 17, 2006 Letter from David Hughes to Walt Auvil
- Exhibit D July 26, 2006 Letter from Walt Auvil to David Hughes
- Exhibit E Medical Authorization proposed by Defendants
- Exhibit F *Plaintiffs' Memorandum in Response to Defendants'
Second Motion to Compel*
- Exhibit G *Civil Procedure and Evidence Committee Newsletter,
Summer 2000 article submitted as Exhibit to Plaintiffs'
Memorandum in Response to Defendants' Second Motion
to Compel*

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Summer 2000 article submitted as Exhibit to Plaintiffs'
Memorandum in Response to Defendants' Second Motion
to Compel*



**AUTHORIZATION FOR RELEASE
OF MEDICAL RECORDS**

**TO ALL HEALTH CARE PROVIDERS THAT HAVE PROVIDED SERVICES TO THE
FOLLOWING INDIVIDUAL:**

NAME: Brenda Graham

CASE NAME: Dye, et al v. Kmart, et al

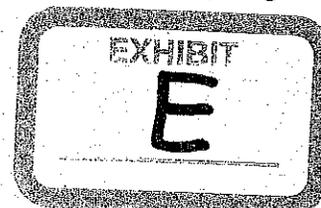
SS#: 232-88-4146

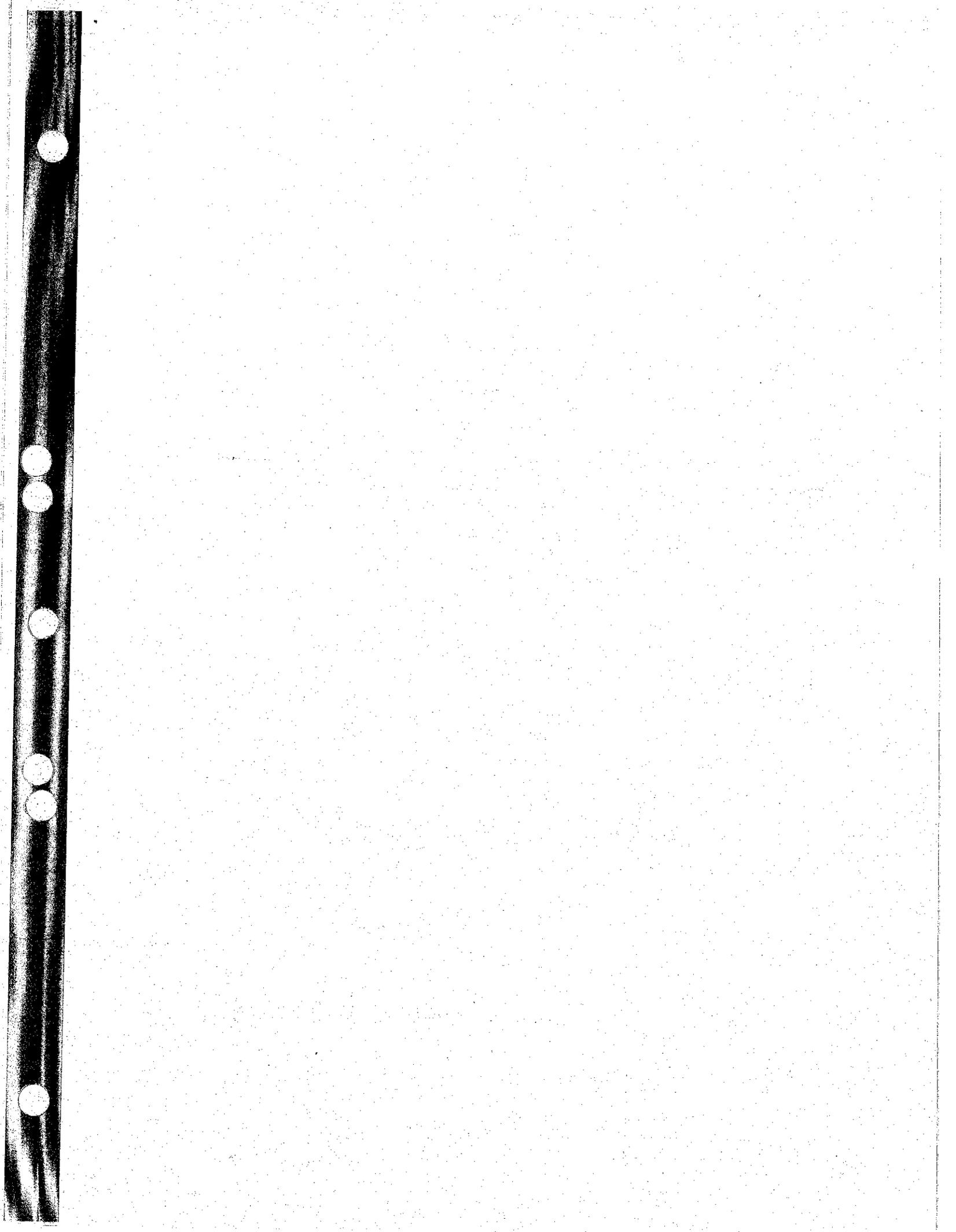
CASE NUMBER: 06-C-121

DOB: 12/12/1952

COURT: Circuit Court of Wood County,
West Virginia

1. I, Brenda Graham, hereby authorize the above-referenced health care providers (the "Providers") to disclose, release, and give the information detailed in Items 2 and 3 below to the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree Deakins"), 600 Peachtree Street, Suite 2100, Atlanta, Georgia 30308, notwithstanding any privilege or confidentiality which may protect these records under state or federal law. This disclosure and release is requested for purposes of litigation that I have initiated.
2. The information to be released includes any and all information described in Item 3 below related to services provided to the above-named individual.
3. The information to be released is any information and documents in a Provider's possession, including notes, charts, discharge, treatment, or operative reports or abstracts, photographs, and the like, concerning medical treatment, medical history, psychiatric or psychological treatment, counseling, history, and diagnosis, medical, psychiatric, and psychological prognosis, prescribed medications, drug or alcohol treatment or counseling, or other similar information or documentation pertaining to services rendered to me and to allow Ogletree Deakins to examine and obtain copies of any such records, charts, x-rays, and each and every document included in any such medical charts, and any other documentation, upon presentation of this authorization or any duplicate or photostatic copy thereof.
4. To the extent that this release is directed to any individual pharmacist or medical practitioner, including physicians, nurses, therapists, or others who rendered or are rendering medical, psychiatric, or psychological treatment or other counseling, the Providers are further authorized to give to Ogletree Deakins an opinion or statement of prognosis, whether written or verbal, as the same pertains to me.
5. A copy of this authorization may be used just as if it were the original.
6. I have read and understand the following related to this authorization:
 - (a) This authorization will expire upon the conclusion of the above-referenced litigation.





COPY

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

SHARON DYE, BERTHA BONAR,
BARBARA COOPER, EVELYNN HAINES,
CAROLE LOFTY, SHIRLEY MONDAY,
MARY PIERCE, ELAINE RICHARDSON,
CARLA SARTOR, LINDA THOMPSON,
PATTY WAGONER, JANET WESTBROOK,
FAITH WHEELER, KAREN YEAGER,
WANDA YEATER and BRENDA GRAHAM,



Plaintiffs,

Civil Action No. 06-C-121
Judge Reed

v.

K MART CORPORATION,
a Michigan corporation,
JOSEPH SHERRARD and
MARK MULLINS,

Document that was represented to
be the original of this copy was filed in the
office of the Circuit Clerk of Wood Co., WV

DEC - 5 2006

Defendants.

Carole Jones, Circuit Clerk
Wood County, WV

PLAINTIFFS' MEMORANDUM IN RESPONSE TO
DEFENDANT'S SECOND MOTION TO COMPEL

Come now the Plaintiffs and file this memorandum of law in response to Defendants' Second Motion to Compel.

FACTS

The sole issue presented in Defendants' Second Motion to Compel is whether the Court should order all Plaintiffs to provide blanket releases for the Defendants to receive all medical records for all Plaintiffs. In connection with discovery disputes leading to the Defendants' first motion to compel and in correspondence since the first motion to compel, Plaintiffs have set forth their position, namely, that the filing of a claim for wrongful termination under the West Virginia Human Rights Act and the demand for "garden variety" emotional distress damages associated therewith, does not, standing alone, justify the Defendants' request for disclosure of

migraines were not caused by her termination as she had them approximately fifteen years before she was terminated.

As to Plaintiff Yeager, the Plaintiff indicated that she had been prescribed Prozac over a decade prior to her termination. What does her Prozac prescription, which preceded her termination by a decade, have to do with emotional distress stemming from Yeager's termination? She obviously makes no claim that her Prozac prescription was caused by her termination.

Defendant's statement in their memorandum (after summarizing the two Plaintiffs' deposition testimony discussed above) that "the document requests seeking medical records are not overly broad . . . because, as evidenced by Plaintiffs' own deposition testimony, such requests are clearly reasonably calculated to lead to the discovery of admissible evidence" is a conclusion which does not follow from the testimony of either Plaintiff Dye or Yeager. The testimony of these two Plaintiffs does not support the view that anything in their medical records is properly discoverable by Defendants.

As the West Virginia Supreme Court noted in Keplinger v. Virginia ELC & Power Co., 208 W. Va. 11, 537 S.E.2d 632 (2000) "A fiduciary relationship exists between a physician and a patient" (citations omitted); "[I]nformation is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard." (citations omitted). While noting that "a person who has filed a civil action that places a medical condition at issue has impliedly consented to the release of medical information", the Keplinger Court stated that "this implied consent involves only medical information related to the condition placed at issue." (emphasis in original) Id. at 23, 644. The Court noted that filing a lawsuit "does not efface the

scope of discovery which Defendant seeks is far too broad.

Additional cases discussing the issue not addressed in the "Medical Records Discovery" article are summarized below.

In State ex rel. Dean vs. Cunningham, 182 S.W.3d 561 (Mo. 2006), the Missouri Supreme Court addressed the question of the discoverability of a plaintiff's medical records in a discrimination case. The Court framed the issue as follows: Does the physician-patient privilege apply to an action seeking damages for emotional distress under the Missouri human rights act for alleged sex discrimination and sexual harassment, or does such an action always waive the privilege? The Court - after an exhaustive analysis of the authority from around the United States concluded: "A person claiming emotional distress damages for sex discrimination and sexual harassment under the Act is protected by the physician-patient privilege where: (1) her claim is only for such emotional distress and humiliation that an ordinary person would experience under the circumstances or that may be inferred from the circumstances, and (2) is not to be supported by any evidence of medical or psychological treatment for a diagnosable condition."

In Burrell v. Crown Central Petroleum, 177 F.R.D. 376 (E. D. Tex. 1997), plaintiffs alleged race and sex discrimination and sought damages for mental anguish. Defendant filed a motion to compel production of documents, including medical records because plaintiffs were seeking mental anguish damages. The Court denied defendant's request to compel production of plaintiffs' medical records, holding that mental anguish was incident to the work-related economic damages like lost wages and asking for mental anguish damages did not place plaintiffs' physical or mental condition in controversy. Medical records or testimony was not

it is that is relevant to the Plaintiffs' "garden variety" emotional distress claims that Defendants seek a classic "fishing expedition" to determine whether there is some information in the Plaintiffs' medical records with which they can discredit or embarrass them. The law does not support the invasion of the confidential fiduciary relationship between a patient and a physician on such flimsy grounds.

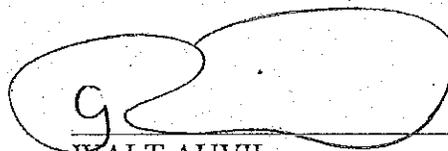
CONCLUSION

For all of the reasons set forth above, Defendant's Second Motion to Compel should be denied.

SHARON DYE, BERTHA BONAR,
BARBARA COOPER, EVELYNN HAINES,
CAROLE LOFTY, SHIRLEY MONDAY,
MARY PIERCE, ELAINE RICHARDSON,
CARLA SARTOR, LINDA THOMPSON,
PATTY WAGONER, JANET WESTBROOK,
FAITH WHEELER, KAREN YEAGER,
WANDA YEATER and BRENDA GRAHAM,

Plaintiffs by Counsel,

Respectfully Submitted:



WALT AUVIL
Counsel for Plaintiffs
State Bar No. 190

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