

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

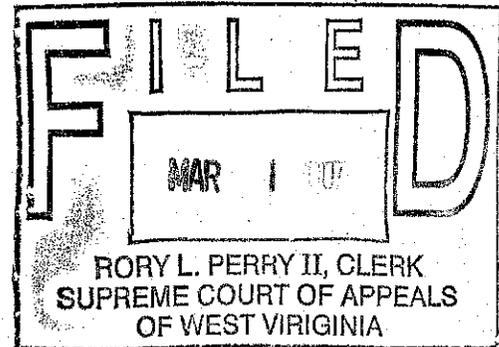
Petitioners,

v.

CIVIL ACTION NO.

HONORABLE JEFFREY B. REED, Judge of
the Circuit Court of Wood County, and
SHARON DYE, BERTHA BONAR, BARBARA COOPER,
EVELYN 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.



PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

KMART CORPORATION, a Michigan corporation,
JOSEPH SHERRARD AND MARK MULLINS

By Counsel

Barbara G. Arnold

Barbara G. Arnold (W. Va. Bar No. 4672)
MacCorkle Lavender Casey & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332-3283
(304) 344-5600 Telephone
(304) 344-8141 Facsimile

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.

CIVIL ACTION NO.

HONORABLE JEFFREY B. REED, Judge
of the Circuit Court of Wood County, and
SHARON DYE, BERTHA BONAR, BARBARA COOPER,
EVELYN 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:

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

COME NOW Petitioners, by and through their undersigned counsel, MacCorkle Lavender Casey & Sweeney, PLLC, and Barbara G. Arnold; and, pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure, file this Petition for Writ of Mandamus and/or Prohibition asking the Court to grant a writ of mandamus requiring the Honorable Jeffrey B. Reed, to compel Plaintiffs/Respondents (hereinafter, Plaintiffs), in the Circuit Court of Wood County Civil Action No. 06-C-121, *Dye, et al., v. K Mart Corporation, et al.*, to sign the Medical Authorizations provided to Plaintiffs' counsel and/or to compel Plaintiffs to produce their medical records. Petitioners further request that the Court grant a writ of prohibition to prevent Respondent Reed from denying Petitioners' right to seek Plaintiffs' medical records, via the discovery procedures, including but not limited to subpoenas duces tecum, as set forth in the West Virginia Rules of Civil Procedure.

1. Plaintiffs were terminated from their positions with Kmart on January 4, 2006; and later brought suit alleging, *inter alia*, that they suffered "mental and emotional distress" as a result of their terminations. Plaintiffs do not limit the monetary amount of damages claimed in any way.

2. On April 21, 2006, Plaintiffs were served with Petitioners' First Interrogatories and Requests for Production of Documents. Plaintiffs then served their responses to those discovery requests on May 22, 2006; and refused to produce medical information and records.

3. On August 2, 2006, Petitioners filed their First Motion to Compel, seeking, among other things, to compel Plaintiffs to produce their medical records. Thereafter, on August 14, 2006, Respondent Reed deferred ruling on that issue and indicated that Petitioners may file a new Motion to Compel if the parties were unable to resolve the discovery disputes on their own.

4. Unfortunately, the parties were unable to reach an agreement. Therefore, Petitioners had no choice but to file their Second Motion to Compel on November 13, 2006.

5. By Final Order entered January 22, 2007, Respondent Reed denied Petitioners' Second Motion to Compel "for reasons set forth by Plaintiffs in their memorandum." For clarification, Petitioners wrote Respondent Reed requesting specific findings of fact and conclusions of law. He did not respond.

6. Respondent Reed has refused to allow discovery of any of Plaintiffs' medical records, by subpoena duces tecum, or otherwise.

7. Respondent Reed has made clear that the only method by which Petitioners may obtain medical information from Plaintiffs is through their depositions. However, Petitioners are concerned that Plaintiffs/Respondents might fail to disclose, whether intentionally or not, all medical providers they have seen related to their emotional conditions. Without access to Plaintiffs' medical records, Petitioners will not be able to verify the medical histories recounted by each Plaintiff during their depositions or defend against their emotional distress claims by accessing psychiatric history which may disprove the allegation that the January 4, 2006 terminations were the primary cause of their present emotional distress.

8. Furthermore, Petitioners cannot effectively depose or cross-examine Plaintiffs' physicians about the emotional distress that they allegedly have suffered. Likewise, the availability of medical records will affect Petitioners' determinations regarding the necessity of retaining their own medical expert(s); and such expert(s) will need to review records obtained through the discovery process.

9. A wholesale denial of access to Plaintiffs' medical records leaves Petitioners vulnerable to substantial expenses in terms of emotional distress damages with no way to defend themselves.

10. By prohibiting access to Plaintiffs' medical records through subpoenas duces tecum, requests for production, or any other discovery methods

permissible under the West Virginia Rules of Civil Procedure, Respondent Reed has left Petitioners with no other adequate remedy at law. Therefore, Respondent Reed has substantially abused his discretion in refusing discovery of medical records in this case.

WHEREFORE, Petitioners respectfully request that this Court issue a rule to appear and show cause why a writ of mandamus and/or prohibition should not be awarded by this Court requiring Respondent Reed to compel Plaintiffs to sign the Medical Authorizations provided to Plaintiffs' counsel and/or to compel Plaintiffs to produce their medical records, and demonstrate why a writ of prohibition should not be awarded prohibiting Respondent Reed from denying Petitioners' right to obtain Plaintiffs'/Respondents' medical records via subpoena duces tecum and other discovery procedures set forth in the West Virginia Rules of Civil Procedure.

Respectfully submitted this 1st day of March, 2007.

KMART CORPORATION, a Michigan corporation,
JOSEPH SHERRARD AND MARK MULLINS

By Counsel

Barbara G. Arnold

Barbara G. Arnold (W. Va. Bar No. 4672)
MacCorkle Lavender Casey & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332-3283
(304) 344-5600 Telephone
(304) 344-8141 Facsimile

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

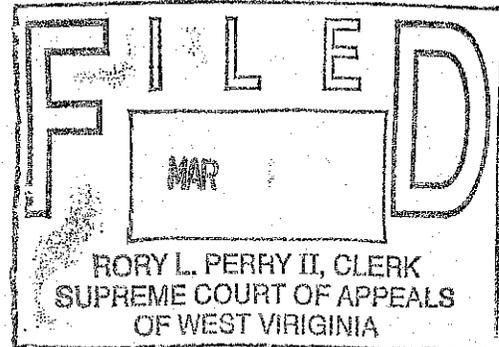
K MART CORPORATION
a Michigan corporation,
JOSEPH SHERRARD,
and MARK MULLINS,

Petitioners,

v.

CIVIL ACTION NO.

HONORABLE JEFFREY B. REED, Judge of the
Circuit Court of Wood County, 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,
and WANDA YEATER,



Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR
WRIT OF MANDAMUS AND/OR PROHIBITION

I. Introduction

Plaintiffs in the matter of *Sharon Dye, et al. v. Kmart Corp., et al.*, pending in the Circuit Court of Wood County, West Virginia, were terminated from their positions with Kmart on January 4, 2006, and later brought suit alleging, among other things, that they suffered "mental and emotional distress"¹ as a result of their terminations. As such, Petitioners should be entitled to Plaintiffs' medical records to develop a proper defense against their emotional distress claims. However, Respondent Jeffrey B. Reed, Judge of the Circuit Court of Wood County, has entered two Orders prohibiting Petitioners' access to Plaintiffs' medical records through subpoena duces tecum, requests for

¹ Am. Compl. p. 4, (attached hereto as Ex. 1).

production, or any other discovery methods permissible under the West Virginia Rules of Civil Procedure. Because this case involves confidential information of a sensitive nature, a writ of mandamus and/or prohibition is appropriate in this action. Petitioners ask this Court to grant a writ of mandamus requiring the Honorable Jeffrey B. Reed to compel Plaintiffs to sign the Medical Authorizations provided to Plaintiffs' counsel and/or to compel Plaintiffs to produce their medical records. Petitioners further request that the Court grant a writ of prohibition to prevent Respondent Reed from denying Petitioners the right to obtain Plaintiffs' medical records via the exclusive discovery procedures set forth in the West Virginia Rules of Civil Procedure.

II. Statement of Facts

The facts of this case as they relate to this Petition are as follows. Plaintiffs filed their Complaint in the above-captioned matter on March 24, 2006, alleging violations of the West Virginia Human Rights Act and the West Virginia Wage Payment and Collection Act.² Among other things, they seek damages for emotional distress.³

On April 21, 2006, Plaintiffs were served with Petitioners' First Interrogatories and Requests for Production of Documents.⁴ Plaintiffs served their responses to those discovery requests on May 22, 2006.⁵ Petitioners took issue with many of the responses and objections to the Interrogatories and Requests for Production.

² *Id.* at ¶¶ 26, ¶ 28.

³ *Id.* p. 4.

⁴ See Defendant Kmart Corporation's First Request for Production of Documents to Plaintiff Sharon Dye, and Defendant Kmart Corporation's First Interrogatories to Plaintiff Sharon Dye, (attached hereto as Ex. 2). Note: all Interrogatories and Requests for Production are identical. Therefore, Petitioners will only provide one set for the Court to view.

⁵ See Plaintiff Sharon Dye's First Responses to Defendant Kmart Corporation's First Interrogatories; and Response of Plaintiffs to Defendants' First Requests for Production of Documents, (attached hereto as Ex. 3). With regard to Requests for Production, Plaintiffs replied jointly.

Numerous letters were exchanged between Plaintiffs' counsel and Petitioners' counsel and some of the discovery disputes were resolved. However, the parties were unable to resolve others, including those requests seeking medical information and records.

On August 2, 2006, Petitioners filed their First Motion to Compel⁶ seeking, *inter alia*, to compel Plaintiffs to adequately respond to Interrogatories 10, 20 and 21, and Requests for Production 5, 10, 11 and 17, all of which seek medical information and records.⁷ A hearing on Petitioners' First Motion to Compel was held, before the Wood County Circuit Court, on August 14, 2006. At the hearing, Respondent Reed granted the Motion to Compel with respect to Interrogatories 10, 20 and 21, with the stipulation that the responses to those Interrogatories would be limited to the preceding five-year period, rather than the ten-year period initially sought by the Interrogatories.⁸ During the hearing for Petitioners' First Motion to Compel, Respondent Reed appeared to recognize Petitioners' need for medical records in terms of relevance to causation of the alleged emotional distress⁹ and corroboration of Plaintiffs' claims.¹⁰ Nonetheless, for reasons that are unclear, he deferred ruling on Requests for Production 5, 10, 11 and 17; and indicated that Petitioners could file a new Motion to Compel if the parties were

⁶ Attached hereto as Ex. 4.

⁷ See Ex. 2.

⁸ See Transcript of Hearing of Petitioners' First Motion to Compel at 33:23-24; 35:18-20, 22-25; 36:1-10, (attached hereto as Ex. 5).

⁹ *Id.* at 18:21-25; 19:1-11 (in which the Court recognizes that if a plaintiff has received psychological treatment predating his termination, that may bring into question whether the termination was the cause of that plaintiff's emotional distress); *see also* 34:12-15 (in which the Court states that "if [plaintiffs] have been diagnosed with depression or something else like that and they've been prescribed a drug or medication for something like that, then I think that's relevant").

¹⁰ *Id.* at 26:13-23 (in which the Court expresses concern that if plaintiffs wanted to hide their history of emotional problems, they would simply choose not to inform their own attorneys about their history of depression and they would likely neglect to mention that history in their depositions as well).

unable to resolve the discovery disputes on their own following Plaintiffs' service of supplemental interrogatory responses and the taking of two of Plaintiffs' depositions scheduled after the hearing.¹¹ The Order of the Court indicated that Petitioners were prohibited from issuing subpoenas duces tecum to obtain the medical records at issue.¹²

At her deposition, Plaintiff Karen Yeager testified that she had been receiving medical treatment for depression for nearly a decade and that she continued to take anti-depressants after her termination.¹³ Plaintiff Sharon Dye testified, in her deposition, that she had been prescribed anti-anxiety and/or anti-depressant medication for migraines as early as 1980,¹⁴ and also explained that after the termination, both her family doctor and her gynecologist prescribed her medication for depression.¹⁵ Furthermore, Plaintiffs' supplemental interrogatory responses,¹⁶ served September 22, 26 and 27, 2006, indicated that other Plaintiffs were treated for depression allegedly caused by the January 4, 2006 terminations. Considering the information obtained through Plaintiffs' supplemental interrogatory responses and Dye's and Yeager's depositions, the relevance of Plaintiffs' medical records became even more apparent to the Petitioners. Hence, Petitioners contacted Plaintiffs' counsel in an attempt to resolve the remaining discovery disputes related to Requests for Production 5, 10, 11 and 17.

¹¹ *Id.* at 29:19-25; 30:6-13.

¹² See Order of the Circuit Court of Wood County, entered Oct. 10, 2006, (attached hereto as Ex. 6).

¹³ See Yeager Dep. at 143:18-23; 144:10-15, Aug. 15, 2006, (attached hereto as Ex. 7).

¹⁴ See Dye Dep. at 115:18-22, Aug. 15, 2006, (attached hereto as Ex. 8).

¹⁵ *Id.* at 109:3-11; 111:22-24; 112:12-18; 113:8-24; 114:1-2.

¹⁶ Attached hereto as Ex. 9.

On September 29, 2006, Petitioners' counsel wrote a letter to Plaintiffs' counsel attaching Medical Authorizations and asked that each of the Plaintiffs sign and return the authorizations.¹⁷ Plaintiffs' counsel answered the letter on October 4, 2006; and refused to provide the authorizations and communicated his clients' continued refusal to comply with the relevant discovery requests.¹⁸ Petitioners' counsel sent another letter to Plaintiffs' counsel, on October 12, 2006, and again explained the reasons why the medical records are relevant to this action.¹⁹ Despite good faith efforts by Petitioners' counsel to resolve the discovery disputes by agreement, in accordance with Rule 37 of the West Virginia Rules of Civil Procedure, and despite Plaintiffs' deposition testimony further establishing the nature of their emotional distress claims and the need for medical records, Plaintiffs continued their refusal to provide records and the parties were unable to reach an agreement with respect to Requests for Production 5, 10, 11 and 17. Thus, pursuant to the instruction of the Respondent during the hearing for Petitioners' First Motion to Compel,²⁰ Petitioners filed a Second Motion to Compel.²¹

Despite Respondent Reed's statements at the first hearing, acknowledging the need for medical records, at the second hearing on December 19, 2006, he denied Petitioners' Second Motion to Compel with no explanation. However, in an attempt to offer some form of justification for his ruling, Respondent Reed asked Plaintiffs to revise

¹⁷ Attached hereto as Ex. 10.

¹⁸ Attached hereto as Ex. 11.

¹⁹ Attached hereto as Ex. 12.

²⁰ See Transcript of Hearing of Petitioners' First Motion to Compel at 30:6-7, (Ex. 5).

²¹ Attached hereto as Ex. 13.

their proposed order to indicate that the motion was denied "for reasons set forth by the Plaintiffs in their memorandum."²² On February 6, 2007 Petitioners wrote Respondent Reed requesting findings of fact and conclusions of law and informing him of their intention to file a writ of mandamus and/or prohibition protesting his ruling.²³ Nonetheless, Respondent Reed refused to provide further findings of fact.

III. Argument

A. A Writ of Mandamus is Warranted and Proper in This Matter.

The writ of mandamus has been used most extensively to control and correct the action of inferior courts. It is used not only to restrain their excesses, but also to quicken their negligence and obviate their denial of justice.²⁴ When a duty is imposed by law upon a court, mandamus from a higher court is the proper means to compel the discharge of that duty. The writ of mandamus will not issue unless three elements coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.²⁵ Generally, mandamus is available only to require discharge of a nondiscretionary duty;²⁶

²² See Order of the Circuit Court of Wood County, entered Jan. 22, 2007, (attached hereto as Ex. 14).

²³ Attached hereto as Ex. 15.

²⁴ *State ex rel. Judy v. Kiger*, 153 W. Va. 764, 767, 172 S.E.2d 579, 581 (1970).

²⁵ *Gribben v. Kirk*, 197 W. Va. 20, 27, 475 S.E.2d 20, 27 (1996); *Berry v. Boone County Ambulance Auth.*, 176 W. Va. 43, 44, 341 S.E.2d 418, 420 (1986); *State ex rel. Cabell County Deputy Sheriff's Ass'n v. Dunfee*, 163 W. Va. 539, 540, 258 S.E.2d 117, 118 (1979); *Hall v. Protan*, 156 W. Va. 562, 568, 195 S.E.2d 380, 383 (1973); *State ex rel. Damron v. Ferrell*, 149 W. Va. 773, 776-77, 143 S.E.2d 469, 472 (1965).

²⁶ *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 658, 246 S.E.2d 99, 114 (1978).

however, a writ of mandamus may lie where the exercise of discretion has been performed in an arbitrary and capricious manner.²⁷

1. There is a Clear Right to Relief Sought.

The three elements required for the issuance of a writ of mandamus exist in the case at hand. First, pursuant to West Virginia Rule of Civil Procedure 26, Petitioners have the right to discover any information reasonably calculated to lead to the discovery of admissible evidence. In the instant case, despite Plaintiffs' claims for emotional distress damages, they attempt to evade the responsibility to produce their medical records by characterizing their emotional distress claims as "garden variety" claims. However, they do not cite any West Virginia authority recognizing this distinction. Indeed, there is not a single case in West Virginia that makes the distinction between traditional emotional distress claims and so-called "garden variety" claims. In fact, Plaintiffs' counsel could not even find support for this argument in the Fourth Circuit.

At the trial court level, Plaintiffs' primary arguments in support of their decision not to produce medical records were: (1) that they only claimed damages for "garden variety" emotional distress; (2) that they did not intend to use expert testimony in support of those claims; (3) and that Petitioners' requests were overbroad. Petitioners will address each argument in turn.

- i. Petitioners are Entitled to Plaintiffs' Medical Records Even if Plaintiffs Only Seek Damages for "Garden Variety" Emotional Distress.

²⁷ *State ex rel. Withers v. Board of Education*, 153 W. Va. 876, 881, 172 S.E.2d 796, 804 (1970).

The West Virginia Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is, in some degree, relevant to the contested issue.²⁸ Although there appears to be no published West Virginia case law speaking directly to the relevance of a plaintiff's medical records where he or she claims emotional distress, it is well established within the Fourth Circuit that medical records are discoverable where plaintiffs seek emotional distress damages.²⁹ For example, in *Martin v. W. Va. Univ. Hosps., Inc.*,³⁰ plaintiff sought damages for "emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance and inconvenience" allegedly suffered by her as a result of her termination.³¹ Plaintiff alleged that, because her claims of mental distress were "garden variety" claims, she did not have to provide her medical records to the defendant.³² The U. S. District Court for the Northern District of West Virginia held that allegations of "severe emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance, and inconvenience" did not constitute "garden variety" mental or emotional distress.³³ Thus, the court compelled plaintiff to produce the medical records at issue.³⁴ The *Martin* decision is important because the court implicitly rejects the idea of "garden

²⁸ See *Evans v. Mutual Mining*, 199 W. Va. 526, 530, 485 S.E.2d 695, 699 (1997).

²⁹ *State ex rel. Paige v. Canady*, 197 W. Va. 154, 160, 475 S.E.2d 154, 160 (1996) (noting that in the absence of West Virginia case law on point, the courts should look to federal law as persuasive authority on how to apply the West Virginia Rules of Civil Procedure); see also *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 399, 540 S.E.2d 917, 923 (1999) (commenting that "we follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure" (quoting *Lawyer Disciplinary Bd. v. Cunningham*, 195 W. Va. 27, 33 n.11, 464 S.E.2d 181, 187 (1995) (additional citations omitted)).

³⁰ No. 1:05CV64, 2006 U.S. Dist. LEXIS 29142 (N.D.W. Va. April 5, 2006).

³¹ *Id.* at **1-2.

³² *Id.* at *5.

³³ *Id.* at *10.

³⁴ *Id.*

variety" emotional distress claims, refusing to accept the plaintiff's "garden variety" characterization and required her to produce her medical records.

Similarly, in *Ricks v. Abbott Labs*,³⁵ plaintiff claimed damages for "emotional distress, humiliation and personal indignity" resulting from the loss of employment.³⁶ The court did not use the term "garden variety" to describe the claim at issue, but it did differentiate plaintiff's claim from more severe distress that would rise to the level of a clinical condition.³⁷ Hence, for all intents and purposes, the court was addressing what would qualify as a "garden variety" claim by Plaintiffs' estimation. In *Ricks*, the plaintiff sought to avoid a compulsory medical examination requested by the defendant. The court held that the plaintiff's mental state was not "in controversy" for the purposes of a Rule 35 medical examination, but agreed with the lower court's decision to compel production of medical records since her medical condition was put "at issue" by her claim for emotional distress damages.³⁸ The court specifically noted that a party's medical condition may be relevant under Rule 26(b), even though it is not "in controversy" within the meaning of Rule 35.³⁹

³⁵ 198 F.R.D. 647, 650 (D. Md. 2001).

³⁶ *Id.* at 648.

³⁷ *Id.*

³⁸ *Id.* at 650; see also *Payne v. City of Philadelphia*, No. 03-3919, 2004 U.S. Dist. LEXIS 8425, at *8 (E.D. Pa. May 5, 2004) (rejecting plaintiff's claim that medical records were irrelevant to his "garden variety" emotional distress claim and noting that the medical records sought by the defendant were relevant because they might suggest whether plaintiff's emotional injuries were due to circumstances prior to or as a result of the incident at issue, or whether he suffered such injuries at all); *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 657, 660 (D. Kan. 2004) (holding that that plaintiff's medical information was relevant to her "garden variety" claim of emotional distress).

³⁹ *Id.*

Plaintiffs herein may argue that they only seek "garden variety" emotional distress damages and that they are not seeking compensation for medical treatment or psychiatric harm. Nonetheless, pragmatically, the mere assertion that one is seeking "garden variety" emotional distress damages has no impact on the amount of damages that Plaintiffs might be awarded for their emotional distress claims. Though they presumably will not receive compensatory damages for medical treatment, the jury certainly still is free to award whatever amount it sees fit for emotional harm. Thus, Petitioners may be forced to pay unlimited emotional distress damages without the benefit of having had access to the Plaintiffs' medical and psychiatric records so that they could have adequately defended against those claims.

- ii. Plaintiffs' Stated Intention Not to Use Expert Testimony in Supporting Emotional Distress Claims has no Bearing on the Discoverability of Their Medical Records.

One of Plaintiffs' primary arguments is that because "garden variety" emotional distress claims are proved through the introduction of lay persons' testimony, and because they do not intend to use expert testimony, Petitioners are not entitled to their medical records. This argument misses the point. As the court pointed out in *Sanchez v. U.S. Airways, Inc.*,⁴⁰ the fact that plaintiffs do not presently intend to use expert testimony to support their claims of emotional distress has nothing to do with whether such information is discoverable for use by the defendant.⁴¹ The court went on to explain that just because plaintiffs would prefer not to prosecute their claims using an

⁴⁰ 202 F.R.D. 131 (E.D. Pa. 2001).

⁴¹ *Id.* at 136 n. 7.

expert, that did not mean that defendant should be precluded from viewing the evidence necessary to discredit plaintiffs' claims.⁴²

Furthermore, while the Court seemed to base its ruling on Plaintiffs' representation that they would not be introducing expert testimony to support their emotional distress claims, it now appears that Plaintiffs may have changed their position. After the hearings, Plaintiffs' vocational rehabilitation expert, Eric Sadlon, prepared written reports giving detailed assessments as to various Plaintiffs' medical/mental conditions. In fact, Ms. Dye's vocational report states that "Ms. Dye has suffered significant psychological difficulties" as a result of her termination.⁴³ With regard to Plaintiff Wanda Yeater, Mr. Sadlon opines that "she may have psychological problems keeping her from attempting a return to work."⁴⁴ In Plaintiff Elaine Richardson's vocational report, Mr. Sadlon commented that "she has developed

⁴² *Id.*; see also *Owens*, 221 F.R.D. at 660 (noting that plaintiff's medical information was relevant to the preparation of defendant's defenses against plaintiff's emotional distress damages claim, because her medical records may have revealed stressors unrelated to defendant that may have affected plaintiff's emotional well-being); *Garrett v. Sprint PCS*, No. 00-2583-KHV, 2002 U.S. Dist. LEXIS 1914, at *6 (D. Kan. Jan. 31, 2002) (noting that plaintiff's intent not to present expert testimony in support of her emotional distress claim did not make medical records and information any less relevant); *Lanning v. SEPTA*, Nos. 97-593, 97-1191, 1997 U.S. Dist. LEXIS 14510, at **1-2 (E.D. Pa. Sept. 17, 1997) (holding that even though plaintiffs stipulated that they would not seek damages for psychiatric/psychological distress, would not offer expert testimony in support of their emotional distress claims, and would not seek any recovery for treatment of their emotional distress, "[d]efense counsel [had] a right to inquire into plaintiffs' pasts for the purpose of showing that their emotional distress was caused at least in part, by events and circumstances that were [unrelated to the facts of the case]").

⁴³ See Vocational Rehabilitation Report of Plaintiff Sharon Dye, (attached hereto as Ex.16) (vocational rehabilitation reports for Plaintiffs Dye, Yeater and Richardson were included as attachments to Petitioners' Feb. 6, 2007 letter to Judge Reed (Ex. 15)).

⁴⁴ See Vocational Rehabilitation Report of Plaintiff Wanda Yeater, (attached hereto as Ex. 17).

considerable psychological difficulties regarding the RIF which has [sic] impacted her ability to mentally function from an overall perspective."⁴⁵ Mr. Sadlon also comments on the alleged psychological difficulties of Plaintiffs Janet Westbrook, Linda Thompson, Carole Lofty, Barbara Cooper, Brenda Graham, Evelyn Haines and Faith Wheeler. Granted, Mr. Sadlon is not a physician or therapist; however, the fact that one of Plaintiffs' experts has made an official report commenting on the issue of Plaintiffs' alleged emotional distress gives Defendants cause for concern. Moreover, the fact that Mr. Sadlon gives detailed assessments of each Plaintiff's medical status/history, as it relates to their ability to perform the physical functions of available jobs, suggests that he may have had access to Plaintiffs' medical records in preparing his reports. As such, Petitioners are also entitled to such records.

iii. Petitioners Request Medical Information Relevant to Plaintiffs' Claims of Emotional Distress.

Plaintiffs cite *Keplinger v. Virginia ELC & Power Co.*⁴⁶ to attack the scope of Petitioners' discovery requests. In *Keplinger*, the Supreme Court of Appeals of West Virginia noted 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, but noted that "this implied consent involves *only* medical information *related to the condition placed at issue*"⁴⁷ (emphasis in the original). If anything, *Keplinger* supports Petitioners' position. As pointed out in *Martin* and *Ricks*, Plaintiffs have put their medical conditions at issue by seeking damages for emotional distress; therefore, they should have to produce their medical records. As for the scope of production requested, at the first hearing,

⁴⁵ See Vocational Rehabilitation Report of Plaintiff Elaine Richardson, (attached hereto as Ex. 18).

⁴⁶ 208 W. Va. 11, 537 S.E.2d 632 (2000).

⁴⁷ *Id.* at 23, 537 S.E.3d at 644.

Respondent Reed recognized that Petitioners' requests were well within the permissible scope of discovery;⁴⁸ and this was further evidenced by the deposition testimony of Plaintiffs Yeager and Dye following the first hearing and by Plaintiffs' supplemental interrogatory responses.

Subsequent to the hearing for Petitioners' First Motion to Compel, Plaintiff Karen Yeager testified, at her deposition, that she has been taking Prozac[®], an anti-depressant, for approximately ten to twelve years.⁴⁹ She further testified that being terminated was humiliating, degrading, and that it made her feel "completely terrible about [herself]."⁵⁰ In addition, Plaintiff Sharon Dye testified, in her deposition, that she had been prescribed anti-anxiety and/or anti-depressant medication for migraines as early as 1980,⁵¹ and also explained that after the termination, both her family doctor and her gynecologist prescribed her medication for depression.⁵² Plaintiff Dye claimed that the termination caused her to suffer tremendous emotional distress.⁵³ She testified that the termination "took over her life,"⁵⁴ that some days she was so depressed that she would not leave the house,⁵⁵ and that the termination was one of the worst things to ever happen to her.⁵⁶ Further, in addition to Dye's and Yeager's deposition testimony, Plaintiffs' supplemental responses to Petitioners' Interrogatories indicate that several

⁴⁸ See *supra* nn. 9-10 and accompanying text.

⁴⁹ See Yeager Dep. at 143:18-23; 144:10-11, (Ex. 7).

⁵⁰ *Id.* at 140:23-24; 141:1.

⁵¹ See Dye Dep. at 115:18-22, (Ex. 8).

⁵² *Id.* at 109:3-11; 111:22-24; 112:12-18; 113:8-24; 114:1-2.

⁵³ *Id.* at 105:12-13.

⁵⁴ *Id.* at 105:18-19.

⁵⁵ *Id.* at 106:17-18.

⁵⁶ *Id.* at 106:24; 107:1.

other Plaintiffs have been treated for depression since the January 4, 2006 terminations.⁵⁷

The deposition testimony of Dye and Yeager, taken with the supplemental interrogatory responses of the other Plaintiffs, justifies the scope of Petitioners' discovery requests. Yeager and Dye admitted to taking anti-depressants for over a decade. Furthermore, when a plaintiff has suffered from emotional issues in the past, it calls into question the viability of the claim that she is entitled to emotional damages as a result of her termination.⁵⁸ At the August 14, 2006 hearing for Petitioners' First Motion to Compel, Respondent Reed agreed with Petitioners' position in that regard.⁵⁹ In fact, he specifically stated that "when somebody says, you know, 'I've suffered emotionally,' well, that brings into issue . . . the state of that person's emotions before the termination."⁶⁰ Contrary to Plaintiffs' position, evidence of depression predating the terminations is relevant to the issue of causation. Respondent Reed not only acknowledged the relevance of medical records in this action, he also thought that such records may be necessary for corroboration of Plaintiffs' claims. He noted that while he did not presume that any of the Plaintiffs are dishonest, there have been cases where plaintiffs have withheld medical information from both their attorneys and the opposing counsel. Thus, Respondent Reed appeared to acknowledge that obtaining medical

⁵⁷ See Ex. 9.

⁵⁸ See *Sanchez*, 202 F.R.D. at 134 (holding that medical records were relevant because they may disclose whether plaintiffs actually suffered emotional distress, or whether they sought treatment for unrelated stress, the existence of which would have mitigated their emotional distress claims against the defendant); *Payne*, 2004 U.S. Dist. LEXIS 8425, at **5-6 (same); *Lanning*, 1997 U.S. Dist. LEXIS 14510, at **1-2 (same).

⁵⁹ See Transcript of Hearing of Petitioners' First Motion to Compel at 18:21-25; 19:1-11, (Ex. 5).

⁶⁰ *Id.* at 19:9-11.

records would be necessary to allow Petitioners to verify Plaintiffs' medical histories,⁶¹ but later denied Petitioners' access to those records without explanation.

Plaintiffs also object to the discovery requests on the grounds that Petitioners are seeking blanket discovery of all of Plaintiffs' medical records.⁶² In particular, Plaintiffs object to the requests for gynecological records. However, these records are relevant to the issue at hand. As evidenced by Plaintiffs' own deposition testimony, at least one of the Plaintiffs has been treated for depression by her gynecologist.⁶³ Further, any privacy concerns of Plaintiffs are greatly alleviated by the fact that a protective order has been entered in this case.

2. There is a Clear Legal Duty on the Part of the Respondent to Allow Petitioners to Avail Themselves of the West Virginia Rules of Civil Procedure to Discover Relevant Information.

⁶¹ *Id.* at 26:3-23.

⁶² The West Virginia Supreme Court has held that it is a substantial abuse of discretion for the circuit court to fail to consider all appropriate factors in determining whether a party's discovery requests are oppressive or burdensome under Rule 26(b)(1)(iii). *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 630, 425 S.E.2d 577, 585 (1992). The relevant factors include: (1) balancing the requesting party's need to obtain the information against the burden that producing such information places on the opposing party; (2) analysis of the issues in the case; (3) consideration of the amount in controversy and the resources of the parties; (4) recognition of the fact that the opposing party must show why discovery is burdensome; and (5) consideration of the relevancy and materiality of the information sought. *Id.* at 628, 425 S.E.2d at 583. In the instant case, the Court considered many of these issues at the hearing for Petitioners' First Motion to Compel. However, at the hearing for the Second Motion to Compel, the Court did not want to hear any oral arguments and gave no findings of fact for its decision to deny the motion. As such, it is fair to say that the Court did not give proper consideration to whether Petitioners' requests were burdensome or oppressive under Rule 26(b)(1)(iii).

⁶³ See *Owens*, 221 F.R.D. at 660 (holding that plaintiff's gynecological records were discoverable (pursuant to a protective order) where plaintiff's own deposition testimony made reference to the recommendation of her gynecologist that she take Celexa®, a drug for depression).

The West Virginia Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is, in some degree, relevant to the contested issue.⁶⁴ The question of the relevancy of the information sought through discovery essentially involves the determination of whether the information requested has any substantive bearing on the issues to be tried. However, under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, discovery is not limited only to admissible evidence; but applies to information reasonably calculated to lead to the discovery of admissible evidence.⁶⁵ Here, Respondent Reed has prevented Petitioners from using all available discovery methods under the West Virginia Rules of Civil Procedure. Therefore, Petitioners have no way to obtain information relevant to Plaintiffs' emotional distress claims. As indicated by the West Virginia Supreme Court in *Kitzmilller v. Henning*,⁶⁶ plaintiffs have a right to maintain the confidentiality of medical records, but not with regard to medical conditions placed at issue in the case.⁶⁷ When one's medical condition is placed at issue, defendant has the right to obtain relevant information through Rule 26 of the West Virginia Rules of Civil Procedure.⁶⁸ The *Kitzmilller* court also noted that discovery is often broad and might lead to irrelevant or sensitive information.⁶⁹ That is the very reason why defendants should be allowed to conduct discovery through formal discovery processes.⁷⁰

⁶⁴ See *Evans*, 199 W. Va. at 530, 485 S.E.2d at 699.

⁶⁵ See *State, ex rel., Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 248, 460 S.E.2d 54, 63 (1995).

⁶⁶ 190 W. Va. 142, 437 S.E.2d 452 (1993).

⁶⁷ *Id.*

⁶⁸ *Id.* at 146, 437 S.E.2d at 456.

⁶⁹ *Id.* at 145, 437 S.E.2d at 455 (discussed in the context of prohibiting *ex parte* interviews with plaintiffs' physicians in favor of proceeding through formal discovery processes).

⁷⁰ *Id.*

3. Respondent Reed's Rulings Have Left Petitioners With No Other Adequate Remedy at Law.

In the instant case, Respondent Reed has refused to allow discovery of any of Plaintiffs' medical records, by subpoena duces tecum or otherwise. Hence, without access to Plaintiffs' medical records, Petitioners will not be able to verify the medical histories recounted by each Plaintiff, during their depositions, or defend against their emotional distress claims by accessing psychiatric histories which may disprove the allegations that the January 4, 2006 terminations were the primary cause of their present emotional distress. Furthermore, Petitioners cannot effectively depose or cross-examine Plaintiffs' physicians about the emotional distress that Plaintiffs have allegedly suffered. Likewise, the availability of medical records will affect Petitioners' determinations regarding the necessity of retaining their own medical expert(s); and such expert(s) will need to review records obtained through the discovery process. A wholesale denial of access to Plaintiffs' medical records leaves Petitioners vulnerable to substantial damage awards for emotional distress with no way to defend themselves. By prohibiting Petitioners access to Plaintiffs' medical records through subpoena duces tecum, requests for production, or any other discovery methods permissible under the West Virginia Rules of Civil Procedure, Respondent Reed has exercised his discretion in an arbitrary and capricious manner.

B. A Writ of Prohibition is Warranted and Proper in this Matter.

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its powers."⁷¹ In determining whether

⁷¹ W. Va. Code § 53-1-1.

to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, the court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, the court will only use prohibition to correct substantial, clear-cut, legal errors.⁷² As indicated above, Plaintiffs' medical records are highly relevant to the issue of causation of emotional distress and are necessary to the formulation of Petitioners' defenses against such claims. Therefore, Petitioners have a right to obtain Plaintiffs' medical records. Yet, Respondent Reed has denied Petitioners' right to seek medical records by any method contemplated under the West Virginia Rules of Civil Procedure. As such, Petitioners have no other adequate remedy at law. Therefore, Respondent Reed has substantially abused his discretion in this matter.

IV. Conclusion

Petitioners tried to follow Respondent Reed's instructions, by engaging in a good-faith discourse with Plaintiffs' counsel regarding this issue, by filing two motions to compel to obtain the necessary medical records, and by respecting the Circuit Court's first Order prohibiting the issuance of a subpoena duces tecum to obtain those records.⁷³ Nonetheless, the Court has denied Petitioners' right to use any method of discovery contemplated under the West Virginia Rules of Civil Procedure. Therefore, Petitioners respectfully request that the Court grant a writ of mandamus requiring Respondent Reed to compel Plaintiffs to sign the Medical Authorizations provided to Plaintiffs' counsel and/or to compel Plaintiffs to produce their medical records. Petitioners further request that the Court grant a writ of prohibition to prohibit

⁷² *Hinkle v. Black*, 164 W. Va. 112, 121, 262 S.E.2d 744, 749-50 (1979).

⁷³ Order of the Circuit Court of Wood County, entered Oct. 10, 2006, (Ex. 6).

Respondent Reed from denying Petitioners the right to seek Plaintiffs' medical records via subpoena duces tecum and all other discovery procedures provided by the West Virginia Rules of Civil Procedure.

Respectfully submitted this 1ST day of March, 2007.

KMART CORPORATION, a Michigan corporation,
JOSEPH SHERRARD AND MARK MULLINS

By Counsel

Barbara G. Arnold

Barbara G. Arnold (W. Va. Bar No. 4672)
MacCorkle Lavender Casey & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332-3283
(304) 344-5600 Telephone
(304) 344-8141 Facsimile