WEEDING THE GARDEN: FINDING A SOLUTION TO “GARDEN VARIETY” EMOTIONAL DISTRESS CLAIMS AND DISCOVERY ISSUES

ABSTRACT

“Garden variety” emotional distress claims are an all-too-common element of damages in civil litigation. Often, these emotional distress damages are pleaded with very little proof to substantiate the claim. Opposing counsel may attempt to discover the extent of these emotional distress damages through discovery requests into the claimant’s medical and mental health background. However, these requests are frequently met with claims of privilege and constitutional rights to privacy. This forces the opposing counsel’s hand and often leads to a motion to compel discovery of these records. Courts differ on whether and to what extent these motions are granted. If courts deny access, opposing counsel is left wondering to what extent, if any, the alleged actions resulted in emotional harm to the claimant. This Note addresses the inherent issues with garden variety emotional distress claims and proposes a solution for courts to follow when presented with such claims.

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I. INTRODUCTION

Many civil cases include, among other elements, allegations of emotional distress damages. This element of damages has become a mainstay in personal injury, wrongful termination, and employment discrimination cases.\(^1\) Not only do plaintiffs seek to recover compensatory damages from their injuries, lost wages, and damage to property, but they now seek to recover the intangible: the emotional distress that goes along with the alleged wrong. In doing so, however, plaintiffs put defense counsel in a precarious situation. How does counsel address the amount and extent of the emotional distress with no way to prove or question this element?\(^2\) The logical solution would seem to be to request the plaintiff's medical records to examine the plaintiff's prior emotional and mental health history in order to discern the extent to which the plaintiff has been damaged—or further damaged—from any preexisting trauma.\(^3\) However, many plaintiffs are reluctant to provide these records, as they claim this would invade not only the psychotherapist–patient privilege, but also their constitutional right to privacy.\(^4\) This leaves defense counsel with few options but to file a motion to compel plaintiff’s medical records. Now the ball is in the court’s court. How does the court address the plaintiff’s statutory and constitutional right to privacy while at the same time ensuring that defense counsel is afforded the right to examine all of the evidence—whether it may hurt or help their case?\(^5\) This Note examines the arguments on both sides of this issue and suggests that defendants should be allowed to examine plaintiffs’ medical records, but only those that are relevant to plaintiffs’ emotional and mental health, including medical records, mental health records, and prescription drug records.

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1. See Helen A. Anderson, The Psychotherapist Privilege: Privacy and “Garden Variety” Emotional Distress, 21 GEO. MASON L. REV. 117, 126 (2013) (“Compensatory damages for pain, suffering, and mental distress are often a major—if not the only—part of the damages sought [in civil rights cases].”).
2. See id. at 119 (“If the judge finds a plaintiff’s claims of emotional distress to be garden variety . . . [t]he defendant is then vulnerable to a large award but unable to fully explore issues such as causation.” (footnote omitted)).
3. See id. (“A plaintiff’s psychotherapy can conjure up competing pictures. One image is that of an injured person earnestly seeking help with recovery; the other is of a truly mentally disturbed and troublesome person hiding his condition behind the therapist’s office walls. Courts want to protect the former but not the latter.”).
5. See Anderson, supra note 1, at 119 (“Courts are sympathetic to . . . privacy concerns, but they are also sympathetic to defendants’ arguments about fairness and causation.”).
II. PHYSICIAN–PATIENT PRIVILEGE

The Iowa Code defines the physician–patient privilege:

A practicing . . . physician . . . [or] mental health professional . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity . . . .

. . . .

In a civil action in which the condition of the plaintiff in whose favor the prohibition is made is an element or factor of the claim or defense of the adverse party . . . , the adverse party shall make a written request for records relating to the condition alleged upon the plaintiff’s attorney for a legally sufficient patient’s waiver under federal and state law.6

The Iowa Supreme Court extended this privilege to protect medical records as well.7 So, the Iowa Code establishes the foundation for the physician–patient privilege, and the Iowa Supreme Court has extended this to include communications between the physician and the patient, the records kept of those communications, and any findings and observations made by the physician that were documented in the records.8

A. Physician–Patient Privilege Extended to Protect Mental Health Records

The U.S. Supreme Court further extended the physician–patient privilege to include protection for a party’s mental health records. In Jaffee v. Redmond, the petitioner sought the other party’s mental health records to prove the other party’s mental state during cross-examination.9 The Court found a great benefit in establishing a psychotherapist–patient privilege to protect mental health patients.10 The Court stated:

Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult

8. See id.; IOWA CODE § 622.10(1), (3)(a).
10. See id. at 10–11.
psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.11

In Jaffee, the Court rejected the balancing test that several states used to determine the confidentiality of mental health records.12 The Court held that leaving this up to a judge’s discretion would destroy the effectiveness and purpose of the privilege.13 The Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure.”14

B. The Curious Case of Chung v. Legacy Corp. and How It Can Be Distinguished

In Iowa, opponents of producing medical records when emotional distress is claimed look to Chung v. Legacy Corp. to bolster their argument. In Chung, an injured motorist alleged that the defendant was drunk at the time of the automobile accident.15 The plaintiff sought the medical records of the physician who treated the defendant after the collision, hoping to see if the medical records contained the defendant’s blood alcohol level.16 The Iowa Supreme Court held that the plaintiff’s allegation did not sufficiently interject the defendant’s physical condition so as to meet the standard required by Iowa Code section 622.10.17 The court opined:

By choosing to adopt the privilege, the legislature made the policy judgment that complete and honest communications between a physician and patient would be enhanced by making these communications confidential. The interpretation sought by Chung would seriously thwart the legislature’s goal of enhancing candid physician-patient communications. If a patient knows an adversary in a civil suit would have the power to make the patient’s medical condition an issue in the case, the patient is more likely to be guarded in the

11. Id. at 10.
12. Id. at 17.
13. Id.
14. Id. at 15.
16. Id.
17. Id. at 151; see IOWA CODE § 622.10(3)(a) (2013).
information he shares with his physician. There are few cases in which an imaginative lawyer could not make the opposing party’s physical or mental condition at least a factor in the case. If such tactics were sufficient to trigger the exception, there would be little left of the privilege.18

However, opponents of producing medical records who rely on Chung to support their position fail to read the statutory language of Iowa Code section 622.10 carefully. The statute reads:

In a civil action in which the condition of the plaintiff in whose favor the prohibition is made is an element or factor of the claim or defense of the adverse party . . . , the adverse party shall make a written request for records relating to the condition alleged upon the plaintiff’s attorney . . . .19

This exception is intended for cases in which the plaintiff’s condition is at issue.20 In Chung, it was not the condition of the plaintiff that was at issue, but the condition of the defendant.21 The plaintiff was seeking the defendant’s medical records in order to show that the defendant was drunk while operating his vehicle.22 The defendant was not putting his condition at issue, but was rather being asked to supply his medical records in order to prove the plaintiff’s case.23 The court was correct in determining that the plaintiff’s interpretation of the statute in this case was not the goal of the legislature, and would “thwart the legislature’s goal of enhancing candid physician-patient communications.”24 How would it be fair for a defendant to be asked to supply medical records for a claim that the defendant was not making? This would likewise work for a plaintiff; if a plaintiff makes no element of damages related to emotional or mental well being, how could the plaintiff be expected to produce medical documents completely unrelated to the case?25 Thus, Chung does not support the argument that

18. Chung, 548 N.W.2d at 150–51 (footnote omitted).
19. IOWA CODE § 622.10(3)(a) (emphasis added).
20. See id.
22. Id.
23. See id.
24. Id. at 150; see IOWA CODE § 622.10(3)(a).
25. See, e.g., Maday v. Pub. Libraries of Saginaw, 480 F.3d 815, 821 (6th Cir. 2007) (“[I]f [the plaintiff] were not seeking emotional-distress damages, then her conversations with a social worker about how she was feeling would likely be privileged.”); Kronenberg v. Baker & McKenzie LLP, 747 F. Supp. 2d 983, 991 (N.D. Ill. 2010) (“Forcing [a] . . . plaintiff, under the theory of implied waiver, to reveal all of
medical records cannot be produced at all during the process of litigation as the case involved facts that cause it to fall outside the language of the statute and beyond the legislature’s intent.26

III. WAIVER OF PHYSICIAN–PATIENT PRIVILEGE

Both sides agree that the statutory physician–patient privilege is not absolute and can be waived, under certain circumstances, both expressly and impliedly.27 If the party puts a medical condition “at issue by injecting the privileged material into the case . . . such that the information is actually required for resolution of the issue, then the privilege-holder must either waive the privilege as to that information or be prevented from using the privileged information to establish the elements of the case.”28 The privilege may also be waived if the adverse party can show that the medical records are essential to the case.29 In order to establish an essential need, the party must “prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure.”30 Both sides do not agree, however, on whether the privilege is waived when “garden variety” emotional distress damages are claimed.

A. Opponents of Producing Medical Records

Opponents of the production of medical records claim that the physician–patient privilege is not waived based on garden variety emotional distress claims.31 Garden variety emotional distress is “ordinary or commonplace emotional distress” that is “simple or usual.”32 As this is an issue of first impression in Iowa, opponents will cite a litany of cases in which courts outside of this jurisdiction have addressed the issue of garden

his personal and confidential mental health information simply by having filed the suit even though no mental health issues were placed in issue would stretch the waiver concept beyond all bounds.”).  

26. See Chung, 548 N.W.2d at 150–51 (holding if an adverse party can put privileged information at issue, the privilege’s purpose and effectiveness are damaged).  
27. See Jaffee v. Redmond, 518 U.S. 1, 15 n.14 (1996) (“Like other testimonial privileges, the patient may of course waive the protection.”).  
29. Id. at 960–61.  
variety emotional distress.\textsuperscript{33}

In \textit{EEOC v. Wal-Mart Stores, Inc.}, a Wal-Mart employee brought an action against his employer for damages that he incurred from Wal-Mart’s failure to accommodate his religious beliefs through their policy of requiring him to work on Sundays.\textsuperscript{34} Wal-Mart sought discovery of the plaintiff’s medical records for the previous five years.\textsuperscript{35} The U.S. District Court for the Eastern District of Washington held that an employee does not waive physician–patient privilege by claiming garden variety emotional distress, as the plaintiff was not going to rely on the medical records or expert testimony.\textsuperscript{36} It also held that when there is not an issue of multiple causes, courts should protect the physician–patient privilege when the claim is incidental emotional distress.\textsuperscript{37}

In \textit{Fitzgerald v. Cassil}, the U.S. District Court for the Northern District of California took a narrow approach when deciding whether the physician–patient privilege had been waived.\textsuperscript{38} In \textit{Fitzgerald}, the plaintiffs brought suit against their landlord for violations of the Fair Housing Act, stating that the defendants discriminated against them based on their familial status.\textsuperscript{39} The plaintiffs claimed that they suffered emotional distress damages as well as the attendant bodily injury resulting from the emotional distress.\textsuperscript{40} The court noted that it was not necessary for a defendant to have unlimited access to a plaintiff’s medical records in order to achieve

\textsuperscript{33} See, e.g., \textit{id.} at 450 (“[A] party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety,’ emotional distress damages, without more.”); \textit{Fitzgerald v. Cassil}, 216 F.R.D. 632, 638–40 (N.D. Cal. 2003) (rejecting the middle ground garden variety approach altogether, and finding even if it applied, there was no waiver because the plaintiffs claimed no specific or unusually severe psychiatric injury); Hucko v. City of Oak Forest, 185 F.R.D. 526, 527 (N.D. Ill. 1999) (holding that a plaintiff does not waive psychotherapist–patient privilege by only asserting a claim for emotional distress); Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 228 & n.3 (D. Mass. 1997) (finding that the plaintiff must first “use the privileged communication as evidence” before the privilege is deemed waived, thus avoiding a determination of whether the plaintiff claimed only garden variety emotional distress); \textit{Desclos}, 903 A.2d at 959 (finding that the psychotherapist–patient privilege is not waived when a plaintiff’s claims only involve generic mental suffering).

\textsuperscript{34} See \textit{EEOC v. Wal-Mart Stores, Inc.}, 276 F.R.D. 637, 638 (E.D. Wash. 2011).

\textsuperscript{35} \textit{id.} at 640.

\textsuperscript{36} \textit{id.} at 641.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Fitzgerald}, 216 F.R.D. at 638.

\textsuperscript{39} \textit{Id.} at 633.

\textsuperscript{40} \textit{Id.}
fairness. The court opined that defendants could use the tool of cross-examination to achieve the same end without needing to obtain the plaintiffs' medical records. These cases seem to bolster the arguments of plaintiffs in supporting their claim that medical records should not be discoverable when garden variety emotional distress is claimed.

B. Proponents of Producing Medical Records

Those who seek discovery of medical records base their claim on the simple proposition that by asserting damages related to emotional distress, the plaintiff has put a medical and mental health condition at issue and has thus waived the physician–patient privilege. The Eighth Circuit and other courts have held that even if the emotional distress alleged is merely garden variety, the physician–patient privilege is waived and a person’s medical and mental health records are discoverable.

In 1998, the plaintiff in Schoffstall v. Henderson “sued the United States Postal Service (USPS) for sex discrimination, retaliation, and sexual harassment.” She claimed, among other things, emotional distress as an element of her damages. The USPS, as part of its discovery requests, requested her medical and mental health records dating back to 1970. Schoffstall refused to release the records, and instead filed a motion for a protective order to prevent her from being compelled to do so, claiming that the records were protected by the psychotherapist–patient privilege. The Eighth Circuit disagreed with Schoffstall’s argument. The court held that although the Supreme Court has recognized the psychotherapist–patient privilege, numerous courts have recognized that the plaintiff waives this privilege by putting a medical or mental health condition at issue. The court analogized the psychotherapist–patient privilege to the attorney–
client privilege, finding that similar to the waiver of attorney–client privilege that occurs when a client places the attorney’s representation at issue, when a patient places a medical condition at issue, the psychotherapist–patient privilege is likewise waived.51 This case clearly illustrates that when a patient makes emotional distress an element of damages, the patient waives the physician–patient privilege with respect to discovery of medical and mental health records.52

Likewise, in Sandoval v. American Building Maintenance Industries, Inc., the U.S. District Court for the District of Minnesota held that the plaintiffs’ medical and mental health records were discoverable even though the plaintiffs claimed their emotional distress was garden variety.53 In Sandoval, the plaintiffs alleged sexual harassment, retaliation, and discrimination.54 In their amended complaint, plaintiffs sought garden variety emotional distress damages.55 The defendants sought discovery of the plaintiffs’ medical and mental health histories for the previous 10 years.56 In finding that the defendants were entitled to discovery of the plaintiffs’ medical and mental health histories, the court held that “plaintiffs may not hide behind a claim of privacy to keep their medical records from defendants.”57 The court did, however, recognize that defendants were not entitled to the discovery of all medical and mental health records; defendants could only “discover those medical records that reflect mental health issues, and the manifestations of those mental health issues, and [they were] not entitled to obtain information and records for other illnesses, physical ailments or injuries.”58 Here, the court again recognized that plaintiffs waive their physician–patient privilege when they put their medical condition at issue, even if they merely assert garden variety emotional distress.59 The court limited the scope of discovery to the mental health issues in controversy and did not include records of all physical ailments the plaintiffs may have suffered from during that time.

51. Id.
52. Id.
54. Id. at 265.
55. Id.
56. Id.
57. Id. at 266 (quoting Order Ruling on Motion for Protective Order at 8, Sandoval, 267 F.R.D. 257 (No. 29)) (internal quotation marks omitted).
58. Id. (alteration in original) (quoting Order Ruling on Motion for Protective Order, supra note 57, at 9 (internal quotation mark omitted)).
59. Id. at 265–69.
period.60

In Pundt v. Select Portfolio Servicing, Inc., the trial court ordered the plaintiff to answer questions concerning the emotional distress he was alleging.61 Again, the plaintiff claimed emotional distress, this time arising out of a violation of the Fair Credit Reporting Act.62 The defendants sought discovery of the plaintiff’s medical records, and the plaintiff refused.63 In finding the plaintiff’s medical records were subject to discovery, the U.S. District Court for the Northern District of Iowa held:

If a plaintiff claims that he or she is suffering from emotional distress, and admits that multiple stressors existed in their life at the time, they cannot simply place their emotional distress at the feet of the defendant and say “take my word for it.”64

Here again, the court held that it seemed illogical to simply take the plaintiff’s word that he was harmed without being able to examine further proof of his claims.65

Several Iowa cases have addressed the issue of waiver of the patient-litigant exception without specifically addressing garden variety emotional distress claims. In State v. Hardin, the Iowa Court of Appeals held that “[w]hen the condition of a person is a factor or element of a claim, or a defense of the person claiming the privilege, the patient-litigant exception vitiates the physician-patient privilege.”66 In Hardin, a criminal defendant “filed a request for a ‘Mental Evaluation and/or Treatment at State Expense.’”67 The defendant also requested the report remain confidential until the defendant called the doctor as a witness.68 The defendant later filed a defense of insanity and diminished capacity; in response, the State filed an application to review the report.69 The defendant resisted the State’s application claiming the physician–patient privilege.70 The court

60. Id. at 266.
62. Id. at *1.
63. See id.
64. Id. at *3.
65. Id.
67. Id. at 519.
68. Id.
69. Id.
70. Id.
stated:

We believe the defense of diminished capacity waived the privilege here, even if it had existed, for the simple reason it would be incongruous to allow a party to put a matter in issue and then deny access of an opposing party to relevant information concerning it. Our modern concept of criminal trials favors full disclosure of facts, within constitutional limitations, on both sides of the table. . . . Even the most restrictive authorities would say [defendant] would have waived the privilege by introducing evidence on it. . . .

The court further held in Hardin that “the privilege is not designed as a shield behind which a patient can conceal information.”

The Iowa Supreme Court, in In re Marriage of Hutchinson, addressed the waiver of the physician–patient privilege. In Hutchinson, the court held that “[t]he object of the patient-litigant exception is to prevent the patient from using the privilege to suppress evidence after the patient has frustrated the purpose of the privilege by introducing evidence on his or her own medical condition.” In the case, a mother offered evidence of her own medical condition in a custody hearing, and the father tried to expand discovery to include production and use of her mental health records. In this type of situation, it is reasonable to construe that the plaintiff waived her physician–patient privilege when she not only offered evidence of her medical condition, but put her very medical condition at issue in her claim.

Finally, Iowa Uniform Jury Instruction 200.32 governs the instructions given to jurors explaining how to evaluate damages for a plaintiff who had a condition that was arguably aggravates by the defendant. This instruction benefits the defendant because it requires the jury to determine the extent of the plaintiff’s injury before the defendant’s actions. In Godfrey v. State, Judge Robert Hutchison, in his Ruling on Outstanding Motions, held that

71. Id. at 520 (alterations in original) (quoting State v. Cole, 295 N.W.2d 29, 35 (Iowa 1980)).
72. Id. (quoting State v. Rieflin, 558 N.W.2d 149, 154 (Iowa 1996)) (internal quotation mark omitted).
73. In re Marriage of Hutchinson, 588 N.W.2d 442, 447 (Iowa 1999).
74. Id.
75. Id. at 445.
77. Id.
[a]ssuming defendants have wronged a plaintiff and have caused damage to him, they must be responsible for the damages they have caused—but only for those damages they have caused, and not for a pre-existing condition. In this case, there would be no way for jurors to evaluate the claims Mr. Godfrey is making for emotional distress caused by defendants without knowing the baseline of his condition.78

This further illustrates the problem: If a defendant is not allowed to access and offer the plaintiff’s medical and mental health records, how can the jury determine the extent to which the plaintiff has been damaged by the defendant’s actions relative to “the baseline of his condition?”79 Of course, if the plaintiff has no prior mental or medical health history relating to the emotional distress claimed, then the baseline would be zero, and any emotional distress shown would logically be the sole result of the defendant’s alleged wrongdoings. It would be difficult for a defendant’s counsel to achieve any other result through simple cross-examination without access to the plaintiff’s medical and mental health records because attorneys need evidence to support their claims and assertions. Without at least some discovery, defense counsel would be at the mercy of the person on the stand in knowing whether the answers to cross-examination were correct and accurate. Without having medical and mental health records to support cross-examination questions, defense counsel would have no way to verify that answers to cross-examination were true, nor could they rebut potentially false answers.

C. Differing Viewpoints on Production of Medical Records

Evidenced by the split in decisions from courts across the country, there are differing viewpoints on how the issue of physician–patient privilege and garden variety emotional distress claims should be handled when discovery of medical and mental health records are concerned. On the one hand, opponents of discoverable medical and mental health records have multiple cases to support their viewpoint that medical and mental health records should not be discoverable when only garden variety


79. See id.; see also Pundt v. Select Portfolio Servicing, Inc., No. C10-0159, 2011 WL 6396617, at *2 (N.D. Iowa Dec. 20, 2011) (subjecting a plaintiff to discovery so that the jury could make determinations about whether the plaintiff’s “sleeplessness, stomach problems, or ‘constant worry’” were attributable to the defendant or to other admitted stressors).
emotional distress is claimed. However, defendants who seek discovery of medical and mental health records when garden variety emotional distress is claimed also have multiple cases to support their view. Courts should follow the defendants’ view because, in these cases, discovery of medical and mental health records affords the defendants the ability to clearly understand the issues at play and the extent of the damages.

IV. DISCOVERY OF MEDICAL AND MENTAL HEALTH RECORDS AND THE CONSTITUTIONAL RIGHT TO PRIVACY

In 1993, the Supreme Court of Iowa held in *McMaster v. Iowa Board of Psychology Examiners* that patients have a constitutionally protected right to privacy. In *McMaster*, during the investigation of a psychologist, the Iowa board of psychology examiners sought the records from another psychologist who was not under investigation. The psychologist whose records were sought filed a motion to quash the subpoena and a petition for a temporary and permanent injunction. The court noted that individuals have “an interest in avoiding disclosure of personal matters,” and that interest is the right to privacy, which is constitutionally protected. The Iowa Supreme Court adopted similar reasoning from the U.S. Supreme Court’s holding in *Whalen v. Roe*, which held that the right to privacy “is implicit in the Fourteenth Amendment’s concept of personal liberty and as such restricts state action.” The Iowa Supreme Court agrees with courts of other jurisdictions that the right to privacy also extends to mental health records. The court held that:

> Psychotherapy probes the core of the patient’s personality. The
patient’s most intimate thoughts and emotions are exposed during the course of the treatment. The psychiatric patient confides [in his therapist] more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sin, and his shame. The patient’s innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress.88

Furthermore, the Iowa Supreme Court agrees with the U.S. Supreme Court in Whalen that:

A patient has an interest in avoiding disclosure of these records because of the obvious personal and intimate information contained in them. The patient also has an interest in keeping independent the patient’s choice to seek the help of mental health professionals . . . If the patient cannot be assured that the choice to seek help will be kept confidential, that choice is severely limited.89

Thus, the Iowa Supreme Court has recognized an important constitutional right of privacy.90

Opponents of requiring plaintiffs to disclose medical and mental health records argue that garden variety emotional distress claims are not compelling enough to undermine the plaintiff’s constitutional right to privacy, and thus, in these circumstances, medical and mental health records should not be discoverable as the potential for discovery may deter people from seeking the services of mental health professionals.91 They cling to statements like that in McMaster that “[t]he possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress.”92 However, they fail to recognize that this right can

89. Id.; see Whalen, 429 U.S. at 599–600 (describing the two prongs of the privacy interest).
90. McMaster, 509 N.W.2d at 758.
92. McMaster, 509 N.W.2d at 758 (alteration in original) (quoting Ariyoshi, 481 F. Supp. at 1039).
be waived.\textsuperscript{93}

\textbf{A. Opponents' Constitutional Argument}

Opponents look to \textit{State v. Cashen} to bolster their position that medical records should not be required to be produced, as doing so would violate the patient’s constitutionally protected right to privacy. In \textit{Cashen}, the defendant was charged with “domestic abuse assault, third offense, and willful injury.”\textsuperscript{94} The defendant claimed self-defense and sought the victim’s medical records to show that the victim had a propensity for violence.\textsuperscript{95} The district court denied his motion to authorize an expert to testify about the records, stating the motion was premature as the court had not determined whether the records would be admissible at trial.\textsuperscript{96} The defendant then deposed the victim, during which the victim revealed past instances of abusive relationships, impulsive and reactive behaviors, posttraumatic stress disorder, anxiety, and depression.\textsuperscript{97} The defendant also employed a private investigator who obtained some of the victim’s medical records.\textsuperscript{98} The State, after learning the defendant had obtained the victim’s medical records, filed a motion in limine to exclude the records from trial.\textsuperscript{99} The district court found that the records were relevant to the victim’s propensity and past history that may have led to the events at trial.\textsuperscript{100} The Iowa Supreme Court acknowledged identical reasoning to the holding in \textit{McMaster}, finding that a patient has a constitutional right to privacy in his or her mental health records because “[t]he patient’s most intimate thoughts and emotions are exposed during the course of the treatment.”\textsuperscript{101} However, a thorough examination of the court’s holding shows that the issue that the court had was with the process and procedure by which the defendant obtained the records, not that the records were ultimately obtained.\textsuperscript{102}

\textsuperscript{93.} \textit{Id.} at 759 (“The constitutional privacy interest is not, however, absolute. At most it is a qualified rather than an absolute privilege.”).


\textsuperscript{95.} \textit{See id.}

\textsuperscript{96.} \textit{Id.}

\textsuperscript{97.} \textit{Id.}

\textsuperscript{98.} \textit{Id.}

\textsuperscript{99.} \textit{Id.}

\textsuperscript{100.} \textit{Id.}

\textsuperscript{101.} \textit{Id.} at 407 (quoting \textit{McMaster v. Iowa Bd. of Psychology Exam’rs}, 509 N.W.2d 754, 758 (Iowa 1993)).

\textsuperscript{102.} \textit{Id.} at 407–10.
The Cashen protocol was addressed statutorily and in subsequent caselaw in State v. Thompson. The Iowa Supreme Court recognized that the confidentiality of a victim’s medical records is absolute in a criminal proceeding unless either “the privilege holder voluntarily waives the confidentiality privilege” or the defendant can show in good faith a “reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case.”

While the court recognized that there is an absolute constitutional right to privacy in criminal proceedings, the court articulated circumstances in which this privilege can be overcome, and thus the privilege is not always absolute.

Opponents may also rely on In re Marriage of Mulligan to bolster their arguments that a patient is protected from disclosure of his or her medical records by a constitutional right to privacy. In Mulligan, the Iowa Court of Appeals acknowledged that there is a constitutionally protected right to privacy in medical and mental health records. However, the court stated the “constitutional right to privacy in medical and mental health records, is not absolute, but qualified.” The court then acknowledged that, in a criminal case, a balancing occurs between the patient’s right to privacy in the patient’s medical records and the defendant’s right to compel production of evidence that is relevant to the defendant’s innocence. While the Mulligan court declined to extend the balancing test to apply to civil cases, the court acknowledged ways in which the constitutional right to privacy in medical and mental health records can be overcome.

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103. 2011 Iowa Acts 9; State v. Thompson, 836 N.W.2d 470, 479–82 (Iowa 2013).
104. Thompson, 836 N.W.2d at 481.
105. Id.
107. Id. (quoting Cashen, 789 N.W.2d at 406) (internal quotation marks omitted).
108. Id. The court noted it would not apply this balancing test to “a civil proceeding such as this custody action” because “there is no countervailing interest that would outweigh [the patient’s] privacy rights” when the constitutional right to exculpatory evidence is not implicated. Id. at *6.
109. Id. The court cited an array of cases supporting the proposition that, in custody cases in which a parent’s mental health becomes vital to the determination of the custody issue by more than mere allegations of instability, “[a] trial judge may balance competing interests with respect to best interests of the child, by directing both
B. Proponents’ Constitutional Argument

If there were an absolute constitutional right to privacy in one’s medical records, it would stand to reason that those medical records could never be disclosed for any purpose, let alone in cases involving garden variety emotional distress. However, the Iowa Supreme Court has recognized that the right to privacy is not absolute. If the defendant can show a compelling need for the information, the production of the medical and mental health records may be required.

It is analogous to assume that when a plaintiff waives the statutory physician–patient privilege under Iowa Code section 622.10, the plaintiff also waives the constitutional right to privacy. When confronted with this argument, federal courts have held that the constitutional right to privacy is waived when a plaintiff alleges emotional distress. In Ferrell v. Glen-Gery Brick, an employee alleged that she had been sexually harassed by her supervisor. The employer requested the plaintiff’s mental health records, and the employee objected, claiming a constitutional right to privacy. The U.S. District Court for the Eastern District of Pennsylvania noted that “both courts and commentators alike have consistently taken the view that when a party places his or her physical or mental condition in issue, the privacy right is waived.” The court further held that “[i]mportant fairness considerations justify this exception: an individual who wishes to receive the benefits of the judicial system should not be allowed to impose an additional burden on the system by withholding necessary information central to her claim.”

In Bertram v. Sizelove, the U.S. District Court for the Eastern District of California addressed the constitutional right to privacy in one’s medical parties to submit to an independent psychiatric or psychological examination.” Id. at *6–7 (emphasis altered) (quoting Leonard v. Leonard, 673 So. 2d 97, 99 (Fla. Dist. Ct. App. 1996)).

110. McMaster v. Iowa Bd. of Psychology Exam’rs, 509 N.W.2d 754, 759 (Iowa 1993).
111. Id.
113. Id. at 112.
114. Id. at 111–12.
115. Id. at 112–13.
116. Id. at 113 (quoting Note, Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1554 (1985)) (internal quotation marks omitted).
In *Bertram*, a prisoner brought claims against the facility where he was being held, claiming that the staff was indifferent to his medical condition. In response, the defendants requested his medical records, and the plaintiff objected to their disclosure. The court held that “[w]ith respect to Plaintiff’s constitutional privacy claim, there is no question that Plaintiff’s medical condition around the time of trial is relevant to claims raised in his petition. By making these claims, Plaintiff waived his privacy rights in his medical records.”

Finally, in *Caldwell v. Beard*, the U.S. District Court for the Western District of Pennsylvania further addressed the issue of a constitutional right to privacy in one’s medical records. In *Caldwell*, the plaintiff was scalded by hot water while working in a prison kitchen, and he filed suit claiming that this violated his Eighth Amendment right to be free from cruel and unusual punishment. The court found that although Plaintiff may have a Fourteenth Amendment substantive due process right to confidentiality in his medical records and in the doctor-patient relationship, when he files a grievance that reasonably puts at issue his medical condition/treatment and/or the extent of injury, then he must reasonably expect that in the course of the grievance process, his medical records will be accessed in order to respond to the grievance and so, his constitutional right to privacy has not been violated. This is so because he has impliedly waived any constitutional right to privacy in those records by the filing of the grievance and putting such at issue.

As these courts have recognized, when a plaintiff places a medical or mental health condition at issue, the plaintiff impliedly waives the constitutional right to privacy in the plaintiff’s medical and mental health records.

118. *Id.* at *1.
119. *Id.*
120. *Id.* at *2.
122. *Id.* at *1.
123. *Id.* at *8.
Finally, there are policy considerations to weigh when evaluating whether records should be disclosed, such as tailoring the medical authorizations to the pleadings, and the interest of the defendant in receiving a fair trial. In *State v. Dowd*, the Supreme Court of Missouri chastised defendants for placing no limits on their discovery, stating:

The absence of any time limits, designation of health care providers, or any other qualifications means that defendants’ authorizations, as submitted, would entitle them to any and all of [the plaintiff’s] medical records, from any provider who has ever treated [the plaintiff] for any reason from his birth to the present day. Despite [the plaintiff’s] pleadings, the open-ended scope of defendants’ authorizations is indefensibly broad.124

This argument was addressed in *Sandoval v. American Building Maintenance Industries, Inc.*, and the court held that defendants could “discover those medical records that reflect mental health issues, and the manifestations of those mental health issues, and [they were] not entitled to obtain information and records for other illnesses, physical ailments or injuries.”125 If courts follow this logic, it will protect plaintiffs from unreasonable witch hunts into every aspect of their past medical and mental health histories and records.126

Finally, one needs to address the policy implications of not allowing defendants the ability to do complete research and fully understand the circumstances surrounding their case. If defendants are not able to develop a full understanding of the baseline of the plaintiff’s medical and mental health, they cannot properly defend the claim and contest the amount of damages.127 If they are not allowed to establish the extent, if any, of the

125.  *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 267 F.R.D. 257, 266 (D. Minn. 2007) (alteration in original) (quoting *Order Ruling on Motion for Protective Order, supra* note 57, at 9) (internal quotation mark omitted); see *id.* at 269 (affirming that the prior order still reflected the court’s position).
126.  *See In re Lifschutz*, 467 P.2d 557, 570 (Cal. 1970) (“The patient . . . is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court.”).
127.  *Doe v. City of Chula Vista*, 196 F.R.D. 562, 569 (S.D. Cal. 1999) (“[T]o insure a fair trial, . . . defendants should have access to evidence that [the plaintiff’s] emotional state was caused by something else. Defendants must be free to test the truth of [the plaintiff’s] contention that she is emotionally upset because of the
damage they allegedly caused, then defendants may find themselves paying for emotional trauma caused by previous incidents.\textsuperscript{128}

\section*{VI. CONCLUSION}

The issue of garden variety emotional distress claims is an issue of first impression in Iowa and evokes strong opinions on both sides of the argument. On the one hand, opponents of discovery of medical and mental health records seek to keep the records confidential by claiming the records are protected statutorily through the physician–patient and psychotherapist–patient privileges, and constitutionally through the right to privacy. On the other hand, proponents of discovery of these medical and mental health records claim the patient waives the statutory and constitutional right to privacy by putting the patient's emotional and mental state at issue in the claim. When the issue of one's mental or emotional health is an element of the damages in a case, it seems counterintuitive to keep information regarding that person's mental or emotional health confidential. How could a defendant be expected to build a case properly as to the extent of the plaintiff's damages—among other things—if the defendant does not know the baseline for determining the plaintiff's mental and emotional health before the alleged incident? It seems only logical that mental health records should be discoverable in these instances, thus eliminating the façade of garden variety emotional distress.\textsuperscript{129}

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\textsuperscript{128.} See Anderson, \textit{supra} note 1, at 119.

\textsuperscript{129.} See \textit{id.} at 140 (“The touchstone of ‘ordinary,’ ‘intrinsic,’ or ‘normal’ emotional harm has no firm basis in reality. . . . It is no more than judicial intuition.”).