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THE EVOLVING TREATMENT OF “GARDEN-VARIETY” CLAIMS UNDER THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

I. INTRODUCTION

Since the United States Supreme Court’s ruling in *Jaffee v. Redmond*,¹ an absolute privilege exists at federal common law regarding the psychotherapist-patient relationship.² This new privilege arose with the guidance and mandate of Rule 501 of the Federal Rules of Evidence.³ In *Jaffee*, Supreme Court Justice Stevens related the psychotherapist-patient privilege to similar absolute privileges arising in professional relationships that require trust and confidence to maintain, and which the public has an interest in protecting.⁴

¹ 518 U.S. 1 (1996).

² *See id.*

³ *See id.* at 8-10 (analyzing history of federal common law). The Senate reported that after the adoption of Rule 501 any changes to the rule “should be determined on a case-by-case basis.” *Id.* at 8 (quoting S. Rep. No. 93-1277, at 13 (1974)). In outlining the need to attain effective psychotherapy, Justice Stevens stated that an atmosphere of confidence and trust was required in an effort to achieve complete disclosure. *Id.* at 10. In contrast, the doctor-patient relationship is not recognized under federal privilege law. *Jaffee*, 518 U.S. at 10. A psychologist’s ability to give medical assistance is premised on complete verbal disclosure of ailments, unlike traditional diagnostic tests and physical examinations used by doctors. *Id.* *See generally* Jennifer Sawyer Klien, “I’m Your Therapist, You Can Tell Me Anything”: *The Supreme Court Confirms The Psychotherapist-Patient Privilege in Jaffee v. Redmond*, 47 DePaul L. Rev. 701 (Spring 1998) (analyzing reasons for new privilege); Gayle Nicole Mapp, *Jaffee v. Redmond: Supreme Court Recognition of Protected Psychotherapist Privilege*, 20 Am. J. Trial Advoc. 679 (Spring 1997) (providing justifications and legislative history of new privilege).

⁴ *See Jaffee*, 518 U.S. at 10 (relating spousal and attorney-client privileges). The possibility of disclosure would most likely impair the development of this special relationship. *Id.* at 10 (citing studies discussed by American Psychiatric Association).

This evidentiary privilege prevents disclosures of psychological records, notes and/or testimony regarding conversations between a psychotherapist and a patient.⁵ Like many other testimonial privileges, only the privilege holder can waive the privilege.⁶ The *Jaffe* Court, however, refused to establish clear guidelines to assist the lower courts in exploring the psychotherapist-patient privilege.⁷ The Court's failure to outline the full contours of the privilege has led to mixed determinations in the lower courts of when a patient waives his rights to it.⁸

Part II of this note will briefly review the *Jaffee v. Redmond* decision. Part III will continue with a discussion of subsequent leading cases illustrating the broad and narrow interpretations when a patient waives the privilege. Part IV explores the waiver analysis when considering "garden-variety" claims. Part V analyzes the response and impact of the broad and narrow view of waiver, including how those views apply to garden-variety claims. Part VI concludes that patients should not be found to have waived the privilege when raising garden-variety claims.

II. CREATION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

In 1975, Congress rejected nine specific privileges recommended by the Advisory Committee on the Federal Rules of Evidence, deciding instead in favor of an open-ended Rule 501.⁹ Traditionally, the Court construed privileges quite narrowly and refused to expand the privileges

⁵ See *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 526 (N.D. Ill. 1999) (commenting on effect of *Jaffee* decision). This is in direct conflict with the general rule that "the public...has a right to every man's evidence." *Jaffee*, 518 U.S. at 19 (Scalia, J., dissenting). Please note that this article does not explore the qualification procedures examined to determine if a doctor, social worker, or caregiver is held to the requirements of the psychotherapist-patient privilege. *Id.* at 20-21 (Scalia, J., dissenting) (questioning the validity of a social worker being covered under the psychotherapist-patient privilege).

⁶ See *Jaffee*, 518 U.S. at n.14 (stating patient can waive protection).

⁷ See *id.* at n.19 (recognizing possible future limited exceptions to rule).

⁸ See *infra* note 24 (noting narrow and broad interpretations of waiver analysis exist in different jurisdictions).

⁹ See *Jaffee*, 518 U.S. at 14-15. Of those nine rules, the psychotherapist-patient privilege was one of them. *Id.* at 16. The failure to include the privilege did not mean the committee disapproved of the recognition of a psychiatrist-patient privilege. *Id.* at 15 (reviewing Senate Judiciary Committee notes). Rule 501 states in part "Except as otherwise required...the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.* at n.3.

granted under Rule 501.¹⁰ Despite this trend, the Supreme Court granted certiorari in the *Jaffee* case after the Court of Appeals for the Seventh Circuit recognized a psychotherapist-patient privilege under Federal Rule 501.¹¹

The Supreme Court upheld the Seventh Circuit's decision in *Jaffee*, thereby recognizing a psychotherapist-patient privilege.¹² The facts of the case are as follows: on June 27, 1991, the respondent, Mary Lu Redmond (Officer Redmond), a police officer for the Village of Hoffman Estates, responded to a fight in progress.¹³ When Officer Redmond arrived at the scene, she witnessed Mr. Allen chasing a third-party with a knife.¹⁴ When Mr. Allen did not respond to Officer Redmond's demand to stop, she shot and killed him.¹⁵

Afterwards, Officer Redmond visited a social worker to discuss the event.¹⁶ The administrator of Mr. Allen's estate requested the notes of the conversation between the social worker and respondent during pre-trial discovery and again at trial.¹⁷ Officer Redmond and the social worker refused to comply, which contributed to an unfavorable result in the case and a subsequent appeal.¹⁸ The Court of Appeals for the Seventh Circuit reversed the trial court, causing the administrator of Mr. Allen's estate to petition the Supreme Court.¹⁹ In rejecting the administrator's arguments,

¹⁰ See *id.* at 20 (Scalia, J., dissenting) (criticizing rule as "new, vast and ill defined").

¹¹ See *Jaffee*, 518 U.S. at 6 (citing reason and experience by court of appeals for acceptance of this new privilege). The court of appeals recognized the psychotherapist-patient privilege as a qualified privilege noting that a presiding justice could pierce the privilege through a balancing test. *Id.* at 7 (citing *Jaffee v. Redmond*, 51 F.3d 1346, 1357 (7th Cir. 1995)).

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Jaffee*, 518 U.S. at 4.

¹⁶ *Id.* at 5. Officer Redmond consulted with Karen Beyer, a clinical social worker at about fifty counseling sessions. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5-6. Officer Redmond and her social worker either refused to answer or professed an inability to recollect details of the event. *Jaffee*, 518 U.S. at 6. The presiding justice stated that the refusal to turn over the notes was not based on a legal foundation and therefore, the jury could assume it would harm respondent. *Id.* The court of appeals reversed the lower court's decision and recognized that a privilege existed. *Id.* at 6.

¹⁹ See *id.* at 7-8 (finding evidentiary need did not outweigh confidential conversation). The court of appeals found that "reason and experience" allowed for the recognition of the psychotherapist-patient privilege under Rule 501. *Id.* at 6 (citing *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995)).

the Supreme Court recognized the psychotherapist-patient privilege for similar reasons as the Court of Appeals, but disagreed with that Court's finding that the privilege would be subject to a balancing test.²⁰

III. DEVELOPMENT OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

"The real issue here is not whether the privilege exists but rather whether [the] plaintiff has waived that privilege."²¹

When the Supreme Court created a new evidentiary privilege between psychotherapists and their patients, it gave little guidance as to its parameters.²² Over the past four years, caselaw has developed on the issue when a patient waives the privilege.²³ Most of those cases can be divided

²⁰ See *Jaffee*, 518 U.S. at 10, 17-18 (noting possibility of disclosure may destroy confidential relationship). The Court rejected the balancing test because the promise made by a psychotherapist on confidentiality may be contingent on a trial judge's subsequent determination, which would destroy the purpose of the privilege. *Id.* at 17. See generally *Klien*, *supra* note 3 (providing other reasons for Court's decision to approve new privilege).

²¹ See *Kerman v. New York*, 1997 WL 666261, at *3 (S.D.N.Y. Oct. 24, 1997).

²² See *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 526 (N.D. Ill. 1999) (citing Supreme Court's purposeful intent not to establish "full contours" of privilege). The Court refused to determine the full effects of the privilege in a way that would "govern all conceivable future questions in this area." *Jaffee*, 518 U.S. at 18 (quoting *Upjohn v. United States*, 449 U.S. at 386 (1981)). The Supreme Court gave one example of waiver, "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id.* at n.19. Furthermore, the Court rejected the balancing approach that the court of appeals implemented. *Supra* note 20 and accompanying text (believing subjective disclosure would destroy relationship). The Court stated that the patient "must be able to predict with some degree of certainty whether particular discussions will be protected." *Jaffee*, 518 U.S. at 18 (quoting *Upjohn v. United States*, 449 U.S. at 393 (1981)). The Court did recognize that the privilege could be waived similar to the attorney-client and spousal privilege. *Id.* at 10, n.14. The psychotherapist-patient privilege tends to be more closely associated with the attorney-client privilege. *Kamper v. Gray*, 182 F.R.D. 597, n.1 (E.D. Mo. 1998) (noting attorney-client privilege not existent when third parties informed, same true with psychotherapist-patient); *EEOC v. Danka Industries, Inc.*, 990 F. Supp. 1138, 1142 (E.D. Mo. 1997) (citing *Sarko v. Penn Del Directory*, 170 F.R.D. 127,130 (E.D. Pa. 1997) (showing attorney-client privilege waived when advise of counsel placed at issue in litigation); *Hucko*, 185 F.R.D. at 528 (noting *Jaffee* analysis of attorney-client privilege); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 229 (D. Mass. 1997) (commenting on waiver of attorney-client privilege).

²³ See *Booker v. City of Boston*, 1999 WL 734644, at *1 (D. Mass. Sept. 10, 1999) (detailing jurisdictions that have ruled differently on issue of waiver); see also *infra* note 24 (detailing two categories of waiver analysis).

into two categories: 1) broad interpretation and 2) narrow interpretation, of when a patient has waived the privilege.²⁴ Of those categories, the two most widely discussed cases are *Sarko v. Peen-Del Directory Co.* (broad interpretation) and *Vanderbilt v. Town of Chilmark* (narrow interpretation).²⁵

In *Sarko*, the defendant fired the claimant for being excessively late to work.²⁶ The employee claimed that she suffered from clinical depression that required medication, which the defendant knew about.²⁷ In order to defend against the employee's ADA claim, the defendant wanted to review certain medical records that were in the custody of the employee's primary psychiatrist.²⁸ The *Sarko* court needed to determine if the employee waived her protection under the psychotherapist-patient privilege when she alleged these types of damages in her complaint.²⁹ The court found that the claimant waived the privilege for three separate reasons.³⁰ First, prior state law had recognized a waiver in these types of situations.³¹ Second, the Supreme Court, in *Jaffee*, analogized the psychotherapist-patient privilege with the attorney-client privilege, and the attorney-client

²⁴ Compare Broad interpretation: *McKenna v. Cruz*, 1998 WL 809533, at *1 (S.D.N.Y. Nov. 19, 1998); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 562 (S.D. Cal. 1999); *Sidor v. Reno*, 1998 WL 164823, at *1 (S.D.N.Y. April 7, 1998); *Danka Industries, Inc.*, 990 F. Supp. at 1138; *Fox v. The Gates Corp.*, 179 F.R.D. 303, 303 (D. Colo. 1998); *Kerman v. City of New York*, 1997 WL 666261, at *1 (S.D.N.Y. Oct. 24, 1997); *Doolittle v. Ruffo*, 1997 WL 151799, at *1 (N.D.N.Y. March 31, 1997) with narrow interpretation: *Ruhlmann v. Ulster County Dep't of Soc. Services*, 194 F.R.D. 445, 445 (N.D.N.Y. 2000); *Hucko*, 185 F.R.D. at 526; *Vanderbilt*, 174 F.R.D. at 225; *Booker*, 1999 WL 734644, at *1; *Allen v. Cook County Sheriff's Dept.*, U.S. Dist. LEXIS 3587, at *1 (N.D. Ill. Mar. 17, 1999); see also *Johnson v. Trujillo*, 977 P.2d 152,152 (Colo. 1999) (reasoning along same lines as *Jaffee*). But see *Santelli v. Electro-Motive*, 1999 WL 635449, at *1 (N.D. Ill. Aug. 19, 1999) (declining to follow either approach); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999), modified by *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (allowing waiver under broad interpretation but limiting discovery to relevant emotional condition).

²⁵ See, e.g., *Fritsch*, 187 F.R.D. at 621, 624; *McKenna*, 1998 WL 809533, at *2, 3; *Hucko*, 185 F.R.D. at 526 (recognizing *Sarko* and *Vanderbilt* as split on application of psychotherapist-patient privilege).

²⁶ *Sarko*, 170 F.R.D. at 129.

²⁷ *Id.* The plaintiff claimed that the defendant employer violated the Age Discrimination Act, Title VII, and the Americans with Disabilities Act (ADA). *Id.*

²⁸ *Id.*

²⁹ See *id.* at 130.

³⁰ See *Sarko*, 170 F.R.D. at 130.

³¹ See *id.* (citing recent state cases that recognized a privilege with a possibility of waiver).

privilege is waived when advice from counsel is placed at issue.³² Finally, the Court held that, in the interests of judicial fairness, the plaintiff should not be allowed to use the privilege as a sword and a shield.³³ Additionally, the Court reasoned that the plaintiff would have to prove the ADA claim with the help of her psychiatrist.³⁴ For the above reasons, the Court required the plaintiff to produce her treating psychiatrist's records.³⁵

In *Vanderbilt*, the plaintiff alleged various claims of discrimination and sought damages for emotional distress.³⁶ In response, the defendant requested all psychiatric and psychotherapeutic records from the plaintiff's doctors.³⁷ The defendant relied on various court decisions, including *Sarko*, that supported waiver when a patient puts her "mental state at issue."³⁸

First, the court found that the "no balancing" instruction in *Jaffee* changed the waiver analysis previously found under state law.³⁹ Second, although the court agreed with *Sarko's* use of the attorney-client analogy, it decided that *Sarko's* application of the privilege had been improper.⁴⁰

³² See *id.* Similarly, the court predicted that under Pennsylvania law the psychotherapist-patient privilege would be waived like the attorney-client privilege. *Id.*

³³ See *id.* (suggesting allowance of privilege would be contrary to fairness and justice).

³⁴ See *Sarko*, 170 F.R.D. at 130 (noting that an ADA claim requires physical or mental impairment and record of such impairment).

³⁵ See *id.* at 129.

³⁶ *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 226 (D. Mass. 1997).

³⁷ *Id.*

³⁸ *Id.* at 228 (citing *Vasconcellos v. Cybex International, Inc.*, 962 F. Supp. 701, 708-09 (D. Md. 1997); *Doolittle v. Ruffo*, 1997 WL 151799, at * 2 (N.D.N.Y. March 31, 1997); *Sarko*, 170 F.R.D. 127, 130 (E.D. Pa. 1997)). The court examined those cases applying waiver when the claimant placed their mental state at issue. *Id.* Of those cases, the court found three common themes: 1) many rulings were pre-*Jaffee* and found waiver when a claimant put their mental state at issue; 2) Waiver to the attorney-client privilege was similar to this privilege; and 3) that it would be unfair in the interests of justice to enforce the privilege. *Id.*

³⁹ See *id.* at 229. By making an emotional claim the privilege is not waived but is now potentially relevant. *Vanderbilt*, 174 F.R.D. at 229. Privileged information is usually highly relevant. *Id.* (referring to attorney-client analogy in *Sax v. Sax*, 136 F.R.D. 541, 542 (D. Mass. 1991)).

⁴⁰ See *id.* (noting the privileges should be analogous following the direction from the Supreme Court). In an attorney-client relationship, the client waives the privilege when he sues his attorney for malpractice or when his defense is based on the advice from the attorney. *Id.* The client however, does not waive that privilege if he is solely seeking attorney fees. *Id.* Similarly, a client that sues his psychotherapist or relies on his psychotherapist's advice has waived the privilege. *Vanderbilt*, 174 F.R.D. at 229. However, if only a communication took place then a subsequent emotional distress claim does not automatically

Lastly, the Court held that a judicial sense of fair play and justice were not compromised in the case because the plaintiff did not use the substance of the communications as evidence, and therefore, did not use the privilege as a “shield and a sword.”⁴¹ In the court’s conclusion, it noted that there are a number of ways to waive the psychotherapist-patient privilege but that the plaintiff had not qualified for any of them.⁴²

IV. WAIVER BY PRIVILEGE HOLDER FOR “GARDEN-VARIETY” CLAIMS

*“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”*⁴³

The majority of cases follow the *Sarko* philosophy.⁴⁴ Recently, however, many jurisdictions have been following both the narrow interpretation of *Vanderbilt* and the practical garden-variety synthesis.⁴⁵ Garden-variety claims, also known as generic or incidental claims, appear to fall in line with the narrow interpretation outlined in *Vanderbilt*.⁴⁶ Garden-

dissolve the privilege. *Id.*

⁴¹ See *id.* at 230 (realizing in this case plaintiff did not introduce her therapy records).

⁴² See *id.* at 228 (recognizing dates of treatment have no privilege but substance is protected). To waive the privilege, the claimant could do so explicitly or could waive it through disclosure of privileged material. *Id.* The court felt that the plaintiff did not waive the privilege because she had not divulged or planned to divulge any of the privileged communications as evidence. *Vanderbilt*, 174 F.R.D. at 228. The court recognized that if the plaintiff had called her psychotherapist or testified as to the communications, then the privilege would have been waived. *Id.* at 230.

⁴³ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

⁴⁴ See *Sidor v. Reno*, 1998 WL 164823, at n.3 (S.D.N.Y. April 7, 1998) (commenting that *Kerman* approach, which followed *Sarko*, representing majority view); *Vanderbilt*, 174 F.R.D. at 228 (stating courts have held waiver solely by placing mental state at issue).

⁴⁵ See *Ruhlmann v. Ulster County Dep’t of Soc. Services*, 194 F.R.D. 445, 451 (N.D.N.Y. 2000) (recognizing “garden-variety” claim under narrow analysis); *Sorenson v. H&R Block, Inc.*, 197 F.R.D. 199, 199 (D. Mass. 2000) (deciding state issue on “garden-variety” analysis); *Booker v. City of Boston*, 1999 WL 734644, at*1 (D. Mass. Sept. 10, 1999) (basing decision on narrow interpretation of *Vanderbilt*); *Allen v. Cook County Sheriff’s Dept.*, U.S. Dist. LEXIS 3587, at*1 (N.D. Ill. Mar. 17, 1999) (stating narrow view acceptable); see also *Hucko*, 185 F.R.D. at 529 (N.D. Ill. 1999) (focusing on in-depth attorney-client waiver analysis relating to *Jaffee* decision).

⁴⁶ See *Ruhlmann v. Ulster County Dep’t of Soc. Services*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000) (associating narrow view with “garden-variety” claims).

variety claims represent emotional distress claims which are considered usual or simple.⁴⁷ *Ruhlmann v. Ulster County Dep't of Soc. Services*, explores the reasons for the current judicial application of a narrow waiver analysis for garden-variety claims.⁴⁸

In *Ruhlmann*, the plaintiff was a former county employee with the Department of Social Services.⁴⁹ Ruhlmann was involuntarily placed in a mental institution following allegations that he made threats to other employees.⁵⁰ As a result, disciplinary charges were filed against Ruhlmann, which ultimately led to his resignation.⁵¹ In response, Ruhlmann filed a lawsuit claiming multiple violations of federal and state law, as well as damages for mental and emotional suffering.⁵²

Based on Ruhlmann's claim for mental and emotional suffering, the defendant requested Ruhlmann's medical and psychiatric files from the previous five years.⁵³ The magistrate judge allowed such discovery and Ruhlmann appealed the decision.⁵⁴ Ruhlmann sought to protect his past psychiatric records, stating that his emotional condition was not at issue merely because he was seeking relief for emotional damages.⁵⁵

In reviewing the issue, the court noted the split amongst the courts on the issue of waiver.⁵⁶ Ruhlmann advocated the use of the narrow interpretation, finding waiver only when a plaintiff affirmatively asserts his mental condition.⁵⁷ The defendants, however, advocated a broad interpretation, finding waiver when a plaintiff seeks any emotional damage, sub-

⁴⁷ See *Ruhlmann*, 194 F.R.D. at n.6. "Garden-variety" is defined as ordinary or commonplace. *Id.* (citing Webster's NEW WORLD DICTIONARY 656 (3d ed. College ed. 1988)). The Colorado Supreme Court, in an analogous evidentiary decision, noted that a "garden-variety" claim should not constitute waiver of the psychotherapist-patient privilege because the emotional condition of a claimant may only be "peripherally involved" therefore, providing no justification for waiver. *Johnson v. Trujillo*, 977 P.2d 152, 158 (Colo. 1999).

⁴⁸ See *Ruhlmann*, 194 F.R.D. at 450-51. The court looked at the Supreme Court's decision in *Jaffee* as well as other courts' decisions that utilize a broader view of waiver. *Id.*

⁴⁹ *Id.* at 447.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Ruhlmann*, 194 F.R.D. at 447.

⁵⁴ *Id.* This issue of waiver under the psychotherapist-patient privilege had not been decisively reconciled by the second circuit after *Jaffee*. *Id.* at 448.

⁵⁵ See *id.* at 448.

⁵⁶ See *id.* at 448-49.

⁵⁷ *Id.* at 448.

jecting all psychiatric records to the discovery process.⁵⁸

In reviewing the contending cases, the court recognized that many of the cases supporting a broad interpretation appeared to exclude garden-variety claims when deliberating issues of waiver.⁵⁹ The court further noted that such disclosure for incidental claims would be inconsistent with the intended purpose of the psychotherapist-patient privilege.⁶⁰ For the aforementioned reasons, the court held that Ruhlmann's garden-variety claim was protected under the psychotherapist-patient privilege.⁶¹

Massachusetts courts have found that garden-variety claims are protected by statute under the psychotherapist-patient privilege.⁶² The requirements that must be satisfied under the Massachusetts statute to trigger the psychotherapist-patient privilege are very similar to those ex-

⁵⁸ *Ruhlmann*, 194 F.R.D. at 449.

⁵⁹ *See id.* The court reviewed three broad interpretation cases to support this view: 1) *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225-26 (D. N.J. 2000), the plaintiff alleged "anxiety, paranoia, depression and hallucinations;" 2) *McKenna v. Cruz*, 1998 WL 80953, at *2-3 (S.D.N.Y. Nov. 19, 1998), the plaintiff alleged "serious and possibly permanent emotional injuries;" and 3) *Doolittle v. Ruffo*, 1997 WL 151799, at *2 (N.D.N.Y. Mar. 1, 1997), the plaintiff alleged "debilitating depression" preventing her from returning to work. *Ruhlmann*, 194 F.R.D. at 449. In all these cases, the plaintiff was denied a psychotherapist-patient privilege because the damages sought were not just incidental or "garden-variety." *Id.* Some cases, however, did not make such a distinction. *Id.* at 450 (citing *Fox v. Gates Corp.*, 179 F.R.D. at 306 (D. Colo. 1998)) (finding waiver whenever emotion damage is sought); *EEOC v. Danka Indus., Inc.*, 990 F. Supp. at 1142 (E.D. Mo. 1997) (finding waiver with emotional damage claim); *Lanning v. Southeastern Pa. Transp.*, 1997 WL 597905, at *2 (E.D. Pa. Sept. 17, 1997) (finding plaintiff's attempt to limit testimony still results in waiver).

⁶⁰ *See Ruhlmann*, 194 F.R.D. at 451. The court felt that the mere seeking of emotional distress for "garden-variety" claims would be incompatible with the purpose of the psychotherapist-patient privilege. *Id.*

⁶¹ *See id.* at 450. The court seemed to accept the view in *Vanderbilt* that Ruhlmann's privacy right should be protected providing he did not bring in any impermissible witnesses or use his treatment as part of his case. *Id.* A plaintiff does not automatically waive his privilege just by placing his emotional or mental condition at issue, providing he is seeking just "garden-variety" damages. *Id.* at 451.

⁶² *See Sorenson v. H&R Block, Inc.*, LEXIS 16250, at *1 (D. Mass. Nov. 2, 2000). In diversity actions, unlike federal questions, the federal court utilizes state law to determine the waiver of privileges. *Id.* at 8. Massachusetts statute provides similar protection for the psychotherapist-patient relationship as set forth in *Jaffee*, even though a balancing test may be utilized by the presiding justice. MASS. GEN. LAWS. ch. 233, § 20B (2000). The issue of waiver concerning such privilege has been addressed by Massachusetts courts on occasion. *See generally*, *Sabree v. United Broth. of Carpenters and Joiners*, 126 F.R.D. 422, 426 (D. Mass. 1989) (noting a "garden-variety" claim does not place mental condition at issue).

pressed in *Jaffee*.⁶³ In *Sorenson v. H&R Block*, the defendants released the plaintiffs' tax information to the IRS, resulting in a criminal and civil investigation.⁶⁴ In response, the plaintiffs sought damages under state law including monetary compensation for mental anguish, severe emotional distress, humiliation, personal indignity, emotional pain, embarrassment and anxiety.⁶⁵

The court in *Sorenson* found that Massachusetts consistently applied a narrow interpretation of waiver.⁶⁶ The cases suggested that mental or psychological injury requiring expert testimony in order to prove the plaintiff's case should be considered waived while, in the alternative, garden-variety emotional distress, not requiring expert testimony, should not waive the psychotherapist-patient privilege.⁶⁷ Delineating the contours of the garden-variety exception, the court noted that the plaintiff cannot try to offer testimony of a psychotherapist, introduce records of treatment at trial or try to introduce the substance of any communications with psychotherapists without waiving the privilege.⁶⁸ Moreover, the court supported its finding by listing other federal privilege law cases which followed the Supreme Court ruling in *Jaffee*.⁶⁹

⁶³ See *Donovan v. Prussman*, LEXIS 403, 19-20 (Mass. Super. Aug. 1, 2000) (recognizing federal and state privilege law are different because of state exemptions). See *cf. Johnson v. Trujillo*, 977 P.2d 152, 153 (holding generic claims are outside scope of statute).

⁶⁴ See *Sorenson v. H&R Block, Inc.*, LEXIS 16250, at *2 (D. Mass. Nov. 2, 2000).

⁶⁵ *Id.*

⁶⁶ See *id.* at 11-12. A request for damages regarding emotional injury in Massachusetts does not always result in waiver unless it requires psychiatric treatment. *Id.* at 11-12 (citing *Perrin v. S&A Enterprises*, 1999 WL 1327665, at *1 (Mass. Super. Feb. 16, 1999); *Myers v. Tom Foolery's Inc.*, 10 Mass. L. Rptr. 592 (Mass. Super. 1999); *Kippenhan v. Chaulk Services, Inc.*, 2 Mass. L. Rptr. 121 at n.1 (Mass. Super. 1994); *McCue v. Drainis*, 1 Mass. L. Rptr. 298 (Mass. Super. 1993); *Boremi v. Lechmere, Inc.*, 1993 WL 818581, at n.3 (Mass. Super. Nov. 22, 1993)).

⁶⁷ See *id.* at 14.

⁶⁸ See *id.* at 15. Moreover, the court noted that even a claim of loss of consortium, intentional or negligent infliction of emotional distress does not automatically waive the privilege. *Id.* (citing *Myers v. Tom Foolery's Inc.*, 10 Mass. L. Rptr. 592 (Mass. Super. 1999) and *McCue v. Kraines*, 1 Mass. L. Rptr. 298 (Mass. Super. 1993)).

⁶⁹ See *Sorenson v. H&R Block, Inc.*, LEXIS 16250, at *14 (D. Mass. Nov. 2, 2000) (recognizing recent opinions of *Booker* and *Vanderbilt* under federal psychotherapist-patient privilege law).

V. ANALYSIS

*"By creating an evidentiary privilege, society has made a judgment that fostering certain ideas or relationships is worth the potential sacrifice involved in terms of the loss of relevant evidence."*⁷⁰

The Supreme Court's recognition of the psychotherapist-patient privilege was a major advancement in the area of evidentiary privilege law.⁷¹ The Court, however, refused to define the parameters of the privilege, leaving the lower courts to consider the details.⁷² Understandably, the issue of waiver has created split decisions that have yet to be reconciled, including the status of waiver regarding garden-variety claims.⁷³

Soon after the *Jaffee* decision, the majority of courts recognized that any claim of emotional distress was sufficient to place one's emotional condition at issue in the litigation, resulting in the waiver of the psychotherapist-patient privilege.⁷⁴ Under this view, waiver would result when a plaintiff makes any claim for emotional distress or pain and suffering, regardless of the severity of the injury.⁷⁵ Federal and state courts are increasingly finding that the mere claim of emotional distress should not be the sole basis of waiver.⁷⁶ *Vanderbilt* has been a leader in defining this stricter approach to the waiver analysis.⁷⁷ The narrow analysis, promulgated by *Vanderbilt* and its progeny, provides for waiver if the claimant: 1) planned to use privileged conversations as evidence of harm, or 2) planned to use a psychotherapist as evidence to prove damages.⁷⁸ This

⁷⁰ *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 631 (S.D. Cal. 1999).

⁷¹ See *supra* note 3 and accompanying text (recognizing psychotherapist-patient privilege originally rejected as an absolute privilege in favor of Rule 501); *supra* note 5 (realizing a conflict with general rules of evidence).

⁷² See *supra* note 21 and accompanying text (examining refusal by judiciary to define parameters of privilege).

⁷³ See *supra* note 24 (noting split in judiciary on waiver).

⁷⁴ See *supra* note 44 (recognizing majority view on waiver analysis).

⁷⁵ See *Booker v. City of Boston*, 1999 WL 734644, at *1 (D. Mass. Sept. 10, 1999) (noting a mere assertion of a claim for emotional distress results in waiver).

⁷⁶ See *supra* note 42 and accompanying text (claiming emotional damage makes privilege "potentially relevant" but not waived); see also *supra* note 46 (recognizing "garden-variety" claims).

⁷⁷ See *EEOC v. Danka Industries, Inc.*, 990 F. Supp. 1138, 1142 (E.D. Mo. 1997) (recognizing *Vanderbilt* for narrow view); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 528 (N.D. Ill. 1999) (noting narrow view of *Vanderbilt*).

⁷⁸ See *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 629 (S.D. Cal. 1999), *modified*

permits a plaintiff to make a claim of emotional damage but limits the depth in which he can disclose that damage without waiving the privilege. Moreover, *Vanderbilt's* two-step analysis would likely have been sufficient to find that a waiver existed in many previous court decisions utilizing the *Sarko* analysis of waiver.⁷⁹

Ruhlmann and others have further analyzed this approach by applying the issue of waiver to garden-variety claims. Under the majority view, an attempt to make a garden-variety claim is sufficient for finding waiver of the privilege.⁸⁰ *Ruhlmann's* refusal to rely on this type of waiver analysis, with such a low threshold, is based on increasing support for that proposition within the judiciary.⁸¹

Of the many concerns the *Sarko* court expressed, one of them was a concern that the privilege should not be used as a shield and a sword.⁸² This idea stands for the proposition that a plaintiff might use evidence of treatment or damage to further their claims but would then shield further disclosure by claiming privilege.⁸³ This idea is similarly embraced by the *Vanderbilt* court.⁸⁴ Under *Vanderbilt*, a plaintiff would not be allowed to use a psychotherapist to testify concerning treatment or damages, and could not refer to those conversations, without waiving his privilege.⁸⁵ *Ruhlmann*, like *Vanderbilt*, also expresses that a privilege should not be used in such a manner.⁸⁶ *Ruhlmann's* analysis attempts to show that judi-

by *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (examining standard utilized in *Vanderbilt*); see also *supra* notes 39-42 and accompanying text (providing detail for waiver analysis by *Vanderbilt* court).

⁷⁹ See *Hucko v. City of Oak Forest*, 185 F.R.D. 526, n. 3 (N.D. Ill. 1999) (recognizing situations that would be waived under narrow analysis of psychotherapist-patient privilege).

⁸⁰ See *supra* note 44 (recognizing majority find waiver by solely placing mental state at issue); *McKenna v. Cruz*, 1998 WL 908533, *2 (S.D.N.Y. Nov. 19, 1998) (noting an unwillingness to distinguish a "garden-variety" claim).

⁸¹ See *supra* note 45 (noting recent cases following *Vanderbilt* and *Ruhlmann* analysis).

⁸² See *supra* note 33 (noting concern with judicial fairness).

⁸³ See *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 229-30 (D. Mass. 1997).

⁸⁴ See *supra* note 41 (recognizing plaintiff did not use communications to undermine judicial fairness standard sought by *Sarko*); see also *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 624 (S.D. Cal. 1999), modified by *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (noting plaintiff's in *Sidor*, *McKenna*, *Danka*, *Doolittle* and *Vann* all would have waived privilege).

⁸⁵ See *Vanderbilt*, 174 F.R.D. at 230.

⁸⁶ See *Ruhlmann v. Ulster County Dep't of Soc. Services*, 194 F.R.D. 445, 448 (N.D.N.Y. 2000) (citing cases which require plaintiff to affirmatively use his mental condition to waive privilege).

cial fairness is preserved regarding "garden-variety" claims because a plaintiff claiming such injuries cannot use a psychotherapist at trial or refer to such treatment.⁸⁷

Vanderbilt and *Sarko* both hold that a waiver analysis for the psychotherapist-patient privilege would be similar to that used in an attorney-client setting; however, both courts apply the privilege differently.⁸⁸ The *Sarko* court found waiver to exist when any communications between a doctor and patient are at issue in the litigation.⁸⁹ On the other hand, *Vanderbilt* adopted a higher standard concerning this relationship.⁹⁰ Waiver of the psychotherapist-patient privilege is more appropriate when a claimant relies on the a psychotherapist's actual findings or discussions with a patient, just as a client waives his attorney-client privilege if he relies on an attorney's advice and then subsequently sues that attorney concerning such advice.⁹¹ Although this analysis is merely mentioned in *Ruhlmann*, it is unlikely that a garden-variety case would waive the psychotherapist-patient privilege.⁹² Unlike an ongoing illness or serious emotional injury, a garden-variety case would not rely on the findings or discussions between a patient and his psychotherapist for its success.⁹³

Public policy dictates that garden-variety claims should not be sufficient to waive the psychotherapist-patient privilege.⁹⁴ Garden-variety claims are commonplace damages that represent normal pain and suffering that an individual receives, typically through no fault of their own.⁹⁵ Furthermore, garden-variety emotional suffering is a natural result of many

⁸⁷ See *id.* at 450 (presenting *Vanderbilt* analysis to demonstrate judicial fairness).

⁸⁸ See *supra* notes 32, 40 (suggesting reasons for attorney-client analogy); see also *supra* note 4 (relating privilege to spousal and attorney-client relationship). Waiver of attorney-client privilege is not based on the clients state of mind but on the attorney's advice. *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 529 (N.D. Ill. 1999).

⁸⁹ See *Sarko v. Penn-Del Directory*, 170 F.R.D. 127, 130 (E.D. Pa. 1997).

⁹⁰ See *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 229 (D. Mass. 1997).

⁹¹ See *supra* note 40 and accompanying text (relating *Vanderbilt* interpretation of attorney-client privilege). The attorney-client relationship is put at issue if the client makes a claim or defense that requires disclosure to rebut such claim. *Hucko*, 185 F.R.D. at 529 (citing *Rhone-Poulenc, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 863 (3d Cir. 1994).

⁹² See *Ruhlmann*, 194 F.R.D. at 450 (explaining *Vanderbilt* analysis of privilege).

⁹³ See *supra* note 59 and accompanying text (showing cases that required a physician due to the severity of the injuries).

⁹⁴ See *supra* note 61 and accompanying text. (accepting narrow view when no impermissible witnesses or treatments are utilized).

⁹⁵ See *supra* note 47 and accompanying text (defining term and noting an emotional condition of a plaintiff as being peripherally involved).

accidents, and does not require physician testimony to establish damages.⁹⁶ The nature of such emotional injuries does not warrant a breach of confidence between a physician and his patient.⁹⁷ It is counterintuitive that therapy, previously obtained in confidence for unrelated issues, should be subject to disclosure in a subsequent unrelated trial.⁹⁸ *Ruhlmann* seeks to uphold compensation claims for such injuries without the intrusion into a claimants therapeutical history.⁹⁹ *Ruhlmann*, however, recognizes that these damages, by definition, are extremely limited.¹⁰⁰ If a plaintiff seeks greater compensation by claiming extensive injury or seeks the testimony of a treatment provider, he will waive the privilege. By seeking compensation for an extensive injury, a waiver of the privilege would have to occur because: 1) the plaintiff violated the two-prong analysis of *Vanderbilt*; and 2) his injury proved to be more than garden-variety.¹⁰¹

VI. CONCLUSION

The court's reasoning in *Ruhlmann* and *Vanderbilt* allows for a higher standard when considering the issue when a patient waives the psychotherapist-patient privilege. While the *Sarko* majority provides a bright line rule, the standard for the rule is too low. Automatic waiver of the privilege for merely experiencing commonplace damages is not based on the original purpose behind establishing the privilege. Garden-variety claims represent commonplace damages that do not require the testimony of a physician. These damages are limited and not extensive. Evidentiary

⁹⁶ See *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999). In an analogous argument by the Colorado supreme court, "garden-variety" claims would not waive the privilege if they are "bare allegations of mental anguish, emotional distress, pain and suffering..." *Id.*

⁹⁷ See *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 628 (S.D. Cal. 1999), modified by *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (citing *Johnson*, 977 P.2d at 158).

⁹⁸ See *id.* This type of disclosure would "degrade the privileges and undermine the public policy of preserving confidence that they were designed to implement." *Id.*

⁹⁹ See *Ruhlmann*, 194 F.R.D. at 451 (basing rule on established parameters of privilege law). "Garden-variety" emotional distress is simple or usual and not complex. *Id.* at n.6.

¹⁰⁰ See *id.* at 450 (holding plaintiff can protect privilege if damages are incidental). Furthermore, when considering the extent of generic claims under Massachusetts state law, this type of emotion claim is limited. *Sorenson v. H&R Block, Inc.*, LEXIS 16250, at *13-4 (D. Mass. Nov. 2, 2000) (noting that claims cannot include psychic damage).

¹⁰¹ See *supra* note 42 and accompanying text (recognizing different methods to waive privilege under narrow analysis).

proof of commonplace damages does not require the treatment or testimony of a physician. Furthermore, *Vanderbilt* provides a narrow two-step analysis that can assist in determining whether a claimant is suing for more than just garden-variety damages.

The Supreme Court attempted to limit an overly broad interpretation of waiver by stating that, "the participants in a confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected." Furthermore, the Supreme Court only expressed waiver by delineating extreme cases, whereas the waiver analysis in *Sarko* and its progeny would result in a common waiver exception, giving insufficient weight to an absolute privilege. The public's perception of the psychotherapist-patient privilege would most likely change if such a privilege could be waived whenever a claim for emotional health was at issue. This would result in an ineffective privilege and an unhealthy public. Providing a holder of the privilege does not use a privileged conversation to prove damages or harm, it is in the public interest ensure that the psychotherapist-patient privilege remains inviolate.

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