

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 76A

WCC No. 9505-7307

MARION MAAS

Petitioner

vs.

INTERMOUNTAIN CLAIMS

Respondent.

ORDER REGARDING CONFIDENTIALITY OF PSYCHOLOGICAL RECORDS

Summary: Citing *State ex. Rel Margaret Leary v. Montana 13th Judicial District Court*, Docket 95-244 (Order dated June 27, 1995), claimant sought order that her psychological records, while introduced at trial and subject to use for cross-examination of witnesses, would remain confidential, with all records and copies returned to her counsel at the conclusion of trial.

Held: Based on conversations with both counsel, the Order is granted, though the Court retains the ability to include the records in the Court file if appropriate.

Topics:

Medical Records: Confidentiality. Based on conversations with both counsel, WCC grants claimant's request that her psychological records be introduced as evidence, and used for potential cross-examination of witnesses, but be ordered confidential and returned to her counsel following trial unless the Court deems their inclusion in the Court file necessary.

(SEE FOLLOWING ORDER)

1995 MTWCC 74A

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

MARIAN MAAS,
Petitioner,
vs.
INTERMOUNTAIN CLAIMS,
Respondent/Insurer for
INTERSTATE BRANDS,
Employer.

ERD No. 2-95-05447-2
WCC No. 9505-7307

ORDER REGARDING
CONFIDENTIALITY OF
PSYCHOLOGICAL RECORDS

FILED
OCT - 6 1995
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

On August 22, 1995, this Court issued its Order Denying In Part Petitioner's Motion For Protective Order. Upon receipt of that Order, Petitioner moved the Court for a so-called *Leary* Order (see *State of Montana ex. rel Margaret Leary v. Montana 13th Judicial District Court and the Honorable G. Todd Baugh*, Docket No. 95-244, Order dated June 27, 1995). Petitioner moved for the *Leary* Order as it is Petitioner's desire to introduce all of the psychological records as an Exhibit, but does not want to waive the confidentiality of the psychological records or have the records become public by way of this proceeding. The Court held a telephone hearing on Plaintiff's Motion for the *Leary* Order on September 25, 1995 with Petitioner and Respondent's counsel participating.

After reviewing the Briefs of the parties previously filed, hearing the respective positions of the parties during the telephone hearing,

IT IS HEREBY ORDERED that all of Petitioner's psychological records are deemed confidential. Defense counsel may review these records, but may not reveal the contents or discuss the same with the client or anyone else. Furthermore, all of Petitioner's psychological records are sealed, and may not be released to anyone without Court permission. Information contained in these records may be used for examination or cross-examination of the Petitioner, or Petitioner's health care providers, with proper safeguards to ensure their confidentiality to the proceedings at hand. Once this matter is decided, and all appeal times have run, all records and copies of the records shall be turned over to Petitioner's counsel, unless the Court is of the opinion that the records must remain in the Court file.

596-22-08

DATED this 6th day of October, 1995.



Workers' Compensation Judge

c: Mr. Patrick R. Sheehy
Mr. Michael P. Heringer

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 95-244

STATE OF MONTANA EX. REL.
MARGARET LEARY,

Plaintiff, Relator,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY, and the
HONORABLE G. TODD BAUGH,
Presiding District Judge,

Respondent.

O R D E R

FILED

JUN 27 1995

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

Plaintiff Margaret Leary (Leary) allegedly suffered physical and emotional damage as a result of professional dental care provided by Dr. Kenneth Bagby (Bagby). Bagby, through discovery, requested ten years of Leary's medical records. Included in this request for discovery are gynecological records held by Dr. Daniel Molloy. Leary objected to Bagby's request and sought a protective order from the District Court on the grounds that the records were privileged and irrelevant to the claims of the lawsuit. The District Court denied the motion for a protective order. Leary now seeks a Writ of Supervisory Control holding that she does not have to produce the records to Bagby. The Thirteenth Judicial District Court has responded to the application for a writ.

In *Jaap v. District Court* (1981), 191 Mont. 319, 322, 623 P.2d 1389, 1391, we held that by commencing an action for personal injuries which places at issue the plaintiff's physical and mental condition arising from the claim, the plaintiff waives any

physician-patient privilege as to the physical or mental condition in controversy. The question before us therefore becomes "what limits, if any, circumscribe the power of the District Court in authorizing and enforcing discovery under the Montana Rules of Civil Procedure." *Jaap*, 623 P.2d at 1391.

Without reviewing the records at issue it is impossible for this Court or the District Court to determine what discovery limits, if any, are appropriate. In *State v. Burns* (1992), 253 Mont. 37, 39, 830 P.2d 1318, 1319-20, we wrote that:

An *in camera* review is a device often used at various stages throughout discovery and trial. The purpose of the proceeding is to balance the privacy interests of the parties and the need to know. The *in camera* procedure can effectively offer protection to both parties by avoiding needless exposure of potentially harmful information. . . . In [*re Lacy*] . . . we determined that the *in camera* procedure should be used to decide what information could be properly discovered.

[Citations omitted.]

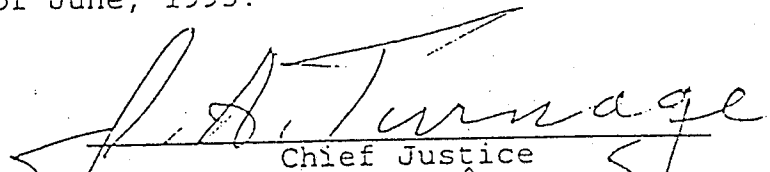
Therefore,

IT IS ORDERED that Relator's application for writ of supervisory control is GRANTED. The District Court is ordered to conduct an *in camera* examination of the records at issue to determine if any of the gynecological records may produce admissible evidence pursuant to Rule 26, M.R.Civ.P. Only those records which meet this test can be properly discovered. Records that the District Court determines are discoverable shall be deemed confidential. Defense counsel may review these records but may not reveal the contents or discuss the same with the client or anyone else. Furthermore, any and all records may be sealed by the

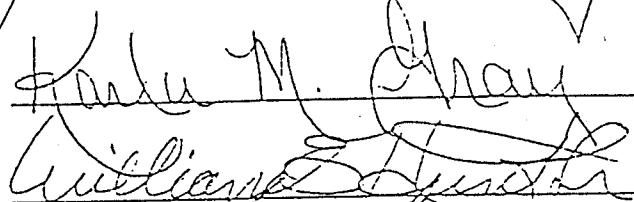
District Court, at its discretion. Information contained in these records may not be used without permission of the District Court after an in chambers hearing on the question of relevancy. Finally, all records deemed discoverable by the District Court, and any copies of these materials, shall be turned over to the Plaintiff's counsel if it is determined they are not relevant to the claim.

The Clerk is directed to mail a true copy of this Order to counsel of record for the parties and to the Honorable G. Todd Baugh, Thirteenth Judicial District Court.

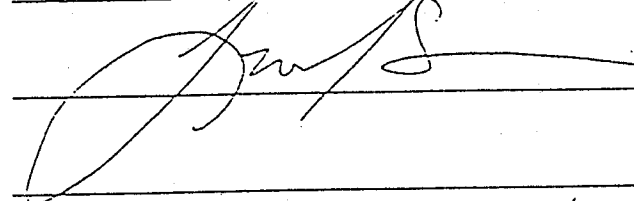
DATED this 27th day of June, 1995.

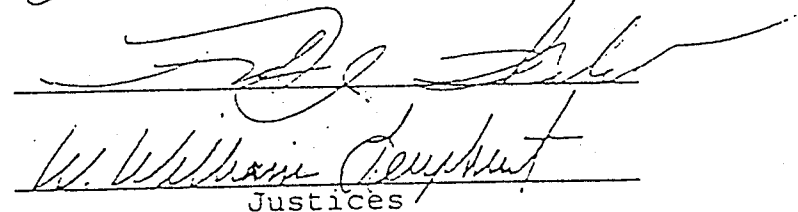


Chief Justice



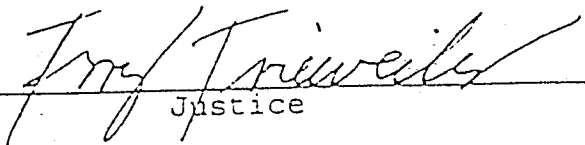
William B. Justice





Justices

Justice Terry N. Trieweiler would grant supervisory control and hold that Margaret Leary's gynecological records are neither relevant nor discoverable pursuant to Rule 35(b), M.R.Civ.P., and are protected pursuant to her right to privacy guaranteed by Article II, Section 10, of the Montana Constitution.


Justice