Clark Law Firm, PC
Gerald H. Clark, Esq. - #048281997
Janet S. Bayer, Esq. - #019321989
811 Sixteenth Avenue
Belmar, New Jersey 07719
(732) 443-0333
(732) 894-9647 (Fax)
Attorneys for Plaintiff

H.L., H.S. and H.D., NAMES BEING FICTITIOUS **Plaintiffs,** **v.** **GIANFRANCO MAUCIONE; SELECTIVE INSURANCE COMPANY OF AMERICA; SELECTIVE WAY INSURANCE COMPANY; JOHN/JANE DOE SECURITY OFFICERS (1-5) (FICTITIOUS DEFENDANTS), JOHN/JANE DOES (1-10) (FICTITIOUS DEFENDANTS), ABC ENTITIES (1-10) (FICTITIOUS DEFENDANTS),** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY** **Docket No.: ESX-L-4567-15** **Civil Action**

I. Defendant Should Not Be Permitted to Rely Upon, Call as a Witness, Subpoena, Nor Read the Deposition of Plaintiff's Consulting Expert and Treating Therapist, Melissa Adessa, LCSW

On April 1, 2019, defense counsel served a subpoena ad testificandum on one of plaintiff's consulting experts from the underlying matter, Melissa Adessa, LCSW. Soon thereafter Defense counsel forwarded a letter dated May 29, 2019, stating their intention to read the deposition testimony of Melissa Adessa, LCSW to the jury at the trial of the above matter. Plaintiff objects to both the subpoena and to the reading of the deposition at trial. New Jersey law is clear an adverse party cannot rely on the opinion testimony of an adversaries consulting expert. If Selective wanted

state of mind expert opinion testimony, it could have retained its own expert. But the law is clear it cannot rely on plaintiff's expert to fill that void. Graham v. Gielchinsky, 126 N.J. 361, 373 (1991)

Ms. Adessa is both a treating medical provider (mental health counselor), and an expert witness consulted by Plaintiff. Ms. Adessa is Plaintiff's mental health counselor, akin to her treating physician. As a treating medical provider, Ms. Adessa cannot be compelled to testify against her patient. As stated in Stigliano by Stigliano v. Connaught Lab, Inc., 140 N.J. 305, 310 (1995),

> The physician-patient privilege, like all privileges, stands as an exception to the general rule that trials are a search for truth. Graham v. Gielchinsky, 126 N.J. 361, 373, 599 A.2d 149 (1991). As we have previously explained, the "inevitable effect of allowing the privilege . . . is the withholding of evidence, often of the most reliable and probative kind, from the trier of fact." State v. Dyal, 97 N.J. 229, 237, 478 A.2d 390 (1984); see Graham, supra, 126 N.J. at 373, 599 A.2d 149; Kurdek v. Board of Educ., 222 N.J. Super. 218, 226, 536 A.2d 332 (Law Div.1987); McCormick, Handbook of the Law of Evidence § 105 at 390 (4th ed. 1992) (McCormick) (stating that privilege "essentially runs against the grain of justice, truth and fair dealing").

The traditional justification for the physician-patient privilege is that it encourages patients to disclose freely information needed for the diagnosis and treatment of disease and injury. State v. Schreiber, 122 N.J. 579, 587, 585 A.2d 945 (1991); McCormick, supra, § 103 at 384. Because privileges undermine the search for truth, however, courts construe them strictly. Schreiber, supra, 122 N.J. at 583, 585 A.2d 945; State v. Soney, 177 N.J.Super 47, 58, 424 A.2d 1182 (App.Div.1980)), certif. denied, 87 N.J. 313, 434 A.2d 67 (1981); State, in the Interest of M.P.C., 165 N.J. Super 131, 136, 397 A.2d 1092 (App.Div.1979). So here, we strictly construe the physician-patient privilege. In Stempler v. Speidell, 100 N.J. 368, 381 (1985), the Court noted:

> "The plaintiff's interest is twofold. The interest advanced as primary is the desire to protect from disclosure by the physician confidential information not relevant to the litigation and therefore still protected by the patient-physician privilege and the physician's professional obligation to preserve confidentiality. An equally if not more important interest of the plaintiff, although not specifically pressed before us, [***22] is the desire to preserve the physician's loyalty to the plaintiff in the hope that the physician will not voluntarily provide evidence or testimony that will assist

> the defendant's cause. See Alexander v. Knight, supra, 197 Pa.Super. at 79, 177 A.2d at 146 (Members of the medical profession "owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation."); Hammonds v. Aetna Cas. & Surety Co., supra, 243 F.Supp. at 799 (quoting Alexander v. Knight, supra, with approval). Contra Doe v. Eli Lilly & Co., supra, 99 F.R.D. at 128 ("As a general proposition * * * no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance.")."

Exceptions have been made in actions where the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient, such as in malpractice actions. See, Stigliano, at 312, "By bringing suit against Dr. Nagahawatte and Connaught, plaintiffs have waived the physician-patient privilege." The case herein is not a malpractice action. It is an insurance coverage action.

Exceptions have also been made for treating physicians whom the plaintiff never intended to call to testify. See, Spedick v. Murphy, 266 N.J. Super. 573 (App.Div. 1993). Here, as further set forth below, Ms. Adessa was consulted as a witness in this matter as she has even undergone a deposition in relation to this matter. She was a consulting expert for the plaintiff in the underlying matter and we do not intend to call her as a witness here. Certainly Selective did not nor could not name her as their own expert witness to give opinion testimony. They would have had to retain their own expert for that.

Finally, exceptions have been made for treating physicians who are merely fact witnesses providing testimony as to their diagnosis and treatment. See, Stigliano, supra. Here, Ms. Adessa's deposition testimony is replete with opinion testimony.

It is apparent that defense counsel's true intent here is to impermissibly secure Ms. Adessa's

opinion, not fact testimony. Yet they never named her as an expert, not that they could have as she was in fact Plaintiff's consulting expert and treating provider in the underlying matter. A review of the portions of her transcript which defense counsel seeks to read at trial contain numerous references to her opinion of Maucione, such as "Maucione's pursuit of H.L. was done for the purposes of abuse," not about the facts perceived. It should be noted that Ms. Adessa was not a witness to any of the underlying events and interactions between Plaintiff and Maucione. Ms. Adessa never interviewed Maucione, observed Maucione, or confirmed Plaintiff's statements through independent evidence, and thus was not qualified to render a diagnosis of Maucione nor confirm his intentions. Likewise, it is not improper to say that Defendant Selective is merely looking for a way to back door in opinion testimony through Plaintiff's own consulting expert and treating provider as they failed to get there own expert in this matter. Surely Defendant should not be permitted to solicit opinion testimony from Plaintiff's own treating provider and consulting expert.

Moreover, there is no legitimate proffer for Ms. Adessa's testimony from the insurance company. Selective admitted that Plaintiff suffered a bodily injury and trichotillomania as a result of Maucione's actions in its responses to Plaintiff's Request for Admissions #39 and #40. This was confirmed in defense counsel's recent e-mail of June 11, 2019 wherein defense counsel confirmed when they stated that,

> "Selective does not contest that H.L. sustained bodily injury as defined under the Selective policy. Selective does, however, contest and refute that Maucione qualifies as an insured under the policy with respect to the duty to indemnify."

In light of Selective's stipulation as to the existence of Plaintiff's injuries, Ms. Adessa's fact testimony is further not necessary for the insurance company. In short, the injury has been admitted in requests for admissions and as stated above. The law is clear that there is no probative value to a treating physician breaking privilege and being force to give fact testimony regarding the diagnosis

and treatment of the plaintiff if same is not the subject of the lawsuit. The patient-client privilege exception is explained in In re Pelvic Mesh/Gynecare Litig., 426 N.J. Super. 167, 177 (App. Div. 2012) a party "cannot claim the privilege as to the diagnosis and treatment of her medical condition that is the subject of the lawsuit, and a treating physician can be compelled to testify as a fact witness regarding those subjects." There is no probative value to Ms. Adessa being forced to, against her will, give fact testimony with regard to Plaintiff's diagnosis and treatment as there is nothing to prove. Defendant has made it clear that they do not contest that Plaintiff sustained a bodily injury. Therefore, the subject of this trial is not Plaintiff's injury. As such, there is no need for this witness as to the injury of Plaintiff.

Furthermore, the law is clear an adverse party cannot call another party's expert where the expert is unwilling to cooperate with the other side. In Genovese v. New Jersey Transit Rail Operations, Inc., 234 N.J. Super. 375, 381 (App. Div. 1989), the court held that, as a matter of policy, an expert's videotaped deposition taken pursuant to R. 4:14-9(e) should not be substantively usable by an adversary over objection. While here, Ms. Adessa's deposition was recorded orally instead of by videotape, the same standard should apply.

In Genovese, the Court also recognized the longstanding rule that the opinion of an expert, as opposed to testimony as to facts perceived, may not ordinarily be compelled against the wishes of the expert. Genovese, at 380. This reasoning was adopted in Fitzgerald v. Stanley Roberts, Inc., 186 NJ 286, 302 (2004) ("...the adversary may produce a **willing** expert at trial.")

Here, Ms. Adessa is unwilling to testify in this matter. Her unwillingness to testify is based not only on her unavailability due to her mother's illness, but also because she simply does not wish to testify for her patient's adversary, particularly when she was consulted as an expert for the plaintiff. She also does not want to damage her patient-therapist relationship with Plaintiff.

Attached hereto please find the Certification of Melissa Adessa in support of this position.

In addition, Plaintiff objects to Defendant's attempt to secure expert testimony from Ms. Adessa, based on the fact that Plaintiff consulted with Ms. Adessa as an expert throughout this litigation. In Graham v. Gielchinsky, 126 N.J. 361, 373 (1991), the Court held, "Hence, we hold that in the absence of exceptional circumstances, as defined under Rule 4:10-2(d)(3), courts should not allow the opinion testimony of an expert originally consulted by an adversary."

There are no exceptional circumstances here. Defense counsel could easily have retained their own expert counsel to review Plaintiff's treatment records, and opine on her injury and causation, or "intent to injure" as the case may be. They did not do so and they cannot use plaintiff's own expert and treating therapist to opine as to intent to injure.

Since she cannot be called as a live witness for substantive reasons, for the same reasons, her deposition also cannot be read to the jury. Defendants cannot get in though the backdoor that which is impermissible through the front. *Rule* 4:16-19(c)

Therefore, Plaintiff respectfully requests that Defendant's subpoena with regard to Plaintiff's consulting expert/treating physician Melissa Adessa, LCSW be quashed and Defendant be barred from reading her deposition transcript at the time of trial.

CLARK LAW FIRM, PC
Attorneys for Plaintiff, H.L.

By:_____
GERALD H. CLARK

Date: June 14, 2019

Motion in Limine I- Adessa testimony.wpd