STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

Appeal No. **2011AP2864-CRAC**
L.C.2011CF376 (Racine County)

SAMUEL CURTIS JOHNSON, III,

Defendant-Respondent-Cross-Appellant.

AMICUS CURIAE BRIEF OF NONPARTY, T.S.

ON INTERLOCUTORY APPEAL
PURSUANT TO SECTION 809.50, STATS.,
FROM CIRCUIT COURT'S
ORDER DENYING DEFENDANT'S MOTION TO PROHIBIT
T.S. FROM TESTIFYING AND
REMEDY ORDERED AS PART OF THAT ORDER,
HONORABLE EUGENE A. GASIORKIEWICZ, PRESIDING

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TABLE OF CONTENTS

Table of Authorities i

Argument. 1

I. Johnson's constitutional rights do not trump T.S.'s statutory privilege under §905.04 such that the circuit court could lawfully order T.S.'s therapy records to be released for in camera review under Wis. Stat. §146.82(2)(a)4 1

II. The circuit court erred in determining that T.S. will be allowed to testify at trial and to be cross-examined about her refusal to waive her privilege under §905.04. 9

Conclusion 17

Certification of Conformity With §809.19(8)(b) and (c) 19

Certification of Conformity with §809.19(12). 19

TABLE OF AUTHORITIES

Cases

In the Matter of the Interest of Jessica J.L.,
223 Wis. 2d 622, 589 N.W.2d 660 (Wis. App. 1998) 12

Jaffee v. Redmond,
518 U.S. 1 (1996) 7, 8-9

Jaffee v. Redmond,
51 F.3d 1346 (7th Cir., 1995) 8

State of Wisconsin v. Denis L.R.,
2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154 5

State of Wisconsin v. Green,
2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298 6

State of Wisconsin v. Locke,
177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993) 4

State of Wisconsin v. Shiffra,
175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) . . 6, 9, 10, 17

Steinberg v. Jensen,
194 Wis. 2d 439, 534 N.W.2d 361 (1995) 3, 5

Statutes

§146.82 . . . . . .1, 5
§146.82(1) 1
§146.82(2) 2
§146.82(2)(a)4 . . . . . 1, 2, 17
§146.81(4) 1
§904.03 15
§905.04 . . . . . .1, 3, 5, 6, 7, 10, 11, 12, 15, 16, 17
§905.04(1)(b) 3
§906.11 15
§911.01(3) 3
§950.01 11

Other Authorities

45 CFR 160.203 2

45 CFR 164.152(e) 2

Health Insurance and
Accountability Act of 1997 (HIPAA) 2

T.S. offers no argument on the issue of whether Johnson made the preliminary showing required for the circuit court to order in camera review of her privileged therapy records. She addresses only two of the three issues presented by the State and Johnson on appeal.

ARGUMENT

I. Johnson's constitutional rights do not trump T.S.'s statutory privilege under §905.04 such that the circuit court could lawfully order T.S.'s therapy records to be released for in camera review under Wis. Stat. §146.82(2)(a)4.

Confidentiality of records under §146.82, Stats.

T.S. enjoys the right to *confidentiality* in her patient health care records under §146.82, Stats.. Section 146.82(1) states:

> All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient.

In general, "patient health care records" are defined as "all records related to the health of a patient prepared by or under the supervision of a health care provider . . . ." §146.81(4).

There are exceptions to this rule. §146.82(2). One exception provides that records can be released without the patient's informed consent when required '[u]nder a *lawful* order of a court of record." §146.82(2)(a)4. (Emphasis added.)

HIPAA

The medical records of a patient are further protected and privileged under federal law through the Health Insurance and Accountability Act of 1996 ("HIPAA")(effective April 14, 2003). Under HIPAA there are very limited situations where privileged records pertaining to medical treatment may be disclosed without a patient's authorization and such exceptions for disclosure for judicial and administrative proceedings require strict procedural safeguards. See 45 CFR 164.152(e). HIPAA also explicitly preempts state laws to the extent that the provisions contradict any state law provisions relating to privacy that are less stringent. 45 CFR 160.203.

Privilege under §905.04, Stats.

In addition to the right to confidentiality in patient health care records, T.S. also has a separate evidentiary *privilege* under §905.04, Stats.

> to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, . . .
> or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the . . . psychologist . . . .

This is a privilege that applies "at all stages of all actions, cases and proceedings." §911.01(3). The purpose of the privilege is to prevent unnecessary disclosure of "confidential" communications. *Steinberg v. Jensen*, 194 Wis. 2d 439, 459, 534 N.W.2d 361 (1995).

> Section 905.04(1)(b) indicates:
>
> A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the

> direction of the . . . psychologist . . . including the members of the patient's family.

The key to the consideration for the privilege is the "patient's objectively reasonable perceptions and expectations of the medical provider." *State v. Locke*, 177 Wis. 2d 590, 604, 502 N.W.2d 891 (Ct. App. 1993). There is no age requirement for an individual to assert her right to maintain the confidentiality of her records and confidential communications and information.

Of course, it is objectively reasonable for T.S. to have perceived that her treatment providers would keep the concerns she shared in private counseling sessions confidential. She never dreamed that any strangers would examine the records of what was said between her and her counselors in therapy sessions.

T.S. is now almost 17 years old. (Doc. 20, Plaintiff - Appellant's Appendix: 169-170). She has had the benefit of discussing with her parents and with an independent attorney her decision related to the disclosure or nondisclosure of her records for in camera inspection. *Id*.

Public policy

The overriding purpose of the therapist-patient privilege in §905.04(2) is to prevent the unnecessary disclosure of "confidential" information. *State v. Denis L.R.*, 2005 WI 110, ¶37, 283 Wis. 2d 358, 374, 699 N.W.2d 154 citing *Steinberg v. Jensen*, 194 Wis. 2d 439, 464, 534 N.W.2d 361 (1995). "The public policy underpinning this privilege is to encourage patients to freely and candidly discuss mental health concerns with their therapists by ensuring that those concerns will not be unnecessarily disclosed to third parties." *Id*.

Subpoenaing T.S.'s or any non-consenting patient's records under §146.82 would undermine the very purpose of the privilege under §905.04. Such an authorization would specifically deter T.S. and will generally deter other Wisconsinites who learn of such an authorization from seeking professional assistance with medical and especially mental health concerns. It will chill the candor between patients and their health care providers and therapists.

Weighing of defendant's rights against privilege

It is true that a defendant's rights to due process, to a fair trial, and to confrontation in the *Shiffra* scenario take precedence over a patient's rights to exercise the privilege under §905.04, Stats. to the extent that, once the defendant has made the proper preliminary showing under *Shiffra* (and *Green*), the privilege-holding patient is invited, then, to waive the privilege. The defendant will not be made to face the testimony of a patient-witness without the benefit of having a court -- with the consent of the patient-witness -- ascertain and disclose the information from the confidential records and privileged communications that may be material and helpful to the defense.

If the patient-witness does not want her privileged communications reviewed by a stranger -- even a judge -- and does not want the privileged communications potentially disclosed to the parties likely for use by the defense, her testimony must be suppressed or prohibited so that the defendant's rights to due process, a fair trial, and confrontation

are not violated. Contrary to the plaintiff-appellant's contentions (Plaintiff-Appellant's Brief at 21), a defendant does not have a constitutional right to an *in camera* inspection of privileged records. He has constitutional rights to due process, a fair trial, and confrontation.

Suppression of the patient-witness's testimony is the means by which the defendant's rights are protected - - *not* by forcing an *in camera* disclosure of the patient's confidential records and privileged communications to the court without the patient's waiver of the privilege.

A witness's privilege under §905.04, Stats., should be afforded no less regard in cases on which the prosecution relies more heavily on the victim's testimony to prove its case. Such balancing and weighing of the evidentiary value of a witness's privileged communications and confidential records in determining whether the privilege should be honored was rejected by the United States Supreme Court in *Jaffee v. Redmond*, 518 U.S.1 (1996). In that case, the Court considered whether

statements made by a police officer who received extensive counseling from a clinical social worker after a traumatic incident in which the officer shot and killed a man were protected from compelled disclosure in a federal civil rights action brought by the family of the deceased. The United States Court of Appeals for the Seventh Circuit had qualified its recognition of the privilege by imposing a balancing test indicating that the privilege would not apply if "in the interests of justice, the evidentiary need for the disclosure of the contents of the patient's counseling sessions outweighs that patient's privacy interests." *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995). "The Supreme Court explicitly 'reject[ed] the balancing component of the privilege implemented by that court . . . . Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*,

518 U.S.1, 116 S. Ct. 1923, 1932 (1996). The Supreme Court further held:

> Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," . . . we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.

Id., 116 S. Ct. at 1931.

In light of the Supreme Court's holding, neither the circuit court nor this court should engage in a balancing test of how necessary to the State's case the privileged communications are likely to be before honoring T.S.'s right to exercise the privilege to prevent disclosure of her confidential records and privileged communications for in camera inspection.

II. The circuit court erred in determining that T.S. will be allowed to testify at trial and to be cross-examined about her refusal to waive her privilege under §905.04.

The Court of Appeals in *State v. Shiffra,* 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) decided two issues -- the second

of which was whether preclusion of the alleged victim's testimony at trial was the proper sanction for her refusal to submit to an *in camera* review. *Shiffra* at 602. As to the second issue, the court stated:

> In this situation, *no other sanction would be appropriate*. The court did not have the authority to hold Pamela in contempt because *she is not obligated to disclose her psychiatric records*. An adjournment in this case would be of no benefit because the sought-after evidence would still be unavailable. Under the circumstances, *the only method* of protecting Shiffra's right to a fair trial was to suppress Pamela's testimony if she refused to disclose her records. *Id*. at 612. (Emphasis added.)

Shiffra informs what the universe of remedies for the situation the parties face here is. It's a universe of one remedy: barring the witness's testimony.

While the interest of Johnson to a fair trial is interesting, it is not the concern of T.S.. T.S. is concerned, instead, with the violation the circuit court's remedy will work on her rights as a victim and witness. She is concerned that the circuit court's remedy will dilute and make far from "absolute" her privilege under §905.04. She is concerned that she is being treated

unfairly and differently from other witnesses in her position and is being unfairly punished for exercising her privilege under §905.04. The circuit court's remedy wreaks havoc on the public policy underpinning §905.04 for T.S. and other patient-witnesses in her position.

The legislature codified in §950.01 its intent "to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity" and to ensure that the rights of victims and witnesses of crime "are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants."

In creating the contemplated remedy, the circuit court ruled that ". . . T.S. will be allowed to testify at the trial in this matter; that T.S. may assert her statutory communication privilege but that the court will allow a jury instruction inferring that the information not disclosed by T.S. would be helpful to the defense position in this matter. The defendant will then be

limited at trial with respect to cross-examination on the issue of assertion of privilege. . . ." (Doc. 36:41-42, Plaintiff-Appellant's Appendix: 141-42).

The portion of the circuit court's order that is especially foreboding to T.S. is the following:

> "There will be limitations on the cross-examination of T.S. regarding her assertion of the privilege [under §905.04], prohibiting questions that inherently or inferentially invade the privilege. *This however, will not limit the defense from testing the strength and reasoning behind any explanation offered by T.S. as to why she chooses to assert the privilege.*"

(Doc. 36:36, Plaintiff-Appellant's Appendix: 137). [Emphasis added.]

The privilege under §904.05 is not contingent on the privilege holder explaining to anyone anywhere the *reasons* for asserting the privilege. Asserting the privilege should not expose the privilege-holder to the harassment of being cross-examined about *why* she is asserting a privilege that has been determined to be absolute. *In the Matter of the Interest of Jessica J.L.*, 223 Wis. 2d 622, 629, 589 N.W.2d 660, 663 (Wis. App. 1998).

The circuit court's remedy treats T.S. differently from any other Wisconsin victim who asserts the privilege after an in camera inspection has been ordered. No other Wisconsin victim who asserts the privilege is required to undergo questioning at trial to explain *why* she chooses to assert the privilege.

There is nothing unusual about this case that warrants radically different treatment of T.S. versus any other victim who asserts her privilege. T.S. should not be subject to improper and unique treatment for exercising her absolute privilege under §904.05.

The stress inherent in being a victim and a witness is only increased for T.S. by the exposure this case has received. The stress is compounded by the fact that a harassing and unique remedy inapplicable to any other victim in Wisconsin is being contemplated for use for T.S..

There is a specter that T.S. is being punished for asserting a privilege which countless other victims assert without qualms. This specter is given substance by the accusatory language

throughout the pleadings and decisions in these proceedings pertaining to T.S.'s assertion of her privilege. The language implies T.S. is being uncooperative, noncompliant, reluctant, recalcitrant, difficult to the point of deserving consequences, and disappointing -- all because she simply chooses to keep private her confidential communications with therapists :

> -"Of concern to the plaintiff is the position taken by the defendant and his unlikely allies, namely the victim and her mother, that suppression of the victim's testimony is a foregone conclusion in light of her refusal to release certain records." (State's Supplemental Brief Concerning Release of Victim's Treatment Records, page 4, Doc. 29:4, Plaintiff-Appellant's Appendix: 208).
>
> -"It should go without further comment that this Court expected compliance with its ruling by the alleged victim in this matter. There was no uttering, either in briefing or in open court, that the alleged victim was not or would not be cooperative in this proceeding." (Order, November 1, 2011, Doc. 32: 2, Plaintiff-Appellant's Appendix: 219).
>
> -"The Court was ultimately advised . . . that the alleged victim, although a minor, asserts her therapist/patient privilege . . . and will not comply with this Court's order." *Id*.

> "[T]his Court verbalized its concern regarding the reluctance of the alleged minor victim to release records for an *in camera* review." *Id*.
>
> "This Court is now asked to render rulings regarding the recalcitrance of the alleged minor victim in this matter." *Id*.
>
> -"T.S. has chosen to avail herself of her statutory right, creating constitutional concerns for this court and depriving this court of utilizing an approved jurisprudential process (*in camera*) which has been proven to balance the respective interests. T.S. may assert her privilege but to do so must have some consequence; a jury instruction is the vehicle this court chooses." (Decision and Order filed 11-29-11, Doc. 36:29, Plaintiff-Appellant's Appendix: 130).
>
> -"Although this Court accepts T.S.' decision in asserting her statutory communication privilege, it wishes to verbalize its sadness that T.S.' action thus deprives this Court of an opportunity to review the privileged information, *in camera*, for independent judicial analysis of relevance, materiality and cumulativeness under the appropriate threshold and under 904.03 and 906.11, Stats.." *Id*. at 33, Plaintiff-Appellant's Appendix:134.

Finding that the circuit court's erred in its decision to subject T.S. to cross-examination about her explanation for asserting her privilege under §905.04 will clarify that Wisconsin's

longstanding privilege under §904.05 is *truly* absolute. It is absolute such that a patient does not have to defend or explain her assertion of the privilege in a courtroom to a jury under cross-examination. It does not depend on the particular case or the particular prosecution for which the victim's testimony is sought. It will validate that, by keeping private confidential communications, persons in the position of T.S. do nothing deviant.

The circuit court's remedy puts in question the nature of all patients' privilege under §905.04, hinging it to a requirement to explain under cross-examination the decision to assert it. This will chill all Wisconsin patients' willingness to benefit from treatment providers in whom they may otherwise be inclined to confide. A decision from this court that the circuit court erred in its remedy will give some certainty and security to patients who are victims or witnesses in this regard and will reinvigorate the public policy underpinning §905.04.

CONCLUSION

This exact situation has been considered by the Wisconsin Court of Appeals in *Shiffra* and that decision provides a remedy of protecting others' rights without violating T.S.'s absolute privilege under §905.04. T.S. should not be subject to the harassment of cross-examination about her assertion of what is to be an absolute privilege. There is no justification to treat her differently from other privilege holders in her position. She should not be treated unfairly and made to pay a "consequence" for asserting her privilege. Failure to vacate the circuit court's decision in regard to the remedy to be applied in this case will undermine and eviscerate the overriding purpose of the therapist-patient privilege and will discourage T.S. and all other Wisconsin patients from freely and candidly discussing mental health concerns with their therapists for fear their concerns will be unnecessarily disclosed to third parties.

For all these reasons, the circuit court's order refusing to order production of T.S.'s records pursuant to §146.82(2)(a)4

should be affirmed and the circuit court's order allowing T.S. to testify and be cross-examined should be vacated.

Dated this 22nd day of March, 2012.

Respectfully submitted:

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CERTIFICATION OF CONFORMITY
WITH §809.19(8)(b) and (c)

I, Kathleen M. Quinn, hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a nonparty brief produced with proportional serif font. The length of this brief is 2,914 words according to the word count function of the word processor available in WordPerfect 9.

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CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12)

I, Kathleen M. Quinn, hereby certify that I have submitted an electronic copy of the brief and that the electronic brief is identical in content and format to the printed form of the brief filed.

Signed:

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