IN THE SUPREME COURT OF IOWA

No. 14-0095

CAMERON FAGEN,

Plaintiff-Appellant,

v.

ROSS IDDINGS, GRAND VIEW UNIVERSITY, AND NPI SECURITY,

Defendants-Appellees.

On Appeal from the District Court for Polk County
The Honorable Rebecca Goodgame Ebinger

Brief of Amici Curiae Iowa Association of Business and Industry and Iowa Defense Counsel Association

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IDENTITY AND INTEREST OF AMICI CURIAE

1. The Iowa Association of Business and Industry (ABI) is the largest business network in the State of Iowa, representing over 1,400 business members that employ over 300,000 Iowans. Among other things, ABI represents the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the business community.

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ARGUMENT

Iowa Code section 622.10(3) provides that a if a plaintiff's medical condition "is an element or factor of the [plaintiff's] claim or [the defendant's] defense," then the defendant is entitled to request and receive "records relating to the condition alleged." It's well-settled that the operative terms of this statute—a "factor of the claim or defense" and "relating to the condition alleged"—do

not limit the scope of discovery to those medical records that relate to the specific injury alleged. If a plaintiff injures his knee in a car accident, the defendant's discovery is not confined to the plaintiff's post-accident medical records. Instead, the defendant is entitled to see all records that might relate to the plaintiff's condition: the pain in his knee. That includes records from the old high-school football injury, that slight twinge the plaintiff felt while playing racquetball, or the regular medical checkup from last year where the plaintiff reported general tightness in his legs. It's possible that those injuries are a cause or contributor to the pain that the plaintiff attributes to the car accident. And because the jury cannot properly put a price on the plaintiff's physical pain unless it knows where the plaintiff started—i.e., where his baseline is—the legislature concluded that the defendant has the right to investigate that possibility.

It's no different for emotional injuries. When a plaintiff claims to have suffered emotional distress, the defendant is entitled to records that relate to the plaintiff's emotional (i.e., psychological) condition, which includes records that pre-date the

impetus for the lawsuit. Indeed, because emotional distress is such an amorphous and individualized concept, the defendant's need to investigate the plaintiff's mental state is probably greater than the need to investigate the plaintiff's physical state. It's easy for judges, lawyers, and—most importantly—jurors to imagine how an injured knee feels compared to a healthy knee, which means that it's relatively easy for the jury to gauge the veracity of the plaintiff's pain allegations. That's not true for emotional distress. Unlike a normal knee, the normal psychological state is anything but homogenous. Some people are normally relaxed; others are usually stressed; and the rest are scattered along the spectrum. And unlike the injured knee, the injured psychological state runs the gamut: In response to stressors, some individuals go on with their daily lives as if little or nothing happened; others are changed forever; and the rest fall somewhere in between.

Plaintiff Cameron Fagen alleges that he was the victim of "bullying and hazing," and he's seeking damages for "great physical and mental pain, physical and mental disability, and loss of enjoyment of life." Plt. Br. 4 (quoting the Amended Petition at ¶

33). Fagen concedes that the defendants are entitled to records relating to his physical injuries (a broken jaw), but he claims that his psychiatric records are off-limits. Taking his cue from a few federal district courts, Fagen asks this Court to create an exception to Iowa Code section 622.10(3) for plaintiffs who allege "garden-variety" emotional distress. The Court should decline that invitation for three reasons:

First, unlike in federal court, the discovery of medical records in Iowa state court is governed by statute, and the garden-variety exception that Fagen urges cannot be squared with that statute's plain terms. Once a plaintiff claims that he is suffering from emotional distress, section 622.10(3) compels that plaintiff to release medical records related to that condition; and as discussed above, the "condition" cannot reasonably be limited to the harm caused by the alleged incident. Instead, the "condition" is the plaintiff's emotional and psychological condition, and treatment that predated the facts surrounding the lawsuit relates to that condition.

Second, "garden-variety" is an oxymoron when it comes to emotional distress. The cases that Fagen relies on define garden-variety as "ordinary or common place," "simple and usual," and something that "any healthy, well-adjusted person would likely feel" that is "within the everyday experience of the average juror." Plt .Br. 16-17. That has a façade of reasonableness—"yes, I just suffer from the normal emotional harm that any assault victim would have"—but when it comes to emotional distress, there is no normal. Fagen cites no medical evidence to support such a theory, and neither do the judges upon whom Fagen relies.

Third, even if courts could assume that emotional harm can be a "simple and usual" thing that any "well-adjusted person would likely feel," Fagen's allegations go well beyond that. So this is not the case to address this issue. Fagen wants damages for "*great* mental pain" and "mental disability, and loss of enjoyment of life." Amended Petition at ¶ 33 (emphasis added). Those descriptions, alone, take Fagen's claim out of garden-variety land (assuming such a land even exists). Both federal and Iowa state district courts have said as much.

There is no garden-variety exception to section 622.10(3); nor should there be. But even so, this is not the case to address the issue. The district court's order should be affirmed.

I. THE PLAIN TERMS OF SECTION 622.10(3) DO NOT ALLOW FOR A GARDEN-VARIETY EXCEPTION.

When an issue turns on a statute, the terms of the statute are the starting point. *McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010). That's obvious, but sometimes forgotten.

Fagen's brief spans 31 pages, cites 48 cases, two law-review articles, a student note, a dictionary, and a legal-usage manual for the proposition that garden-variety emotional distress does not come within the scope of section 622.10. Some of those authorities talk broadly about the purpose of the physician-patient privilege; some talk about what it means for a claim to be garden-variety; and some of them define garden-variety (indeed, one calls it a cliché).[1] But none analyzes the operative terms of section 622.10(3), and neither does Fagen. He block quotes the statute at the beginning of the argument, but that's it. Instead of trying to

[1] Bryan A. Garner, *Garner's Dictionary of Legal Usage* 386 (3d ed. 2011).

fit the garden-variety exception into the terms section 622.10, he makes broad pronouncements based on non-Iowa cases.

For example, he cites to two New Hampshire Supreme Court decisions for the proposition that a plaintiff's mental-health records are not discoverable unless the defendant shows "essential need"—meaning that the defendant must "prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure." Plt. Br. 13 (citing *Desclos v. S. N. H. Med. Ctr.*, 903 A.2d 952, 960-61 (N.H. 2006) and *In re Grand Jury Subpoena for Medical Records of Payne*, 839 A.2d 837 (N.H. 2004)). And relying on federal cases, Fagen contends that his medical records are privileged, unless he calls a medical expert to testify. Plt. Br. 18.

Regardless of whether those cases were rightly decided, Fagen's analysis misses the point: None of them was decided under section 622.10—or any statute, for that matter. The New Hampshire cases and the federal cases were based on common law; there was no statute to interpret, so the courts could make-up factors that they thought wise.

There is a statute here, which states that if a plaintiff's medical condition "is an element or factor of the [plaintiff's] claim or [defendant's] defense," then the defendant is entitled to request and receive "records relating to the condition alleged." Iowa Code § 622.10(3). When a plaintiff alleges emotional distress, then emotional distress (and the many synonyms for it) is the condition alleged. The *cause* of that condition and the plaintiff's veracity concerning the extent of that condition is what's at issue: It's a *factor* in the plaintiff's claim. That's why the legislature provided that medical records that could touch on that issue are not privileged.

Fagen cites one decision that addresses section 622.10—*Chung v. Legacy Corporation*, 548 N.W.2d 147 (Iowa 1996)—but in that case, this Court was focused on a different part of the statute. In *Chung*, the plaintiff was arguing that the defendant had put his medical condition at issue—and thus had to produce his medical records under section 622.10—merely because the defendant denied the plaintiff's allegations. *Id.* at 148. The plaintiff and defendant were involved in a car accident, and the

plaintiff alleged that the defendant was drunk at the time. *Id.* The defendant disputed the drunk-driving allegation, so the plaintiff argued that the defendant's medical records were not privileged: By denying the allegations of drunk-driving, the plaintiff claimed that the defendant had made his intoxication "'an element or factor of [his] defense.'" *Id.* at 149 (quoting the previous version of section 622.10).

This Court disagreed, for reasons that have nothing to do with this case. The defendant's alleged intoxication was an element of the *plaintiff's* claim, but it was not an element of the defendant's defense. *Id.* at 150. That makes all the difference: Section 622.10 "requires the condition be an element or factor of the claim or defense *of the person claiming the privilege*" and because the defendant had not made *his* condition an element of his defense by merely denying an allegation, he had not waived the physician-patient privilege. *Id* at 150 (emphasis in original). Had the defendant put his medical condition at issue through some "affirmative[] and voluntar[y]" pleading, that would be different; but this Court recognized that "[o]ne cannot say a party

has voluntarily chosen to make his condition an issue in the case by simply denying his adversary's allegation." *Id.* at 151, 151 n. 3.

It was in that context—where a defendant denied an allegation rather than affirmatively putting his medical condition at issue—that the *Chung* Court explained that "[t]here 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." *Id.* If a mere denial of an allegation triggered section 622.10, then a defendant would waive the physician-patient privilege any time the plaintiff made an allegation about his medical condition. But "there would be little left of the privilege" in that case, because the plaintiff would be the one who was putting the defendant's medical condition at issue. *Id.* And one party cannot waive the other party's privilege. That's not how waiver works. *Id.*; *see also Ashenfelter v. Mulligan*, 792 N.W.2d 665, 672 (Iowa 2010) (reaffirming *Chung*).

This case is the exact reverse. Fagen has voluntarily put *his* medical condition at issue; he is the one who claims to have great emotional distress. For that reason, he has waived the physician-

patient privilege for medical records relating to his emotional health.

If *Chung* has any relevance for this case, it's for the proposition that the terms of the statute matter. And under the terms of the statute, there is no room for a garden-variety exception.

II. THE GARDEN-VARIETY EXCEPTION IS UNWORKABLE, BECAUSE EMOTIONAL DISTRESS DOES NOT LEND ITSELF TO A GARDEN-VARIETY CHARACTERIZATION.

Fagen, and the cases he relies on, make the garden-variety exception sound so benign. When a plaintiff is simply alleging "the distress that any healthy well-adjusted person would likely feel as a result of being so victimized,"[2] or is just making a claim for "the generalized insult, hurt feelings and lingering resentment which anyone could be expected to feel" given the defendant's conduct,[3] then there is no need to investigate the plaintiff's emotional past, because these damages are just "ordinary or

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[2] *Kunstler v. City of New York*, No. 04C1v1145, 2006 WL 2516625, at *9 (S.D.N.Y.2006).

[3] *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 657, 660 (D. Kan. 2004).

commonplace," or "simple or usual."[4] That might seem reasonable. It's not, and here's why: there is no "ordinary" or "normal" when it comes to emotional distress. Emotional states are like snowflakes: they're all unique.

Which is why it's so important for the defendant to have a full picture of the plaintiff's history. "[I]t 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." *State v. Cole*, 295 N.W.2d 29, 35 (Iowa 1980). Or as one federal court put it: "[I]t is only fair to allow Defendant access to the information. To protect the records would allow Plaintiff to proceed with a claim on unequal terms. If [a plaintiff] wants a jury to compensate [him] for emotional distress, Defendant should be able to explore in discovery[] other circumstances that may have caused the injury." *Flowers v. Owens*, 274 F.R.D. 218, 225 (N.D. Ill. 2011).

If there really is a "normal" when it comes to emotional distress, then why let the jury pick the damage award? Under Fagen's garden-variety theory, the only fair way to award

[4] *Ruhlmann v. Ulster Cnty. Dept. of Soc. Servs.*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000).

emotional-distress damages, it seems, is to create schedules that assign dollar figures to certain injuries. If there are two assault victims with broken jaws, and both victims allege garden-variety emotional distress—the amount of distress that any healthy, well-adjusted person would suffer from such an assault—then how can the judiciary justify a jury award of $2,000 for one plaintiff and $10,000 for the other? If garden-variety emotional distress is a thing, then it would be arbitrary to award anything but identical (i.e., garden variety) damages. Both plaintiffs should be able to declare to the court: "I'm not alleging any specific symptoms nor am I calling a doctor to testify. I just want damages for the physical pain that any normal, healthy person would feel if someone broke their jaw. You know, the normal damages." The judge can then look at his detailed tables for the relevant entry: "Broken jaw by assault. That'll be a garden-variety award of $5,000."

That's silly, of course, because—despite its nice ring—there is no such thing as garden-variety emotional distress. Fagen cites no psychological studies to show that there is some "normal"

reaction to being the victim of a certain intentional tort or negligent act. And that's because nothing is normal when it comes to emotional distress, which is why courts don't generally require that the plaintiff put a number on an emotional-distress claim; it's just too hard to quantify because the factors are innumerable.[5]

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[5] *See Anderson v. United Parcel Serv., Inc.,* No. 09-2526, 2010 WL 4822564, at *10 n. 33 (D.Kan. Nov. 22, 2010), compiling the following cases: *Williams v. Trader Publ'g, Co.*,218 F.3d 481, 486 n. 3 (5th Cir.2000) ("Since compensatory damages for emotional distress are necessarily vague and are generally considered a fact issue for the jury, they may not be amenable to the kind of calculation disclosure contemplated by Rule 26(a)(1)(C)."); *Creswell v. HCAL Corp.*, No. 04-cv-388 BTM (RBB), 2007 WL 628036, at *2 (S.D.Cal. Feb. 12, 2007) ("While Rule 26 generally requires a party to provide a computation of such damages, emotional damages, because of their vague and unspecific nature, are oftentimes not readily amenable to computation."); *Gray v. Fla. Dep't of Juvenile Justice*, No. 3:06–cv–990–J20MCR, 2007 WL 295514, at *2 (M.D.Fla. Jan. 30, 2007) ("[C]ompensatory damages for emotional distress may not be susceptible to computation and thus, it is within the jurors' ability to determine a reasonable amount. As such, Plaintiff is not required to provide Defendant with a calculation of her suggested compensatory damages for emotional distress pursuant to Rule 26(a)(1)(C).") (internal citation omitted); *Burrell v. Crown Cent. Petroleum, Inc.*, 177 F.R.D. 376, 386 (E.D.Tex.1997) (denying motion to compel requesting plaintiffs to submit computation of compensatory damages attributable to mental anguish where plaintiffs argued trier of fact must determine proper amount of damages for mental anguish). *See also First v. Kia of El Cajon*, No. 10-cv-536-DMS, 2010 WL 3069215, at *1 (S.D.Cal. Aug. 4, 2010); *E.E.O.C. v. Gen. Motors Corp.*, No. 3:06-cv-19-WHB-LRA, 2009 WL 910812, at *3 n.

If further proof is necessary, look no further than employment-discrimination cases. There are numerous cases in which juries find the plaintiff—a victim of intentional discrimination—has suffered no emotional distress, despite their allegation to the contrary.[6] If there is no minimal or "normal" level for emotional distress in the case of discrimination, then what kind of emotional-distress claim can ever be garden-variety?

What Fagen is saying, at bottom, is that the jury should award emotional-distress damages based on an objective, reasonable-person standard—that he can keep his medical records secret, because he only needs to prove damages based on how

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1 (S.D. Miss. Apr. 1, 2009) (finding that a claim for punitive damages is an issue for the jury and not amenable to a specific calculation under Rule 26 and, therefore, that the EEOC is not barred from seeking such damages based on its failure to provide a specific computation in its disclosures).

[6] *See, e.g., Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 233–35 (1st Cir. 2006) (jury found for the plaintiff on the hostile-work environment claim but awarded no damages for emotional distress); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359–60 (2d Cir. 2001) (same); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1235 (10th Cir. 2001) (same); *Bailey v. Runyon*, 220 F.3d 879, 881–82 (8th Cir. 2000) (same); *Parton v. GTE N., Inc.*, 971 F.2d 150, 154–55 (8th Cir. 1992) (same); *Lintz v. Am. Gen. Fin., Inc.*, 76 F. Supp. 2d 1200, 1204 (D. Kan. 1999) (same).

"any healthy, well-adjusted person would likely feel as a result of being so victimized." Plt. Br. 17 (quoting *Kennedy v. Municipality of Anchorage*, 305 P.3d 1284, 1291 (Alaska 2013)). That's wrong. "An award of damages for emotional distress must be supported by competent evidence of 'genuine injury,'" meaning that the standard is a subjective one. *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999). That should go without saying.

But even if the jury could award damages by determining what "any healthy, well-adjusted person would likely feel as a result of being so victimized," Fagen would still have to prove that he is indeed well-adjusted—that he fits this reasonable-person standard. And that means his psychiatric records are in play.

The garden-variety exception is also unworkable because it forces the district court to accept the plaintiff's version of events at the discovery stage, which is something that the court cannot do. Fagen's emotional-distress claim is based on the "the normal feelings of anguish, grief, distress, fear, and pain and suffering that any reasonable person would feel after they had been assaulted and battered in *such an egregious manner*." Plt. Br. 14

(emphasis added). (His amended petition actually alleges more than that, but we'll get to that below.) In other words, Fagen says that his emotional distress is of a level of anyone who's been severely bullied and assaulted. But what if the jury does not believe Fagen's version of events? What if the jury thinks that Fagen was initially having fun: that he was playing along with a childish game that had become common-place in the dorm, but that he had asked his friends, politely, not to put him upright. They did anyway, and Fagen broke his jaw when he fell.

That set of events is much different than the "egregious bullying and hazing" that Fagen describes. It might technically be an assault, but it's not the horrible story that Fagen and the Iowa Association for Justice tell in their briefs. Assuming, though, that the jury believes this story over Fagen's, is Fagen's emotional-distress claim still a garden-variety one? Fagen says that he's in fear, but it seems unusual that a well-adjusted person would be in fear if this was more of an accident than a horrible case of bullying. So if the jury believes this alternative theory, then it's

hard to say that Fagen is simply making a claim for garden-variety emotional distress.

The problem, of course, is that the court will not know exactly how Fagen was victimized until the jury decides. And if the court does not yet know how he was victimized, then it cannot determine—at least at the discovery stage—whether the alleged level of emotional distress is the normal kind suffered by others who are "so victimized." To put it another way: Under any standard, the emotional distress that a "normal" person feels from an act of negligence (or technical, but not mean-spirited assault) is surely different from the emotional distress that a normal person feels from an act of "egregious bullying and hazing." Plt. Br. 2. So if a person was the victim of the former but feels the emotional distress of the latter, then his claim is not garden-variety under any reasonable definition.

* * *

When explained at the highest level of abstraction, the garden-variety exception sounds reasonable. But with just a little

digging, it's clear that such an exception is unworkable. For that additional reason, the Court should decline Fagen's request.

III. EVEN ASSUMING THERE IS SUCH A THING AS GARDEN-VARIETY EMOTIONAL DISTRESS, FAGEN'S ALLEGATIONS DO NOT FIT ANY REASONABLE DEFINITION OF THAT PHRASE.

"It goes without saying that the Court cannot simply accept Plaintiff's assertion that h[is] allegations of emotional distress constitute 'garden variety' allegations. Instead, the Court must examine the substance of Plaintiff's allegations to determine what type of damages []he is pursuing." *Langelfeld v. Armstrong World Industries, Inc.*, -- F.R.D. --, 2014 WL 1909448, at *6 (S.D. Ohio May 13, 2014). Even under the federal district court decisions that Fagen wants this Court to adopt, his allegations go beyond garden-variety.

In his amended petition, Fagen alleges that he "has endured *and will continue to endure* great physical and mental pain" and "mental disability, and loss of enjoyment of life." Amended Pet. ¶ 47. That is not normal or ordinary. The ongoing nature of Fagen's

alleged emotional distress alone puts this case outside of the garden-variety type. Courts consistently rule as much.[7]

The alleged severity of Fagen's emotional distress also places his claim outside the garden-variety exception. There is nothing "simple or usual" about claiming that a defendant's actions caused mental *disability* and *great* emotional pain. *See* Plt Br. 16 (citing

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[7] *Langelfeld*, 2014 WL 1909448, at *6 ("damages for some type of ongoing consequences from the humiliation or embarrassment or distress" do "not fall within the 'garden variety' exception as the term typically is used"); *Bourne v. City of Middletown*, No. 3:11CV309, 2012 WL 6600297, at *4 (D. Conn. Dec. 18, 2012) (defining a garden-variety claim as one in which the plaintiff "acknowledged that she 'has alleged neither a separate tort claim for emotional distress *nor an allegation of ongoing severe mental injury*"); *Kim v. Interdent Inc.*, No. C08-5565 SI, 2010 WL 1996607, at *1 (N.D. Cal. May 18, 2010) (concluded that the claim was garden-variety because it was not ongoing, but instead limited to the accident and "about a month or so" afterwards); *Green v. Mich. Dep't of Nat'l Resources*, No. 08–14316, 2009 WL 1883532, at *2–3 (E.D.Mich. June 30, 2009) (holding that the plaintiff asserted more than garden-variety emotional distress when he allegedly suffered ongoing depression and anxiety as well as physical manifestations of his distress); *Verma v. Am. Express*, No. C08-2702 SI, 2009 WL 1468720, at *2 (N.D. Cal. May 26, 2009) (emotional distress allegations not garden-variety where the plaintiff alleged that she "suffers ongoing emotional harm as a result of defendant's actions almost two years ago"); *Ali v. Wang Labs., Inc.*, 162 F.R.D. 165, 168 (M.D. Fla. 1995) (plaintiff placed mental condition in controversy by alleging ongoing and serious emotional distress); *Jansen v. Packaging Corp. of Am.*, 158 F.R.D. 409, 410–11 (N.D.Ill.1994) (same).

and relying on cases that define garden-variety as "ordinary," "commonplace," and "usual"). Fagen tries to downplay those allegations now by saying that he's not alleging any kind of *specific* disability or disorder, but that is not a true distinction. The word "disability" has a legal and medical meaning, and it goes well beyond garden variety. It's the opposite. *Cf. In re Consolidated RNC Cases*, 2009 WL 130178 (S.D.N.Y. Jan. 8, 2009) (allegations of "severe emotional distress, emotional injuries, psychological harm, mental anguish, mental injury, embarrassment, humiliation, shock, fright, and apprehension" are not garden-variety).

Fagen is not alone in taking this tact: Plaintiffs often plead significant emotional distress damages, only to downplay those allegations when the defendant asks for medical records, and then ramp them back up during trial. Take *Godfrey v. State,*[8] a case with which the Court is familiar. The plaintiff—who claimed to be the victim of defamation, extortion, and discrimination—alleged

[8] *Godfrey v. State*, No. CL 124195 (Polk County), Ruling on Outstanding Motions, Aug. 31, 2012, attached hereto as an addendum.

that he "has in the past and will in the future suffer mental and emotional harm and anguish, anxiety, fear, depression, loss of enjoyment of life, degradation, disgrace, uncertainty, apprehensiveness, grief, restlessness, dismay, tension, and unease." *Id.* at 3. Those are significant emotional-distress allegations, but when faced with a request for medical records, the plaintiff claimed that he was asking for nothing more than the garden-variety damages. *Id.* Judge Robert Hutchison disagreed, concluding that "[a]s must be apparent from the language quoted above from plaintiff's petition, he is claiming far more than garden variety emotional distress." *Id.* at 4.[9]

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[9] Judge Hutchison also explained why the garden-variety exception has no place in Iowa law:

> Assuming 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.

Id. at 4.

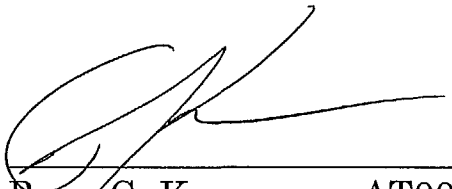
The same is true here. Fagen's allegations are not normal, usual, or commonplace. They are significant and ongoing, and thus not of the garden variety.

CONCLUSION

There is no garden-variety exception to section 622.10, but that doesn't necessarily mean that plaintiffs like Fagen must share their detailed medical histories with the world. District courts have many ways to protect such sensitive material: They can, and almost always do, enter a protective order that limits the distribution of the documents and the information; they can act as a gate-keeper under Iowa Rule of Evidence 5.403; and, in rare cases, they can view the documents *in camera* before production.

But, as this Court has recognized, "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." *Cole*, 295 N.W.2d at 35. The Court should deny Fagen's request to create an exception to 622.10 that is unworkable and does not comport with the statute's terms. But at the very least, the Court

should make clear that Fagen's allegations go beyond the garden variety.



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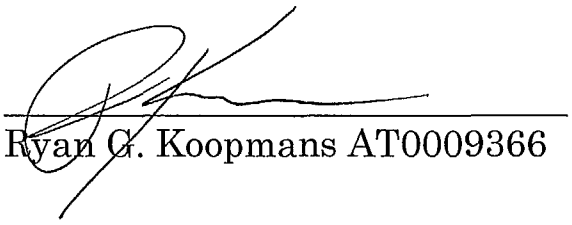

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Addendum

IN THE DISTRICT COURT OF IOWA IN AND FOR POLK COUNTY

CHRISTOPHER J. GODFREY, Plaintiff, v. STATE OF IOWA, et. al., Defendants.	CASE NO. CL 124195 RULING ON OUTSTANDING MOTIONS

On August 24, 2012 the above-captioned matter came before the Court on defendants' motion for partial summary judgment and motion to compel discovery. By agreement of the parties, plaintiff's motion to amend was also considered. Plaintiff appeared by his attorney, Roxanne Barton Conlin. Defendants appeared by their attorneys, George LaMarca, Philip De Koster and Andres Doane. After hearing the statements and arguments of counsel, reviewing the court file and being fully advised in the premises, the Court now enters the following ruling.

As indicated above, the parties agreed that plaintiff's motion to amend was properly before the Court. Defendants stated that they had no resistance to the amendment, but reserved their right to admit or deny the allegations of the amended petition at a later date with an amended answer. Plaintiff's motion to amend is granted.

Defendants filed a motion for partial summary judgment, urging that plaintiff's claim for punitive damages should be stricken from the case. Defendants further argued that sanctions should be imposed on plaintiff for making a claim for punitive damages, contending that such claim is frivolous as a matter of law. Plaintiff resisted both the motion for partial summary judgment and the request for sanctions.

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Plaintiff urges that he is entitled to seek punitive damages because no Iowa Supreme Court decision has expressly disallowed such a claim, at least not by a case that remains in effect. The Court disagrees. The statute in question does not expressly authorize punitive damages, and the Court concludes that in the absence of such authorization no claim for punitive damages can exist. *See Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 851 (Iowa 2001); *Smith v. ADM Feed Corp.*, 456 N.W.2d 378 (Iowa 1990). The motion to strike the claim for punitive damages is granted.

Defendants' request for sanctions is based upon their contention that Iowa law has been well settled for many years that punitive damages are not available under the Iowa Civil Rights Act, citing to the cases set forth above. While the Court agrees with defendants that punitive damages are not available, it is also aware that a dispute exists between the plaintiffs' bar and defendants' bar as whether there is binding precedent on the issue. At least two district court judges have ruled in recent history that punitive damages are available to such claimants, and the Iowa Supreme Court has recently accepted an interlocutory appeal on this very issue, as noted in plaintiff's brief. Under these circumstances, it cannot be said that plaintiff's claim for punitive damages is frivolous or in bad faith. The request for sanctions is denied.

The remaining issue before the Court is defendants' motion to compel discovery. At the heart of the dispute is defendants' request for plaintiff's medical records for the past ten years, both pertaining to his physical and mental health. Defendants argue that they are entitled to those records because of plaintiff's claims for personal injury damages in the case. Plaintiff contends that his medical and mental health records are privileged, that he has not waived such privilege and that they should not be discovered.

According to the allegations of plaintiff's petition, as amended, he has been the victim of discrimination on the basis of his sexual orientation, and defendants have engaged in numerous types of tortious conduct toward him in addition to allegedly violating the Iowa Civil Rights Act. Plaintiff alleges in his petition that he has been damaged as a proximate result of defendants' actions:

> As a direct and proximate result of DEFENDANTS' acts aforesaid, Plaintiff has in the past and will in the future suffer mental and emotional harm and anguish, anxiety, fear, depression, loss of enjoyment of life, degradation, disgrace, uncertainty, apprehensiveness, grief, restlessness, dismay, tension, and unease, pain and suffering, and has in the past and will in the future suffer loss of wages, loss of earning capacity, benefits, and other emoluments of employment.

Defendants argue that making these claims for damages, plaintiff has waived any privilege or right to privacy that he might otherwise have.

Plaintiff has already acknowledged that he was being treated by a licensed mental health counselor for anxiety both before and after the incidents which gave rise to his claims in this case. However, despite the language set forth above from his petition, he asserts that he is only seeking damages for "garden variety" emotional distress in this action, and therefore he retains his right to privacy and privilege from producing his medical records. Plaintiff defines "garden variety" emotional distress as that which any person would suffer as a consequence of the alleged actions of defendants, and which jurors could reasonably understand without the benefit of the testimony of professionals. Plaintiff stresses that he has no present plan to call as a witness any mental health professional, and that he is not seeking compensation for the expense of treatment by any mental health professional.

Plaintiff has cited to cases in his brief in which courts have concluded that a mere claim for garden variety emotional distress does not cause a waiver of a plaintiff's right

to privacy and/or privilege. Defendants have cited numerous cases which have refused to recognize such an argument. The Court has found no case in Iowa directly on point. In any event, the Court concludes that right to privacy and general privilege which protects medical records has been waived by plaintiff here. As must be apparent from the language quoted above from plaintiff's petition, he is claiming far more than garden variety emotional distress. Furthermore, he acknowledges that he was already being treated for at least one of the conditions, namely anxiety, which he now claims was caused by defendants' actions.

Iowa Uniform Jury Instruction 200.32 governs the message to jurors at trial concerning how they are to evaluate damages for a plaintiff who had a condition which arguably has been aggravated by subsequent actions of the defendant(s). During argument on the motion, plaintiff's counsel assured the Court that plaintiff would not be seeking this instruction at trial. This is hardly surprising, since the instruction is to the benefit of the defendants. Assuming 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.

During arguments, defendants stated that they were willing to reduce their request for medical records to the time period of five years before the claimed wrongful actions of the defendants until the present. With that understanding, defendants' motion to compel is sustained. The Court has been advised that the parties have agreed to the terms of a protective order that will cover all medical records produced in accord with this

ruling. Plaintiff will not be required to produce the subject medical records until the protective order has been signed by the Court. Thereafter, he shall produce the required medical records within fourteen (14) days of the ruling, or provide a patient's waiver to defendants' counsel so that they may obtain the records directly.

Dated this 31st day of August 2012.

Robert A. Hutchison, Judge-
Fifth Judicial District of Iowa

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