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United States District Court
For the Northern District of California

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVE FUNDERBURG, ET AL.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, ET AL.,
Defendants.

NO. C 02-05461 JW (RS)
**ORDER GRANTING MOTIONS
TO COMPEL: (1) MENTAL
EXAMINATION OF
FUNDERBURG; (2) FURTHER
DISCOVERY RESPONSES FROM
PLAINTIFFS; AND, (3)
RESPONSES BY HAMED
SAJJADI TO DEPOSITION
QUESTIONS AND
PRODUCTION OF DOCUMENTS**

I. INTRODUCTION

Defendants County of Trinity and United States of America ("defendants") filed motions to compel: (1) a mental examination of plaintiff Steve Funderburg ("Funderburg"); (2) further discovery responses to requests for production and an interrogatory; and, (3) Hamed Sajjadi, a third party witness in this action, to answer deposition questions and produce documents. All three motions were fully briefed and heard by the Court on October 27, 2004. Based on all papers filed to date, as well as on the oral argument of counsel, the Court grants defendants' motions for the reasons set forth below.

II. BACKGROUND

This action was filed as a result of an aircraft accident that occurred on August 5, 2001 near Weaverville, California. Dr. Sajjadi was the pilot of the aircraft and his daughter, Dr. Susan Booth, as well

1 as her minor son, plaintiff Mark D. Booth, and husband Steven Funderburg, were passengers on the
2 airplane. During takeoff, Dr. Sajjadi allegedly traveled in the wrong direction and crashed the plane into
3 trees at the north end of the runway. Dr. Booth was killed in the crash. Dr. Sajjadi, as well as his grandson
4 and son-in-law, (collectively, "plaintiffs") suffered injuries and sued the United States for negligence and
5 wrongful death pursuant to the Federal Tort Claims Act. Plaintiffs contend that the accident occurred as a
6 result of erroneous information provided to Dr. Sajjadi by an FAA Flight Services Station briefer and due
7 to inadequate warning signs and markings at the Weaverville Airport.

8 The County of Trinity (hereinafter "County") filed claims against the United States and Dr. Sajjadi
9 seeking contribution and indemnity. The United States, in turn, filed a counterclaim against Dr. Sajjadi for
10 contribution, indemnity and declaratory relief. Plaintiffs allege negligent infliction of emotional distress in
11 their complaints. Thus, the County sought to conduct an independent mental examination ("IME") of
12 plaintiffs. According to the County, such effort was met with much resistance. As a result, the County filed
13 a motion to compel mental examinations of all three of the plaintiffs, which was joined by the United States.
14 Subsequent to the filing of the County's motion, plaintiffs Mark Sajjadi and Mark Booth consented to
15 mental examinations. Accordingly, the County presently moves to compel a mental examination only of
16 Funderburg, who refuses to submit to any type of mental IME based on his religious beliefs.

17 In addition, defendants filed a motion to compel further discovery responses from plaintiffs.
18 Specifically, they contend that the plaintiffs have failed to provide adequate responses to Requests for
19 Production of Documents Nos. 13, 23, 33, 35, 41, 42, and 43.¹ Defendants also move to compel Hamed
20 Sajjadi, plaintiff Dr. Sajjadi's nephew, to answer deposition questions and provide documents. Plaintiffs
21 oppose both motions on the bases that the answers provided are sufficient and that Hamed Sajjadi was
22 acting as the agent of Dr. Sajjadi and, as such, engaged in communications which are protected by the
23 attorney-client and insurer-insured privileges.

24 III. LEGAL STANDARDS

25 _____
26 ¹ Defendants also filed a motion to compel a further response to Interrogatory No. 4. However, prior to the hearing
27 on these discovery motions, plaintiffs provided a supplemental response. Accordingly, defendants withdrew their motion
28 at the hearing.

1 A. Motion to Compel Independent Mental Examination

2 Federal Rules of Civil Procedure, Rule 35(a), provides, in relevant part:

3 When the mental or physical condition... of a party...is in controversy, the court in which the action
4 is pending may order the party to submit to a physical or mental examination.... The order may be
5 made only on motion for good cause shown and upon notice to the person to be examined and to
6 all parties and shall specify the time, place, manner, conditions, and scope of the examination and
7 the person or persons by whom it is to be made.

8 Accordingly, to justify a mental examination under Rule 35, the defendants must demonstrate (a) that
9 Funderburg has placed his mental condition "in controversy," and (b) "good cause" exists for the
10 examination. Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 241-43, 13 L.Ed.2d 152 (1964).

11 A plaintiff's mental or physical condition is "in controversy" when such condition is the subject of the
12 litigation. Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (MD FL 1988). Specifically,
13 courts have held that a separate tort claim for emotional distress places the plaintiff's mental condition in
14 controversy. See Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D. Cal. 1995) (intentional infliction of
15 emotional distress claims place mental condition in controversy.).

16 "Good cause" generally requires a showing of specific facts justifying discovery. Factors that courts
17 have considered include, but are not limited to, the possibility of obtaining the sought after information by
18 other means, whether plaintiff plans to prove his claim through the testimony of expert witnesses, whether
19 the desired materials are relevant, and whether plaintiff is claiming ongoing emotional distress. See Turner,
20 161 F.R.D. 89, 97-98 (expert testimony); Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 608 (C.D.
21 Cal. 1995) (ongoing emotional distress); Schlagenhauf, 379 U.S. 104, 118-119 (availability by other
22 means). Even if good cause is shown, it is still within the court's discretion to determine whether to order an
23 examination. Stinchcomb v. United States, 132 F.R.D. 29, 30 (E.D. Pa. 1990). Although the rule is to be
24 construed liberally to allow the examination, the court must still balance the privacy rights of the party to be
25 examined against the moving party's right to a fair trial. Curtiss v. Express, Inc., 868 F. Supp. 467, 468
26 (N.D. N.Y. 1994).

27 B. Motion to Compel Discovery Responses

28 Under Fed. R. Civ. Pro. 26(b)(1), parties may obtain discovery regarding any matter, not
 privileged, that is relevant to the claim or defense of any party. "For good cause, the court may order

1 discovery of any matter relevant to the subject matter involved in the action. Relevant information need not
2 be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of
3 admissible evidence." Fed. R. Civ. Pro. 26(b)(1). Evidence is relevant if it has "any tendency to make the
4 existence of any fact that is of consequence to the determination of the action more probable or less
5 probable than it would be without the evidence." Fed. R. Evid. 401. Discovery may be limited by the court
6 for good cause shown "to protect a party or person from annoyance, embarrassment, oppression, or undue
7 burden or expense." Fed. R. Civ. Pro. 26(c).

8 Where a deponent fails or refuses to answer questions and/or provide documents during a
9 deposition, the examining party may move for an order compelling answers and/or production of
10 documents. The discovering party may adjourn the deposition before applying for an order. Fed. R. Civ.
11 Pro. 37(a). For purposes of this rule, an incomplete disclosure, answer or response is to be treated as a
12 failure to disclose, answer or respond. Fed. R. Civ. Pro. 37(b).

13 IV. DISCUSSION

14 A. Motion to Compel Mental Examination of Funderburg

15 As noted above, where a separate tort claim for emotional distress is alleged, courts have held that
16 plaintiff's mental condition is placed in controversy. Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D.
17 Cal. 1995). Such is the case in this instance. In addition to claiming mental pain and suffering as part of his
18 general allegations, Funderburg also alleges a separate claim for negligent infliction of emotional distress in
19 both his federal and state actions. Therefore, the Court finds that Funderburg has placed his mental
20 condition in controversy.

21 Moreover, the "controversy" for purposes of Rule 35 need not be disclosed in the formal pleadings.
22 Swift v. Swift, 64 F.R.D. 440 (E.D. NY 1974). An alleged ongoing mental or emotional illness puts the
23 claimant's mental condition in controversy. See Ragge v. MCA/Universal Studios, 165 FRD 605, 608
24 (C.D. Cal. 1995); Jansen v. Packaging Corporation of America, 158 FRD 409 (N.D. Ill. 1994). In this
25 case, Funderburg claims that he has suffered and continues to suffer emotional injuries arising out of the
26 accident and the impact of witnessing his wife's death resulting therefrom. Therefore, these specific claims
27 put at issue his mental condition.

1 The County further has shown "good cause" justifying a mental examination of Funderburg. First,
2 the County has the right to investigate fully Funderburg's claim of negligent infliction of emotional distress.
3 By allowing Funderburg to proceed without affording the County the opportunity to make a thorough
4 investigation would result in great prejudice to the County, especially since it has no other means to obtain
5 such information. Its effort to elicit testimony on this subject at Funderburg's deposition met with refusals to
6 respond and with counsel's instructions not to answer.

7 Second, the proposed mental examination does not appear to conflict with Funderburg's asserted
8 religious beliefs grounded in Scientology. The literature on Scientology provided by both parties suggests
9 that its teachings are against psychiatric "treatment" involving the use of substances or therapies that would
10 alter or affect the minds of its members. Here, the County is seeking to conduct a non-invasive
11 "examination" of Funderburg which may include a written set of questions, but is not requesting leave to
12 perform any "treatment." The County, accordingly, is not seeking to "heal" Funderburg, but simply to
13 inquire as to the extent, nature or existence of any purported mental or emotional injuries as understood and
14 established by the sciences of psychiatry and psychology. The parameters of the mental examination
15 proposed by the County are reasonable, especially in light of the fact that Funderburg has had experiences
16 similar to a psychiatric examination at his own Church. As such, the County should be allowed to proceed
17 with an oral and/or written examination of Funderburg so long as it limits the scope of such examination as it
18 has proposed.

19 Finally, the County asks the Court to allow it and its expert witnesses to supplement, amend and
20 modify their Fed. R. Civ. Pro. 26(a)(2) reports following the completion of the mental IME. Since the
21 County did not have the opportunity to include the results of these examinations in its Rule 26(a)(2) reports
22 prior to the expert witness disclosure deadline, it will be allowed to do so upon completion of the mental
23 examination of Funderburg to avoid any prejudice.

24 B. Motion to Compel Further Discovery Responses

25 1. Defendants' Motion to Compel Education Expenditures (Request No. 13)

26 Defendants withdrew this issue at the hearing on the motion.

27 2. Defendants' Motion to Compel Insurance Policy Applications for Dr. Booth and Steve

1 Funderburg (Request Nos. 23 and 33)

2 Document Request Nos. 23 and 33 ask for Dr. Booth and Steve Funderburg's insurance policy
3 applications. Defendants argue that these records are necessary because they could reveal additional
4 doctors who treated plaintiffs, but whose identity plaintiffs cannot now recall. The requested information is
5 relevant to the issues in the case and plaintiffs present no reason to preclude production or response.
6 Therefore, the Court grants defendants' motion to compel plaintiffs to provide further responses to
7 Requests for Production Nos. 23 and 33 or, in the alternative, to provide authorizations to release the
8 requested information.²

9 3. Defendants' Motion to Compel Steve Funderburg's Schedule Planners (No. 35)

10 Document Request No. 35 asks Steve Funderburg to provide copies of all daily, weekly, monthly
11 or yearly schedule planners from 1997 until the present. The government argues that these records are
12 necessary because they could reveal how Funderburg's daily activities were affected by his injuries or could
13 contain notes and remarks relating to the accident. While that speculation could prove true, these materials
14 are also likely to contain much private information of no relevance at all to the claims at issue here.
15 Therefore, the Court orders Funderburg to produce his schedule planners only as to those entries that either
16 relate to the accident or cover the time period during which he is claiming lost wages. In all other respects,
17 the motion to compel is denied.

18 4. Defendants' Motion to Compel Marriage and Birth Certificates (Nos. 41, 42, and 43)

19 At the hearing, plaintiffs agreed to provide defendants with both the location of, and authorization
20 for, birth certificates for Mark and Susan Booth, as well as the marriage certificate for Steve Funderburg
21 and Susan Booth. Therefore, this portion of the motion is denied as moot.

22 C. Defendants' Motion to Compel Witness Hamed Sajjadi to Answer Deposition Questions

23 1. Attorney Client Privilege between Hamed Sajjadi and Joseph Olson

24 Defendants also seek to compel Hamed Sajjadi, a nephew of Mark Sajjadi, to answer various

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26 ²Although these requests did not seek either medical releases or request the identity of all health care providers,
27 such information was requested in Interrogatory Nos. 16-19. Rather than require the parties to brief another motion to compel,
28 the court finds that such Interrogatories are sufficiently intertwined with the current requests so as to make this issue ripe
for judicial determination.

1 deposition questions regarding conversations which occurred between Hamed and an attorney, Mr. Olson,
2 who is a family friend and business lawyer for Mark Sajjadi. During his deposition, Hamed was instructed
3 not to answer these questions based on plaintiffs' contention that an agency relationship existed between
4 Hamed and Mark Sajjadi, such that, when Hamed spoke to Mr. Olson, as well as to plaintiffs' present
5 counsel, Mr. Rand, and Mark Sajjadi's insurance company, Great American, the communications were
6 protected by the attorney-client and/or insurer-insured privileges.

7 The attorney-client privilege is applicable when: (1) legal advice of any kind is sought (2) from a
8 professional legal advisor in his capacity as such (3) the communications relate to that purpose and (4) are
9 made in confidence (5) to the client (6) are protected (7) from disclosure by the client or by the legal
10 advisor (8) unless the protection is waived. In re Grand Jury Investigation, 974 F.2d 1068, 1071, n.2. (9th
11 Cir. 1992). At the hearing on defendants' motion, plaintiffs requested that the Court conduct an *in camera*
12 review of the disputed documents to verify the existence of an attorney-client privilege between Mr. Olson
13 and Hamed Sajjadi. However, before engaging in *in camera* review to determine the applicability of the
14 attorney-client privilege, "the judge should require a showing of a factual basis adequate to support a good
15 faith belief by a reasonable person," that *in camera* review of the materials may reveal evidence to establish
16 the claim that the privilege applies. See United States v. Zolin, 491 U.S. 554, 572 (1989); quoting
17 Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982). "Once that showing is made, the decision
18 whether to engage in *in camera* review rests in the sound discretion of the district court." Id. Factors
19 which the court may consider in light of the facts and circumstances of the case are: the volume of materials
20 the court has been asked to review; the relative importance to the case of the alleged privileged information;
21 and, the likelihood that the evidence produced through *in camera* review will establish that the privilege
22 applies. Id.

23 In this instance, plaintiffs have failed to make a threshold showing to support their contention that an
24 agency relationship existed such that Hamed Sajjadi was acting in the place of Mark Sajjadi during any
25 conversations which occurred between Hamed and Olson. Neither Mark Sajjadi nor Mr. Olson submitted
26 affidavits which verify that, at the time of the accident, Mr. Olson was acting in his capacity as the family
27 attorney when he spoke to Hamed Sajjadi. Although plaintiffs suggest that such an inference might be
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1 drawn based on Mr. Olson's appearance at the hospital, an equally permissible inference could also be
2 drawn that Mr. Olson went to visit Mark Sajjadi as a friend and not in any business capacity.

3 Case law has also established that the presence of a third party during an alleged confidential
4 conversation waives the attorney-client privilege for that communication. See e.g., Gonzales v. Municipal
5 Court of Los Angeles, 67 Cal.App.3d 111, 118 (1977). During his deposition, Hamed Sajjadi testified
6 that he never had any conversations with Mr. Olson outside the presence of other family members. See
7 Deposition, pp. 101,102. Accordingly, such testimony demonstrates that there were no private
8 communications between Hamed Sajjadi and Mr. Olson, and, hence, no privileged conversations could
9 have occurred. Even assuming that plaintiffs had established the existence of an agency relationship
10 between Hamed and Mark Sajjadi, which they have not, the attorney-client privilege would not protect the
11 communications which occurred between Hamed Sajjadi and Mr. Olson.

12 Moreover, identifying facts about the client or attorney, or the scope or objective of the
13 engagement, are not treated as confidential communications to which privilege attaches. Ramseur v Chase
14 Manhattan Bank, 865 F. 2d 460, 467 (2nd Cir. 1989). Defendants, therefore, are entitled to ask questions
15 of Hamed Sajjadi regarding when Mr. Olson came to the hospital, who was present, why he was present,
16 and if there was any formal arrangement for him to represent the family. Accordingly, the Court grants
17 defendants' motion to compel answers to deposition questions by Hamed Sajjadi.

18 2. Attorney Client Privilege between Hamed Sajjadi and David Rand

19 As noted, defendants also move to compel Hamed Sajjadi to answer deposition questions
20 concerning conversations which occurred between Hamed and David Rand, counsel for Mark Sajjadi in
21 this action who subsequently was also retained by Hamed. Although defendants do not dispute that Hamed
22 retained Mr. Rand to represent him on August 21, 2004, they argue that conversations which occurred
23 prior to that date were not privileged and, therefore, are subject to discovery. It is clear from the record
24 that conversations between Hamed and Rand subsequent to August 21, 2004 are entitled to the
25 presumptive protection of the attorney-client privilege, since such discussions occurred during the course of
26 their attorney-client relationship and/or were undertaken for the purpose of retaining Mr. Rand.

27 However, conversations which Hamed Sajjadi may have had with attorney Rand prior to August
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1 21, 2004, are not presumptively privileged, since plaintiffs have failed to establish the existence of any
2 agency relationship between Hamed and Mark Sajjadi, as discussed above. Therefore, although Rand may
3 have been retained to represent Mark Sajjadi at the time that Rand had conversations with Hamed, another
4 fact that has not been established by plaintiffs, such conversations are not entitled to the protection of the
5 attorney-client privilege. Moreover, as previously noted, the general rule is that identifying facts about the
6 client or attorney, or the scope or objective of the attorney's engagement, are not treated as confidential
7 communications to which privilege attaches. Ramseur v Chase Manhattan Bank, 865 F. 2d 460, 467 (2nd
8 Cir. 1989). Defendants are, accordingly, entitled to ask questions of Hamed Sajjadi regarding the
9 circumstances and scope of his retention of Mr. Rand, as well as the content of any conversations that the
10 two conducted prior to August 21, 2004, other than for the purpose of determining if Mr. Rand could be
11 retained as Hamed's counsel. Within those guidelines, defendants' motion to compel Hamed Sajjadi to
12 answer deposition questions directed to conversations with David Rand is granted. Defendants may not
13 inquire, however, as to conversations which occurred between Hamed and Rand after August 21, 2004.

14 While the Court will not issue an anticipatory order precluding Mr. Rand from instructing his client
15 not to answer deposition questions, the parties are expected to abide by the rules of discovery, which
16 permit an instruction not to answer only to preserve a privilege, to enforce a limitation previously ordered
17 by the court, or to adjourn the deposition while seeking a court order limiting further examination. Fed. R.
18 Civ. P. 30(d)(1). If a party claims a privilege, the record must show each element necessary to assert the
19 privilege and, if requested, opposing counsel may examine the witness regarding the foundation for the
20 privilege claim. In re Stratosphere Corp. Secur. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998).

21 3. Insured-Insurer Privilege

22 Defendants also move to compel Hamed Sajjadi to answer deposition questions concerning
23 conversations he may have had with Mark Sajjadi's insurer, Great American. Again, plaintiffs argue that
24 such conversations are privileged since they occurred during a time when Hamed was acting as an agent on
25 behalf of his uncle. A statement to an insurer generally is not privileged. Jackson v. Kroblin Refrigerated
26 Xpress, Inc., 49 F.R.D. 134, 136 (N.D. West Virginia 1970) (a communication received by a liability
27 insurance company from one of its insured concerning a matter covered by the insurance policy is not a
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1 privileged communication). However, communications between an insured and his insurer "concerning an
2 event which may be the basis of a claim against him covered by the policy, is a privileged communication,
3 as being between attorney and client, if the policy requires the company to defend him through its attorney,
4 and the communication is intended for the information or assistance of the attorney in so defending him."
5 Travelers Ins. Co. v. Superior Court, 143 Cal. App. 3d 436, 448-448 (1983).

6 In this instance, Great American is defending plaintiff Mark Sajjadi in the cross-complaint filed by
7 the County of Trinity seeking to apportion fault for the accident. However, Hamed Sajjadi could not have
8 been acting as an agent for Mark Sajjadi regarding this lawsuit during his communications with Great
9 American because Hamed Sajjadi testified that he did not know that a lawsuit existed until just a few weeks
10 prior to his deposition. See Deposition pg. 94. Therefore, the communications Hamed Sajjadi engaged in
11 with Great American are not privileged, and, hence, are discoverable, and the Court grants defendants'
12 motion to compel answers to the deposition questions related to such conversations.

13 4. Privilege Log

14 Defendants request that plaintiffs provide a privilege log identifying each document for which
15 privilege is being asserted. On September 29, 2004, plaintiffs provided a privilege log to defendants.
16 Therefore, this portion of the motion is denied as moot.

17 also requested production of Defendant Sajjadi's deposition transcript and notes. ~~On Defendant Sajjadi's Motion to Compel Witness Hamed Sajjadi to Produce His Logbook~~
18 had been produced, therefore, this portion of the motion is denied as moot.

19 V. CONCLUSION

20 For the reasons set forth herein, the Court grants defendants' motions to compel as follows:

- 21 1. Defendants' motion to compel a mental examination of plaintiff Steve Funderburg is
22 granted. A mental examination of Mr. Funderburg shall occur at a mutually convenient time
23 and place, based on the parameters agreed to by counsel at the hearing.³ Upon completion
24 of the examination, a copy of the results shall be provided to plaintiff's counsel and to

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27 ³At the hearing, counsel for the County indicated that the examination would last approximately two
28 hours and may include a written test(s). Funderburg's counsel agreed to these ground rules.

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defendants and the expert witnesses shall be allowed to supplement, amend, and modify their Rule 26(a)(2) reports to reflect such results.

- 2. Defendants' motion to compel further discovery responses to Requests for Production Nos. 23, 33, 35, 41, 42, and 43 is granted as described herein.
- 3. Defendants' motion to compel Hamed Sajjadi to answer deposition questions and produce documents is granted, within the parameters set forth above.

IT IS SO ORDERED.

Dated: 11/5/04

/s/ Richard Seeborg
RICHARD SEEBORG
United States Magistrate Judge

**THIS IS TO CERTIFY THAT COPIES OF
THIS ORDER HAVE BEEN DELIVERED
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Dated: 11/5/04

Richard W. Wieking, Clerk

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