IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29021

ALYSSA FERGUSON,

Plaintiff/Respondent,

vs.

BRADLEY C. THAEMERT, M.D.,

Defendant/Petitioner.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Camela C. Theeler, Presiding Judge

BRIEF OF PETITIONER

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Defendant Bradley C. Thaemert, M.D. Petitioned the Court for Permission to Take Appeal of Intermediate Order and Request for Stay on June 14, 2019
The Order Granting the Petition was filed on July 18, 2019

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PRELIMINARY STATEMENT

Citations to the Certified Record are "R." followed by the applicable page number(s) in the Clerk's Index. Petitioner Bradley Thaemert, M.D., is referred to as "Dr. Thaemert." Respondent Alyssa Ferguson is referred to as "Plaintiff." References to Dr. Thaemert's Appendix are "App." followed by the applicable page number(s).

JURISDICTIONAL STATEMENT

Dr. Thaemert appeals from the order dated June 5, 2019 granting in part Plaintiff's Motion to Compel, in the Second Judicial Circuit, Minnehaha County. APP.1-3. Notice of Entry of Order and Judgment was served via Odyssey File & Serve on June 11, 2019. R.454-58. On June 14, 2019, Dr. Thaemert filed a Petition for Permission to Take Appeal of Intermediate Order and Request for Stay. R.459-60. On July 18, 2019, the South Dakota Supreme Court granted the petition for allowance of appeal from an intermediate order. R.459-60. This Court has jurisdiction pursuant to SDCL § 15-26A-3(6).

REQUEST FOR ORAL ARGUMENT

Dr. Thaemert respectfully requests oral argument.

STATEMENT OF THE ISSUES

Whether Confidential, Non-Party Patient Records, which are Sought to be Used for Determining a Defendant's Credibility About His Custom and Practice are Discoverable.

The circuit court erroneously allowed for discovery of confidential, non-party patient records because such records are irrelevant to the ultimate issue in the case. *See* APP.1-3; *see also* R.521-22.

STATEMENT OF THE CASE

Plaintiff commenced this action by service of Summons and Complaint on May 1, 2018. R.1-6. In her Complaint, Plaintiff alleged that Dr. Thaemert was negligent in performing a vertical incision rather than a horizontal incision without Plaintiff's consent, resulting in physical injuries, past and future pain, past and future medical expenses, permanent impairment and disability, permanent scarring, embarrassment and humiliation, mental pain and inconvenience, and loss of normal pleasures of life. R.4. Dr. Thaemert denied these allegations. R.11-13.

On April 27, 2018, Plaintiff sent written discovery requests to Dr. Thaemert. *See* APP.26-31. As part of the discovery requests, Plaintiff sought "[a] copy of all medical records of any patients on whom you performed incisions, for anterior spinal fusions at or below the L4 level, during the past 5 years without identifying the patient consistent with the South Dakota Supreme Court's decision in *Wipf v. Alstiel* [sic], No. 27491 -r-SLZ, SD 2016." APP.29. Dr. Thaemert objected to the request on the grounds that it was irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, vague,

sought discovery which violated of HIPAA, and otherwise sought protected health information that could not be disclosed under South Dakota law. APP.28-29. After counsel for both parties exchanged letters regarding the requested information, Plaintiff brought a motion to compel seeking copies of unrelated medical records of Dr. Thaemert's former patients. R.239-40; R.249-50; R.218.

As part of the Motion to Compel, Plaintiff argued that the records of Dr. Thaemert's former and unrelated patients were relevant because Dr. Thaemert had "no specific recollection of his discussions or assessments of Plaintiff and relies entirely on what [Dr. Thaemert] considers his general practice." R.228. Plaintiff claimed that "[t]he only way to determine the truthfulness of Defendant's general practice claim is to review the records of other patients." R.228. Plaintiff further argued that the reason unrelated patient records are relevant to this case is because Dr. Thaemert claimed he has a habit of talking to patients about whether he can perform a horizontal incision, so Plaintiff needs the records of those patients to determine whether Dr. Thaemert actually does have such a habit. R.527-28.

On June 5, 2019, the circuit court ordered Dr. Thaemert to produce the requested medical records of unrelated patients to Plaintiff's counsel, subject to limitations. APP.1-3. The court ordered production of all pre-operative notes,

operative notes, consult notes, age, gender, and body mass index of any patient on whom Dr. Thaemert performed incision surgeries for similar anterior spinal fusions over the past three years. APP.1-3. Notice of Entry of Order was filed on June 11, 2019. R.454.

On June 14, 2019, Dr. Thaemert petitioned for interlocutory appeal from the circuit court's Order granting Plaintiff's Motion to Compel in part. R.469-71. The Supreme Court of South Dakota granted Dr. Thaemert's petition allowing appeal from the circuit court's intermediate order. R.459-60.

STATEMENT OF FACTS

On May 2, 2017, Plaintiff sought treatment at Orthopedic Institute for low back pain. R.386. After visiting with Dr. Walter Carlson, Plaintiff agreed to undergo an anterior spinal surgery. R.386-87. The anterior spinal surgery involved an exposure incision to be made, which required a surgeon to cut through the abdominal muscles and peritoneal cavity to gain access to the spine through the front of the patient's body. R.386-87. This approach requires moving the abdominal organs and blood vessels in front of the spine so that the surgeon can approach the spine and disc space. R.104. An anterior spine exposure requires delicate movement of blood vessels, the peritoneal cavity, the kidney, ureter, nerves, muscle, and soft tissue. R.104. It is a major surgery

which involves risk of injury to those organs, nerves, and blood vessels. R.106.

On June 8, 2017, Plaintiff presented to Dr. Thaemert for an evaluation of an anterior spine exposure for spinal surgery that was to be performed by Dr. Carlson. APP.4-7; R.387. During her discussion with Dr. Thaemert, Plaintiff told Dr. Thaemert she would prefer to have a horizontal incision (also known as "transverse incision" or "Pfannenstiel incision") "if at all possible." APP.7; R.387. Plaintiff informed Dr. Thaemert that she would like to have the horizontal incision because of its cosmetic appeal below the bikini line. APP.7; R.387. While Dr. Thaemert advised Plaintiff that this type of incision was possible, Dr. Thaemert did not promise or guarantee Plaintiff that he would be able to make a horizontal incision. R.157.

Dr. Thaemert has a typical procedure when meeting with a patient for a pre-operative appointment, during which he has a standard discussion with all patients undergoing an anterior exposure for spine surgery. APP.14-15. Although Dr. Thaemert cannot specifically recall the conversation he had with Plaintiff in this case, he has testified that he never promises to perform a particular type of incision on any patient. APP.18-25. Further, Dr. Thaemert has testified that he discusses with all patients the exposure surgery procedure, the structures that need to be moved, the risks of the procedure and how he can

perform the surgery the safest. APP.18-25. Although there is some discussion concerning the incision, Dr. Thaemert devotes the great majority of the initial pre-operative appointment explaining the surgery is significant and reviewing the risks of surgery with the patient. APP.14-15. Dr. Thaemert testified that it is his practice to advise patients that he must do the safest exposures during spinal incisions, and that may result in having to do a vertical incision because of all the dangerous parts and movements that take place during a surgery. R.20; R.23.

On June 22, 2017, Plaintiff presented to Sioux Falls Specialty Hospital to have her incision and spinal surgery performed. APP.8. Upon her arrival, Plaintiff reviewed and signed a consent form authorizing Dr. Carlson and Dr. Thaemert to perform the surgery. APP.9; 334-35. The informed consent form that Plaintiff signed acknowledged that "conditions may necessitate additional or different procedures than those specifically set out above[,]" and that Plaintiff would "thereby authorize and request [Dr. Carlson and Dr. Thaemert] to perform such procedures." APP.9.

Plaintiff was brought into the operating room where anesthesia was administered. APP.8. Dr. Thaemert finished preparing for the exposure and assessed Plaintiff. APP.19-20. After assessing the patient, Dr. Thaemert felt it was safest and best for a vertical incision to be made. APP.19-20.

Accordingly, Dr. Thaemert completed the anterior spine exposure using a vertical incision to ensure that Plaintiff's spinal surgery was performed in the safest manner. APP.19-20; APP.8. Ultimately, the surgery was successful in relieving the pain Plaintiff was experiencing in her back. R.328; R337. However, after learning that the incision made by Dr. Thaemert was a vertical incision, rather than the horizontal incision she preferred, Plaintiff now contends that she would not have allowed Dr. Thaemert to operate if she would have been aware that he was going to make a vertical incision. R.4.

ARGUMENT

Standard of Review

The South Dakota Supreme Court may review the circuit court's discovery orders under an abuse of discretion standard. *Andrews v. Ridco, Inc.*, 2015 SD 24, ¶ 14, 863 N.W.2d 540 (quoting *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 SD 69 ¶ 47, 771 N.W.2d 623, 636). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *In re Jarman*, 2015 SD 8, ¶ 19, 860 N.W.2d 1, 9 (quoting *Thurman v. CUNA Mut. Ins. Soc'y*, 2013 SD 63, ¶ 11, 836 N.W.2d 611, 616). When the Supreme Court is "asked to determine whether the circuit court's order violated a statutory privilege, however, it raises a question of statutory

interpretation requiring de novo review." *Arnoldy v. Mahoney*, 2010 SD 89, ¶ 13, 791 N.W.2d 645, 652 (quoting *Acuity*, 2009 SD 69, ¶ 47, 771 N.W.2d at 636).

I. Whether Confidential, Non-Party Patient Records, which are Sought to be Used for Determining a Defendant's Credibility About His Custom and Practice are Discoverable.

The non-party patient records that are the subject of the court's discovery order are not discoverable for three primary reasons. First, the information sought through the unrelated records is irrelevant to the issues in this case, and cannot lead to the discovery of any admissible evidence at trial. Second, the information sought is overbroad and unduly burdensome. Third, Plaintiff's, and presumably, the circuit court's reliance on the South Dakota Supreme Court's decision in *Wipf v. Altstiel*, 2016 SD 97, 888 N.W.2d 790 is misplaced, leading to the erroneous order granting Plaintiff's Motion to Compel. For these reasons, Dr. Thaemert respectfully asks the Supreme Court to reverse the circuit court's order.

Non-Party Patient Records are Irrelevant to the Issues in this Case.

SDCL § 15-6-26(b)(1) states "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." "Evidence is relevant if . . . [i]t has any tendency to make a fact more or less probable than it would be without the evidence." SDCL § 19-19-401. When discovery is irrelevant and not reasonably calculated to lead

to the discovery of admissible evidence, discovery requests may be properly denied. *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 20 (S.D. 1989). In this case, Plaintiff's request for discovery is wholly irrelevant to the issues and subject matter in this case.

The liability issues in the present case are straightforward: (1) whether Dr. Thaemert was negligent in performing a vertical incision, and (2) whether the surgery was performed with Plaintiff's informed consent. Plaintiff did not identify how the non-party patient records that are unrelated to this case may address any of the issues in this case. The circuit court, following Plaintiff's argument, failed to articulate how such information was related to the subject matter involved in the pending action, as required by SDCL § 15-6-26(b)(1). Instead, the circuit court relied on Plaintiff's argument that the non-party patient records were relevant to the issue of what Dr. Thaemert discusses with his patients as part of his general practice. *See* R.228-29; R.433-34. Plaintiff argued that the evidence sought in their request for production of non-party patient records was relevant on the issues of Dr. Thaemert's credibility and with regard to his standard operating procedure. *See* R.434. Plaintiff did not indicate how such evidence would have a tendency to make a fact at issue in this case more or less probable. *See* SDCL § 19-19-401. It is unclear how Dr.

Thaemert's conversations with former non-party patients relates to what occurred in Plaintiff's case.

In his deposition, when asked whether about he received input from Plaintiff to perform a vertical incision rather than a horizontal incision, Dr. Thaemert testified that "[i]t was part of my original discussion that I would do the safest exposure for her. That's how I always present my discussion on a spine exposure." APP.20. Dr. Thaemert did not document that discussion in the record, but testified that his "discussion is pretty routine for all spine exposure patients, and it's something I do on all patients. And I specifically spend 99 percent of the time talking about the risk of the exposure and how I can do it the safest." R.139. Further, Dr. Thaemert provided an affidavit to the Court indicating that he has "a standard discussion with all patients undergoing an anterior exposure for spine surgery [which includes] a description of the procedure, the risks of the procedure, including but not limited to, the risk of injury to nerves, bowel, and blood vessels." APP.14-15. Plaintiff used Dr. Thaemert's testimony to support her argument that "[t]here are only two sources of evidence available to support Dr. Thaemert's defense: his own vague and naked testimony, or, the records for those [similar] procedures." R.431-32. Without citing to any authority allowing discovery of unrelated patient records, Plaintiff argued she was entitled to such records under the

notion that Dr. Thaemert's defense "*should* be verified by something more than the doctor's word." R.431.

Plaintiff has not offered any reason to believe that the medical records she requested as part of the discovery to Dr. Thaemert would provide any relevant information in this case. Plaintiff has no way of showing that the medical records of former unrelated patients are material to the issue of whether he advised Plaintiff of the risks in this case. Further, even if Plaintiff were to obtain all of these records, there would be no basis of comparison between Plaintiff and other patients of Dr. Thaemert. Plaintiff has no way of showing that the medical records from Dr. Thaemert's former patients are material to the issue of whether he advised Plaintiff of the risks in this case or what factors he reviewed in determining what type of incision to use on other patients. Moreover, because each patient is different, there is no information that could be gathered by Plaintiff that would be admissible at trial. Instead, if Plaintiff did find a record that she believed was relevant and sought to use the record at trial, Dr. Thaemert would be entitled to defend against such record by demonstrating how the patient's case is unrelated to Plaintiff's case.

Doing so would also open the door to a number of issues—most notably, creating disclosure of further confidential identifying information. In order to adequately defend against non-party patient records, Dr. Thaemert may

necessarily have to disclose additional identifying information to explain why the former unrelated patient was treated under different circumstances than Plaintiff. The circuit court ordered Dr. Thaemert to produce the medical records, along with indications of "age, gender, and body mass index (BMI)" for those non-party patients who underwent anterior spinal fusions during the past three years. APP.2. Even if Plaintiff could delineate any relevance that the medical records have on the issues in the present case, the age, gender, and BMI of a patient is not determinative of whether it is appropriate to perform a vertical or horizontal incision. *See* APP.15-16. Instead, the primary factor to consider is the amount of fat in the abdominal area, which relates to the body habitus of the patient. APP.15-16. Such information would not be described in the medical records, and thus, the medical records would be irrelevant for comparison of Dr. Thaemert's former patients.

The records of unrelated, non-party, former patients of Dr. Thaemert are irrelevant to the issues in this case. The circuit court stated that the information was "relevant because Defendant has no specific recollection of his discussions or assessments of Plaintiff and relies entirely on what Defendant considers to be his general practice." APP.2. The circuit court apparently thought that unrelated patient records are relevant to the issue of Dr. Thaemert's credibility—i.e., whether Dr. Thaemert actually does have the general practice

of discussing the risks of surgery and conducting assessments of his patients at the time of surgery. Evidence that might be relevant for the purpose of impeaching a witness, however, does not establish the relevancy needed for discovery of confidential patient records. It is well established that "the need for evidence to impeach witnesses is generally insufficient to require its production in advance of trial." *Milstead v. Johnson*, 2016 SD 56, ¶ 26, 883 N.W.2d 725, 235 (quoting *United States v. Nixon*, 418 U.S. 683, 701 (1974)).

In *Milstead v. Smith*, 2016 SD 55, 883 N.W.2d 711, the defendant in a criminal case sought the personnel records of the Minnehaha County Sheriff's Office through use of a subpoena. The trial court denied the Sheriff's motion to quash the subpoena, stating that the personnel records from the past five years must be presented for in-camera review. *Milstead*, 2016 SD 55, ¶ 1, 883 N.W.2d 725, 727-28. The Supreme Court reversed, stating that the only use for the personnel records is to establish that the law enforcement officer might have used unnecessary force in other cases, and such information might be useful to impeach his credibility. *Id.* ¶ 26, 883 N.W.2d at 735. Thus, the personnel records were not discoverable. *Id.*

Similarly, in the present case, the information sought by Plaintiff is only being sought for purposes of determining whether Dr. Thaemert has a general practice of explaining the risks and assessments with each patient, so that his

credibility may be attacked. Although Plaintiff argues this is relevant to Dr. Thaemert's credibility, there is no indication that such information is relevant to Plaintiff's case. Rather than focusing on the true issue in this case—Plaintiff's treatment—Plaintiff attempts to focus on other patients. Dr. Thaemert would then be required to expound on other patients' records and treatments to explain any criticisms Plaintiff may have of Dr. Thaemert's treatment of other patients. The case would likely turn into a trial about other patients' records, which creates confusion on the issues for the jury.

Evidence is discoverable upon a showing that the evidence "is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." SDCL § 15-6-26(b)(1). The circuit court concluded only that the information Plaintiff seeks to discover was relevant to Dr. Thaemert's credibility, and not that it was relevant to the subject matter of the pending action. Former patient records of Dr. Thaemert that are wholly unrelated to the present case are not "relevant to the subject matter" of this case. Accordingly, there has been no showing of relevance of the evidence sought by Plaintiff. Dr. Thaemert, therefore, respectfully requests that the Court reverse the circuit court's order compelling discovery of the unrelated former patient records.

Any Limited Relevance of Non-Party Records must be Weighed Against the Burdens to the Non-Party Patients and Defendant.

Even if the records of other patients who have undergone a similar procedure have some limited relevance to the issues in this case, given the sensitive nature of medical records, even when they have been redacted, the circuit court should have adopted a balancing test for production of non-party medical records pursuant to SDCL 15-6-26(b). In their briefing and argument to the circuit court, Plaintiff relied heavily on the South Dakota Supreme Court's decision in *Wipf v. Altstiel*, 2016 SD 97, 888 N.W.2d 790, for the proposition that medical records of past, unrelated patients are discoverable. In *Wipf*, Defendant Dr. Altstiel performed a laparoscopic hernia repair on plaintiff Wipf to repair a tear or opening in Wipf's abdominal wall. *Id.* ¶ 2, 888 N.W.2d at 791. Wipf reported to the emergency room three nights after his surgery reporting worsening pain. *Id.* ¶ 4. A computed tomography scan revealed fluid and air in his abdomen. *Id.* Dr. Wehrkamp operated on Wipf and discovered two perforations in the small bowel. *Id.* Wipf sued Dr. Altstiel for malpractice alleging Dr. Altstiel perforated his bowel during the hernia repair and failed to inspect and find the perforations prior to finishing the surgery. *Id.* ¶ 5. Dr. Altstiel claimed he inspected the bowel and no perforations were present. *Id.* However, Wipf argued that the bowel inspection was not recorded in Dr. Altstiel's operative note. *Id.*

The circuit court presumably relied upon the *Wipf* case in making its decision to grant Plaintiff's motion to compel the records of Dr. Thaemert's former patients. In *Wipf*, the defendant physician placed the records at issue with regard to an essential element of the case: whether the physician violated the standard of care. The defendant in *Wipf* conceded that the non-party medical records were relevant to that central issue. In this case, even if the Court were to determine that there was some limited relevance to the non-party records, the burdens on the confidentiality of the non-party patients and upon Dr. Thaemert's clinic greatly outweighs any relevance to any issue in this case. SDCL 15-6-26(b) provides that the court may limit discovery if the court determines "discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the party's resources, and the importance of the issues at stake in the litigation." In this case, even if the medical records had some minimal relevance, such relevance is greatly outweighed by the intrusion on patient privacy and the burden on Dr. Thaemert to redact and produce the records.

The Burden on the System of Confidential Physician-Patient Communication Outweighs Any Limited Benefit of Disclosure.

The intrusion on patient privacy outweighs any limited relevance of these records. Although the *Wipf* Court stated that non-identifying patient information is not protected by the physician-patient privilege, Defendant urges

this Court to consider the intrusion of privacy of disclosure of redacted medical records on Dr. Thaemert's patients. The communications between a patient and their physician is one of the most sensitive and important privileges protected by our legal system. Removal of the names and other identifying information does not totally remove the intrusion on one of the fundamental confidences in our society. Although identifying information would be redacted, given the number of patients whose records will be released, there is a high probability that some of them can be identified by their circumstances alone in a less populous state such as South Dakota. There can be little doubt that most patients who were informed that their records were being released to third parties would strongly object to such disclosure, even if such disclosure was redacted. The interests of the non-party patients should also be considered when weighing the relevance of the information against the needs of the case and the issues at stake in the litigation. As recognized by Justice Gilbertson in the dissenting opinion in *Wipf*:

> However, South Dakota's physician-patient privilege is not merely concerned with a patient's privacy. It "expresses a long-standing policy to encourage uninhibited communication between a physician and his patient. It is a privilege that seeks to insure the free flow of health care, absent *any* fears on the patient's part that *anything* he says might later be used against him." *Maynard*, 1997 S.D. 60, ¶ 8, 563 N.W.2d at 833 (emphasis added) (quoting *D.K.*, 245 N.W.2d at 648)." Whether physician-patient communication is inhibited necessarily depends on the patient's subjective assessment of the relative security of his or her identity. Thus, the

> purpose of the privilege may be undermined when a patient fears identification through the disclosure of his medical records—*even if no such identification occurs.*

Wipf, 2016 SD 97, ¶ 22, 888 N.W.2d at 799 (Gilbertson, J., dissenting) (emphasis in original). When considering the interests of non-party patients, it is important to consider how these records could be used as evidence or lead to the discovery of admissible evidence. Every patient is different and each patient is treated as an individual, and not based upon a cookbook formula.

While Plaintiff's specific plans for use of these records has not been clearly expressed, one can speculate that any use would involve using non-party patient records in trial to show that on some other occasion Dr. Thaemert documented informed consent differently than he did in this case. Such a use would lead only to additional intrusions on non-party patients. Would Dr. Thaemert be allowed to explain the circumstances that led to a different care of one patient over another? Would such explanation allow Plaintiff to further intrude upon non-party patient privacy by seeking the identity of certain non-party patients? This is a slippery slope that would undoubtedly lead to issues that are irrelevant to the case and a breach of non-party patients' confidentiality. Even assuming *arguendo* that the evidence is even peripherally relevant, the risk of confusion, delay and misleading the jury substantially outweighs any probative value. Production of the medical records

will only cause the parties to engage in side litigation requiring many trials on the care and treatment of non-party individuals.

Unlike in *Wipf*, where the non-party records were relevant to determine complication rates, there are no issues related to complication rates and so the records would almost certainly be used independently, rather than as a comprehensive statistical analysis. Allowing a disclosure of this type every time a physician testifies as to his habit or custom, would open the flood gates to disclosure of non-party records in nearly every medical malpractice case.

Production of Non-Party Patient Records is Overbroad and Unduly Burdensome Considering Any Limited Relevance the Records Might Have.

Even if the Supreme Court were to agree with the circuit court's ruling that the unrelated patient records are relevant "because Defendant has no specific recollection of his discussions or assessments of Plaintiff and relies entirely on what Defendant considers to be his general practice[,]" the records should still not be discoverable due to the undue burden it places on Dr. Thaemert. The court has previously determined that "allowing discovery without bounds" would "add[] to the already burdensome time and costs of litigation." *Voorhees Cattle Co., LLP v. Dakota Feeding Co., LLC*, 2015 SD 68, ¶ 15, 868 N.W.2d 399, 407. In determining whether the evidence is discoverable, the court must take into consideration whether the "discovery is unduly burdensome or expensive, taking into account the needs of the case, the

amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation." SDCL §15-6-26(b)(1)(A)(iii). In this case, the limited relevance that the circuit court placed on the evidence is outweighed by the undue burden and expense.

As it relates to expenses, Dr. Thaemert would have to produce the records after receiving them from Surgical Institute. APP.10. The employee responsible for maintaining the records at Surgical Institute estimated that this request would include 329 patients and that it would take nearly fifty hours to identify the information, locate the pre-operative reports and operative reports, and redact the necessary identifying information for each patient if the circuit court were to order records from the past five years be produced.[1] APP.10-11. Even with the limitation of three years rather than five years, the time for gathering this information creates a significant burden on the staff at Surgical Institute.

The Health Insurance Portability and Accountability Act ("HIPAA") requires that all individually-identifiable health information be redacted so that there is not a reasonable basis to believe the information could be used to

[1] This estimate was based on the five years of records originally requested by Plaintiff. The Court ordered three years of records be produced and so the estimate would be less.

identify an individual. Pursuant to 45 C.F.R. § 164.514(b), HIPAA requires redaction as follows:

> (2)(i) The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:
>
> (A) Names;
>
> (B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census:
>
> (1) The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people; and
>
> (2) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000.
>
> (C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
>
> (D) Telephone numbers;
>
> (E) Fax numbers;

(F) Electronic mail addresses;

(G) Social security numbers;

(H) Medical record numbers;

(I) Health plan beneficiary numbers;

(J) Account numbers;

(K) Certificate/license numbers;

(L) Vehicle identifiers and serial numbers, including license plate numbers;

(M) Device identifiers and serial numbers;

(N) Web Universal Resource Locators (URLs);

(O) Internet Protocol (IP) address numbers;

(P) Biometric identifiers, including finger and voice prints;

(Q) Full face photographic images and any comparable images; and

(R) Any other unique identifying number, characteristic, or code, except as permitted by paragraph (c) of this section; and

(ii) The covered entity does not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information.

45 C.F.R. § 164.514(b) (emphasis added). The burden upon Dr. Thaemert and Surgical Institute, combined with the intrusion upon the sensitive and private health information of Surgical Institute patients, overwhelmingly outweighs any relevance that the circuit court found that the unrelated medical records have to the issues in this case.

Even if Plaintiff were to get access to the records from the past three years, there has not been a showing that such information would be relevant to her case. As Dr. Thaemert stated in his deposition, he has a general discussion with every patient about the safety of exposure in comparing a vertical incision to a horizontal incision. R.130; R.140. A detailed recitation of this discussion is not typically in his notes. However, it is part of every discussion and is usually documented in the patient's notes that the patient has been explained the risks of the procedure and would like to proceed. APP.15. Thus, even if Plaintiff obtained the records of Dr. Thaemert's former patients, such discussion would likely not be detailed in the record. The burden of going through non-party patient medical records, not only in this case, but in future cases in which this issue is raised, undoubtedly outweighs any benefit derived through discovery of the records. Plaintiff's attempt to obtain these records is an overbroad and unduly burdensome attempt to comb through privileged records that are irrelevant to the present case as part of a fishing expedition.

The South Dakota Supreme Court's Decision in *Wipf v. Altstiel* is Not Applicable to the Facts of this Case.

Any reliance on the *Wipf* case is misplaced, and the South Dakota Supreme Court should take this opportunity to clarify its decision that evidence of unrelated patient medical records are not discoverable unless their relevance has been placed at issue by the defense. The biggest distinction in the *Wipf* case is that the defendant's own expert testified that in order for him to opine that the defendant breached the standard of care, he would need to find out if there was "an unacceptably high complication rate in similar procedures with different patients." *Id.* The South Dakota Supreme Court found, and the defendant even admitted, that the expert made such records relevant to the subject matter in that case. *Id.* ¶ 6.

In the present case, Dr. Thaemert has not put his surgical record at issue, unlike the expert in *Wipf*. Further, Dr. Thaemert has not conceded that the information is relevant to this case. The Supreme Court in *Wipf* specifically stated that these two factual differences were the basis for its decision and that discovery of other patient records would not be applicable in many malpractice cases. *Id.* n.2. The Supreme Court reasoned that "[t]he records sought in this case would not be discoverable in many malpractice cases because they would not be relevant. However, in this case, Dr. Altstiel's expert made the

information relevant in his deposition testimony, and Dr. Altstiel does not contest the court's relevancy determination for purposes of this appeal." *Id.*

The defendant in *Wipf* undoubtedly put prior unrelated records at issue through the testimony of his own expert. That has not happened in this case. In fact, during his deposition, Plaintiff's counsel specifically asked Dr. Thaemert whether other patient's records could be compared to Plaintiff's records. *See* R.25. Dr. Thaemert specifically denied that any other patient's record would be relevant in this case:

> Q: . . . . are [Plaintiff's] records different than what we would find if we looked at the records of your other L5-S1 anterior exposure spine patients?
>
> MR. HAIGH: Object to the form of the question. He's not going to talk about other patients.
>
> Q: I'm not asking you to talk about other patients in detail. I'm asking you if their records would be different than her records, without identifying any patient.
>
> MR. HAIGH: Every patient's different. I'm going to object as vague and unanswerable. If you can answer it, go ahead.
>
> Q: Can you answer it?
>
> A: I can't compare a patient to patient without looking at their records.
>
> Q: Okay. So would you say the only way that we can determine the reasonableness of your testimony is if

> we have the records of your other patients so we can compare them and discuss them with you?
>
> MR. HAIGH: Object to the form. Vague, irrelevant. Go ahead.
>
> A: Every patient's individual. So what I do with another patient is not necessarily relative to how—I take care of each individual patient individually.

R.25. Dr. Thaemert explicitly testified that he takes care of each of his patients individually because each patient is different. R.25. Unlike the defense expert in *Wipf*, Dr. Thaemert did not put his surgical record at issue in this case. Plaintiff's counsel asked Dr. Thaemert if his former unrelated patients' records would be relevant, and Dr. Thaemert denied that such records had any relevance to this case. R.25.

The South Dakota Supreme Court explicitly noted that former patient records would not be relevant in many medical malpractice cases, because such records are not relevant to determining whether the physician breached the standard of care. *Wipf*, 2016 SD 97, ¶ 6, 888 N.W.2d at 792 n.2. As previously predicted by the Court, in this case, Dr. Thaemert's former patient records are not relevant to the substantive issues in this case. Instead, Plaintiff is attempting to obtain discovery of unrelated patient records to determine if Dr. Thaemert's credibility can be impeached through those records. That is an improper purpose for discovery under SDCL § 15-6-26(b)(1), and has been

explicitly rejected by the South Dakota Supreme Court. Therefore, the Court should reverse the circuit court's order to produce the unrelated former patient records in this case.

CONCLUSION

Because the medical records sought by Plaintiff are irrelevant and create an undue burden, Dr. Thaemert respectfully requests that the South Dakota Supreme Court reverse the circuit court's order requiring Dr. Thaemert to produce the unrelated medical records of former patients.

Dated at Sioux Falls, South Dakota, this _____ day of October, 2019.

EVANS, HAIGH & HINTON, L.L.P.

_____

Mark W. Haigh
Tyler W. Haigh
101 N. Main Avenue, Suite 213
PO Box 2790
Sioux Falls, SD 57101-2790
Telephone: (605) 275-9599
Facsimile: (605) 275-9602
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Petitioner complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 5,705 words, excluding the Table of Contents, Table of Authorities, Jurisdiction Statement, Statement of Legal Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this _____ day of October, 2019.

EVANS, HAIGH & HINTON, L.L.P.

_____

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DOCUMENT **APPENDIX PAGE(S)**

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29021

ALYSSA FERGUSON,

Plaintiff/Respondent,

vs.

BRADLEY C. THAEMERT, M.D.,

Defendant/Petitioner.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Camela C. Theeler, Presiding Judge

PETITIONER'S APPENDIX

Robert D. Trzynka
Daniel K. Brendtro
Brendtro Law Firm
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Telephone: (605) 951-9011

Attorneys for Plaintiff/Respondent

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Attorneys for Defendant/Petitioner

Defendant Bradley C. Thaemert, M.D. Petitioned the Court for Permission to Take Appeal of Intermediate Order and Request for Stay on June 14, 2019
The Order Granting the Petition was filed on July 18, 2019

PETITIONER'S APPENDIX
TABLE OF CONTENTS

STATE OF SOUTH DAKOTA COUNTY OF MINNEHAHA	) :SS)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

ALYSSA FERGUSON, Plaintiff, vs. **BRADLEY C. THAEMERT,** Defendant.	49CIV 18-1484 **MEMORANDUM ORDER FOLLOWING APRIL 4, 2019 HEARING**

This matter came before the Court on April 4, 2019, pursuant to Alyssa Ferguson's ("Plaintiff") Motion to Compel, Motion for Punitive Damages Discovery, and Bradley C. Thaemert's ("Defendant") Motion for Summary Judgment. The Plaintiff was present at the hearing, represented by Daniel Brendtro, of the Brendtro Law Firm, Sioux Falls, South Dakota. The Defendant was represented by Mark Haigh and Tyler Haigh of Evans, Haigh, and Hinton, L.L.P., Sioux Falls, South Dakota.

Based upon the written materials submitted, the oral arguments of counsel and the complete file, records, and proceedings in this matter, the Court issues the following orders:

1. The *Defendant's Motion for* Summary Judgment regarding Plaintiff's medical negligence claim is DENIED, the Court finding that there are genuine issues of material fact concerning the informed consent under the circumstances. The issues of material fact include whether Defendant breached the standard of care

by allegedly not performing an updated history, by allegedly not discussing the medical procedure, and by allegedly not allowing Plaintiff to ask questions and be educated the day of surgery. The Court notes that Plaintiff has retained an expert to testify to the standard of care issues if necessary.

2. The Defendant's Motion for Summary Judgment regarding Plaintiff's battery claim is also DENIED, the Court finding that there are genuine issues of fact regarding Defendant's reasons for performing the vertical incision, and whether Plaintiff's consent included consent for Defendant to perform the vertical incision.
3. The Court finds that Plaintiff is not judicially estopped from bringing her claims because her Bankruptcy Petition was filed before her equitable interest in this claim arose and her post-Petition tort claims were not part of her bankruptcy estate. There was no duty for Plaintiff to disclose these claims at the time of filing or to amend her Bankruptcy Petition.
4. The Plaintiff's Motion to Compel is GRANTED IN PART and DENIED IN PART, the Court finding that the information sought is relevant because Defendant has no specific recollection of his discussions or assessments of Plaintiff and relies entirely on what Defendant considers to be his general practice. However, the Court limits the discovery request to pre-operative notes, operative notes, consult notes, age, gender, and body mass index (BMI) of any patient on whom Defendant has performed incisions, for anterior spinal fusions at or below the L4 level, during the past 3 years. The Court limits the scope of the information to be

provided and the time frame to 3 years based on the arguments of counsel made at the hearing. Plaintiff indicated that information on patients in pre-operative notes, operative notes, consult notes, the age, gender and BMI of patients on whom Defendant had performed incisions for anterior spinal fusions at or below the L4 level, would be relevant to her claims. Defendant indicated that he had performed over 300 such surgeries in the last 5 years. Considering the number of similar procedures Defendant has performed, the Court finds that 5 years is unreasonably cumulative and limits the inquiry to 3 years. The information should be provided under a protective order mutually agreed upon by the parties. If the parties cannot mutually agree on a protective order, each party shall submit a protective order to the Court for approval.

5. The Plaintiff's Motion for Punitive Damages Discovery is DENIED, the Court finding that Plaintiff has not met her burden of establishing by clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct by Defendant warranting discovery related to punitive damages.

Dated this 5th day of June, 2019

BY THE COURT:

Camela C. Theeler
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court
By: Jaymi LaDuke
Deputy Clerk

FILED
JUN 05 2019
Minnehaha County, S.D.
Clerk Circuit Court

SURGICAL INSTITUTE
911 E 20TH ST STE 700
SIOUX FALLS
SD 57105-1050
P#: (605)334-0393

Patient: FERGUSON,ALYSSA KAYLYNN
DOB: REDACTED
Acct: REDACTED
Enc: REDACTED
Enc Date/Time: 06/08/2017 1340
Provider: Thaemert, Bradley C MD, FACS

LSS Data Entry Report

Past, Family & Social History

Past Medical History

HEENT: Seasonal allergies

Cardiovascular: Hypertension (pre-eclampsia)

Gynecologic: Polycystic ovarian synd

Musculoskeletal: Chronic back pain, Other (degenerative disc disease)

Neurologic: Headaches

Past Surgical History

HEENT: Tonsillectomy

Family Medical History

Cancer of breast
Depression
Diabetes mellitus
Seizures
Thyroid disease

Substance Use

Substance use: Painkillers

cc: ; ;

Bradley C Thaemert MD, FACS
SURGERY
SURG INSTITUTE OF SOUTH DAKOTA

SI 000001

SURGICAL INSTITUTE
911 E 20TH ST STE 700
SIOUX FALLS
SD 57105-1050
P#: (605)334-0393

Patient: FERGUSON,ALYSSA KAYLYNN
DOB: REDACTED
Acct: REDACTED
Enc: REDACTED
Enc Date/Time: 06/08/2017 1330
Provider: Thaemert, Bradley C MD, FACS

LSS Clinic H/P Reports

<Electronically signed by Bradley C Thaemert MD, FACS> 06/09/17 0829

Nurse Interview Notes

Encounter Date/Number
6/8/17 REDACTED
Primary Insurance
Sanford Health Plan Sanford
back surgery ALIF L5-S1 cages infuse K2 anterior plate and BMP
Nurse
Jessica L Bernards, LPN Jun 8, 2017 13:58.

Vitals

Vitals:
Height 5 ft 2 in / 157.48 cm
Weight 86.183 kg / 190 lbs
BSA 1.98 m2
BMI 34.8 kg/m2 (H) (Normal: 18.5 - 24 kg/m2)
Temperature 98.8 F - Tympanic / 37.11 C (Normal: 36.4 - 38 C)
Pulse 78 (Normal: 60 - 100 bpm)
Respirations 16 (Normal: 12 - 20)
Blood Pressure 118/68 Sitting, Right Arm
Systolic 118 (Normal: 100 - 139 mmHg)
Diastolic 68 (Normal: 60 - 89 mmHg)
Visit Reason: Back Other

Allergies & Medication History

Allergies:
Coded Allergies:
cefaclor (Verified Allergy, Severe, Rash, hives, 6/8/17)
Medications
Omeprazole 20 Mg Capsule.dr1 Cap PO DAILY Gerd #30 CAP Ref 0
Reported 6/8/17
medroxyPROGESTERone (Depo-Provera 150mg/ml)150 Mg/Ml Vial150 Mg IM Q3MONTH #1 VIAL
Reported 6/8/17
Cyclobenzaprine 10 Mg Tablet1 Tab PO PRN Muscle Spasm #90 TAB
Reported 6/8/17
clonazePAM 0.5 Mg Tablet1 Tab PO PRN #30 TAB
Reported 6/8/17
Loratadine (Claritin)10 Mg Tablet1 Tab PO PRN #30 TAB Ref 5
Reported 6/8/17
Ibuprofen 400 Mg Tablet1 Tab PO PRN Pain #60 TAB Ref 1
Reported 6/8/17
TraMADol 50 Mg Tablet1-2 Tab PO 4XD PRN PAIN #30 TAB
Reported 6/8/17

Pain

Pt experiencing pain: Yes

SI 000002

Pain Location: Bilateral Back
Present Level of Pain: 3/10

Safety
Fall in last 3 months: No

Tobacco Use
Smoking status: Former smoker

Learning Preferences
Learning barriers: No Barriers
Readiness to learn: Ready to learn

Past, Family & Social History
Past Medical History

HEENT: Seasonal allergies

Cardiovascular: Hypertension (pre-eclampsia)

Gynecologic: Polycystic ovarian synd

Musculoskeletal: Chronic back pain, Other (degenerative disc disease)

Neurologic: Headaches

Past Surgical History

HEENT: Tonsillectomy

Family Medical History

Cancer of breast
Depression
Diabetes mellitus
Seizures
Thyroid disease

Substance Use
Substance use: Painkillers

History of Present Illness
CHIEF COMPLAINT: Back pain.

HISTORY OF PRESENT ILLNESS: The patient is a 26-year-old female who is coming in to have an anterior exposure at L5-S1 for chronic back pain who would like to have a transverse incision if possible.

Medications, allergies, medical history and review of systems have been reviewed. See the chart.

ROS
Constitutional: DENIES: Change in appetite, Excessive sweating, Fatigue, Fever, Night sweats, Other, Weight gain, Weight loss
Eyes: Complains of: Corrective lenses
Ears, nose, mouth, throat: DENIES: Bleeding gums, Dental pain, Ear pain, Facial pain, Hearing loss, Hoarseness, Mouth lesions, Nasal discharge, Nasal obstruction, Nosebleeds, Other, Postnasal drainage, Sore throat, Tinnitus, Vertigo
Cardiovascular: DENIES: Chest pain, Claudication, Decr. exercise tolerance, Exertional dyspnea, Leg ulcers, Orthopnea, Other, Palpitations, Peripheral edema, Syncope
Respiratory: DENIES: Apneas, Cough, Hemoptysis, Other, Pleuritic pain, Shortness of breath, Snoring, Sputum

production, Wheezing
Gastrointestinal: Complains of: Reflux/heartburn
Genitourinary: Denies: Change in urinary stream, Dysmenorrhea, Dyspareunia, Dysuria, Hematuria, Incontinence, Nocturia, Other, Postmenopausal, Sexual dysfunction, Urinary frequency, Urinary urgency, Vaginal bleeding, Vaginal discharge
Musculoskeletal: COMPLAINS OF: Back pain
Integumentary: Denies: Breast masses, Breast skin changes, Hair changes, Lesions/changes in moles, Nipple discharge, Other, Pigment changes, Pruritus, Rash
Neurologic: DENIES: Abnormal gait, Altered mental status, Dizziness, Focal weakness, Headache, Incoordination, Lightheadedness, Memory problems, Numbness, Other, Seizures, Slurred speech, Tremor

Exam

Physical Exam

Exam
General: On exam she is in no distress.
Vital Signs: Stable.
HEENT: No scleral icterus. Conjunctivae are clear.
Lungs: Clear.
Respiratory: Nonlabored.
Heart: Regular rate and rhythm.
Abdomen: Soft, nontender.
Skin: Warm and dry.
Neurologic: Grossly intact.
Psychiatric: Appropriate.

Imaging Studies

[I]

Assessment/Plan

1. Chronic back pain.
2. The plan is for anterior exposure. If at all possible she would prefer to have a Pfannenstiel incision.
3. I told her it is a little longer incision and she may have a little bit of numbness. The main issue would be that it is cosmetically below the bikini line which she wishes for.
4. The risk of seromas, bleeding, DVTs, bowel injury, nerve injury discussed and she would like to proceed.

BCT/tw13

DD: 06/08/2017
DT: 06/08/2017
Disorder characterized by back pain

cc: ; :

Bradley C Thaemert MD, FACS
SURGERY
SURG INSTITUTE OF SOUTH DAKOTA

<Electronically signed by Bradley C Thaemert MD, FACS> 06/09/17 0829

SI 000004

SIOUX FALLS SPECIALTY HOSPITAL
910 East 20th Street
Sioux Falls, SD 57105

OPERATIVE REPORT

PATIENT NAME: ALYSSA FERGUSON
VISIT ID NUMBER: REDACTED
DATE OF BIRTH: REDACTED
PROCEDURE DATE: 06/22/17
SURGEON: Bradley C. Thaemert, MD
CO-SURGEON: Walter O. Carlson, MD
COPY TO:

PREOPERATIVE DIAGNOSIS: Back pain.
POSTOPERATIVE DIAGNOSIS: Back pain.
PROCEDURE: Anterior exposure L5-S1.
ANESTHESIA: General.

INDICATIONS: Back pain. The risks of bleeding, infection, DVT, blood transfusions, injury to the great vessels, ureter, surrounding nerves, wound infections or hernia were discussed. The patient understood and wished to proceed. Standard preoperative IV antibiotics and DVT prophylaxis was used.

OPERATIVE PROCEDURE: The patient was placed under satisfactory anesthesia. The abdomen was prepped and draped in normal sterile fashion. A low midline incision was made. Anterior rectus sheath was divided to the left of midline. Retroperitoneum was mobilized across the midline exposing the common iliac vessels. The middle sacral vessels were clipped and divided and the iliac vessels were mobilized laterally. I exposed while Dr. Carlson performed the discectomy and placement of the cages and the plate. At conclusion, the vessels were in good repair. There were no signs of bleeding or injury. Arista was sprayed in the retroperitoneum. The fascia and skin was injected with diluted Exparel local anesthetic. Fascia was closed with a loop #1 PDS. Subcu. was closed with 2-0 Vicryl and skin with 3-0 V-Loc. Fluoroscopic exam confirmed normal sponge, instrument, and needle counts.
DD: 06/22/17 DT: 06/22/17 jkt
Electronically Authenticated by:
Bradley C Thaemert, MD On 06/28/2017 11:41 AM CDT

SI 000009

SIOUX FALLS SPECIALTY HOSPITAL CONSENT FORM

AUTHORIZATION FOR SURGERY: I hereby authorize Doctor W.Carlson/B.Thaemert and any assistant to perform a anterior lumbar interbody fusion L5-S1 with lumbar -tapering cage, infuse, BG, anterior plate, possible post fusion on FERGUSON ALYSSA(patient).

I recognize that conditions may necessitate additional or different procedures than those specifically set out above. I hereby authorize and request above named doctors or designees to perform such procedures. I consent to the administration of whatever anesthetics may be necessary or desirable. I have been informed of the nature of anesthesia along with goals, risks and alternative anesthetic techniques. I consent to the study and disposition of body tissue removed in the procedure. I have been informed of risks and complications possible in this procedure. I have been informed of the benefits of this procedure as well as alternatives available.

I hereby acknowledge that I was informed, and fully understand, that the physicians who may provided services to me at the Specialty Hospital, including but not limited to, physicians providing x-ray and radiologic services, pathology services, anesthesiology services, and hospitalist services are not employees of the Sioux Falls Specialty Hospital but are independent from the Specialty Hospital, and that they are using the Specialty Hospital facilities for the performance of their services.

AUTHORIZED OBSERVERS: I consent to the presence of individual observers authorized by my physician.
AUTHORIZED STUDENTS: I consent to the presence of students.
AUTHORIZATION FOR RELEASE OF PATIENT RECORDS TO OTHER HEALTH CARE PROVIDERS: I, the undersigned, hereby authorize Sioux Falls Specialty Hospital to release such information, including, but not limited to, my patient records to another health care provider if Sioux Falls Specialty Hospital reasonably believes the purpose for releasing such information is for my continued or future care.
ASSIGNMENT OF INSURANCE BENEFITS: I hereby authorize payment directly to the Sioux Falls Specialty Hospital for benefits otherwise payable to me. I also authorize payment of benefits directly to the Sioux Falls Specialty Hospital anesthesiologists. I understand that I am financially responsible to Sioux Falls Specialty Hospital and my physicians for charges not covered by my insurance.
AUTHORIZATION FOR RELEASE OF INFORMATION: I authorize the Sioux Falls Specialty Hospital to release such information as may be necessary for the completion of my insurance claim forms.
COUNTY ASSISTANCE CONSENT: I authorize the Sioux Falls Specialty Hospital and any holder of medical or other information about me or members of my household to release to my county of residence any information needed for this or a related County Assistance Claim. I request that payment of authorized benefits be made on my behalf.
MEDICARE CONSENT: I certify that the information given by me in applying for payment under Title XVIII of the Social Security Act is correct. I authorize any holder of medical or other information about me to release to the Social Security Administration or its intermediaries or carriers any information needed for this or a related Medicare claim. I request that payment of authorized benefits be made on my behalf.
BILLING AND CREDIT POLICY: All patients' accounts will be considered due upon receipt of your itemized bill. As a courtesy to you, the Business Office will process your insurance if proper information is provided. You will be billed on the current balance of your account regardless of the insurance claim status.
ADMINISTRATION OF BLOOD OR BLOOD PRODUCTS: I consent to the administration of blood or blood products if my medical condition warrants the administration of such products.
TESTING FOR HIV (AIDS) AND/OR HEPATITIS: I consent to testing for HIV (AIDS) and/or Hepatitis should a healthcare worker have accidental exposure to my blood or other body substance, or in the event testing is directed by my physician.
PHOTOGRAPHY/VIDEO RECORDING: I consent to photographing or video recording of the operation or procedures to be performed for scientific or educational purposes, provided my identity is not revealed by the picture or by descriptive texts accompanying them.

I understand that unless otherwise advised by the staff of the Sioux Falls Specialty Hospital, I should not operate a motor vehicle or machinery or potentially dangerous appliances, drink alcoholic beverages or make critical decisions for 24 hours following discharge. I understand that a responsible adult must accompany me when I am discharged. I certify that I have read and hereby authorize the above.

Patient: Alyssa Ferguson
Witness: Kelsey Wiencken
Date: 8-30
Time: 8:20

Patient's Representative:
Relationship to Patient:
Signature of Interpreter:
Doctor's Signature:

G:\Dept Forms\Master Chart Forms\Six Page Chart\Chart Consent for Surgery 10-09, 2-10

FERGUSON ALYSSA

FERGUSON, ALYSSA K

PL SFSH 000097

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
ALYSSA FERGUSON,		CIV. 18-1484
Plaintiff,		
vs.		**AFFIDAVIT OF JAYLA LENTINI**
BRADLEY TIIAEMERT, M.D.,		
Defendant.		

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

JAYLA LENTINI, being duly sworn on her oath, deposes and states as follows:

1. I am an employee of Surgical Institute of South Dakota. As part of my employment, I am responsible for maintaining medical records of the surgeons who practice at Surgical Institute. I have been employed at Surgical Institute since March 2018.

2. Surgical Institute's medical records are maintained on an electronic medical record system. I was asked to determine the number of anterior spine exposure surgeries that had been conducted by Dr. Bradley Thaemert in the last five years. In order to determine the number of anterior spine surgeries conducted by Dr. Thaemert during the last five years, I ran a search of the Surgical Institute electronic medical records using the diagnostic code for that procedure. According to the search I ran on December 20, 2018, Dr. Thaemert performed 329 anterior spine exposure surgeries in the last five years.

3. I was then asked to estimate how long it would take me to locate the records of all patients who have undergone this procedure, print the medical record from the pre-operative appointments and the operative reports, and redact identifying information in accordance with HIPAA. I performed this task with two random files while a co-worker timed me, and it took me between eight and nine minutes per patient. If I could locate the patient chart, print it, and redact identifying information for 329 patients at nine minutes per patient, it would take me 49.35 hours to locate and redact each patient's pre-operative note and operative report. However, because some of the records have different formats and because I do not believe I could keep up a nine-minute pace for 329 patients, I estimate that it would take me several more hours to locate, print, and redact the pre-operative consultation and operative report for 329 patients.

4. According to Surgical Institute records, Dr. Thaemert has performed anterior spinal exposure surgeries at Avera McKennan Hospital, Sanford Medical Center, and Sioux Falls Specialty Hospital. When Dr. Thaemert performs a spinal exposure surgery at Sioux Falls Specialty Hospital, copies of his operative reports are faxed to Surgical Institute and scanned into the patient's Surgical Institute chart. When Dr. Thaemert performs an anterior spinal exposure surgery at Sanford Medical Center, the operative report (and consultation notes if made at Sanford) is emailed to Surgical Institute, and I scan the records into the patient's Surgical Institute chart. When Dr. Thaemert performs anterior spinal exposure surgeries at Avera McKennan Hospital, Avera McKennan Hospital provides copies of Dr. Thaemert's operative reports to Surgical Institute. However, they are not saved in the patient's Surgical Institute chart because Surgical Institute has access to Avera McKennan Hospital records of Surgical Institute patients through a Business Associate Agreement between Surgical Institute and Avera

Filed: 1/11/2019 2:40 PM CST Minnehaha County, South Dakota 49CIV18-001484

McKennan Hospital. Avera McKennan Hospital records, including Dr. Thaemert's operative reports, are not maintained in the Surgical Institute medical charts.

Further your affiant sayeth not.

Dated at Sioux Falls, South Dakota, this 11th day of January, 2019.

Jayla Lentini

Subscribed and sworn before me this 11th day of January, 2019.

MARK A. HATTING
NOTARY PUBLIC
SOUTH DAKOTA

Notary Public, South Dakota
My Commission expires: 2/11/2023

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant, hereby certifies that a true and correct copy of the foregoing "Affidavit of Jayla Lentini." was filed electronically with the Clerk of Court using the Odyssey File and Serve system which will send notification of such filing to the following:

Timothy L. James
James Law, P.C.
P. O. Box 879
721 Douglas, Suite 102
Yankton, SD 57078

Attorneys for Plaintiff

on this 11 day of January, 2019.

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
ALYSSA FERGUSON, Plaintiff, vs. BRADLEY THAEMERT, M.D., Defendant.	*	CIV. 18-1484 **SECOND AFFIDAVIT OF BRADLEY THAEMERT, M.D.**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

BRADLEY THAEMERT, M.D., being duly sworn on his oath, deposes and states as follows:

1. I am the Defendant in the above-captioned matter. I submit this Affidavit in opposition to Plaintiff's Motion to Compel Responses to Plaintiff's Interrogatory No. 24 and Request for Production of Documents No. 16.

2. I am a general surgeon and practice at Surgical Institute in Sioux Falls, South Dakota.

3. One of the surgical procedures that I perform is an anterior spine exposure. An anterior spine exposure is a surgery that allows a spinal surgeon access to the spine through the abdomen to conduct surgery on the spine. I perform anterior spine exposures regularly.

4. My typical procedure when performing an anterior approach for spine surgery is to see the patient in my clinic for a pre-operative appointment. During this appointment, I have a

Filed: 1/11/2019 2:40 PM CST Minnehaha County, South Dakota 49CIV18-001484

standard discussion with all patients undergoing an anterior exposure for spine surgery. The discussion includes a description of the procedure, the risks of the procedure, including but not limited to, the risk of injury to nerves, bowel, and blood vessels. Although there is some discussion concerning the incision, the great majority of the appointment is devoted to explaining that the surgery is a major surgery and the risks of the surgery.

5. Although a patient may have a preference for a particular type of incision, my primary focus during the surgery is to make certain the patient has the safest and best surgery possible. I cannot and would not promise a patient that I would perform a particular type of incision during the exposure surgery.

6. Because of the length of the discussion concerning the description and risks of the procedure, it would be atypical and impractical for me to document in any patient's chart the entirety of the discussion with the patient concerning the procedure, the description of the procedure, and the risks. I commonly document the entire discussion concerning the procedure and its risks with a brief note in the patient's chart that the patient has been explained the risks of the procedure and would like to proceed.

7. With a typical patient involving an anterior exposure for spine surgery, I see the patient at a pre-operative appointment and then conduct the surgery. After the exposure surgery, I usually do not see the patient again for follow up unless there are wound issues. The patient is followed after the surgery by the spine surgeon.

8. In determining the safest incision for a patient undergoing an anterior spinal exposure, a primary factor to consider is the amount of fat in the abdominal area. While a patient's BMI can be an indication of the amount of abdominal fat, it is not determinative. Different people carry fat in different areas of the body and so a patient could have a relatively

high BMI and have little fat in the abdominal area. Conversely, a patient can have a low BMI and have more fat in the abdominal area.

Further your affiant sayeth not.

Dated at Sioux Falls, South Dakota, this 11 day of January, 2019.

Bradley Thaemert, M.D.

Subscribed and sworn before me this 11th day of January, 2019.

MARK A. HATTING
NOTARY PUBLIC
SOUTH DAKOTA

Notary Public, South Dakota
My Commission expires: 2/1/2023

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant, hereby certifies that a true and correct copy of the foregoing "Second Affidavit of Bradley Thaemert, M.D." was filed electronically with the Clerk of Court using the Odyssey File and Serve system which will send notification of such filing to the following:

Timothy L. James
James Law, P.C.
P. O. Box 879
721 Douglas, Suite 102
Yankton, SD 57078

Attorneys for Plaintiff

on this 11 day of January, 2019.

Alyssa Ferguson v.
Bradley Thaemert, MD

Bradley Thaemert, MD
August 8, 2018

Audrey M. Barbush, RPR
audrey@paramountreporting.com
605.321.3539

paramount reporting

Min-U-Script® with Word Index

EXHIBIT
tabbies
B

of the discussion, but it is part of my discussion.
Q Okay. On June 22, 2017, you didn't do a horizontal incision. Instead, you did a vertical incision. Is that correct?
A Yes.
Q What changed from June 8, 2017, to June 22, 2017, with regard to the horizontal incision?
A At the time of surgery I felt it was the easiest, safest incision for the patient.
Q What happened at the time of surgery that caused you to change it from a horizontal to a vertical incision?
A Every time I do a surgery, I assess a patient before I start the surgery.
Q Okay. Tell me about the specifics of the assessment with regard to Alyssa Ferguson on June 22, 2017, that caused you to change from a horizontal incision to a vertical incision.
A I didn't make a change. I assessed her abdomen in the operating room, like I always do, and elected to do a vertical incision because I thought it was the safest, best incision.
Q What was it about her abdomen on the morning of June 22, 2017, just before surgery, that caused you to determine that you would do a vertical instead of a horizontal incision?

A Typically it's the amount of belly fat and where I would have to place the incision under the fat.
Q Was Alyssa Ferguson awake, or was she under the effects of anesthesia when you did that assessment and made that decision?
A Typically the patient is asleep.
Q Did you think it was important at all for Alyssa Ferguson to have some input into that decision, whether or not she had a vertical or horizontal incision?
A The discussion of the incision options are discussed at the consult, and the main discussion is that I need to do a safe exposure for the patient, that's best for the patient.
Q Okay. Did you take the time to go out to talk to any of her family members and say that despite the fact that Alyssa Ferguson specifically requested a horizontal incision, you had now made the assessment and determination that you would do a vertical incision because it was safer?
A It was part of my original discussion that I would do the safest exposure for her. That's how I always present my discussion on a spine exposure.
Q That wasn't my question. My question was whether or not on the morning of June 22, 2017, after you assessed Alyssa Ferguson while she was under the effects of

in your note back on June 8, 2017, which was "the main issue would be that it is cosmetically below the bikini line, which she wishes for."

Is that what she told you on that day?

A By the note I understand that she would like to have a Pfannenstiel incision, but I did not say I could do a Pfannenstiel for sure. I said it was a possibility.

Q By the note you indicated that the main issue for Alyssa was that she have a horizontal incision that was cosmetically below the bikini line, correct?

A That is one of the things about a horizontal incision, yes.

Q Right. And on that day, June 8, 2017, you knew and you wrote that Alyssa's main issue was that it be below the bikini line and be horizontal, correct?

A I did not write that that was her main issue. The main issue that I discuss, again, is the exposure and the safety of the exposure.

Q Well, whose main issue is it? Because you wrote, quote, the main issue would be --

A The main issue I talk about is the specific of the incision -- I guess I'm not sure what you're saying different than what I already said.

Q Yeah, I'll start over so -- if you're not sure.

My question is to you that you knew on June 8,

Q Okay. Tell me -- do you look at it under the shirt? over the shirt? How do you look at it?
A I usually look at it under the shirt.
Q So on June 8, 2017, Alyssa Ferguson lifted her shirt and showed you her abdomen; is that correct?
A I don't recall the specifics of the exam.
Q And you touched her abdomen, didn't you?
A I would typically do that.
Q And on that day, after touching her abdomen and looking at her abdomen, you found that it was soft and nontender; is that correct?
A That's what I documented.
Q What were the problems on June 8, 2017, with her abdomen that would have indicated against doing a horizontal incision?
A The same thing in my assessment. I always say it's a possibility, and the things that go against it are usually the obesity of the abdomen.
Q Okay. Did she get fatter between June 8 and June 22 of 2017?
A I don't know that.
Q So why didn't you tell her on June 8, 2017, that, hey, I'm looking at your abdomen, I'm feeling your abdomen, and I know you want a horizontal incision, but I can't do a horizontal incision?

calculated BMI of 34.5.

Q And then below that, what's the weight?

A They list a weight of 195 -- or 185. But they don't always weigh people. Sometimes they just take the patient's weight.

I don't know how they weighed her. I wasn't there when they put this data in to know if they actually weighed the patient or not. Sometimes the patient just gives a weight.

Q Sure. So on June 8, anyway, in your medical record it indicates that she weighed 190 pounds; and on June 22, according to the Sioux Falls Specialty Hospital record, it showed that she lost 5 pounds and weighed 185 pounds. Is that right?

A That's what the record shows.

Q So having lost weight from the time you saw her, how did your assessment change from June 8 to June 22 to make the decision when she was asleep that you would now do a vertical incision?

MR. HAIGH: Object to the form of the question. It assumes she lost weight.

BY MR. JAMES:

Q Go ahead.

A Again, I make my assessment at the time of surgery, in the operating room.

Q All right. So --
A I don't use a patient's weight.
Q Let me ask you this: Are your clinic records typically accurate?
A Yes.
Q All right. And then how about with your experience at the Sioux Falls Specialty Hospital? Are their records typically accurate?
A Yes.
Q Okay. Are you a shareholder of the Sioux Falls Specialty Hospital?
A I am.
Q How long have you been a shareholder?
A I don't know.
Q Okay. So the record at the hospital that you're an owner of showed that she lost 5 pounds; is that fair?
A That's what the record shows.

MR. HAIGH: Object to the form.

BY MR. JAMES:

Q I'd like to go through these answers that you made, Exhibit 1, in a little more detail. Let's start with Interrogatory No. 22 on page 11 of your answers, which are Exhibit 1.

At Interrogatory 22 you were asked this question: "Describe in complete detail what you independently

A I don't know anything about that conversation, but the spine surgeon usually has nothing to do with the exposure incision.
Q When you had your conversation with Dr. Carlson about this lawsuit, did you ever discuss that issue with him?
A I did not.
Q Alyssa stated that had you not promised a low horizontal incision, she would have found a different surgeon.

I guess my question with regard to that statement is, could you have done a low horizontal incision on Alyssa?
A So I would never promise an incision, ever, on a patient. That's not something any surgeon would typically do.
Q Yeah, my question is, could you have done a low horizontal incision --
A But you started the question that way.
Q Right. But my question now is, could you have done a low horizontal incision on Alyssa Ferguson on June 22 within the standard of care?
A As I said in my note, it's a possible incision.
Q Okay. My question now is, could you have done it with her weight and body type on June 22, 2017, and would it have been acceptable within the standard of care?

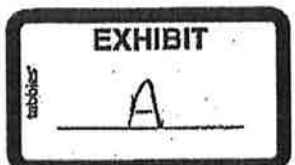
STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
ALYSSA FERGUSON, Plaintiff, vs. BRADLEY THAEMERT, M.D., Defendant.	*	CIV. 18-1484 **DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT (FIRST SET)**

GENERAL OBJECTIONS

1. Defendant Bradley Thaemert, M.D., objects to Plaintiff's interrogatories to the extent that they seek information which is irrelevant or immaterial to the issues in this action and which are not reasonably calculated to lead to the discovery of admissible evidence on the grounds that compliance with such interrogatories would be unduly burdensome and oppressive and would cause undue time and expense to Defendant which is not commensurate with Plaintiff's legitimate discovery needs.

2. Defendant Bradley Thaemert, M.D., reserves the right to supplement these responses and to introduce into evidence or at trial such additional facts and documents as are uncovered, developed, or relied upon by Defendant, his experts, and Defendant's counsel in the continuing discovery and investigation of the issues in this action.

3. Defendant Bradley Thaemert, M.D., objects to Plaintiff's interrogatories to the extent they call for the disclosure of information or communications protected by the attorney-client privilege or any other applicable privilege on the grounds that privileged matters are



exempt from discovery; Defendant also objects to the extent that the interrogatories call for disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or the representative of a party concerning the litigation on the grounds that such materials are also exempt from discovery; and Defendant further objects to the extent that any responses constitute or include materials prepared in anticipation of litigation which may be discovered upon Plaintiff's fulfillment of the requirements set forth in SDCL 15-6-33 and SDCL 15-6-34, which requirements have not been met.

ANSWERS TO INTERROGATORIES

Comes now Defendant Bradley Thaemert, M.D., and, pursuant to SDCL 15-6-33, answers Plaintiff's interrogatories as follows:

INTERROGATORY NO. 1. Please state the name, address and telephone number of any person with knowledge of information that is relevant or may lead to the discovery of relevant evidence regarding the allegations in the Plaintiff's Complaint, any Counterclaim or the defenses in the Defendant's Answer, and for each such person state the substance, as best you can give it, of all information or knowledge known to each such individual.

ANSWER: *See* medical records.

INTERROGATORY NO. 2. Other than the action herein, have you ever been a plaintiff or defendant in any other lawsuit? If so, for each lawsuit, please state:

a. The subject matter or controversy of the lawsuit:

b. The court, docket number and place of filing;

c. The names and addresses of all parties and their attorneys;

d. The present state of the suit; and

INTERROGATORY NO. 24. Identify any circumstances of patients on whom you performed incisions, for anterior spinal fusion at or below the L4 level, during the past 5 years *without* identifying the patient consistent with South Dakota Supreme Court's decision in *Wipf v. Altstiel*, No. 27491-r-SLZ, SD 2016.

ANSWER: Defendant objects to Interrogatory No. 24 as seeking information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Defendant objects to Interrogatory No. 24 as overbroad and overly burdensome. Defendant objects to Interrogatory No. 24 as vague with regard to the term "circumstances." Defendant objects to Interrogatory No. 24 as seeking information that is non-specific in that it requests "circumstances" without limitation. To the extent this interrogatory seeks records or other identifying information of patients, such records are protected by HIPAA and physician-patient privilege. To the extent the court finds that any records or other pertinent information are not protected health information under HIPAA and/or South Dakota law, Defendant objects to Interrogatory No. 24 as it is not reasonably tailored to obtain the minimal protected health information required for any purpose relevant to this lawsuit. To the extent the court would determine the information sought in Interrogatory No. 24 is not protected health information and information protected by the physician-patient privilege, Defendant objects as Plaintiff has failed to seek and/or obtain a qualified protective order or make other arrangements to ensure the disclosure of such information is strictly limited.

INTERROGATORY NO. 25. State every reason why you performed a vertical incision on Alyssa rather than a transverse incision.

ANSWER: Defendant objects to Interrogatory No. 25 as vague and overbroad. Without waiving the foregoing, Defendant states that there are a number of reasons why a

REQUEST NO. 15. A copy of Alyssa's electronic medical records relating to your surgical consult or surgery of Alyssa from the period of June 8, 2017, to the present, in the form as viewed by Defendant on the computer screen.

RESPONSE: *See* attached screen prints of Plaintiff's medical records along with printed copies of those records.

REQUEST NO. 16. A copy of all medical records of any patients on whom you performed incisions, for anterior spinal fusions at or below the L4 level, during the past 5 years without identifying the patient consistent with the South Dakota Supreme Court's decision in *Wifp v. Alstiel,* No. 27491 -r-SLZ, SD 2016.

RESPONSE: *See* response and objections to Interrogatory No. 24.

REQUEST NO. 17. In the event any document or writing has been lost, destroyed, removed, secreted, or otherwise removed from the possession of the Defendant or Defendant's attorney, provide herewith an identification of such document(s) or writing(s), a detailed explanation of how such document(s) or writing(s) were removed from the files, the date of their removal, the person ordering their removal, and the present location of the document.

RESPONSE: Not applicable.

REQUEST NO. 18. If you withhold any requested information on the basis of privilege, work product or otherwise, provide the following information:

a. The nature and subject matter of the document or communication;

b. The date of the document or communication;

c. The name and title of the author, addressees and any other recipients;

d. The name and title of each person (other than stenographic or clerical assistants) participating in the communication or preparing the document;

e. The basis on which you claim the document or communication is protected from disclosure;

f. The name and title of each person supplying the information requested in paragraphs a-e above.

RESPONSE: *See* response to individual requests.

OBJECTIONS TO INTERROGATORIES

Defendant objects to the forgoing Interrogatories for the reasons and upon the grounds set forth in said objections.

Dated at Sioux Falls, South Dakota, this 14 day of June, 2018.

EVANS HAIGH & HINTON, LLP

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Email: mhaigh@ehhlawyers.com
Attorneys for Defendant

Dated this 13th day of June, 2018.

Bradley Thaemert, M.D.

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Bradley Thaemert, M.D., being first duly sworn, on oath deposes and says:

That he has read the foregoing "Defendant's Answers to Plaintiffs' Interrogatories and Requests for Production of Documents to Defendant (First Set)" by him subscribed and knows the contents thereof; that said answers were prepared with the assistance and advice of counsel upon whose advice he has relied; that the answers set forth herein, subject to inadvertent or undiscovered errors, are based on, and therefore necessarily limited by, the records and information still in existence, presently recollected and thus far discovered in the course of the preparation of these answers; that consequently he reserves the right to make any changes in the answers if it appears at any time that omissions or errors have been made therein or that more accurate information is available; that subject to the limitations set forth herein the said answers are true to the best of his knowledge, information and belief.

Bradley Thaemert, M.D.

Subscribed and sworn to before me this 13th day of ~~May,~~ June 2018

MARK A. HATTING
NOTARY PUBLIC
SOUTH DAKOTA

Notary Public, South Dakota
My Commission expires: 2/1/2023

IN THE

Supreme Court

of the

State of South Dakota

No. 29021

ALYSSA FERGUSON,

PLAINTIFF/RESPONDENT

VS.

BRADLEY C. THAEMERT, M.D.,

DEFENDANT/PETITIONER.

An appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Hon. Camela C. Theeler
CIRCUIT COURT JUDGE

RESPONDENT'S BRIEF

Submitted by:
Daniel K. Brendtro
Robert D. Trzynka

Hovland, Rasmus,
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P.O. Box 2583
Sioux Falls, SD 57101

Attorneys for Plaintiff/Respondent

Order Granting Petition for Intermediate Appeal filed on July 18, 2019

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JURISDICTIONAL STATEMENT

Respondent agrees that this Court has jurisdiction.

REQUEST FOR ORAL ARGUMENT

Respondent requests oral argument.

STATEMENT OF THE ISSUES

I. Did the Circuit Court abuse its discretion by finding that non-party patient records are discoverable when they are redacted to remove any identifiers, and are necessary to evaluate a doctor's defense of "custom and practice"?

No. When a doctor relies on his custom, pattern, or practice in his or her defense, non-party patient records are relevant to establish the regularity and uniformity of that purported practice. If non-identifying personal information is redacted from those records, no privilege attaches. Defendant made non-party patient records relevant in two different ways. First, Defendant asserted that the way he interacted with his prior patients informs the standard of care. Second, Defendant claimed that, because he conformed to his standard procedure, he neither violated the applicable standard of care nor failed to properly inform Alyssa about the surgery he performed on her. The only physical evidence that would prove or disprove those defenses is contained in non-patient medical records. The Circuit Court correctly compelled Defendant to produce redacted non-party records because Defendant asserted his custom, pattern, or practice as part of his defense.

- SDCL § 19-19-406
- F.R.E. 406
- *Hall v. Arthur*, 141 F.3d 844 (8th Cir. 1998)
- *Wipf v. Altstiel*, 2016 SD 97, 888 N.W.2d 790

INTRODUCTION

Defendant made non-party medical records relevant when he asserted his treatment pattern as his primary defense in this case. The Circuit Court agreed that, because Defendant claimed that he treated Alyssa the same as *every other* one of his patients, he made these non-party patient records relevant. The Circuit Court's order compelling the production of these records should be affirmed.

STATEMENT OF THE CASE

Alyssa filed suit on May 1, 2018. R. 1-6. Defendant answered, denying Alyssa's claims. R. 11-16. Because Defendant relied on his pattern as his defense but refused to provide information regarding that pattern, Alyssa moved to compel production of these non-patient medical records. R. 218, 239-40, 249-50. The Circuit Court heard argument from both parties at an April 4, 2019, hearing. R. 487. The Circuit Court later issued a memorandum opinion granting, in part, Alyssa's motion to compel. R. 451. The Circuit Court did not fully grant Alyssa's motion, reducing the scope of medical records that needed to be produced and the time period subject to production. *Id*. Defendant petitioned for intermediate appeal on June 14, 2019. R. 469-71. This Court later allowed that appeal. R. 459-60.

STATEMENT OF THE FACTS

Defendant's statement of facts is incomplete and, in places, argumentative.

On June 8, 2017, Alyssa met with Defendant related to an upcoming elective anterior approach spine surgery. (R. 34). Defendant was scheduled to open for the spine surgeon, rather than performing the spine surgery, himself. *Id*. Alyssa told Defendant that she wanted a horizontal incision below the bikini line, if that was possible. (R. 21, 31).

Defendant examined Alyssa's abdomen. (R. 26). Defendant noted Alyssa's body mass index (BMI) and her weight. (R. 26, 36). Despite now claiming that her BMI and weight required him to perform a vertical incision,[1] Defendant told Alyssa, at the time, that he could use a horizontal incision. (R. 31). Defendant also used his finger to show Alyssa where the horizontal incision would be. (R. 36).

As Defendant wrote in Alyssa's medical records, the "main issue would be that [the incision] is cosmetically below the bikini line, which she wishes for." (R. 23-24, 35). Defendant admitted that horizontal incisions are routine for the type of surgery Alyssa was going to have. (R. 25, 26). Additionally, the Defendant claims he has performed several horizontal incisions for the same surgery Alyssa was scheduled to have. *Id*. Defendant also said that the horizontal incision Alyssa wanted was consistent with the standard of care. (R. 37).

Defendant told Alyssa that "the low horizontal incision would be '*ideal*' for [Alyssa] given [Alyssa's] age and the fact that [Alyssa] wanted to have children in the

[1] (R. 31).

future." *Id*. Additionally, "[Defendant] never once mentioned Alyssa's weight or body type or any problem with the horizontal incision." *Id*.

Alyssa's spine surgeon had likewise told Alyssa (and her mother) that the spinal procedure could be done via a horizontal incision. *Id*. Alyssa told her friend, Breanna Peters, an RN who had experience working in orthopedics at Sanford Health, that she wanted a horizontal incision. (R. 192-93). As Alyssa told nurse Peters, she wanted a horizontal incision below her bikini link for cosmetic reasons and because she was concerned that she might need a C-section in the future because she had already had a stillborn baby. (R. 192). Nurse Peters encouraged Alyssa to have the horizontal incision; she had seen many patients with Alyssa's body type have horizontal incisions during the type of surgery Alyssa was about to have. (R. 193).

After her pre-operative meeting with Defendant, Alyssa told nurse Peters that Defendant agreed to use a horizontal incision. *Id*. Alyssa said that she was more comfortable with having the spine surgery because she would be getting a low horizontal incision below her bikini line, which was important to her. *Id*. Nurse Peters believed that Alyssa would have consulted a different surgeon if Defendant had not agreed to perform the horizontal incision. *Id*. Additionally, if Defendant had not agreed to perform the horizontal incision, nurse Peters would have intervened and urged Alyssa to see a different surgeon. *Id*.

Alyssa told her family and friends that she felt comfortable going forward with the spine surgery because Defendant agreed to use a horizontal incision. (R. 52-55). Alyssa's surgery was not an emergency. *Id*. Further, if her weight or BMI meant that

she would need a vertical incision, all Defendant had to do was tell Alyssa, and she could have waited to have the surgery after she lost weight. *Id*.

While Alyssa remembered her conversations with Defendant, as did Nurse Peters, Defendant himself claims he cannot independently remember anything he said to her:

> Defendant does not recall specifics of his surgery consult or surgery with plaintiff beyond what is contained in the medical records.

(R. 26-27). As Defendant later testified, "I don't recall the specifics of the incision discussion." (R. 28).

Even though he promised Alyssa that he would perform a horizontal incision, Defendant performed a vertical incision during Alyssa's June 22, 2017, surgery. (R. 22). Defendant claimed that, at the time of surgery, he decided that a vertical incision was the easiest and safest approach. *Id*.

Defendant said something different in the surgical suite, however. Shawn Bootsma, a radiology technician employed by Sioux Falls Specialty Hospital,[2] was in the surgical suite for the June 22, 2017, surgery. (R. 42-43). Alyssa was being put under anesthesia, and Defendant had not yet arrived. *Id*. Defendant later entered the suite and said he could not remember if he was supposed to perform a horizontal incision on Alyssa or not:

> Q. Okay. And then what did Dr. Thaemert do when you came in?
>
> A. He had – as in the affidavit, he had asked, he knew that there was a horizontal incision at some point but he wasn't sure if Alyssa was that surgery – or was that case, I should say.

[2] Defendant is a shareholder at Sioux Falls Specialty Hospital. (R. 45).

(R. 43). *See also* (R. 44) ("Q. Okay. What's your best recollection of the specific words he used? A. Is this a case that requires a horizontal incision, are there any notes regarding the case."). Based on Defendant's statements and the context of those statements, it appeared to Mr. Bootsma that Defendant was confused about whether Alyssa was supposed to get a horizontal incision. (R. 48).

Mr. Bootsma never saw Defendant examine Alyssa in the surgical suite. *Id*. Instead, Mr. Bootsma remembered Defendant's nurses looking through Alyssa medical records to see if there were notes that would say if Alyssa was Defendant's horizontal incision case. (R. 44).

Even though Defendant now claims that Alyssa's physical condition required a vertical incision, he was unable to articulate how Alyssa's condition had changed in the roughly two weeks between when his promise to perform a horizontal incision and when he performed the vertical incision. (R. 25). When asked how he examined Alyssa's abdomen on June 8, 2017, Defendant answered, "I don't recall" (R. 24) and "I don't recall the specifics of the exam." (R. 25). When asked what had changed, Defendant could not remember:

> Q. What was different about your evaluation on June 22 from the evaluation you did on June 8?
>
> A. I can't say?
>
> Q. Was there any difference?
>
> A. I wouldn't know.

Id. The chart, however, showed that Alyssa's BMI and weight had dropped since June 8. (R. 26).

Alyssa was never told that the surgery was performed with a vertical incision. After the surgery, Nurse Peters visited Alyssa and asked about the incision. (R. 193). Alyssa lifted up her clothing and they noticed that the dressing was not consistent with a horizontal incision and appeared to be covering a vertical incision. (R. 193). Alyssa cried at this discovery. (R. 155).

Nurse Peters asked Alyssa if there were complications during surgery that forced Defendant to use a vertical incision. (R. 193). Alyssa did not know, so she asked an on-duty nurse if there was something in the chart that would explain why Defendant performed a vertical incision when she had only "giv[en] consent for a horizontal incision." (R. 194). "The nurse responded that the chart did not explain any complication that would explain why the incision was vertical instead of horizontal." *Id*.

Alyssa advised the nurse that Defendant had performed the wrong incision, so the nurse tried to get ahold of Defendant. (R. 52-55). Defendant, however, did not respond to the nurse's call that day or the following day. *Id*. When Alyssa got home from the hospital, she tried calling Defendant's office. *Id*. He was unavailable. *Id*. She left a message to have Defendant call her "regarding [Alyssa's] incision site." *Id*. Defendant, again, ignored her. *Id*.

Alyssa described how Defendant performed a vertical incision without her consent at her post-op visit with her spine surgeon. *Id*. Alyssa also told her spine

surgeon that Defendant had been ignoring her. *Id*. The spine surgeon called Defendant from a cell phone and directed him to contact Alyssa. *Id*.

Alyssa talked to Defendant the next day. *Id*. During this call, Defendant admitted that he performed the wrong incision. *Id*. He agreed that the June 8, 2017, chart confirmed that Alyssa's incision was supposed to be horizontal. *Id*. He, however, claimed that "nobody informed him that [Alyssa] was the horizontal case that day and that the incision – [she] shouldn't get too bad of a scar." (R. 383).

He then told Alyssa that his daughter had her appendix out[3] and did not have a scar. *Id.* He also told Alyssa to keep the scar out of sunlight for at least a year and apply zinc oxide. *Id*.

As the case progressed, Defendant abandoned his initial defense that the operating room staff had failed to tell him that Alyssa was a horizontal incision. Instead, he claimed that he intentionally performed the vertical incision because it was safer for Alyssa, based on her abdominal fat. (R. 321-22).[4]

While advancing this new "safety defense," however, Defendant claims to have "no specific recollection of his discussion or assessments of [Alyssa] and relies entirely

---

[3] Defendant admitted at his deposition that his daughter had her appendix removed. (R. 37-38).

[4] Plaintiff's expert identified several issues with the Defendant's new "safety defense." First, the horizontal incision (medically known as a Pfannenstiel incision) has "a similar safety profile for anterior exposure of the abdomen" to the vertical incision Defendant performed. (R. 361). Second, there were several drawbacks to the incision Defendant used. For example, the vertical incision caused "prolonged incisional pain and discomfort" for Alyssa. *Id*. The horizontal incision, on the other hand, "would have resulted in a lower level of postoperative pain and discomfort for Alyssa… since her clothing lines would not typically rest or rub on a Pfannenstiel incision." *Id*.

on what Defendant considers to be his general practice." (R. 474; Memorandum Order, ¶ 4). Defendant also claims to have no memory of the surgery itself. In the post-operative notes, Defendant did not record any rationale for changing from a horizontal incision to a vertical incision. Instead, Defendant has no memory of anything, "and relies entirely on what Defendant [himself] considers to be his general practice." (R.474; Memorandum Order, ¶ 4).

In light of these unique facts, the Circuit Court ordered a limited production of documents into Defendant's prior records. Specifically, the Circuit Court ordered that Defendant produce three years of surgical records in order to show his "general practice" for these surgeries and his informed consent process. *Id.* "[T]he Court limits the discovery request to pre-operative notes, operative notes, consult notes, age, gender, and body mass index (BMI) of any patient on whom Defendant has performed incisions for anterior spinal fusions at or below the L4 level, during the past 3 years." *Id.* "The information should be provided under a protective order mutually agreed upon by the parties [or] if the parties cannot mutually agree on a protective order, each party sall submit a protective order to the Court for approval." *Id.*

STANDARD OF REVIEW

This Court "'review[s] the [Circuit] court's rulings on discovery matters under an abuse of discretion standard.'" *Anderson v. Keller*, 2007 SD 89, ¶ 5, 739 N.W.2d 35, 37 (*quoting Maynard v. Heeren*, 1997 SD 60, ¶ 5, 563 NW2d 830, 833) (other citations omitted). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or

unreasonable.'" *Taylor v. Taylor*, 2019 SD 27, ¶ 14, 928 N.W.2d 458, 465 (*quoting Thurman v. CUNA Mut. Ins. Society*, 2013 SD 63, ¶ 11, 836 N.W.2d 611, 616) (other citations omitted).

The Petitioner has not challenged any of the Circuit Court's factual findings. Thus, the only review before this Court is the supervision of the Circuit Court's broad discretion to manage and direct the pre-trial discovery process. "Proper supervision under the rules enables a trial court to exercise broad discretion to manage the discovery process in a fashion that will implement the philosophy of full disclosure of relevant information and at the same time afford the participants the maximum protection against harmful side effects ….'" *Maynard*, 1997 S.D. 60, ¶ 29 (quoting *Bond v. Dist. Ct., In & For Denver Cty*., 682 P.2d 33, 40 (Colo 1984) (quoting 4 J. Moore & J. Lucas, Moore's Federal Practice P 26.6.7 (1983))

Petitioner's Brief suggests this appeal involves *de novo* review because it implicates the statutory physician-patient privilege. That is incorrect. According to this Court's prior holdings, when identifying information is removed from the records, there is no longer a patient, and no longer a privilege at issue.

Furthermore, the Petitioner did not appeal or brief the Circuit Court's decision that Defendant's prior surgical records must be disclosed under a protective order. That issue is therefore waived. Even if the manner of disclosure were at issue, this, too, would be reviewed under an abuse-of-discretion standard. This Court, therefore, must defer to "the sound discretion of the trial court in placing reasonable restrictions upon dissemination and use of the sought-after material." *Maynard*, 1997 S.D. 60, ¶ 15.

ARGUMENT-IN-RESPONSE

Defendant performed an operation that Alyssa did not authorize. Defendant has used multiple excuses to deflect responsibility for the unauthorized surgery. Defendant now claims to have no memory of treating Alyssa, and, his current excuse is that he must have done a good job because he would have done what he "always does." Or, in other words, Defendant is submitting his pattern and habit as proof that his treatment of Alyssa conformed with that pattern and habit.

As a result of this specific defense, Alyssa requested discovery on what Defendant "always does." Defendant refused to produce the evidence that would show his pattern and habit, even though it is at the crux of his own defense. Alyssa filed a motion to compel.

The Circuit Court ordered Defendant to produce his prior surgical records, reasoning that those records are relevant and reasonably likely to lead to the discovery of admissible evidence. For example, the records would show what Defendant always does, or, in other words, it would show the strength of his pattern and habit. (To be admissible, Defendant's pattern evidence must be shown to be virtually automatic.) The records would also show how he documents and responds to a patient's incision preference. Non-party patient records, therefore, are both relevant and admissible, including to determine whether Defendant has met the threshold requirement to even assert his habit as a defense.

I. The Scope of Discovery is Extremely Broad

"Despite recent changes to the rules of civil procedure, courts agree the scope of discovery under the Federal Rules of Civil Procedure is extremely broad." *Colonial Funding Network, Inc. v. Genuine Builders, Inc*., 326 F.R.D. 206, 212 (D.S.D. 2018) (*citing* 8 Fed. Prac. & Proc. Civ. § 2007). This Court has found the Federal Rules, its legislative history, and case law to be "instructive." *See e.g.*, *Kaiser v. Univ. Physicians Clinic*, 2006 SD 95, ¶ 31, 724 N.W.2d 186, 194 ("The legislative history, concerning the Federal Rules that govern pretrial discovery, is instructive."); *Williams v. Carr*, 84 SD 102, 104, 167 N.W.2d 774, 775 (1969) (noting the similarities between South Dakota and Federal Rules of Civil Procedure, and quoting the forerunner to SDCL § 15-6-26(b)).

"All relevant matters are discoverable unless privileged." *Kaarup v. St. Paul Fire & Marine Ins. Co*., 436 N.W.2d 17, 20 (S.D. 1989). "[I]nformation that may lead to admissible evidence" is also discoverable. *Id*. (citations omitted). "A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Id.* at 19 (*citing* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2001 (1970)).

II. When Defendant relied on his habit, pattern, or practice as the centerpiece of his defense, evidence of his habit, pattern, or practice became relevant

It is the Defendant, rather than Alyssa, who put his own prior surgical records at issue. First, Defendant claimed that the way he treated prior patients informs the standard of care. Second, Defendant claimed that he obtains informed consent the same way in *every* single anterior approach surgery he performs. Third, because

Defendant does not remember what he said to Alyssa, he claimed that he could not have violated the standard of care because he operated on Alyssa the same way he *always* does. Finally, Defendant claimed that he properly obtained informed consent because he obtained consent the way he *always* does.

These non-party patient records are not discoverable merely because they could be used to gauge Defendant's credibility. Instead, they are relevant because they constitute threshold evidence necessary to determine the admissibility of Defendant's habit defense. The Circuit Court's order compelling their production should be upheld.

A. Defendant does not remember Alyssa, so he is relying on his pattern to defend his actions

Defendant has utilized two primary excuses for his surgical error. When Alyssa first talked to Defendant, Defendant claimed that he performed the incision vertically because "nobody informed him that [Alyssa] was the horizontal case that day…." (R. 383). After this lawsuit started, however, Defendant tried a different excuse. Defendant now claims that the way he handled Alyssa's surgery is *the same way he handles all of his patients*:

- He claims he has "a standard discussion with all patients undergoing an anterior exposure for spine surgery [which includes] some discussion about the incision. (R. 277-78)
- He claims he "cannot and would not promise a patient that [he] would perform a particular type of incision." (R. 278)
- He claims he "tells ***all patients*** undergoing this procedure about the possibility of different incisions…." (R. 85)

- He claims that other patients have asked him "for a horizontal incision … for cosmetic reasons." (R. 25)

- He claims that "in determining the 'safest incision' … a primary factor to consider is the amount of fat in the abdominal area [and] a patient's BMI can be an indication of the amount of abdominal fat…." (R. 278)

- He claims he "has performed 329 anterior spine exposure surgeries in the last five years." (R. 273)

- He claims he "doesn't know" if he has ever performed a horizontal incision on an obese patient, and he has "no idea" what the highest BMI was where [he] performed a horizontal incision." (R. 26).

Or, in summary, Defendant claims that has no memory of this surgery, and therefore no memory of any mistake, but, since he does these surgeries so often that in lieu of his memory, we can look to how he always does things as evidence of how he performed Alyssa's surgery, and how he elicited her informed consent.

Furthermore, it is apparent that Defendant will also attempt to tell the Jury that since he has done this surgery 329 times in the past five years, without incident, and thus Alyssa's surgery was therefore flawless, and her informed consent was fully valid. Defendant has put his surgical record at issue…because Defendant's only defense is his surgical record.

B. For Defendant to rely on his pattern, that pattern must be semi-automatic

In order to be admissible, Defendant's claim of pattern and custom must first meet a threshold test for viability. The threshold test requires that the pattern must be

so strong as to be nearly automatic. Evidence of the strength of his habits would be found in his prior surgical records.

"Under Federal Rule of Evidence 406, evidence of the routine practices of an organization, whether corroborated or not and regardless of the availability of eyewitnesses, is admissible to show that the conduct of the organization on a particular occasion was in conformity with the routine practice." *Smith v. United States*, 583 A.2d 975, 979-80 (D.C. 1990). Federal Rule of Evidence 406 mirrors SDCL § 19-19-406. *Compare* F.R.E. 406 *with* SDCL § 19-19-406.[5]

But, "Rule 406 does not authorize the admission of every personal habit or office routine." *Brown v. Liberty Mut. Ins. Co*., 774 A.2d 232, 243 (Del. June 13, 2001). "To be probative, evidence presented under Rule 406 must consist of specific, 'semi-automatic' conduct that is capable of consistent repetition." *Brett v. Berkowitz*, 706 A.2d 509, 516-17 (Del. 1998).

"Before a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature." *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 542 (S.D.N.Y. 2005) (*quoting Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988)). "Although a precise formula cannot be proposed for determining when the

[5] They are both worded as follows: "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness."

behavior may become so consistent as to rise to the level of habit, adequacy of sampling and uniformity of response' are controlling considerations." *Id*. (*quoting Reyes v. Missouri Pac. R.R. Co.,* 589 F.2d 791, 795 (5th Cir. 1979) (*quoting* Notes of Advisory Committee)). "It is only when examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct, that examples are admissible." *Id.* (*quoting Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985)).

C. Evidence showing that Defendant either conformed or failed to conform to that professed pattern is relevant

"The cases and the commentary make clear that courts should be cautious in permitting admission of habit or pattern of conduct evidence under Rule 406 because of the danger that it may afford a basis for improper inferences, cause confusion, or operate unfairly to prejudice a party." *Smith*, 583 A.2d at 980 (*citing Wilson v. Volkswagen of America, Inc*., 561 F.2d 494, 512 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S. Ct. 744, 54 L. Ed. 2d 768 (1978)) (*citing* McCormick on Evidence § 162 at 341-42)). "As the Eleventh Circuit Court of Appeals, joining the Fourth Circuit, has written: 'We stress that 'habit or pattern of conduct' is never to be lightly established, and evidence of example, for purposes of establishing such a habit, is to be carefully scrutinized before admission.'" *Id*. (*quoting Loughan*, 749 F.2d at 1524 (*quoting Wilson*, 561 F.2d at 511)). *See also Simplex Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988) ("the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature.").

In a medical case, a party "can substantiate [a] doctors' routine adherence to [a] protocol through documentary evidence -- the dosage charts assertedly given to their participating patients." *Wetherill v. Univ. of Chi*., 570 F. Supp. 1124, 1129 (N.D. Ill. 1983). If, however, those charts or records are "marred by internal contradictions" of the purported habit, the habit, itself, is inadmissible. *Id*. In other words, the Circuit Court will conduct a gatekeeping function, and the Jury will be able to hear about Defendant's purported "habit" only if the prior surgical records substantiate it.

As Judge Theeler observed, "Defendant has no specific recollection of his discussions or assessments of Plaintiff *and relies entirely on what Defendant considers to be his general practice.*" (R. 452) (emphasis added). Defendant does not dispute that Alyssa asked for a horizontal incision. (R. 23-24, 35). Defendant, however, disputes that he agreed to perform a horizontal incision on Alyssa because he claims he *never* makes that promise:

> Although a patient may have a preference for a particular type of incision, my primary focus during the surgery is to make certain the patient has the safest and best surgery possible. *I cannot and would not promise a patient that I would perform a particular type of incision during the exposure surgery*.

(R. 278) (emphasis added).

Defendant's *pattern* or *habit*, therefore, is relevant because Defendant himself seeks to use that pattern to show conformity as part of his own defense. Evidence proving or disproving a defense is discoverable. SDCL § 15-6-26(b)(1). As a preliminary matter, Alyssa should be entitled to discovery regarding

Defendant's *pattern* or *habit* because it is "regarding… the claim or defense of any other party." *Id*.

Alyssa can rebut Defendant's purported habit by showing that the underlying medical records are "marred by internal contradictions." *Wetherill*, 570 F. Supp. at 1129. Alyssa can also rebut Defendant's purported habit by showing (1) that there was not sufficient uniformity of Defendant's responses; or, (2) that Defendant failed to act in the claimed habit enough times for it to constitute a habit. *Zubulake*, 382 F. Supp. 2d at 542 (citations omitted).

For example, if Defendant has a *habit* or *pattern* for each of his anterior exposure surgeries, the medical records for those other patients would show that pattern. For Defendant's actions to constitute a pattern, *all* of his medical records would have to conform to the same pattern that he claims he followed for Alyssa. In order to evaluate Defendant's claim of pattern, his prior, non-party, surgical records are discoverable because they will contain the following information:

1) Each patient's height and weight (which would allow the parties to calculate BMI);

2) If the patient had a preference, and, if so, whether he or she preferred a vertical or horizontal incision;

3) If Defendant agreed to perform a surgery consistent with the patient's preference;

4) If Defendant used a horizontal or vertical incision during the surgery (i.e., if the surgery followed the preference);

5) If Defendant used horizontal incisions on past patients with similar BMI's to Alyssa;

6) If Defendant informed prior patients that he would make the decision of which incision to use at the time of surgery; and,

7) If Defendant performed the anterior approach surgery consistent with the patient's preference.

Those records would also show if Defendant operated consistent with the patient's preference or, as Defendant claimed in this lawsuit, that he freely changes his mind during surgery without consulting the patient. Evidence showing that Defendant deviated from that pattern would be relevant to either rebut *or preclude* Defendant's pattern defense. *Zubulake*, 382 F. Supp. 2d at 542.

As noted above, Defendant performed an operation that Defendant did not authorize. The only defense Defendant has is that he did what he always does. In order to raise that defense, Defendant must provide examples "to establish [that] such pattern of conduct or habit are numerous enough to base an inference of systematic conduct…." *Zubulake*, 382 F. Supp. 2d at 542. Likewise, the "evidence of example, for purposes of establishing such a habit, is to be carefully scrutinized before admission." Smith, 583 A.2d at 980 (*quoting Loughan*, 749 F.2d at 1524)). The only "evidence of example" that the trial court or Alyssa can "carefully scrutinize" regarding Defendant's habit is his prior, non-party, medical records. As a result, they are discoverable.

D. Non-Party medical records have been regularly admitted in cases where, like here, a doctor's pattern is at issue

Numerous cases have dealt with similar issues before this Court. In fact, Alyssa's counsel were unable to find *any* cases that held differently. Instead, the rule appears to be that non-party medical records are discoverable when the doctor's pattern is at issue, as long as appropriate safeguards are in place. In some cases, the non-party patients themselves agree to testify.

For example, in *Hall v. Arthur*, 141 F.3d 844 (8th Cir. 1998) the doctor, like Defendant here, argued that he *always* discussed the risks of a specific medical device. The trial court admitted testimony from other patients, who disputed his claims. The doctor appealed, claiming that it was reversible error for the trial court to admit evidence that contradicted his pattern claims. The Eighth Circuit Court of Appeals affirmed and indicated that doctors are subject to the same pattern evidence standards as any other litigant:

> The defendants complain that the trial court improperly admitted testimony from patients other than Mr. Hall concerning what Dr. Arthur told them about Orthoblock prior to surgery. We believe, however, that that evidence was properly admitted to undermine Dr. Arthur's deposition testimony that all of his patients knew that Orthoblock was not designed for use in an ACF surgery or approved by the FDA for that purpose, and his testimony that he told all of his patients that Orthoblock could fracture and migrate after it was in place. While the defendants objected to the introduction of the deposition evidence on relevance grounds, we believe that it was properly admitted under Fed. R. Evid. 406 as evidence of the routine practice of an organization. The other patients testified that Dr. Arthur did not inform them of many of the risks associated with Orthoblock or that it was not intended for the purpose of an ACF surgery and did not have FDA approval. Such testimony, we believe, is plainly admissible under Fed. R. Evid. 401 as tending to shed light on the issue of Mr. Hall's informed consent to the procedure that he underwent.

Id. at 849. Similar to *Hall,* the Trial Court allowed anonymous, redacted records of other patients for the same procedure, which will shed light on the issue of the consent that Alyssa gave.

Likewise, in *Arthur v. Zearley*, the defendant doctor, like Defendant here, based his defense on "what he told all of his patients during their informed consent conferences…." 337 Ark. 125, 139, 992 S.W.2d 67, 75, (Ark. March 25, 1999). The plaintiffs in *Arthur* presented testimony "from three patients other than [the plaintiff] concerning what Dr. Arthur told them about Orthoblock prior to surgery." *Id*. The defendant doctor asserted that this testimony was inadmissible "because it was extrinsic evidence on a collateral matter." *Id*. The Arkansas Supreme Court ruled that these other patients' testimony, like the non-patient medical records requested here, was both relevant and admissible:

> A matter is not collateral if the cross-examining party would be entitled to prove the issue as part of the case-in-chief, or if the evidence is relevant to show bias, knowledge, or interest. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997); *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). Whether or not Dr. Arthur obtained an informed consent from Mrs. Zearley was the central issue in this case. Dr. Arthur's deposition testimony about what he told all of his patients before surgery was contradicted by the testimony of the three other patients. Their rebuttal testimony tended to shed light on the central issue [*140] of Mrs. [***19] Zearley's informed consent, and was, thus, admissible under Ark. R. Evid. 401.

Id. at 139-40.

Additionally, the defendant in *Arthur*, like Defendant here, claimed that the trial court erred in allowing these non-party patient testimony "because it was unfairly prejudicial." *Id*, at 141. The Arkansas Supreme Court disagreed, finding that the trial

court's decision to admit this non-party patient testimony was not an abuse of discretion. *Id*.

Numerous other courts have ruled that non-party patient records are admissible if they are redacted to remove identifying information. This was the position of the Missouri Supreme Court in *State ex rel. Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813, 814 (Mo. 1984). There, the plaintiffs sought the "medical records of any patient at Cox (from 1978 forward) who had developed a bacteriological infection and/or shock subsequent to surgery and identification of and disclosure of the reason for hospitalization of any patient in the same room or ward with decedent." The defendant objected, arguing, like Defendant here, that these non-party medical records were privileged and confidential. *Id*. The Missouri Supreme Court overruled a lower court's writ of prohibition, reasoning that redacted, non-party medical records were discoverable because they could lead to the discovery of admissible evidence:

> It is apparent that information contained in the redacted records of other patients may be relevant or lead to the discovery of evidence relevant to plaintiff's malpractice claims and the search for truth demands that such records be examined by the trial court with a careful eye to protection of the non-party patients, such as they are entitled to by the physician-patient privilege, from humiliation, embarrassment or disgrace.

Id. at 815.

In *Amente v. Newman*, the plaintiffs "sought discovery in the medical malpractice lawsuit they filed against Dr. Newman, requesting production of the complete medical records for all of Dr. Newman's 'markedly obese' patients giving birth between January 1, 1989, and December 31, 1990." 653 So. 2d 1030, 1031 (Fla. 1995). The plaintiffs in *Amente* sought these non-patient medical records because the

defendant doctor "stated that he relied upon his past experience in delivering morbidly obese women without complication in selecting his delivery method for [the plaintiff that he operated on]." *Id*. at 1032. The plaintiffs also wanted these medical records because they were "relevant to show that [the defendant] had notice that [his] method was deficient" and "because [the defendant] claim[ed] he has followed this method for some time without injury occurring to the infants he has delivered, the Amentes argue that any discovery which reveals the opposite would be relevant for impeachment." *Id*. at 1031, 1033. Like here, the plaintiffs in *Amente* "specifically requested that all patient-identifying information be redacted (removed or blacked out) from the medical records prior to production." *Id*.

Like Defendant here, the *Amente* defendant objected to the production of these non-patient medical records. He argued "that the request was too burdensome and would force him to create records that do not now exist," like Defendant does here. *Id*. The *Amente* defendant also argued "that the confidentiality of the patient and physician relationship would be invaded by the production of evidence not relevant to the lawsuit" just like Defendant here. *Id*.

The Florida Supreme Court rejected the defendant doctor's argument. First, the Florida Supreme Court adopted the same rule this Court did in *Wipf* that the physician-patient privilege did not apply "as long as the medical records are properly redacted so as to protect the patient's identity." *Id*. at 1032. It also rejected the defendant doctor's claims regarding the non-party patients' right to privacy, ruling "that the patients' right of privacy and the confidentiality of the patients' medical records are protected by the

trial judge's requirement that all identifying information be redacted from the medical records." *Id*. at 1033. If, however, there were situations where the redactions were "deemed insufficient to protect the patients' right of privacy, the trial court, in its discretion, may also order the medical records sealed and allow only the parties' attorneys and medical experts to have access to the medical records." *Id*. Even then, as the Florida Supreme Court reasoned, the records were still discoverable. *Id*.

In contrast to this series of cases supporting the Circuit Court's decision, the Defendant's brief is devoid of any direct authority for his argument. Instead, he attempts to use *Milstead v. Smith*, which he quotes out of context and then misapplies.

E. *Milstead v. Smith* and *U.S. v. Nixon* do not support Defendant's position

Conspicuously absent from Defendant's brief is any directly applicable case law on the topic of anonymous, prior surgical records. Instead, Defendant rests his case on *Milstead v. Smith* and *U.S. v. Nixon* for the proposition that there is not a right to obtain impeachment evidence from confidential records. In proper context, the rule actually announced in *Milstead* is that a criminal defendant can pursue discovery within confidential records for any purpose, including impeachment, provided that there is a good-faith factual basis for doing so, and, provided that proper safeguards are in place to protect the information. These legal rulings are consistent with Judge Theeler's factual and legal findings.

The *Milstead* cases[6] are problematic to Defendant for several reasons. First, the crux of *Milstead* involves the statutory limits of Rule 17(c) of South Dakota *Criminal* Procedure (SDCL 23A-14-5). Rule 17(c) governs the use of subpoenas in criminal cases, and, notably, "Rule 17(c) was not intended as a tool for discovery in criminal cases." *Milstead,* ¶ 36. Even so, this Court recognized that confidential records are "not shielded from discovery." *Id.* This Court adopted the three-part test from *United States v. Nixon,* which allows enforcement of a discovery subpoena in criminal cases upon a threshold showing of: (i) relevance, (ii) admissibility, and (iii) specificity. *Milstead,* ¶ 19. Again, *Milstead* is a criminal procedure case, and the *Milstead* test is not the test for civil cases. Because Defendant has not provided any authority to suggest that the *Nixon* test

[6] Defendant cites to *Milstead v. Smith,* 2016 S.D. 55. A companion case (nearly identical) was handed down on the same day, *Milstead v. Johnson,* 2016 S.D. 56.

can be used in civil cases, he waives its applicability. *State v. La Croix*, 423 N.W.2d 169, 171 (S.D. 1988).

Second, although this Court rejected the discovery subpoenas in *Milstead,* it was because the criminal defendants failed to meet the *Nixon* test, not because the case stands for an outright prohibition for discovery of impeachment evidence in confidential records. Both criminal defendants sought personnel records of deputy sheriffs, but *solely* for impeachment, and neither could identify any other use for the information.[7] Further, this Court noted that both defendants were merely *surmising* about the utility of the personnel files: Johnson and Smith each argued that "the requested information in the personnel records ***might*** produce information useful to impeach [the deputy's] credibility." *Milstead v. Johnson,* ¶ 26; *Milstead v. Smith,* ¶ 26 (emphasis added).

Based upon those specific facts (rather than a general legal rule), this Court refused to permit discovery to the *Milstead* defendants, noting that access to personnel files "has been denied where the defendant failed to demonstrate any theory of relevancy and materiality, but, instead, merely desired the opportunity for an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information would enable him to impeach the witness." *Milstead v. Johnson*, 2016 S.D. 56, ¶ 22, 883 N.W.2d 725, 734 (quoting *People v. Gissendanner,* 399 N.E.2d 924, 928 (N.Y. 1979). *See, also, Milstead v. Smith*, 2016 S.D. 55, ¶ 24, 883 N.W.2d 711, 722 ("defendant must advance some factual predicate which makes it

[7] This Court hinted, for example, that if a defendant were charged with assaulting an officer, then the arresting officer's personnel records might be relevant to a claim of self-defense.

reasonably likely the requested file will bear information material to his or her defense. A bare assertion that a document 'might' bear such fruit is insufficient.)

Third, *Milstead* is contrary to Defendant's position because the Court's opinion explicitly ratifies the ability of litigants to discover private, confidential information. *Id.,* ¶ 35 (confidential records "not shielded from discovery"). This is not a new rule. Within the opinion, this Court discussed prior cases allowing the discovery of privileged, non-party psychotherapy records, ¶ 34 (citing *Maynard v. Heeren,* 1997 S.D. 60), and the discovery of non-party counseling records protected by physician-patient privilege, ¶ 14, (*citing State v. Karlen*, 1999 S.D. 12).

Further, this Court concluded the *Milstead* opinion by recognizing the well-settled principle that the Circuit Court has ample authority and ability to protect sensitive information during discovery. "The circuit court is equipped with necessary enforcement tools, such as Rule 11, 'to assure that no privileged information is misused by the discovery litigant." *Id.,* ¶ 35 (quoting *Maynard,* 1997 S.D. 60, ¶ 17). This Court's original *Maynard* opinion is even more expansive:

> Under its inherent authority to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, the trial court may order that the inadmissible contents of any records be sealed and that the adversarial party be prevented from revealing them to anyone. Motions in limine prior to trial would offer further protection against unnecessary public disclosure. In the exercise of its discretion in this area, the trial court will be faced with situations where the privilege is invoked as a shield when the nondisclosure of the information and the conditions it protects are being used as a sword. Such is the case now before us. Clearly, heightened care must be exercised in other instances to avoid abuse or improper disclosure where the material pertains to an involuntary defendant rather than a voluntary plaintiff….The public disclosure of irrelevant confidential material by a discovering party would appear to us to be a prima facie violation of Rule 11. If such disclosure is not necessary for litigation purposes, it would appear on its

> face to be for the improper purpose of harassment or embarrassment of the other party. Rule 11 provides a deterrent to misuse by both the discovering attorney and litigant, since its sanctions can be imposed on the offending attorney, party or both.

Id., ¶¶ 16-17 (citations omitted).

In summary, the Defendant's prior surgical records, when redacted and subject to a protective order, are discoverable in this case. Those prior records will allow the Circuit Court to perform its gatekeeping function as to the validity of Defendant's purported habit and custom and the other reasons outlined above.

III. *Wipf* is applicable

Wipf v. Altstiel is not dispositive for *when* non-party patient records are discoverable or admissible. Instead, *Wipf*, in part, describes the procedures that courts are supposed to follow if non-patient medical records become discoverable. *Wipf* mirrors this case both factually and procedurally.

Defendant, however, argues that *Wipf* is inapplicable because "he takes care of each of his patients individually because each patient is different." Petitioner's Brief, p. 20. That claim, however, is contradicted by Defendant's prior testimony and his asserted defenses. If Defendant is being truthful with the Court and "each patient is different," Defendant may have committed perjury for each of the following matters:

- He claims he has "a ***standard*** discussion with ***all*** patients undergoing an anterior exposure for spine surgery [which includes] some discussion about the incision. (R. 277-78)
- He claims he "cannot and would not promise a patient that [he] would perform a particular type of incision." (R. 278)

- He claims he "tells ***all patients*** undergoing this procedure about the possibility of different incisions…." (R. 85)

- He claims that other patients have asked him "for a horizontal incision … for cosmetic reasons." (R. 25)

- He claims that "in determining the 'safest incision' … a primary factor to consider is the amount of fat in the abdominal area [and] a patient's BMI can be an indication of the amount of abdominal fat…." (R. 278)

Defendant cannot have this issue both ways. He either had a "habit" that dictated[8] his treatment of Alyssa or he did not. If Defendant did not have a pattern, he would be prohibited from saying that he treated Alyssa like he did *every other patient*. *Zubulake*, 382 F. Supp. 2d at 542. If he did, non-patient medical records would be relevant for that pattern to be admissible or to rebut the pattern. *Hall*, 141 F.3d at 849.

Alyssa agrees that there are medico-legal cases where non-patient medical records might not be relevant. This case, however, is not one of them. Defendant repeatedly put his past treatment at issue when his defense is grounded on the idea that he treated Alyssa like he treated *all* of his former patients.

IV. Producing the compelled records would not be unduly burdensome

Defendant claims that he should not be forced to produce any of the evidence related to his defense. Defendant asserts that "the intrusion on patient privacy" of doing so would outweigh its relevance. Brief of Petitioner, p. 13.

This is a red herring. Redacted patient records do not impinge upon patient privacy. Defendant has not demonstrated any meaningful burden that would be placed

[8] This pattern evidence might also show that Defendant did have a pattern, but he deviated from that pattern when treating Alyssa.

on him by producing these records. Defendant failed to seek compensation for the staff time involved in collecting and redacting the records, and he did not raise that issue on appeal. Instead, Defendant asserts the kind of vague "undue burden" argument that courts routinely reject.

A. When redacted, there is no impact on the physician/patient privilege

As this Court observed, "[t]he text of SDCL 19-19-503 does not protect all of a physician's 'medical records.' Rather, it only protects physician-patient 'confidential communications' contained in medical records. *Wipf*, 2016 S.D. 97, ¶ 8. Additionally, this Court recognizes that "[w]ith almost unanimity, the courts applying analogous rules protecting physician-patient 'confidential communications' hold that when adequate safeguards ensure the anonymity of the patient, *relevant, nonidentifying information is not privileged*." *Id*. (*citing Snibbe v. Superior Court*, 224 Cal. App. 4th 184, 168 Cal. Rptr. 3d 548, 554, 556-57 (Cal. Ct. App. 2014)*; Bennett v. Fieser*, 152 F.R.D. 641, 642-44 (D. Kan. 1994)*; Osterman v. Ehrenworth*, 106 N.J. Super. 515, 256 A.2d 123, 129 (N.J. Super. Ct. Law Div. 1969)*; Staley v. Jolles*, 2010 UT 19, 230 P.3d 1007, 1010-11 (Utah 2010)) (emphasis added). *See, also, Id.,* ¶ 9 (*citing Ziegler v. Superior Court*, 134 Ariz. 390, 656 P.2d 1251, 1254-56 (Ariz. Ct. App. 1982); *Cmty. Hosp. Ass'n v. District Court*, 194 Colo. 98, 570 P.2d 243, 244-45 (Colo. 1977); *Fischer v. Hartford Hosp*., 31 Conn. L. Rptr. 291, 2002 Conn. Super. LEXIS 269 (Conn. Super. Ct. 2002); *Tomczak v. Ingalls Mem'l Hosp*., 359 Ill. App. 3d 448, 834 N.E.2d 549, 552-555, 295 Ill. Dec. 968 (Ill. App. Ct. 2005); *Terre Haute Reg'l Hosp., Inc. v. Trueblood*, 600 N.E.2d 1358, 1360-62 (Ind. 1992); *Baptist*

Mem'l Hosp. v. Johnson, 754 So. 2d 1165, 1169-71 (Miss. 2000); *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 409-10 (Mo. 1996)).

"This type of anonymous, nonidentifying information is not protected by the physician-patient privilege because there is *no patient* once the information is redacted." *Id.,* ¶ 10 (emphasis in original). To rebut this ruling, Defendant urges this Court to follow Justice Gilbertson's concerns in his original dissent in *Wipf*, that any reference to medical records would necessarily invade the physician/patient relationship. This Court, however, already addressed (and rejected) that argument:

> The dispositive question is whether anonymous, nonidentifying information—i.e., a record without a patient—… is a physician-patient confidential communication. Further, if such information is not privileged, it does not matter who may invoke the privilege because there is no patient to invoke it for, … nor does it amount to creating a new exception to the privilege.

Id., ¶ 9, n. 3.

1. Under HIPAA, redacted medical records do not affect patient privacy, as a matter of law

The Health Insurance Portability and Accountability Act ("HIPAA") governs most medical privacy concerns. Under HIPAA, "[a] covered entity or business associate may not use or disclose protected health information…." 45 C.F.R. § 164.502. "Protected health information means individually identifiable health information…." 45 C.F.R. § 160.103. "Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and … [t]hat identifies the individual; or … there is a reasonable basis to believe that the information can be used to identify the individual." *Id*. "Health information that does

not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information." 45 C.F.R. § 164.514(a).

This Court, in *Wipf*, was concerned whether additional safeguards to protect patient anonymity beyond redacting "the patient's name, address, phone number, date of birth, and social security number." *Wipf*, 2016 SD 97, ¶ 12. Federal regulations give that additional guidance, however. Under HIPAA, a party seeking non-party medical records must make additional redactions in order to ensure that patient privacy is protected. 45 C.F.R. § 164.514(b)(2).

Defendant acknowledged these additional requirements in his brief. Petitioner's Brief, pp. 16-18. Alyssa requested production of those records with HIPAA-mandated redactions, rather than full, unredacted, copies. *See e.g.*, R. 438.

2. Under HIPAA, a Court may even compel production of unredacted medical records

Under HIPAA, "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding … [i]n response to an order of a court … provided that the covered entity discloses only the protected health information expressly authorized by such order[.]" 45 C.F.R. § 164.512(e)(1)(i). A covered entity may also disclose protected health information "[i]n response to a subpoena, discovery request, or other lawful process" unaccompanied by a court order if the individual had been given notice of the request "or … that reasonable efforts have been made by such party to secure a qualified protective order[.]" 45 C.F.R. § 164.512(e)(1)(ii).

A trial court, under HIPAA, may also set a protective order *in lieu* of the redactions Alyssa proposed. "[U]nder HIPAA, a party is authorized to produce *unredacted* documents containing [personal health information] without obtaining patient consent when such disclosures are required by law and are *subject to a qualified protective order*." *UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, No. CV 05-1289 (PJS/SRN), 2010 WL 11519976, at *8 (D. Minn. Dec. 14, 2010) (emphasis added) (citing 45 C.F.R. § 164.512(a)(1)). *See also Mayfield v. Orozco*, No. 2:13-CV-02499 JAM AC, 2016 WL 8731367, at *5 (E.D. Cal. July 1, 2016) (ordered that "discovery withheld or redacted by the defendants pursuant to HIPAA, and/or on medical privacy grounds, shall be produced *in unredacted form* within 14 days of this court's approval of a Protective Order[.]" (emphasis added)); *Ruggles v. WellPoint, Inc.*, 2010 WL 11570681, at *15 (N.D.N.Y. Dec. 28, 2010) ("So that the disclosure process is no longer forestalled but rather expedited, the Court orders that such records be disclosed *unredacted* and grants a qualified protective order containing the necessary protection mandated by HIPAA.") (emphasis added).

Alyssa did not seek production of unredacted records in her motion to compel. Instead, Alyssa sought evidence to substantiate or refute Defendant's defense: what he always does. Even if Alyssa had sought unredacted medical records, those records are discoverable under HIPAA so long as the trial court takes other appropriate precautions to protect patient privacy.

3. Defendant has not articulated how production of these records would harm patient privacy rising to an abuse of discretion

There is no privilege at stake in this case because the circuit court limited production to redacted non-party medical records. *Wipf*, 2016 S.D. 97, ¶ 8; 45 C.F.R. § 164.514(a). As a result, reversal would only be appropriate if the circuit court abused its discretion. *Anderson*, 2007 SD 89, ¶ 5 (citations omitted). Defendant, therefore, is required to show that the circuit court made a "fundamental error of judgment." *Taylor*, 2019 SD 27, ¶ 14.

Defendant asserts (as have numerous other doctors all over the country) that production of *any* non-party patient records "is a slippery slope that would undoubtedly lead to issues that are irrelevant to the case and a breach of non-party patients' confidentiality." Petitioner's Brief, p. 14. But, as noted above, numerous courts have compelled non-patient medical records all over the country. If Defendant's claims were true, that production of non-patient medical records were a slippery slope leading to the destruction of medical privacy, we would already be seeing the effects in these other jurisdictions. We have not. Defendant's argument is, therefore, empirically denied.

Furthermore, this very Court has also previously compelled the production of non-party medical records. *See, Karlen,* 1999 S.D. 12, ¶ 46 (compelling production of non-party counseling records which were protected by the physician-patient privilege). Likewise, this Court recognized in *Milstead* that confidential information is not categorically shielded from discovery; instead, it must be disclosed when the information is relevant and "disclosure of such information must be carefully tailored to

the legitimate need for information in the case." *Milstead,* 2016 S.D. 55, ¶ 35. There is no evidence that the *Karlen* ruling subsequently led to a destruction of medical privacy in this jurisdiction, nor that the *Milstead* ruling has had a chilling effect on other confidential information.[9]

Defendant provides no examples or evidence to support his claims. He presents no studies showing a negative impact on doctor/patient relationships or the candor that doctors and patients have with one another. By failing to submit such authority, Defendant waives the issue. *La Croix*, 423 N.W.2d at 171 ("It is well settled that failure to submit authority in support of a position on appeal constitutes waiver of that argument.") (*citing State v. Banks*, 387 N.W.2d 19 (S.D. 1986); *State v. Shull*, 331 N.W.2d 284 (S.D. 1983); SDCL 15-26A-60(6)).

Regardless, Defendant has not shown that the circuit court made "a choice outside the range of permissible choices…." *Taylor*, 2019 SD 27, ¶ 14. Defendant makes not claim that the circuit court's weighing of the harms versus benefits rose to "a decision, which, on full consideration, is arbitrary or unreasonable." *Id*. As a result, even if this Court were inclined to agree with Defendant that there might be some risk of the slippery slope that Defendant rails against, the circuit court's rationale was in line with how numerous other courts have weighed these risks. *See e.g.*, *Hall*, 141 F.3d 844; *Arthur*, 337 Ark. 125; *Cox Med. Ctr.*, 678 S.W.2d 813; *Amente*, 653 So. 2d 1030.

[9] Nor has this Court's decision in *Wipf* resulted in the concerns predicted by the dissent in that case, namely that "this decision [will] force citizens of this state to seek medical treatment outside the boundaries of this state to protect and maintain the privacy of their medical records". *Wipf,* 2016 S.D. 97, ¶ 24 (Gilbertson, C.J., dissenting).

B. The Court-ordered production is not unduly burdensome

Defendant complains that the trial court unduly burdened him by making him redact 329 patients' medical records. Petitioner's Brief, p. 16. This number, however, is inaccurate. The circuit court did not order Defendant to produce all 329 patients' medical records. The 329 patients were for the five years of records that Alyssa sought. R. 273-74. Additionally, the 50+ hours of work Defendant claims he (or, more likely, an assistant) would have to do would be for redacting from those 329 patients' *entire* medical records, not the limited set of information ordered here. *Id*.

At the hearing, Defendant made the same arguments it makes now. First, Defendant argued that, to redact the 329 records, it would take 50+ hours of work. R. 519. Defendant also suggested that the Court might consider making Alyssa pay for the redaction of these records. R. 520 ("I'm not suggesting that it's relevant or that it should be used, but if plaintiffs think it's so important to the case, they can pay the costs of redacting all of these records."). The Circuit Court weighed the facts and determined that 50 hours of work was not so burdensome as to require Alyssa to pay for it.

"[B]ased on the arguments of counsel made at the hearing" the circuit court limited production to lower Defendant's burden. R. 453. For example, the circuit court "limit[ed] the discovery request to pre-operative notes, operative notes, consult notes, age, gender, and body mass index (BMI)" records. R. 452. Additionally, the circuit court "limit[ed] the … the time frame to 3 years…." R. 453.

Defendant, however, did not raise as an appealable issue that the circuit court should have compelled Alyssa to pay for these redactions. As a result, Defendant

waived that argument. Additionally, Defendant failed to show how many fewer records would have to be reviewed to comply with the circuit court's 3-year limitation. Defendant's burden argument, therefore, lacks the requisite information for this Court to determine whether the circuit court's limitation was "a choice outside the range of permissible choices…." *Taylor*, 2019 SD 27, ¶ 14.

Regardless, just because a request might be burdensome does not make it "unduly burdensome." *Kirschenman v. Auto-Owners Ins*., 280 F.R.D. 474, 491 (D.S.D. 2012) ("where the discovery requests are relevant, the fact that answering them will be burdensome and expensive is not in itself a reason for a court's refusing to order discovery which is otherwise appropriate") *See also In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 265 (N.D. Ill. 1979) ("[b]ecause the interrogatories themselves are relevant, the fact that answers to them will be burdensome and expensive 'is not in itself a reason for refusing to order discovery which is otherwise appropriate.'"); *Alexander v. Parsons*, 75 F.R.D. 536, 539 (W.D. Mich. 1977) (stating that "the mere fact discovery is burdensome … is not a sufficient objection to such discovery, providing the information sought is relevant or may lead to the discovery of admissible evidence"); and, *Burns v. Imagine Films Entertainment, Inc*., 164 F.R.D. 589, 593 (W.D.N.Y. 1996)) ("…[T]he fact that answering the interrogatories will require the objecting party to expend considerable time, effort and expense consulting, reviewing and analyzing 'huge volumes of documents and information' is an insufficient basis to object.").

Courts regularly require parties to provide similarly burdensome discovery. *See e.g., Kirschenman*, 280 F.R.D. at 490-91 (ordering Auto-Owners to produce the initial

pleadings in all 67 bad faith lawsuits against it and "copies of any transcripts of deposition or trial testimony of its employees or officers in any of the litigation files requested by plaintiffs."); *Lillibridge v. Nautilus Ins. Co*., No. CIV. 10-4105-KES, 2013 WL 1896825, at *6 (D.S.D. May 3, 2013) (ordering Nautilus to list every bad faith lawsuit brought against it, nationwide, since 2005 with a summary of each case); *Ashes v. Jager*, CIV. 16-1364, (Feb. 13, 2017; Minn. Co., S.D.) (ordering production of over three years of redacted IME reports).

As noted above, "where the discovery requests are relevant, the fact that answering them will be burdensome and expensive is not in itself a reason for a court's refusing to order discovery which is otherwise appropriate." *Kirschenman*, 280 F.R.D. at 491. The circuit court weighed all these factors and came up with a solution that would alleviate the burden on Defendant. That ruling was not "a choice outside the range of permissible choices…." *Taylor*, 2019 SD 27, ¶ 14. The Circuit Court should be affirmed.

Dated this 6th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief does not exceed the word limit set forth in SDCL § 15-26A-66. Based on the word count provided by Microsoft Word, this Brief contains 9,846 words, exclusive of the Table of Contents, Table of Authorities, Jurisdiction Statement, Statement of Legal Issues, any addendum materials, and any certificates of counsel.

Dated this 6th day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December2019, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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Supreme Court Clerk
500 East Capitol Avenue
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and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this same day, I sent copies of the foregoing by email to Defendant/Petitioner's counsel, as follows:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29021

ALYSSA FERGUSON,

Plaintiff/Respondent,

vs.

BRADLEY C. THAEMERT, M.D.,
Defendant/Petitioner.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Camela C. Theeler, Presiding Judge

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Defendant Bradley C. Thaemert, M.D. Petitioned the Court for Permission to Take Appeal of Intermediate Order and Request for Stay on June 14, 2019
The Order Granting the Petition was filed on July 18, 2019

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Petitioner Bradley Thaemert, M.D., respectfully submits the following Reply Brief.

RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Defendant disputes both the relevancy and accuracy[1] of many of the facts set forth in Plaintiff's Brief but will resist the urge to respond to each of Plaintiff's factual assertions in order to focus on the issue before this Court: Whether approximately 200 redacted medical records of non-party patients should be discoverable by Plaintiff to test Dr. Thaemert's credibility as to his custom and practice as to how he obtains a patient's informed consent prior to this type of surgery. Defendant requests that this Court limit the production of non-party medical records to cases where such records are directly relevant to an essential, substantive issue in the case.

[1] As one example, Plaintiff, citing R.37, states that Dr. Thaemert "never once mentioned Alyssa's weight or body type or any problem with the horizontal incision" (Plaintiff's Brief at 3). However, R.37 is a citation to Dr. Thaemert's deposition where he specifically denies that question. A second example can be found on page 4 of Plaintiff's Brief where Plaintiff, citing R.22, states that Dr. Thaemert promised Alyssa he would perform a horizontal incision but performed a vertical incision. Nothing in R.22 supports Plaintiff's statement of fact that Dr. Thaemert promised a vertical incision. Rather, Dr. Thaemert testified twice during his deposition that because his job is to perform the safest surgery, he could never promise a patient a particular type of incision for this type of surgery. R.24; R.37.

ARGUMENT

I. Standard of Review

Dr. Thaemert agrees with Plaintiff that discovery orders are generally reviewed under an abuse of discretion standard. *See Andrews v. Ridco, Inc.*, 2015 SD 24, ¶ 14, 863 N.W.2d 540 (quoting *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 SD 69 ¶ 47, 771 N.W.2d 623, 636). When the Supreme Court is "asked to determine whether the circuit court's order violated a statutory privilege, however, it raises a question of statutory interpretation requiring de novo review." *Arnoldy v. Mahoney*, 2010 SD 89, ¶ 13, 791 N.W.2d 645, 652 (quoting *Acuity*, 2009 SD 69, ¶ 47, 771 N.W.2d at 636). In this case, the statutory physician-patient privilege is at issue, and thus, a *de novo* review is proper when the Court considers the extent to which SDCL § 19-19-503 applies in this case.

II. The Non-Party Patient Records are Not Discoverable in this Case

The issue in this case is simple—whether Dr. Thaemert obtained adequate informed consent for the operation he performed on Plaintiff. Medical records of other patients are not determinative of that issue. Plaintiff's position is that every time a physician testifies that he cannot recall a discussion with a patient but that it is his custom and practice to explain the material risks of a treatment plan, then the medical records of former non-party patients become discoverable.

Physicians in South Dakota visit with thousands of patients every year. These physicians cannot be expected to remember every conversation they have with every individual patient. Accordingly, physicians will likely have to rely upon their custom and practice concerning their informed consent procedure. If a physician cannot recall his or her specific discussion with a patient who later brings a claim against the physician, Plaintiff argues that the medical records of that physician's former patients are discoverable. That cannot be the law.

In this case, Plaintiff argues that the records are necessary to find out if this is truly Defendant's pattern and habit. *See* Respondent's Brief at 10. Further, Plaintiff argues that the records would show how Dr. Thaemert documents and responds to a patient's incision preference. *Id.* Both of these arguments still do not address how the non-party patient records are relevant to anything other than Plaintiff's use to impeach Dr. Thaemert's credibility. The non-party patient records, however, are not relevant to the issue in this case, which is whether Dr. Thaemert obtained informed consent from this patient, Plaintiff Alyssa Ferguson. Plaintiff will have the opportunity to cross-examine Dr. Thaemert to point out that he does not have a specific recollection of his conversation with Plaintiff and that he is relying on his custom and practice. Production of these irrelevant records will only create a slippery slope leading

to the erosion of the physician-patient privilege and the disclosure of privileged non-party medical information.

Dr. Thaemert did not put the non-party patient records at issue.

In this case, Plaintiff tries to suggest that Dr. Thaemert put his former non-party patient records at issue merely because he does not recall his specific discussion with Plaintiff and because he has a general practice of obtaining informed consent. This contention does not make former non-party patient records relevant for purposes of discovery.

First, Plaintiff creates a defense that Dr. Thaemert "claimed that he performed the incision vertically 'because nobody informed him that [Alyssa] was the horizontal case that day. . . ." Respondent's Brief at 12. This argument was never advanced by Dr. Thaemert during the litigation, but rather was a straw man argument created by Plaintiff during her deposition. R.383. Further, Plaintiff also crafts an argument that "Defendant will also attempt to tell the jury that since he has done this surgery 329 time in the past five years without incident, and thus Alyssa's surgery was therefore flawless, and her informed consent was fully valid." Respondent's Brief at 13. Again, this is an argument invented by Plaintiff without any citation to the record. Dr. Thaemert has never suggested that he will bring up his surgery complication rate for the past incision surgeries he has performed. Plaintiff creates straw

man arguments that have never been made by Dr. Thaemert and then knocks down these fictitiously-conceived arguments.

Nevertheless, Plaintiff fails to identify a logical argument for how the unrelated non-party patient records are relevant to any essential issue in this case. In essence, Plaintiff's argument is that Dr. Thaemert does not recall the specific conversation he had with Plaintiff, but relies on his habit and standard discussion he has with all of his patients in this type of surgery, and thus, Plaintiff should be entitled to see all former non-party patient records to find out what Dr. Thaemert told those other patients relating to informed consent. *See* Respondent's Brief at 12-13. If Dr. Thaemert did not include all of the details of what is included in his standard informed consent discussion in Plaintiff's medical record, then there is nothing that suggests he would have included such details in other non-party patient medical records. *See* R.312-15. This is demonstrated by reviewing the Assessment/Plan section of Plaintiff's medical record, which was drafted and electronically signed by Dr. Thaemert and notes four points:

1. Chronic back pain.

2. The plan is for anterior exposure. If at all possible she would prefer to have a Pfannenstiel incision.

3. I told her it is a little longer incision and she may have a little bit of numbness. The main issue would be that it is cosmetically below the bikini line which she wishes for.

4. The risk of seromas, bleeding, DVTs, bowel injury, nerve injury discussed and she would like to proceed.

R.315. This is the medical record containing all relevant information *to this case*. Plaintiff does not like the fact that the medical record does not promise a certain type of incision but states that she would like a horizontal (Pfannenstiel) incision "[i]f at all possible" and that Dr. Thaemert notified Plaintiff of the risks and she wished to proceed. R.315. As a result, Plaintiff tries to infringe on other patient records in order to find some inconsistency in Dr. Thaemert's medical notes. Any information contained in other patient records, however, is irrelevant. As Dr. Thaemert has testified, and as confirmed by Plaintiff's record, although Dr. Thaemert has a standard informed consent discussion with each patient for this type of surgery, the discussion and consent are documented in the medical record with a brief note that the risks of the procedure have been explained and the patient would like to proceed. R.278, R.315. Dr. Thaemert testified that because of the length of the discussion, it would be impractical for him to include the full discussion he has with each of his patients concerning the risks of surgery in his medical notes. R.278; *see also* R.31 (explaining that a discussion about the risks is "not in the note. It's a general discussion."). Accordingly, Plaintiff has not demonstrated any reason

to believe that the non-party patient medical records are relevant to determining whether Dr. Thaemert has this general discussion.

> Dr. Thaemert can testify about his standard informed consent discussion that he generally has with his patients without producing all of the unrelated, former non-party patient medical records.

Plaintiff further contends that the non-party patient records are relevant and must be produced if Dr. Thaemert is going to testify that he has a standard discussion with all of his patients. In order to establish that he actually does have a habit or pattern under SDCL § 19-19-406 for each of his surgeries, Plaintiff erroneously claims that this can only be demonstrated through the medical records. Plaintiff's argument, however, is directly contradicted by SDCL § 19-19-406, which states:

> Habit--Routine practice. Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Accordingly, Dr. Thaemert's habit of having a standard discussion with all his exposure patients does not need to be corroborated by any evidence under the rule, as Plaintiff suggests. The South Dakota Supreme Court has held that in order qualify as a habit, the "evidence must be sufficiently similar to constitute a 'repeated specific situation' and rise to the level of habitual behavior." *Bad Wound v. Lakota Community Homes, Inc.*, 1999 SD 165, ¶ 20, 603 N.W.2d

723, 728-29. In the present case, Dr. Thaemert has testified that he has a general discussion with each of his patients about the safety of the spine exposure surgery. R.27. Pursuant to SDCL § 19-19-406, this testimony is admissible to prove that he acted in accordance with his habit.

Plaintiff, however, attempts to state that more is required under SDCL § 19-19-406 by arguing that there must be evidence to show that Dr. Thaemert either conformed or failed to conform to his professed pattern. Respondent's Brief at 15. To support such claim, Plaintiff cites to *Wetherill v. University of Chicago*, 570 F. Supp. 1124 (N.D. Ill. 1983). In *Wetherill*, the issue was not whether corroborating evidence was necessary to establish a habit or whether non-party medical records could be discovered to impeach the physician's testimony concerning habit. In fact, *Wetherill* involved a clinical study and not unrelated patient records. In *Wetherill*, the court stated that while it was permissible for the defendant healthcare provider to substantiate the doctors' routine adherence to its protocol through documentary evidence from a clinical study, the court also found that testimony of the defendant physicians alone embraces more than enough specific instances to establish a habit. *Id.* at 1128-29.

In the present case, it has been established that Dr. Thaemert has performed 329 anterior spine exposure surgeries over the past five years.

R.273. This undoubtedly demonstrates that there is a sufficient number of instances to constitute Dr. Thaemert's habit. However, Plaintiff further argues, using the distinguishable *Wetherill* case, that Defendant cannot demonstrate a habit if his records are "marred by internal contradictions." Respondent's Brief at 16. Plaintiff presents absolutely no evidence that non-party patient records are marred by internal contradictions, nor is there anything to suggest that Dr. Thaemert's records would contain anything relevant to this case beyond a brief acknowledgement of informed consent. Instead, Plaintiff is attempting to blindly search for some piece of evidence, at the expense of disclosing unrelated non-party patient records,[2] that may help to impeach Dr. Thaemert's credibility. This is improper under the rules of discovery and should not be allowed.

Plaintiff cites cases involving claims of medical malpractice to support her argument that Dr. Thaemert's former non-party patient records are relevant and discoverable. This case, however, is not based on medical negligence other than Plaintiff's claim that Dr. Thaemert failed to obtain informed consent. A review of informed consent cases illustrates a defendant

[2] Although Dr. Thaemert recognizes that the *Wipf* court determined that once identifying information is redacted, the physician-patient privilege no longer attaches, Dr. Thaemert urges this Court to adopt a rule that provides some protection for redacted medical records. Without that protection, plaintiffs in medical malpractice cases can nearly always create some type of relevancy to open the door to unfettered disclosure of patient records.

physician's testimony as to habit is appropriate based upon testimony from the providers and without the need for confirming documents. *See Meyer v. United States*, 464 F. Supp. 317 (D. Colo. 1979) (considering habit evidence based upon testimony of dentist and assistants); *Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982) (affirming trial court's admission of dentist's routine practice of telling patients risks and alternatives of procedure and obtaining informed consent); *Rigie v. Goldman*, 148 A.D.2d 23 (N.Y. App. Div. 1989) (affirming trial court's admission of testimony regarding dentist's routine practice of telling patient risks and alternatives of procedure and obtaining informed consent); *Hoffart v. Hodge*, 609 N.W.2d 397, 404 (Neb. App. 2000) (allowing physician to testify as to his habit of telling patient mammogram failure rates even though he did not recall the conversation because of "the reality that a doctor cannot be expected to specifically recall the advice or explanation he or she gives each and every patient he or she sees and treats."); *Reaves v. Mandell*, 507 A.2d 807 (N.J. Super. 1986) (permitting admission of physician's testimony on informed consent practice when physician could not remember the specifics of conversation with the plaintiff). These cases represent some of the many examples contradicting Plaintiff's argument that she "should be entitled to discovery regarding Defendant's pattern or habit" merely because it relates to Dr. Thaemert's custom and practice of obtaining informed consent.

Authority in Plaintiff's briefing is distinguishable and inapplicable to the issues in this case.

Plaintiff attempts to confuse the Court by stating "Defendant performed an operation that [Plaintiff] did not authorize. The only defense Defendant has is that he did what he always does." Respondent's Brief at 18. Dr. Thaemert does not contend, however, that he "did what he always does" as it relates to performing the incision on Plaintiff. Instead, Dr. Thaemert testified that he gives a standard *discussion* to all of his patients—stated another way, he "did what he always does" as it relates to explaining the risks of surgery to the patient. Plaintiff attempts to argue that because Dr. Thaemert is relying on his habit of his standard discussions, then he must also have a habit of performing the incision surgeries the exact same way in every case. The Court should look past Plaintiff's attempt to confuse that issue.

Plaintiff cites to several cases that are distinguishable from the present case. Plaintiff cites to *Hall v. Arthur*, 141 F.3d 844 (8th Cir. 1998) and *Arthur v. Zearley*, 992 S.W.2d 67 (Ark. 1999). *See* Respondent's Brief at 18-20. Each of these cases involve the same physician, Dr. James Arthur, who was sued for placement of a non-FDA-approved medical product called Orthoblock in patients' spines during anterior cervical discectomies. In those cases, however, the court merely allowed *testimony* from non-party patients about what Dr. Arthur had told them about Orthoblock prior to their surgeries. *See*

Hall, 141 F.3d at 849; *Zearley*, 992 S.W.2d at 72. In those case, unlike the present action, Dr. Arthur objected to the non-party testimony because he believed it was "extrinsic evidence on a collateral matter" and, thus, could not be used to impeach Dr. Arthur's credibility. *Hall*, 141 F.3d at 849; *Zearley*, 992 S.W.2d at 75. Contrary to the facts of the present case, the non-party medical records sought in *Hall* and *Zearley* had already been identified by the patients who willingly came to trial to testify about what Dr. Arthur had told them.[3]

Furthermore, medical records of the non-party patients in the present case would solely be used for the collateral purpose of demonstrating that Dr. Thaemert acted in accordance with those records, which is improper under SDCL § 19-19-608(b). Plaintiff argues that the unrelated non-party medical records would "show if Defendant operated consistent with the patient's preference or, as Defendant claimed in this lawsuit, that he freely changes his mind during surgery without consulting the patient." Respondent's Brief at 17. This is exactly the type of evidence that is precluded by SDCL § 19-19-608(b), which states that "extrinsic evidence is not admissible to prove specific

[3] In *Zearley*, the Supreme Court of Arkansas had previously reversed the trial court's certification of a class action involving over 300 patients who had undergone similar surgeries involving Orthoblock. *Arthur v. Zearley*, 895 S.W.2d 928, 930 (Ark. 1995). While the opinion is silent on this issue, presumably the 300-plus patients had produced their own records as part of the class-action lawsuit, and thus, discovery of such records was unnecessary.

instances of a witness's conduct in order to attack or support the witness's character for truthfulness." *See also JAS Enterprises, Inc. v. BBS Enterprises, Inc.*, 2013 SD 54, ¶ 33, 835 N.W.2d 117, 127 (citing to Rule 608 for the proposition that witnesses may offer their opinion as to credibility of another witness, but that extrinsic evidence cannot be used to prove specific instances of conduct).

Plaintiff next relies on a 1984 case from Missouri in which the plaintiff sought records of all former patients who developed the same bacterial shock as the claimant experienced. *State ex rel Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813, 814 (Mo. 1984). In that case, however, the only issue was whether the non-party patient records were protected by the physician-patient privilege. *See Keet*, 678 S.W.2d at 815. The court noted that it was "apparent that the information contained in the redacted records of other patients may be relevant or lead to the discovery of evidence relevant to plaintiff's claims," but does not address the question of the relevancy. *Id.* Presumably, the defendants admitted relevance or there was no objection on the grounds of relevancy. *Id.* Furthermore, the *Keet* case involved a cause of action for malpractice, rather than informed consent. *Id.* at 814. In the present case, unlike *Keet*, there is no reason to look at unrelated non-party patient records, because Dr. Thaemert has already addressed that he has a general conversation with all of his patients

about the risks of surgery, which cannot practically be fully documented in his records due to the length of the conversation. R.22; R.278.

Plaintiff also cites to *Amente v. Newman*, 653 So.2d 1030 (Fla. 1995), which is a medical malpractice case from the Florida Supreme Court. The court in *Amente* reviewed whether the records of former non-party morbidly obese patients who had given birth to children delivered by the defendant physician were discoverable. *Amente*, 653 So.2d at 1031. The court explained there were three reasons that the records were relevant in that case: 1) notice of deficient treatment; 2) causation evidence; and 3) if other patients suffered injuries from the same delivery method used on the plaintiff, those injuries could be used as impeachment evidence against the defendant physician who claimed he had never had a patient experience a similar injury with the treatment method at issue. *Id.* at 1032-33.

The present case is distinguishable from the *Amente* case for two main reasons. First, *Amente* involved a medical malpractice case in which the treatment method used by the defendant physician was at issue. In this case, there is no medical malpractice issue, but rather an issue as it relates to obtaining informed consent. This is an important distinction, because the court found that there was relevance by comparing those past non-party patients to determine whether the defendant physician was put on notice that the treatment

method he used could lead to injuries. *Id.* at 1032. Second, in *Amente*, there was no factual dispute as to what kind of treatment method the doctor used, and therefore the discovery was relevant for purposes of determining whether that kind of treatment was appropriate. *Id.* In this case, there is a dispute as to what Dr. Thaemert told Plaintiff as part of obtaining informed consent, and specifically, whether he "promised" a horizontal incision. There is no dispute that the vertical incision performed by Dr. Thaemert was not a breach of the standard of care. Finally, Dr. Thaemert has not put his past surgical complication record at issue and therefore cannot be impeached on results from other cases. The *Amente* case is categorically distinguishable from the facts in this case.

Plaintiff even cites to *State v. Karlen*, 1999 SD 12, ¶ 46, 589 N.W.2d 594, 605, for her argument that "this very Court has also previously compelled the production of non-party medical records." Respondent's Brief at 32. The *Karlen* case involved a criminal defendant who sought the psychotherapy counseling records of the purported victim of the defendant's alleged rape and sexual contact. *Karlen*, 1999 SD 12, ¶ 28, 589 N.W.2d at 600. Plaintiff omitted the crucial fact in that case that the South Dakota Supreme Court held that the production of those therapy records was discoverable because the purported victim had waived the patient-physician privilege by publicly

communicating the information contained within those records. *Id.* ¶ 31. The records of what the specific victim *in that case* had said to his therapist were undoubtedly relevant, and any privilege to such records had been waived by his communication to a third party. *Id.* None of the cases cited in Plaintiff's briefing are applicable to the issue in this case.

The *Milstead* analysis is applicable in this case, while the *Wipf* analysis is not.

Plaintiff argues that the *Milstead* analysis does not support Dr. Thaemert's position because such analysis is limited to criminal procedure and because the Court's opinion allows litigants to discover confidential information. *See* Respondent's Brief at 24-25. First, contrary to Plaintiff's argument, there is nothing in *Milstead* suggesting that the *Milstead* test is limited to criminal procedure and is inapplicable in civil cases. *See Milstead v. Smith*, 2016 SD 55, 883 N.W.2d 711. In fact, Chief Justice Gilbertson joined in Justice Severson's dissenting opinion in *Wipf* which cited to the *Milstead* decisions. *See Wipf v. Altstiel*, 2016 SD 97, ¶ 41, 888 N.W.2d 790, 805 (Severson, J., dissenting) (stating that redaction of non-party patient medical records is inappropriate when the plaintiffs offered no reason for compelling such production). Second, as Plaintiff argued, access to confidential records has been denied where the party seeking discovery "failed to demonstrate any theory of relevancy and materiality, but instead, merely desired the opportunity

for an unrestrained foray into confidential records in hope that the unearthing of some unspecified information would enable him to impeach the witness." *Milstead*, ¶ 22. This is exactly what Plaintiff attempts to do in this case—Plaintiff has failed to articulate anything that might be found in the non-party medical records, aside from vague possibilities that there may be some information about the standard informed consent discussion Dr. Thaemert has with all of his patients.[4] Plaintiff "must advance some factual predicate which makes it reasonably likely the requested file will bear information material to" her claims. *Id.* She has not done so. As stated by the trial court in *Milstead*, the court should have "a very difficult time understanding how, even if there was information contained in the personnel files, how any of it would be relevant under [SDCL § 19-19-608]."[5] Just like in the present case, Plaintiff has not met the standard set forth by the South Dakota Supreme Court in *Milstead* and fails to articulate how any of the information in the unrelated non-party patient records would be relevant.

[4] Plaintiff suggests in her brief that she may also use other patient medical records to show incisions Dr. Thaemert used for other patients based on their BMI. Since the type of incision is based primarily on the amount of abdominal fat rather than BMI (R.278), use of these records in this manner would be impractical and exemplifies the extent of irrelevant information Plaintiff seeks to interject in the trial of this case.

[5] The South Dakota Supreme Court also cited to *United States v. Nixon*, 418 U.S. 683, 701 (U.S. 1974), stating that "the need for evidence to impeach witnesses is [generally] insufficient to require its production in advance of trial." *Milstead*, 2016 SD 55, ¶ 26, 883 N.W.2d at 722.

Plaintiff further argues that the *Wipf* analysis is relevant. *See* Respondent's Brief at 26. While the Court in *Wipf* addressed whether non-party patient records were discoverable, the Court did so by analyzing whether they were privileged. *Wipf*, 2016 SD 97, ¶ 6, 888 N.W.2d at 792. In *Wipf*, however, the issue of relevance was not analyzed because the defendant physician conceded that the non-party patient records were relevant to the case. *Id.* Plaintiff fails to address the one portion of *Wipf* that addresses relevance, which states that the non-party patient records "would not be discoverable in many malpractice cases because they would not be relevant." *Id.* ¶ 6, 888 N.W.2d at 792 n.2. Further, the Court noted that "Dr. Altstiel's expert made the information relevant in his deposition testimony, and Dr. Altstiel does not contest the court's relevancy determination for purposes of this appeal." *Id.*

This is the only portion of the *Wipf* case that is applicable because this appeal stems from the issue of relevance rather than privilege.[6] In the present case, Dr. Thaemert did not put his prior surgical records at issue simply because he relied upon the general discussion that he has with all his patients. Therefore, Plaintiff's argument that the *Wipf* analysis applies is inapposite.

[6] Dr. Thaemert does not intend to waive the argument that the information sought by Plaintiff is protected by the physician-patient privilege, although he does admit that the *Wipf* case determined that non-party patient records are not privileged once identifying information has been redacted. Nevertheless, there is a good-faith argument that the *Wipf* case should be overturned on that issue.

Plaintiff even makes an inappropriate reach to assert that Dr. Thaemert "may have committed perjury" because he asserted that "he takes care of each of his patients individually because each patient is different" while also claiming that he "has a standard discussion with all patients undergoing an anterior exposure for spine surgery." Respondent's Brief at 26. Plaintiff attempts to conflate the issue of how Dr. Thaemert treats his patients with how he explains the material risks as part of obtaining informed consent.

Dr. Thaemert testified that he treats each patient individually, meaning that he might determine that a vertical incision is the safest on one patient, while determining that another patient can safely receive a horizontal incision. *See* R.25 ("Every patient's individual. So what I do with another patient is not necessarily relative to how – I take care of each individual patient individually."). On the other hand, Dr. Thaemert testified that he has the same general *discussion* with all of his patients. *See* R.27 ("Q: Okay. And you don't have any specific recollection of talking to Alyssa Ferguson regarding the safety of a vertical versus horizontal incision, correct? A: That's a discussion I have with every patient. Q: Okay. And you do not have -- A: It's just a general discussion I have with every patient about the safety of the exposure and all the important structures that I need to move."). Plaintiff's misleading contention that Dr. Thaemert "may have committed perjury" highlights

Plaintiff's attempt to conflate the treatment Dr. Thaemert performed with the discussion he has with his patients. Accordingly, Plaintiff's argument that "Defendant repeatedly put his past treatment at issue when his defense is grounded on the idea that he treated Alyssa like he treated all of his former patients" is an attempt to confuse the actual issue before this Court.

Non-party patient records are unduly burdensome and not proportional to the needs of the case.

Under the rules of discovery, Plaintiff must show that the sought-after discovery is proportional to "the needs of the case." *See* SDCL § 15-6-26(b)(1)(A)(iii); *see also Vallejo v. Amgen, Inc.*, 903 F.3d 733, 742 (8th Cir. 2018). Plaintiff's unsupported hypothesis that unrelated non-party patient records might contain "internal contradictions" is not proportional to the needs of the case. Plaintiff is requesting highly sensitive information in the form of unrelated medical records of Dr. Thaemert's former patients. In determining whether discovery is unduly burdensome or expensive, the court must take into "account the needs of the case, the amount in controversy, limitations on the party's resources, and the importance of the issues at stake in the litigation." SDCL § 15-6-26(b)(1)(A)(iii). In this case, the discovery is unduly burdensome, will inject irrelevant non-party patient records into the case, and has minimal, if any, relevance to the substantive issues at stake in this litigation. Simply put, it is not proportional to the needs of the case. Thus, the

Court should reverse the circuit court's order partially granting discovery of unrelated non-party former patient medical records of Dr. Thaemert.

CONCLUSION

Plaintiff seeks to expand this Court's holding in *Wipf* to allow discovery of redacted non-party patient records to impeach Dr. Thaemert's testimony regarding his custom and practice of obtaining informed consent. Allowing discovery of non-patient records under these circumstances will open the door to discovery of non-patient records in nearly all medical malpractice cases. Dr. Thaemert respectfully requests that the South Dakota Supreme Court reverse the circuit court's order requiring Dr. Thaemert to produce the unrelated medical records of former patients.

Dated at Sioux Falls, South Dakota, this _____ day of January, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Reply Brief of Petitioner complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 4,989 words, excluding the Table of Contents, Table of Authorities, Jurisdiction Statement, Statement of Legal Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this _____ day of January, 2020.

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