IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-00755

JOE ELLIS RILEY — PLAINTIFF/APPELLANT

VS.

F.A. RICHARD & ASSOCIATES, INC.,
INGALLS SHIPBUILDING, INC.,
and ALEXIS HYLAND, an Individual — DEFENDANTS/APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES F.A. RICHARD & ASSOCIATES, INC., INGALLS SHIPBUILDING, INC., and ALEXIS HYLAND, an Individual

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Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Joe Ellis Riley, Appellant

F.A. Richard & Associates, Inc., Appellee

Ingalls Shipbuilding, Inc., Appellee

Alexis Hyland, Appellee

Robert E. O'Dell, Esq., Attorney for Appellant

Silas W. McCharen, Esq., Brandi N. Smith, Esq., Richard P. Salloum, Esq., Attorneys for Appellees

Honorable Dale Harkey, Jackson County Circuit Judge

This, the 24th day of March 2008.

Silas W. McCharen

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STATEMENT REGARDING ORAL ARGUMENT

Appellees, F.A. Richard & Associates, Inc. ("FARA"), Ingalls Shipbuilding, Inc. ("Ingalls"), Alexis Hyland ("Hyland") (collectively "Appellees"), submit that pursuant to MISS. R. APP. P. 34, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process will probably not be significantly aided by oral argument.

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TREATISE

I. STATEMENT OF THE ISSUES

The Appellees accept the Statement of the Issues which Appellant, Joe Ellis Riley (hereinafter "Riley"), presents to this Court for review in his appeal from the summary judgment entered in favor of the Appellees.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Riley appeals from an Order awarding summary judgment in favor of Appellees arising from an alleged claim of "tortious interference" with the medical care he received in connection with his claim for benefits under the Longshore and Harbor Workers' Compensation Act[1] (hereinafter "LHWCA"). The trial court dismissed, as a matter of law, all of Riley's nine separate theories of recovery under Mississippi tort law.

B. DISPOSITION IN THE COURT BELOW

On June 7, 2000, Riley filed this action in the Circuit Court of Jackson County, Mississippi, Civil Action No. CI-2000-00, 213(3)[2]. [R. 23-31]. Riley named the following parties as defendants: (1) Ingalls, Riley's employer at the time of his injuries; (2) FARA, Ingalls' Third Party Workers' Compensation Administrator ("TPA") for LHWCA claims; and (3) Hyland, who worked as a nurse case manager for FARA in LHWCA matters.

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[1] Because Riley was engaged in a maritime industry, his worker's compensation claims were governed by the provisions of the LHWCA, 33 U.S.C. § 901, not the Mississippi Workers' Compensation Act ("MWCA").

[2] An amended complaint thereafter followed in September 2003. [R. 69-77].

Although he was receiving ALL BENEFITS to which he was entitled in his LHWCA case, Riley filed suit against all three Appellees under no less than nine different Mississippi tort law theories:

- intentional interference with contract;
- breach of fiduciary duty[3];
- intentional interference with prospective advantage;
- medical malpractice (against Hyland, a registered nurse[4]);
- fraud and misrepresentation[5];
- negligence[6];
- intentional infliction of emotional distress;
- intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege; and
- intentional interference with medical care by *ex parte* communication.

All of the above-referenced torts were based on a single conference between Hyland and Riley's primary treating physician, Dr. Christopher E. Wiggins, in regard to Riley's maritime work related injury.

In July 2000, Appellees removed the case to federal district court based on diversity jurisdiction. Appellees alleged fraudulent joinder of Ingalls, the only non-diverse defendant, since Riley's exclusive remedy was under the LHWCA and any state law claims were pre-empted by federal law. Riley thereafter filed a motion to remand and the Appellees filed a motion to dismiss asserting that the LHWCA provided the exclusive remedy for Riley's claims and that all state law claims were pre-empted by the LHWCA. The federal district court dismissed Riley's suit

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[3] Riley has abandoned his previous claim of breach of fiduciary duty.

[4] Riley has abandoned his previous claim of medical malpractice.

[5] Riley has abandoned his previous claim of fraud and misrepresentation.

[6] Riley has abandoned his previous claim of negligence.

concluding that the LHWCA provided Riley with an exclusive remedy and thus the federal court lacked subject matter jurisdiction over the case. The district court further denied Riley's motion to remand as moot. Riley then appealed the district court's final judgment. On August 1, 2002, the Fifth Circuit reversed the decision of the district court and remanded this action to state court.[7]

Given that all of the facts involved in this action revolved around Riley's maritime work related injury, the Appellees, on September 18, 2003, moved to stay the action pending the adjudication and resolution of Riley's federal LHWCA worker's compensation case. [R. 66-68]. On August 12, 2004, the Administrative Law Judge ("ALJ") for the U.S. Department of Labor rendered his DECISION AND ORDER in Riley's LWHCA worker's compensation claim. [R. 146-57]. The ALJ subsequently rendered a Supplemental Decision on September 2, 2004. [R. 159-60].

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[7] Appellees anticipate that Riley, as he repeatedly did at the trial court level, will argue in his reply brief that because the Fifth Circuit remanded this case to state court, his claims therefore will survive a Rule 56 summary judgment motion. It is important to note, however that the Fifth Circuit's decision dealt only with the issue of removal, specifically (1) whether "federal question" jurisdiction existed and (2) whether Ingalls was fraudulently joined so as to establish the existence of diversity jurisdiction. The Fifth Circuit's decision did not concern whether Riley's litany of claims held water under MISS. R. CIV. P. 56.

In the context of federal question jurisdiction the Fifth Circuit stated that "'the LHWCA is . . . nothing more than a statutory defense to a state-court cause of action - the classic circumstance of non-removability." [R. 53-54] (*citing Aaron v. Nat'l Fire Ins. Co. of Pittsburgh*, 876 F.2d 1157, 1166). The court did not hold that the Appellees could not assert the LHWCA preemption defense in Riley's state court action after remand nor did it state that the LHWCA did not preempt state law.

In the context of proving fraudulent joinder to establish diversity, the Fifth Circuit has repeatedly stated, and did so in this appeal, that it does not determine/decide "whether the plaintiff will actually or even probably prevail on the merits of the claim, but look only for a possibility that the plaintiff might do so." [R. 59]; *Guillory v. PPG Indus.*, 434 F.3d 303, 308-309 (5th Cir. 2005). The Fifth Circuit did not look to merits of Riley's claims but only looked to the allegations as stated in the complaint. [R. 56]. "[B]ecause the record in this case does not include evidence, we are limited to review the allegations in the complaint in determining whether any possibility exist for Riley to establish a claim against Ingalls in state court." [R. 56].

Unlike the Fifth Circuit, the Circuit Court of Jackson County's decision was on the merits and was not limited to the allegations in the complaint. Combining the exhibits presented to the trial court by Riley and the Appellees, the trial court reviewed over 160 pages of documentary evidence, including sworn testimony and statements of the major players of this action, i.e. Joe Riley, Dr. Wiggins and Hyland.

With the final adjudication of his LWHCA action, Riley and the Appellees thereafter began litigating the merits of this action. After discovery was concluded, the Appellees moved for summary judgment and requested the trial court to dismiss all of Riley's claims as a matter of law. [R. 231,521,534].

Oral argument was heard on September 22, 2006 and thereafter, on on April 3, 2007, the trial court entered its written MEMORANDUM DECISION granting the Appellees' Motion for Summary Judgment in its entirety. [R. 199-208]. The trial court's memorandum extensively examined and analyzed the facts and the applicable law and specifically found as follows:

> Riley's civil suit complains of the ex parte conference with his treating physician on June 7, 1999, as violating the medical privilege and giving rise to causes of action based on the following:
>
> 1. Intentional interference with contract;
> 2. Breach of fiduciary duty;
> 3. Intentional interference with prospective advantage;
> 4. Medical malpractice;
> 5. Fraud and misrepresentation;
> 6. Negligence;
> 7. Intentional infliction of emotional distress;
> 8. Intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege; and
> 9. Intentional interference with medical care by *ex parte* communication; and
> 10. Punitive damages.
>
> Riley alleges that as a result of Dr. Wiggins being the physician of choice for Ingalls in compensation cases it, through FARA, was able to exert undue influence upon Dr. Wiggins and obtain a causation opinion (on the question of Riley's back injury) favorable to it. Riley also alleges that the ex parte contacts with Dr. Wiggins were tortious and the result of misrepresentations made to Dr. Wiggins as to FARA's relation with Riley, asserted to be fiduciary in nature. These facts give rise to the various causes of action asserted by Riley.

> Riley claims that his waiver of the medical privilege was obtained when he was disabled and incompetent due to pain medication after his first surgery In support of this allegation Riley submits his personal affidavit stating he was on pain medication and was not advised that the waiver was a waiver but a document he had to sign to obtain medical treatment.
>
> On these facts the Court concludes that the Plaintiff [Riley] has failed to produce evidence sufficient to demonstrate a genuine issue of material facts and a prima [facie] cause of action against the Defendants [Appellants]. There is no evidence to support the element of malice necessary in several of the claims asserted.

[R. 202-03]. The trial court recognized that Riley's action involved the controversion of his LHWCA worker's compensation claim, a matter controlled by federal and not state law. [R.203]. Each of the nine causes of action and Riley's request for punitive damages were addressed and individually analyzed in the trial court's memorandum decision. On April 4, 2007, the trial court entered its FINAL JUDGMENT dismissing Riley's case. [R. 209].

Riley now appeals the trial court's decision.

C. STATEMENT OF THE FACTS

On October 16, 1997, Riley was involved in a maritime industrial accident while working for Ingalls. [R. 71 at ¶ VII]. Riley claimed to have suffered disabling injuries to his left foot, left ankle, and lumbar spine[8]. [R. 71]. Riley was taken to Singing River Hospital where on the following day, October 17, 1997, Dr. Charlton Barnes performed emergency surgery for a fracture to Riley's lower leg and ankle. [R. 314].

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[8] As the evidence will demonstrate below, at the time of his accident, Riley made no complaints about any injuries to his lumbar spine.

On October 21, 1997, and at **his own request**, Riley met with Caty Suthoff (hereinafter "Sutoff"), a claims adjuster for FARA. [R. 441]. At this meeting, Suthoff informed Riley that she was an employee for FARA, which was a representative of Ingalls, and would be interviewing him concerning his industrial injury. [R. 379]. Suthoff further informed Riley that she would be tape recording their conversation. [R. 379]. At this meeting Riley also was given for review and signature a one page document encompassing a "Medical Authorization," "Claim Information Release" and "Choice of Physician Form" (hereinafter "Medical Authorization"). [R. 385].

The Medical Authorization specifically stated:

> I, the undersigned, [Riley], do hereby voluntarily, specifically, and unconditionally authorize any physician, nurse, hospital or other medical provider, to furnish, discuss or confer with Ingalls Shipbuilding, Inc., its agents, attorneys, and/or representative, all records and information regarding my past or present physical or emotional condition and treatment rendered therefore.

[R. 385]. The Medical Authorization further provided the following language,

> [r]evocation of this document can only be made by myself and only through a written instrument signed by me and a representative of Ingalls Shipbuilding, Inc. in whose favor this medical release is granted.

[R. 385]. The only injury listed on the Medical Authorization, labeled as "Nature of Injury," was the "left ankle." [R. 385].

This standard twelve (12) point font Medical Authorization was signed by Riley and witnessed by Suthoff. This October 21, 1997 meeting between Suthoff and Riley was to initiate his LHWCA worker's compensation benefits from Ingalls due to the industrial injury.

Riley's complaint herein alleged that

> a purported "medical authorization" signed by the Plaintiff on or about October 21, 1997 was procured by direct contact by a representative of the Defendant, F.A. RICHARD & ASSOCIATES, INC., and at a time when the Plaintiff was disabled and incompetent to waive any medical privilege due to being under the effect of pain medication while in the hospital and being in great pain from his injury.
>
> . . . any such purported "medical authorization" was procured under duress and/or by adhesion and that its full contents and/or consequences were not disclosed; and even if they had been, plaintiff was not competent at that time to waive his medical privilege or give full and knowledgeable consent to allow ex-parte contacts with any treating physician.

[R. 73 at ¶¶ XIII and XIV]. Contrary to his allegations, Riley, a high-school graduate with some college education, was completely competent and mentally and physically capable of executing the Medical Authorization document.

At the LHWCA hearing, Riley testified to the following under oath:

> Q. Now going back to when you were in the hospital the first time following your accident on October 16, 1997, is it correct that a lady named Caty Suthoff came to see you on October 21, 1997, while you were in the hospital.
> A. Yes.
> Q. And that's four days after your ankle surgery?
> A. Yes.
> Q. And is it correct that Ms. Suthoff called you before she came out to ask permission to come see you in the hospital?
> A. I think I - you know, she might of did, I don't know.
> Q. You don't deny that she called and asked permission to come see you in the hospital do you?
> A. I really don't know, I might have called her and told – well **I did call her and told her, I called Workman's Comp. at West Bank and I told them that I was in the hospital, and that's what I did.**
> Q. Okay. And then after you made that telephone call to Workman's Comp. Caty Suthoff came to see you in the hospital on October 21, of 1997?
> A. Yes.

Q. And is it correct that at that time she took your recorded statement to find out about the details of your accident, and about your work and medical history?
A. Yes, she took a statement.
Q. And you gave her a recorded statement; is that correct?
A. I gave her a recorded statement.

. . .

Q. Isn't it correct that during that statement you told her that you understood the questions that she asked you, and that you gave her truthful answers to the questions asked?
A. I gave her the best answers of my ability at the time, yes.
Q. And those answers included that fact that you gave her you Social Security Number; is that correct?
A. Yes.
Q. You gave her your badge number?
A. Yes.
Q. You gave her your date of birth?
A. Yes.
Q. You gave her your department number?
A. Yes.
Q. You gave her your work history, where you worked?
A. Yes, I told what I could.
Q. You gave her your job title?
A. Yes.
Q. You told her you graduated from high school?
A. Yes.
Q. You told her you went to one year of trade school at East Central Junior College?
A. I think so.
Q. You gave her your home address?
A. I probably - - yes.
Q. And you gave her your telephone number.
A. Yes.
Q. And, is it also correct that at the time she took that statement you also signed a document, which is our Exhibit 8, in five different places, which included a Medical Authorization, a Claim Information Release, and a Choice of Physician Form saying that you wanted to be treated by Dr. Barnes or Dr. Cope?
A. Yes.
Q. And that's your signature on Exhibit 5 [sic], isn't it?
A. Yes, that was for medical treatment.

[R. 441-444] (emphasis added).

This uncontradicted evidence revealed that it was Riley who contacted his workers' compensation carrier to initiate his claim and it was Riley who gave Sutoff permission to see him in the hospital. Further it is evident that Riley understood what was being asked of him and what he was signing. To this day, neither Riley nor his past or present counsel have ever revoked the Medical Authorization.

Riley was released from the hospital on October 30, 1997. [R. 314]. After his release, Dr. Christopher Wiggins took over Riley's post surgery orthopedic treatment. [R. 313].[9] Dr. Wiggins' treatment of Riley began on November 3, 1997. [R. 313-314].

On September 9, 1998, almost one year after his October 1997 LHWCA injury, Riley hired the law firm of Byrd & Associates to represent him "in connection with his workers' compensation case." [R. 505]. Riley's lawyers corresponded with and advised FARA of their representation of Riley and requested that FARA cease contact with their client. Nothing in this three (3) sentence letter made any reference to the October 21, 1997 Medical Authorization or a request that it be revoked. Moreover, this letter made no demand that FARA cease or have no *ex parte* contact with Riley's doctors during his ongoing workers' compensation case.

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[9] Dr. Wiggins previously treated Riley in the late 1980's and early 1990's for another industrial injury to his finger. [R. 311]. At the time of Riley's emergency surgery, Dr. Wiggins' partner, Dr. Barnes, was the physician on call at Singing River Hospital. Because he was the physician on call, Dr. Barnes, instead of Dr. Wiggins, performed the surgery on Riley's ankle. [R. 313].

From the date of Riley's industrial injury until final adjudication of his LHWCA claim in 2004, Ingalls complied with 33 U.S.C. § 914[10] regarding payment of compensation. From 1997 through 1999, Riley was treated by and had another ankle surgery performed by Dr. Wiggins. At his LHWCA hearing, Riley admitted that at all times Ingalls provided payment for all of his medical services/bills. [R. 444]. During this time period, Dr. Wiggins, consistent with the requirements of 33 U.S.C. § 907 of the LHWCA, always provided FARA a copy of his medical reports regarding Riley's treatment.

On March 9, 1999, almost a year and a half after the October 16, 1997 industrial accident, Riley first complained to Dr. Wiggins that he was having problems/pains with his back. [R. 332-334, 503-504]. Dr. Wiggins performed x-rays on Riley's back, which indicated spondylosis or spondylolisthesis[11] of Riley's L4. [R. 336, 503-04]. In his March 9, 1999 note, Dr. Wiggins documented that Riley's severe gait disturbance caused by his industrial fall injury and subsequent surgery were both reasonable causes to the increasing back pain from his pre-existing, but previously asymptomatic spondylosis. [R. 503-04]. FARA was provided with a copy of Dr. Wiggins March 9, 1999 report. This March 9, 1999 report was FARA's (and Dr. Wiggins') first knowledge of any allegation of injury to Riley's back as a result of his work related injury.

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[10] 33 U.S.C. § 914 addresses an employer's duties to compensate its injured employee. § 914 (a), entitled "Manner of payment" states

> [c]ompensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

[11] Spondylolysis is a crack in the vertebra in the lower back. Spondylolisthesis is a crack with slippage where the vertebra slides forward as result of the crack. [R. 337].

On March 29, 1999, Riley's counsel, Byrd & Associates, mistakenly filed an application for Lump Sum Payment with the Mississippi Workers' Compensation Commission ("MWCC"). [R. 506-07]. On April 13, 1999, Ross McBryde, the Claims Supervisor for FARA informed Riley's counsel that the MWCC did not have jurisdiction over Riley's claim and that the claim was being handled under the Federal LHWCA. [R. 508]. On May 25, 1999, Byrd & Associates ended their legal representation of Riley. [R. 509].

After FARA was informed of Riley's new back injury, defendant Hyland, a medical case manager for FARA, was assigned to Riley's worker's compensation claim. Hyland is a registered nurse[12]; however, she never rendered any medical treatment to Riley. At no time did she have a "nurse-patient" relationship or otherwise with Riley. [R. 512]. She was employed by FARA for claim consulting with physicians regarding medical injury causation, diagnosis, prognosis, treatment, etc. She was at all times a nurse case manager for FARA.

On June 7, 1999, as part of her medical case management duties, Hyland met and consulted with Dr. Wiggins regarding Riley's "new" back injury. Hyland played a neutral role as medical case manager relating to Riley's LHWCA claim.

Regarding his consultation with Hyland, Dr. Wiggins testified as follows:

> they're [physician/nurse case manager meetings] not uncommon in workers' compensation that I'll be asked to meet or talk or correspond or one way or the other interface with the managed care

[12] Nurse case managers are routinely assigned to communicate with the claimant's physicians regarding the claimant's medical diagnosis, prognosis and treatment. Because the nurse case manager has a better understanding of medical terms and can communicate easier with the treating physicians, nurse case managers are usually preferred over a typical "adjuster" in dealing with the medical aspect of a claimant's LHWCA claim. Additionally nurse case managers assist the adjusters in promptly relaying the medical information directly from the physician to the adjuster, instead of having the adjuster wait possibly weeks for the medical reports from the treating physicians.

> authority. And it's also not uncommon in other aspects of managed care.

[R. 345].

Dr. Wiggins testified that he believed Hyland to be a representative for "FARA, which is the workers' compensation carrier for Ingalls" and not Riley's nurse representative. [R. 346]. Dr. Wiggins' testimony negated any theory of fraud and/or misrepresentation[13] as alleged by Riley that Hyland

> **represented herself** [to Dr. Wiggins] **as the plaintiff's medical case manager, a person who owes a duty to the injured worker to assist him in his obtaining appropriate medical care** while in fact, Highland [sic] was acting entirely in the interest of F.A. Richard & Associates, Inc. and Ingalls Shipbuilding, Inc. and in opposition to the interest of the plaintiff.

[R. 71-72] (emphasis added).

At this June 7, 1999 meeting, Dr. Wiggins reversed his prior opinions as to the causation of Riley's back injuries. On December 8, 1999, Dr. Wiggins opined that

> Mr. Riley's spondylolisthesis was pre-existing his industrial injury to his ankle and was in no way related or aggravated by his industrial injury.
>
> The problems he has with his back are natural progression of the congenital/developmental spondylolisthesis defect.

[R. 513-14].

On July 7, 1999, Riley hired his current counsel, Robert E. O'Dell, to represent him in his LHWCA claim. [R. 510-11].

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[13] As stated above at fn. 5, Riley has abandoned his fraud and misrepresentation claims.

On August 30, 1999, Riley's new counsel filed an Employee's Claim for Compensation with the U.S. Department of Labor under the LHWCA. [R. 515-17]. On September 3, 1999, FARA filed its Notice of Controversion to Rights of Compensation with the U.S. Department of Labor under the LHWCA. [R. 518].

On June 7, 2000, Riley filed the subject action in the Circuit Court of Jackson County, Mississippi which was ultimately stayed pending the final adjudication of Riley's LHWCA claim. During the August 8, 2000 deposition of Dr. Wiggins in Riley's LHWCA action, Dr. Wiggins "**re-reversed**"[14] his opinion regarding the "causation/aggravation" of Riley's back injury.

> I have changed my opinion on that. Specifically, it's now my opinion that his [Riley's] preexisting spondylolisthesis was aggravated as a result of the accident in question.

[R.365].

Dr. Wiggins' explained his contradictory opinions at his deposition.

> A. I think your asking me why I said one thing at one point and something else in another, which is a reasonable question and one that I will probably have difficulty answering. There's obviously no way to know with 100 percent absolute certainty, and I suspect when I wrote this letter [Dec. 8, 1999 letter] to Ms. Hale, I had not been - - made myself fully aware of everything that was in the record. And there's no way of knowing with absolute certainty, but I think, all things considered, at this point in time, I think it's reasonable to conclude that his underlying spondylolisthesis was aggravated by the fall, and if not the fall, certainly aggravated by his limp.

[R. 352].

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[14] The term "re-reversed" was used by the Fifth Circuit in Riley's Appeal. [R. 47 at fn.1].

Q. And the fact that you may have met with whatever this lady's name [Hyland] was that Mr. O'Dell pointed out, that wasn't the basis of a change of any opinion you had in this case, was it?

. . .

MR. FRANKE:

Q. Doctor, it's not a question of whether – he's asking you – just about all his questions were about changes, and he's put in evidence these so called letters, so I correspondingly have the same right or obligation, really, to ask you questions about why these changes occurred. And if doctors do not normally change their opinions on the bases of causation, diagnosis, extent of disability when they receive either faulty or inaccurate information, is that not a normal thing?

DR. WIGGINS:

A. This is true, and **I do change my opinion upon occasion as I review the records and rethink the case.** And this obviously is not a straight-forward, easy clear-cut situation, and **one of the factors here that did not make it clear-cut was the patient did not report back pain until some years after the initial injury. That was probably the single complicating factor in decision about my medical opinion here** [June 7, 1999 and December 8, 1999 medical opinions] **and causality.** And so I do apologize for having switched my opinion some, but it's a complex case for that reason.

[R. 358-60] (emphasis added). Contrary to Riley's allegations, Dr. Wiggins further testified that he had never been influenced by Ingalls or any third parties regarding his medical opinions in a given matter.

Q. In those 22 years of examining patients, have you ever treated any Ingalls patients who have been injured on the job at Ingalls where that employer has attempted to influence or pressure you to render any medical opinion one way or the other?

A. No, sir. **I've never had any pressure or influence applied by the employer or their personnel.** If fact, when I get letters, reports and questions, they're particularly phrased to be, in my opinion, to not influence the opinion, other that to say that, you know, we as an adjuster look at a situation. There's Factor A, there's Factor B. It seems to us the proper conclusion is C. Do you agree or disagree with that. If I disagree, **I've never had any pressures applied**.

[R. 369] (emphasis added).

As seen above, Riley's claims involve events, some of which, occurred more than 10 years ago. The following time line offers this Court a quick and concise summary of the facts and sequence of events relevant to Riley's action.

October 16, 1997	Riley's suffers work related injury while on the job at Ingalls.
October 17, 1997	Emergency ankle surgery performed.
October 21, 1997	At his request Sutoff interviews Riley in regard to his work injury.
	Riley signs Medical Authorization.
September 9, 1998	Correspondence from Byrd and Associates to FARA advising of representation of Joe Riley and requests that FARA cease contact with Joe Riley. No request for revocation of the Medical Authorization is made to FARA.
March 9, 1999	Riley makes his first back pain complaint to Dr. Wiggins.
	X-Ray reveals spondylolisthesis.
	Dr. Wiggins' March 9, 1999 medical report diagnosing Riley with spondylolisthesis is sent to FARA.
	Dr. Wiggins' report is FARA's first notice of any type of back injury relating to Riley's October 16, 1997 industrial injury.

March 29, 1999	Byrd and Associates files application for Lump Sum Payment with the Mississippi Workers' Compensation Commission.
April 13, 1999	Correspondence from FARA informing Byrd and Associates that Riley's claims for worker's compensation benefits were covered under federal, not Mississippi, workers' compensation claim law and that Riley's claims were being administered under the Longshore and Harbor Workers' Compensation Act ("LHWCA").
May 25, 1999	Byrd and Associates withdraw as Riley's counsel. No application for benefits under the LHWCA was ever filed on Riley's behalf.
June 7, 1999	Hyland meet with Dr. Wiggins regarding Riley's previously unknown back injuries.
July 7, 1999	Riley retains his current counsel, Robert O'Dell.
August 30, 1999	Riley files an Employee's Claim for Compensation with the U.S. Department of Labor under the LHWCA.
December 8, 1999	In a letter Dr. Wiggins opines that Riley's spondylolisthesis was pre-existing and not related or aggravated by his industrial injury.
June 7, 2000	Riley sues Ingalls, FARA and Hyland in tort damages he allegedly claims to have suffered from Hyland's meeting with Dr. Wiggins.
August 8, 2000	In his deposition, Dr. Wiggins "re-reverses" his opinion as to causation and testifies that Riley's preexisting spondylolisthesis was aggravated as a result of his work related injury.

III. SUMMARY OF THE ARGUMENT

Riley's entire appeal rests on a theory of recovery that does not exist in law or in fact. All of Riley's alleged causes of action revolve around the Appellees' [Hyland's] contact with Riley's treating physician while investigating his newly claimed back injury for which he sought benefits from the Appellees [Ingalls] under the LHWCA.

To promote efficiency in processing maritime workers' compensation claims, there is no physician-patient privilege under the LHWCA. Under federal law, FARA and Hyland were entitled to have full access to Riley's physicians and medical information. Additionally, Riley authorized access to his medical information and physicians by executing a valid medical release.

The crux of Riley's appeal is whether a breach of the physician-patient privilege in and of itself creates a right to sue in tort. (*See* Riley's Brief at p. 21). The sole issue of concern in this appeal is: **Whether, in the context of the LHWCA, *ex parte* communications between the employer/insurance carrier and a treating physician, create a cause of action in tort under Mississippi or state law against the employer/insurance carrier for violation of the physician patient-privilege?** Under the LHWCA, the answer to this question is NO. Even if this Court were applying Mississippi law, the answer would still be NO.

The LHWCA is a federal act. The manner in which LHWCA claims are investigated, evaluated and adjudicated is exclusively controlled by the federal law. Since all of Riley's claims arise from the manner in which the Appellees investigated and evaluated his LHWCA injury, federal law and federal evidentiary privileges control.

Riley's efforts to have this Court judicially create a "new" cause of action under Mississippi law is nothing more than a thinly veiled attempt to circumvent the exclusive remedy

provision of the LHWCA. The LHWCA is a comprehensive statutory scheme enacted by Congress to provide a uniform federal remedy for workers injured in maritime industries. Congress has not seen fit, in more than 81 years, to repeal the bargain struck by labor and management in the LHWCA and neither should this Court.

IV. ARGUMENT

A. Standard of Review

This Court reviews *de novo* a trial court's grant of a motion for summary judgment. *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004). The standard by which this Court reviews an appeal of summary judgment is the same standard employed by the trial court under MISS. R. CIV. P. 56 (c). *Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 136 (Miss. 1998). Pursuant to MISS. R. CIV. P. 56 (c), summary judgment is appropriate,"if the pleadings, depositions and answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law." The presence of a hundred contested issues of fact will not prevent summary judgment where there is no genuine dispute regarding material issues of fact. *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss. 1985). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* A fact is "material" if it "tends to resolve any of the issues properly raised by the parties," *Morgan v. City of Ruleville*, 627 So.2d 275, 277 (Miss. 1993), and a dispute over a material fact is "genuine" only if the evidence is such that "reasonable minds in a jury could differ on such an issue." *Strantz v. Pinion*, 652 So.2d 738, 741 (Miss. 1995).

If the moving party's evidence satisfies the initial burden, the adverse party must produce "significant probative evidence showing that there are indeed genuine issues for trial." *Price v.*

Purdue Pharma Co., 920 So. 2d 479, 485 (Miss. 2006) (emphasis added). The party opposing the motion must be diligent and may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing there are genuine issues for trial. *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997). If the nonmoving party fails to set forth specific facts to rebut the showing that no genuine issues of material fact exist, summary judgment should be entered in the moving party's favor. *Coleman Powermate, Inc. v. Rheem Mfg. Co.*, 880 So.2d 329 (Miss. 2004).

B. The Trial Court Did Not Err in Granting Summary Judgment as to Riley's Mississippi State Law Tort Claims and Request for Punitive Damages

Riley claims the trial court erred in granting summary judgment as to the following causes of action: (1) intentional interference with contract; (2) intentional interference with prospective advantage; (3) intentional infliction of emotional distress; (4) intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege; and (5) intentional interference with medical care by *ex parte* communication[15]. Riley further claims that the trial court also erred in denying, via summary judgment, his request for punitive damages. Riley's argument however does not concern the merits of these specific torts (which the trial court thoroughly analyzed and applied to the facts of Riley's claims and concluded failed as a matter of law), but is a summary of the physician-patient privilege generally.

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[15] Riley admits that his claims of (1) intentional interference with contract, (2) intentional interference with prospective advantage, (3) intentional interference with medical care and/or breach of confidentiality of doctor-patient privilege, and (4) intentional interference with medical care by *ex parte* communication are essentially the same claim of "intentional/tortious interference with contract." *See Lamar Adver. Co. v. Cont'l Cas. Co.*, 396 F.3d 654 n. 5 (5th Cir. 2005).

Riley's brief cites to a litany of non-binding case law from foreign jurisdictions.[16] These cases, however, do not address an alleged violation of a physician-patient privilege where the patient seeks damages in tort against third parties, but discuss discovery and evidentiary privileges in general. In fact, not one of the authorities cited in Riley's entire brief concerns LHWCA claims - - which is the very subject of this appeal. As he previously did throughout the underlying litigation, Riley again erroneously equates adjusting and controverting a claim for LHWCA benefits to that of litigating a claim for damages in a civil action. As this Court is aware, compensation claims and civil litigation are vastly different.

1. Federal Law under the LHWCA Governs all Actions Taken by the Appellees in Investigating and Controverting Riley's Claim for LHWCA Benefits

All of Riley's claims center on the Appellees' conduct in adjusting and controverting his claim for LHWCA benefits. His tort claims necessarily presuppose an obligation to pay LHWCA benefits and hence necessarily arise out of his maritime on the job injury. *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 811-812 (5th Cir. 1988). The LHWCA is a federal act which provides specific federal statutory remedies that preempt state law claims. *Id.* The manner in

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[16] It is worth noting that out of the **24** cases cited in Riley's Brief relating to the physician-patient privilege, **21** are foreign non-binding jurisdiction decisions, two are Mississippi state cases, and one is a United States Supreme Court decision. As will be demonstrated below, the vast majority of these decisions are clearly inapposite, distinguishable, and/or irrelevant to the current issues on appeal. The two Mississippi state court decisions do not support his appeal and the U.S. Supreme Court decision of *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977) is in fact contrary to Riley's claims. (The *Whalen* court specifically held there to be no physician-patient privilege under federal law). (*See* Riley Brief at p. 11 confirming this holding). Moreover, several of the cases cited by Riley at pp. 13-14 specifically allow *ex parte* contact with physicians even when a physician-patient privilege does exist. *See Doe v. Eli Lilly & Co.*, 99 F.R.D. 126 (D.D.C. 1983); *Stempler v. Speidell*, 100 N.J. 368 (N.J. 1985); *Arctic Motor Freight v. Stover*, 571 P.2d 1006 (Alaska 1977); *see also Brandt v. Pelican*, 856 S.W.2d 658 (Mo. 1993) (*ex parte* contact allowed where no physician-patient privilege).

which the LHWCA claims are investigated, evaluated and adjudicated is exclusively controlled by the federal Act. *Id.*

The purpose of the LHWCA "was to provide an **expedited procedure** to enable the covered employees to recover adequate compensation with **minimum legal entanglements**." *Atkinson v. Gates, McDonald & Co.*, 665 F. Supp. 516, 520 (S.D. Miss. 1987) (Emphasis added). The U.S. Supreme Court in *Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, stated the following:

> . . . the Act [LHWCA] was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. **Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.**

461 U.S. 624, 636 (1983) (emphasis added). In the case *sub judice*, a "prompt" investigation is exactly what occurred. As soon as FARA became aware of Riley's previously unknown back injury it proceeded to investigate the claimed injury in conformance with its duties under the LHWCA.

This state court action regarding the investigation and controversion of Riley's LHWCA claim is nothing more than a "back door" attempt to circumvent his exclusive procedural remedies under the LHWCA.

2. No Physician-Patient Privilege is Afforded under the LHWCA

The evidentiary privileges applicable to federal question suits are afforded not by state law but by federal law. *See* FED. R. EVID. 501, Sen. Rep. No. 93-1277, 93d Cong., 2d Sess.;[17] *see also Whalen*, 429 U.S. 589, 602, n.28. ("The physician-patient evidentiary privilege is unknown to the common law."); *Gilbreath v. Guadalupe Hosp. Found.*, 5 F.3d 785, 791 (5th Cir. 1993) ("[T]here is no physician-patient privilege under federal law."). Title 33 U.S.C. § 923 expressly excludes strict compliance with rules of evidence, and procedure:

> § 923. Procedure before deputy commissioner or Board
>
> (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board **shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act**; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

(Emphasis added). Larson's Workers' Compensation Law, a well known and authoritative treatise, comments on the issue of the physician-patient privilege in the workers' compensation arena and teaches that the public policy rule of doctor-patient privilege is contrary to the policies of workers' compensation as a whole. 7-127 LARSON'S WORKERS' COMPENSATION LAW § 127.11 ("In

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[17] The Senate Report provides:

> The committee has . . . adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and **Federal question civil cases, federally evolved rules on privilege should apply** since it is Federal policy which is being enforced. [It is also intended that the **Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.**]

Sen. Rep. No. 93-1277, 93d Cong., 2d Sess. (emphasis added).

particular, the **physician-patient privilege not only is of doubtful utility**, but because of the high proportion of cases in which declarations to physicians are indispensable links in the testimony, **it is capable of working severe injustice.**") (Emphasis added).

The most compelling evidence which confirms the non-existence of a physician-patient privilege in the context of LHWCA claims is found in the Health Insurance Portability and Accountability Act ("HIPPA"). When it enacted HIPPA in 1996, Congress excluded LHWCA claims from the Act. 65 FR 82462. Congress, commenting specifically on 45 CFR 164.512(l) regarding the scope of HIPPA's protections against disclosure, stated:

> In the final rule, we include a new provision in this section that clarifies the ability of covered entities to disclose protected health information **without authorization** to comply with workers' compensation and similar programs established by law that provide benefits for work-related illnesses or injuries without regard to fault. Although most disclosures for workers' compensation would be permissible under other provisions of this rule, particularly the provisions that permit disclosures for payment and as required by law, we are aware of the significant variability among workers' compensation and similar laws, and include this provision to ensure that existing workers' compensation systems are not disrupted by this rule. We note that the minimum necessary standard applies to disclosures under this paragraph.
>
> **Under this provision, a covered entity may disclose protected health information regarding an individual to a party responsible for payment of workers' compensation benefits to the individual, and to an agency responsible for administering and/or adjudicating the individual's claim for workers' compensation benefits**. For purposes of this paragraph, workers' compensation benefits include benefits under programs such as the Black Lung Benefits Act, the federal Employees' Compensation Act, **the Longshore and Harbor Workers' Compensation Act**, and the Energy Employees' Occupational Illness Compensation Program Act.

65 FR 82462, "Section 164.512(l)--Disclosures For Workers' Compensation" (emphasis added).

Despite binding case authority and express federal statutory law holding to the contrary, Riley contends that the physician-patient evidentiary privilege found in MISS. CODE ANN. § 13-1-21 and MISS. R. EVID. 503 should apply in his federal LHWCA action.

The Fifth Circuit, however, in *Gilbreath v. Guadalupe Hosp.*, *supra*, entertained and specifically rejected Riley's argument for applying a forum state's physician-patient privilege in a federal question action. In rejecting the appellant's request to apply the Texas' physician-patient privilege, the *Gilbreath* court stated as follows:

> The district court also correctly held that Gilbreath **cannot block the release of her medical records by invoking the physician-patient privilege recognized under Texas law. This is a federal case** in which the MSPB is seeking to enforce subpoenas issued under federal statutory authority. **Gilbreath's right to assert a privilege is therefore dictated by federal law.**

5 F.3d at 791 (emphasis added).

Thus, Riley has no legally cognizable "physician-patient privilege" under federal law which governs this case.

3. The Physician-Patient Privilege under Mississippi Law

Even if Mississippi's physician-patient privilege evidentiary statute (MISS. CODE ANN. §13-1-21) or evidentiary rule (MISS. R. EVID. 503) were applicable to Riley's claims, they are rules of evidence only, for which the remedy for violation is exclusion of the evidence, not damages in tort. Riley's tort claims, all which arise out of the investigation of his claim for worker's compensation benefits, find no support under Mississippi's workers' compensation laws even if such laws were relevant.

Citing to MISS. CODE ANN. § 71-3-55, the Mississippi Court of Appeals held that "[p]roceedings before the Mississippi Workers' Compensation Commission are not judicial proceedings in which evidence may only be admitted in strict accordance with the applicable rules of evidence." *Nosser v. First Am. Credit Corp.*, 814 So. 2d 178, 180 (Miss. Ct. App. 2002). Section § 71-3-15(6) of the Mississippi Workers' Compensation Action ("MWCA") provides the following:

> Medical and surgical treatment as provided in this section shall not be deemed to be privileged insofar as carrying out the provisions of this chapter is concerned.

(Emphasis added). This Court has stated that § 71-3-15(6) does not constitute a blanket waiver of the privilege. *Cooper's, Inc. of Mississippi v. Long*, 224 So. 2d 866 (Miss. 1969). The *Cooper's* court however held that the statute did remove the privilege from medical treatment related to the industrial injury. *Id.*; *Nosser*, 814 So. 2d at 180. In distinguishing the application of the physician-patient privilege in civil litigation from the privilege in a workers' compensation claim, the court in *Nosser* ruled that medical information related to the work injury is not privileged while seeking treatment and benefits for the injury. *Nosser*, 814 So. 2d at 181.

In the case *sub judice*, the medical conditions discussed by Hyland and Dr. Wiggins related directly to the industrial injuries for which Riley was being treated, at Ingalls' expense, and for which he was seeking benefits from Ingalls. Hyland did not inquire nor did she receive from Dr. Wiggins any medical information not relevant to his industrial injuries. Because the *ex parte* communication involved only Riley's medical conditions for which he sought workers' compensation benefits, such information is therefore not protected by the Mississippi's physician-patient privilege.

Even if Mississippi's physician-patient privilege applied to Riley's LHWCA claim[18], Riley has not cited, and the Appellees have found, no authority allowing a patient to sue a third party in tort for violating the privilege. The majority of cases cited and relied on by Riley address the physician-patient privilege in the context of discovery and evidentiary privileges and do not concern civil tort actions based on the violation of the privilege.[19]

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[18] Waiver of the physician-patient privilege will be addressed below.

[19] The following cases (presented in the order they appear in Riley's Brief beginning at p. 14) concern discovery, i.e., the **method of how to obtain medical information**. Riley's Brief inappropriately implies that these cases are tort actions seeking damages for violations of the physician-patient privilege. A review of the cases below readily shows that they merely involve trial court's rulings on discovery motions or are appeals regarding discovery procedures at the trial court level and/or whether evidence should have be excluded because of the physician-patient privilege.
(1) *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006) (Appeal from discovery order in a medical malpractice action which permitted *ex parte* communications between plaintiff's treating physicians);
(2) *Wenninger v. Muesing*, 240 N.W.2d 333 (Minn. 1976) (Appeal from discovery order in medical malpractice action which permitted *ex parte* communications);
(3) *Anker v. Brodnitz*, 413 N.Y.S. 2d 582, (N.Y. Spec. Term, 1979) (Trial court decision in medical malpractice action regarding discovery and *ex parte* communications);
(4) *Homer v. Rowan Co., Inc.*, 153 F.R.D. 597 (Where Texas, not federal, law controlled, U.S. District Court denied a motion seeking discovery sanctions for *ex parte* communications with treating physicians);
(5) *Neubeck v. Lundquist*, 186 F.R.D. 249, 251 (D. Me. 1999) (Where Maine, not federal, law controlled, U.S. District Court ordered that no future *ex parte* communications during litigation. In regard to the previous *ex parte* contacts, the court specifically stated "[d]efense counsel has not engaged in any sanctionable conduct with respect to contact with Dr. Keith Buzzell.") (emphasis added);
(6) *Benally v. United States*, 216 F.R.D. 478 (D. Ariz. 2003) (Where Arizona, not federal, law controlled, U.S. District Court denied defendant's motion *in limine* requesting *ex parte* contact with plaintiff's physicians);
(7) *Neal v. Boulder*, 142 F.R.D. 325 (D. Colo. 1992) (Where Colorado, not federal, law controlled, U.S. District Court, denied defendant's motion to compel seeking *ex parte* contact with plaintiff's physicians);
(8) *Ritter v. Rush-Presbyterian-St. Luke's Medical Center*, 532 N.E.2d 327, 333 (Ill. App. Ct. 1988) (Denied plaintiff's request for monetary sanctions against defendant for communicating ex parte with plaintiff's physicians - ". . . we cannot award plaintiff an element of her damages as a penalty against Rush for its violation of the subject discovery order.);

(continued . . .)

This Court in *Franklin Collection Serv. v. Kyle*, 955 So. 2d 284 (Miss. 2007) recently discussed MISS. CODE ANN. § 13-1-21 and MISS. R. EVID. § 503. In *Kyle*, a collection agency acting on behalf of a medical clinic filed suit on an open account to collect an unpaid medical bill for services rendered to Kyle. *Id.* at 286. The collection agency attached to its complaint an itemized statement referencing not only the amounts owed for the medical services, but also the specific types of medical procedures performed. *Id.* 287. Kyle thereafter answered the complaint and counter-claimed for damages alleging violation of the physician-patient privilege and invasion of privacy. *Id.* Despite the defendant's publication of Kyle's medical procedures, this Court found no violation of the physician-patient privilege[20].

In a Special Concurrence, Justice Randolph noted that MISS. CODE ANN. § 13-1-21 did not apply to a third party but to the physician or other provider covered under the statute. *Id.* at 294

(. . . continued)
(9) Coutee v. Global Marine Drilling Co., 895 So. 2d 631 (La. Ct. App. 2005) (Holding that evidence of *ex parte* communication which was only revealed to plaintiff on the day of trial should have been excluded from evidence), *reversed* and trial court decision in favor of defendant re-instated by Supreme Court of Louisiana in *Coutee v. Global Marine Drilling Co.*, 924 So. 2d 112 (La. 2006);
(10) Linton v. Great Falls, 749 P.2d 55 (Mont. 1988) (Applying Montana's physician-patient privilege in a Montana workers' compensation action, Supreme Court overruled discovery order allowing *ex parte* communications during discovery);
(11) McCauley v. Purdue Pharma, L.P., 224 F. Supp. 2d 1066 (D. Va. 2002) (In diversity action applying Virginia law, U.S. District Court denied motion to conduct *ex parte* interviews with physicians);
(12) Loudon v. Mhyre, 756 P.2d 138 (Wash. 1988) (Discovery order prohibiting ex parte contact in "personal injury litigation"). ** *But see Holbrook v. Weyerhaeuser Co.*, 822 P.2d 271 (Wash. 1992) cited at P. 30 below wherein the Washington Supreme Court declined extending to worker's compensation proceedings the *Loudon* rule that prohibited *ex parte* contact in civil litigation.

[20] This Court did not hold that no claims whatsoever existed against the collection agency, but that no claim existed for a violation of the physician-patient privilege. This Court concluded that Kyle's invasion of privacy claim survived summary judgment - "by the barest thread" - based on the publication of such private information.

(J. Randolph, Special Concurrence). In regard to MISS. R. Evid. 503, Justice Randolph further held that the

> Mississippi Rules of Evidence were adopted to govern evidentiary rules, **not to create causes of action**. . . . The violation of a rule of evidence **does not, standing alone, create a cause of action**. Only when the act or conduct involved in failing to adhere to a rule of evidence breaches an independent, legally-protected interest or right, may a cause of action occur or accrue.

Id. (Emphasis added).

If the actions in *Kyle*, which clearly concerned Kyle's expectation of privacy, were held not to be in violation of Mississippi's physician patient-privilege, it is inconceivable how the actions of the Appellees herein violated the privilege where no expectation of privacy existed. The *ex parte* conference between Hyland and Dr. Wiggins concerned medical opinions directly related to Riley's treatment under the LHWCA. The Appellees did not publish this information and Riley has NEVER alleged that Appellees violated any privacy interest he may have had.

4. *Ex Parte* Communications: Civil Litigation vs. Workers' Compensation

As stated above, Mississippi's physician-patient privilege is an evidentiary privilege, a violation of which constitutes exclusion of evidence in a court proceeding, but does not constitute an independent tort. Riley's counsel in fact admitted that there is no Mississippi authority that allows a party to sue in tort for an alleged violation of the physician-patient privilege.

> BY THE COURT: Mr. O'Dell is there a Mississippi case that allowed a cause of action for disclosure of confidential - - I mean, in this scenario? That you can sue somebody who gets information from your doctor?
>
> BY MR. O'DELL: Ex parte communications? There is Scott vs. Flynt, which is in the context of an evidentiary - -
>
> BY THE COURT: Other than Scott vs. Flynt, which is the context of - - you know, the parameters of that privilege and how

> we're going to handle that type of thing. But as a cause of action that - - you know, I can sue somebody for talking to my doctor. I can sue them for doing that.
>
> MR. O'DELL: . . . the short answer is, of course, not to my knowledge. There is no Mississippi case that deals specifically with the issues presented in this case.
>
> . . .

[R.25]

> BY MR. O'DELL: . . . we have only Scott v. Flynt to go by as far as whether Mississippi recognizes an independent tort for intentional interference with the - - .
>
> BY THE COURT: And there is not a word about that in Scott v. Flynt.

[R. 50].

The Appellees have found no Mississippi authority that holds a physician civilly liable in tort for violating MISS. R. EVID. 503 and/or MISS. CODE ANN. § 13-1-21, much less a third party for merely requesting medical information. As he did unsuccessfully at the trial court level, Riley again relies on *Scott v. Flynt*. *Scott* however does not support Riley's claims but in fact makes clear that courts can not prohibit *ex parte* communications between a physician and third party. This Court however stated that should the third party attempt to utilize, in a court proceeding, any information obtained from such *ex parte* contact, the trial court can sanction the conduct by excluding from evidence any information obtained therefrom.

This Court in *Scott*[21] held that

> [t]he **evidentiary prohibition** against *ex parte* contacts by the opposing party presumably **can not prevent a person, i.e. a**

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[21]*Scott* did not involve a claim for workers' compensation, but medical malpractice, therefore the procedural rules and rules of evidence were not "relaxed" as they would be in a claim for workers' compensation under the MWCA.

> **physician of the plaintiff, from physically speaking** *ex parte*. However, the rule against such **will be used to prevent the admissibility of any evidence gathered** *ex parte* just as in *Horner v. Rowan* [153 F.R.D. 597 (S.D. Tex. 1994)] and *Karsten v. McCray* [509 N.E.2d 1376 (Ill. App. Ct. 1987)].
>
> . . . The question of *ex parte* contacts and the waiver of a privilege **only come into play during a court proceeding**. Therefore, **our rules are not applicable** and can neither allow **nor prohibit a defendant from speaking** *ex parte* **with the plaintiff's physician**. We simply note with caution that those who violate these rules do so at their own risk.

704 So. 2d 998, 1006 (Miss. 1996) (emphasis added). The Court further held that "[i]n the event a physician speaks, then the **only rules applicable** at that point **in the absence of a court proceeding** are his [physician's] **professional ethical codes concerning confidentiality**." *Id.* (Emphasis added). These specific findings in *Scott* make clear that even if the physician-patient privilege was violated through *ex parte* communications the only remedy is exclusion of that evidence in the subject court proceeding.

Moreover, the Mississippi Worker's Compensation Commission addressed *ex parte* communications in *Hinson v. Mississippi River Corp., et al.*, MWCC No. 94-19422-F-4717. (*See* Appendix). Over his objections, the carrier initiated *ex parte* contact with Hinson's treating physician. *Id.* at 2. Based on the physician's opinion that Hinson could return to light duty work, the carrier allegedly ceased paying benefits for temporary total disability. *Id.* Hinson thereafter filed a petition to controvert with the MWCC. *Id.* Thoroughly analyzing this Court's decision in *Scott*, the Full Commission held that *ex parte* contact with a physician after formal litigation has

commenced (i.e., filing a petition to controvert) is prohibited without consent, but *ex parte* contact occurring before controversion is allowed. *Id.* at p. 12-14[22].

In Riley's case, the facts clearly show that Hyland's meeting with Dr. Wiggins took place prior to controversion of his LHWCA claim. *Scott* and *Hinson* both make clear that the *ex parte* contact at issue was not prohibited in the Mississippi civil litigation or workers' compensation context. Accordingly, Riley would have no ground to assert an evidentiary exclusion, much less a cause of action in tort based on such *ex parte* contact.

Since Riley concedes that Mississippi law does not create a right to sue in tort for a violation of the physician-patient privilege by *ex parte* contact, he invites this Court to create such a cause of action. As stated above at footnote 18 the vast majority of cases cited by Riley have nothing whatsoever to do with this issue. Riley further relies on an American Law Reports article in support of his claim. The specific ALR article which he repeatedly cites does not discuss or even make reference to the right a patient might have to sue a third party for having an *ex parte* communication with his/her physician. Moreover, this article does not mention tort liability against an employer/insurer in investigating, *via ex parte* communication, a work related injury.

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[22] The Full Commission stated the following:

> The arguments for and against non-consensual ex parte contact . . . center around the applicability and the extent of the patient-physician privilege in workers' compensation claims. It is to be remembered, however, that this privilege is first and foremost an evidentiary privilege which has no force or application outside the context of hearing ....

Id. at 4 (emphasis added).

> Based on the above, we hold on the facts of this case that no prohibited conduct has thus far occurred. . . . there was no claim pending at the time the contact occurred, and no formal litigation had been commenced.

Id. at 13.

Riley further provides this Court with a list of states he claims have adopted a rule that prohibits *ex parte* communications with physicians. Decisions in at least four of the states (specifically Florida, Louisiana, Illinois, and Ohio) offer no support for Riley's arguments because those states in fact allow *ex parte* contact between the employer/insurer and treating physician in controverting and investigating workers' compensation claims.

Each case Riley relies upon is not only factually distinguishable but is not persuasive for the legal propositions he now asserts on appeal.

For example, in *Hammonds v. Aetna Casualty & Surety Company* the plaintiff sued a hospital's insurance carrier (Aetna) for allegedly inducing his physician to breach his duty of confidentiality during the underlying claim against the hospital for medical malpractice. 237 F. Supp. 96 (N.D. Ohio 1965). Aetna's conduct in the underlying malpractice action is clearly distinguishable for the conduct of the Appellees in Riley's LHWCA claim. Aetna persuaded the plaintiff's treating physician to surrender certain confidential medical information for use in pending litigation against the plaintiff on the false pretext that the plaintiff was contemplating a malpractice suit against the physician. *Id.* Such conduct did not take place in this action and Riley's reliance on *Hammonds* as persuasive authority is therefore misplaced.

Two of the cases Riley relies upon, *Givens v. Mullikin* and *Loudon v. Mhyreand*, in fact support Mississippi's position that no independent tort will arise for *ex parte* communications with a claimant's physician.

The plaintiff in *Givens* sued Allstate insurance for inducement to breach express and implied contracts of (medical) confidentiality, inducement to breach a (medical) confidential relationship, and invasion of privacy. *Givens v. Mullikin*, 75 S.W.3d 383, 390 (Tenn. 2002). The

Tennessee Supreme Court affirmed the trial court's dismissal of these claims and stated that the plaintiff had no legally cognizable injury resulting from these informal conversations which allegedly induced her physician to breach his duty of confidentiality. *Id.* at 410. The court further commented that since the medical information obtained from the *ex parte* contact was discoverable in her underlying claim, she had no expectation of privacy and therefore could not sue Allstate for requesting and obtaining such information.

Riley's reliance on *Loudon* is likewise misplaced. The Washington Supreme Court in *Holbrook v. Weyerhaeuser Co.*, 822 P.2d 271, 275 (Wash. 1992) expressly held that the *Loudon* prohibition on *ex parte* contact did not extend to workers' compensation proceedings. The *Holbrook* court thoroughly analyzed the policy concerns addressed in *Loudon* and ultimately concluded that those concerns were not present under Washington's workers' compensation laws. *Id.* at 273-75.

Other jurisdictions have directly addressed factual scenarios similar to those in the case *sub judice* and have allowed employers/insurers independent access to a workers' compensation claimant's medical information, including *ex parte* physician contact. Unlike the out-of-state authorities cited by Riley, the authorities relied on by Appellees are not only persuasive but directly related to the issues in this appeal.

In *Lakin v. Skaletsky*, 2004 U.S. Dist. LEXIS 737 (N.D. Ill. Jan. 21, 2004), the district court dismissed a former workers' compensation claimant's action against the compensation insurer for violation of his right to medical confidentiality. During the pendency of his compensation claim, the insurer requested the doctor to provide information on several specific issue surrounding the employee's medical condition. *Id* at *5. Since the Illinois Workers'

Compensation Act provided that the insurer had a right to the employee's medical records relating to his compensation claim, the district court granted summary judgment.

In *Thompson v. Eiler*, 2000 Ohio App. LEXIS 2895 (Ohio Ct. App. 2000), an Ohio Court of Appeals dismissed a similar action claiming damages for violation of the physician-patient privilege. The plaintiff in *Thompson* claimed to have suffered mental and emotional distress as a result of her physician's disclosure of medical information to her employer during the pendency of her workers' compensation claim. *Id.* at *6-7. Like Riley, the plaintiff in *Thompson* filed suit claiming negligence and breach of confidentiality. The appellate court affirmed the trial court's grant of summary judgment in the physician's favor, finding that Ohio Rev. Code Ann. § 4123.651 required the release of records relevant to her claim.

In *S & A Plumbing v. Kimes*, a Florida Court of Appeals concluded that *ex parte* contact between the employer/carrier and physician in a workers' compensation action did not violate the claimant's right to privacy. 756 So. 2d 1037 (Fla. 1st Dist. Ct. App. 2000). Like Riley, Kimes was initially treated and compensated for a work related injury to a certain scheduled member (right knee). *Id.* at 1038. Three years later Kimes sought authorization for surgery to his ankle, which he claimed was secondary to his initial right knee injury. *Id.* Without his knowledge and consent, the workers' compensation carrier met with Kimes' treating physician concerning his new ankle injury.

At this *ex parte* meeting the physician opined that Kimes' ankle surgery was only necessary because he would not wear his brace. *Id.* When Kimes learned of this *ex parte* contact, he sought to exclude the physician's records and any testimony relating to this meeting. *Id.* The judge of compensation claims ("JCC") however admitted the evidence and denied the claimant's request

for ankle surgery. *Id.* at 1039. Kimes thereafter appealed. In ruling that the JCC did not infringe on his Kimes' right to privacy by admitting evidence received through *ex parte* communications, the Florida Court of Appeals, explaining the ultimate purpose behind workers' compensation, specifically held as follows:

> In the instant case, Kimes has failed to demonstrate that petitioners for worker's compensation benefits, such as himself, have a reasonable expectation of privacy vis-a-vis the employer, its insurance carrier, and the health care provider treating a worker injured in an industrial accident, regarding the **medical records related to that treatment**. The workers' compensation system transposed dispute resolution for workplace injuries from the private law of torts to a publicly administered and regulated system. The **very foundation of an employee's right to receive benefits** under the self-executing system in Chapter 440 **requires a healthcare provider to assess the injury, establish a causal connection to the workplace accident, and communicate that information to the employer's insurance carrier**. *See* § 440.13, Fla. Stat. (1997). By presenting himself to be examined by a health care provider for the purpose not only for treatment for an injury, but also for evaluation of the injury and assessment of whether it is attributable to his employment, Kimes consented to the provider disclosing to the carrier medical information relating to the claim. The discussions authorized by section 440.13(4)(c) simply furthers that disclosure system. In fact, **to accept Kimes' absolute privacy argument would make it impossible to petition for, controvert and decide claims under the workers' compensation law without resort to a system of litigation which chapter 440 is intended to avoid**.

Id. at 1041-42 (citations omitted).

In *Farr v. Riscorp*, 714 So. 2d 20, 21 (La. Ct. App. 1998), a Louisiana court analyzed a fact pattern nearly identical to those in the instant appeal. The plaintiff, a workers' compensation claimant, sued her employer's workers' compensation claims administrator and the case manager assigned to the claim in tort for a violation of her constitutionally protected right to privacy. *Id.* Specifically she asserted claims for interference with her physician-patient relationship as a result

of defendants' meeting with her treating physician to discuss her medical condition, prognosis and treatment. *Id.* The defendants moved for and were granted summary judgment.

The Louisiana Court of Appeals held that plaintiff's physician-patient privilege was waived when she filed for worker's compensation benefits. *Id.* at 22. The concurring opinion of Justice Byrnes is instructive to the case at hand.

> There is no prohibition against asking for the information. Normally it is up to the party possessing the information to assert the privilege. **Privileges are not normally prohibitions against asking, they are licenses not to answer.**
> . . .
>
> By way of analogy, customer account information at a banking institution is confidential. This does not mean that a request for such information is actionable.
> . . .
>
> If my doctor releases my medical records without my authorization or a court order I **may have grounds to sue[23] him, but not the recipient of that information unless the law unambiguously provides me with a right to do so.**

Id. at 24 (Byrnes, J., concurring) (emphasis added).

A U.S. District Court for the Western District of Missouri has also ruled contrary to Riley's arguments. The district court in *Mikel v. Abrams*, 541 F. Supp. 591 (W.D. Mo. 1982) held

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[23] Because Dr. Wiggins is not a party to this lawsuit, and because Riley's complaint made no allegations against Dr. Wiggins, it is impossible to determine if any substantive tort could have resulted from the communication which occurred between Dr. Wiggins and Hyland. *See Scott*, 704 So. 2d at 1006 (evidence obtained by an opposing party from such *ex parte* contacts with a patient's medical provider without prior consent is inadmissible); *Johnson v. Memorial Hospital at Gulfport*, 732 So. 2d 864, 865 (Miss. 1998) (manner by which relevant information subject to the medical privilege is acquired is limited to voluntary consensual disclosure by the patient or the formal discovery process).

that no Missouri court had ever recognized a cause of action based solely on breach of a doctor and patient relationship.

Unlike Riley's "persuasive authority," the above-mentioned authorities directly relate to the type of relief for which Riley seeks. These cases offer specific guidance concerning the legal issues on appeal.

All of Riley's claims based on a violation of the physician-patient privilege are without merit. Under the applicable federal law, there is no physician-patient privilege. Even under Mississippi law, which is not controlling in this instance, *ex parte* communications are allowed in the workers' compensation context. Finally, if the Appellees did violate Riley's physician-patient privilege under Mississippi law, his only remedy is exclusion of the evidence, not a right to sue in tort.

5. Riley's Claim for Intentional/Tortious Interference with Contract Fails as a Matter of Law

Riley asserts that the trial court erred in granting summary judgment and dismissing his claim of intentional/tortious interference with his contract for medical services with Dr. Wiggins. Riley argues that he need only prove the following elements to survive summary judgment on his tortious interference claim:

> (1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiffs in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) that actual damage and loss resulted.

Par Indus., Inc. v. Target Container Co., 708 So. 2d 44 (Miss. 1998). The Appellees agree that the four elements above are required to prove tortious interference with contract. The Appellees

however do not agree with Riley's assertion that he is not required to additionally prove that the contract would have been performed but for the alleged interference. This Court in *Par Indus.*, on which Riley himself relies, stated that "[i]n addition, the plaintiff must prove that **the contract would have been performed but for the alleged interference**." *Id.* (Emphasis added). There have been numerous other Mississippi appellate decisions specifically requiring additional proof that the contract would have been performed but for the interference. *See Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So. 2d 1093, 1098-1099 (Miss. 2005) ("A plaintiff claiming intentional interference with a contract must prove that "the contract would have been performed but for the alleged interference."); *Sentinel Indus. Contr. Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 969 (Miss. 1999) ("In addition, the plaintiff must prove that the contract would have been performed but for the alleged interference."); *Grice v. Fedex Ground Package Sys.*, 2006 Miss. App. LEXIS 244 at *5 (Miss. Ct. App. 2006). Riley's evidence before the trial court failed to establish this additional element. The "contract" for medical services by Dr. Wiggins was in fact performed.

Riley also failed to prove the requisite element of malicious intent. Since Riley's Brief separately addressed "malicious intent," this element will be discussed separately in Subsection D below.

Riley's claim must also fail because a cognizable claim for tortious interference with contract includes the element of "actual loss." As has been shown, Riley was in no way "damaged" by Hyland's communications with Dr. Wiggins. Dr. Wiggins did not change or alter his medical treatment of Riley, he only changed his opinion of whether Riley's spondylolisthesis was aggravated by his industrial injury. Dr. Wiggins however ultimately "re-reversed" his opinion

and concluded that Riley's spondylolisthesis was caused/aggravated by his industrial injury. Contrary to Riley's allegation that he was damaged by Hyland and Dr. Wiggins' conference, Riley was compensated under the LHWCA for all of his injuries related to the industrial fall, including his now symptomatic spondylolisthesis. Riley admitted there was never a period of time during the course of his LHWCA claim that he did not receive any benefit to which he was entitled.

Additionally, any alleged "actual loss" flowing from the contractual interference claim is compensable and preempted by the LHWCA., 33 USC § 905(a) (Exclusiveness of liability). Therefore, Riley's claim is not an allegation of an additional independent injury but simply a related compensable injury covered under the exclusivity provision of the LHWCA. Therefore, as a matter of law, plaintiff's claim for tortious interference with contract, medical care, prospective advantage, etc. cannot survive summary judgment.

6. Riley's Claim of Intentional Infliction of Emotional Distress Fails as a Matter of Law

In regard to his claim for intentional infliction of emotional distress ("IIED"), Riley makes the following two sentence argument:

> Recovery for intentional infliction of emotional distress depends upon the conduct being outrageous, evoking revulsion, and being intentional done with foreseeable results. Wilson v. GMAC, 883 So.2d 56 (Miss. 2004). There is certainly a jury question as to whether the conduct of the defendants alleged in the pleadings and in the record did just that.

(Riley's Brief at p. 22). Riley appears to confuse surviving motion for summary judgment with that of a 12(b)(6) motion to dismiss.

It is well established in Mississippi that "[t]he standard for intentional infliction of emotional distress ...is very high: the defendant's conduct must be "wanton and willful [such that]

it would evoke outrage or revulsion." *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 476 (5th Cir. 2002) (*quoting Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 659 (Miss. 1995)). The acts must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Hatley*, 308 F.3d at 476 (*quoting Speed v. Scott*, 787 So. 2d 626, 630 (Miss. 2001)). The Appellees' acts of investigating Riley's compensation claim were hardly willful or done with an "actual intent to injure" Riley. *Blailock v. O'Bannon*, 795 So. 2d 533, 535 (Miss. 2001).

This Court has repeatedly held that to survive summary judgment the opposing party must present significant probative evidence (i.e., specific facts) showing that there are genuine issues for trial. Riley's bare assertion that a jury question exists as to whether Appellees' conduct was outrageous, evoking revulsion, and intentionally done with foreseeable results, clearly does not constitute **specific facts** to survive summary judgment, much less is it enough to carry the **high burden** of establishing a claim for IIED.

7. Riley Did Not Offer Clear and Convincing Evidence to Support His Request for Punitive Damages

Other than including the words "punitive damages" in the title of his first argument on appeal (Riley Brief at p. 10), Riley offers no argument that the trial court erred in concluding that the record evidence did not support a request for punitive damages[24]. Appellees however will

[24] "Punitive damages" are a remedy not a separate cause of action in any event . *Cole v. Chevron USA, Inc.*, 2007 U.S. Dist. LEXIS 70594, *52 (S.D. Miss. Sept. 24, 2007).

briefly address this issue. Mississippi follows the rule that punitive damages are not recoverable in contract actions. MISS. CODE ANN. § 11-1-65.

However Mississippi does recognize common law punitive damages, outside the statute, where an insurance company has refused a claim in "bad faith." In order to prevail in a bad faith claim against an insurer, the plaintiff must show that the insurer lacked an arguable or legitimate basis for denying the claim, or that the insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights. *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 641 (Miss. 1998)). Simple negligence on the insurer's part will not suffice. *Gallagher Bassett Servs. v. Jeffcoat*, 887 So. 2d 777, 783 (Miss. 2004). The fact that an insurer's decision to deny benefits may ultimately turn out to be incorrect does not in and of itself warrant an award of punitive damages if the decision was reached in good faith. *Grimes*, 722 So. 2d at 641. Where an insurance carrier denies or delays payment of a valid claim, punitive damages will not lie if the carrier has a reasonable cause for such denial or delay. *Mut. Life Ins. Co. v. Estate of Wesson*, 517 So. 2d 521, 528 (Miss. 1987).

The Appellees' prompt investigation of the Riley's new back injury belies any willful or malicious wrong, or actions that were with gross and reckless disregard for the Riley's rights. It was reasonable and in fact prudent to contact Dr. Wiggins regarding this new injury and its relation, if any, to the industrial injury. Clearly Riley was not and is not entitled to punitive damages. Riley has failed to show that the conduct of any Appellee, rose to the level of malice or gross neglect/reckless disregard.

Furthermore 33 U.S.C. § 905, the exclusivity provision of the LWHCA, does not allow for punitive damages. *See Houston v Bechtel Associates Professional Corp.,D.C.*, 522 F. Supp. 1094

(D.D.C. 1981) (Plaintiff may not circumvent 33 U.S.C. § 905(a)'s exclusivity command under guise of a claim for punitive damages.)

Finally, Appellees NEVER denied any of Riley's claims.

C. The Trial Court Did Not Err in Holding the Medical Authorization Signed by Riley to be a Valid Agreement

In holding that there were no facts to overcome summary judgment which would indicate Riley was incompetent when he executed the medical authorization, the trial court relied on (1) the tape recording transcript[25] of Riley's interview with Caty Suthoff [R. 379-84] and (2) the expert opinion of William George, Ph.D.[26], opining that no medication Riley was taking would have been impaired his ability to make critical decisions, such as waiving medical privilege. [R. 519-20].

Riley contends that his self-serving affidavit (stating he was heavily medicated with narcotics and in a great deal of pain at the time of execution of the medical authorization) alone

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[25] At p. 23 of his Brief, Riley claims that he was never provided with a copy of the October 1997 audio recording and further claims that the transcript was not included in this appellate record. In regard to the audio cassette itself, a copy was not only made available to Robert O'Dell (Riley's LHWCA counsel and counsel herein) during the pendency of the LHWCA claim, but was in fact made an exhibit at the May 26, 2004 LHWCA hearing. [R. 442]. In regard to the typed transcript of the interview, the same was also made available in his LHWCA claim and exhibited at the hearing [R.442]. What is even more compelling is that Mr. O'Dell raised no objections to these exhibits or any of the 56 other exhibits offered into evidence by Ingalls at the May 2004 hearing. [R. 391]. Lastly, the transcript **is included** in this appellate record at **R. 379-84**.

Accordingly, Riley's claims that he was never provided with a copy of the recording and that transcript was not included in this appellate record are not only incorrect but are disingenuous.

[26] Professor of Pharmacology and the Director of Toxicology at Tulane University School of Medicine.

is enough to avoid summary judgment and have the issue of competency[27] determined by a jury. Riley offers no legal authority whatsoever in support of his claims of incompetency or the burdens established for carrying such claims under MISS. R. CIV. P. 56.

Appellees again deny that a medical authorization was even required to investigate the specific medical conditions at issue in Riley's federal LHWCA claim. Notwithstanding the fact no medical authorization was required, Riley nonetheless executed a valid medical authorization.

"Mississippi law presumes that a person is sane and mentally capable to enter into a contract." *Frierson v. Delta Outdoor, Inc.*, 794 So.2d 220, 224 (Miss. 2001) (*citing Foster v. Wright*, So.2d 873, 876 (Miss. 1961)). The burden is upon the party seeking to avoid an instrument on the ground of insanity or mental incapacity, to establish the same by "clear and convincing evidence." *Richardson v. Langley*, 426 So. 2d 780, 783 (Miss. 1983). This Court examined the heavy burden placed on the party who seeks to avoid an instrument based incompetency in *Richardson, supra,*:

> The **mere fact that a grantor has been taking drugs or alcohol is not sufficient to raise the presumption of incapacity so as to require "strong and demonstrative proof" of a lucid period on the part of the grantee**. In *Herrington v. Herrington, supra,* as previously discussed, we held that the mere fact that the grantor had been taking Demoral, a powerful narcotic, for the pain induced by his terminal cancer, did not *ipso facto* render him mentally incapable of executing a deed. The *Herrington* opinion indicated that the **grantor's actions and conversation at the time in**

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[27] At the trial court level Riley also claimed the medical authorization was procured under duress. Riley has waived this contract defense by not including it in his appeal. The Appellees however note that Mississippi law presumes that a contract is freely entered into by the parties without coercion or overreaching. *Parks v. Parks*, 914 So. 2d 337, 341 (Miss. Ct. App. 2005) (*citing Singer v. Tatum*, 171 So. 2d 134, 148 (Miss. 1965)). Riley put forth no evidence that he was under "duress" when he signed the medical authorization.

> **question** were the primary indicia of mental capacity or lack thereof.
>
> . . . **the mere ingestion of substances which have a potential to affect a person's mind is not sufficient to render *ipso facto* invalid a deed executed by that person on the ground of lack of mental capacity**. Clearly in such circumstances, the grantor's **capacity must be judged within the context of his actions at the time he executed the deed**. Here Dr. Morris' testimony did not establish that grantor Parks lacked mental capacity when she executed the deed to the appellants Richardson.
>
> Parks herself took the stand and testified that she remembered her daughter taking her to the hospital and she remembered being given a shot that made her sleepy. She denied remembering any discussion about her deeding the land away. She testified she remembered little, if anything else, about her entire stay at the hospital, and on cross-examination did not remember going to the hospital at all. *McGowan v. Brooks, supra*, makes it clear that a grantor's inability to remember the execution of a deed is insufficient to establish that the grantor lacked the mental capacity to execute the deed.

Id. at 784-85. (Emphasis added).

Riley initiated the meeting with Suthoff on October 21, 1997. [R. 441]. Riley allowed Sutoff to question and record his testimony concerning his industrial injury. [R. 442]. Riley was able to answer every question asked of him by Sutoff[28]. Riley further testified that he understood all of the questions being asked of him at the October 21, 1997 interview. [R. 442]. Riley was clearly competent during the course of the October 21, 1997 interview, therefore he was competent when he signed the October 21, 1997 medical authorization. Other than his self-serving

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[28] Riley was even capable of providing the following specific and detailed information: social security number, badge number, date of birth, department number, work history, job title, education (specifically trade school at East Central Junior College), home address, telephone number, driver's license, work history at Ingalls, names of superiors at Ingalls, and specific details and specific facts concerning his industrial injury. [R. 379-84].

statements, Riley failed to offer any evidence demonstrating that the was mentally incompetent when he signed the medical authorization, much less did he clear and convincing evidence as is required to prove incompetency. Despite not being required to prove Riley's competency, the Appellees provided clear and convincing evidence (factual evidence and expert testimony) demonstrating that Riley was in fact mentally competent when he executed the medical authorization.

D. The Trial Court Did Not Err in Finding That the Evidence Presented by Riley Did Not Establish the Element of Malice

Riley relies on MISS. R. CIV. P. 9(b) in support of his argument that the trial court erred in finding that he failed to establish the necessary element of malice. Riley specifically cites to ¶ XVI of his complaint where he included the word "maliciously." He states that since Rule 9(b) only requires malice to be averred "generally," he "has complied with the mandates of the rules as to any issue pertaining to malice." (Riley's Brief at p. 24). Riley, however, has again confused the requirements for surviving a Rule 12(b)(6) motion to dismiss with those required to survive a Rule 56 motion for summary judgment.

Just because a party's pleadings comply with MISS. R. CIV. P. 9 to survive a 12(b)(6) motion to dismiss, does not mean that the case holds water under Rule 56. If complying with Rule 9(b)'s "general pleading" requirements were enough to prevail against a summary judgment motion, as Riley so suggests, all lawsuits (**including frivolous ones**) would proceed to trial. Such an argument is not only nonsensical but is legally wrong.

"[T]he requisite intent is inferred when defendant knows of the existence of a contract and does a wrongful act **without legal or social justification** that he is certain or substantially certain

will result in interference with the contract." *Amsouth Bank v. Gupta*, 838 So. 2d 205, 214 (Miss. 2002) (*quoting Liston v. Home Ins. Co.*, 659 F. Supp. 276, 281 (S.D. Miss. 1986)) (emphases added). A jury does not decide whether a defendant acted with actual malice unless a genuine issue of material fact exists. In regard to this scienter element, Riley was required to show by specific facts (not relying on the allegations in his complaint) that the Appellees acted without any lawful purpose or right or justifiable cause when Hyland met with Dr. Wiggins to discuss Riley's new back injury.

The record evidence shows that at the time of the *ex parte* meeting, the Appellees reasonably believed they could contact Dr. Wiggins based on the following factors: (1) Riley's worker's compensation claim was being administered under the federal LHWCA where no physician-patient privilege exists; (2) Riley had signed a medical authorization allowing such *ex parte* contact; (3) Ingalls, as Riley's employer, was paying Dr. Wiggins pursuant to the LHWCA to treat Riley's work-related injury; and (4) Riley's new injury was not claimed until a year and half after his maritime injury occurred. Nothing about Hyland's meeting with Dr. Wiggins met the requisite malicious intent required to prove tortious interference with a contract. *See Amsouth Bank v. Gupta*, 838 So. 2d 205, 214 (Miss. 2002). Additionally, under §§ 912 and 913 of the LHWCA, employers are encouraged to conduct prompt investigations in an effort to prevent fraudulent claims. *See Jones Stevedoring Co. v. Director, Office of Workers Compensation Programs*, 133 F.3d 683, 692 (9th Cir. 1997). All of these factors demonstrate Appellees' legal justification for contacting Dr. Wiggins.

As such, the trial court correctly ruled Riley failed to demonstrate any specific facts demonstrating the requisite element of malicious intent to establish any claim for intentional/tortious interference with contract

E. The Trial Court Did Not Err in Entertaining and Ruling on a Second Summary Judgment Motion

Riley asserts that the trial court erred in considering and ruling on the summary judgment motion now on appeal because the Appellees had previously filed a motion for summary judgment in 2003. On September 18, 2003, the Appellees did file a motion with the trial court entitled "MOTION TO DISMISS OR STAY PROCEEDINGS OR TO GRANT SUMMARY JUDGMENT.[29]" [R.66-68]. This motion however did not challenge the "legal sufficiency" of Riley's claims as required by Rule 56. *See Murphy Exploration & Prod. Co. v. Sun Operating Ltd. Pshp.*, 747 So. 2d 260, 261 (Miss. 1999) ("The motion for a summary judgment challenges the very existence of legal sufficiency of the claim or defense to which it is addressed."). A review of the 2003 motion clearly shows that it was essentially a motion to stay Riley's state court tort proceedings pending final adjudication of the LHWCA claims.

Other than stating that MISS. R. CIV. P. 56 does not provide for successive motions (Riley Brief at p. 25), Riley cites no legal authority supporting this assertion. In fact, Riley's counsel stated at the hearing on the subject motion on appeal that he didn't know whether this Court had even spoken on this topic. [Tr. 18]. Rule 56, however, does not restrict the number of summary

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[29] Other than using the words "Summary Judgment" in the motion's title and the last sentence of the motion stating "[i]n the alternative, Defendants [Appellees] request Summary Judgment" nothing in the motion even addressed whether genuine issues of material fact existed or whether Defendants were entitled to a judgment as a matter of law.

judgment motions a party can file. Rule 56(b) in fact states "[a] party . . . may, **at any time, move** . . . for summary judgment." (Emphasis added). In regard to a FED. R. CIV. P. 56, which Mississippi's rule mirrors[30], the Fifth Circuit has said:

> Successive motions for summary judgment . . . are not always aberrational. Courts have found that a subsequent summary judgment motion based on an expanded record is permissible. . . .
>
> The district court . . . opted to allow a successive motion for summary judgment. Such a determination, particularly regarding questions of the timing and sequence of motions in the district court, best lies at the district court's discretion.

Enlow v. Tishomingo County, 962 F.2d 501, 506-07 (5th Cir. 1992).

Relying on the Mississippi Court of Appeals decision in *Scafide v. Bazzone*, 962 So. 2d 585, 597 (Miss. Ct. App. 2006), where the court held there to be "no principle of Mississippi law that the refusal to grant a summary judgment bars a later directed verdict on the same grounds," the trial court stated that there was no prohibition in filing successive summary judgment motions. [Tr. p. 18]. After this oral ruling Riley's counsel stated "we're not hanging our hat on that, and I'm here ready." [Tr. 18].

The Appellees' motion went directly to the heart of every claim asserted by Riley and successfully proved that each of his claims was legally insufficient under Federal and Mississippi law and warranted judgment as a matter of law. Accordingly, the trial court did not err in considering and rendering its decision granting Appellees' motion for summary judgment.

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[30] This Court, when interpreting Mississippi Rules of Civil procedure, looks to federal court decisions interpreting the analogous Federal Rule of Civil Procedure as persuasive authority. *Veal v. J. P. Morgan Trust Co., N.A.*, 955 So. 2d 843, 847 (Miss. 2007).

V. CONCLUSION

Based on the record evidence and the above and forgoing law, Appellees respectfully requests this Court to AFFIRM the trial court's order granting summary judgment and dismissing all of Riley's claims as a matter of law.

Respectfully submitted,

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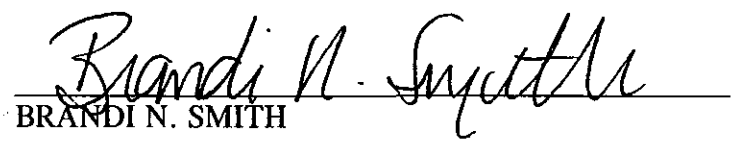
CERTIFICATE OF SERVICE

I, Brandi N. Smith, of counsel for Appellees, F.A. Richard & Associates, Inc., Ingalls Shipbuilding, Inc. and Alexis Hyland, an Individual, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing document to:

Robert E. O'Dell, Esq.
P.O. Box 1291
Pascagoula, MS 39568-1291
Honorable Dale Harkey

Jackson County Circuit Judge
P. O. Box 998
Pascagoula, MS 39568-0998

THIS, the 24th day of March 2008.



BRANDI N. SMITH

4329-102806

ADDENDUM

Hinson v. Mississippi River Corp., et al., MWCC No. 94-19422-F-4717

MISSISSIPPI WORKERS' COMPENSATION COMMISSION

MWCC NO. 94-19422-F-4717

JIMMY DUANE HINSON, JR. CLAIMANT

VS.

MISSISSIPPI RIVER CORPORATION EMPLOYER

AND

MISSISSIPPI MANUFACTURERS ASSOCIATION
WORKERS' COMPENSATION GROUP CARRIER

REPRESENTING CLAIMANT:

John G. Jones, Esq., Jackson, MS

REPRESENTING EMPLOYER/CARRIER:

William D. Blakeslee, Esq., Gulfport, MS

FULL COMMISSION ORDER

This matter was heard by the Commission on January 26, 1996 pursuant the Employer's and Carrier's Petition for Review. Review is sought of an Order of Administrative Judge dated November 6, 1995 which held that the Employer or Carrier or their representatives had no right to engage in so-called non-consensual ex parte contact or communication with the Claimant's treating physicians or medical providers.[1]

Also before the Commission is the Claimant's Motion to Dismiss Interlocutory Appeal whereby the Claimant is seeking to forestall Commission review of the above Order until such time as all outstanding issues have first been resolved by the Administrative Judge. Because the

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[1] Non-consensual ex parte contact is used herein to describe contact or communication with a claimant's treating physician outside the presence of the claimant or his legal representative and without their consent.

issue presented by the Petition for Review is of sufficient importance to justify our review at this time, and because it appears as well that the Claimant now favors Commission review of the merits of the Order of Administrative Judge dated November 6, 1995, the Motion to Dismiss Interlocutory Appeal is hereby denied.

Finally, the Claimant has filed a Motion for Reinstatement of Benefits. In addition to arguing for affirmance of the Order of Administrative Judge, the Claimant seeks an additional directive from the Commission compelling the Employer and Carrier to reinstate his temporary total disability benefits retroactive to May 2, 1995. It was on this date, according to the Claimant, that his benefits were cut in half on the basis of information gained by the claims adjuster through non-consensual ex parte contact with Hinson's treating physician. In the end, this Motion for Reinstatement of Benefits is remanded to the Administrative Judge for consideration in light of our present ruling.

I.

The facts show that Hinson sustained a compensable injury on November 2, 1994 and has not yet reached maximum medical improvement, at least insofar as we can tell. On or about May 2, 1995, and over the objections of Hinson's attorney, the claims adjuster for the carrier initiated ex parte contact with one of the claimant's treating physicians. The claims adjuster obtained an opinion from this doctor that Hinson could then return to light duty work for up to four hours per day. Based on this opinion, the Carrier allegedly ceased paying Hinson benefits for temporary total disability and began paying benefits for temporary partial disability.

It was not until June 20, 1995 that the Claimant filed his Petition to Controvert and served therewith certain requests for discovery. The Employer and Carrier followed with their Answer

and own discovery requests in early July 1995. On September 5, 1995 the Employer and Carrier filed a Motion for Protective Order Waiving Medical Privilege, Protecting Confidentiality of Medical Information, and Authorizing Private Access to Health Care Providers. By this Motion, the Employer and Carrier requested an order from the Administrative Judge declaring that the medical privilege, if any, of Hinson had been waived with respect to all treatment he has received as a result of his work connected injury. The Employer and Carrier sought further permission to have private, ex parte access to all of the providers who have rendered treatment to Hinson for this injury. Following a hearing on this Motion, the Administrative Judge entered the Order which is the subject of the present proceeding. The questions presented are whether the so-called non-consensual ex parte contact between the claims adjuster for the Carrier and Hinson's treating physician was permissible, and whether the Employer and Carrier are entitled, absent Hinson's consent, to have ex parte access to all medical providers who have treated Hinson for the injury in question.

II.

The Claimant as well as the Employer and Carrier have gone to unsurpassed lengths in briefing this issue for the Commission. We dare say that no other issue or claim has generated such zealous representation and widespread interest as the one presently before us. A host of reasons, from constitutional ones to policy ones, have been advanced pro and con and lengthy invitations have been issued by both parties to fashion a detailed rule or guide to govern the practice of non-consensual ex parte contact with treating physicians in workers' compensation claims. This already lively debate has been made more so by the very recent opinion of the Mississippi Supreme Court in the case styled Scott v. Flynt, Miss.Sup.Ct.No. 92-IA-00397-SCT

(dec'd. April 18, 1996), an opinion which Hinson contends is the coup de grace for the Employer and Carrier.

A.

The arguments for and against non-consensual ex parte contact made by the parties all center around the applicability and the extent of the patient-physician privilege in workers' compensation claims. It is to be remembered, however, that this privilege is first and foremost an evidentiary privilege which has no force or application outside the context of hearings or formal discovery conducted in accordance with the applicable Rules of Civil Procedure and which ultimately governs the admissibility of evidence at a formal hearing where traditional rules of evidence are applied. See M.R.E. 101, 1101; Comment, M.R.E. 503; Scott v. Flynt, Miss.Sup.Ct.No. 92-IA-00397-SCT (dec'd. April 18, 1996); Cooper's, Inc. of Mississippi v. Long, 224 So.2d 866, 870 (Miss. 1969). In Hinson's view, it is an absolute privilege he enjoys with each of his medical providers which allows him to prevent the Employer, the Carrier or any of their representatives from having any non-consensual ex parte contact with these providers, regardless of the purpose of such contact and regardless of the timing of this contact. In the Claimant's opinion, and as found by the Administrative Judge, there is a medical privilege which exists between the Claimant and his providers which has not been waived by statute, rule or Commission order to an extent which would permit the non-consensual ex parte invasion thereof by the Employer, the Carrier, or any party representing the Employer or Carrier.[2]

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[2] While the Order of Administrative Judge in this matter is not so limited, we understand the Claimant to have softened his position somewhat so as to permit non-consensual ex parte communication or contact with treating physicians at any time prior to a claimant's retention of legal counsel.

The Employer and Carrier, on the other hand, argue that the medical privilege, to the extent it even applies in workers' compensation proceedings, is no more than an evidentiary privilege which may be invoked only in the context of a testimonial setting where the purported witness is under oath. To use the privilege as a basis for prohibiting or limiting their ex parte access to a claimant's treating physicians would, in their view, amount to an unconstitutional restraint on the exercise of free speech and association. The Employer and Carrier also have argued that a prohibition or limitation on non-consensual ex parte contact violates their constitutional guarantee of equal protection because such a ruling favors claimants over employers and carriers, that it denies them due process of law, that it impermissibly invades their work product privilege, and finally that it denies them the constitutional right to effective assistance of counsel.

B.

It has long been established that a workers' compensation claimant may invoke the physician-patient privilege in proceedings for compensation. Although traditional rules of evidence and procedure are relaxed in this context, they are not completely ignored. Also, the fact that the Workers' Compensation Law declares that no privilege attaches to medical treatment which is rendered pursuant the provisions of the Law does not entirely abolish the physician-patient privilege and does not "throw open all of the [claimant's] personal medical history to public record because of a claim for compensation under the Workman's Compensation Law." Cooper's, Inc. of Mississippi v. Long, 224 So.2d 866, 870-71 (Miss. 1969); Miss. Code Ann. §71-3-15(6) (Rev. 1995).

On the other hand, not all of the claimant's personal medical history may be absolutely

protected from discovery or disclosure or admission simply because it may otherwise fall within the confines of the medical privilege. As in Cooper's, if there is in the claimant's personal medical history information which is relevant and necessary to permit a fair and just resolution of the workers' compensation claim, such as information bearing on the existence of an apportionable pre-existing condition, then this information should be made available notwithstanding the assertion of a medical privilege. 224 So.2d at 870. In the end, Cooper's makes clear that as to information gathered and related to treatment rendered for the work connected injury in question, there is no medical privilege. And as to information related to prior, unrelated medical treatment, the Commission may relax "the traditional common law and statutory rules of evidence [including the evidentiary medical privilege] in order to obtain a full development of the facts concerning each claim." Id.

C.

It is, therefore, undeniable that a workers' compensation claimant may invoke the medical privilege in an attempt to prevent the discovery and evidentiary use at a formal hearing of information which he deems to be the protected product of a confidential physician-patient relationship. In the end, of course, this case is not about whether the information discovered falls within the protective boundaries of the privilege. It is not about how far removed the privilege has become in workers' compensation claims. The fact that the privilege has not been completely abolished in workers' compensation claims and that it may not be completely ignored is all that we need to know about the privilege.

Even were we to decide that the information obtained in this case via non-consensual ex parte contact was not otherwise privileged information, we would still be duty bound to decide

whether and to what extent non-consensual ex parte contact is an allowable method for obtaining information from a treating physician or other medical provider. Salaam v. North Carolina Department of Transportation, 468 S.E.2d 536, 538 (N.C.Ct.App. 1996). Questions regarding the scope of the medical privilege are entirely distinct from questions regarding the propriety of non-consensual ex parte contacts. Id., citing Crist v. Moffat, 326 N.C. 326, 332-333, 389 S.E.2d 41, 45 (1990); Scott v. Flynt, slip op. at 18 ("It is not the substance of the information that is being regulated, it is the method of how it is obtained."). "Clearly, 'the gravamen of [allowing ex parte contacts] is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered.'" Salaam, 468 S.E.2d at 538; Crist, 326 N.C. at 336, 389 S.E.2d at 47. In the end, this is what and all this case is about - with a physician-patient privilege lurking somewhere in the background, may parties opposed in interests to a claimant seek information from his treating physicians by non-consensual ex parte means?

III.

In Salaam, one of the claimant's treating physicians was engaged in a non-consensual ex parte conversation by the employer's attorney. Subsequently, the parties deposed this doctor, but the claimant's attorney objected to the deposition "based on, among other things, the inappropriate nature of the ex parte conversation" with defense counsel. 468 S.E.2d at 537. At a hearing on the merits of Salaam's claim, the hearing officer and the Commission allowed this doctor's deposition to be admitted as evidence. On appeal, the Court of Appeals of North Carolina held that the Commission erred in admitting this testimony "in light of the non-consensual ex parte contact between NCDOT and Dr. Pritchard." 468 S.E.2d at 539.

North Carolina provides a waiver or exception to the medical privilege in workers'

compensation claims very similar to our own. N.C.Gen.Stat. §97-27(b) (1991) provides, in part:

> "No fact communicated to or otherwise learned by any physician . . . who may have . . . examined the employee, or . . . been present at any examination, shall be privileged, either in hearings provided for by this Article or any action at law."

Notwithstanding this exception to the physician patient privilege, the Court of Appeals held:

> . . ."[t]he statutory physician-patient privilege is distinct from the rule prohibiting unauthorized ex parte contacts" and, therefore, information actually discoverable because the statutory privilege is inapplicable may be improperly acquired if done so through ex parte communications. Crist v. Moffat, 326 N.C. 326, 332-333, 389 S.E.2d 41, 45 (1990). Clearly, "the gravamen of [allowing ex parte contacts] is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered." Id. at 336, 389 S.E.2d at 47.
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> In Crist, a medical malpractice case, the Court held "defense counsel may not interview plaintiff's nonparty treating physician privately without plaintiff's express consent" because "considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which ex parte contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery." Id. In so holding, the Court assumed the statutory physician-patient privilege was waived by plaintiff. Therefore, the Crist rule precludes non-consensual ex parte communications during adversarial proceedings.
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> Although we recognize "the Commission is not required to strictly apply the rules of evidence applicable to a court of law," Tucker v. City of Clinton, 120 N.C.App. 776, 780, 463 S.E.2d 806, 810 (1995), we likewise note the rationale of the Crist Court did not turn on the existence or nonexistence of an evidentiary privilege. Moreover, after careful review of the bases for the Crist holding--patient privacy, the confidential relationship between doctor and patient, and the adequacy of formal discovery devices--we cannot discern why these policy considerations would not be equally applicable to adversarial proceedings before the Commission. Therefore, notwithstanding the relaxed evidentiary rules applicable to the Commission, Id., and the fact defendant's arguments would carry great force were we writing on a clean slate, we nonetheless are bound by Crist. Consequently, we must conclude the Commission erred by admitting Dr. Pritchard's deposition testimony in light of the non-consensual ex parte contact between NCDOT and Dr. Pritchard. See Crist, 326 N.C. at 336, 389 S.E.2d at 47.
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> Finally, we also note NCDOT, in its brief, argues Salaam suffered no prejudice by admitting Dr. Pritchard's deposition over his objection because "Salaam was allowed to question the physician about the [ex parte] communication and show any possible taint or

> bias." Although the opportunity to cure any prejudice resulting from ex parte communications prior to deposition is theoretically available in every adversarial proceeding, we note the Crist Court appears to have established a prophylactic protection against non-consensual ex parte communications. See Id. Therefore, we must reject this contention.

Salaam v. North Carolina Department of Transportation, 468 S.E.2d at 538-539.

The rationale used by the North Carolina court for prohibiting non-consensual ex parte contact outright during adversarial proceedings has been repeated by several other courts faced with the issue. Such a prophylactic rule has been deemed necessary to counter the threat which non-consensual ex parte contact poses to physician-patient confidentiality. And the important distinction between regulating what is discoverable as opposed to regulating merely the means used to discover has been consistently apparent. See e.g. Morris v. Consolidation Coal Co., 191 W.Va. 426, 446 S.E.2d 648 (1994); Church's Fried Chicken No. 1040 v. Hanson, 114 N.M. 730, 845 P.2d 824 (N.M.Ct.App. 1992).

A.

Our own Supreme Court has recently addressed the issue of non-consensual ex parte contact in the context of a medical malpractice case. It was decided first that under M.R.E. 503 and Miss. Code Ann. §13-1-21 (Supp. 1995), a plaintiff filing suit on medical malpractice or other personal injury grounds which places his physical, mental or emotional condition in issue waives the medical privilege as to any relevant medical information from whatever source to the extent which the plaintiff's condition has been put in issue. Determinations as to the relevancy and privileged nature of certain information were left to be decided on an ad hoc basis. The Court held that in no circumstances, though, should a court in a pending suit order a plaintiff to provide an unconditional release of medical information. Scott v. Flynt, Miss.Sup.Ct.No. 92-IA-00397-

SCT (dec'd. April 18, 1996).

The Court in Scott also decided that non-consensual ex parte contact with treating medical providers is not a permissible method of discovery under the Mississippi Rules of Civil Procedure. In order to preserve the integrity of the confidential physician-patient relationship, the Court held that the Rules of Civil Procedure do not authorize or permit ex part contact with treating physicians as a means of discovery.

In the end, the Court fashioned the following guide:

> When a personal injury suit is pending, the medical privilege with regard to *relevant* information is automatically waived, making it unnecessary to have an automatic court order issue, to permit both parties equal access to all of the relevant information needed to get to the truth. The manner by which the relevant information is to be acquired is limited to either a voluntary consensual disclosure by the patient who is the holder of the privilege or the formal discovery process to prevent any breach of confidentiality. We hold that evidence obtained from ex parte contacts, without prior patient consent, by the opposing party which is subsequently used during a legal proceeding, is inadmissible.

Scott v. Flynt, slip op. at 20 (italicized emphasis in original) (underlining added for emphasis).

B.

As for the Court's interpretation of Rule 503 and the evidentiary medical privilege, we feel no compulsion to follow the opinion in Scott. Simply put, Rule 503 of the Mississippi Rules of Evidence is not applicable in workers' compensation proceedings. While we cannot totally ignore the medical privilege which exists independently of Rule 503 as a matter of statute,[3] traditional or formal rules of evidence, particularly those adopted for use "in proceedings in the courts of the State of Mississippi," nonetheless do not bind the Commission unless specifically adopted by the Commission. **M.R.E.** 101; Miss. Code Ann. §71-3-47, -55(1) (Rev. 1995); MWCC Procedural

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[3] Miss. Code Ann. §13-1-21 (Supp. 1995).

Rule 8. The Commission has not specifically adopted Rule 503 or any of the other Mississippi Rules of Evidence for use in its hearings.

Moreover, whether and to what extent the medical privilege has been waived in workers' compensation proceedings is governed entirely by Miss. Code Ann. §71-3-15(6), any related provisions of the Act and Commission Rules, and any judicial interpretations thereof. Regard for any of the waiver provisions of Rule 503 is simply unnecessary. We have previously answered this question by reference to these authorities alone, and we feel no further obligation in this regard as a result of the Court's latest interpretation of its own Rule 503.

On the issue of discovery, however, the Commission has via its Procedural Rule 9 specifically adopted Rules 26 - 37 of the Mississippi Rules of Civil Procedure to govern the conduct of discovery in litigated claims before the Commission. We therefore are compelled to conclude, based on Scott, that non-consensual ex parte contact with a treating medical provider is not an authorized method of discovery under our Procedural Rule 9.

Finally, the Court in Scott made clear its ruling based on both the Rules of Evidence and Rules of Civil Procedure was "only applicable during a court proceeding which includes discovery," and that the whole issue "of ex parte contacts and the waiver of a privilege *only* come into play during a court proceedings." Scott, slip op. at p.17 (emphasis in original).[4] Therefore,

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[4] The Court variously described the limits of its rules of evidence and civil procedure, and hence its ruling, as applying only in "Mississippi state courts," or "*once* the lawsuit has begun," or "*only* . . . during a court proceeding," or "in a court proceeding, which includes all hearings, trials, and discovery measures, or "when a personal injury suit is pending." Slip op. at pp.15, 16, 17, 18, 20 (emphasis in original). Other courts addressing this issue, particularly in the context of workers' compensation claims, have likewise held that a prohibition against non-consensual ex parte contact with treating physicians, grounded as it is on the evidentiary medical privilege and/or formal rules of civil procedure, is applicable only after a

the Court had to concede that, absent a pending suit, it could "neither allow nor prohibit a defendant from speaking ex parte with the plaintiff's physician." Id.[5] It was readily conceded by the Court that if a defendant initiated contact and the physician chose to speak, outside the confines of a formal court proceeding, "then the only *rules* applicable at that point . . . are his professional ethical codes of conduct concerning confidentiality." Id. (emphasis in original).

C.

In the end, we are led to the conclusion that the Scott ruling binds us only after a claim has been filed and only insofar as it provides that the Rules of Civil Procedure do not permit the use of non-consensual ex parte contact as a formal discovery method. This is because we have specifically adopted Rules 26 - 37 of the Mississippi Rules of Civil Procedure as the rules of discovery in claims pending before the Commission. All else announced by the Court which is grounded on Rule 503 or any other of the Mississippi Rules of Evidence applies only in "court proceedings" when "a personal injury suit is pending." Hinson's arguments to the contrary notwithstanding, we are not willing to declare that workers' compensation proceedings are the substantial equivalent of "any other typical personal injury suit" which is litigated in a court of law. Goasa and Son v. Goasa, 208 So.2d 575 (Miss. 1968) (". . . the rules of evidence for the

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claim has been filed. See Salaam v. North Carolina Department of Transportation, 468 S.E.2d 536, 539 (N.C.Ct.App. 1996) (". . . rules precludes non-consensual ex parte communications during adversarial proceedings."); Holiday Inn v. Re, 643 So.2d 13, 15 (Fla.App. 1 Dist. 1994) (ex parte communications "not prohibited prior to existence of an adversarial relationship" which is marked by "the filing of a claim.").

[5] In its footnote 5, the Court made reference to a "similar position" taken in Steinberg v. Jensen, 194 Wis.2d 439, 534 N.W.2d 361 (1995) to the effect that "ex parte contacts are not absolutely prohibited as rules of evidence do not control matters other than those during judicial proceedings. . ."

Workmen's Compensation Commission, a fact-finding agency, are not the same as that prescribed for ordinary civil actions."), *overruled in part on other grounds* Cockrell Banana Co. v. Harris, 212 So.2d 581, 584-585 (Miss. 1968); Wells-Lamont Corp. v. Watkins, 247 Miss. 379, 386, 151 So.2d 600, 603 (1963) ("The procedure before the Commission is not that prescribed for ordinary civil actions, brought in a regular trial court."). We likewise have not adopted the Mississippi Rules of Evidence in whole or in part for use in hearings before the Commission.

IV.

Based on the above, we hold on the facts of this case that no prohibited conduct has thus far occurred. Aside from the fact that no actual violation of any privilege has occurred, and aside from the fact that there has been no attempt to use the information gained by the adjuster as evidence in a formal hearing before the Commission or one of its administrative judges, there was no claim pending at the time the contact occurred, and no formal litigation had been commenced. See Kathleen L. Chapman v. Delta Financial Services, Inc. and Audubon Insurance Company, MWCC No. 92-09587-E-6950 (dec'd. February 15, 1994) (a claim, in the sense the term is used herein, is commenced by the claimant filing a petition to controvert or other substantially and legally equivalent written document). Hence, any rule prohibiting non-consensual ex parte contact in litigated claims simply would have no force or application to the conduct which has occurred thus far in this case.

As for the much broader question presented by the Employer's and Carrier's request for authorization to initiate non-consensual ex parte contact with any and all of the Claimant's treating physicians, we hold that the Administrative Judge correctly denied the Employer's and Carrier's request. Once formal litigation has been commenced by the filing of a petition to controvert or

equivalent and formal discovery ensues in accordance with the applicable Rules of Civil Procedure adopted by the Commission, non-consensual ex parte contact with treating physicians may not be initiated by the Employer, the Carrier, their legal representatives or agents. This is because non-consensual ex parte contact is not a formal discovery method authorized by those Rules, and once a controverted claim has been commenced, information is to be discovered or obtained only in accordance with those Rules. Scott v. Flynt, *supra* at p. 20 ("The manner by which the relevant information is to be acquired is limited to either a voluntary consensual disclosure by the patient who is the holder of the privilege or the formal discovery process to prevent any breach of confidentiality.").

We wish to emphasize that the holding herein is limited to non-consensual ex parte communication or contact in a pending, controverted workers' compensation claim.[6] Ex parte contact may certainly occur if consented to by the claimant or his legal representative. Absent patient consent, however, "[f]ormal discovery, on the record, with notice and an opportunity to other parties to be present and to participate in the proceeding, is simply the fairest and most satisfactory means of obtaining discovery from a treating physician." Scott v. Flynt, slip op. at 15, quoting Horner v. Rowan Companies, Inc., 153 F.R.D. 597, 601-602 (S.D.Tex. 1994). Outside the context of a pending claim, there are no formal rules of procedure upon which we may rely and enforce, and we are not inclined here to fashion one.

We also discourage in the strongest possible terms any disputes between the parties over the propriety of routine administrative and clerical matters which are usually undertaken ex parte

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[6] The Order of Administrative Judge is hereby amended to provide likewise.

by the employer or carrier, such as the scheduling of appointments, communication regarding authorization for treatment, or communications concerning the acquisition of medical records and the payment of charges. Such matters are hardly considered discovery in any significant sense and we fully expect a claimant or his attorney not to interpose any objection to such matters.

Because we have no choice but to conclude that a ban on ex parte communication or contact with a claimant's treating physicians is required in certain situations, we have the added obligation to determine what remedy ensues for a violation thereof. The Court in Scott v. Flynt concluded that a violation of the ban on ex parte contact in a pending action would automatically result in the exclusion of any information gathered as a result of the contact if an attempt is subsequently made to use the information in a legal proceeding. Slip op. at 20; see also Salaam, supra. While the basis for this outright exclusion is not altogether apparent from the Court's opinion, it is in its effect a rule of evidence, plain and simple. Certainly nothing in the rules of discovery demands exclusion in every case where a discovery violation occurs, and the Court has in fact previously deemed exclusion of evidence as a sanction of last resort for discovery violations. McCollum v. Franklin, 608 So.2d 692, 694 (Miss. 1992).[7] Nonetheless, the Court in Scott concluded that exclusion of evidence was the sole and only remedy when an unauthorized ex parte contact occurs during a pending action.

In our view, an outright exclusion of otherwise relevant evidence or information obtained through an unauthorized ex parte contact with a treating physician may be an appropriate remedy

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[7] Two Justices concurring in Scott were of the opinion that "[o]ne who obtains information not otherwise privileged without recourse to the processes of court should not for solely that reason have the evidence barred."

in courts of law but would be wholly at odds with the nature and purpose of workers' compensation litigation at the administrative level. This Agency is under charge in the adjudication of claims to consider all available relevant evidence and to conduct hearings "in such manner as best to ascertain the rights of the parties." Technical application of formal rules of evidence or procedure should not be used to frustrate or defeat this objective. Miss. Code Ann. §71-3-55 (Rev. 1995); MWCC Procedural Rule 8. The Commission has much greater latitude with regard to the conduct of hearings and the admissibility or exclusion of evidence than do courts of law in ordinary civil actions. Goasa and Son v. Goasa, 208 So.2d 575, 578 (Miss. 1968); Wells-Lamont Corp. v. Watkins, 247 Miss. 379, 386, 151 So.2d 600, 603 (1963). There are a number of decisions where the Supreme Court has reversed this Commission for refusing to consider relevant evidence for reasons deemed too technical in the workers' compensation setting but which may have sufficed had the issue arisen in a civil action in a court of law. See Dunn, Mississippi Workmen's Compensation §378 (3d ed. 1982); Smith v. Container General Corp., 559 So.2d 1019, 1023-1024 (Miss. 1990). Even in Cooper's, Inc. of Mississippi v. Long, a decision ironically at the heart of the Claimant's arguments in this case, we were instructed to relax the medical privilege in order to permit the introduction of relevant evidence which may otherwise be privileged, although admittedly, the privileged information obtained in Cooper's was not obtained by unauthorized means.

It is also as important as it is basic to remember that the question is not what should happen in the event of an unauthorized discovery of irrelevant evidence from a treating physician. Such evidence obviously is of no use in determining the claim and may safely be discarded on relevancy grounds alone without regard to the method which might have been used to obtain it.

Instead, we struggle with the question of what remedy should ensue when an unauthorized ex parte contact (a/k/a a discovery violation) has resulted in the discovery of otherwise relevant information, privileged or not? Even though in Cooper's, otherwise privileged information was deemed admissible because it was also highly relevant, we can't help but wonder what the outcome would have been had that information come to light as the result of a violation of the applicable rules of discovery.

Complicating our search for an appropriate remedy is our feeling that the problem brought to light by this case occurs only irregularly and often without any irreparable harm or prejudice. But it is ultimately the threat thereof which has caused courts, and hence this Commission, to take the course we take this day. And having taken this course, we must fashion an appropriate remedy.

In the end, we believe an automatic and unforgiving evidentiary barrier to the introduction of any evidence obtained via unauthorized ex parte contact is not an inappropriate remedy in the context of litigated workers' compensation claims. Instead, we are of the opinion that the rules of discovery as adopted by the Commission, as well as the Act itself, provide varying and adequate remedies for the breach thereof, and that these remedies should be considered and used on a case by case basis as the particular facts justify. Our statutory duty to consider all relevant evidence, to fully develop the facts and to conduct hearings in such manner as to best ascertain the rights of all parties, unshackled by the technical application of formal rules of evidence or procedure, demands no less.

We of course strongly insist that no unauthorized discovery take place, and wish to emphasize that this Order should not be read by anyone to mean that such acts will go unpunished.

What and all we are saying is that the absolute exclusion of evidence obtained by unauthorized means of discovery is not in our view an appropriate remedy in each and every case hereafter without regard for the facts and circumstances at hand; nor do we feel such a blanket exclusion is necessary to counter the threat which unauthorized ex parte contact poses to the sanctity of the physician-patient relationship. Exclusion of evidence may be considered a possible remedy but should not be considered as the exclusive one. McCollum v. Franklin, 608 So.2d at 694.

We are currently satisfied that the rules of discovery adopted by Commission provide an adequate repellant to those who would undertake an unauthorized invasion of the physician-patient relationship. **Miss.R.Civ.P.** 37(e)(ii). In addition, the Act itself may permit a finding that one who wanders outside the lawful discovery process is engaging in contemptuous behavior, Miss. Code Ann. §71-3-61 (Rev. 1995), and in extreme cases, that one who wanders outside the lawful discovery process and provides false or misleading information to a treating physician for the purpose of withholding benefits to an injured employee is guilty of criminal behavior, Miss. Code Ann. §71-3-69 (Rev. 1995).

V.

Having decided that a ban on non-consensual ex parte contact with treating physicians is appropriate, if only after a controverted claim has been filed by a claimant, it becomes necessary to address the many constitutional challenges which the Employer and Carrier have raised. We note quickly that the Employer's and Carrier's argument that such a ban impermissibly infringes upon their work product privilege, and that it denies them the constitutional right to effective assistance of counsel, was specifically rejected by the Court in Scott, slip op. at 19-20.

A.

They have also argued generally that a ban on non-consensual ex parte communication with a claimant's treating physician would result in a deprivation of due process. According to this argument, a ban on non-consensual ex parte access to an adverse party's treating physician will mean that "employers and carriers will be required to participate in adjudicative proceedings which may deprive them of property without the reasonable opportunity to discover and know about the evidence relevant to the claim, or to interview and otherwise confront witnesses, and employers and carriers will be deprived of the right to have their claim adjudicated in an impartial tribunal with meaningful participation of counsel." Such an argument simply does not hold water.

The prohibition in this case on non-consensual ex parte contact with treating physicians applies only after a controverted claim has been commenced. Limiting employers and carriers at that point to the formal rules of discovery provided in the Mississippi Rules of Civil Procedure and our own Procedural Rule 9 hardly deprives them of a reasonable opportunity to discover relevant evidence and confront witnesses. That is why the formal rules of discovery exist - to provide all parties with a fair and reasonable opportunity to discover relevant evidence in advance of a hearing or trial. If we were to seriously credit this argument of the Employer and Carrier, then we might as well declare Rules 26 - 37 of the Mississippi Rules of Civil Procedure, and the adjudicatory system as we know it, unconstitutionally void of meaningful due process.

What the Employer and Carrier apparently fail to appreciate is that nothing in this Order or any other opinion we have seen attempts to prevent them from obtaining otherwise discoverable information. This Order merely holds, unavoidably in light of Scott v. Flynt, that the method preferred by the Employer and Carrier for the discovery of evidence from the Claimant's treating

physicians once a claim is pending is not permissible. No substantive rights of theirs have been or will be remotely affected, adversely of otherwise, so far as we are concerned. Taken to its logical extreme, the Employer's and Carrier's argument suggest that its attorney cannot meaningfully participate in the defense of any claim, whether workers' compensation or not, if confined during the pendency of the claim to the formal rules of discovery. Surely such a suggestion is unintended.

This precise argument has received the attention of at least one other court. It was held there that due process in the constitutional sense prohibits the deprivation of liberty or property without due process of law, and that so long as one is given a reasonable opportunity to be heard and adequately defends one's interest, no unconstitutional deprivation occurs. Testin v. Dreyer Medical Clinic, 238 Ill.App.3d 883, 891, 605 N.E.2d 1070, 1075 (Ill.App. 2 Dist. 1992), *judgment vacated on other grounds* Almgren v. Rush-Presbyterian-St. Luke's Medical Center, 162 Ill.2d 205, 642 N.E.2d 1264 (1994).[8] In Testin, Dreyer Medical Clinic appealed a ruling prohibiting its attorney from engaging in ex parte contact with the plaintiff's treating physician, who incidentally also happened to be an employee, shareholder and director or Dreyer Medical Clinic. In dismissing the due process claim, the court stated that "Dreyer fails . . . to elaborate on what information that could be obtained in an ex parte discussion with Dr. Herwick [that]

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[8] Admittedly, this case arose out of a medical malpractice claim, but the Employer and Carrier has argued generally that bans on ex parte contact are unconstitutional and has cited a number of cases not arising in the workers' compensation context. Since this issue is whether ex parte bans in general are constitutional, we do not think there is any meaningful distinction to be drawn based on the form of the action out of which the constitutional issue arose.

could not [also] be obtained via [formal] discovery." 238 Ill.App.3d at 892, 605 N.E.2d at 61.[9] The same may be said for Employer and Carrier herein.

B.

The Employer and Carrier also vigorously argue that any prohibition on non-consensual ex parte contact with a claimant's treating physicians amounts to a prior restraint or content-based subsequent restraint on their exercise of free speech and association in violation of the First Amendment of the United States Constitution and Article 3, Section 13 of the Mississippi Constitution of 1890. We deal first with the argument that such a ban amounts to an unconstitutional prior restraint of speech in violation of the First Amendment to the United States Constitution and corresponding provisions of the State constitution.[10] In Petrillo v. Syntex Laboratories, 148 Ill.App.3d 581, 499 N.E.2d 952 (Ill.App. 1 Dist. 1986), *appeal denied* 113 Ill.2d 584, 505 N.E.2d 361 (1987), *cert. denied* Tobin v. Petrillo, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987), this precise argument was made and rejected.

There, counsel for the defense in a products liability action was held in contempt of court for refusing to comply with an order barring him from engaging in private, ex parte conferences with the plaintiffs' treating physicians. It was argued that such a ban violated counsel's First Amendment freedom of speech rights.

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[9] The court in Testin also rejected Dreyer's claim that such a prohibition hindered the preparation of an adequate defense and violated the work product doctrine, two claims specifically rejected by our own Supreme Court in Scott, as noted above. Id.

[10] We are indulging for argument sake, but by no means accepting, the Employer's and Carrier's claim that the ban in question on non-consensual ex parte contact is first and foremost a "prior restraint" justifying constitutional scrutiny.

The court first analyzed the ban on ex parte contact[11] as a possibly unconstitutional prior restraint. It was noted that a court ordered prior restriction on the speech of a private person "can be sustained only if it can be shown that the . . . restriction is a precisely drawn means of serving a compelling state interest." Petrillo, 148 Ill.App.3d at 606-607, 499 N.E.2d at 969. The Court quickly concluded there was a compelling state interest in the right of privacy possessed by the patient/plaintiff and in the confidential relationship existing between doctor and patient. Id. The restriction on defense counsel's ability to communicate ex parte with the plaintiffs' treating physicians regarding his medical condition was deemed a precise and narrowly drawn limit which was clearly necessary to serve this compelling state interest. 148 Ill.App.3d at 607, 499 N.E.2d at 969.

The Court in Petrillo also utilized a balancing test which weighed "the state's interest in the confidential and fiduciary relationship existing between a patient and his physician and in the privacy rights of the patient-plaintiffs against Tobin's claim that he is free to confer with the plaintiffs' treating physicians even though such conferences are not authorized by the rules of discovery." 148 Ill.App.3d at 608, 499 N.E.2d at 970. The court concluded:

> . . . upon balancing the interests set forth above, that the sanctity of the physician-patient relationship combined with the privacy rights of the patient-plaintiffs is of paramount importance and that they should therefore take precedence over Tobin's alleged right to confer privately with the plaintiffs' treating physicians. . . .[T]he instant action involves relationships inherently beneficial to society involving the rights and interests of physicians and patients across the state. Accordingly, because the balance of interests favors such, we find that the trial court's order prohibiting Tobin from engaging in ex parte conferences with the plaintiffs' treating physicians does not infringe upon Tobin's Freedom of Speech Rights.

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[11] Ex parte contact was defined by the court as any contact with the plaintiffs' treating physicians outside the formal rules of discovery. 148 Ill.App.3d at 584, 499 N.E.2d at 954.

Petrillo, 148 Ill.App.3d at 608, 499 N.E.2d at 970.

The court in Petrillo also considered whether such a ban constituted an unreasonable time, place or manner restriction in violation of defense counsel's First Amendment rights. The question thus became whether the restriction served a significant governmental interest and left ample alternative channels for communication. The court quickly concluded that a significant governmental interest was being served, as noted above, and that the formal discovery process provided more than ample alternative means to communicate with the plaintiffs' treating physicians and thereby obtain all of the information to which defense counsel would be entitled. 148 Ill.App.3d at 608-609, 499 N.E.2d at 970-971.[12]

We next consider the argument that a ban on non-consensual ex parte contact with a treating physician in a pending workers' compensation claim amounts to an unconstitutional "content-based subsequent restraint." There is virtually no reference we can find in the decisional law regarding what the Employer and Carrier term a "content-based subsequent restraint," so we are not entirely sure what to make of this argument. Nonetheless, the Employer and Carrier argue that such a restraint exist in any ban on ex-parte communication with the claimant's treating physicians because such a ban is "regulating the content of the discussion." If that is in fact the nature of such a restraint, we may readily conclude that the ban herein does not fit the mold for it should be clear that the ex parte contact prohibition "regulates only how defense counsel may obtain information from a treating physician, not the substance of what is discoverable." Scott

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[12] Petrillo was reaffirmed in Testin v. Dreyer Medical Clinic, supra, wherein it was held that a ban on non-consensual ex parte contact with a plaintiff's treating physician does not violate the constitutional rights of free speech and association.

v. Flynt, slip op. at 15, quoting Horner v. Rowan Companies, Inc., 153 F.R.D. at 602.

On the chance, however, that we have misunderstood the nature of a content-based subsequent restraint, we will indulge the notion put forth by the Employer and Carrier, even though, according to the Employer and Carrier, it ultimately does not matter how we characterize the restraint for first amendment purposes. They contend the restraint, however characterized, is subject to the same level of strict constitutional scrutiny. If this be so, then the holdings above relative to the prior restraint argument are equally adequate to dispel the subsequent restraint argument.[13]

Applying the reasoning of Petrillo to the instant case, we note first that the physician-patient privilege survives in workers' compensation proceedings, if only remotely. Cooper's, Inc. of Mississippi v. Long, 224 So.2d 866 (Miss. 1969). And in Scott v. Flynt, the Court noted that "a patient's privilege of confidentiality is of paramount importance and must be afforded protection." Slip op. at 13. This indicates to us a compelling state interest in preserving the sanctity of patient-physician confidentiality. See also Lauderdale County DHS v. T.H.G., 614 So.2d 377, 383-384 (Miss. 1992) (physician-patient privilege protects a "compelling societal interest"). We feel, based on the above, that the restriction herein on non-consensual ex parte contact with a claimant's treating physicians in a pending claim is a narrowly drawn restriction

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[13] In Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980) there is mention of "subsequent restraints," but not in any meaningful way that helps us determine exactly whether the prohibition which is at the heart of this case is a subsequent or prior restraint. The Court there does state that subsequent restrictions on freedom of expression are easier to justify than prior restraints. 619 F.2d at 468, 473. Nevertheless, by utilizing the most heightened scrutiny, we consider the label we may ultimately attach to the restraint irrelevant. If the restraint survives strict scrutiny, then it survives regardless of whether it is a prior or subsequent restraint.

which serves a compelling state interest and also leaves the Employer and Carrier with ample alternative means for obtaining whatever medical information to which it is entitled in defense of this claim. There is, in our view, no violation of the Employer's and Carrier's First Amendment rights.

C.

Finally, the Employer and Carrier argue that the ban in question violates their right to equal protection because it discriminates in favor of claimants and affords claimants preferential treatment and privileges over employers and carriers. They argue that such a "suspect classification" must withstand strict constitutional scrutiny not only because it is suspect, but also because it infringes on their exercise of a valuable constitutional right, i.e., free speech.

We wholly disagree with the assertion that a ban on employer's and carrier's non-consensual ex parte contact with a claimant's treating physician in a pending claim is a suspect classification which infringes on the exercise of their fundamental free speech rights. As held above, we are the opinion first that no such free speech rights of the Employer and Carrier would be unconstitutionally impaired.

Second, we are not persuaded that employers and carriers in workers' compensation claims are members of a suspect or even quasi-suspect class anymore than are claimants. See cf. Phillips v. Ford Motor Company, ___ F.3d ___, 1996 WL 229463 (8th Cir. 1996) (workers' compensation claimants challenging the administration of Missouri's Workers' Compensation Law are not "members of a constitutionally-protected suspect or quasi-suspect class"); Industrial Claims Appeals Office v. Romero, 912 P.2d 62 (Colo. 1996) (workers' compensation claimants not members of a suspect class); Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d

504, 524 (Tex. 1995) (workers' compensation claimants do not constitute a suspect class); Mathieu v. Bath Iron Works, 667 A.2d 862, 867 (Maine 1995) (workers' compensation claimant not a member of any suspect class); Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994) (injured employees treated differently based on type of injury are not members of a suspect class); Hansen v. W. C. A. B., 18 Cal.App.4th 1179, 1183, 23 Cal.Rptr.2d 30, 32 (Cal.App. 1 Dist. 1993) (mentally injured claimants treated differently based on cause of mental injury are not suspect class); Harris v. State, Dept. of Labor and Industries, 120 Wash.2d 461, 476-77, 843 P.2d 1056, 1064-65 (1993) (provision of workers' compensation law which provided offset for claimant's receiving social security benefits did not create suspect class). Accordingly, the strict scrutiny argument must fail. Romer v. Evans, ___ U.S. ___, 1996 WL 262293 (May 20, 1996) (classification that neither burdens a fundamental right nor targets a suspect class need only bear a rational relation to a legitimate end); Romero, 912 P.2d at 66.

Assuming then that the ban on non-consensual ex parte contact which is provided herein nonetheless constitutes unequal treatment among those similarly situated,[14] the test becomes

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[14] Employer and Carrier argue that a ban on ex parte contact would constitute unequal treatment of employers and carriers as against claimants. This argument suggests that claimants, on the one hand, and employers and carriers on the other, are similarly situated parties who are not being treated similarly, which is the essence of any legitimate equal protection claim. But to accept this proposition is to also accept that employers and carriers who are treated differently than claimants are not members of a suspect class anymore than are claimants who are treated differently as against other claimants or employers and carriers. Put another way, if employers and carriers and claimants are all similarly situated persons in the workers' compensation context, as argued herein, then the dissimilar treatment of employers and carriers is no more suspect than the dissimilar treatment of the claimants in the cases cited above.

We wish to make clear that we do not accept the basic proposition that a case of unequal treatment among similarly situated persons has even arisen in this case, and will assume its validity only arguendo. There is a significant question in our mind as to whether employers and carriers, on the one hand, and claimants on the other, in controverted claims under the workers'

whether the alleged unequal treatment bears a rational relation to a legitimate state interest. Romer v. Evans, supra; F.C.C. v. Beach Communication, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). A classification which does not affect fundamental rights and which does not proceed along suspect line carries with it a "strong presumption of validity" and one challenging the constitutionality of such a classification on equal protection grounds must "negative every conceivable basis which might support it." F.C.C. v. Beach Communication, Inc., 508 U.S. at 314-315. Again, assuming arguendo that the ex parte contact ban in this case even constitutes a classification or form of dissimilar treatment which is subject to equal protection review, we think it is a narrowly tailored limitation which at the least bears a rational relation to the legitimate state interest in preserving the sanctity of the physician-patient relationship.[15]

VI.

The Order of Administrative Judge dated November 6, 1995 is affirmed and amended as provided herein. This matter is hereby remanded to the Administrative Judge for such further proceedings as are appropriate, to include consideration of the Claimant's Motion for Reinstatement of Benefits.

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compensation law, are indeed similarly situated, and hence, whether a rule regulating certain discovery conduct of all employers and carriers alike even remotely results in the dissimilar treatment of similarly situated persons. Because, however, the equal protection challenge is easily disposed of on other grounds, we see no need to answer this basic question.

[15] The Employer and Carrier have also put forth certain "practical and pragmatic considerations" which they say militate against any ban on non-consensual ex parte contact with a claimant's treating physicians. They point to increases in the cost and time it will take to process and resolve claims if such a ban is implemented. These arguments, as against the sanctity of the confidential patient-physician relationship, have been soundly rejected. See e.g. Morris v. Consolidation Coal Co., 191 W.Va. 426, 430, 446 S.E.2d 648, 652 (1994); Church's Fried Chicken No. 1040 v. Hanson, 845 P.2d 824, 829 (N.M.Ct.App. 1992).

SO ORDERED this the 1st day of August, 1996.

MISSISSIPPI WORKERS' COMPENSATION COMMISSION:

Claire M. Porter

Beverly W. Hogan

John M. Nypper

COMMISSIONERS

ATTEST:

Brenda H. Goolsby

Brenda H. Goolsby, Secretary