



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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|------------------------------|---|---------------------------|
| KENNETH WHITWELL, | : | |
| | : | C.A. No: 07C-08-006 (RBY) |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| ARCHMERE ACADEMY, INC., | : | |
| PREMONSTRATENSIAN FATHERS | : | |
| INC., THE NORBERTINE FATHERS | : | |
| OF DELAWARE, INC; THE | : | |
| NORBERTINE FATHERS, INC. | : | |
| REV. EDWARD J. SMITH, | : | |
| | : | |
| Defendants. | : | |

ORDER

This is ongoing litigation involving an allegation of clerical sex abuse occurring in the early 1980s. Plaintiff’s Motion to Compel relates to one defendant’s deposition, the deposition of his therapist and the therapist’s records. Defendant Smith refused to answer questions related to his treatment sessions with his therapist, Dr. Phillip Miraglia, by asserting his psychotherapist-patient privilege. Plaintiff responded with the instant Motion to Compel.

Legal privileges exist for social and policy reasons. To encourage honest communications between attorneys and clients or physicians and patients, these conversations are protected from general disclosure in legal proceedings. However, the protections are not without limits.

In determining the existence of a psychotherapist-patient privilege, a Court must determine, first, if the privilege in question exists; and, if so, whether it was waived. Exceptions to legal privileges exist where the Legislature finds that the need

for the testimony outweighs the benefits of its confidentiality.¹ Additionally, privileges can be abrogated by statute or waived by a voluntary disclosure of the confidential communication to an unnecessary third party.² Once the information is shared with outsiders, the veil of secrecy is lifted, obviating the need for a witness, otherwise possessing the privilege, to refuse to disclose the information.

The Legislature has evidenced an intent to abrogate the psychotherapist-patient privilege in child abuse cases.³ This intent was shown in an earlier version of the statute as well.⁴ The previous version has been applied in similar cases to the one at hand.⁵ Further, this privilege has been rejected widely in situations of threatened or revealed child abuse.⁶ The concept would appear to apply to the abrogation statutes.

Defendant argues that Delaware Rule of Evidence 1103 somehow precludes the statutory abrogation of the privilege. This argument is unpersuasive. Although counsel showed that the rules of evidence apply to cases filed after their adoption in 1980, she did not point the Court to any authority requiring the application of the Rules to the exclusion of Delaware statutes. However, even if the Rules were applicable exclusively, Defendant does not then gain the privilege, because the rules

¹ Jennifer Sawyer Klein, *I'm Your Therapist, You Can Tell Me Anything: The Supreme Court Confirms the Psychotherapist-Patient Privilege in Jaffe v. Redmond*, 47 DePaul L. Rev. 701, 721 (1998).

² D.R.E. 510.

³ 16 *Del. C.* §909.

⁴ 16 *Del. C.* §908 (1996).

⁵ *State v. Patti*, 1991 WL 53460 (Del. Super. Apr. 3, 1991), *State v. Hinson*, 1991 WL 89823 (Del. Super. May 15, 1991).

⁶ Jennifer Sawyer Klein, *I'm Your Therapist, You Can Tell Me Anything: The Supreme Court Confirms the Psychotherapist-Patient Privilege in Jaffe v. Redmond*, 47 DePaul L. Rev. 701, 722 (1998).

of evidence themselves articulate the inapplicability of the psychotherapist-patient privilege in child abuse cases.⁷

Defendant also made an argument related to the location of the confidential communication. This argument was made without giving any authority for the proposition. Defendant argued that the Delaware procedural and evidentiary rules should not apply to the communications because they were made outside the state. Since this is a Delaware case, the rules of this state will apply to the evidence in this case. The location of the communication is immaterial.

Because the privilege was abrogated, the issue of waiver need not be decided. The question of whether a privilege is waived is fact based. Even if the Court were to address the issue of waiver, there is insufficient evidence before it to make such a determination. The only evidence relating to a potential waiver is a series of references to deposition testimony by Defendant Smith.

Since the privilege was abrogated and not available for waiver, Dr. Miraglia will be deposed. His records of sessions with Smith from August 1984 through December 1985 will be provided to the Court for an in camera review, pursuant to the standard set forth in Superior Court Civil Rule 26(b)(1). Plaintiff's Motion to Compel is GRANTED to the extent discussed herein.

SO ORDERED this 29th day of May, 2008.

/s/ Robert B. Young

J.

RBV/sal

⁷ D.R.E. 503(d)(7), noting that the psychotherapist privilege does not exist in Title 16 Chapter 9 (child abuse) cases.