

SUPERIOR COURT
OF THE
STATE OF DELAWARE

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Transaction ID 18706524
Case No. 07C-08-006 RBY



ROBERT B. YOUNG
JUDGE

KENT COUNTY COURT HOUSE
38 THE GREEN
DOVER, DELAWARE 19901

February 22, 2008

RE: *Whitwell v. Archmere Academy, et. al.*, C.A. No. 07C-08-006

Dear Counsel:

The Plaintiff has filed a Motion to Compel answers to deposition questions from Smith regarding acts that occurred in Delaware, New Jersey and Pennsylvania only. The statutes of limitations for these acts have all expired,¹ making criminal prosecution impossible. Smith opposes the Plaintiff's Motion by claiming that, notwithstanding the foregoing, the possibility of criminal prosecution in Wisconsin for acts occurring outside of the state, on the basis of certain (for want of a better phrase) "criminal long arm" statutes.²

That is, Smith cites a Wisconsin statute which allows prosecutions of acts outside the state if there were an intent to cause a consequence in Wisconsin. The consequence must be "set forth in a section defining a crime."³ Smith, then, refers the Court to a different statute which lists "causing bodily or mental harm to the child" as a legitimate consequence to the crime of Child Enticement.⁴ Smith's argument is that the acts outside Wisconsin could be construed to have had the intended consequence of causing harm to a child in Wisconsin.

According to Smith, these two statutes, read in combination, allow for his prosecution for all acts committed outside Wisconsin because Smith and the Plaintiff once visited Wisconsin together, presuming for these purposes that the Plaintiff suffered harm in Wisconsin thereby. Wisconsin case law shows this jurisdictional

¹ Smith withdrew his argument under the Pennsylvania tolling provision after reviewing *Commonwealth v. Powers*, 577 A.2d 194, 196 (Pa. Super. Ct. 1990).

² W.S.A. §§939.03(1)(c), 948.07..

³ W.S.A. §939.03(1)(c).

⁴ W.S.A. §948.07.

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statute's being used in child custody cases where one parent took the child from Wisconsin to another state or country,⁵ holding that keeping a child outside of Wisconsin caused the consequence of concealment in Wisconsin.⁶

Wisconsin statutes are interpreted similarly to Delaware statutes, using the plain meaning rule.⁷ Theoretically, an application of these statutes could lead to a criminal prosecution, though the statutes never have been so applied. The 1953 amendments, which added W.S.A. §939.03(1)(c), have been held to intend to broaden Wisconsin's territorial jurisdiction.⁸ Certainly, a prosecution under these circumstances seems highly unlikely. Nevertheless, the 5th Amendment privilege against self-incrimination is not dependent on the Court's opinion of the likelihood of prosecution. Rather, it looks only to the reasonable possibility of prosecution.⁹

The 5th Amendment of the United States Constitution protects a person from being a witness against himself. In order to invoke one's 5th Amendment privilege against self-incrimination properly, there must be a reasonable fear of criminal prosecution.¹⁰ The privilege protects from non-speculative and non-remote dangers of prosecution only.¹¹ The analysis must look at what a truthful answer would disclose.¹²

The answers need not incriminate the proponent directly. It is enough that the

⁵ *State v. Inglin*, 592 N.W.2d 666 (Wis. App. 1999).

⁶ *Id* at 673-74.

⁷ *Thomas v. Milwaukee City Bd. of Fire and Police Com'rs*, 2008 WL 299061 (Wis. App. Feb. 5, 2008).

⁸ *State v. Anderson*, 695 N.W.2d 731 (Wis. 2005).

⁹ *In Re Folding Carton Antitrust Litigation*, 609 F.2d 687 (7th Cir. 1979).

¹⁰ *Mason v. U.S.*, 244 U.S. 362 (1917).

¹¹ *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972).

¹² *Id.*

answers would furnish a link in the chain that could lead to prosecution.¹³ When the privilege is asserted over a series of questions, the Court must make a particularized inquiry for each question posed.¹⁴ It is the Court's responsibility to determine whether the privilege applies.¹⁵ There is sufficient evidence to find the invocation of the privilege proper when the Court can use a reasonable inference or judicial imagination to conceive of a sound basis for the proponent's reasonable fear of prosecution.¹⁶ Any doubt must be resolved in favor of the privilege.¹⁷

In the case at bar, there is significant doubt as to whether Smith will be prosecuted under these Wisconsin statutes. However, certain prosecution is a non-speculative possibility. Therefore, the Motion to Compel is **GRANTED** in part and **DENIED** in part. Smith is ordered to answer questions regarding acts in Delaware, New Jersey and Pennsylvania for the time before the trip to Wisconsin was planned and after Smith and the Plaintiff departed Wisconsin from said trip. All questions regarding incidents that occurred from the commencement of plans to travel to Wisconsin until departure will, at this juncture, be excluded.

Clearly, the description of the commencement of such planning is subject to abuse. Hence, a hearing thereon with testimony for a factual determination may be required. If Smith's description of that period is sufficiently circumspect to satisfy Plaintiff, then no such determination will be necessary. If not, then Plaintiff may request such a proceeding.

All deposition testimony, and each copy thereof, taken pursuant to this Order will be maintained in a sealed envelope. Only those with association to this litigation or parties thereto shall have access to the contents, and there only upon execution of an affidavit of confidentiality agreed upon by the parties, hopefully without the need for intervention of the Court. Subject to further Order, "association with" does not

¹³ *Mumford v. Croft*, 93 A.2d 506, 508 (Del. 1952).

¹⁴ *U.S. v. Zappola*, 646 F.2d 48, 53 (2nd Cir. 1981).

¹⁵ *Mumford*, 93 A.2d at 508.

¹⁶ *Tyson v. Equity Title & Escrow Co. of Memphis, LLC*, 282 F.Supp.2d 820 (W.D. Tenn. 2003).

¹⁷ *Mumford*, 93 A.2d at 509.

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include news media or similarly situated organizations or individuals.

The foregoing is **ORDERED**, any breach thereof will be considered CONTEMPT OF COURT.

/s/ Robert B. Young

J.

RBY/sal

oc: Prothonotary

cc: Counsel

File