

**IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA**

**JOHN DOE NO. 13,**

**Plaintiff,**

**CASE NO.: 2010-CA-015146-O  
DIVISION 34**

**v.**

**DIOCESE OF ORLANDO, a  
Corporation Sole; and DALE J.  
MELCZEK as Bishop of the Roman  
Catholic Diocese of Gary, Indiana, a  
Corporation Sole,**

**Defendants.**

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**ORDER GRANTING MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS**

This matter came before the Court on plaintiff's motion to compel the production of certain documents and, for the reasons that follow, the motion is granted.

**BACKGROUND**

The plaintiff alleges that he was sexually molested by Richard A. Emerson ("Emerson") who was, at the time, a Roman Catholic priest assigned to the Diocese of Orlando ("Diocese"). He has brought suit against the Diocese and defendant, Dale J. Melczek ("Melczek") its then-Bishop. The particular theories of recovery are not relevant to the disposition of this motion other than to say that the requested documents are relevant as that term is used in the context of pre-trial discovery. Emerson had previously been assigned to the Diocese of Gary, Indiana. While there, other allegations of sexual abuse arose and the Gary Diocese sent Emerson to the

St. Luke Institute in Maryland ("St. Luke's"). One court has stated that "[t]he medical staff at the institute has training and experience in the evaluation and treatment of priests, including priests who have problems related to sexual abuse and alcoholism." *Soc'y of Jesus of New England v. Commonwealth*, 808 N.E. 272, 276 (Mass. 2004). Melczek's motion papers indicate that "Emerson, as the subject of the evaluation conducted by St. Luke's Institute, authorized the release of the St. Luke's Institute report to the Diocese of Gary." (Melczek Resp. para. 15.) The plaintiff here has requested records relating to that evaluation and Melczek refused to provide them for several reasons. Plaintiff has now moved to compel them.

The Court has also accepted the opposition to the motion submitted on behalf of the non-party Emerson. He argues that the law of Maryland, where St. Luke's is located, should govern the disposition of this motion and that under Maryland law, production of the records is "unequivocally protected under Maryland law." (Emerson Opp. Mem. 6.) The Court has conducted an *in camera* review of the documents in question<sup>1</sup> and rules that plaintiff's motion should be granted and these documents produced.

### **DISCUSSION**

Emerson asserts that the law of Florida (where the alleged abuse took place) and the law of Maryland (where St. Luke's is located) conflict and that, therefore, the threshold issue "is whether the Court should apply the privilege laws of Maryland or Florida." (Emerson Opp. Mem. 2.) In the Court's view, the threshold issue here is whether a true conflict even exists. The Second District Court of Appeal has explained

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<sup>1</sup> The specific documents in question on this initial review are Bates stamped 707-710, 715-725, and 729-736.

As a threshold issue, we are not convinced that this case involves a "true" conflict-one in which two states have conflicting interests. A false conflict can exist under at least three different circumstances. It can exist when the laws of different states are (1) the same, (2) different but would produce the same outcome under the facts of the case, or (3) when the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by the application of its laws.

*Tune v. Philip Morris, Inc.*, 766 So. 2d 350, 352 (Fla. 2d DCA 2000).

The Court has reviewed the parties' submissions and conducted its own research and concludes that, here, Florida and Maryland law yield the same result and that the laws of both states require that the documents in question be provided to the plaintiff.

First, the Court examines Maryland law.

#### **Maryland law**

Emerson argues that "[t]he St. Luke's report is unequivocally protected under Maryland law." The Court disagrees. In asserting that the documents are "protected" and should not be produced, Emerson confuses "confidential" with "privileged."

There is a difference between a "confidential" medical record and a "privileged" communication. *Shady Grove Psychiatric Group v. State*, 736 A.2d 1168 (1999). Information can be confidential and, at the same time, non-privileged. *Id.* 736. "Privilege is the legal protection given to certain communications and relationships, i.e., attorney-client privilege, doctor-patient privilege, and marital privilege. Confidential is a term used to describe a type of communication or relationship." *B.F.G. Employees Credit Union, Inc. v. Kopco & Co.*, 2002 Ohio 2202. Privilege statutes must be narrowly construed. *Reynolds v. State*, 633 A. 2d 455 (1993).

*Doe v. Md. Bd. of Social Workers*, 840 A. 2d 744, 748 (Md. App. 2004).

Emerson urges that mental health records are statutorily confidential under Maryland Code Ann., Health-Gen, section 4-307(b). He further asserts that "Maryland

has set a very high bar for waiver of this privilege." (Emerson Opp. Mem. 6.) This statutory provision, however does not create any privilege. It merely defines certain medical records as "confidential." Nowhere is the word "privileged" found. Under the Maryland General Health Code, as Emerson correctly points out, a "confidential" medical record does not lose that status when it is disclosed to a third party. Again, this enactment does not address privilege. Emerson's reliance on this statutory provision is therefore, misplaced.

Under Maryland law, the applicable statute is Maryland Code, Courts & Judicial Proceedings, section 9-109 which establishes a patient-therapist privilege. A "patient" is defined as

a person who communicates or receives services regarding the *diagnosis or treatment* of his mental or emotional disorder from a psychiatrist, licensed psychologist, or any other person participating directly or vitally with either in rendering those services in consultation with or under direct supervision of a psychiatrist or psychologist.

*Md. Code Ann., Cts. & Jud. Proc. §9-109 (emphasis added).*

The privilege is described as follows:

(b) Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing:

- (1) Communications relating to *diagnosis or treatment* of the patient; or
- (2) Any information that by its nature would show the existence of a medical record of the *diagnosis or treatment*.

*Md. Code Ann. Cts. & Jud. Proc. §9-109(b) (emphasis added).*

There are two reasons why the documents in question here are not privileged. First, their production would not result in the disclosure of matters related to diagnosis or treatment.

Second, even if a privilege existed, it has been waived.

Under Maryland law, as is true generally, privileges must be narrowly construed. *In re Alethea W.*, 747 A. 2d 736, 741 (Md. App. 2000) (quoting *Reynolds v. State*, 633 A. 2d 455, 464 (Md. 1993)).

The parties cite no case, and the Court finds none, construing the meaning or parameters of the term "for diagnosis or treatment" in this context.<sup>2</sup> The Court, then, turns to first principles. "The purpose of the privilege is to aid in the effective treatment of the [patient] by encouraging the patient to disclose information fully and freely without fear of public disclosure." *In re Alethea W.*, 747 A.2d 736, 738 (Md. App. 2000) (citation omitted). The Court has conducted an *in camera* review of the documents in dispute and concludes that they are not related to diagnosis or treatment of Emerson<sup>3</sup>. *Rather, they are meant to provide the Diocese with a professional assessment of his suitability to properly perform priestly duties*<sup>4</sup>. The psychological services here were for the benefit of the Gary Diocese and if there was any benefit to Emerson it was purely incidental. The referral was not for treatment, but to

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<sup>2</sup> The Court notes that Melzek refers to Emerson having been "evaluated" at St. Luke's and never says he was diagnosed or treated there. Emerson refers to his "treatment." The Court has reviewed the records and determines that they are not treatment-related.

<sup>3</sup> The information available to the Court throughout the review of the records speaks of "evaluation(s)," "the evaluation process," "this evaluation," "evaluation staff," "interviews," "collection of data," "assessment," and "evaluation procedure." Even the "physical examination and laboratory examination" is referenced as an "evaluation." The "neuropsychological examination" is even an "evaluation and assessment." While the term "diagnoses" is used to identify Axis I through Axis III categories of disorders, the overall report is essentially an evaluation.

<sup>4</sup> The concluding paragraph is telling. It reads, in part, "[w]e hope this report is of help to you and to Father Emerson, and that it addresses the questions identified by the diocese regarding Father Emerson's current functioning."

"...address[ ] the questions identified by the diocese .... " (Bates Stamp 725.) The purpose of the privilege - to aid in treatment- is therefore not served. Although not bound by them, the Court has reviewed and finds informative several opinions from other jurisdictions. In *Niemann v. Cooley*, 637 N.E. 2d 943 (Ohio App. 1st Dist. 1994) (disapproved of on other grounds), another clergy molestation case, it was held that where an accused priest's "counseling with a psychologist or psychiatrist was not for treatment, but, rather, for the Archdiocese to determine his future as a priest or how it intended to handle his problems, then the records are not privileged." *Niemann v. Cooley*, 637 N.E.2d 943, 952 (Ohio App.1st Dist. 1994).

Even if the documents at issue here do relate to diagnosis or treatment, and the Court holds that they do not, they must still be produced. Under Maryland law, "[i]t is well-established, however, that when a privilege does exist but is waived for one purpose it will be deemed waived for other purposes absent some reasonable basis for limiting the waiver." *In re Alethea W.*, 747 A. 2d at 742. The Court finds no reasonable basis for limiting the waiver under these circumstances. The Court has found no clergy molestation case dealing with this issue in which a limited waiver was found and none has been cited to it. Where, as here, an individual undergoes a psychiatric evaluation at the behest of his employer, at the expense of his employer and for the use of his employer<sup>5</sup>, that employee cannot claim any expectation of privacy in communications made. It is readily apparent to the employee that records generated in the course of such an evaluation will be provided to a third party, the employer. The Archdiocese required that Emerson enter St. Luke's and it obtained the records from St. Luke's for its own

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<sup>5</sup> It is apparent that Emerson was sent by the Diocese, at the request of the Diocese and at the expense of the Diocese. (See Bates Stamped docs. 707-708, 709-710, 715,725,729-730.)

use. Emerson knew this as evidenced by his execution of a release.

There are other decisions from outside of Florida which the Court finds helpful. In *In re Clergy Cases I*, 116 Cal. Rptr. 360 (Cal. App. 2d Dist. 2010), the court held that the psychiatric records of Franciscan priests accused of molesting children were not privileged:

The Franciscans obtained the records to make personnel decisions and to arrange for treatment so the Individual Friars could continue their ministry on behalf of the Franciscans. The Franciscans paid for the therapy to make sure the Individual Friars received treatment, but the psychological records were not disclosed to the Franciscans for diagnostic and treatment purposes. It also makes no difference that the Individual Friars were told and believed their psychological records would be kept confidential. Their voluntary disclosure of these records to the Franciscans for purposes that were not reasonably necessary for diagnosis and treatment operated as a waiver of the privilege irrespective of what the Franciscans may have told the friars.

*In re Clergy Cases I*, 116 Cal. Rptr. 360 (Cal. App. 2d Dist. 2010).

A Massachusetts court took a somewhat different analytical route in deciding whether records of assessments of priests performed at St. Luke's were protected by the psychiatrist-patient privilege. Plaintiff cites a case construing a statutory privilege nearly identical to Maryland's, in which the court held the privilege inapplicable where "the communications are made for the purpose of being conveyed to a third-party." *Ford v. Law*, No. 02-4550, 02-1296, 2001 WL 32139028 \*7 (Mass. Super. Nov. 25 2001). It further held that "the psychotherapist-patient privilege does not arise where the diagnosis and treatment occur at the behest of an employer for the purposes of making employment decisions." *Id.* at \*8. While referring to "diagnosis and treatment," the court nevertheless held the St. Luke's documents to be not privileged. The Massachusetts Superior Court continued that "even if a psychotherapist-patient privilege somehow arose respecting [the priest] and his doctors respecting the 'hospital-type

records' of his treatment and diagnosis, that privilege was waived by the disclosures made to third parties and [the priest's] consent to those disclosures." *Id.* In this last-quoted sentence *Ford* appears to hold that even though the records there were related to diagnosis and treatment they were not privileged because the diagnosis and treatment came at the employer's asking and therefore the privilege was effectively waived when the employer was permitted to obtain them. The Court agrees with the *Ford* court on the waiver issue and holds that even if the records in issue here relate to diagnosis and treatment and are thus privileged, that privilege has been waived. Here, Emerson clearly intended to release to Melczek the "... results of my medical and psychological assessments ..." by his signature on the release. (Bates Stamp 393).

Emerson points to a Maryland case which hold that "no waiver of [the therapist-patient] privilege should result from the holder's limited disclosure to a person who has a separate confidential relationship with the holder." *Reynolds v. State*, 633 A. 2d 455, 462 (Md. App. 1993). Emerson's attorney says in his brief that he is "prepared to present an expert on Cannon law to establish the confidential nature of the Bishop-Priest relationship at an evidentiary hearing should this Court so require." (Emerson Opp. Mem. 8.) Inasmuch as Emerson has not supplied the name or curriculum vitae or report of this purported expert, the Court cannot find a reason to hold an additional hearing to take his testimony. In any event, the Court finds no reason to plum the intricacies of Cannon law. It will accept that the priest-bishop relationship is a confidential one. The communications here, however, were not made in the course of that relationship but rather in the employer-employee context. (*See* letter of Jan. 19, 2005 to St. Luke's, Bates Stamp 729-730). Emerson does not claim that the employer-employee relationship is a confidential relationship. Thus, there is not a "separate confidential relationship," which could, under



*Reynolds*, defeat a finding of waiver. The Court finds no reason to permit Emerson to selectively waive his claim of privilege.

Under the law of Maryland, the document must be produced.

### **FLORIDA LAW**

Emerson argues strenuously for application of Maryland law because, as he acknowledges, "Maryland has not enacted a statute which abrogates the [psychotherapist-patient] privilege to the extent the communications relate to child abuse." (Emerson Opp. Mem.. 8.) He cites section 39.204, Florida Statutes, as having this effect. The Court accepts Emerson's analysis and concludes that his assertion of therapist-patient privilege under Florida law is ineffectual in this case.

Clearly, Florida law had stated its strong intent to supercede any privilege when it might impede obtaining information relating to child abuse. Florida Statute 39.204 entitled "Abrogation of privileged communications in cases involving child abuse, abandonment, or neglect" states:

The privileged quality of communication between husband and wife and between any professional person and his or her patient or client, and any other privileged communication except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report as required by s. 39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect.

Fla. Stat. §39.204.

Florida's psychotherapist-patient privilege would not apply anyway. This privilege has a statutory basis. *See Fla. Stat.* §90.503. As with the Maryland privilege, it is critical to its application that the communication in question be made in the course of diagnosis or treatment.

A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the *purpose of diagnosis or treatment* of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship

Fla. Stat. §90.503(2)(emphasis added).

Indeed, while the statute grants this right to refuse disclosure to the patient, Emerson was not even a patient. For purposes of Florida's psychotherapist-patient privilege "[a] patient is a person who consults, or is interviewed by, a psychotherapist for purposes of *diagnosis or treatment* of a mental or emotional condition, including alcoholism and other drug addiction." §90.503(1)(b), Fla. Stat.(emphasis added). Emerson does not meet this definition. *See e.g. Delaurentos v. Peguero*, 47 So. 3d 879, 881 (Fla. 3d DCA 2010) (psychotherapist-patient privilege not applicable to psychologist's report of police officer's pre-employment evaluation).

### CONCLUSION

The Court finds no true conflict in this case inasmuch as the same result will be reached under the law of both states involved. Under Florida and Maryland law, the documents in question are not shielded from production.

Accordingly, it is hereby ORDERED and ADJUDGED that the motion of the

plaintiff, John Doe13, to compel production of documents is hereby GRANTED

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this

21 day of October, 2011.



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**JOHN MARSHALL KEST**  
**Circuit Judge**

I HEREBY CERTIFY that a on the 21 day of October, 2011, a true copy of the foregoing has been electronically filed with the Clerk of the Courts by using the ECF system which will send a notice of electronic filing to the following: Jeffrey M. Herman, Esq., Stuart S. Mermelstein, Esq., and Adam D. Horowitz, Esq., 18205 Biscayne Blvd., Suite 2281, Miami, FL 33160; Kevin Shaughnessy, Esq., and Marilyn Moran, Esq., 200 South Orange Avenue, Suite 2300, Orlando, FL 32801; and a copy was furnished by U.S. Mail delivery Robert Radel, Esq., 777 S. Harbour Island Blvd., Suite 500, Tampa, FL 33602.

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