

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

|                              |   |                          |
|------------------------------|---|--------------------------|
| STATE OF DELAWARE,           | ) |                          |
|                              | ) |                          |
| Plaintiff,                   | ) |                          |
| v.                           | ) |                          |
|                              | ) |                          |
| LAUREL DELAWARE              | ) | C.A. No. N14C-05-122 MMJ |
| CONGREGATION OF JEHOVAH'S    | ) |                          |
| WITNESSES, JOEL MULCHANSINGH | ) |                          |
| and WILLIAM PERKINS,         | ) |                          |
|                              | ) |                          |
| Defendants.                  | ) |                          |
|                              | ) |                          |
|                              | ) |                          |
|                              | ) |                          |
|                              | ) |                          |

Submitted: November 9, 2015

Decided: January 26, 2016

Upon Defendants' Motion for Summary Judgment

**DENIED**

**OPINION**

James E. Liguori, Esq., Liguori & Morris, and Francis J. McNamara, Esq.  
(Argued), Watchtower Legal Department, Attorneys for Defendants

Janice R. Tigani, Esq. (Argued), and Valerie H. Farnan, Esq., Deputy Attorneys  
General, Attorneys for Plaintiff

**JOHNSTON, J.**

## **FACTUAL AND PROCEDURAL CONTEXT**

This Motion presents an issue of first impression in Delaware. The question is whether 16 *Del. C.* § 909 exempts Elders of the Laurel Congregation of Jehovah's Witnesses, Delaware, from the duty to report child abuse, on the basis of privileged communications "between priest and penitent in a sacramental confession." The Court is required to examine the constitutionality of this statutory privilege.

The State brought this enforcement action pursuant to 16 *Del. C.* § 914. In 2013, a juvenile member ("Juvenile Member") of the Laurel Delaware Congregation of Jehovah's Witnesses ("Congregation") reported to his mother ("Mother") that he was engaged in a sexual relationship with an adult female member ("Adult Member") of the Congregation. Two Elders of the Congregation met with Juvenile Member and Mother at the church building. The Elders were informed of the sexual relationship.

The Elders spoke with Adult Member, who confirmed that the relationship occurred. Both Juvenile Member and Adult Member were "disfellowshipped" (excommunicated) from the Congregation. The Elders did not report the child abuse under the procedures established by 16 *Del. C.* §§ 903 and 904.

The State seeks civil penalties against the Congregation and the two Elders.

Defendants have moved for summary judgment. Defendants assert that all communications among the Elders, Juvenile Member, and Adult Member are subject to the clergy/penitent privilege. Additionally, Defendants argue that the State's claims are barred by the First Amendment to the United States and Delaware Constitutions. Finally, Defendants argue that they are exempt from a reporting duty pursuant to Section 909.

In support of their Motion, Defendants have submitted affidavits, signed by the Elders. The affidavits state, in pertinent part:

In keeping with the beliefs and practices of Jehovah's Witnesses, congregation members frequently share confidential information with elders seeking spiritual guidance, assistance, and direction. This is done in a private setting in the presence of at least two (2) elders.

On occasion, the disclosure of confidential information to the elders will result in congregation disciplinary action being taken against the congregant disclosing the information.

In accordance with the beliefs and practices of Jehovah's Witnesses, confidential information is kept confidential so as to uphold the elders' role as spiritual shepherds of the congregation, to maintain respect for the position of elders and congregants, and to allow congregants to feel comfortable fully disclosing information to the elders....

During January 2013, [the two Elders] spoke to [Juvenile Member] who had already accepted all the primary tenets of the Jehovah's Witness faith so as to [sic] baptized, regarding some confidential matters. [Juvenile Member] was seeking spiritual advice and counsel from us as elders in a private setting.

During January 2013, [the two Elders] also spoke to [Adult Member] regarding some confidential matters. [Adult Member] was seeking spiritual advice and counsel from us as elders in a private setting.

In February 2013, both [Adult Member and Juvenile Member] were disfellowshipped (excommunicated) from the Laurel Congregation.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.<sup>1</sup> All facts are viewed in a light most favorable to the non-moving party.<sup>2</sup> Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.<sup>3</sup> When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.<sup>4</sup> If the non-moving party bears the burden of proof at trial, yet “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” then summary judgment may be granted against that party.<sup>5</sup>

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<sup>1</sup> Super. Ct. Civ. R. 56(c).

<sup>2</sup> *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

<sup>3</sup> Super. Ct. Civ. R. 56(c).

<sup>4</sup> *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

<sup>5</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## ANALYSIS

### **16 Del. C. § 909**

Section 909 of title 16 of the Delaware Code provides:

No legally recognized privilege, except that between attorney and client and that ***between priest and penitent in a sacramental confession***, shall apply to situations involving known or suspected child abuse, neglect, exploitation or abandonment and shall not constitute grounds for failure to report as required by § 903 of this title or to give or accept evidence in any judicial proceeding relating to child abuse or neglect. (Emphasis added.)

Neither party has presented the Court with any legislative history indicating why the General Assembly chose the language “between priest and penitent in a sacramental confession,” as opposed to more ecumenical religious terms. The terms are not defined. Therefore, they will be given their common meaning.

By analogy, Black’s Law Dictionary defines “priest-penitent privilege” as follows: “In evidence, the recognition of the seal of confession which bars testimony as to the contents of a communication from one to his confessor.”<sup>6</sup>

Rule 505(b) of the Delaware Uniform Rules of Evidence provides: “A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual adviser.”<sup>7</sup> “Clergyman” is defined as “a minister, priest,

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<sup>6</sup> *Priest-Penitent Privilege*, Black’s Law Dictionary (5<sup>th</sup> ed. 1975).

<sup>7</sup> Del. R. Evid. 505(b).

rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.”<sup>8</sup> “A communication is ‘confidential’ if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.”<sup>9</sup>

The Section 909 privilege is a narrow exception to the duty to report child abuse or neglect. It is the religious equivalent of the attorney/client privilege. The obvious purpose of these privileges is to balance free and candid communications with legal or religious advisors, with the public mandate to prevent and prosecute child abuse.

### ***Constitutional Considerations***

The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”<sup>10</sup> Delaware’s Constitution is more directly applicable to the issues presented in this motion. Under the Delaware Bill of Rights, the Freedom of Religion section prohibits any “preference given by law to any religious societies,

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<sup>8</sup> Del. R. Evid. 505(a)(1).

<sup>9</sup> Del. R. Evid. 505(a)(2).

<sup>10</sup> U.S. Const. amend I.

denominations, or modes of worship.”<sup>11</sup> “[Delaware’s] First Amendment does not select any one group or any one type of religion for preferred treatment.”<sup>12</sup>

In *Lemon v. Kurzman*,<sup>13</sup> the United States Supreme Court recognized a three-part test for the validity of laws challenged under the First Amendment establishment clause. First, the statute must have a secular legislative purpose. Second, the principal or primary effect must neither advance nor inhibit religion. Third, the law must not involve the government in an excessive entanglement with religion.<sup>14</sup>

This Court has found that the purpose of Chapter 9 of Title 16 is to prevent child abuse. The reporting requirement was enacted to enable the State to protect children and to prosecute their abusers. This is a secular legislative purpose.<sup>15</sup> The second and third parts of the *Lemon v. Kurzman* test are less clear under these facts.

The Section 909 privilege creates a narrow exception. The Court has no authority to “invalidate legislation absent a showing that it is unconstitutional.”<sup>16</sup>

If the terms “priest,” “penitent,” and “sacramental confession” are narrowly interpreted, only certain religions would be entitled to take advantage of the

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<sup>11</sup> Del Const. art. I, § 1.

<sup>12</sup> *United States v. Ballard*, 322 U.S. 78, 87 (1944).

<sup>13</sup> 403 U.S. 602 (1971).

<sup>14</sup> *Id.* at 612-13.

<sup>15</sup> *State v. Bodenweiser*, I.D. No. 12100015127 (Del. Super. 2014) (The *Bodenweiser* Court also found that the specific facts in that case warranted the conclusion that Section 909 neither advanced nor inhibited how the affected church practiced its religion, and did not entangle the government with religious practices. *Bodenweiser* involved application of Section 909 to admission of evidence, and did not address the reporting requirement exemption.).

<sup>16</sup> *United States v. Booker*, 543 U.S. 220, 283 (2005).

Section 909 exception. The exception only would apply to denominations that title their clergy “priests,” refer to parishioners as “penitents,” and officially recognize a sacrament called “confession.” Clearly, such an interpretation would compel a finding that Section 909 is in violation of the Delaware Constitution. Carving out an exception only for certain denominations would impermissibly grant a “preference...to...religious societies, denominations, or modes of worship.”<sup>17</sup>

If Section 909 were to be interpreted narrowly, the effect would be to advance certain religions over others. To apply Section 909 on a denomination-by-denomination basis, the Court would have to engage in an excessive entanglement with religion.

To avoid a finding that Section 909 is unconstitutional, the statute may be interpreted more generically. A broader reading may be justified because the terms at issue are neither defined, nor upper case (which could indicate that the terms are more akin to proper titles).

By analogy to the Delaware Rules of Evidence, “priest” could be defined as “a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.”<sup>18</sup>

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<sup>17</sup> Del Const. art. I, § 1.

<sup>18</sup> Del. R. Evid. 505(a)(1).

“Penitent” could refer to any person who makes an admission to clergy for the purpose of repenting and confessing. “Repent” is defined as “to feel or show that you are sorry for something bad or wrong that you did and that you want to do what is right.”<sup>19</sup> “Confession” is defined as “an act of confessing; *esp*: a disclosure of one’s sins in the sacrament of reconciliation.”<sup>20</sup> “Sacramental confession” could mean communications that are intended and reasonably understood to be confidential, for the purpose of confession, and sacramental in the context of that particular religion.

### ***Genuine Issues of Material Fact***

There are two separate conversations to consider. Conversation I is among Juvenile Member, his Mother and the two Elders. Conversation II is among Adult Member and the two Elders. For purposes of this motion, the Court finds that both conversations were intended by all parties to be confidential. There is nothing in Defendants’ affidavits that specifically indicates that either conversation is a “sacramental confession.” Instead, the affidavits state that both conversations were for the purpose of “seeking spiritual advice and counsel from us as elders in a private setting.”

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<sup>19</sup> *Repent*, Merriam-Webster Collegiate Dictionary (11th ed. 2003).

<sup>20</sup> *Confession*, Merriam-Webster Collegiate Dictionary (11th ed. 2003).

### Conversation I

The Section 909 privilege applies only when the purpose of the conversation is for penitence. The affidavits supplied by Defendants leaves open certain questions of fact. What was the motivation of Juvenile Member and Mother in bringing the sexual relationship to the attention of the Elders? Was the intention to report misconduct to church officials, or to confess sinful behavior and thus to obtain absolution? The fact that Juvenile Member was excommunicated may indicate that Juvenile Member did not come voluntarily to the meeting, or that Juvenile Member did not reveal the information with the understanding that his repentance might result in the absolution that ordinarily is associated with “sacramental confession.”

Additionally, there is no public policy reason to shield from the reporting requirement communications with a *victim* of child abuse. The identity of the child, as well as the child’s well-being, are intended to be protected from the ramifications of public revelation by the procedures that are part of the law enforcement process. Juvenile Member would not have been subject to any punishment by the State. His punishment was imposed solely by the Congregation.

## **Conversation II**

The circumstances and motivation of Adult Member also are in question. Defendants' affidavits indicate that the conversation was demanded by the Elders as part of a disciplinary process. If the meeting with the Elders was not initiated by Adult Member, Adult Member may not be deemed to be a "penitent." If the purpose of this meeting was for the Elders to investigate alleged child abuse, Conversation II may not be a "sacramental confession."

## **CONCLUSION**

The Section 909 privilege exemption from the requirement to report child abuse and neglect, if narrowly interpreted, is unconstitutional on its face. The terms "priest," "penitent," and "sacramental confession" literally apply only to select denominations. The Delaware Constitution prohibits laws that give preference to any religion. However, Section 909 potentially can be read to apply to all religions.<sup>21</sup>

Regardless of the constitutionality of Section 909, genuine issues of material fact exist that prevent summary judgment.

**THEREFORE,** Defendants' Motion for Summary Judgment is hereby  
**DENIED.**

**IT IS SO ORDERED.**

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<sup>21</sup> Of course, Delaware's General Assembly could clarify its intentions through legislative action, with language that would make the exemption denomination-neutral.

/s/ Mary M. Johnston  
The Honorable Mary M. Johnston