

Court of Appeals of Texas,

Houston (14th Dist.).

Keith and Margaret SIMPSON, Individually and as Next Friends of Jennifer

Simpson, Relators,

v.


The Honorable Geraldine TENNANT, Judge of the 113th District Court of Harris

County, Texas, Respondent.

I. NATURE OF THE CASE

This is an original mandamus proceeding. Keith and Margaret Simpson (the "Simpsons") sued the Texas Annual Conference of the United Methodist Church (the "Conference") for negligence and gross negligence in connection with severe injuries sustained by their daughter, Jennifer, in a playground accident at the First United Methodist Church of Pearland (the "Church"). During discovery, the Simpsons deposed Reverend Clifton Lamb, pastor of the Church. Reverend Lamb indicated that he had obtained some information concerning the accident from an unidentified person. However, claiming the communications-to-clergymen privilege, Reverend Lamb refused to divulge that information or the identity of the source. The trial court, Judge Tennant, denied the Simpsons' motion to compel Reverend Lamb to identify the source. The Simpsons now ask us to issue a writ of mandamus ordering the trial court to compel Reverend Lamb to answer. We deny the writ.

II. FACTS

On May 21, 1992, officials of the Church caused the legs of a monkey-bar set to be cut and the set to be laid on its side in the church playground. The monkey bars were not chained to a fence to prevent their use; nor were Church personnel warned not to use them until the set could be anchored safely in the ground. Unknown persons stood up the monkey bars between Saturday night, May 23, and Sunday morning, May 24. On Sunday morning, teachers and aides took a Sunday school class to the playground and allowed the children to use the monkey bars without realizing that they were unsecured. Jennifer Simpson was swinging on the monkey bars when they collapsed upon her. Jennifer, three years old at the time, suffered a broken neck and was rendered quadriplegic and respirator-dependent for life.

Keith and Margaret Simpson, relators, settled their claim against the Church. Subsequently, they filed a lawsuit against the Conference. On September 9, 1993, at a deposition, the Simpsons asked Reverend Lamb if he had any information as to who stood up the monkey bars. Reverend Lamb indicated that he had some "iffy" information but invoked the communications-to-clergymen privilege and refused to disclose what information he had or who gave it to him. The questions were certified.

The Simpsons filed a motion to compel answers to certified deposition questions. On October 29, 1993, Judge Tennant conducted a hearing and denied relief.

III. BASIS FOR MANDAMUS

The Simpsons complain that the trial court abused her discretion by erroneously interpreting the communications-to-clergymen privilege in denying the requested discovery. The Simpsons argue that the trial court's ruling was arbitrary, unreasonable, and a clear and prejudicial error of law. The Simpsons claim the right to discover the identity of persons who are potential parties or who have information concerning the liability of others. The Simpsons maintain that the requested information goes to the heart of their lawsuit.

The Simpsons contend that the privilege protects only the divulgence of the *substance* of the confidential communications made to a clergyman, not the *identity* of the communicant. Absent disclosure of the identity of

the communicant, the Simpsons are unable to determine whether the communicant claims *303 the privilege and, if so, whether the communicant's actions before or after the communication have effectively waived the privilege. Tex.R.Civ.Evid. 511 . The Simpsons argue that they probably will not need to question the communicant regarding the actual conversation with Reverend Lamb. They assert that it should suffice simply to ask the communicant about *who* stood up the monkey bars and *when*.

* * *

V. ANALYSIS

The issue before us is one of first impression in Texas: Whether the communications-to-clergymen privilege provided by Texas civil evidence Rule 505 protects the *identity* of the communicant. We squarely confront the tension between discovery and privilege. The purpose of discovery is to facilitate the search for truth, to enable courts to decide cases "by what the facts reveal," not "by what facts are concealed;" the purpose of privilege is to suppress information, even if relevant and vital. Helen A. Cassidy & Edward L. Rice, *Privileges and Discovery: Part One--The Expanding Scope of Discovery*, 52 Tex.B.J. 462, 462 (1989) (citation omitted). In this case, we resolve the tension in favor of privilege and conclude that the identity of Reverend Lamb's communicant is protected.

A. The Rule

Rule 505. Communications to Clergymen

(a) **Definitions.** As used in this rule:

(1) A "clergyman" is 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.

(2) 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.

(b) **General rule of privilege.** 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 spiritual advisor.

(c) **Who may claim the privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. *The person who was the clergyman at the *304 time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.*

Tex.R.Civ.Evid. 505 (emphasis added).

Reverend Lamb's testimony is evidence from which the trial court could have concluded that the communication to Reverend Lamb was a "confidential communication by [a] person to a clergyman in his professional character as spiritual advisor." *See* Rule 505(b) . The trial court could also have concluded that Reverend Lamb had authority to claim the privilege on behalf of the communicant. *See* Rule 505(c) .

The Simpsons propose that the unidentified communicant had a purely secular concern in contacting Reverend Lamb, i.e., a desire not to become involved in the litigation as a party or a witness. But Reverend Lamb's testimony that the communication came to him in the "informal confessional" as a "burden and a pain" was evidence from which the trial court could have found that the communicant was seeking spiritual solace and guidance.

D. Rule 505 Protects the Communicant's Identity

The real issue in this case is whether the scope of the communications-to-clergyman privilege encompasses the *identity* of the communicant. We hold, on the facts of this case, that it does.

Communicant-clergyman confidentiality benefits the individual communicant, the clergy, and society. The individual benefits from unfettered freedom of religion in his use of the confessional; his perceived ability to communicate with God through an emissary; the therapeutic value in obtaining psychological and physical relief from fear, tension, and anxiety; and in his exercise of a fundamental right to privacy. 24 Ohio St.L.J. at 60. The clergy benefits in being able to safely draw out a communicant's innermost thoughts and feelings with the assurance that confidences are protected by public policy. *Id.* The church as an institution benefits in enjoying recognition of its prestigious place in society. *Id.* The judiciary benefits by avoiding direct confrontations with the clergy. *Id.* There is the realization that requiring the clergy to testify will not necessarily produce testimony. "The concept of jailing a clergyman for adhering to the absolute duty imposed upon him by deep religious beliefs is offensive." Brian Domb, *I Shot the Sheriff, but Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & Health 209, 216 (1990-91).

The Simpsons argue that, under Tex.R.Civ.P. 166b, subd. 2 they are entitled to discover the identity of persons who are potential parties or have information concerning the liability of others. But, the broad scope of discovery is limited by the legitimate interest of the opposing party to avoid the disclosure of privileged information. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex.1984) (orig. proceeding). It is true that discovery proceedings have as their aim and purpose the administration of justice by allowing the parties to obtain the fullest knowledge of issues and facts prior to trial; however, if matter sought to be discovered is privileged, it is not subject to discovery. *West v. Solito*, 563 S.W.2d 240, 243 (Tex.1978) (orig. proceeding). Rule 166b, subd. 3e exempts from discovery "any matter protected from disclosure by ... privilege." *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex.1985) (orig. proceeding); Tex.R.Civ.P. 166b, subd. 3e. This exemption is qualified: "Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party [or] any person having knowledge of relevant facts..." Rule 166b, subd. 3e. But we interpret this qualification as permitting the disclosure of the identity of potential parties or witnesses whose identities were learned independently of any privileged communication. We do not read the qualification to authorize the disclosure of the identity of a communicant when the identity was only learned through a confidential communication opportunity.

The Simpsons are no worse off for being denied the identity of the communicant since *309 that information would not have existed but for the privilege. Stephen A. Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 Iowa L.Rev. 811, 817 (1981). "[C]ommunications that are made because of the privilege and which the law assumes never could have been made without the privilege remain private. Nothing is hidden that the rest of the world would have reasonably expected to be available." *Id.* at 818 (footnote omitted).

In sum, "[t]he benefit of preserving [the communications-to-clergyman privilege] overbalances the possible benefit of permitting litigation to prosper at the expense of the ... spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment." *Mullen v. United States*, 263 F.2d 275, 280 (D.C.Cir.1958). "I think a communication made in reasonable confidence that it will not be disclosed, and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding..." *Id.* at 291 (Edgerton, J., concurring).

We believe that the Wigmore analysis supports the conclusion that the identity of a person who has made a privileged communication to a clergyman is privileged itself.

2. Analogy to Attorney-Client Privilege

The Simpsons analogize the relationship between a clergyman and his communicant with that between an attorney and his client. The Simpsons correctly contend that the identity of an attorney's client is generally not privileged. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir.1991). The Simpsons do recognize an exception to this general rule, where so much

of the communication between the attorney and client has already been disclosed, that revealing the identity of the client would, in effect, disclose more of the communication including the confidential motive for the client's seeking legal advice. *Id.* The Simpsons maintain, however, that this exception does not apply in the present case.

First, we are unconvinced that a communicant confiding in a clergyman is analogous to a client seeking legal assistance. A legal client does not usually hold the same expectation of confidentiality with respect to his identity. He typically approaches an attorney in anticipation of judicial proceedings where it is highly likely that his identity will be discoverable at some point in the litigation process. 66 Iowa L.Rev. at 821. Attorneys typically do not take steps to prevent a client from being seen entering their offices, to avoid using the client's name in addressing correspondence, or to feign from greeting clients by name in the presence of others. *Id.* Therefore, an attorney's client does not normally harbor a realistic expectation that his identity will be protected indefinitely.

In bold contrast, a communicant seeking to unburden himself of a psychological burden and pain and hoping to achieve spiritual solace brings to the "confessional" different expectations. The communicant "bares his soul" to the clergyman and reveals his innermost thoughts and feelings. The communication experience is sought for its own sake to achieve peace of mind and not with the anticipation that the information will be used by the clergyman to represent the communicant in a public forum.

We therefore find suspect the premise that communications to a clergyman are on the same plane as those to an attorney.

Second, even if we pursue this analogy, we would find that the identity of Reverend Lamb's communicant is so inextricably intertwined with the subject matter of the communication as to warrant its protection by the privilege. *See In re Reyes-Requena*, 926 F.2d at 1432. From Reverend Lamb's testimony, the trial court could have found that: (1) the unidentified communicant gave Reverend Lamb information relating to who stood up the monkey bars; (2) the communicant came to Reverend Lamb to make a "true confession," i.e., to seek relief for a "burden and a pain." From these findings, the trial court could have inferred that the communicant was implicated, directly or indirectly, in the events leading up to the playground accident. Revealing the communicant's identity would supply a missing component *310 of the communication to Reverend Lamb, i.e., the name of the individual implicated in the setting up of the monkey bars. In such circumstances, we protect the communicant's identity because connected inextricably with a privileged communication. *See id.*

The identity of a communicant may not be privileged merely because its revelation incriminates the communicant in wrongdoing, but neither does his identity lose its privilege merely because the information would be useful to litigants. *See id.* The communications-to-clergyman privilege prevents the Simpsons from obtaining useful information, but this is the price we pay for a system that affords individuals at least one harbor of refuge where they can make a full disclosure of their most personal and sensitive feelings in return for understanding and spiritual guidance. *See id.* Rule 505 does not refer only to the *content* of communication, but rather, focuses on the counseling *opportunity*. *Wittig*, 832 S.W.2d at 686.

At the hearing on the motion to compel, The Simpsons' counsel stated: "If the identity of the communicant is disclosed, we will probably never need to get into the substance of what he told the pastor, because all I would intend to do would be to ask that person *what he did, what he saw or what he heard*. And what he told the pastor would never become an issue." (Emphasis added.) We fail to see how a communicant, truthfully answering these questions, would not be forced to reveal the substance of his communications to Reverend Lamb. The communicant could not claim a privilege as to the facts underlying his communication to Reverend Lamb, the Simpsons would have gained access to information they would not have had but for the communications-to-clergyman privilege, and the privilege would be effectively negated. *See In re Reyes-Requena*, 926 F.2d at 1432 (the government is not credible when it asserts that it sought only the fact of intervenor's identity rather than confidential communications; the government clearly sought the identity in hopes of broadening their investigations by obtaining more defendants to charge in a conspiracy). Of course, if the Simpsons locate the communicant by independent means, then they could treat him as any other witness as to facts within his knowledge with the exception of actual privileged statements made to Reverend Lamb. 66 Iowa L.Rev. at 823.

3. The Texas Communications-to-Clergymen Privilege is Broad in Scope

Our decision to uphold the trial court's protection of the identity of Reverend Lamb's communicant is consistent

with what we believe to be the intent of the Texas legislature and Supreme Court to provide Texans with a strong communications-to-clergymen privilege. First, the Texas privilege is broader than in some jurisdictions in that a communication need not be strictly "penitential" to qualify for protection. *Easley v. State*, 837 S.W.2d 854, 856 (Tex.App.--Austin 1992, no pet.) (interpreting the identical Rule 505 in the code of criminal evidence). Second, while other comparable Texas communications privilege rules contain express exceptions, the communications- to-clergyman privilege contains none at all. *Wittig*, 832 S.W.2d at 686; see RULES 503 (lawyer-client), 504 (husband-wife), 508 (informer), 509 (physician-patient), & 510 (mental health info). Third, and most significantly, when Rule 505 was adopted in 1983, it dropped a provision of the previous communications-to-clergymen statute that had given the trial court discretion to compel disclosure of a communications to a clergyman if necessary to a proper administration of justice. *Wittig*, 832 S.W.2d at 684-85; Tex.Rev.Civ.Stat. Ann. art. 3715a (Act of June 12, 1967, 60th Leg. R.S., ch. 435, § 1, 1967 Tex.Gen.Laws 1005, *repealed by* order of the Texas Supreme Court, dated Nov. 23, 1982, effective Sept. 1, 1983, adopting the Texas Rules of Evidence.)

We perceive a clear intent to afford Texans the opportunity for spiritual counseling in "total and absolute confidence." See *Trammel*, 445 U.S. at 51, 100 S.Ct. at 913.

The Simpsons argue that a person's identity is not a "communication" at all, but a mere "observation" and discoverable. The Simpsons cite cases where a communicant's demeanor and state of mind were discoverable. *311 *Snyder v. Poplett*, 98 Ill.App.3d 359, 53 Ill.Dec. 761, 764, 424 N.E.2d 396, 399 (1981); *Buuck v. Kruckeberg*, 121 Ind.App. 262, 95 N.E.2d 304, 307 (1950) ; *State v. Kurtz*, 564 S.W.2d 856, 861 (Mo.1978) . But in all these cases, the communicant's identity was already known. These cases are no authority for the proposition that the hitherto unknown identity of a communicant is discoverable as a mere "observation."

VI. CONCLUSION

We conclude that the trial court did not abuse its discretion in finding that the identity of Reverend Lamb's communicant was protected by the communications-to-clergymen privilege. The trial court could have based its decision on fundamental principles of privilege or on the basis that the communicant's identity was inextricably intertwined with the content of the communication. Her decision was consistent with the concept of a strong Texas communications-to-clergymen privilege and available, albeit sparse, precedent. The trial court did not err in denying the Simpsons' motion to compel, and we deny the writ.

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