

STATEMENT OF FACTS

This case involves claims brought under the New Jersey Law Against Discrimination. Specifically, plaintiffs herein contend that the defendants discriminated against them based upon color in denying admittance to Le Terrace Swim club and in retaliating against them for standing up for their rights and the rights of others.

In or about May, 2001 Mike and Katie Russo joined Le Terrace Swim club owned and operated by defendants Nardone. The defendant club is located in Nutley, New Jersey. Mr. Russo paid the necessary fee for a summer membership for him and his family. The Russo's had embraced as part of their family a young black woman named Marci Shepard. Marci had lost her father and mother and needed a home while attending Nutley High School. Marci was not with Mr. Russo when he joined the club, and Mr. and Mrs. Nardone were unaware that she was a member of the Russo family and an African American.

Shortly thereafter, Mrs. Russo went to the club in June 2001 with her 4 children and Marci Shepard to enjoy an afternoon of swimming and recreation. When defendant Nardone saw Marci Shepard he told Mrs. Russo that there would be "no guests today". Mrs. Russo got the distinct impression that Mr. Nardone was discriminating against Marci Shepard because of the color of her skin.

Mrs. Russo challenged Mr. Nardone on his admission of white guests that day and his rejection of Marci Shepard on the date in question. Mr. Nardone

then informed Mrs. Russo that she and her family were no longer welcome at the defendant, Le Terrace Swim club. It was clear to the Russos that Marci Shepard was not permitted to enjoy the rights and privileges of other members and guests of the defendant Swim Club because of her color. It was clear to the Russo's that they were retaliated against by defendants herein because they had the audacity to stand up for the rights of others, including Marci Shepard.

Initially, a Complaint was brought by the Division on Civil Rights in behalf of the Russo's, Giordano's and several others against Mr. Nardone and Le Terrace Swim Club. The Russo's and Giordano's opted out of that suit and initiated the within action in the Superior Court of New Jersey after consulting with their counsel, Anne P. McHugh and Ed Barocas of the ACLU. The Division On Civil Rights suit was settled by defendants who agreed to cease and desist their discriminatory practices and paid a find of \$25,000.00.

As can be seen from the Certifications of Mssrs. Giordano and Russo, counsel was retained and consultations were had between plaintiffs and their lawyers regarding the merits of the case and the damages recognized by law. At the depositions of Mssrs. Russo and Giordano, counsel for the defendant pursued a line of inquiry regarding what motive the plaintiffs had in bringing this suit. Since plaintiffs brought suit only after consulting with their counsel, any such inquiries regarding motive would lead to an invasion of the attorney client privilege as claimed by the undersigned.

It is plaintiffs' further contention that why the Giordanos and Russos brought this action is irrelevant to any of the claims and defenses asserted

herein. Plaintiffs' personal reasons for bringing this suit are not relevant nor are they likely to lead to any relevant information. Simply stated it is manifestly improper for counsel to try to do an end run around the attorney client privilege under the rubric of "motive" when one's motive in bringing a suit is not relevant and obviously flows from communications one has had with one's counsel.

LEGAL ARGUMENT

I. **Rule 504 Of The Rules Of Evidence Precludes Inquiry Into Communications Between The Lawyer And His Client In The Course Of That Relationship.**

Rule 504(1) provides:

Subject to Rule 37 [Rule 5030] an accept as otherwise provided by paragraph two of this Rule communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged and the client has a privilege (a) to refuse to disclose any such communication, and (b) prevent his lawyer from disclosing it. . .

The lawyer – client privilege is the oldest privilege for confidential communications known to the common law. Upjohn Co. v. US, 449 U.S. 383, 389 (1981). That privilege has been firmly in bedded in New Jersey common law as well. State v. Toscano, 13 NJ 418 (1953).

The rationale undergirding the privilege is based on the need for the attorney to know all that relates to the client's reason for seeking representation. Macy v. Rollins Environmental Services, 159 NJ Super 535, 539 (App. Div. 1981). The purpose of the privilege is to encourage clients to make full disclosure to their attorneys so that they can better prepare the case. The

general rule is that if the privilege is applicable, "it must be given as broad a scope as its rationale requires." United Jersey Bank v. Wolosoff, 196 NJ Super 553, 561 (App. Div. 1984).

Rule 504(3) raises the presumption that a communication made in the lawyer – client relationship has been made in professional confidence. See Comments to New Jersey Rules of Evidence 2003 Ed. at P.569. Here, the Giordano's and Russo's sought legal advice from staff counsel to the ACLU as well as from Anne P. McHugh, Esquire. Initially, both plaintiffs had consulted with an attorney from the Division on Civil Rights and lodged a complaint therein after discussions with a legal representative of the Division. Thereafter, plaintiffs abandoned their claims in the Division on Civil Rights and decided to proceed in the Superior Court of New Jersey after consultation with Ed Barocus, Esquire and Anne P. McHugh, Esquire. Why the Giordanos and the Russos pursued the current causes of action against the defendants herein invades the attorney client privilege. Ms. Gardiner was so informed at the deposition after the undersigned consulted with Mssrs Giordano and Russo to determine if questions posed would invade the privilege. See Certification of Anne P. McHugh. That determination was made, and the undersigned informed Ms. Gardiner that the entire line of questioning was fraught with the potential to invade confidences and communications exchanged by and between counsel and plaintiffs herein.

So sacrosanct is Rule 504, that the Code of Professional Responsibility of the ABA sets forth the professional obligations of the attorney concerning attorney – client communications. Rule 4-101 in the code imposes a strict ethical

obligation on an attorney to preserve both the confidences and secrets of his/her client. This Rule is made applicable to New Jersey attorneys by Rule 1:14.

The colloquy of counsel set forth in defendants papers as Exhibit "A", 52:4-56:10 sets forth the inquiry of the defendants posed to Mr. Russo and illustrate that counsel fails to make the necessary distinctions between privileged and non-privileged material. The undersigned had no objection to Mr. Russo answering the question as to whether or not he called an attorney after he saw a newscast and provide the identity of that attorney. But what counsel sought was not the identity of the attorney but rather information that went to the communications between Ed Barocus, Esquire and Mr. Russo. Counsel for the ACLU contacted Mssrs Giordano and Russo after seeing the television broadcast. What communications occurred between the Russos and Ed Barocus, Esquire of the ACLU are privileged under Rule 504 and not relevant to any of the claims and/or defenses in this case.

That inquiry into motive calls for invasion of the attorney-client privilege is well settled. "A client's motive for seeking legal advice is undeniably a confidential communication." Matter of Grand Jury Proceeding, Cherney, 898 F.2d 565 (7th Cir. 1990). A client goes to an attorney believing he has been wronged and seeking legal advice regarding how he can redress that wrong and through what mechanism. If Mssrs Russo and Giordano went to the ACLU seeking legal advice on what remedy, if any, they had against the defendants herein then those communications are privileged. There is no way for the defendants to explore the reasons for filing suit without invading the attorney

client privilege and revealing the communications. Ms. Gardiner was told that during the course of the deposition after the undersigned consulted with her respective clients. Yet the defendant persisted in this line of inappropriate questioning.

II. The Information Sought By The Defendants Is Irrelevant, and/or Argumentative, and/or Calls For A Legal Conclusion.

Counsel for defendant pursued multiple lines of question regarding not only plaintiffs' motives in filing suit, but what plaintiffs knew about the ownership interest of the defendant Swim Club and whether or not injunctive relief was appropriate. This questioning is objectionable for the following reasons.

First it calls for a legal conclusion. Whether or not injunctive relief is appropriate in this case will be determined solely by a judge. An inquiry as to whether or not the sale of the Swim Club was bona fide and did not violate the Fraudulent Conveyances Act, will follow the entry of judgment and is not appropriate at this stage of the proceedings.

Second, what Plaintiff Giordano read in a magazine article about the status of the defendant Swim Club, long after this suit was filed, is utterly irrelevant and not likely to lead to any admissible evidence. Counsel has not articulated any reason for such discovery.

Third, much of questioning by counsel was argumentative and not designed to lead to legitimate discovery. In essence, what counsel is trying to do is argue with the plaintiff concerning whether or not a court of law can enter an Order granting injunctive relief when the club has purportedly been sold. This is not an appropriate inquiry regarding any of the claims and/or defenses in this

case. Similarly, counsel's questioning about this lawsuit being about money is argumentative and not probative of any of the issues in this case.

Further, plaintiff Giordano was asked a series of questions concerning alleged quotes from him appearing in news articles. Mr. Giordano answered those questions as best he could. Mr. Giordano was honest when he testified he could not recall who he said what to, as there was considerable media interest in this shocking behavior on the part of defendants herein.

Finally, Defendants' contention that they did not know that the Russos retained counsel when they heard Mr. Giordano on Channel 9 news is disingenuous. I told Ms. Gardiner that Mr. Russo called Mr. Giordano after the Giordanos "went public" and he gave Mr. Russo's name to the ACLU. Thereafter everything that occurred between the ACLU and Mr. Russo was privileged communication.

Respectfully submitted,

ANNE P. McHUGH, ESQ.

Dated: November 7, 2003