
S upreme Court of the S tate of N ew Y ork

Appellate Division - S econd D epartment

**App. Div. No.
2000-09263**

RICHARD A. ALIANO,

Plaintiff-Appellant,

-against-

DON DAVID LUSTERMAN, Ph.D,

Defendant-Respondent.

**REPLY BRIEF OF AMICUS CURIAE
JUSTICE FOR CHILDREN**

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ARGUMENT AND AUTHORITIES

I. Neither the Law Guardian Nor Mrs. Aliano Waived the Children's Privilege.

Contrary to Mr. Aliano's assertions in his reply brief, the Law Guardian did not waive the children's privilege in the Family Court. Indeed, Mrs. Aliano (not the Law Guardian) filed the petitions (and Dr. Lusterman's letter) on behalf of the children in the Family Court. (R. 79-113.) Mr. Aliano's counsel confirmed this when it told the court "[i]t is your affirmant's understanding that the 'affirmation' of Dr. Lusterman attached to the Family Court petition was at the instigation of the plaintiff's wife or her attorneys."¹ (R. 134.) For the reasons articulated in the principal brief of amicus curiae, Mrs. Aliano cannot waive the children's privilege because by virtue of her divorce proceedings with Mr. Aliano, she, like Mr. Aliano, has a potential conflict of interest with her children.² (Brief of Amicus Curiae at 6-7.) The Law Guardian asserted the children's privilege. (R. 6-7; 120-21.) No one else should be entitled to waive that privilege for the children.³

II. Relevance Does Not Require Disclosure of the Children's Privileged Communications.

Contrary to Mr. Aliano's position, the Aliano children are not required to reveal their privileged communications with Dr. Lusterman simply because Mr. Aliano believes that the

¹ Mr. Aliano opposed the appointment of a Law Guardian. (R. 137.)

² Mr. Aliano concedes that Mrs. Aliano's interests may be inconsistent with those of her children by stating that "[t]he best interests of the children seem to be what is in her best interests." (R. 126.) Mr. Aliano further states that the "plaintiff's wife had no problem or hesitation in attaching written statements of the oldest daughter to the Family Court petition when it served her needs. She obviously had no concern about the best interests of her children when she attached these remarks to her petition and what affect it would have on the father-daughter relationship." (R. 133.)

³ Mr. Aliano did not argue waiver of the privilege in the court below.

information might be relevant to his claims against the doctor. Indeed, a privilege can be waived only where a party to the lawsuit is seeking to assert a defense or an affirmative claim and assertion of the privilege would work an injustice. *See also Connell v. Bernstein-MaCauley Inc.*, 407 F. Supp. 420 (S.D.N.Y. 1976) (“where a litigant seeks to avoid a statutory protection, the party making the assertion waives the privilege.”); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (waiver of privilege applies only where party puts confidences at issue, asserting a privilege would be manifestly unjust, and the information is “vital”); *Paruch v. Paruch*, 140 A.D.2d 418, 421, 528 N.Y.S.2d 119 (2d Dept. 1988). As noted by the very authorities cited by Mr. Aliano:

it simply cannot be said that plaintiff has placed her privileged communications . . . in issue, or that discovery of such communications is required to enable defendants to assert a defense or to prosecute their third-party claim. To conclude otherwise would render the privilege illusory in all legal malpractice actions: the former attorney could, merely by virtue of asserting a third-party claim for contribution against the present attorney, effectively invade the privilege in every case. Such a result would surely contravene the purpose of the privilege, i.e., ‘to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment’ (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 67-68; Richardson, Evidence [Prince, 10th ed], §§ 410).

Jakobleff v. Jakobleff, 97 A.D.2d 834, 835-36, 468 N.Y.S.2d 892, 898 (N.Y. App. Div. 1985).

In this case, Mr. Aliano seeks to discover the children’s privileged communications for use against Dr. Lusterman. But the privilege belongs to the Aliano children who are not parties to this lawsuit and are not asserting any claims or defenses against Mr. Aliano. Accordingly, the narrow exception that Mr. Aliano seeks to benefit from does not apply to the children’s privileges.

CONCLUSION

Nothing in Mr. Aliano's reply brief supports disclosure of the Aliano children's privileged communications with their therapist. For the reasons stated in the Brief of Amicus Curiae and this reply brief, the amicus curiae respectfully urge this Court to protect the interests of the Aliano children and the rights of all children in the justice system by affirming the lower court's order denying Mr. Aliano access to those privileged communications.

Dated: May 29, 2001
Houston, Texas

Respectfully submitted,

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