53RD CASE of Level 1 printed in FULL format.

C.J.C., Appellant, v. CORPORATION OF THE CATHOLIC IN BISHOP OF YAKIMA, a sole PART corporation; FATHER RICHARD SCULLY; and FATHER DALE CALHOUN, Respondents.

No. 37632-2-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

88 Wash. App. 70; 943 P.2d 1150; 1997 Wash. App. LEXIS 1576

September 22, 1997, Filed

PRIOR HISTORY: [**1] Appeal from Superior Court of King County. Docket No: 94-2-18300-1. Date filed: 10/05/95. Judge signing: Hon. John M. Darrah.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

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JUDGES: Authored by Walter E. Webster. Concurring: Ronald E. Cox, Susan R. Agid.

OPINIONBY: Walter E. Webster

OPINION: [*71] WEBSTER, J. -- This case concerns the childhood sexual abuse statute of limitations. CJC alleges that two Catholic priests fondled his genitals in 1980 and 1981 when he was fifteen to sixteen years old. When CJC sued the priests and the Diocese in 1994, the court dismissed the lawsuit as barred by the statute of limitations, and made other rulings that CJC also appeals. The child abuse limitations statute applies to acts that were sex crimes at the time they were perpetrated. Victims must file suit within three years of discovering that the abuse caused injury. In this case, a jury could find that the acts constituted the sex crime of communication with a minor for an immoral purpose. Moreover, CJC testified that until 1994, he did not discover that the priests' acts caused the mental [*72] distress for [**3] which he now seeks recovery. Consequently, we reverse the trial court's dismissal of CJC's lawsuit.

FACTS

CJC was raised in the Catholic faith and participated at church as an altar boy. Fathers Richard Scully and Dale Calhoun were priests at his parish, although not particularly close to each other. At different times, they supervised CJC's altar boy training, came to his family's house for dinner, and took him on outings such as dinner, movies, and also trips to Seattle and southern California.

In this action, CJC alleges that Father Scully massaged his neck and back on two occasions, his buttocks on one occasion, and his penis on one occasion. He alleges that Father Calhoun fondled his penis on one occasion, during which CJC ejaculated. All five occasions occurred while CJC was fifteen to sixteen years old, during 1980 and 1981. He soon began having regular nightmares, which he continues to have, replaying the sexual contact.

In March 1993, CJC's girlfriend (now wife) suggested that his "drug problem" might be related to the abuse.

Two months later, CJC talked to the mother of a boy to whom Father Calhoun had allegedly made sexual advances. At her suggestion, CJC started [**4] counseling. As a result of that counseling, he now identifies several areas of mental distress that he attributes to the priests' conduct: promiscuity, inability to form trusting relationships, sexual identity issues (i.e. fear of being a homosexual), and a single instance when he contemplated suicide. n1

n1 CP 589; 544-45.

In March 1994, CJC sued Father Calhoun, Father Scully, and the Corporation of the Catholic Bishop of Yakima. He alleged that the Bishop of Yakima (Diocese) knew or should have known of the priests' inappropriate sexual tendencies, and negligently failed to supervise or [*73] negligently retained them. Further, he alleged that Scully and Calhoun breached their duty as his priest by sexually abusing him, for which they were personally, and the diocese was vicariously, liable. Scully admits to an act of sexual child abuse in 1981 with a 15 year old boy, but denies CJC's allegations.

The diocese acknowledges that Scully told it of a 1981 incident in which he fondled a person. Calhoun denies [**5] any sexual abuse of CJC, but exercised his Fifth Amendment right against self-incrimination when asked whether he has had sexual contact with anyone else. The trial court dismissed CJC's claims as barred by the statute of limitations.

DECISION

I.

Childhood Sexual Abuse Statute of Limitations

CJC argues that the priests' conduct triggered the childhood sexual abuse statute of limitations:

> All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:
>
> . . .
>
> . . .
>
> (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought. n2

n2 RCW 4.16.340(1)(c).

The statute utilizes the criminal code's categorization of sexual offenses when defining "childhood sexual abuse:"

> As used in this section, "childhood sexual abuse" means any act committed by the defendant against a complainant [**6] who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW [*74] or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed. n3

n3 RCW 4.16.340(5).

Preliminary, we must decide which criminal statutes the childhood sexual abuse limitation statute utilizes. One amicus argues that "childhood sexual abuse" includes violations of the current version of RCW 9A.44.

This interpretation contradicts the statute's plain language, which references acts that "would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed." The childhood sexual abuse limitation statute applies only if Scully or Calhoun committed an act that violated a sex crime statute effective in 1980 or 1981, and CJC filed within three years of discovering that their acts caused his injury.

A. Assault.

CJC alleges that the priests assaulted him. Even if true, assault is not a crime codified [**7] within RCW 9A.44 or 9.68A.040. Neither is it a prior law of similar effect." n4 Hence, assault is not a childhood sexual abuse.

n4 RCW 4.16.340(5).

B. Indecent Liberties.

CJC also argues that the priests committed the crime of indecent liberties. n5 In addition to the element of sexual contact, however, the 1981 statute required that the victim must have been forcibly compulsed, younger than fourteen years old, or "incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless." n6

n5 Former RCW 9A.44.100.

n6 Former RCW 9A.44.100(1)(c).

Because CJC was over fourteen, and he did not introduce any evidence supporting either compulsion or [*75] incapacity, the trial court properly held that the alleged acts did not violate the indecent liberties statute in effect in 1981.

C. Communication [**8] With A Child For An Immoral Purpose.

CJC argues that the priests communicated with him for an immoral purpose. n7 The defendants respond that a person who communicates for only immoral, as opposed to illegal purposes, is not guilty of communication with a minor for immoral purposes. n8 Our supreme court rejected this argument in State v. McNallie. n9 In that case, the court approved a "to convict" instruction that did not require the conduct to be illegal under existing law; the instruction required the prosecution to prove only that the defendant communicated "for immoral purposes of a sexual nature." n10 In so doing, McNallie overruled State v. Danforth, n11 which held that individual sections of the Sexual Exploitation chapter defined "immoral purposes." n12

n7 Former RCW 9A.44.110 (1981) ("Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor. . .").

n8 *State v. Luther, 65 Wash. App. 424, 428, 830 P.2d 674 (1992).*

n9 *120 Wash. 2d 925, 846 P.2d 1358 (1993).*

n10 WPIC 47.06; *McNallie, 120 Wash. 2d at 929.* [**9]

n11 *56 Wash. App. 133, 136, 782 P.2d 1091 (1989).*

n12 *120 Wash. 2d at 933.*

The McNallie court explained that the statute criminalizes communication with minors "for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." n13 Thus, under McNallie, the jury could find that an act not specifically proscribed by another criminal statute constitutes communication with a minor for immoral purposes. n14 Such an act, because it would violate RCW 9A.44, would be "childhood sexual abuse" within the childhood sexual abuse limitation statute.

n13 *McNallie, 120 Wash. 2d at 933.*

n14 *120 Wash. 2d at 933.*

[*76] Applying this standard, we hold that CJC's allegations raise an issue of material fact. A reasonable juror could find that Fathers Calhoun and Scully communicated with CJC for immoral purposes of a sexual nature and that the priests' position of authority and trust vis--vis CJC made such [**10] conduct predatory in nature. CJC testified that initially he was unable to connect the abuse to his current injuries. n15 What is more, CJC presented expert testimony: a psychotherapy professor, who had been treating CJC twice monthly for six months, concluded that CJC did not link the abuse to his mental distress before April 1994. n16 The trial court erred by granting summary judgment because the jury could find that CJC suffered childhood sexual abuse, and that he filed within three years of discovering that the abuse caused his emotional injuries. n17

n15 CP 69.

n16 CP 545; *J.N. v. Bellingham Sch. Dist. No. 501, 74 Wash. App. 49, 61, 871 P.2d 1106 (1994)* (admissible expert opinion on ultimate issue is sufficient to preclude summary judgment.

n17 RCW 4.16.340(1)(c); *Oostra v. Holstine, Wash. App., 86 Wash. App. 536, 937 P.2d 195, 198 (1997).*

We affirm in part, reverse in part, and remand for further proceedings.

The remainder of this opinion will not be published because it addresses assignments of error which [**11] have no precedential value. It will be filed for public record in accordance with the rules governing unpublished opinions. n18

n18 RCW 2.06.040.

D. Diocese Liability.

CJC sued the Diocese under a derivative theory (respondeat superior) and a direct theory (negligent supervision/retention). In section IV of this opinion, we de-

cide that the trial court correctly granted summary judgment to the Diocese on CJC's respondeat superior theory. Consequently, we will not decide whether a plaintiff can pursue derivative liability under the childhood sexual abuse limitation statute. n19

n19 But see 1988 Wash. Sess. Laws Ch. 144 2 (allowing actions for childhood sexual abuse against an entity specified in medical malpractice limitation statute) (codified at RCW 4.16.350).

In a different case, we have recently held that the childhood sexual [**12] abuse limitation statute does not authorize a direct claim against a party other than the actual perpetrator of abuse. n20 Thus, CJC cannot bring his negligent supervision action against the Diocese under the childhood sexual abuse limitation statute. Consequently, we will address the application of RCW 4.16.080, the general personal injury statute of limitations, to CJC's negligent supervision claim.

n20 *Jamerson v. Vandiver, 85 Wash. App. 564, 934 P.2d 1199, 1201 (1997).*

II.

Common Law Discovery Rule

The Diocese argues that the common law discovery rule does not apply to CJC's claim, and that his claim is barred under the general personal injury statute of limitations, RCW 4.16.080. Because the parties did not brief the issue, we will assume, without deciding, that the discovery rule applies to a negligent supervision cause of action.

A. The Effect of RCW 4.16.340 on Tyson v. Tyson and The Common Law Discovery Rule.

We must first address the relationship between the childhood sexual abuse statute [**13] of limitation (RCW 4.16.340), the personal injury statute of limitations (RCW 4.16.080), the common law discovery rule, and Tyson v. Tyson. n21 The Washington Supreme Court adopted the common law discovery rule in 1969. n22 But in Tyson, it refused to apply that rule to a repressed memory childhood sexual abuse case brought under RCW 4.16.080. n23

n21 *107 Wash. 2d 72, 727 P.2d 226 (1986).*

n22 *Ruth v. Dight, 75 Wash. 2d 660, 668, 453 P.2d 631 (1969).*

n23 *107 Wash. 2d 72, 74, 79.*

Subsequently, the Legislature enacted 4.16.340, and later, when it amended that statute, included findings regarding its intent:

The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington supreme court decision in Tyson.

It is still the legislature's intention that Tyson be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual [**14] abuse commences the statute of limitations. n24

n24 RCW 4.16.340, Historical and Statutory Notes (citations omitted).

Obviously, by enacting a specific childhood sexual abuse limitation statute, the legislature gave plaintiffs an additional opportunity to recover. But the legislature's act, including its findings, indicates that it also meant to affect the judicial application of the discovery rule to RCW 4.16.080.

Several principles of statutory construction help us to determine the effect of the legislature's actions. First, a legislative act will be interpreted to preserve a well established common law rule unless the legislature intends to abolish that rule. n25 Also, "absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." n26 Further, even though a statute provides a specific remedy, that does not preclude our resorting to an appropriate common law remedy. n27 Finally, courts should respond to the legislature's obvious efforts [**15] to make changes in the law, rather than archaically cling to doctrines disfavoring change in the common law. n28

n25 Norman J. Singer, Sutherland Stat Const 61.03, at p. 190 (5th ed. 1992).

n26 Norman J. Singer, Sutherland Stat Const 50.01 at p. 90 (5th ed. 1992).

n27 Norman J. Singer, Sutherland Stat Const 50.02, at p. 99 (5th ed. 1992).

n28 Norman J. Singer, Sutherland Stat Const 58.03 at p. 75 (5th ed. 1992).

When applying these principles to the legislative act and its findings, several points emerge. The legislature did not repeal the common law discovery rule. By reversing Tyson, it strengthened it. n29 The legislature undoubtedly told the courts that Tyson, Raymond v. Ingram, n30 and Kaiser v. Milliman, n31 were unacceptable applications of the rule. In addition, by enacting a specific childhood sexual abuse statute of limitation, it did not intend to preclude reliance on the common law discovery rule, if otherwise applicable. For these reasons, we think the most appropriate course [**16] is to analyze the common law discovery rule as if Tyson and its progeny are not the law. n32

n29 *Oostra v. Holstine, Wash. App., 86 Wash. App. 536, 937 P.2d 195, 198 (1997).*

n30 *47 Wash. App. 781, 737 P.2d 314 (1987).*

n31 *50 Wash. App. 235, 238, 747 P.2d 1130 (1988).*

n32 See *Teeter v. Lawson, 25 Wash. App. 560, 564, 610 P.2d 925 (1980)* (recognizing legislative change to judicial formulation of discovery rule).

B. Whether To Apply the Common Law Discovery Rule: Balancing.

The decision to apply the common law discovery rule requires balancing. n33 The court balances the possibility of stale claims against the unfairness of precluding justified causes of action. n34

n33 *Gazija v. Nicholas Jerns Co., 86 Wash. 2d 215, 220-21, 543 P.2d 338 (1975); Beard v. King County, 76 Wash. App. 863, 867, 889 P.2d 501 (1995).*

n34 *U.S. Oil v. Dept. of Ecology, 96 Wash. 2d 85, 93, 633 P.2d 1329 (1981); Estates of Hibbard, 118 Wash. 2d 737, 745, 826 P.2d 690 (1992).*

[**17]

As to the staleness of this claim, the events occurred in 1980 and 1981. Assuming that the three year personal injury statute of limitations applies, CJC's right to recover terminated in 1986, three years after he turned eighteen. CJC filed suit in March 1994. In reviewing the priests' testimony, they do not claim to have forgotten relevant incidents occurring at the time of the allegations. Scully testified that the fondling incidents alleged by CJC "did not occur," not that he could not remember. n35

n35 CP 647.

Father Calhoun also denied any sexual incidents, as opposed to being unable to remember. n36 True, two priests who served with Father Calhoun at St.

n36 CP 660.

Joseph's parish have died; yet, no party argues that they would have offered important testimony. n37 Some Diocesan files are also missing, "the exact nature [**18] and extent of which are unknown." n38 But no other witnesses or documents are unavailable. In conclusion, staleness is not a particular concern for the Diocese in this case. n39

n37 CP 223; 181.

n38 CP 230.

n39 Cf., e.g., *Barquin v. Roman Catholic Diocese of Burlington, Vermont, Inc., 839 F. Supp. 275, 279 (D. Vt. 1993)* (alleged abuse occurred forty years earlier).

As to fairness, the balance weighs in favor of allowing the claim.

The priests and Diocese occupied a position of trust and authority vis--vis CJC. n40 Furthermore, "application of the rule is extended to claims in which plaintiffs could not immediately know of the cause of their injuries." n41 And childhood sexual abuse is precisely that type of case, because victims may be unable to connect the abuse to any injury until after the statute of limitations has run. n42 The equities weigh in favor of applying the common law discovery rule.

n40 *Peters v. Simmons, 87 Wash. 2d 400, 406, 552 P.2d 1053 (1976).*

[**19]

n41 *Hibbard, 118 Wash. 2d 737, 750, 826 P.2d 690.*

n42 *Tyson, 107 Wash. 2d 72, 91-92, 727 P.2d 226*

(Pearson, J., dissenting).

C. Discovery Rule Application.

The parties evidently agree that causation is the only element about which CJC might not have known. n43 The defendants cite cases holding that the plaintiff need only know that he had sustained some damage, not the total extent of damages. n44 But causation is distinct from damage: a cause of action accrues when a claimant knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action, specifically, duty, breach, causation, and damages. n45 As to cause, the weight of authority holds that summary judgment is inappropriate when the time of discovering the fundamental cause of the injury is disputed. n46

n43 App. Br. at p. 11; Resp. Calhoun at pp. 9-10.

n44 See, e.g., Resp. Scully Br., p. 6.

n45 *Hibbard, 118 Wash. 2d at 752.*

n46 *Lo v. Honda Motor Co., 73 Wash. App. 448, 460, 869 P.2d 1114 (1994); Ohler v. Tacoma Gen. Hosp., 92 Wash. 2d 507, 510-11, 598 P.2d 1358 (1979); North Coast Air v. Grumman Corp., 111 Wash. 2d 315, 328, 759 P.2d 405 (1988); Adcox v. Children's Orthopedic Hosp., 123 Wash. 2d 15, 34-35, 864 P.2d 921 (1993); Department of Labor and Industries v. Estate of MacMillan, 117 Wash. 2d 222, 231, 814 P.2d 194 (1991).*

[**20]

For the reason discussed above, we decline to apply cases relying on Tyson. n47

n47 See footnotes 30-31.

Consequently, if the time that CJC discovered the cause of his condition, or should have known its cause, is disputed, then summary judgment was inappropriate. We have already held in section I.C. above, that CJC's testimony creates an issue of material fact as to whether he knew the cause of his injury.

Thus, we will focus on whether he should have known the cause as a matter of law. The alleged abuse occurred when CJC was fifteen and sixteen years old. Soon thereafter, as a high school junior, CJC began having nightmares twice a month. CJC described the recurring nightmares as "replaying of the sexual molestation." n48 During some dreams, Fathers Calhoun and Scully had devil horns coming out of their heads. CJC still suffers from the nightmares, but never connected the abuse with his mental distress until after January 1995. n49 CJC also feared that he was homosexual. But he testified that he [**21] was not consciously concerned about being gay prior to engaging in counseling. n50 We cannot say as a matter of law that CJC's dreams or fears should have caused him to link the abuse to his mental distress.

n48 CP 68-69.

n49 CP 545; *J.N. v. Bellingham Sch. Dist., 74 Wash. App. 49, 61, 871 P.2d 1106 (1994)* (admissible expert opinion on ultimate issue is sufficient to preclude summary judgment.

n50 CP 587.

The Diocese also relies upon one answer given by CJC at his deposition, in which he characterized the fondling as "a pretty traumatic experience." n51 But in that August 1994 testimony, CJC was being asked about a 1988 conversation that he had with his mother. CJC's reluctance to attend church was causing friction in their relationship. n52 So, CJC told her about the fondling. He thought that his revelation would help his mother understand his decision to not attend mass. When defense counsel pressed for an explanation of CJC's thinking, he asked CJC to assume that CJC was a parent, and to explain [**22] why the revelation would excuse his child's absence from church. In that context, CJC replied that the fondling was "a pretty traumatic experience." CJC's August 1994 characterization of his perception as a hypothetical parent does not establish that CJC should have linked the abuse to his mental distress.

n51 CP 98-99.

n52 CP 96-98.

Taken most favorably to CJC, a material issue precludes summary judgment as to whether he should have known what caused his mental distress. The trial court improperly dismissed CJC's direct liability claim against the Diocese on grounds that it was barred by RCW 4.16.080.

III.

Negligent Hiring and Supervision

The Diocese argues that the negligent retention and fail-

ure to supervise claim is barred by the establishment clause. n53 The appellate rule governing review of summary judgment allows us to consider only "issues called to the attention of the trial court." The Diocese did not raise the establishment clause in its answer, nor in its memorandum supporting its [**23] motion for summary judgment. n54 It raised it only briefly in its reply memorandum. n55 It was not an issue "called to the attention of the trial court," and we decline to consider it.

n53 *U.S. Const. amend. I. Compare Pritzlaff v. Archdiocese of Milwaukee, 194 Wis. 2d 302, 533 N.W.2d 780, 790 (Wis. 1995)*, and *Swanson v. Roman Catholic Bishop of Portland, 1997 Me. 63, 692 A.2d 441, 445 (Me. 1997)*, with *Winkler v. Rocky Mountain Conference of the United Methodist Church, 923 P.2d 152, 157 (Colo. App. 1995)*, and *Konkle v. Henson, 672 N.E.2d 450, 455 (Ind. Ct. App. 1996)*.

n54 See CP 6-10; 124-49.

n55 CP 675.

IV.

Respondeat Superior

CJC contends that the trial court erred in dismissing his respondeat superior claim against the Diocese.

An employer is subject to liability for the torts of an employee while acting within the scope of employment. n56 Thus, when an employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable. [**24] n57 Still, an employer can be liable even when a employee is acting outside of the scope of employment if the employee was aided in accomplishing the tort by the existence of the agency relation. n58 CJC argues that a jury should be allowed to determine whether the priests were aided in accomplishing the tort by the existence of their agency relation vis--vis the church. But this liability principle is limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment. n59 Here, from CJC's viewpoint, the priests could not reasonably have appeared to have been acting within the scope of their employment.

n56 Restatement (Second) of Agency 219(1).

n57 *Niece v. Elmview Group Home, 131 Wash. 2d 39, 48, 929 P.2d 420 (1997); Thompson v. Everett Clinic, 71 Wash. App. 548, 551, 860 P.2d 1054 (1993)*.

n58 Restatement (Second) of Agency 219(2)(d); *Thompson v. Berta Ent., 72 Wash. App. 531, 538, 864 P.2d 983 (1994)*.

n59 *Bozarth v. Harper Creek Bd. of Ed., 94 Mich.App. 351, 354, 288 N.W.2d 424 (1979)*.

[**25]

Consequently, the trial court correctly dismissed CJC's respondeat superior cause of action.

V.

Strict Liability Against The Diocese

CJC also argues that the Diocese is strictly liable. Relying on Thompson v. Berta Ent., n60 he argues that even when an employee acts outside the scope of employment, an employer who cloaks the employee with apparent authority is strictly liable.

The employer's liability in Berta arose within the context of an employment relationship. Berta Enterprises entrusted actual authority for work schedules and pay raises to its employee, Fares. Fares made a sexual relationship a quid quo pro of raises, advancement, and a favorable work schedule. Because Berta had given Fares actual authority to affect terms and conditions of employment, it was strictly liable for its employee's illegal conduct in exercising that authority: because quid pro quo sexual harassment cannot take place without actual or apparent authority, the investiture of authority aids the perpetrator because he actually had the authority to make the demand. n61 Here, by contrast, the sexual contact could have taken place without actual or apparent authority. The investiture [**26] of authority did not aid the perpetration of the act in the same way as in the employment setting. Consequently, the trial court properly dismissed CJC's strict liability claim.

n60 *72 Wash. App. 531, 864 P.2d 983 (1994)*.

n61 *72 Wash. App. at 538-39*.

VI.

Motion To Compel Counseling Records

CJC moved to compel production of several documents.

The parties made numerous arguments, but the only issue before us concerns testimonial privileges. Our discussion is limited to the record on appeal, from which we have identified only three documents: (1) a 1981 or 1982 report sent to the Diocese by Dr. Robert Lester, a psychologist who treated Father Scully; (2) a July 1987 letter discussing Father Calhoun, sent to Bishop Skystad by Tim Smith, who holds a Masters of Education degree and works at the Northwest Treatment Association; and (3) a 1986 letter from Father Calhoun to Tim Smith. n62 The trial court denied CJC's motion to compel. First, it held that Father's Scully and Calhoun had not "waived" [**27] testimonial privileges by allowing their psychologists and counselors to send reports to the Diocese. n63 Second, it held that any communications between the priests and their counselors were protected from disclosure. n64

n62 CP 373 and CP 359.

n63 CP 461.

n64 CP 696.

A. Testimonial Privileges.

A witness in a civil case has a duty to testify fully. n65 Yet, this general duty sometimes yields to testimonial privileges. The legislature has granted a privilege to communications between a patient and his or her psychologist:

> Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client, but this exception is subject to the limitations under RCW 70.96A.140 and 71.05.250. n66

n65 *Jaffee v. Redmond, 116 S. Ct. 1923, 1928, 135 L. Ed. 2d 337 (1996).*

[**28]

n66 RCW 18.83.110; the attorney client privilege, which the legislature amended in 1997, is codified at RCW 5.60.060(2).

Additionally, a client's communications with a therapeutic counselor are privileged:

> An individual registered or certified under this chapter shall not disclose the written acknowledgment of the disclosure statement pursuant to RCW 18.19.060 nor any information acquired from persons consulting the individual in a professional capacity when that information was necessary to enable the individual to render professional services to those persons . . . n67

n67 RCW 18.19.180 (exceptions omitted).

The patient (or client) has the burden of establishing that a communication was made within a privileged relationship and was made in confidence. n68

n68 *Dietz v. Doe, 131 Wash. 2d 835, 844, 935 P.2d 611 (1997).*

[**29]

Unless the patient intends the conversation to be confidential, the testimonial privilege is not bestowed. n69 Even if the patient expects confidentiality, other facts surrounding the actual communication may establish that the expectation was unreasonable. n70 Courts determine confidentiality after considering objective evidence, and the patient's subjective expectation of confidentiality. n71 Thus, the patient's reason for the communication is important in deciding its confidentiality. n72 A patient seeking treatment intends a confidential communication. n73 Similarly, the intended use of the communication sometimes resolves whether it was intended to be confidential. n74

n69 *Ramsey v. Mading, 36 Wash. 2d 0,303, 217 P.2d 1041 (1950).*

n70 *State v. Post, 118 Wash. 2d 596, 613, 826 P.2d 172, 837 P.2d 599 (1992).*

n71 *Post, 118 Wash. 2d 596, 612.*

n72 *J.N. v. Bellingham School Dist. No. 501, 74 Wash. App. 49, 64, 871 P.2d 1106 (1994); In re Henderson, 29 Wash. App. 748, 753, 630 P.2d 944 (1981).*

n73 *State v. Sullivan, 60 Wash. 2d 214, 226, 373 P.2d 474 (1962).*

n74 Compare *Redding v. Virginia Mason Med. Center, 75 Wash. App. 424, 428, 878 P.2d 483 (1994)* (although purpose of joint counseling was to provide court with a report, because the report was to address domestic violence charges against the husband, wife may have intended that statements about her alcohol problem would be confidential), with *Post, 118 Wash. 2d at 612-13.*

[**30]

The presence of third parties frequently precludes the assertion of a testimonial privilege. n75 When another person is included in a communication, it is generally not intended to be confidential, for the simple reason that it is not, in fact, confidential. n76 But the speaker may still intend a confidential communication even when a third party is present, if the presence is reasonably necessary to facilitate the purpose of the communication, or to enable the parties to communicate. n77 On the other hand, the third party's promise of confidentiality does not transform an unprivileged communication into a privileged one. n78 Testimonial privileges are evidentiary rules created by statute, not a private promise governed by contract. And because testimonial privileges suppress the truth, we interpret privileges narrowly and their exceptions broadly. n79

n75 *State v. Falsetta, 43 Wash. 159, 162, 86 P. 168 (1906); In re Quick's Estate, 161 Wash. 537, 547, 297 P. 198 (1931); Sullivan, 60 Wash. 2d at 217.*

n76 *Hartness v. Brown, 21 Wash. 655, 665, 59 P. 491 (1899);* see also *State v. Wilder, 12 Wash. App. 296, 299, 529 P.2d 1109 (1974).*

[**31]

n77 See, e.g., *State v. Espinosa, 47 Wash. App. 85, 89, 733 P.2d 1010 (1987)* (police officer was a necessary party to rape counselor's communication with victim); *State v. Gibson, 3 Wash. App. 596, 600, 476 P.2d 727 (1970)* (police officer was an agent of doctor); and RCW 2.42.160 (translator).

n78 *Westinghouse Elec. v. Republic of the Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991).*

n79 *State v. Waleczek, 90 Wash. 2d 746, 749, 585 P.2d 797 (1978); In re Dodge, 29 Wash. App. 486, 492, 628 P.2d 1343 (1981).*

B. Reports to the Diocese.

Although Fathers Scully and Calhoun participated in counseling at the insistence of the Diocese, there can be no denying that the purpose of their counseling was treatment. Both priests certainly intended that the counseling itself would be confidential. But both priests also knew that their counselors and/or psychologists would be reporting to the Diocese.

In the written waiver signed by Scully, he authorized his caregivers to disclose information relating to his "personal and psychological status" and his "progress"; Calhoun had a similar understanding [**32] of reports to the Diocese. n80 Thus, the reports to the Diocese are outside the privilege because they were not intended to be confidential communications between patient and psychologist, or client and counselor.

n80 CP 428-29, 358-363.

Still, Scully and Calhoun argue that the Diocese was reasonably necessary to facilitate the purpose of the communication. In this regard, they analogize to a husband and wife attending joint counseling, n81 or multiple defendants who, without waiving the attorney-client privilege, work towards a common objective. n82 The joint counseling and common interest analogies are unpersuasive. The Diocese's primary interest in monitoring the counseling was to learn whether Calhoun and Scully could return as functioning priests. It did not participate in counseling. Thus, while the Diocese referred the priests for counseling, supported them financially, and kept in contact with them, it was not an entity with a "common interest" so as to preserve the privilege. n83 We reverse the trial [**33] court's determination that reports sent by the mental health providers to the Diocese were privileged.

n81 *Redding, 75 Wash. App. 424, 428, 878 P.2d 483.*

n82 *In re LTV Securities Litigation, 89 F.R.D. 595, 604 (1981).*

n83 See generally, Edna S. Epstein and Michael M. Martin, The Attorney-Client Privilege and the Work-Product Doctrine, at p. 48 (2d. ed. 1989).

C. Father Calhoun's Letter To Tim Smith.

Father Calhoun saw Tim Smith weekly between mid-1986 and June 1988. n84

n84 Car. & P. 665.

Because the purpose was treatment, his letter to Tim Smith is within the client counselor privilege. n85 But testimonial privileges may be limited by other statutes. CJC argues that the child abuse reporting statute (RCW 26.44.030-26.44.060) limits the client-counselor privilege. We have not found a case applying that statute to civil discovery, but, for purposes [**34] of this appeal, we will assume that it applies to the discovery sought in