

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>GRACE BURKERT,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>THE EQUITABLE LIFE ASSURANCE</b>	:	
<b>SOCIETY OF AMERICA,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	
<b>THE EQUITABLE LIFE ASSURANCE</b>	:	
<b>SOCIETY OF AMERICA,</b>	:	
	:	
<b>Third-party plaintiff</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>JACOB JAMISON, A minor, by and</b>	:	
<b>through his natural parent and guardian</b>	:	
<b>Cosima Jamison,</b>	:	
	:	
<b>Third-party defendant.</b>	:	<b>No. 99-1</b>

**ORDER & MEMORANDUM**

**ORDER**

AND NOW, to wit, this 18th day of April, 2000, upon consideration of Plaintiffs' Motion for Protective Order to Preclude Defendant's Use of Improperly Obtained Privileged Psychotherapeutic Information Pursuant to F.R.C.P. 26(c)(4) (Document No. 17, filed September 13, 1999), Defendant, The Equitable Life Assurance Society of the United States' Answer in Opposition to Plaintiff's Motion for Protective Order (Document No. 18, filed October 4, 1999), Plaintiffs' Reply Brief in Support of Motion for Protective Order (Document No. 19, filed

October 18, 1999), Praecipe to Substitute Page 14 of Brief and Exhibit “G” in Plaintiffs’ Reply Brief in Support of Motion for Protective Order (Document No. 20, filed October 25, 1999), Defendant’s Sur Reply Brief in Support of Its Opposition to Plaintiff’s Motion for Protective Order (Document No. 21, filed October 25, 1999), and Plaintiffs’ Sur Reply Brief in Support of Motion For Protective Order (Document No. 22, filed October 28, 1999), it is **ORDERED** that Plaintiffs’ Motion for Protective Order to Preclude Defendant’s Use of Improperly Obtained Privileged Psychotherapeutic Information Pursuant to F.R.C.P. 26(c)(4) is **DENIED**.

It is **FURTHER ORDERED** that a status conference will be **SCHEDULED** in due course.

### **MEMORANDUM**

In this action against The Equitable Life Assurance Society of America (“Equitable” or “defendant”), plaintiff Grace Burkert (“plaintiff”) seeks to recover the proceeds of a life insurance policy in which she and Jacob Jamison (“third-party defendant” and, together with plaintiff, “beneficiaries”) are named as beneficiaries. Equitable defends on the basis of fraud in the application for the policy. Presently before the Court is plaintiff’s motion for a protective order in which plaintiff asks the Court for an order preventing defendant from using psychiatric and psychological records of Seth Jamison, the insured (“decedent”), which plaintiff contends were improperly obtained.

#### **I. BACKGROUND**

On July 30, 1997, decedent applied to Equitable for a life insurance policy. As part of the application process, decedent completed a medical questionnaire in which he answered questions regarding medical treatment and other health-related matters. Relevant to this case are

decedent's affirmative answers to questions asking whether he had illegally taken controlled substances in the last ten years and whether he had received medical counseling or medical treatment regarding the use of alcohol or drugs. In the space provided on the application for explaining his answers, plaintiff stated that, in the "late '80s-1990--[there was] occasional use of cocaine" and that he had received "inpatient treatment at Institute of Pennsylvania for 28 days [with] no problem since." Decedent signed the application, which also stated, "The above statements and answers are true and complete to the best of my knowledge and belief. I agree that such statements and answers shall be part of the application for insurance or request for policy change or reinstatement, as the case may be. The Insurer may rely on them in acting on the application...."

Decedent's signed application also contained the following provisions:

**AUTHORIZATIONS.**

**Obtain Medical Information.** I (we) authorize any physician, hospital, medical practitioner or other facility, insurance company, and the Medical Information Bureau to release to Equitable and its legal representative any and all information they may have about any diagnosis, treatment and prognosis regarding my physical or mental condition.

\* \* \*

**Use and Disclose Information.** I (we) understand that the information that I (we) authorize Equitable to obtain will be used by Equitable to help determine my insurability or my eligibility for benefits under an existing policy.

\* \* \*

**DURATION.** I (we) agree that these authorizations will be valid for 12 months from the date shown below [July 30, 1997].

On August 22, 1997, decedent completed and signed a "Confidential Questionnaire" in which he informed Equitable, in response to a question, that he had used minimal quantities of cocaine for less than 18 months from 1988-1989. In response to the question, "Have you used

alcohol in combination with any drug,” decedent answered in the affirmative, explaining, “I used cocaine on approximately ten occasions while drinking over the above 2 year period.”

On September 3, 1997, decedent completed and signed an “Alcohol Use Questionnaire” in which, in response to a question asking decedent to describe his previous drinking habits and the reasons for any change, he responded, “In 1989-90 I drank daily for approx. 7-8 months, leading to my deciding to place myself into rehab.” In response to a question on the Alcohol Use Questionnaire asking plaintiff to describe any treatment or counseling he received for alcohol abuse or dependency, decedent stated, “4/90--In-patient voluntary rehab at Institute of Pa Hospital...28 day program.” In response to a question on the Alcohol Use Questionnaire asking whether he had ever used alcohol in combination with controlled substances, decedent responded, “Yes--cocaine used (rarely) as set forth in Substance Questionnaire.”

In November, 1997, relying on all of decedent’s signed statements, Equitable issued to decedent a life insurance policy providing \$1 million in benefits. The policy designated Grace Burkert and Jacob Jamison as beneficiaries, with each receiving a 50% share.

On January 10, 1998, decedent was discovered dead in a room at the Four Seasons Hotel in Toronto, Canada. An autopsy determined the cause of death to be “mixed drug toxicity (heroin and cocaine).” Equitable assigned an investigator, John Maher, to investigate the circumstances surrounding decedent’s death. Maher hired Robert Young, an independent insurance investigator, to investigate the case.

On May 21, 1998, Young obtained from Michael Dixon, the co-executor of decedent’s estate, a signed “Authorization to Release Medical Information,” releasing to Equitable “*any information* regarding the Insured’s medical care, advice, treatment or supplies provided to the

[decedent] ....” This document also contained a statement that the purpose of the authorization was to “process a claim to life insurance benefits....”

On June 16, 1998, Young obtained from Judith Jamison, decedent’s mother and the other co-executor of decedent’s estate (together with Dixon, the “executors”), an “Authorization for Release of Information,” authorizing the release of any “information, data or records you may have concerning [decedent’s] health condition or health history, or regarding any advice, care or treatment provided to the [decedent] including information concerning ...drug or alcohol use....” This document also stated, “I understand that any information obtained pursuant to this authorization will be used to evaluate an insurance claim presented to the [Equitable]....”

Young subsequently obtained records (the “treatment records”) from Dr. Ann Spector, Ph.D.--a licensed psychologist with a marriage counseling practice who was counseling decedent and his wife, Cosima Jamison, in 1997--and Dr. Jean Forest, M.D.--a psychiatrist who treated decedent following his release from inpatient drug treatment and alcohol treatment. The treatment records revealed that decedent had used cocaine within the five years prior to his application and treatment by Drs. Forest and Spector, none of which was disclosed in the application for insurance.

On October 15, 1998, Equitable provided the beneficiaries with a Notice of Rescission of decedent’s life insurance policy. Equitable informed the beneficiaries in its Notice of Rescission that “we have now learned of cocaine use within 5 years, as well as counseling for same by Dr. A. Spector and counseling for alcohol and/or drug use by Dr. J. Forest [which] was not disclosed in the application.”

## **II. PROCEDURAL HISTORY**

Plaintiff filed her Complaint against Equitable on January 4, 1999. On February 19, 1999, Equitable filed an Answer and Counterclaim for Rescission and a Third-Party Complaint against third-party defendant. On March 29, 1999, plaintiff and filed an Answer to defendant's counterclaim, and third-party defendant filed an Answer and Counterclaim to defendant's Third-Party Complaint. On April 6, 1999, defendant filed an Answer to third-party defendant's counterclaim.

On September 13, 1999, plaintiff filed a motion for a protective order; defendant filed a response on October 4, 1999. On October 18, 1999, plaintiff filed a reply in support of her motion, and on October 25, 1999, defendant filed a sur-reply in opposition to the motion; plaintiff filed a sur-reply in support of her motion on October 28, 1999.

## **III. DISCUSSION**

Rule 26(c) of the Federal Rules of Civil Procedure provides, in relevant part, "Upon motion by a party ...for good cause shown, the court in which the action is pending...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one of more of the following: ...(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." Fed. R. Civ. P. 26(c).

As the party seeking the protective order, plaintiff bears the burden of demonstrating that good cause exists for protection of the discovery material. See Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994). Plaintiff can establish good cause by demonstrating that disclosure will cause a

clearly defined and serious injury, such as the violation of a privacy interest. See Glenmede Trust, 56 F.3d at 483.

To satisfy its burden of showing good cause, plaintiff argues that the treatment records are privileged pursuant to Pennsylvania's psychotherapeutic privilege and that defendants have no right to discover them or to use them in this suit. Defendant responds that decedent waived any applicable privilege when he signed the application, that the executors waived any applicable privilege when they signed separate authorizations, that the initiation of this suit necessarily puts decedent's history at issue and waives any applicable privilege as a matter of law, that the beneficiaries do not have standing to assert any applicable privilege, and that plaintiff waived any applicable privilege by serving subpoenas duces tecum on Drs. Spector and Forest. For the reasons that follow, the Court concludes that Pennsylvania's psychotherapeutic privilege does not warrant protection of the treatment records in this case.

Rule 501 of the Federal Rules of Evidence provides, in relevant part, "with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with state law." Fed. R. Evid. 501. This Court has jurisdiction over this case on the basis of diversity jurisdiction, and, as such, state law is applicable. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The Court concludes, and the parties do not contest, that Pennsylvania law supplies the rule of decision in this case.

The Pennsylvania Code creates a privilege for confidential communications made by an individual to a psychiatrist or licensed psychologist (the "psychotherapeutic privilege"). See 42 Pa.C.S.A. § 5944 (Purdon's 1999) ("§ 5944"). The Code provides that the "confidential relations

and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.” Id. This privilege applies not only to the communications themselves but also to records of those communications. See Commonwealth v. Counterman, 553 Pa. 370, 391 (1998). Moreover, the psychotherapeutic privilege survives the death of the patient. See Cohen v. Jenkintown Cab Company, 238 Pa. Super. 456, 462 (1976) (holding that the attorney-client privilege survives the death of the client).

The treatment records at issue in this case were created from confidential communications by decedent to Dr. Spector--a licensed psychologist--and Dr. Forest--a psychiatrist--in the course of treatment. As such, the Court concludes that the treatment records are within the scope of Pennsylvania’s psychotherapeutic privilege, and turns to the question of whether any exception to this privilege is applicable.

**A. Standing**

Defendant argues that plaintiff does not have standing to assert the psychotherapeutic privilege because she is neither the patient nor the personal representative of the patient. Plaintiff responds that the privilege exists independently of the plaintiff who raises it. For the reasons that follow, the Court concludes that plaintiffs do not have standing to assert the privilege.

§ 5944 provides for a psychotherapeutic privilege on the same basis as the attorney-client privilege. In construing the attorney-client privilege, Pennsylvania courts have held that only the client has standing to assert the privilege. See Commonwealth v. Trolene, 263 Pa. Super. 263, 272 (1979); Commonwealth v. McKenna, 206 Pa. Super. 317, 322 (1965); Estate of Dowie, 135 Pa. 210 (1890). In Trolene, a defendant objected to testimony regarding a conversation between

his co-conspirator and the co-conspirator's attorney. 263 Pa. Super. at 272. The Trolene court held that the attorney-client privilege was not a rule of competency, but rather a privilege held by the attorney's client, and that a third-party--that is, someone other than the client, such as the defendant--had no standing to assert the privilege. See id.

Similarly, in McKenna, a defendant on trial for blackmail sought to exclude testimony of an attorney who represented an acquaintance of the defendant at a prior trial. See 206 Pa. Super. at 319. The McKenna court held that the defendant could not assert the attorney-client privilege based on the relationship that existed between the acquaintance and the attorney because the privilege was the acquaintance's to assert. See id. at 322.

In this case, the psychotherapeutic privilege applies to decedent's conversations with Drs. Spector and Forest and the records relating to those communications. The privilege was decedent's to assert. The psychotherapeutic privilege, like the attorney-client privilege as it was construed in McKenna and Trolene, is not a general rule of competence, as plaintiff argues. The Court concludes that it is a specific privilege which only the patient may assert and, accordingly, holds that plaintiff does not have standing to assert the privilege in this case.

## **B. Waiver**

### **1. Waiver by the executors**

Defendant argues that the executors validly waived decedent's privilege. Plaintiff responds that the executors did not have the power to waive the privilege and, in any event, did not knowingly waive the privilege. For the reasons that follow, the Court concludes that the executors validly waived the privilege.

In Pennsylvania, an attorney-client privilege may be raised or waived after the client's death by the client's representative, "so long as the waiver would not reveal scandalous and impertinent matter." Cohen, 238 Pa. Super. 462-63. In Cohen, the decedent struck a pedestrian while driving and subsequently perjured himself about the incident. See id. at 458. He revealed these facts to his attorney before his death. See id. At a civil trial against the decedent's employer, the trial court excluded testimony of the conversations between the decedent and his attorney, and the plaintiff appealed. See id. On appeal, the Cohen court ruled that the attorney's testimony concerning the decedent's statements would not have revealed scandalous and impertinent matters notwithstanding the fact that such testimony would have disclosed that the deceased was both the cause of the accident and a perjurer. See id. at 464. The Cohen court also held that "evidence such as we have here, so obviously relevant to the plaintiff's claim, may not be considered so scandalous and impertinent as to bar its admission at trial." Id.

In this case, the treatment records reveal that decedent was treated for drug and alcohol abuse. The information covered by the executors' waiver of the privilege is obviously relevant to the claim before this Court. The Court concludes that, under the circumstances of this case, the information in the treatment records is not scandalous or impertinent. Thus, the executors had the authority to waive the psychotherapeutic privilege.

Having the authority to waive decedent's psychotherapeutic privilege, the executors did so in this case. Judith Jamison--decedent's mother and a co-executor--authorized defendant to obtain any information regarding "any advice, care or treatment provided to [decedent] including information about ...drug or alcohol use..." Similarly, Michael Dixon--the other co-executor--authorized defendant to obtain "*any information* regarding [decedent's] medical care, advice

...provided to [decedent]...” (emphasis in original). Each of these documents waives the psychotherapeutic privilege by allowing defendant to obtain information about drug or alcohol use and treatment or advice provided to decedent. Judith Jamison’s authorization goes so far as to specifically refer to information regarding drug and alcohol use.

Plaintiff submitted an affidavit from each executor stating that, in signing his or her respective authorization, neither of them intended to waive the psychotherapeutic privilege. However, it is well-settled that, absent evidence of fraud, incapacity or duress, a party to a written agreement is charged with knowledge of the contents of that agreement. See Orner v. T.W. Phillips Gas and Oil Co., 401 Pa. 195, 199 (1960); Barnhart v. Barnhart, 376 Pa. 44, 54 (1954). Plaintiffs have offered no evidence of fraud, incapacity or duress regarding either executor’s authorization. Thus, the Court concludes that the executors validly waived the psychotherapeutic privilege.

### **3. Waiver by decedent**

Defendant also argues that decedent waived the psychotherapeutic privilege when he signed the application for life insurance. The application that decedent signed contains provisions--quoted above--in which he authorizes defendant to obtain his medical records from a physician or other institution in order to determine decedent’s insurability or eligibility for benefits. The application also states decedent’s authorization shall be valid for one year from the date on the application--July 30, 1997.

The Court notes that none of the parties has provided any evidence as to whether Equitable requested the treatment records before July 30, 1998, one year from the date of the application. In that connection, defendant states that it did not rely on decedent’s waiver when it

obtained the treatment records. Nonetheless, the Court will consider defendant's argument that decedent waived his privilege when he signed the application.

Under Pennsylvania law, if an individual or corporation signs an insurance agreement waiving its attorney-client privilege, such a waiver is enforceable. See Southeastern Pennsylvania Transportation Authority v. Transit Casualty Co., 55 F.R.D. 553, 556 (E.D.Pa. 1972). Moreover, if an applicant for life insurance waives a privilege in a life insurance policy, such a waiver will survive the party's death. See Adamos v. New York Life Ins. Co., 22 F. Supp. 162, 164 (W.D.Pa. 1937). The Court concludes that, under Pennsylvania law, a decedent's waiver of his psychotherapeutic privilege is enforceable and such a waiver survives his death.

The question remaining for the Court, then, is whether decedent waived his privilege. Decedent signed the application, allowing defendant to obtain information from a "physician, hospital, [or] medical practitioner ...." Black's Law Dictionary defines "physician" as a "practitioner of medicine;...one lawfully engaged in the practice of medicine." Black's Law Dictionary 1147 (6th ed. 1990). As a psychiatrist Dr. Forest is lawfully engaged in the practice of medicine and is therefore a physician. Thus, the Court concludes that decedent validly waived his privilege as to Dr. Forest.

Dr. Spector is a psychologist--she does not practice medicine--and is not a physician. Decedent's waiver makes no reference to psychologists, other mental health professionals, or something similar. To the extent that this creates any ambiguity as to the applicability of decedent's waiver to Dr. Spector, such ambiguity must be resolved against defendant. See Hartford Mutual Ins. v. Moorehead, 578 A.2d 492, 495 (Pa. Super. 1990) (holding that

ambiguous insurance contracts are construed against the insurance company). Thus, the Court concludes that decedent did not waive his psychotherapeutic privilege as to Dr. Spector.

#### **IV. CONCLUSION**

Plaintiff lacks standing to assert decedent's psychotherapeutic privilege. In addition, the executors waived the privilege as to Drs. Spector and Forest, and decedent waived the privilege as to Dr. Forest. For all of these reasons, the Court denies plaintiff's motion for a protective order.<sup>1</sup>

**BY THE COURT:**

---

**JAN E. DUBOIS, J.**

---

<sup>1</sup>This decision of the Court makes it unnecessary to address the remaining issues raised by the motion papers.