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Our File No. 18018-00200

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K.F. on behalf of John Doe, a minor : COURT OF COMMON PLEAS
: YORK COUNTY, PENNSYLVANIA

Plaintiff

vs. : No. 2016-SU-02316-74

YOUNG MEN'S CHRISTIAN :
ASSOCIATIONS OF YORK AND : CIVIL ACTION – LAW

YORK COUNTY and NATIONAL :
COUNCIL OF YOUNG MEN'S :
CHRISTIAN ASSOCIATIONS OF :
THE UNITED STATES OF : JURY TRIAL DEMANDED

AMERICA d/b/a YMCA OF THE :
USA

YORK COUNTY COURT
2019 SEP 16 PM 2:12
JUDICIAL CENTER YORK PA

**DEFENDANT YOUNG MEN'S CHRISTIAN ASSOCIATIONS OF YORK AND YORK
COUNTY'S BRIEF IN SUPPORT OF MOTION *IN LIMINE***

I. STATEMENT OF RELEVANT FACTS

The incident that is the subject of this litigation occurred on July 3, 2015, when the minor Plaintiff, a 5 year old camper at the YMCA summer camp, called Camp Spirit, was sexually abused

by a 13 year old camper ("B.G."). There is no question that the July 3, 2015 incident occurred as the incident was witnessed by a camp counselor.

The Plaintiff in the case, K.F., the minor Plaintiff's mother, testified at her deposition on September 14, 2017, that she had just learned a few months ago that B.G. had fondled the minor Plaintiff on a few occasions on the school bus that transports children from the Dover YMCA to Camp Spirit in Springettsbury Township. (Deposition Transcript of K.F., pgs. 70 – 71, attached to Motion as **Exhibit A**). The alleged incidents on the school bus were not witnessed by anybody. The alleged incidents on the school bus were reported by the minor Plaintiff to K.F. when he was approximately 7 years of age, and approximately two years after the alleged incidents occurred. The minor Plaintiff is not going to testify at trial.

The parties have stipulated that the minor Plaintiff's interview on July 14, 2015, with the Child Advocacy Center is admissible under the Tender Years Act 42 Pa. C.S. §5985.1. The minor Plaintiff underwent two forensic evaluations with Dr. Steven Berkowitz, Plaintiff's expert psychiatrist. In the minor Plaintiff's first interview with Dr. Berkowitz on January 12, 2017, the minor Plaintiff denied any incidents of sexual abuse perpetrated by B.G. other than the July 3, 2015 incident.

However, in an interview on October 1, 2018, the minor Plaintiff, in the presence of his mother, K.F., stated that B.G. had fondled him "everyday in the morning and on the way home." Dr. Berkowitz's report states as follows:

I asked him if he remembered any more about what [B.G.] did and if it happened more than once. He did not answer the question, **but his mother said** it happened more than once. I asked [minor Plaintiff] about this and he reported that it happened on the bus. According to [minor Plaintiff], [B.G.] and [minor Plaintiff] would sit together and [B.G.] would put a towel over their laps and fondle

him under his pants. I asked, how often and he said every day in the morning and on the way home.

(October 23, 2018, Report authored by Steven Berkowitz, M.D. attached to Motion as **Exhibit**

B). (Emphasis added.) Again, the minor Plaintiff is not going to testify at trial.

Given the circumstances under which these alleged incidents have come to light, with a 7 year old reporting about an incident that occurred when he was 5 for the first time, and the apparent influence that his mother has on these statements, the statements are inherently unreliable and not relevant. Moreover, the statements by the minor Plaintiff are otherwise hearsay and testimony regarding the alleged incidents of fondling on the bus should not be admitted at trial.

II. ARGUMENT

A. The Statements of K.F. and the minor Plaintiff Regarding the Alleged Occurrences on the Bus Constitute Hearsay and are Inadmissible.

Both the statements made by K.F. and the minor Plaintiff during the October 1, 2018, interview are hearsay and not admissible at the time of trial. Per Pennsylvania Rule of Evidence 801, hearsay is defined as, “a statement that, (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Plaintiff minor is not going to testify at the time of trial. Therefore, the statements he allegedly made to K.F. about what occurred during bus rides constitutes hearsay as K.F. will purportedly offer said testimony to prove that they occurred as the minor Plaintiff allegedly described. Therefore, given that no exception to the hearsay rule applies to this statement, it is inadmissible.

Similarly, the minor Plaintiff’s statement to Dr. Berkowitz is similarly hearsay if either Dr. Berkowitz or K.F. were to testify about what the minor Plaintiff said during the October 1, 2018, interview. The fact that the minor Plaintiff is not going to testify at trial does not trigger a hearsay

exception. Accordingly, because these two statements are barred by the hearsay rule, they are inadmissible at the time of trial.

B. The Statements of K.F. and the minor Plaintiff Regarding the Alleged Occurrences on the Bus are not Relevant and Prejudicial, and therefore are Inadmissible.

Not only are the statements made by K.F. and the minor Plaintiff to Dr. Berkowitz inadmissible hearsay, but they are not relevant to Plaintiff's causes of action. As stated in Pennsylvania Rule of Evidence 401, evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. K.F. on behalf of the minor Plaintiff has only filed a claim based on the July 3, 2015, incident, not for any alleged contact between the minor Plaintiff and B.G. which allegedly occurred on the bus. Moreover, the only prior incident K.F. contends that should have made the Defendants aware of B.G.'s conduct was one that occurred in 2014. The minor Plaintiff never reported the alleged bus contact and only spoke of it years later, after it was suggested by K.F. Therefore, not only is this alleged occurrence unreliable as it was suggested by K.F. but it does not make any other fact more or less probable.

Additionally, as outlined in Pennsylvania Rule of Evidence 403, "the court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Although experts, in this case Dr. Berkowitz, may rely on hearsay statements, the admissibility of the facts experts rely on is still subject to Rule 403. *Luzerne County Flood Prot. Auth. v. Reilly*, 825 A.2d 779, 783 (Commw. Ct. 2003). Specifically, "neither the Code nor the Rules of Evidence require admission of any and all hearsay statements which an expert may have considered in reaching his or her opinion."

The presentation of the alleged incident that occurred on the bus is certainly prejudicial and could mislead the jury given the unreliability of the description of what allegedly occurred on the bus. Said alleged occurrence was not reported by the minor Plaintiff and thus not investigated by the Defendant. The Defendant would be prejudiced in its ability to defend against the submission of this evidence given its sudden emergence years after the fact.

Finally, the minor Plaintiff's statement is not admissible per the Tender Years Act. An out of court statement of a child 12 years old or younger is admissible per the Tender Years Act 42 Pa. C.S. §5985.1 if, "the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and" the child either testifies at the proceeding or is unavailable. 42 Pa. C.S. §5985.1 (emphasis added). Here, none of the criteria are met. As discussed at length above, the alleged bus incident is not relevant and is unreliable based on the influence of K.F. Moreover, minor Plaintiff will not be testifying. Therefore, the statements cannot be admissible per the Act.

Accordingly, because the testimony regarding the alleged bus incident is not relevant and highly prejudicial, it should be deemed inadmissible.

III. CONCLUSION

For the above outlined reasons, and those listed in Defendant's Motion in Limine, the testimony pertaining to the bus incident should not be admissible.

Respectfully submitted,

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Dated: September 12, 2019

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Defendant

Signature: 

Name: Christopher M. Reeser, Esquire

Attorney No. (if applicable): 73632

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CERTIFICATE OF SERVICE

I, Christopher M. Reeser, Esquire, of Marshall, Dennehey, Warner, Coleman & Goggin, do hereby certify that on September 12, 2019, I served a copy of Defendant Young Men's Christian Associations of York and York County Brief in Support of Motion in Limine being filed with the Court via First Class United States mail, postage prepaid as follows:

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