Case No. B215775

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION EIGHT

JOHN DOE 1 et al.
Plaintiffs and Respondents,

versus

FRANCISCAN FRIARS OF CALIFORNIA,
Defendant/Appellant.

Appeal from the Judgment of the Superior Court
County of Los Angeles
Case No. JCCP 4286
The Honorable Peter D. Lichtman
The Honorable Emilie Elias
The Honorable Haley Fromholz
The Honorable Charles McCoy, Jr.

RESPONDENTS' BRIEF REGARDING APPEAL BY THE FRANCISCAN FRIARS

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I.
INTRODUCTION

This appeal is Appellants Franciscan Friars of California, Inc.'s ("Franciscans") latest effort to conceal from the public the threat to children posed both by Franciscan perpetrators and the Franciscan hierarchy's conduct in concealing their predatory employees. In furtherance of this goal the Franciscans first seek to expand the statutory definition of the *purpose* for which a psychotherapist is consulted, as set forth in Evidence Code section 1011. The proposed expansion would enable the Franciscans to use the privilege for a purpose for which it was never intended: as a shield to preserve the secrecy of the Franciscans' child-endangering practices regarding their numerous predatory friars. Specifically, the Franciscans argue the definition should include their purpose in sending the perpetrators to therapists – to obtain a diagnosis for use in the Franciscans' employment decisions – and should not be limited to the long-standing statutory definition that limits the purpose of the consultation to diagnosis and/or treatment for the patient's benefit. By expanding the definition the Franciscans seek to render the privilege-waiving transmittal to them of the documents at issue reasonably necessary, even though the disclosure did nothing to facilitate the diagnosis or treatment of the patients. The Franciscans will then use the restored protection of the privilege to shield

the documents – and the evidence therein of the threat their longstanding policy of secrecy poses to children – from public disclosure. However, the Franciscans cite no legal authority for their proposed expansion because none exists.[1]

The Franciscans then accuse both the Trial Court and this Court – in its decision in *Roman Catholic Archbishop of Los Angeles v. Superior Court*, 131 Cal.App.4th 417, 424 (2005), *cert. denied*, 547 U.S. 1071 (2006) ("*RCALA*") – of doing exactly what the Franciscans attempt in arguing for the expansion of the definition of "purpose": altering the psychotherapist-patient privilege in a way that conflicts with the purpose of the privilege, the relevant statutory language, and the applicable case law. Specifically, the Franciscans accuse this Court of creating and the Trial Court of applying a new or heightened standard for determining whether the privilege survives the transmittal of privileged documents to third parties.

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[1] Employing what can at best be described as creative legal arguments to preserve Franciscan corporate secrets related to child-abusing friars is far from a novel tact for the Franciscans. Their argument for the expansion of the definition of "purpose" is not as overtly offensive as some of the Franciscans' arguments in prior litigation, such as that pedophilic sex-crimes against children are protected by the right of privacy so long as the perpetrator sexually assaults the child "in a private setting." Joint Appendix ("JA") 0718B. However, the current argument is just as unsupportable as that outrageous proposition, and no less insidious in the harm it will cause, both by preventing the transmission of information to the public critical to childcare custodians' abilities to make informed decisions regarding who can be trusted with society's children, and by expanding the Franciscans' arsenal of legal arguments to employ in the future in their ongoing battle for secrecy.

However, neither court did any such thing. The *RCALA* opinion did not result in a new or heightened standard, nor did the Trial Court apply such a standard in the underlying proceedings. Instead, the Trial Court followed this Court's example in *RCALA*, considered all circumstances that might allow the documents disclosed to the Franciscans to remain privileged, and concluded that none of those circumstances were present at the time of the disclosure.

Accordingly, the Franciscans' argument regarding a new or heightened standard is fiction, and the claimed threat to other privileges is unfounded. Both arguments are smoke-screens intended to conceal the Franciscans' true purpose: continuing the Franciscans' policies of secrecy by shielding from public view the documents at issue.

The therapist-patient privilege was created for the benefit of the patient, not for the benefit of an employer. The Franciscans' attempt to transform the privilege into a protective shield used to conceal their child-endangering conduct must be rejected, and the Trial Court's order affirmed.

II.
FACTUAL AND PROCEDURAL HISTORY

Although the twenty-five (25) Plaintiffs in this matter reached a tentative settlement agreement with the Franciscans on approximately March 12, 2006, the terms of the written Global Settlement Agreement

were not finalized until May 25, 2006. JA 0783.[2] The sole reason for the more than two months that passed before the terms were agreed to was two diametrically opposed competing interests: 1) the Respondents' determination to prevent further childhood sexual abuse by Franciscans by publicizing the evidence of the Franciscan hierarchy's conduct and their knowledge of the perpetrators' propensities. Such information likely would have saved Respondents from suffering such abuse had it been known to anyone other than the Franciscans at the time the Respondents were abused; and 2) the Franciscans' desire to preserve decades of secrecy that continues to put today's children at risk.

After more than two months of negotiating a protocol for the publication of the perpetrators' files, Paragraph 15 of the Settlement Agreement was finalized. Respondents hoped that the Franciscans finally agreeing to the document disclosure protocol set forth in Paragraph 15 signaled that the Franciscans were finally prepared to do the right thing, and recognize the harm their decades of secrecy had wrought on countless children.

However, after nearly four years of the Franciscans employing no less than four law firms to fight the production of documents and terminate

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[2] The Procedural History set forth in JA 783-788 was never disputed or objected to by any participant in the proceedings in the Trial Court.

the proceedings conducted pursuant to paragraph 15, Respondents now realize they were horribly naive to hope that a century-old province of a centuries-old religious order was prepared to change its ways and prioritize the welfare of children. Instead, the Franciscans now fight for even *greater* secrecy, and in so doing implicitly refuse to acknowledge the tragedy decades of secrecy has wrought. Specifically, through this appeal the Franciscans ask this Court to turn the purpose of the therapist-patient privilege on its head, transforming it from a privilege that exists solely for the benefit of patients, to a privilege that benefits employers seeking to preserve the secrecy of the most deadly corporate conduct.

In September of 2006 the parties to the Settlement Agreement commenced the process agreed to with regards to the files and depositions at issue (collectively referred to as the "subject documents"). JA 783-84. Specifically, the Franciscans voluntarily submitted perpetrator personnel files to the Trial Court and plaintiffs' counsel, as well as deposition transcripts with the Franciscans' proposed redactions, all pursuant to Paragraph 15 and without any order of the Trial Court. JA 784. On September 20, 2006 Respondents' counsel sent counsel for the Franciscans the first draft of the Joint Statement of Items in Dispute ("Joint Statement") as to the Franciscans' objections to publication of and proposed redactions in the subject documents. JA 784. The parties then commenced an

extensive meet and confer process regarding the Joint Statement for final submission to the Trial Court on October 9, 2006. JA 784.

Pursuant to a schedule agreed to by the parties, in November 2006 the Franciscans notified the perpetrators and other individual Franciscans of their right to object to the publication of the subject documents. Pursuant to that notification, various individuals began serving objections on Respondents' counsel in December 2006. JA 784. This process resulted in the addition of two groups of nonparties to the proceedings: 1) the perpetrators who were not parties to the Settlement Agreement, and who now, along with perpetrators/defendants Robert Van Handel and Mario Cimmarrusti, have filed an appeal from, among others, the Trial Court's April 2, 2009 Order; and 2) various Individual Friars consisting primarily of a) former members of the Franciscan hierarchy, and b) Franciscans who have been accused of sexual misconduct but who did not sexually assault any of the plaintiffs in the Clergy I or III lawsuits. The perpetrators were and are represented by the law firm of Howie & Smith, the firm that has represented Franciscan perpetrators in civil lawsuits since at least 1998. The Individual Friars were represented by Sedgwick Detert Moran & Arnold, the law firm that represented the Franciscan corporate entity in civil

lawsuits throughout the 1990s.[3]

On December 27, 2006, each of the perpetrators served (and later filed with the Court) documents stating their specific objections to the publication of the subject documents. On January 8, 2007, counsel for the parties, for the perpetrators and for the Individual Friars appeared before the Trial Court. On January 31, 2007, the Individual Friars filed a brief objecting on various grounds to the publication of the subject documents, arguing there were documents in the perpetrators' personnel files to which there attached various rights and privileges held by the Individual Friars. JA 784.

On February 9, 2007 counsel for the parties, the perpetrators and the Individual Friars signed a Stipulated Order wherein all counsel agreed there was a potentially dispositive threshold issue to be briefed in the proceeding before the Trial Court ruled on the numerous specific objections. JA 754, 785. Specifically, whether the Perpetrators' privacy rights in the personnel

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[3] The Sedgwick firm identified the Individual Friars as "Bystanders," a very misleading descriptive term given that it is often used with "innocent." The Individual Friars are anything but innocent bystanders. Each is a Franciscan. They are not just people outside the organization who happened to witness some action by the perpetrators. Rather, they are members of an organization that allowed children to be sexually molested for decades. Many were members of the Franciscan hierarchy involved in concealing these crimes. Some, such as Father Steve Kain and Father Mel Bucher, are sexual offenders themselves. For these reasons Respondents refuse to use the suggestive term "Bystanders" and instead refer to them as the Individual Friars.

files prohibited their disclosure altogether (hereafter "threshold issue"). JA 754, 785. The Trial Court signed the order on March 2, 2007. JA 619. Pursuant to this stipulation and order, if the Trial Court sustained the perpetrators' privacy objections to the disclosure of their personnel files, that ruling would be dispositive and the proceeding would be concluded. JA 0615, para. 3, 754, 785. On the other hand, if the Trial Court overruled the privacy objections the proceeding would continue so that the Trial Court could rule on objections by the Franciscans, the perpetrators, and the Individual Friars, to the disclosure of specific documents contained within those files. *Id.*

After completing briefing regarding the threshold issue, on April 10, 2007, counsel for the Franciscans, the plaintiffs, the Perpetrators, and the Individual Friars appeared before the Trial Court. At the start of the hearing the Trial Court confirmed that the threshold issue being addressed was whether the Perpetrators' privacy rights in the personnel files prohibited their disclosure. Counsel for the Individual Friars further stated any other rights and privileges would be addressed in the future, "if necessary," after the Trial Court ruled on the threshold issue. No objections or disagreements were voiced by anyone to these statements. Reporter's Transcript ("RT"), A-1 to A-4, line 10. Although the only issue addressed at the hearing was the perpetrators' privacy rights in their

personnel files, the Trial Court not only permitted but invited all counsel in attendance to be heard regarding this threshold issue, expressly stating "I want to hear from everybody" on the threshold issue. RT A-29, Lines 3-12. In fact, a review of the transcript suggests that counsel for the Individual Friars argued as long if not longer than counsel for the perpetrators. RT A-1 to A-48. Towards the end of the hearing counsel for the Individual Friars again confirmed, without objection by anyone, that the only issue being decided was whether any document in the personnel files could be published. RT A-34, line 25 to A-35, Line 2. At the conclusion of the hearing, the Trial Court requested further briefing on three specific subjects related to the threshold issue.

On May 11, 2007, counsel for the perpetrators and for the Individual Friars jointly filed their additional briefing as requested by the Trial Court. On May 18, 2007, counsel for the perpetrators and for the Individual Friars filed their joint reply to additional briefing by plaintiffs on the same three issues for which further briefing was requested by the Trial Court. JA 786.

On June 7, 2007, counsel for the Franciscans, the plaintiffs, the perpetrators, and the Individual Friars appeared again before the Trial Court for final arguments regarding the threshold privacy issue. At the start of the hearing the Trial Court again confirmed the threshold privacy rights issue was the only matter to be ruled on at that time. RT, B-1, Lines 8-13. No

counsel disagreed with that statement, and it was understood that the Trial Court's ruling would be dispositive if the privacy objection was sustained, with counsel for the perpetrators going so far as to state "the issue before the court is much like a summary judgment motion." RT, B-16, Line 24 to B-18, Line 5. And as at the earlier hearing, counsel for the Individual Friars confirmed, repeatedly, that the only issue before the Trial Court was whether the Perpetrators' privacy rights prevented disclosure of their personnel files, and that the Trial Court's ruling would be dispositive of the entire proceeding if the objection was sustained. RT, B-6, Line 26 to B-7, Line 6; B-22, Lines 16-18; B-41, Line 5 to B-42, Line 28. At the conclusion of the hearing the Trial Court asked all counsel, including counsel for the Franciscans, if they wished to state anything further for the record. Each attorney stated they submitted on behalf of their respective clients. RT, B-40, Lines 10-22.

On June 18, 2007 ("2007 Order"), the Court issued its order overruling the privacy rights objection, acknowledging that the evidence presented by plaintiffs of the history of abuse by Franciscans against Santa Barbara children had neither been opposed nor objected to, and stating that "the perpetrators at issue here have either admitted to the abuse or have shown dangerous propensities towards youth." JA 15. Neither the Franciscans, the perpetrators or the Individual Friars filed a motion for

reconsideration, notice of appeal, or any other challenge or objection to the Trial Court's 2007 Order until the Franciscans filed their notice of appeal on April 24, 2009, followed by the perpetrators on May 29, 2009 (JA 997). Accordingly, the proceedings continued, culminating with the Trial Court ruling on objections to specific documents in the April 2, 2009 Order that is the subject of this appeal.

III.
APPEALABILITY: THE APPEAL FROM THE TRIAL COURT'S JUNE 18, 2007 ORDER IS TIME-BARRED

The Trial Court's June 18, 2007 Order was appealable. As a result, the Franciscans' failure to timely file their notice of appeal deprived this Court of jurisdiction to consider their appeal from any portion of the 2007 Order.

Appellate courts lack jurisdiction to review appealable orders or judgments from which a timely appeal was not taken. *Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 (party who did not immediately appeal from pendent lite attorney fees orders, which became final and binding on him, could not challenge them on appeal from subsequent judgment on reserved issues). Final judgments or orders are appealable. Additionally, some judgements and orders are considered final for purposes of appealability even if they do not dispose of all issues in the proceeding. *Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1235 (order denying

substitution of attorneys prevented performance of an act and thus was not appealable). Final orders on collateral issues are appealable. *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, 1148 (denial of motion to seal was final order on collateral issue). An order unsealing previously sealed records is appealable. *In re Providian Credit Card Cases* (2002) 96 CalApp.4th 292, 297 n. 2 (order unsealing records containing trade secrets was final determination of collateral matter); *see also Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 76-77 (order granting media motion to unseal amended complaint and exhibits was appealable).

The Franciscans contend the 2007 Order was a "preliminary or intermediate ruling," but cite no authority for this proposition. Opening Brief, p. 18. In *In re Keisha T.* (1995) 38 Cal.App.4th 220, 229, a newspaper petitioned for the right to inspect the juvenile court records of ten minors. Although the type of records to be disclosed differed from the personnel files in this matter, the procedure the *Keisha T.* trial court employed in ruling on the petition was quite similar to the procedure herein. Specifically, the *Keisha T.* trial court first made a threshold determination as to whether the newspaper was entitled to access the records at all. *Id.* Only upon deciding the newspaper could access the records was there a subsequent proceeding wherein a determination was made as to what specific portions of the records the newspaper could access. The *Keisha T.*

court concluded the threshold determination was "appealable as a final judgment in a special proceeding." *Id.*

Here, early in the proceedings in the Trial Court it was stipulated to by all counsel, and ordered by the Trial Court, that the perpetrators' privacy rights in their personnel files presented a potentially dispositive threshold issue that should be decided at the outset: were the privacy rights in the personnel files a complete barr to their disclosure? JA 0615, para. 3, 754, 785. It was understood by all that if the Trial Court sustained this objection, the proceeding would be terminated. Resolving this threshold issue at the outset insured neither the Trial Court nor counsel would have to perform any briefing or analysis rendered unnecessary if the Trial Court sustained the privacy objection.

Both the Trial Court and various counsel confirmed the potentially dispositive nature of the issue repeatedly during two oral arguments (RT, A-1 to A-4, Line 10; RT A-29, Lines 3-12; RT A-34, Line 25 to A-35, Line 2; RT, B-1, Lines 8-13; RT, B-16, Line 24 to B-18, Line 5; RT, B-6, Line 26 to B-7, Line 6; B-22, Lines 16-18; B-41, Line 5 to B-42, Line 28; RT, B-40, Lines 10-22), with counsel for the perpetrators accurately analogizing the resolution of this threshold issue to a motion for summary judgment. RT, B-16, Line 24 to B-18, Line 5. Under such circumstances, the 2007 Order was appealable as a final judgment in a special proceeding, and the

time to appeal that order has long since expired. *In re Keisha T.*, 38 Cal.App.4th at 229.

In an attempt to avoid this time-barr the Franciscans argue they "lacked standing to object to any evidence submitted in connection with" the 2007 Order because they did not assert the privacy objections overruled by the Trial Court. However, under identical circumstances this supposed lack of standing did not prevent counsel for the Individual Friars from filing two joint briefs with the perpetrators on May 11 and May 18, 2007, asking the Trial Court to sustain the perpetrators' privacy objections and deny altogether access to the personnel files. JA 786. Nor did it stop counsel for the Individual Friars from arguing extensively at both hearings that the Trial Court should sustain the perpetrators' objections and terminate any further proceedings. RT A-1 to A-48; RT, B-6, Line 26 to B-7, Line 6; B-22, Lines 16-18; B-41, Line 5 to B-42, Line 28. In fact, the Trial Court expressly stated at the first hearing that it wished to hear from <u>all</u> counsel regarding this threshold issue. RT A-29, Lines 3-12. And at the conclusion of the second and final hearing the Trial Court asked all counsel, including counsel for the Franciscans, if they wished to state anything further for the record. Each attorney, including counsel for the Franciscans, stated they submitted on behalf of their respective clients. RT, B-40, Lines 10-22.

In short, like the Individual Friars, the Franciscans were served with

each brief filed in this proceeding, and had every opportunity to voice objections to or raise arguments regarding evidence and legal arguments considered by the Trial Court in resolving the threshold issue. The Trial Court expressly invited their participation. The fact the Franciscans chose to sit on their rights does not change the fact the time to appeal the 2007 Order has long since expired.[4]

IV.
ARGUMENT

At the heart of the Franciscans' appeal are two unsupportable

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[4] It also is somewhat disingenuous for the Franciscans to argue on the one hand that all Franciscans take a vow of poverty and thus cannot pay for their own therapy (Opening Brief, page 13), and then argue on the other hand that their interests were not represented in the proceeding to resolve the threshold issue. If all Franciscans take the vow of poverty and cannot pay for their own medical care, it follows that they cannot afford to pay for their own legal representation either. Thus, it was the Franciscan corporate entity that paid two law firms, in addition to the third and fourth law firm representing the corporate entity, to represent the interests of assorted Franciscans – from perpetrators to former members of the Franciscan hierarchy – throughout these proceedings. Even if the Trial Court had not invited the Franciscans to participate in the threshold issue proceeding, it is hard to imagine the Franciscans arguing with a straight face that there was not a [3] [3 cont.] unity of interests between the Franciscan corporate entity and the various individual Franciscans – each subject to vows of obedience to the Franciscans (Opening Brief, p. 30) – represented by the two law firms paid for by the Franciscans. Notwithstanding the Franciscans' repeated claims in their opening brief that they were not involved in and/or were disinterested parties in the numerous efforts to have the proceeding terminated, there is no escaping the reality that the Franciscans repeatedly signed checks to law firms that made and continue to make every effort to terminate the process agreed to by the Franciscans in Para. 15 of the Settlement Agreement. The fact the Franciscans continue to make such arguments suggests they believe their repeated statements that the *Roman Catholic* opinion evidences a lack of common sense on this Court's part. Opening Brief, pp. 25, 32.

arguments. The first is for the expansion of the definition of the *purpose* for which a therapist is consulted beyond the benefit to the patient. This argument ignores the fact the privilege exists for the benefit of the patient, not the patient's employer. The Franciscans' proposed expansion is really a covert attempt to transform the disclosure of privileged documents to third parties in this dispute from unnecessary to the consultation and therefore unprotected, to reasonably necessary to the consultation and entitled to the protection of the privilege. However, they cite no authority supporting their proposed expansion, and their public policy justifications for the expansion fail under the weight of the abuse and suffering their conduct has inflicted on more than sixty Santa Barbara children.

The Franciscans' second argument is a classic case of the pot calling the kettle black, except, in this instance, only the pot is black. Specifically, after arguing for the unsupportable expansion of the definition of "purpose," the Franciscans accuse this Court and the Trial Court of creating and/or applying a new and unsupported heightened standard for determining whether documents disclosed to third parties remain protected by the therapist-patient privilege. Neither court did any such thing. Both courts recognized multiple circumstances where communications to a third party remain within the scope of the therapist-patient privilege, such as where the third party is being supervised by or is a licensed therapist.

However, neither court elevated any one of these circumstances to the status of a new or heightened standard by which all such communications should be judged. The transmittals to the Franciscans of the documents at issue herein simply do not fit within *any* of these circumstances necessary to retain the privilege.

A. Facilitating an Employer's Personnel Decisions is Not a Recognized Purpose That Brings Communications by a Therapist to a Third-Party Employer Within the Protection of the Therapist-Patient Privilege

The Franciscans cannot render the disclosure of privileged documents to them reasonably necessary by arguing for the unsupportable expansion of the definition of the "purpose" for which a patient consults a therapist. A patient consults a therapist for diagnosis and/or treatment for the benefit of the patient, not for the benefit of an employer such as the Franciscans. Although there are circumstances where the transmittal of privileged communications to third parties is reasonably necessary to the purpose of the consultation, none of those circumstances were present in the disclosure of the documents at issue.

Evid. Code § 1011 defines the purpose for which a therapist is consulted. *RCALA*, 131 Cal.App.4th at 450. Specifically, Section 1011 states:

> "[P]atient" means a person who consults a psychotherapist or submits to an examination by a

> psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition[.]

Evid. Code § 1012 defines confidential communication between a patient and a psychotherapist as:

> information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted[.]

Recognizing that the disclosure of the documents to them was not reasonably necessary to the therapist accomplishing diagnosis and/or treatment of the perpetrators, the Franciscans attempt to expand the definition of "purpose" to include the Franciscans' purpose in hopes of making transmittal of the privileged documents to them reasonably necessary. However, nowhere is there any language in these definitions that supports the Franciscans' contention that "purpose" includes obtaining a diagnosis for the benefit of and use by the patient's employer in making employment decisions regarding the patient. To the contrary, subject to certain exceptions discussed below, none of which apply to the Franciscans, disclosure of privileged documents to third parties terminates the protection offered by the therapist-patient privilege unless the disclosure was

reasonably necessary to accomplish the consultation. *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932.[5] The privilege exists for the benefit of the patient, not the patient's employer. *Id.* at 933, n.13 (*quoting City and County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 232 ["The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments."]).

The Franciscans cite no authority whatsoever other than *RCALA* – much less one that agrees with their interpretation of Section 1011 – in the nearly five pages they devote to arguing for the expansion of the definition of "purpose." Opening Brief, pp. 19-23. No court has found that "the purpose of securing a diagnosis" of an employee's mental or emotional condition includes an employer's desire to obtain such information to make an employment decision related to the employee/patient. The privilege exists for the benefit of patients, not for use by an employer attempting to conceal from the public its shameful and child-endangering conduct. The Franciscans' proposed expansion should be rejected accordingly.

1. The Franciscans' Justifications for Expanding the Definition of "Purpose" Collapse Beneath the Weight of Their "Past Failures"

In the absence of any legal authority supporting their expansion of

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[5] The physician-patient privilege is analogous to the therapist-patient privilege. *RCALA*, 131 Cal.App.4th at 453.

the definition of "purpose" set forth in section 1011, the Franciscans resort to a fundamentally-flawed public policy argument to convince this Court to expand the definition. Specifically, that the Franciscans obtaining the diagnoses is "equally important" to permit the them "to make decisions about whether any limitations should be imposed on the friar's ministry, for example, that he not have any ministry involving minors or that he not have any unsupervised contact of any kind with minors." Opening Brief, p. 21. The Franciscans reference their "important responsibility" to "supervise offending priests and prevent them from perpetrating sexual abuse." *Id.* at 34. According to the Franciscans, "past failures should not sidetrack concerns about the future." *Id.* at 33.

The fact the Franciscans have the temerity even to make such an argument is unbelievable, and illustrative of their still-dangerously paternalistic/"father knows best" distorted world-view. Society expects everyone, including religious organizations like the Franciscans, to report child abusers to law enforcement so that the legal system can prevent such men from perpetrating sexual abuse. For decades the Franciscans have circumvented this obligation by concealing reports of abuse by their members from the public and from law enforcement, instead performing their "important responsibility" to "supervise offending priests and prevent them from perpetrating sexual abuse" in secret. JA 15. The Franciscans

have failed miserably in this regard with disastrous results (JA 15, 85), and have long since lost any right to conceal information from the public for the purported purpose of protecting children. The identification of fifty-nine (59) Santa Barbara child-victims[6] of Franciscan sexual abuse since 1960 makes it clear that priority number one for the Franciscans is protecting the institution, number two is protecting the friar perpetrators, and a distant third, if that, is protecting children.

Nothing will be lost by anyone but the Franciscans' if their "ability" to protect children from Franciscan perpetrators is compromised. To the contrary, publicizing the documents at issue will empower the public to do what the Franciscans have failed to do for decades: protect children from sexual abuse by Franciscan predators by placing the welfare of children first. Through the disclosure of the documents at issue Respondents seek to return to the public what the Franciscans have deprived them of for decades: the ability to make *informed* decisions regarding whether the Franciscans can be trusted with the welfare of children. Respondents

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At the time of the briefing on the threshold issue in 2007 Respondents' counsel had identified a total of fifty-four (54) victims of childhood sexual abuse by friars in Santa Barbara. JA 15. By the date of Respondents' Omnibus Brief in November 2008 that number had increased to fifty-nine (59). JA 85. None of the Franciscan participants in the subject proceeding ever disputed those numbers, or objected to them being asserted in the briefing in the proceedings in the Trial Court, undoubtedly because they knew the actual number of such victims of friars in Santa Barbara to be even higher.

respectfully ask this Court not to enable the Franciscans in their battle to preserve their deadly secrets and reject the Franciscans' self-serving attempt to expand the definition of purpose.

B. Neither This Court in *RCALA* Nor the Trial Court Created or Applied a New or Heightened Standard for Determining Whether a Document Disclosed to a Third Party Remains Protected by the Therapist-Patient Privilege

Notwithstanding the Franciscans' "the sky is falling" arguments for the therapist-patient privilege and analogous privileges, neither the *RCALA* opinion created nor the Trial Court applied a heightened or new standard for the therapist-patient privilege.

Both courts cited with approval authorities recognizing circumstances where disclosures to third parties were reasonably necessary. In *RCALA*, this Court cited and discussed with approval an extensive list of authorities setting forth circumstances where disclosures to third parties remain privileged. *RCALA*, 131 Cal.App.4th at 450-453. Specifically, this Court cited and discussed *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502 (medical records reflecting statements by parents to child's care givers remained privileged because such statements furthered the child's interest by facilitating treatment and diagnosis of child); *People v. Gomez* (1982) 134 Cal.App.3d 874 (statements made to student interns, who were not working under a licensee to whom the privilege attached,

were not privileged); *Luhdorff v. Superior Court* (1985) 166 Cal.App.3d 485 (statements made to social worker working under a licensee to whom the privilege attached remained privileged); *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521 (statements made during group therapy session remained privileged because they furthered the interest of the patient in the consultation or the accomplishment of the purpose of the consultation); *In re Pedro M.* (2000) 81 Cal.App.4th 550 (disclosure of juvenile delinquent's records to juvenile court was reasonably necessary where court was empowered to make treatment decisions on behalf of minor); *In re Mark L.* (2001) 94 Cal.App.4th 573 (disclosure of records to court in juvenile dependency context reasonably necessary to decisions regarding child's welfare); *In re Christopher M.* (2005) 127 Cal.App.4th 684 (limited disclosure of records to juvenile court and probation officer reasonably necessary to their ability to make decisions for benefit of juvenile); *Rudnick v. Superior Court* (1974) 11 Cal.3d 924 (disclosure of records by doctor to drug manufacturer reasonably necessary to doctor obtaining assistance in use of drug in treating patient); *Blue Cross v. Superior Court* (1976) 61 Cal.App.3d 798 (transmittal to insurer of claims form identifying only patients' names and ailments was reasonably necessary so that insurer would pay for medical care). This Court then applied the facts related to the disclosures to the Archbishop and his agents to the law, noting that in so

doing it was "[g]uided by these authorities." *Id.* at 453. The Trial Court acknowledged this Court's review of and reliance on these authorities in *RCALA*. JA 0279, n. 17. Neither court gave any indication it considered these authorities, or the propositions stated therein, anything other than good law, nor that the circumstances set forth in these authorities had been superseded by some new or heightened standard.

According to the Franciscans, however, this Court in *RCALA* created a new standard, subsequently applied by the Trial Court, that in order for transmittals to third parties to remain privileged, the third parties either had to be either treating therapists or be supervised by therapists. Neither the *RCALA* opinion nor the Trial Court's order supports the Franciscans' contention. Although both paid particular attention to whether the third party was either a therapist or being supervised by a therapist, they did so only after ruling out and/or distinguishing all other circumstances that might have preserved the privilege. No new standard was created.

In *RCALA*, this Court applied Section 1012 and the authorities cited above to the specific circumstances of the disclosure of the documents. In one instance the Court found the privilege remained intact, pursuant to the *Grosslight* opinion, notwithstanding the fact the third party was neither a treating therapist nor being supervised by a therapist. *RCALA*, 131 Cal.App.4th at 455. In the remaining instances the Court first considered

whether the disclosure was reasonably necessary to accomplish the purpose of the consultation. *Id.* at 454-56. The Court also considered whether the privilege remained intact because the disclosure was to a third party who either was a therapist or was being supervised by a therapist. *Id.* However, at no point did the Court state this latter circumstance was a new standard. Such a holding would have been utterly inconsistent with the Court's statement it was "[g]uided by the[] authorities" cited above.[7]

Similarly, although the Trial Court concluded the subject documents were not privileged because they had been transmitted to third parties who

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[7] The *RCALA* rulings on objections to specific documents are somewhat inconsistent in a few instances, and, read alone, might cause some confusion as to whether the Court was creating a new standard. Specifically, in ruling on documents Doe 1 #74 and Doe 1 #80, this Court flatly stated the communication at issue did not remain privileged because the recipient was not rendering therapy to the priest or being supervised by a therapist. However, when read in the context of this Court's analysis for all of the documents, it is clear the Court did not create a new standard. To the contrary, the Court first considered whether the disclosure was reasonably necessary based on the authorities it previously considered. Then, in addition, it considered whether the third party was either rendering therapy to the priest or being supervised by a therapist. In each of these instances, after determining whether the disclosure was reasonably necessary, this Court stated "*Moreover*, the [third party] was not involved in rendering therapy to the priest or being supervised by a therapist." *RCALA*, 131 Cal.App.4th at 454-56 (emphasis added). The fact this Court started each of these sentences with "moreover" contradicts the Franciscans' contention that *RCALA* makes it necessary to the survival of the privilege that third parties who receive such communications must either be a treating therapist or being supervised by a therapist, and that no other circumstances apply. To the contrary, this is simply an additional circumstance that would allow the privilege to remain intact. Such circumstances were not present in the disclosure of the subject documents to the Franciscans.

neither were treating therapists nor being supervised by therapists (JA 281), it did so only after first explaining why the transmittals to the Franciscans were not analogous to the additional circumstances acknowledged in the authorities relied on by this Court and cited above. JA 279-81, nn. 17 and 19.

Like this Court in *RCALA*, the Trial Court did in fact find that some transmittals involving third parties remained privileged despite the fact the third parties were not treating therapists nor being supervised by a therapist. JA 321, 326-27, 329, 330. For the remaining documents, the Trial Court first considered whether any of the circumstances in the authorities cited in *RCALA* were present. Only after determining they were not did the Trial Court then consider whether the third parties were treating therapists or being supervised by a therapist. JA 279-81, nn. 17 and 19.

This process can be seen in each instance the Trial Court overruled objections to specific documents. JA 319-331. First the Trial Court concluded the "disclosure was not reasonably necessary to accomplish the purpose for which the therapists were consulted (i.e. treatment and diagnosis)." Only after ruling out the presence of the circumstances that would have allowed privilege to remain intact did the Trial Court consider the additional circumstances that might save the privilege: whether the third parties were treating therapists or being supervised by a therapist. When it

concluded such circumstances did not exist, the Trial Court then stated "*Moreover*, the documents were not disclosed to individuals that were involved in rendering psychotherapy and/or were being supervised by the treating psychotherapists." JA 319-331 (emphasis added). Thus, the Trial Court ruled out the final remaining circumstance, but not the only possible circumstance.

In short, the Franciscans claim that this Court created and the Trial Court applied a new standard is a fiction. Neither court "engrafted" an additional requirement into the statutory scheme that allows documents disclosed to third parties to remain privileged only where the third party is a treating therapist or being supervised by a therapist. To the contrary, the standard remains unchanged. A reviewing court must determine whether the disclosure to the third party was reasonably necessary. One of the circumstances, but not the only, that renders such a disclosure reasonably necessary is where the third party either is a treating therapist or being supervised by a therapist. Such circumstances did not exist in the disclosure to the Franciscans of the subject documents.

C. The Trial Court was Correct in Finding That None of the Privilege-Preserving Circumstances Considered in *RCALA* Were Present in the Disclosures of the Subject Documents

Disclosure of the subject documents to the Franciscans was not reasonably necessary to diagnosis or treatment of the perpetrators, and was

not analogous to any of the recognized circumstances considered in *RCALA* wherein such disclosures remain privileged.

Like this Court in *RCALA*, the Trial Court in the underlying proceeding considered authorities that recognize certain circumstances where disclosures to third parties can remain privileged. *RCALA*, 131 Cal.App.4th at 450-53; JA 279-81, nn. 17 and 19. The Trial Court then considered those circumstances with regards to the disclosure of the documents at issue and found such circumstances did not exist. JA 277-81.

The circumstances where disclosures to third parties remain privileged, as illustrated by the decisions discussed in *RCALA*, generally involve one of two scenarios: 1) where the third party is making decisions for the patient and the patient has lost the right to make such decisions, such as in the cases of parolees, juvenile delinquents or juvenile dependents; or 2) where the disclosure to the third party assists in or facilitates the therapist in diagnosing or treating the patient, such as where the third party is an insurer, or the manufacturer of a drug used by the patient, or is a participant in group therapy that benefits the patient.[8] *RCALA*, 131

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[8] The Franciscans make no effort to analogize to the third circumstance that may result in the preservation of the privilege: where the third party is either being supervised by or is a treating therapist. *RCALA*, 131 Cal.App.4th at 450-51 *citing People v. Gomez* (1982) 134 Cal.App.3d (statements made to student interns, who were not working under a licensee to whom the privilege attached, were not privileged); *Luhdorff v. Superior Court* (1985) 166 Cal.App.3d 485 (statements

Cal.App.4th at 450-53. The Trial Court correctly found that no such circumstances existed in the disclosures to the Franciscans.[9] The first scenario often involves a trial court or a social worker making a decision regarding a juvenile delinquent or dependent, or an adult probationer. *See In re Pedro M.* (2000) 81 Cal.App.4th 550 (disclosure of juvenile delinquent's records to juvenile court was reasonably necessary where court was empowered to make treatment decisions on behalf of minor); *In re Kristine W.* (2001) 94 Cal.App.4th 521, 528 (limited disclosure of records to court in juvenile dependency context reasonably necessary to decisions regarding child's welfare); *In re Mark L.* (2001) 94 Cal.App.4th 573 (disclosure of records to court in juvenile dependency context reasonably necessary to decisions regarding child's welfare); *In re Christopher M.* (2005) 127 Cal.App.4th 684 (limited disclosure of records to juvenile court and probation officer reasonably necessary to their ability to make decisions for benefit of juvenile); *Story v. Superior Court* (2003)

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made to social worker working under a licensee to whom the privilege attached remained privileged). Instead they mistakenly argue it is a stand-alone new standard created by this Court and applied by the Trial Court in the underlying proceedings.

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Although the Franciscans try to analogize the disclosure to these circumstances, their initial attempt to "backdoor" the disclosure into protected status – by arguing for the expansion of the definition of "purpose" – implicitly acknowledges the failure of these analogies.

109 Cal.App.4th 1007, 1018-19 (therapy records remain privileged where disclosed to court only to extent necessary to allow monitoring of patient's progress and participation in therapy ordered as condition of probation).

Here, the Franciscans are not a court tasked with assessing and making decisions regarding a minor's welfare or a defendant's compliance with the terms of probation. And despite their paternalistic delusions, the Franciscans are not a parent sending a child to a psychologist.[10] Similarly, the perpetrators are not juveniles; they are adult men who sexually assaulted children. Unlike the patients in the authorities cited above, the perpetrators are not bound by the decision of a third party nor in custody of the state or under the control of a court. To the contrary, and notwithstanding any vow of obedience they may have taken to the Franciscans, the perpetrators are grown men who are free to refuse treatment, or to leave the Franciscan Order, at any time. In fact, a number of perpetrators have done just that in the last ten years, with at least one

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[10] The Trial Court considered and expressly rejected the Franciscans' analogy in this regard (JA 281, n. 19), a decision that further refutes the Franciscans' argument that the Trial Court applied the Franciscans' fictional new or heightened standard to reach this conclusion. To the contrary, it simply refused to accept that the Franciscans' "relationships with the alleged perpetrators are akin to that of parent and child." *Id.* Whether the Franciscans were therapists or being supervised by therapists was not a basis for the Trial Court's decision that the circumstances of the disclosure to the Franciscans did not fit into the privilege-preserving circumstances recognized in *RCALA* in *In re Pedro M.* and *Story v. Superior Court*.

such departure producing recent tragic

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results for children.[11]

Case law considering the second scenario has involved a variety of circumstances necessitating disclosures because they somehow facilitated diagnosis or treatment. *See Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502 (medical records reflecting statements by parents to child's care givers remained privileged because such statements furthered the child's interest by facilitating treatment and diagnosis of child); *Rudnick v. Superior Court* (1974) 11 Cal.3d 924 (disclosure of records by doctor to drug manufacturer reasonably necessary to doctor obtaining assistance in use of drug in treating patient); *Blue Cross v. Superior Court* (1976) 61

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[11] Early in his career as a Franciscan Fr. Louis Ladenburger was treated for what a former Franciscan Provincial Minister described only as "inappropriate professional behavior and relationships," vague terms that are standard procedure for the Franciscans when describing acts of childhood sexual abuse by friars. After sending Ladenburger for treatment for his criminal conduct twice in the 1980s, the Franciscans sent him for another psychological review in 1993. The Franciscans were sufficiently concerned to restrict Ladenburger's ministry, but never reported Ladenburger's criminal acts to law enforcement. Nor did they warn any families or communities where Ladenburger had worked or was working as a priest. As a result, when he grew frustrated with the restrictions and left the Order in 1996 – nearly twenty-years after the Franciscans first learned of and began to conceal the risk he posed to children – Ladenburger had never been convicted of a sex crime, was not a registered sex offender, and only the Franciscans were aware of his pedophilic propensities. In May of 2007 Ladenburger was arrested and ultimately pleaded guilty to sexually assaulting several children in Idaho, receiving a five year prison sentence. CT, B-25, line 1 to B-26, line 15.

Cal.App.3d 798 (transmittal to insurer of claims form identifying only patients' names and ailments was reasonably necessary so that insurer would pay for medical care); *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521 (statements made during group therapy session remained privileged because they furthered the interest of the patient in the consultation or the accomplishment of the purpose of the consultation).

As in *Grosslight*, the Trial Court sustained a number objections to the disclosure of documents where it determined they contained communications from the Franciscans to the therapists that facilitated and thus were reasonably necessary to the diagnosis or treatment of the perpetrators. JA 321, 326-27, 329, 330. However, it rejected all other analogies by the Franciscans, expressly rejecting the application of the circumstances in *Blue Cross* by noting the Franciscans' "relationship with the alleged perpetrators is distinct from the 'tripartite relationship, between a doctor, patient, and insurer.'"[12] JA 279, n. 17. The Franciscans are not a health insurer, paying for the treatment of their insured. In fact, in the underlying proceeding Respondents submitted evidence that the

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[12] Again, as with its rejection of the parent-child analogy, the Trial Court rejected the application of the *Blue Cross*/health insurer analogy without reference to whether the Franciscans were therapists or being supervised by therapists. The Franciscans' fictional new standard was not a factor in the Trial Court's decision. JA 279-80 n. 17.

Franciscans obtain health insurance for their members, and in some cases even for their former members. JA 100-01; 156-57. This evidence was neither objected to nor disputed by the Franciscans.[13]

Additionally, even if the Franciscans could somehow be considered analogous to the insurer in *Blue Cross,* the amount of information disclosed in the subject documents could not be considered reasonably necessary to the decision-making process of an insurer in deciding whether to pay for the treatment. In *Blue Cross*, there was no disclosure, as here, of entire records. To the contrary, the only information disclosed was the patients' names and ailments contained on a claim form transmitted to the insurers. *Blue Cross,* 61 Cal.App.3d at 799, 801. Here, it was not just the names and ailments of the perpetrators on claims forms that were disclosed to the Franciscans, but entire pages of records. Nothing in *Blue Cross* or any other authority cited by the Franciscans supports finding that the disclosure of entire medical records is reasonably necessary to allow an insurer to pay for medical care. Thus, even if the Franciscans were in a position analogous to an insurer, the disclosed documents would not be protected as their disclosure was not reasonably necessary.

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[13] Although the perpetrators objected, they cited no evidentiary basis to exclude this evidence. JA 751H-I. Additionally, the Trial Court never ruled on the objection, nor did the perpetrators ever demand such a ruling.

The circumstances in *Rudnick v. Superior Court* also have no application here as disclosures by a doctor to a drug manufacturer would remain protected so long as they were reasonably necessary for the treating physician to obtain assistance in the use of a drug in treating patients. *Rudnick*, 11 Cal.3d at 933. The Franciscans are not in a position analogous to a drug manufacturer whose knowledge of the drug it manufacturers – such as symptoms or side-effects the drug triggers – may help a caregiver treat her patient. Additionally, unlike the subject dispute where entire records were disclosed, the only information disclosed in *Rudnick* was contained in reports by doctors to drug manufacturers referencing adverse drug reactions of their patients, all for the purpose of the doctors obtaining information from the manufacturers to facilitate their diagnosis or treatment of the patients. *Id.* Here, the disclosure of entire records to the Franciscans was not reasonably necessary to the purpose of diagnosis and/or treatment. Nothing in *Rudnick* or *Blue Cross* supports such a complete disclosure of records as being reasonably necessary. Even assuming *arguendo* that the perpetrators' caregivers required input and oversight from the Franciscans, neither of these would have required transmittal to the Franciscans of purportedly confidential and privileged records. To the contrary, input and/or oversight would have required transmittals from the Franciscans to the care givers. In fact, where such circumstances were present in the

transmittal, the Trial Court sustained the objections.

V.

CONCLUSION

Respondents made the protocol in Paragraph 15 regarding the publication of the subject documents a condition of the 2006 Global Settlement Agreement. Respondents did so in the belief that the information in those documents should have been disclosed by the Franciscans decades ago, and would have empowered parents and other childcare custodians to prevent other children from suffering childhood sexual abuse by the perpetrators and other friars. Respondents fought for this settlement term because they did not believe the Franciscans ever would have disclosed such information voluntarily.

Consistent with the Respondents' belief, the Franciscans are doing everything in their power to prevent the publication of these most important documents that graphically illustrate how much they knew about and when they first learned of the threat posed by the perpetrators. However, the Franciscans also now pursue – through the expansion of the definition of the purpose for which a patient consults a caregiver – an equally disturbing goal: convincing this Court to add another arrow to the Franciscans' quiver of unsupportable legal arguments used to preserve their secrets, and to maintain the public's ignorance of the threat they pose. Respondents

respectfully submit that the Trial Court's order should be affirmed.

DATED: March 4, 2010 NYE, PEABODY, STIRLING & HALE, LLP

By: _____
Timothy C. Hale, Esq.
Attorneys for Plaintiffs and Respondents

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to California Rules of Court, Rule 8.204(c)(1), the undersigned certifies that the attached Respondents' Brief Regarding Appeal By The Franciscan is proportionately spaced, has a typeface of at least 13-point and contains approximately 8,814 words, including footnotes, excluding tables, this certificate, and supporting documents. In making this Certificate, I am relying on the "word count" function of the Computer word processing program used in preparing this brief.

Dated: March ____, 2010 NYE, PEABODY, STIRLING & HALE, LLP

By:
Timothy C. Hale, Esq.
Attorneys for Plaintiffs and Respondents

PROOF OF SERVICE

I am employed in the County of Santa Barbara, State of California. I am over the age of eighteen years and not a party to this action. My business address is 33 West Mission Street, Suite 201, Santa Barbara, California 93101.

On the date stated below, I served the following document: **RESPONDENTS' BRIEF REGARDING APPEAL BY THE FRANCISCAN FRIARS** on the interested parties in this action, by placing a COPY thereof in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 4, 2010

_____
Suzanne Gorelick