2013 WL 7487318 (N.H.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of New Hampshire.
Hillsborough County

Melissa MARTIN, et al,

v.

CHESHIRE MEDICAL CENTER.

No. 2162010CV126.
November 21, 2013.

Plaintiffs' Memorandum of Law in Support of Objection to Defendant Cheshire Medical Center's Motion in Limine to Exclude Ex Parte Deposition Testimony and A. Negative Inference from the Invocation of the Fifth Amendment Privilege by Richard Mello, Jr.

Melissa Martin, et al, By their attorneys, Law Offices of Peter E. Hutchins, PLLC, Peter E. Hutchins, Esq. #1231, The Beacon Building, 814 Elm St., Suite 200, Manchester, NH 03101.

NOW COME the plaintiffs in the above matter, through counsel, and respectfully submit the following Memorandum of Law in Support of their Objection to Defendant's Motion in Limine to Exclude *Ex Parte* Deposition Testimony and a Negative Inference from the Invocation of the Fifth Amendment Privilege by Richard Mello, Jr., and state as follows:

Issue Presented

Defendant moves to exclude the admission of a deposition taken of the rape perpetrator in this case, Richard Mello, Jr., on January 22, 2010, and from preventing the jury from taking a "negative inference" from the fact that Mello invoked the 5th Amendment throughout that deposition. The plaintiffs object for the following reasons:
1. The deposition at issue was properly taken pursuant to an order of this Court. Defendant's claim that it was taken "ex parte" is both wrong and irrelevant.

2. It has not yet been determined whether Richard Mello Jr. is physically an "unavailable witness" for trial.

3. The criminal statute of limitations for Richard Mello, Jr. has not run, and therefore, even if called to testify at trial, he would still invoke the 5th Amendment. Accordingly, his physical unavailability is a moot point, and under NHRE 804(a)(1) he should be declared "unavailable" by this Court and the plaintiff should be allowed to read the Mello deposition into evidence at trial.

4. Use of the deposition is perfectly appropriate for the impeachment of defense witnesses, including hospital employees and retained experts, who intend to testify that the rape did not or could not occur.

5. It is settled law that a negative inference may be draw against a witness invoking the 5th amendment in a civil case.

6. Defendant should be estopped from attempting to claim on the one hand that the plaintiff is "lying" about the rape, yet on the other hand attempting to exclude evidence of the perpetrator refusing / failing to "deny" the rape when given a full and fair opportunity (while represented by counsel) to do so. In short, they cannot have their cake and eat it too. They cannot assert a lack of evidence based upon their own efforts to exclude the very evidence they claim does not exist. See also "Defendant's

Motion in Limine to Exclude Introduction of Hearsay Police Report and Transcript" filed November 12, 2013, and Plaintiffs' objection to that Motion filed November 20, 2013.

In short, it is the position of the plaintiffs that they should be allowed to read the deposition of Richard Mello, Jr. into evidence in this case, that a negative inference be drawn against the defendant, and that the deposition be available for use for impeachment purposes.

I. ***The Mello Deposition was Properly Taken and Available for Use in this Case***

In February of 2009, undersigned counsel contacted counsel for the defendants to advise of this claim and a copy of a draft complaint, knowing that defense counsel had, in the past, represented Dartmouth Hitchcock in similar cases. *See* letter of February 5, 2009 attached as Exhibit C to defendant's Motion. On February 26, 2009, defense counsel wrote to undersigned counsel requesting extensive information surrounding the claim and the plaintiff. *See* attached letter, Exhibit A. On May 29, 2009 plaintiff's counsel sent to defense counsel a large notebook containing all the materials requested by the defense. *See* cover letter attached as Exhibit D to defendant's Motion. In short, the plaintiff was engaged in pre-suit negotiations of this case with the defendant and its counsel. Defendant's Motion attaches other correspondence between counsel during 2009 and into 2010 before this suit was filed, evidencing ongoing discussions and the voluntary sharing of information by the plaintiffs.

In July, 2009, plaintiff's counsel decided that in order to present his client's claim in the best and most truthful light for purposes of these negotiations, he should attempt to obtain certain discovery, and namely a deposition and potentially medical information, directly from the perpetrator, Richard Mello, Jr. At this time, no suit had been filed against Cheshire Medical Center, and to the knowledge of the plaintiffs and their counsel, the medical center and its counsel were reviewing the voluminous materials voluntarily provided by the plaintiff in May. In fact, plaintiff's counsel never received a response from defense counsel formally denying the claim and declining settlement discussions until February 9, 2010.

Since no suit was pending against this defendant, and since plaintiffs were more than entitled to continue to pursue pre-suit discovery in this case, plaintiffs proceeded by way of Petition for Discovery pursuant to RSA 498:1. Of note is that the Petition, attached to defendant's Motion as part of Exhibit I, plainly stated that the plaintiffs sought discovery against Richard Mello because they were contemplating a claim against Cheshire Medical Center. In short, plaintiffs and their counsel were completely up front and direct in their pleadings and before the Court.

After a hearing before this Court (Abramson, J.), the court granted plaintiff's Petition by order dated December 3, 2009, however appointed Attorney Donald Kennedy of Manchester, NH to represent Mr. Mello as a GAL due to the potential that Mr. Mello, at a deposition or otherwise, may incriminate himself criminally. *See* order, attached as Exhibit B. Pursuant to that court order, the deposition of Richard Mello, Jr. was taken on January 22, 2010. Mr. Mello was accompanied by Attorney Kennedy, and invoked the 5th amendment to every question posed by undersigned counsel. See deposition transcript, attached as Exhibit C. Shortly after the deposition was taken, plaintiff's counsel advised defense counsel that he had conducted the deposition, and of the results. See acknowledgment letter of defense counsel of February 19, 2010, attached as Exhibit B to defendant's Motion. The deposition transcript was provided to defendant by plaintiffs' counsel on April 29, 2010 in response to Requests for Production of Documents propounded in this case by defendant. *See* Exhibit I to defendant's Motion.

In its instant Motion, the defendant suggests that the manner in which the plaintiff conducted the Mello deposition was improper, and should not be admissible into evidence in this case.

First and foremost, the potential case against Cheshire Medical Center was prominently discussed in the Petition for Discovery. Therefore, plaintiffs and their counsel were hiding nothing, and fully informed the Court of the purpose of their request for discovery prior to any order being made. Had the Court required notice to Cheshire Medical Center, plaintiff's counsel certainly would have complied.

Second, the ONLY legal support cited for defendant's position is RSA 518:1. This statute pertains only to depositions in perpetual remembrance. It does not deal with a perfectly legitimate Petition for Discovery brought (and granted) pursuant to RSA 498:1. FRCP 27, also cited by defendant, also deals only with depositions in perpetual remembrance. Depositions in perpetual remembrance are those taken where a witness is ill, **elderly**, or otherwise may not be available for trial. *See generally New Castle v. Rand,* 101 NH 201 (1957). That is not the case here. In this case, the deposition was taken pursuant to an order of this Court prior to the filing of a lawsuit with all appropriate constitutional safeguards being granted the defendant and deponent.

Further, in addition to being irrelevant to the deposition at issue, RSA 518:1 does not require notice to potential defendants when the depositions are taken pursuant to a properly filed and granted Petition for Discovery under RSA 498:1.

Third, this pre-suit deposition by plaintiffs was no different from typical pre-suit investigation and attorney work product. Plaintiffs could have attempted to interview Mello directly, and sought his permission to record the interview and/or request Mello to sign a statement or a transcription of an interview under oath. Given the potential criminal implications, however, plaintiffs' counsel deemed it more appropriate to obtain direct permission and guidance from the Court, which they did.

Fourth, there is no requirement that a party share its pre-suit case investigation opportunities with a potential future litigant or opponent, and in fact, in 99% of the cases, it would be imprudent and likely constitute malpractice to do so.

Fifth, our Supreme Court has specifically noted that Petitions for Discovery cannot be brought against actual potential or likely defendants in a case. *See Gutbier v. Hannaford Bros. Co.,* 150 NH 540 (2004). Therefore, Cheshire Medical Center could not have been named as a party in this Petition for Discovery.

Sixth, the Court in *Gutbier* recognized specifically that "Equitable discovery arose in response to the common law maxim that one is not bound to arm one's adversary against oneself." *Id* at 543. The Court further recognized that the modem reason for allowing these Petitioners, other than they are specifically permitted by state statute, is that "a nonparty often has no interest in participating in the plaintiff's suit against another litigant, and, absent equitable discovery, a plaintiff may have had no means at law to obtain the necessary information." *Id.* at 544. The Petition for Discovery was the most appropriate and possibly the only manner in which plaintiffs could obtain pre-suit investigation from the alleged perpetrator, Richard Mello, Jr.

Therefore, not only was including Cheshire Medical Center in the subject Petition for Discovery not required (or ordered by the Court), but under the Supreme Court's interpretation of the proper use of a Petition for Discovery, it would not have been permitted.

Moreover, plaintiffs' use of equitable discovery in this case was perfectly consistent with the purposes of the statute and the procedure, and clearly, in this case, Richard Mello, Jr. (having taken the 5th at his deposition) would have had no interest in assisting the plaintiffs' in their case preparation against the hospital. In fact, he would have every reason to avoid assisting or cooperating with the plaintiffs.

The plaintiffs wish the record to be clear that neither they nor their counsel engaged in any conduct which was improper and which was not conducted with the full understanding and under the strict guidance of this Court.

Moreover, it cannot possibly be said that had a representative of the defendant been present at this deposition, that Mello would not have invoked the 5th Amendment. In fact, a week before the deposition, Attorney Kennedy, who was representing Mr. Mello pursuant to Judge Abramson's order, write to plaintiffs' counsel and simultaneously filed his Answer to the Petition for Discovery clearly indicated that his client intended to invoke the 5th Amendment at the upcoming deposition, and that he would refuse "to answer any questions with regard to the allegations contained in the equity petition." *See* letter and Answer of Richard Mello Jr. attached as Exhibit D hereto. Therefore, even if defendant had been present at the deposition, Mello still

would have pled the 5th, and defendant, regardless of what questions they asked, would have received no answers. Importantly, defendant has not asserted nor can they prove otherwise.

At his deposition, Richard Mello Jr. answered one question - his name. After that, his attorney stated the following on the record:

> "We're going to object to any other questions with regard to this matter. We understand it will be in violation of the Fifth Amendment right any question that you ask at all at this time which will lead to a possible link to any evidence with regard to the allegations you have in the petition.... I'm saying we're not going to answer any questions other than his name."

See deposition, Exhibit C, page 4-5.

The colloquy between counsel at the deposition continued for 5-6 more pages, with Mello's attorney making it clear that Mello was not going to answer any questions remotely related to the evening in question, the sexual assault, or, for that matter, anything else. Undersigned counsel then asked Mr. Mello no fewer than 42 individuals questions, with Attorney Kennedy pleading the 5th to all. In fact, when asked for his address at the time, Mello refused to answer, invoking the 5th. *See* deposition, Exhibit C, Page 10, line 18.

Given the above, the fact that the deposition of Richard Mello, Jr. was taken pursuant to a pre-suit Petition for Discovery is not a basis for prohibiting its use at trial in whatever manner is appropriate under the circumstances.

II. ***It Has Not Been Determined Whether Richard Mello Jr. is Physicially Unavailable for Trial***

It has not yet been determined whether Richard Mello, Jr. is physically available for trial. In fact, the defendant itself in its "Reply to Plaintiffs' Objection to Motion to Unseal Record in Related Case" filed November 13, 2013, in advising the court that it had sent "notice" of its Motion by certified mail to Richard Mello, Jr., admits that it sent this notice to his "last known address." It is unknown as to how defendant obtained the address of "4 Easy St., Epsom, NH" for Richard Mello Jr., whether that address is correct, or whether defendant has since obtained a return receipt for its certified mailing. The plaintiffs can state that they have since learned that this "Epsom" address is NOT the correct address for the Richard Mello, Jr. involved in this case.

Plaintiffs have independently endeavored to confirm Mello's current address without success to date.

If it is determined by this Court in advance of trial that Richard Mello Jr. qualifies as an "unavailable witness," then the entire deposition is admissible as a matter of law pursuant to NHRE 804(b)(1).

The deposition transcript was provided to defendant by plaintiffs' counsel on April 29, 2010 in response to Requests for Production of Documents propounded in this case by defendant. *See* Exhibit I to defendant's Motion. Therefore, the defendant has had possession of this transcript for over 3 1/2 years. They also knew the identity of the GAL representing Mello's interests, Attorney Kennedy. Had they wished, they could have attempted to speak to Richard Mello Jr. about the deposition, or they could have issued a subpoena for his deposition in this case. This is particularly true given the defense position that the sexual assault did not occur and/or Joshua Martin is lying about it. Therefore, they had every opportunity to examine Mr. Mello themselves, and have chosen not to do so.

Moreover, as discussed in detail *supra.* at pages 6-7 of this Memorandum, it is clear that had a representative of the defendant been present at this deposition, Mello would have invoked the 5th Amendment and refused to answer any questions at all other than his name. In fact, when asked for his address at the time, Mello refused to answer, invoking the 5th. *See* deposition, Exhibit C, Page 10, line 18.

Since it has not yet been determined whether Mello is available or unavailable for the start of this trial on December 9, 2013, ruling on this particular issue, i.e., whether the deposition can be read into evidence under NHRE 804(b)(1), at the very least, must be deferred until that time. It is only at that time that this Court will be in a position to make the factual determination whether Mello is unavailable for trial.

III. ***The Criminal Statute of Limitations for Richard Mello, Jr. has not Run, and if he were Called to Testify Live at this Trial, He Would Still Invoke the Fifth Amendment, Rendering his Technical Physical Availability Moot, and this Court should Declare Mello Unavailable Pursuant to NHRE 804(a)(1)***

The sexual assault in this case occurred on March 23 or 24, 2007. Josh Martin's date of birth is XX/XX/1992. He was 15 years old at the time of the assault. Josh Martin is alleging forcible rape - anal penetration by Mello with his penis.

The crime for which Mello was investigated by the Keene Police Department was Aggravated Felonious Sexual Assault, RSA 632-A:2. *See* cover page of Keene Police Report attached as Exhibit F. This was the potential charge on record at the time of Mello's discovery deposition in January of 2010. Other lesser included offenses could include Felonious Sexual Assault, RSA 632-A:3, or Sexual Assault, RSA 632-A:4.

"If the period prescribed in paragraph I has expired, a prosecution may nevertheless be commenced: For any offense under RSA-A.... where the victim was under 18 years of age when the alleged offense, within 22 years of the victim's 18th birthday." RSA 625:8(III)(d).

Joshua Martin will not be 40 years old until January 13, 2032. Therefore, the criminal statute of limitations will not expire against Mello for another 19 years.

If Mello were to be called as a witness in this case, plaintiffs would ask essentially all of the same questions posed during Mello's January 22, 2010 discovery deposition. There is no basis to argue or even suggest that Mello would do anything other than invoke the Fifth Amendment to each and every question posed by either party just as he did in his deposition. *See* Exhibit C generally. In fact, in his deposition, he invoked the 5th Amendment when asked something as simple as his address. Exhibit C, page 10, line 8. Further, at the outset of his deposition, his attorney made clear Mello's intention to answer nothing even remotely related to the allegations in this case. Exhibit C, pages 4-10.

More importantly, the fact is that Mello remains at jeopardy for the next 19 years.

NHRE 804(a)(1) reads as follows:

> " 'Unavailability as a witness' " includes situations in which the declarant - ...is exempted by ruling of the court on the ground of privilege from testifying, concerning the subject matter of his or her statement."

This Court has already recognized the criminal jeopardy facing Mello relative to providing testimony or information relating to plaintiffs' allegations in its order of December 3, 2009 on Plaintiffs' Petition for Discovery: "Given the potential for criminal charges that could arise from disclosure...the Court... concluded that a GAL must be appointed to represent Mr. Mello Jr. to ensure that his constitutional rights are protected in a criminal forum. Accordingly, the Court appoints Attorney Donald. Kennedy as GAL for Mr. Mello Jr., to proceed with disclosure as he deems appropriate." Exhibit B.

Attorney Kennedy, acting on behalf of Mr. Mello, sent plaintiff's counsel a letter and filed an Answer and Affidavit with this court clearly indicating that Mr. Mello would be invoking the Fifth Amendment on all questioning or matters pertaining

to plaintiffs' allegations of sexual assault. Exhibit D. At the deposition, as described herein, Mr. Mello invoked the Fifth Amendment as to every one of counsel's 42 questions except his name. Exhibit C.

Since the criminal statute of limitations has not run against Mr. Mello, requiring or compelling him to testify at this trial in December 2013 is no different from when this Court allowed his deposition to be taken in January 2010. All of the considerations are the same, and the criminal jeopardy he faces is identical. Nothing has changed. Importantly, defendant has failed to demonstrate that anything has changed. Therefore, pursuant to NHRE 804(a)(1), this Court should declare Richard Mello, Jr. "unavailable" for purposes of the hearsay exceptions identified in NHRE 804, and in particular, rule 804(b)(1) and (6).

Since Mr. Mello is "unavailable" for trial, plaintiffs should be allowed to read his January 22, 2010 deposition into evidence. The fact that defendant was not present to question Mr. Mello is moot and irrelevant, since it was clear at the time that Mello intended to invoke the Fifth Amendment to every question posed except his name. *See* Exhibits B, C and D. Even if it were to be determined that under the law he could be compelled to answer "some" questions perhaps unrelated to establishing a chain of criminal liability, *see generally Fischer v. Hooper,* 143 N.H. 585 (1999), it is beyond dispute that the privilege would attach to any and all questions surrounding the alleged assault, the admission to Cheshire Medical Center, and any matter related in any way to the material dispute present in this case.

Accordingly, plaintiffs request that this Court declare Mr. Mello "unavailable" for trial pursuant to NHRE 804(a)(1), and that plaintiffs be allowed to read his January 22, 2010 deposition into evidence pursuant to NHRE 804(b)(1) and (6).

IV. *Use of the Deposition is Appropriate for "Impeachment"*

Even if it is ultimately determined that plaintiffs are not allowed to "read" the Mello deposition into evidence, it can be used for impeachment of defense witnesses. The statement and the report are potentially highly material and probative for purposes of impeachment of defendant's witnesses, including its two experts.

The defendant's experts, Dr. Bernard Levy and Dr. John Matthews, are taking the position that the alleged rape in this case did not occur. They are claiming that the plaintiff is lying. *See* Plaintiff's pending "Motion in Limine to Preclude Defendant's Retained Experts From Offering Any Opinion or Testimony Pertaining to Plaintiff's Credibility filed November 1, 2013.

These experts will further identify portions of the record, including deposition testimony, medical records and other discovery, in an effort to support their opinions that the plaintiff is lying and/or that the rape otherwise did not and COULD NOT have occurred. *See* attached reports of defendant's experts, Exhibit E.

To the extent that Richard's Mello's failure to "deny" that he raped Joshua Martin may be used to properly impeach defendant's experts and/or their opinions, these documents can certainly be used by counsel during cross-examination for this purpose. At that point, the trial court can determine whether formal admission of the portions of those documents used for impeachment should be admitted as exhibits. NHRE 607, 703.

Further, it is anticipated that a number of defense witnesses, including nurses and physicians working at Cheshire Medical Center during the time of the subject hospitalization of the plaintiff and Mello, will similarly testify that the rape, as alleged by the plaintiff, could not have occurred. It is also anticipated that one or more may attempt to testify that they could not believe Mello would commit such an act. Again, under these circumstances, Richard Mello's refusal to deny the sexual assault under oath in his deposition can similarly be used by counsel during cross-examination for purposes of impeachment.

Therefore, even if the deposition itself is not themselves initially admissible or cannot be read into evidence, it is clearly available for use during cross-examination for purposes of impeaching any of the defense witnesses. NHRE 105 (evidence inadmissible for one purpose can be admissible for another). *See also Noel v. Lapointe,* 86 NH 162, 167 (1933) ("the latitude permissible in cross-examination extends ordinarily to any matter which tends to discredit the opposing parties' claim."). The fact that experts

or other defense witnesses failed to consider and/or discounted the deposition and Mello's decision to invoke the 5th in reaching their opinions and conclusions is certainly probative and a proper subject of impeachment.

Defense counsel is free to argue, if appropriate, that Mr. Mello had the right to take the 5th. That is not denied. However, the simple fact is that if Mello would completely deny the allegations, why wouldn't he simply deny them under oath. A denial would not incriminate him.

Alternatively, even if during impeachment this Court rules it improper to ask a witness whether he was aware and/or considered that the perpetrator invoked the 5th amendment when asked about the rape, it is certainly proper to ask whether the witness was aware that when given an opportunity in January of 2010 to deny the allegations under oath, Mello declined to do so. This is perfectly legitimate for purposes of impeachment, and would be highly prejudicial to the plaintiff if he was not allowed to use the deposition for this purpose, especially since defendant is attempting to call the plaintiff a liar.

Again, the defendant wants it cake and to eat it to. It cannot have it both ways. It cannot claim the plaintiff is lying, yet hide the fact that the perpetrator declined to deny the allegations when given the chance - *regardless of the reason.*

V. ***It is Settled Law that a Negative Inference Can be Drawn from Invoking the Fifth Amendment***

In the case of *Fischer v. Hooper,* 143 N.H. 585, 593-594 (1999), the civil defendant argued that the trial court should have granted him a blanket privilege that prevented the plaintiff from asking him any questions which would require him to invoke the Fifth Amendment. *Id.* The NH Supreme Court considered the argument and, relying upon NH Rule of Evidence 512, found that the trial court erred in requiring the civil defendant to invoke his right against self-incrimination in the presence of the jury. NHRE 512 pertains to comments upon and inferences to be drawn from a claim of privilege. NHRE 512, at the time *Fischer* was decided prohibited the jury in both civil and criminal cases from drawing negative inferences from the invocation of the right against self-incrimination. *Id.* at 594-595.

Although the *Fishcer* Court found that an adverse inference could not be drawn as a result of the civil defendant's invocation of his Fifth Amendment right against self-incrimination, the Court set forth the analysis and reasoning followed by other jurisdictions as to why an adverse inference should be allowed in a criminal case. The Court stated,
Although instructing the jury that it may draw a negative inference from the defendant's invocation of his right against self-incrimination in a criminal case violates the Fifth Amendment, *see Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Constitution does not preclude the jury from drawing a negative inference from the defendant's invocation of his Fifth Amendment right in a civil case. *See Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Some federal courts allow a party to call a witness to the stand even if the witness has made known an intention to invoke the Fifth Amendment. *See Rosebud Sioux Tribe v. A & P Steel, Inc,* 733 F.2d 509, 522 (8th Cir.), cert. denied, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984). There are a number of reasons that courts allow the jury to draw a negative inference in a civil case. First, excluding this information from the jury's consideration undermines the jury's search for the truth. *See RAD Services, Inc. v. Aetna Cas. and Sur. Co.,* 808 F.2d 271, 274-75 (3d Cir.1986). Moreover, most of the reasons for preventing the State from utilizing the invocation of the right against self-incrimination in a criminal case are far less persuasive in a civil case. *See Rosebud Sioux Tribe,* 733 F.2d at 521-22. Unlike in a criminal case in which the State bears an extraordinarily high burden to prove its case, allowing the defendant in a civil case to invoke the privilege without the jury's knowledge places the plaintiff at an unfair disadvantage. *See id.* at 521. '[T]he privilege, when fully **exploited**, puts the private civil plaintiff at a disadvantage more severe than previously appreciated. Especially when civil liability allegedly arises from criminal conduct, the privilege precludes discovery and frustrates the truth-determining capacity of the litigation process to an alarming extent.' Heidt, The Conjurer's Circle-The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1135 (1982). Allowing the plaintiff to call the defendant to the stand, even when the defendant intends to invoke the privilege, 'reduce[s] the disadvantage plaintiffs suffer when the privilege weapon is used against them.' *Id.*

Id. 594-595.

The *Fischer* Court, however, was prevented from following this line of cases because of the version of NHRE 512 in effect at the time, which stated:
(a) Comment or Inference Not Permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming Privilege Without Knowledge of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Id.

Indeed, the Court specifically referenced New Hampshire's version of the Rule at the time as the specific reason it could not apply the reasoning of the cases it had cited, supra.: "New Hampshire, however, has adopted New Hampshire Rule of Evidence 512, which prohibits the jury in both civil and criminal cases from drawing negative inferences from the invocation of the right against self-incrimination." *Id.* at 594.

Subsequently, however, effective January 1, 2003, the NH Legislature amended Rule 512. The amendment removes the restriction as regards any "non-criminal case". The Rule remains the same as above, except the amendment added subsection (d):

> (d) Application--Self-Incrimination. Subsections (a) to (c) do not apply in a non-criminal case with respect to the privilege against self-incrimination.

NHRE 512(d).

Therefore, the restriction against drawing an inference in civil cases faced by the *Fischer* court in 1999 was removed by the addition of subsection (d) to NHRE 512 in 2003. Under the reasoning and specific language of *Fischer,* therefore, the federal cases cited by that Court and quoted above are currently the proper considerations and standards to apply when determining whether the negative inference can be drawn in this case. As a result, this law cited by the *Fischer* court from various federal cases quoted extensively, *supra.,* applies in full force to the instant Motion.

Defendant argues that in order for the negative inference to be allowed in this case, it must be shown that some form of special relationship exists between Mello and Cheshire Medical Center.

First, defendant cites no New Hampshire precedent for this proposition, and in fact, relies primarily on law review articles in its Memorandum of Law, *see* p. 9-10. In fact, under New Hampshire law, and specifically NHRE 512(d), the premise that "no inference may be drawn [from invoking the 5th Amendment]" contained in NHRE 512(a) specifically does not apply in non-criminal cases: "Subsections (a) to (c) do not apply in a non-criminal case with respect to the privilege against self incrimination." NHRE 512(d).

Second, even if some relationship need be shown, it does exist in this case. Mello was a patient of the defendant. A significant privilege and privacy relationship existed between Mello and the defendant relative to his health care - sufficient enough that defendant obtained a medical authorization from Mello prior to releasing his admission records in this case. Mello and defendant have an identical interest in this case relative to refuting the allegations being made by the plaintiffs - Mello to avoid criminal

liability, defendant to avoid civil liability. Defendant was in the sole and exclusive position to "control" the content of Mello's medical records during his admission, the vast majority of which occurred after the evening of the sexual assault and after Josh Martin had been discharged. The relationship between a patient and his medical providers is so "special" under the law that all communications between the two parties are privileged as a matter of law. NHRE 503. Communications between a patient and medical provider are so inherently trustworthy that said communications are exempted from the hearsay rules. NHRE 803(4).

In fact, the importance of this privilege in the context of psychological care (which was the purpose of Mello's admission to Cheshire Medical Center in the first place) has been emphasized by our Supreme Court:
"We recently emphasized the importance of the psychotherapist patient privilege: 'By fostering productive relationships between therapists and their clients, the therapist-client privilege advances the public good accomplished when individuals are able to seek effective mental health counseling and treatment.... The mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. It is difficult if not impossible for a psychotherapist to function without being able to assure patients of confidentiality and, indeed, privileged communication.' *In the Matter of Berg & Berg,* 152 N.H. 658, 665, 886 A.2d 980 (2005) (quotations and citations omitted)."

Desclos v. NH Southern Regional Medical Center, 153 NH 607 (2006).

In addition, the special nature of this relationship, and the duties imposed by law, are clearly evidenced in the New Hampshire and Federal Patients' Bill of Rights. RSA 151:21 and 42 USC §1395,42 CFR 482.13 (both of these statutes comprise separate counts of the plaintiffs' complaint in this case).

Therefore, even if there were to be some requirement of a "special relationship" between a declarant and the party against whom a negative inference is to be drawn, it cannot be said under the law that there is a relationship more special or protected than that of physician / patient. Additionally, in this case, the interests of the defendant and Richard Mello with respect to disputing the allegations of the plaintiff are identical.

Accordingly, under current New Hampshire law, the jury should be specifically instructed in this case that it may draw an inference negative to the defendant from Richard Mello's invocation of the Fifth Amendment at his deposition.

VI. ***Defendant Should be Estopped from Seeking to Exclude Mello Deposition***

The defense in this case is taking the position, through witness testimony both of their retained experts, *see* Exhibit E, that the sexual assault alleged in this case never happened, and that the plaintiff is lying. The fact that defendant's own experts have both disclosed this opinion in their expert disclosures serves to judicially estop defendant from now attempting to exclude this highly reliable contrary evidence from this trial. *Porter v. City of Manchester,* 155 NH 149, 156 (2007).

The Mello deposition was taken properly, and was taken under oath. Mello invoked the Fifth Amendment. New Hampshire law is clear that a negative inference may be drawn in a civil case. This negative inference, and the refusal of Mello to deny the allegations, is critical evidence for the plaintiff to use in refuting the claims of defendant's witnesses, including their experts. It is not the fault of the plaintiff that Mello decided to invoke the Fifth. The plaintiff should not be penalized, nor should the defendant be allowed to benefit from this decision. The plaintiff should be allowed the leeway to use any and all evidence available to him to refute the charge by defendant that he fabricated the sexual assault giving rise to this action. To rule otherwise would not only be patently unfair, but would allow the defendant to take a certain position at trial and block the introduction of material and trustworthy evidence to the contrary.

Conclusion

For all the reasons set forth herein, defendant's Motion should be denied.

WHEREFORE, the plaintiff's respectfully request the following relief:

A. That defendant's motion be denied;

B. That plaintiffs be allowed to read into evidence the deposition of Richard Mello, Jr.;

C. That plaintiffs be allowed to use the Mello deposition for impeachment purposes; and

D. For other such relief as may be just.

Date: November 21, 2013

Respectfully Submitted,

Melissa Martin, et al

By their attorneys

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