

MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

FILED
DEC 31 2013

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY DEPUTY

JANE DOE 92,)
))
 Plaintiff,)
))
v.))
))
ARCHDIOCESE OF ST. LOUIS, etc.,)
 et al.,))
))
 Defendants.)

No. 1122-CC10165
Div. 18

ENTERED
DEC , 2013
SR

MEMORANDUM AND ORDER

The Court previously entered orders requiring discovery of prior complaints of sexual abuse leveled against employees of the defendant Archdiocese, including the identities of complainants and alleged (or proven) perpetrators. The order compelling disclosure was accompanied by a protective order. The protective order forbade disclosure of the information except for purposes of trial preparation. Although the protective order contemplated that non-parties subscribing to the terms of the order would be relieved of the obligation of confidentiality five years after termination of this litigation, the defendant and others apparently interpret this "sunset" provision as a blanket authorization for disclosure of information by the parties as well as experts or consultants, after the five year period. Of course, the termination provision was not intended to facilitate disclosure by counsel and the parties to this action, but was intended to keep the obligations of confidentiality of third persons within reasonable bounds, consistent with the First Amendment. As a general proposition, the courts are not in the business of conducting litigation--particularly litigation affected by strong public policy interests--in secret. Neither the federal nor the Missouri

constitution authorizes Star Chamber proceedings. See Mo.Const. art. I, §x; *Butterworth v. Smith*, 494 U.S. 624 (1990); see also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

The Court wonders when the trend toward secret litigation will come to an end. The Court recognizes that sexual abuse allegations are embarrassing to accuser and accused alike; but the courts are supposed to be open and public. Anonymous litigation serves to conceal from the public the identities of litigants when disclosure might very well serve the ends of justice, by exposing false or malicious prosecutions on one hand, or by encouraging others to bring perpetrators to justice on the other. The Court will not, however, undertake a resolution of this problem in this case at this time.

The Court is now confronted with a motion for leave to intervene by a clergyman of the Archdiocese, who asserts that he was the subject of a false accusation of sexual abuse and who contends that disclosure of his identity and the circumstances of the complaint would deny him constitutional and common law rights. The clergyman, like plaintiff herself, seeks to remain anonymous. A parallel motion by defendant Archdiocese again seeks to avoid discovery of the identities of persons involved in prior complaints of sexual abuse by archdiocesan clergy or school employees. The dispute over this facet of discovery threatens to overwhelm the other issues in the case.

Although the Court was persuaded that it had given careful consideration to the issues raised by plaintiff's motion to compel disclosure of prior complaints, the further motions, briefs and arguments have impelled the Court to reconsider. The motion to

intervene and the brief in support are particularly persuasive that the Court did not adequately heed the teaching of *State ex rel. Delmar Gardens North Operating, LLC v. Gaertner*, 239 S.W.3d 608 (Mo.banc 2007); see also *State v. Robinson*, 835 S.W.2d 303 (Mo.banc 1992); *State v. Sinner*, 772 S.W.2d 719 (Mo.App.E.D. 1989). The Court also did not give consideration to the policy underlying the availability of criminal arrest records when no conviction results. See §§ 610.105-.120, RSMo 2000 & Supp.

On the other hand, the dogged refusal of defendant Archdiocese to comply with the Court's orders has inflicted unnecessary trouble and expense on plaintiff, manifestly interfered with trial preparation, and borders on if not actually amounting to contempt. The Court cannot condone such behavior.

The only viable claim by plaintiff in this action against the Archdiocese is for intentional failure to supervise clergy. The elements of that action are delineated in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo.banc 1997); see also *Doe v. Roman Catholic Archdiocese of St. Louis*, 311 S.W.3d 818 (Mo.App.E.D. 2010); *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575 (Mo.App.W.D. 2001). The burden on plaintiff is to establish that the ecclesiastical supervisor knew that harm was certain or substantially certain to result from lack of oversight of a wrongdoer and disregarded the known risk. Constructive knowledge is not enough. *Id.* In the case at bar, ex-Rev. Ross was a convicted child molester who was returned to a parish where he could enjoy unsupervised contact with children. He allegedly committed monstrous criminal acts against plaintiff; but criminal charges were

dismissed by the prosecutor. Thus, the liability of defendant Archdiocese also depends upon plaintiff's ability to prove the wrongful conduct of defendant Ross in the first place.

Mo.R.Ct. 56.01(b)(1) prescribes the scope of discovery in a civil case: it embraces any matter, not privileged, that is relevant to the subject matter of the pending action, including the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible in evidence, so long as it "appears reasonably calculated to lead to the discovery of admissible evidence." There can be little doubt that the history of the defendant Archdiocese's dealings with sexual predators amongst its clergy employees, prior to the incidents alleged in the petition, meets the standard of Rule 56.01. Subsequent conduct also appears relevant to the claim for punitive damages.

Plaintiff is certainly entitled to discover instances in which the Archdiocese knowingly permitted unsupervised contact between children and clergy known by the Archdiocese to present a threat to those children, as well as instances paralleling the circumstances in this case, in which a clergyman who had been subjected to psychological or psychiatric treatment had reoffended after such treatment. The discovery requests at issue are undoubtedly relevant to the subject matter of the lawsuit and reasonably calculated to lead to the discovery of admissible evidence. See *Weaver v. African Methodist Episcopal Church, Inc.*, supra. While the identities of persons involved in prior complaints might be irrelevant in the ordinary case, the special circumstances of the claim against

defendant in this context compel the conclusion that plaintiff must be able to probe the facts of similar prior complaints to some extent, in order to be able to present a convincing case of intentional failure to supervise to the jury.

After two orders compelling discovery, defendant Archdiocese has tendered a catalog which responds only in part to the plaintiff's discovery, and wholly fails to provide the "identity and location of persons" having knowledge of the prior complaints. Defendant insists that an archbishop of the Roman Catholic Church does not have control of records of the various parishes within the diocese as an excuse for not having produced information regarding employees of parish schools.

Defendant further repeats its prior arguments regarding the privacy interests of complainants and accused persons. At oral argument on the defendant's motion to modify the prior orders of the Court, defense counsel refused to stipulate to the admissibility of the catalog (or "matrix" in the parties' locution) into evidence at trial, while at the same time insisting that plaintiff should be precluded from discovering the identities of witnesses who could provide direct evidence of the matters set out in the "matrix."

The Court will not enter into a dispute regarding canon law. The pending action and the rules of discovery are not the Constitutions of Clarendon, nor is the Archdiocese here in the role of St. Thomas á Becket. See 1 F. Pollock & F. Maitland, *The History of English Law* 124-125 (Milsom ed. 1968). As a matter of neutral common law, the status of Catholic parishes under canon law is legally irrelevant. Defendant has not demonstrated that, as a matter of Missouri law, the

Archdiocese has no right to require parishes to provide the Archbishop with the required information. Further, the position of the Archdiocese in this regard seems strikingly at odds with its position in the case underlying *State ex rel. Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 521 (Mo.App.E.D. 2010).

Nevertheless, the Court has concluded that discovery of complaints regarding lay employees is only marginally relevant and the burden of discovery of such information outweighs its utility in developing evidence at trial. This is an action for intentional failure to supervise clergy. As a matter of fact and law, the role of clergy is materially different than the role of secular employees in the Archdiocese. While evidence of knowledge of risks of harm from secular employees is not wholly irrelevant to plaintiff's case, there can be no doubt that the supervision of secular employees in parishes is a significantly different matter than the supervision of clergy. Discovery of prior incidents of injury, when permitted, usually requires some symmetry between the prior incidents and the incident at issue. E.g., *Dillman v. Missouri Highway & Transp. Com'n*, 973 S.W.2d 510 (Mo.App.E.D. 1998); *State ex rel. Kawasaki Motors Corp. v. Ryan*, 777 S.W.2d 247 (Mo.App.E.D. 1989). The symmetry between failure to supervise clergy and failure to supervise other classes of employees seems attenuated.

The defendant's invocation of the privacy interests of complainants rings hollow. The Court had already permitted defendant to withhold the identity of any complainant who had expressly requested anonymity. Plaintiff points to a case in St. Louis County

in which discovery of complainants' identities was permitted, and observes that there is no evidence that a single complainant objected to disclosure of his identity. The General Assembly has seen fit to make complaints of sexual abuse of minors subject to mandatory reporting requirements, and disclosure of complaints has been compelled by courts in other actions involving sexual molestation of minors by clergy or employees of charitable organizations. The disclosure required in this case is subject to a protective order and creates no greater risk to complainants' well-being than a "hot line" report. However, the Court is persuaded that, in accordance with Rule 56.01(c), it should take additional measures to protect complainants from annoyance and embarrassment. The Court is likewise persuaded that its "sunset" provision, added to the third party agreement required of persons to whom protected information is disclosed, should be elided from the protective order. That "sunset" provision was the Court's handiwork, not that of either party, and the Court concludes that it was improvidently added to the protective order.

As for the identity of persons accused of sexual abuse of minors, the Court finds and concludes that the protective order entered in this case adequately meets the strictures of *Delmar Gardens*. However, in light of the arguments advanced by the proposed intervenor, the Court concludes that here, too, some modification of the order compelling discovery is warranted. The Court perceives no useful purpose in subjecting plaintiff (or the Court) to an inundation of motions to intervene to contest the disclosure (however circumscribed) of information that has limited value even for purposes of

establishing a claim for punitive damages. Constitutional questions are to be avoided where possible. When constitutional questions are injected by what is essentially a collateral matter in a pending case, it seems sensible to avoid the questions if feasible, so long as the plaintiff is not materially prejudiced.

The "matrix" filed under seal by defendant identifies 234 incidents of prior complaints of sexual abuse. A number of the complaints are reported to have resulted in "settlement," "lawsuit," reports to police or the Division of Family Services, "assistance" (whatever that means), or referrals to a religious order. The Court perceives no merit whatever in defendant's argument that the identities of the complainants or alleged perpetrators in those incidents should not be disclosed to plaintiff. The Court is aware of no authority for the proposition that fear of additional lawsuits is a ground for avoiding discovery. Moreover, the refusal to disclose the identities of perpetrators whose misconduct led the Archdiocese to pay a settlement or defend a lawsuit is inexcusable. The Court also notes that the General Assembly has created an express exception to the closure of arrest records in cases of sexual offenses. §610.105. The Court infers from that exception that the policy of Missouri is to encourage civil actions against sex offenders, even if no criminal prosecution resulted. *A fortiori*, there is no sound basis to impede discovery of other perpetrators in a civil case involving child sexual abuse, so long as there is no ulterior motive--and the Court finds none here.

As for the defendant's representation that a number of complaints

identified in its "matrix" were unfounded or unsubstantiated, the Court refuses to hold a "mini-trial" on the truth or falsity of the defendant's representation. Defense counsel have filed the "matrix" and in so doing are subject to Rule 55.03. The Court will accept the representations and will not require disclosure of the identities of complainants or the accused.

The Court will deny the anonymous clergyman's motion for leave to intervene, as moot. Because the proposed intervenor asserts that accusations against him were unfounded, his identity will not be disclosed in light of the Court's modification of its prior orders. Furthermore, the Court has elected to remove the "sunset" provision of the protective order, so that issue is likewise moot.

As to sanctions, the Court concludes that defendant's answer should not be stricken in its entirety, but that deployment of lesser sanctions will meet the case. Although plaintiff may justifiably accuse the Court of "rewarding" defendant's obduracy, the Court considers that the punishment should fit the crime. In particular, the Court has grave doubts that the defendant can be disabled from presenting exculpatory evidence in defense of the claim for punitive damages, consistent with due process, and any effort to preclude a defense to that claim raises constitutional questions unnecessarily. Moreover, the failure to comply with the Court's order compelling discovery has prejudiced plaintiff in gathering evidence only on some of the issues in this case, not all. Finally, the Court acknowledges that defendant's motion to modify, coupled with the motion to intervene, did persuade the Court to modify its orders, and so the

position of the defendant cannot be found to be wholly contumacious, frivolous, or in bad faith.

The Court will attempt to redress the damage done to plaintiff's trial preparation by striking a portion of the Archdiocese's answer and limiting defendant's ability to contest certain issue at trial, insofar as the claim for compensatory damages is concerned. The Court is also ordering further disclosure because plaintiff still must carry a heavy burden to establish all elements of her claim, including the claim for punitive damages. Plaintiff will thus have the option of going forward with or without additional evidence of the Archdiocese's knowledge of and disregard of risk in connection with the assignment of clergy. If defendant remains obdurate, further sanctions will be applied. Accordingly, the Court will enter a revised order, including an award of reasonable attorney's fees. Rule 61.01.

ORDER

In light of the foregoing, it is

ORDERED that the Court's orders of May 15 and November 13, 2013, are amended as follows:

(1) The Court's modification of the protective order addendum to terminate its effect five years after disposition of this case is vacated and the addendum shall be utilized as originally proposed by the parties;

(2) Further discovery of prior complaints of sexual abuse by secular employees of the Archdiocese is denied;

(3) Defendant Archdiocese shall forthwith disclose the identities and locations (including last known addresses and telephone

numbers or e-mail addresses) of complainants identified in the "matrix" beginning ARCHJRma0001 as complainant nos. 1, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, , 25, 26, 34, 35, 37, 38, 39, 40-51, 55-58, 62-68, 74, 80, 81, 83-92, 94-96, 98-100, 105, 107-111, 114-116, 118-131, 134, 136, 137, 139-145, 146-154, 156, 158, 159, 161, 168-172, 176-183, 186, 187, 189-193, 197, 203-214, 219, 220-227, and 233 and all persons referenced as "accused individuals" except those referenced in complaints identified as "unsubstantiated";

(4) Paragraphs 49 and 50 of the answer of the defendant Archdiocese are stricken and partial judgment is entered in favor of plaintiff on the issue of defendant Archdiocese's knowledge that harm was certain or substantially certain to result from the assignment of ex-Rev. Ross to St. Cronan's parish, for purposes of defendant Archdiocese's liability for compensatory damages, and defendant Archdiocese shall not be permitted to contest that issue at trial; provided, that defendant Archdiocese will not be precluded from contending at trial that its knowledge of the likelihood of harm was insufficient to warrant punitive damages; further, the "matrix" filed with defendant's motion to modify the Court's discovery orders shall be deemed admissible in evidence on request of plaintiff without further authentication or foundation;

(5) Plaintiff shall have and recover of defendant Archdiocese the sum of \$5,000 as and for reasonable attorney's fees incurred in connection with the Court's orders compelling discovery;

(6) Plaintiff shall not contact complainants identified in response to this Order except as follows: (a) plaintiff shall

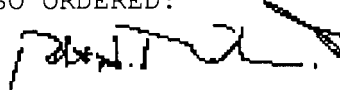
notify the Special Master hereinafter designated of the names of complainants plaintiff wishes to contact, with contact information; such notification need not be filed with the Court or served on defendants; (b) the Master will contact each identified complainant solely to ascertain if the complainant wishes to cooperate, and shall report to the Court and the parties any response; (c) complainants reported as willing to cooperate may be contacted by plaintiff's counsel in counsel's discretion; (d) complainants reported as unwilling to cooperate may be subpoenaed by leave of Court;

(7) Hon. James J. Wilson, Esq., is designated as Special Master for purposes of monitoring complainant discovery as provided herein, at an hourly rate of \$275; the fees and expenses of the master will be paid by defendant Archdiocese as a consequence of defendant's conduct herein; the master may contact complainants by any reasonable means and may report responses to the Court as soon as convenient and practicable; the defendant Archdiocese shall forthwith deposit \$1,000 into the Court's registry to defray the fees and expenses of the master;

(8) Counsel for both parties will certify to the Court not later than 5 p.m. on January 3, 2014, defendant Archdiocese's compliance with the disclosure ordered herein; if compliance is not certified, the Court reserves the right to enter further sanctions; all disclosures herein, including disclosures by and to the master, are subject to existing protective orders, and the master will observe the terms of the protective orders except as otherwise ordered by the Court; and it is

FURTHER ORDERED that the motion of Rev. John Doe for leave to intervene be and the same is hereby denied.

SO ORDERED:



Robert H. Dierker
Circuit Judge

Dated: December 31, 2013
cc: Counsel/Special Master
James J. Wilson - Bar Number: 18356
Berg, Borgmann & Wilson, LLC
7711 Bonhomme Ave., Ste. 850
Clayton, MO 63105
Phone: 314-725-5955 Fax: 314-725-0559