

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

FILED - CIRCUIT COURT
JACKSON CO. MO-KC
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JOHN DOE B.P.)	
)	
Plaintiff,)	
)	Case no.: 1016-CV-29995
vs.)	
)	Division 7
FATHER MICHAEL TIERNEY, et al.)	
)	
Defendants.)	

**MOTION FOR
RECONSIDERATION OF ORDER**

COME NOW the Survivors Network of those Abused by Priests (“SNAP”) and David Clohessy, by and through their counsel of record, and hereby move this Court to reconsider its order dated April 23, 2012 (attached hereto). In support of this Motion, SNAP states as follows:

On April 23, 2012, this Court entered an order regarding the Defendant Fr. Michael Tierney’s Motion to Compel pertaining to the deposition of David Clohessy. This Motion by Fr. Tierney was briefed by all the parties involved, and oral argument was held before the Court on April 20, 2012. SNAP requests reconsideration of the following issues from the Court’s order:

1. Identity of Named Plaintiffs:

Regarding the Motion to Compel answers to deposition questions and Produce documents directed at Mr. Clohessy, the Court ordered SNAP to locate and produce any documents referencing any of the plaintiffs in the numerous cases involving defendant Tierney to be located and produced (without redaction of these plaintiff’s names). (See Order, pg. 2, ¶ d.; pg. 3 ¶ f.). However, as stated at the hearing, SNAP does not know the actual identity of any of these persons other than John Doe B.P. and David Tate. As Mr. Clohessy testified on January 2, 2012 (and confirmed by SNAP’s president in a declaration provided to the Court), SNAP has never had any communication with the person identified as John Doe B.P.¹ Therefore, no documents regarding this person exist. As to the other plaintiffs, unless the Court orders the

¹ There are also no documents reflecting any communication with Tate.

parties in those other actions to provide the actual names of those persons, SNAP will not be able to conduct any such search.

2. Documents Reflecting any other Incidents of sexual and other misconduct of Priests involving the Dioceses of K.C.-St. Joseph:

Under the Court's order, SNAP is supposed to locate and produce (with identifying information redacted) any and all documents maintained throughout the history of the organization that in anyway address any sexual or other "misconduct" of priests in the Kansas City-St. Joseph diocese. Of course, this includes people who have not brought claims in any fashion against anyone and would apparently include persons who contacted SNAP anonymously.

As the Court is aware, SNAP argued at the April 20, 2012 hearing that any such documents would have no relevant application to claims asserted by John Doe B.P. (or any other plaintiff) against Tierney or the diocese. Whether person "X" was molested by Tierney or any other priest is not relevant as to whether John Doe B.P.'s claim is valid or whether his claims are time barred. When this was addressed at oral argument by SNAP, the Court commented that such communication with SNAP could be evidence of the diocese being on notice of such issues. However, as stated at oral argument, the diocese could not be on notice of something communicated by person "X" to SNAP in a confidential matter. In response, the Court stated that maybe SNAP communicated what this person shared with the diocese. If that indeed ever occurred, it may be evidence of the diocese being put on notice. However, this approach fails for several reasons: 1) SNAP has never shared confidential communications with the diocese; 2) even if they did, then information of that notice is with the diocese and can be obtained from them; and 3) any evidence of the diocese being put on notice is only of benefit to the plaintiff in this case, and therefore, has no relevant application to discovery being sought by the Defendant Tierney in his subpoena.

Further, it should be noted that the Defendant Tierney has the burden of establishing that the information sought is subject to discovery under the “reasonably calculated to lead to the discovery of admissible evidence” standard set forth in Rule 56.01(b). *State ex. rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669, 672 (Mo. Ct. App. 2010). Thus, the connection between the information sought and the issues presented in the pleadings cannot be “remote and tenuous” and still meet the reasonably calculated standard under Rule 56.01(b). *State ex. rel. MacDonald v. Franklin*, 149 S.W.595, 598-98 (Mo. Ct. App. 2004). Additionally, there must be something in the record that demonstrates that the information sought falls within the “reasonably calculated” standard in Rule 56.01(b) in order for the information to be discoverable. *State ex. rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. banc 2007). SNAP respectfully suggests that the record here demonstrates no connection between the information sought and the issues presented in the pleadings.

Therefore, SNAP respectfully requests that this Court modify the definition it set forth in paragraphs (g)(category 1) and (category 5) in its April 23, 2012 order. SNAP believes that these paragraphs should only include production of documents that refer to such incidents where SNAP, in turn, reported such incidents to the diocese or any person outside of SNAP. Without this limitation, the existing definition would only include documents that reference incidents that were confidentially shared only between the victim and SNAP. Such documents could have no application to notice or any other relevant aspect of John Doe B.P.’s claims.

At oral argument, counsel for Tierney also argued that such documents might reflect communications with somebody who was molested by Tierney, and that person’s communication with SNAP may provide information as to when that person truly appreciated what happened to them. In turn, Tierney argued that such a communication could be used by to address B.P.’s claim of repressed memory. SNAP can only assume Tierney would attempt to use such information to argue that B.P. should have appreciated and understood what happened to him because person “X” certainly did and shared that information with SNAP. However, even

this truncated approach still generates completely irrelevant evidence. The experiences of person "X" cannot be used by the plaintiff or the defendant when addressing the legal question of repressed memory.

Counsel for Tierney at oral argument also suggested that the Defendants are entitled to discover the identity of other victims because such victims may testify that they understand that the abuse was wrongful at the time it occurred. Tierney's counsel posits that such testimony is relevant to the question of whether B.P.'s injuries were capable of ascertainment at the time of the abuse so as to begin the running of the statute of limitations under §516.120. The "capable of ascertainment" standard contained in §516.120 is **objective** in that the cause of action accrues when a reasonable person would have been put on notice that an injury and substantial damages may have occurred. *State ex. rel. Marianist Province v. Ross*, 258 S.W.3d 809, 811 (Mo. banc 2008).

A lay witness may not offer opinion testimony as to the ultimate fact in issue. *Burrows v. Union Pacific R.R.*, 218 S.W.3d 527, 537 (Mo. Ct. App. 2007). Rather, such testimony invades the province of the jury decide such issues. *State v. Dixon*, 70 S.W.3d 540, 548-49 (Mo. Ct. App. 2001). Thus, a party may not proffer the opinion testimony of a lay witness as to whether a party's belief or behavior was objectively reasonable. *Guzman v. Hanson*, 988 S.W.2d 550, 555 (Mo. Ct. App. 1999). Further, whether another victim **subjectively** knew that he or she had suffered an injury and substantial damage when the abuse occurred is simply irrelevant to the ultimate question on the statute of limitations: whether an *objectively* reasonable person would have been put on notice of both injury and substantial damage so that the cause of action accrued under §516.120.

Accordingly, because the Defendants could not proffer the testimony of other victims concerning those victims' subjective knowledge of whether they believed they suffered substantial damage at the time they were abused, the stories of such victims are not reasonably calculated to

lead to the discovery of admissible evidence concerning the statute of limitations issue. Such information, therefore, is beyond the scope of discovery contained in Rule 56.01(b).

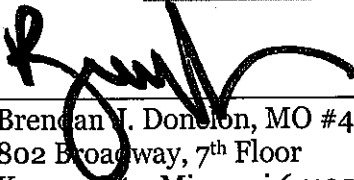
WHEREFORE, SNAP and Clohessy respectfully request that this Court issue an order requiring the parties in the other Tierney litigation to provide the actual identity of the plaintiffs so documents can be reviewed for production by SNAP, and an order clarifying paragraphs (g)(category 1) and (category 5) in its April 23, 2012 order whereby only documents involving communications that were in turns shared by SNAP with the diocese or third person outside of SNAP being produced.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing was sent via U.S. Mail, first class postage prepaid, on May 3, 2012 to:

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

JOHN DOE BP,

Plaintiff

v.

FATHER MICHAEL TIERNEY, et al.

Defendants

CASE NOS 1016-CV-29995
1116-CV-20233
1116-CV-30296
1116-CV-31555
1116-CV-17932

DIVISION 7

ORDER

On this 20th day of April, 2012, the Court took up for consideration motions filed by the parties including Defendants' Motion to Compel Answers to Deposition Questions and to Produce Documents and Motion for a Protective Order for the Documents in the David Clohessy Deposition. The parties appeared by counsel. Based on a review of the pleadings, argument of counsel, and applicable legal authorities, the Court enters the following findings and orders:

Findings

- a) Defendants affirm to the Court that they are not seeking the names or other identifying information of individuals who may have been in contact with SNAP except as it relates to plaintiffs in the ongoing litigation against the K.C.-St. Joseph Diocese.
- b) Defendants are not now seeking the names of the members of SNAP.
- c) There is no attorney-client privilege applicable to the communications between SNAP and attorneys for Plaintiffs or Defendants.

d) It is premature to determine whether SNAP is subject to the provisions of the Missouri Rape Crisis Center legislation, R.S. Mo. 455.003, therefore the Court will apply the provisions of the legislation in crafting its Order.

e) The constitutional protections concerning Freedom of the Press are designed to protect the press. It is a limited protection. A significant factor to consider is whether alternative sources of information are available from which to discover the privileged information. See *State ex rel Classic III Inc. vs. Ely*, 954 S.W.2d 650, 656 (Mo. Ct. App. 1997); *U.S. v. Culbertson*, 630 F. 2d 139, 148 (3d. Cir. 1980), cert denied, 449 U.S. 1126 (1981). The protection does not extend to SNAP an agency that would be defined as one of the "alternative sources" from which information could be obtained.

f) By prior court order, Brendan Donelon is to act as the repository of SNAP documents.

Orders

1) **Motion to Compel Answers to Deposition Questions and to Produce Documents:**

The deposition of David Clohessy taken in January, 2012, was unsealed by prior order of the Court. To the extent specific questions or areas of questioning seek information which either party believes should be considered confidential, the deposition may be identified as Confidential, subject to further motions and orders of the Court.

a) Plaintiffs are ordered to prepare and produce a detailed privilege log which clearly defines the nature of the document to which each objection is made, and the basis of any claimed privilege or protection, including, but not limited to attorney-client privilege, work product protection or "freedom of the press" protections.

b) Documents produced by SNAP as to which Plaintiffs or SNAP claim confidentiality shall be produced subject to a Protective Agreement entered into by the parties as approved by the Court.

c) The names and personally identifiable information about individuals whose names appear in SNAP records are to be deleted.

d) Notwithstanding the above, documents identifying any of the plaintiffs in the Tierney litigation shall be produced without deletions.

e) If and to the extent the Defendants in litigation other than the Tierney cases are authorized by Court order to have access to these records, the orders of those Courts shall define the conditions under which those records are received.

f) In light of the statements that SNAP has not searched for records of at least some individual Plaintiffs, SNAP is ordered to make such a search before responding to discovery requests stating that there are no such records.

g) Defendants have identified eight categories of information as to which they seek discovery from David Clohessy. The Court orders that the following categories of information are subject to discovery from Mr. Clohessy:

Category 1—documents that refer to the Diocese of K.C.-St. Joseph re sexual and other misconduct of priests and other claims.

Category 2—press releases or drafts of press releases that mention Tierney or the Diocese of K.C.-St. Joseph.

Category 3—correspondence to and from the press that mention or refer to Tierney or the Diocese of K.C.-St. Joseph re sexual misconduct and other misconduct of priests..

Category 4—correspondence to or from Randles that mention or refer to Tierney or the Diocese of K.C.-St. Joseph. To the extent counsel claims work product protection, Plaintiffs shall provide a detailed privileged log as specified elsewhere in this order.

Category 5—emails to and from members of the public and plaintiffs that mention or refer to Tierney or the Diocese of K.C.-St. Joseph re sexual misconduct and other claims.

Category 6—documents or correspondence that mention or refer to any priest currently or formerly associated with the Diocese of K.C.-St. Joseph re sexual conduct and related claims.

Category 7—correspondence to or from John Doe B.P.

Category 8—correspondence to or from members of the public that discusses or relates to repressed memory in conjunction with cases involving the Diocese of K.C.-St. Joseph.

2) Motion for a Protective Order For Documents in the David Clohessy Deposition is granted.

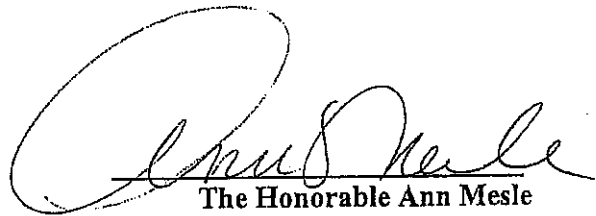
Proposed protective order submitted by Defendants is approved, subject to the modifications and provisions set forth herein, specifically that names and personally identifiable information about all individuals, other than the Plaintiffs in the Tierney litigation, whose

names appear in SNAP records are to be deleted. Further, to the extent the courts in non-Tierney litigation involving the Diocese and priests who served in the Diocese are subject to relations as determined by those courts.

Parties in litigation not involving Tierney who were cross-noticed for the SNAP deposition are to file applicable pleadings with the courts in which their cases are pending.


IT IS SO ORDERED.

4-23-2012
Date


The Honorable Ann Mesle
Circuit Court Judge

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this 23rd of April, 2012 to:

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