STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JANE DOE 2 and JANE DOE 3,

Plaintiffs,

v.

ARCHDIOCESE OF MILWAUKEE, Case No. 2007-CV-10888

Defendant,

and

COMMERCIAL UNION INSURANCE COMPANY n/k/a ONEBEACON INSURANCE COMPANY,

Intervening Defendant,

and

DIOCESE OF SIOUX FALLS,

Defendant.

BISHOP RICHARD J. SKLBA'S BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Bishop Richard J. Sklba has legitimate, protectable, personal interests in not having his deposition taken while appeals and mediation are pending. A protective order that his deposition not be had at this time is necessary to prevent oppression, undue burden, expense and prejudice to the Bishop. His deposition should not go forward while appeals of other Archdiocese of Milwaukee cases are pending, and until such time as he can be deposed ***once and for all, in each filed*** case. Wisconsin Statutes preclude depositions while appeals are pending, and an order permitting

depositions of witnesses who are 75 years of age or older has only been entered in Case No. 07-CV-10888.

If Bishop Sklba's deposition is permitted at this time, the Court should further order that his deposition transcript, exhibits and video be sealed, and that the scope of the deposition be limited. Such an order is necessary because Bishop Sklba has recently retired and should not be put to the undue personal burden, expense and prejudice of multiple deposition appearances.

Personal prejudice and reputational harm to Bishop Sklba may result from public dissemination of deposition transcript, exhibits and video. By its very nature the cross examination in a deposition is a one-sided process that does not permit a full airing of the evidence that ultimately will be revealed at trial. Plaintiffs' counsel has already publicly posted Archbishop Rembert Weakland's deposition transcript and exhibits on their law firm's website, as well as posting the deposition video on YouTube.

In doing so, Plaintiffs have demonstrated an unwillingness to adhere to express, written agreements between counsel that the Arcbishop's testimony would be kept by counsel and not be made publicly available unless and until it is used in the litigation, thus demonstrating deceit and dishonesty contrary to the requirements of *Wisconsin Rules of Professional Conduct*, S.C.R. 20:8:4(c). Further, Plaintiffs' actions in publicly posting the Archbishop's testimony and video may constitute an extrajudicial statement, publicly disseminated, which will have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter, contrary to *Wisconsin Rules of Professional Conduct*, SCR 20:3.6(a), (c). Their actions further demonstrate their inability to follow Wisconsin law which requires that deposition transcripts are to be kept private and not

disseminated publically because they are the private property of litigants prior to the time they are filed with the court and become public record.

If Bishop Sklba's deposition is taken, he should not be exposed to unnecessary publicity, personal reputational harm and prejudice by slanted pre and post-trial public dissemination of the deposition transcript, exhibits and video. Good cause exists under applicable statutes and Wisconsin authority for a protective order that the deposition transcript, exhibits and video be sealed, and dissemination prohibited as requested; good cause is found in the right to privacy of confidential employment records, reputational harm due to seriousness of the fraud claims alleged in the complaint, and prejudice to the Bishop, as shown below. The scope of discovery should be limited to inquiries concerning this case and the individuals subject to the allegations.

FACTS

This matter was commenced on 9/10/07 and was appealed on 11/24/09. Plaintiffs have made no prior request for Bishop Sklba's deposition, (Affidavit of Patrick W. Brennan) but now seek to depose Bishop Sklba in cases which have no trial court activity (or record), are currently pending in the court of appeals, and which are also subject to on-going mediation. (Brennan Aff., **Exhibit A**) Plaintiffs have not filed or served the prospective deponent with any motion for leave to take his deposition. (Brennan Aff.).

The Court has ordered that the Plaintiffs may conduct depositions in the above captioned case only for deponents who have reached the age of 75. This deposition will involve the testimony of Bishop Sklba regarding allegations of sexual assault and fraud which remain unproven in either criminal or civil court. (Brennan Aff.)

Archbishop Rembert Weakland was deposed on June 5, 2008 in the above captioned cases by Plaintiffs. Following the deposition, on November 19, 2008, Plaintiff's counsel Jeff Anderson & Associates, PA, (Anderson) posted Archbishop Weakland's deposition transcript and exhibits on their law firm's website, (Brennan Aff. **Exhibit D**) with a direct link from Plaintiff's counsel's website to "BishopAccountability.org" for a "Searchable and Enhanced Archbishop Weakland Deposition." (Brennan Aff. **Exhibits D, F**) The video of Archbishop Weakland's deposition was also posted by Plaintiffs' law firm on YouTube, by "andersonadvocates" on November 20, 2008. (Brennan Aff., **Exhibit E**)

This was done by plaintiffs' attorneys in direct contravention of an agreement confirmed in writing between counsel, that Archbishop Weakland's deposition testimony would be kept confidential until it is used in the litigation, as shown in Attorney Thomas Schriner's letter dated April 24, 2008 to Plaintiff's Attorney Michael Finnegan:

> " . . .this is to confirm that my client, the Most Rev. Rembert G. Weakland, the retired Archbishop of Milwaukee, will make himself available for deposition on Thursday, June 5, 2008, ... ***We have agreed*** that ***all copies of the transcript of the deposition and of any other form of recording of the testimony will be kept by counsel and will not be made publicly available*** unless and until it is used in the litigation."

(Brennan Aff., **Exhibit G**) (Emphasis added.)

An organization called "BishopAccountability.org" asserts that it copied the transcript and exhibits of Archbishop Weakland's deposition from Anderson's website and posted them on the internet, along with links to excerpts to the video deposition of Archbishop Weakland, which it asserts it obtained from "excerpts of the deposition . . . posted on YouTube by Jeff Anderson & Associates". (Brennan Aff. **Exhibit F**)

Bishop Sklba has been present in the Milwaukee area for almost 50 years. (Brennan Aff., **Exhibit B**) He just turned 75 and is in good health. (Brennan Aff., **Exhibit B**) He continues to serve as a retired bishop throughout the end of 2010, and after that he will continue to assist the Archdiocese in 2011 by providing weekend help in parishes and presiding at confirmations. (Brennan Aff., **Exhibit B**) Also, Bishop Sklba continues to serve as Vicar General and Auxiliary Bishop for the Archdiocese of Milwaukee. (Brennan Aff., **Exhibit C)**

ARGUMENT

I. Wis. Stat. Sec. 804.02(2) Prohibits Depositions During Appeal.

No motion has been brought under Wis. Stat. § 804.02(2) as required, and there is no need at this time for the Court to order perpetuation of the Bishop Sklba's testimony "***to avoid a failure or delay of justice***". The Court should find that Bishop Sklba's deposition is not necessary under the November 23, 2009 order, and should exercise its discretion to decline to make any further order for the deposition even if the proper motion were made.

The procedure set forth in the statute is mandatory, as indicated by the words "shall" with regard to the required showing to be made by the party requesting leave. Wis. Stat. Sec. 804.02(2)(b). See, *Messner v. WHEDA*, 204 Wis.2d 492, 501, 555 N.W.2d 156 (Ct. App. 1996), citing *WHEDA v. Bay Shore Apartments*, 200 Wis.2d 129, 141, 546 N.W.2d 480, 485 (Ct. App. 1996) ("[t]he word "shall" is presumed mandatory when it appears in a statute.")

Upon receiving a proper motion the court "may" order that the requested deposition be taken if it finds that "perpetuation of the testimony is proper to avoid a failure or delay of justice." Wis. Stat. Sec. 804.02(2)(c). Wisconsin courts construe the

word "may" in a statute as allowing for the exercise of discretion. *Linda v. Collis*, 2006 WI App 105, 294 Wis.2d 637, 671, 718 N.W.2d 205, citing *Rotfeld v. DNR*, 147 Wis.2d 720, 726, 434 N.W.2d 617 (Ct. App. 1988). A circuit court's ***discretionary determination*** will be affirmed if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. *Id.*, citing *Sellers v. Sellers*, 201 Wis.2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996).

Plaintiff has neither filed the required motion nor made the required mandatory showing under Wis. Stat. Sec. 804.02(2) that the deposition is ***proper to avoid a failure or delay of justice*** with respect to Bishop Sklba personally. A deposition of Bishop Sklba would not produce any information that would be available to or relevant for the appeals, as the briefs have been filed.

II. A Protective Order Prohibiting Depositions During Appeal Should Be Granted.

Wis. Stat. Sec. 808.08(2)(a)3 permits the circuit court to "make any order appropriate to preserve the existing state of affairs" while a case is pending on appeal. Accordingly, the Archdiocese's requested protective order should be granted at this time, pursuant to Wis. Stat. § 804.01(3)(a)1 that the deposition of Bishop Sklba "***not be had***," as a matter of law.

A trial court has the authority under Wis. Stat. § 804.01(3) to issue a protective order. Wis. Stat. Sec. 804.01(3) Protective orders, provides in pertinent part:

> (a) Upon motion by a party or ***by the person from whom discovery is sought***, and for good cause shown, the court may make any order which justice requires ***to protect a*** party or ***person*** from ***annoyance, embarrassment, oppression***, or ***undue burden or expense, including but not limited to*** one or more of the following:
>
> 1. ***That the discovery not be had***;

2. ***That the discovery may be had only on specified terms and conditions***, including a designation of the time or place;

. . .

4. ***That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;***

5. ***That discovery be conducted with no one present except persons designated by the court;***

6. ***t a deposition after being sealed be opened only by order of the court***

. . .

Wis. Stat. § 804.01(3) (Emphasis added.)

> ". . . a trial court may increase its supervision of the discovery process to ensure that sensitive or confidential information is protected through the creation of an appropriately tailored protective order."

Sands v. Whitnall Sch. Dist., 2008 WI 89, 312 Wis.2d 1, 44, 728 N.W.2d 15, 754 N.W.2d 439. (Emphasis added.)

Circuit courts have broad discretion in determining whether to limit discovery through a protective order. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 594 N.W.2d 370 (1999) citing *State v. Beloit Concrete Stone Co.*, 103 Wis.2d 506, 511, 309 N.W.2d 28 (Ct.App. 1981). A circuit court properly exercises its discretion if it examines the relevant facts, applies the proper standard of law and, using a rational process, reaches a conclusion that a reasonable judge could reach. *See Beloit Concrete*, 103 Wis.2d at 511. (citing *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971)). See also *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982).

A. A Protective Order Is Necessary to Prevent Undue Burden and Expense to Bishop Sklba From Repetitive Depositions.

It is an unnecessary waste of time and expense to force Bishop Sklba to give a deposition at this point, given the limited scope of the issue to be resolved in this case.

Bishop Sklba is willing to give his deposition at a later date, should this case even go forward after a ruling by the Court of Appeals and the conclusion of mediation.

In *State v. Beloit Concrete Stone Co.*, 103 Wis.2d 506, 511, 309 N.W.2d 28 (Ct.App. 1981), the court concluded that a highly placed state official who sought a protective order should not be compelled to testify at a deposition in his official capacity unless a clear showing was made that the deposition is necessary to prevent prejudice or injustice. *Beloit Concrete*, 103 Wis.2d at 512-13. The same reasoning holds true in this matter.

B. A Protective Order Is Necessary to Prevent Oppression and Prejudice to Bishop Sklba.

Should the Court permit his deposition now or in the future, Bishop Sklba requests that the Court order the protections sought in this Motion in order to prevent oppression, prejudice and reputational harm to him personally. There is a sound basis for the rules on how depositions are to be used. These do not include sensational publication via website or selective revelations or distorted images to media outlets.

1. Scope of Discovery Should Be Limited to This Case.

Should the Court order that his deposition go forward at this time, the court should limit the scope of the discovery pursuant to Wis. Stat. Sec. 804.01(3)(a)4, that only testimony pertaining to this case be given. No other court has issued an order similar to the one of November 23, 2009, and other cases may not even go forward after the conclusion of the appeal or upon successful completion of mediation.

2. Deposition Videos and Transcripts Should Be Sealed and Not Be Publicly Disseminated Pre or Post-Trial.

Plaintiffs have already deposed Archbishop Rembert Weakland in this case. Anderson posted Rembert Weakland's June 5, 2008 deposition and exhibits in the

above captioned case on their law firm's website, with a direct link from Plaintiff's counsel's website to "BishopAccountability.org" for a "Searchable and Enhanced Archbishop Weakland Deposition." (Brennan Aff. **Exhibits D, F**) Further, the video of Archbishop Weakland's deposition was posted by "andersonadvocates" on YouTube according to that website. (Brennan Aff., **Exhibit E**) Without a protective order, Plaintiffs will likely publicly post Bishop Sklba's deposition as well.

This was done in contravention of the express agreement between counsel shown in Attorney Thomas Schriner's letter dated April 24, 2008 to Plaintiff's Attorney Michael Finnegan, that the deposition transcript and recording of the testimony would be kept by counsel and not be made publicly available unless and until it is used in the litigation. (Brennan Aff., **Exhibit G**)

The actions of Plaintiffs' counsel constitute deceit and dishonesty contrary to the requirements of *Wisconsin Rules of Professional Conduct*, S.C.R. 20:8:4(c). Further, Plaintiffs' actions in publicly posting the Archbishop's testimony and video may constitute an extrajudicial statement, publicly disseminated, could have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter, contrary to *Wisconsin Rules of Professional Conduct*, SCR 20:3.6(a), (c). Example of statements which a lawyer ***may*** make under SCR 20:3.6(c)(2) include information which is in the "public record"; deposition transcripts, exhibits and videos are not in the "public record" prior to the time they are filed with the court, according to Wisconsin authority governing pre-trial discovery, as shown below.

The Wisconsin Supreme Court has unequivocally held that deposition transcripts which " . . . remain in the possession of the parties and have not yet been filed or used in court remain the ***private, personal property of the litigants to which neither***

the media nor the public have a common law right to access." *Mitsubishi Heavy Industries America, Inc. v. Circuit Court of Milwaukee County*, 233 Wis. 2d 1, 11-12, 605 N.W.2d 868 (2000) (Emphasis added.) Further, "unfiled, pretrial discovery materials generated in a civil action between private parties ***are not public records***, and . . . ***neither the public*** nor . . .[the media] has ***either a common law or First Amendment right of access to such materials***." *Mitsubishi*, 233 Wis. 2d at 19-20. (Emphasis added.)

In *Mitsubishi*, a case in which counsel had followed Wisconsin law and properly kept discovery depositions from the public prior to trial, the circuit court entered an order permitting the Milwaukee Journal Sentinel to intervene and directing parties in possession of any deposition transcripts, videotapes or related exhibits to provide copies of them to the newspaper upon request. *Mitsubishi*, 233 Wis. 2d at 4, 5. A defendant filed a petition for a supervisory writ challenging the circuit court's order, which the Court of Appeals denied. The same defendant then petitioned the Wisconsin Supreme Court for review and also for a supervisory writ; the Supreme Court granted the writ, holding that the circuit court ***erred*** in permitting the newspaper to intervene and have access to unfiled, pretrial discovery materials the parties and their attorneys had in their possession. *Id.* ***The Supreme Court held that the deposition transcripts, videos and related exhibits were not to be provided to the new media or made public prior to trial see ¶s 18 and 19.***

Mitsubishi, 233 Wis. 2d at 11-15, fn5. The Wisconsin Supreme Court reiterated:

> We **878 hold that unfiled, pretrial discovery materials generated in a civil action between *20 private parties are not public records and that neither the public nor MJS has either a common law or First Amendment right of access to such materials.[FN6]

Mitsubishi, 233 Wis. 2d at 19-20.

This broad prohibition applies to ***all*** discovery materials including videotapes of depositions. There is no need for a "document-by-document" determination of the need for a protective order. *Mitsubishi*, 233 Wis. 2d at fn 5; *Id.*, at 19, *citing Gannett Co. v. DePasquale*, 443 U.S.368, 396, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

Here, without an appropriately tailored protective order, the Court will lack control over information disseminated to the public. The transcripts should be sealed and stay that way until trial. Public dissemination of testimony and exhibits (some of which may ultimately be ruled inadmissible at trial) before trial could prejudice the Bishop and harm his reputation when his words are taken out of context and manipulated.

3. Sensitive and Confidential Material Requires a Protective Order.

The prohibitions of the protective order should apply even after discovery depositions are filed with the court because the deposition of Bishop Sklba may likely include testimony and documentation about the personnel and employment records of Archdiocese employees, which by nature are sensitive and confidential. Employment records are not available to the general public and may not be obtained without a signed, notarized authorization of the employee. See, *Wisconsin Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis.2d 768, 787, 546 N.W.2d 143 (1996) (expectation of privacy regarding employment records)

III. Good Cause Exists For Protective Order.

"Good cause shown" under Wis. Stat. Sec. 804.01(3), includes "potential harm to . . . ***privacy or reputational interests of*** parties or ***nonlitigants*** and the possible

prejudice to the parties' fair trial rights." *Mitsubishi*, 233 Wis. 2d at 22. (concurring opinion.) (Emphasis added.)

> Wis. Stat. § 804.01(3) provides in part:
> ***the scope of discoverable information is broad, including material that cannot be introduced into evidence at trial***; and ***pretrial discovery is designed for the party receiving it, not for strangers*** to the case.

Mitsubishi, 233 Wis. 2d at 22. (concurring opinion.) (Emphasis added.)

Deposition testimony will, in the normal course of litigation, be subject to motions in limine so that ***the Court will ultimately decide and control*** what information will, and will not, be put before the jury in a public courtroom, for reasons including relevance and prejudice to the deponent. *Mitsubishi*, 233 Wis. 2d at 22. (concurring opinion.)

In Wisconsin, personal credibility of a sexual assault victim is a central issue in litigation involving sexual assaults, and the Plaintiffs' allegations have put their credibility at issue.[1] The fraud claims alleged are serious public accusations of improper conduct which could be prejudicial and damaging to the reputations of innocent nonlitgant witnesses such as Bishop Sklba. His name has already been published in the Milwaukee Journal Sentinel without benefit of the ruling of the circuit court as to the relevance and admissibility of that evidence at trial.

"In order for our adversary system to effectively ensure the ability of litigants to uncover the truth, and to seek and be accorded justice, it is our responsibility to render decisions that do no harm to the fundamental and important right of litigants to access

[1] *See, State v. Lelinski*, 2009 WI App 110, 320 Wis.2d 704, 771 N.W.2d 928 ("Lelinski's trial counsel made direct attacks on Amanda's credibility, questioning her about inconsistencies in her story and about statements she made to neighbors, which suggested that she was lying about the sexual assault to make money in a civil lawsuit against Lelinski. The impeachment and attack on her credibility was strong."); *State v. Austin*, 2009 WI App 141, 478, 774 N.W.2d 478 ("Inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve.").

our courts." *Sands v. Whitnall Sch. Dist.*, 312 Wis.2d at 15, 16. A protective order sealing the transcript and preventing public dissemination at all times, in addition to the pre-filing protections noted by the Wisconsin Supreme Court in *Mitsubishi,* is needed here, and is proper to prevent oppression, undue burden and expense, and prejudice to Bishop Sklba under Wis. Stat. Sec. 804.01(3).

CONCLUSION

For all of the reasons stated above, the Archdiocese respectfully requests that the Court grant its motion for a protective order.

Dated this 23rd day of November, 2010.

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PROOF OF SERVICE

The undersigned certifies that the foregoing documents was served upon all counsel of record in the above matter by depositing a copy thereof in the U.S. Mail with postage prepaid on

Mark
11-23-10