STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Personal Injury

John Doe 76C,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis
and Diocese of Winona,

Defendants,

David Pususta,

Third-Party Intervenor.

Court File No.: 62-C9-06-003962
Judge Gregg E. Johnson

DAVID PUSUSTA'S MEMORANDUM IN SUPPORT OF NOTICE OF INTERVENTION TO UNSEAL THE LIST OF PRIESTS CREDIBLY ACCUSED OF CHILD SEX ABUSE

INTRODUCTION

David Pususta, ("Mr. Pususta") a survivor of sexual abuse as a child by a priest of the Defendant Archdiocese of St. Paul and Minneapolis should be permitted to intervene in this matter for the limited purpose of seeking to unseal the Archdiocese's list of priests credibly accused of child sex abuse. Mr. Pususta is entitled to intervention for four reasons. First, Mr. Pususta's motion is timely; second, as a survivor of abuse by a priest of the Defendant Archdiocese, Mr. Pususta has an interest related to the subject matter of this action; third, Mr. Pususta's ability to seek disclosure of the list of predator priests is impaired by the protective order sealing the list in this action; and fourth, Mr. Pususta's interests were not adequately represented by the existing parties.

Additionally, Mr. Pususta seeks by his intervention to unseal the list of credibly accused priests in the Defendant Archdiocese of St. Paul and Minneapolis sealed by this Court's protective order of April 17, 2009. The court records containing the names of priests credibly accused of child sexual abuse in the Archdiocese of St. Paul and Minneapolis should be unsealed for at least two reasons. First, children could be at risk because some of the accused sex offenders are unknown. Second, there is a strong presumption of public access to court records. Accordingly, Mr. Pususta respectfully requests that this honorable Court permit him to intervene and unseal the list of priests accused of sexually molesting children.

FACTUAL BACKGROUND

In 2004 the Archdiocese publicly admitted that it had a list of 33 priests that had been credibly accused of sexually molesting minors. The Archdiocese publicly stated:

> "This review found that a total of 26 diocesan priests **have had credible allegations of sexual abuse involving minors . . .**"
>
> "If priests from religious orders and other dioceses who have served here during those 50 years are included in the total, then seven more priests, or **33 in total, are known to have credible allegations of the abuse of minors.**"

(Statement of Archdiocese of St. Paul and Minneapolis, 2/27/04 attached as Ex. C to Finnegan Aff. 9-12-11.)

The Court in John Doe 76C ordered the Archdiocese to produce the list of priests credibly accused of sexually molesting minors. Subsequently the list was filed in the case. (Exhibit A to Finnegan Affidavit of August 17, 2009.)[1] The list of priests was filed under seal because of the Court's earlier protective order which was granted in part because of the close proximity to trial.

[1]The list was also filed on 9-12-11 as Exhibit A to Plaintiff's motion to unseal the names.

To date, Defendant Archdiocese has not publicly released the list of priests credibly accused of sexually molesting children.

Mr. Pususta, while a minor, was sexually abused by Fr. John Brown, a priest of the Archdiocese of St. Paul and Minneapolis. Mr. Pususta, a resident of St. Paul, Minnesota, is fearful for the safety of children in his community and others by virtue of the secret list of credibly accused priests maintained by Defendant Archdiocese. Fr. John Brown is not an offender known to the public.

ARGUMENT

I. Mr. Pususta, as a Survivor of Sexual Abuse by a Priest of the Archdiocese, Should be Allowed to Intervene in This Action to Unseal the List of Credibly Accused Priests.

The best method for a non-party seeking to intervene to challenge a court's order sealing a court file is to use Minn. R. Civ. P. 24.01. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 207 (Minn. 1986). Rule 24.01 provides:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Minn. R. Civ. P. 24.01.

Rule 24.01 mirrors the Federal Rules of Civil Procedure 24, which also permits third party intervention for the limited purpose of seeking to unseal court file records. Rule 24 outlines a four-part test to determine whether a third party may intervene to unseal records. Id. The policy of encouraging intervention whenever possible is favored by courts, and the rule should be liberally applied. Engelrup v. Potter, 302 Minn. 157, 166, 224 N.W.2d 484, 489

(1974); Blue Cross/Blue Shield of Rhode Island v. Flam by Strauss, 509 N.W.2d 393, 396 (Minn. Ct. App. 1993).

The first element of the test for intervening is timeliness, which is analyzed on a case-by-case basis. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (1986). Timeliness factors considered include how the suit has progressed, the reason for any delay in seeking intervention, and any prejudice to the existing parties because of the delay. Id. In one example, an uninsured motorist carrier's motion to intervene in action between insured and uninsured motorist filed almost three months after a default hearing was found to be timely. Erickson v. Bennett, App. 1987, 409 N.W.2d 884. Even three years after a case has settled has been deemed timely. United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1426 (10th Cir. 1990)(allowing intervention three years after settlement of case); see also Pansy v. Borough of Stroudsburg, 23 F.3d 772, 778 (3d. Cir. 1994)(allowing permissive intervention six and a half months after case settled). Intervention is not allowed where circumstances show that the would-be intervenor was aware of the suit and permitted the trial to proceed, waiting to see if the outcome would be favorable to its interests. State Auto. & Casualty Underwriters v. Lee, 257 N.W.2d 573, 576 (Minn.1977).

Here, Mr. Pususta's notice of intervention is timely for many reasons. There would be no prejudice to the parties, as the case has already resolved. Mr. Pususta is timely filing an intervention subsequent to the passage of the Child Victims Act, 2013 Minn. Sess. Law Serv. Ch. 89 (H.F. 681), signed into law by Governor Dayton on May 24, 2013, amending Minn. Stat. 541 opening a three year window for survivors of child sexual abuse to bring previously time-barred claims in negligence. Mr. Pususta was made aware of the secret list of priests by virtue of new lawsuits filed under the Child Victims Act. Mr. Pususta was not aware of the present suit when

it was pending in Ramsey County District Court, and therefore did not wait to intervene pending the outcome of the suit. Accordingly, Mr. Pususta's notice of intervention is timely.

Secondly, when a third party seeks access to judicial records, a court considers whether the presumption of the public right to the records is raised. Then, a party seeking to intervene must demonstrate that the public interest relates to the property or transaction involved in the underlying action. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 207 (Minn. 1986). Here, Mr. Pususta has an interest in the present action, as he is a citizen and a survivor of sexual abuse at the hands of a priest in the Defendant Archdiocese, a priest not known to the public as an offender.

Courts have long recognized a "common law presumption in favor of public access to judicial records." U.S. v. McDougal, 103 F.3d 651, 657 (8th Cir. 1996); Star Tribune v. Minn. Twins P'ship, 659 N.W.2d 287, 296 (Minn. App. 2003). In Minnesota, "[a] presumption of access to judicial records exists under the First Amendment." Minn. Twins P'ship, 659 N.W.2d at 296.

This presumption is enshrined in Minnesota's Rules of Public Access to Records of the Judicial Branch. Rule 2, General Policy, Minnesota Rules of Public Access to Records of the Judicial Branch (Mar. 1, 2008):

> "**Records of all courts and court administrators in the State of Minnesota are presumed to be open** to any member of the public for inspection or copying at all times during the regular office hours of the custodian of the records."

This presumption applies to "any recorded information that is collected, received, maintained, or disseminated by a court or court administrator, regardless of physical form or method of storage." Rule 3, Definitions, sub.5, Minnesota Rules of Public Access to Records of the Judicial Branch (Mar. 1, 2008). Documents filed with the court in connection with any

proceeding going to the merits of the dispute, therefore, have a presumption of openness. Minn. Twins P'ship, 659 N.W.2d at 296. See also In re GlaxoSmithKline PLC, 732 N.W.2d 257, 266 (Minn. 2007) ("Once documents are filed with the court, public access is governed by the Minnesota Rules of Public Access to Records of the Judicial Branch.").

Therefore, a presumption of openness renders proper intervention by Mr. Pususta to seek the unsealing of the list of accused priests.

Third, a party seeking intervention must demonstrate that their interests are impaired by the court's order in the action in which the party is seeking to intervene. Here, Mr. Pususta's interests in making the list of accused priests known to the public is impaired by the protective order in this action. Mr. Pususta is a survivor of sexual abuse by a predator priest not known to the public. There are at least 33 predator priests on the list of accused priests maintained by Defendant Archdiocese. Mr. Pususta, as a survivor of abuse, is fearful for the safety of other children, and he seeks to ensure that no other harm is inflicted on children as it was on him. Thus, Mr. Pususta's intervention is proper because the protective order in this matter impairs his interests.

Fourth, intervention is only proper when the third party's interests are not adequately represented by the parties to the action. Mr. Pususta's interests are not adequately represented in the present matter. Although the Plaintiff John Doe 76C is also a survivor of abuse, Mr. Pususta's interests are separate and distinct from John Doe 76C's and are not therefore adequately represented. John Doe 76C's perpetrator, Fr. Adamson, is a well-known perpetrator priest, acknowledged by Defendant Archdiocese to have abused dozens of children. Fr. Brown, however, Mr. Pususta's offender, is not known to the public nor has Defendant Archdiocese acknowledged to the public Fr. Brown's history of sexually abusing children. Therefore, Mr.

Pususta stands in a position with unique interests unmet by the parties in this action, and accordingly, his intervention must be granted.

II. The Names Should Be Unsealed Because Keeping Them Secret Is Against Public Health And Safety As Many Of These Alleged Offenders Are Unknown To The Community, Putting Children In Danger.

Mr. Pususta should be permitted to intervene for the purpose of unsealing the list of accused priests because the release of this information promotes the significant public safety and public health concerns of preventing child sexual abuse. "The public interest and public health and safety concerns are factors that weigh in favor of allowing public disclosure." State ex rel. Humphrey v. Philip Morris Inc., 606 N.W.2d 676, 692 (Minn. Ct. App. 2000) (determining whether modification of a protective order was proper). In Philip Morris the court determined that "there is compelling public interest in the disclosure of the documents that address the addictive nature of nicotine, research by the tobacco industry into nicotine addiction, and advertising tobacco products to minors." Id. The compelling interest in the prevention of sexual abuse of minors, especially by trusted authority figures, is just as strong as it is for disclosure of documents relating to nicotine. See e.g., MINN. STAT. §541.073 (providing special statute of limitations for those molested as children).

In Ferber the United States Supreme Court recognized that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." New York v. Ferber, 458 U.S. 747, 757 (1982); R.S. v. State, 459 N.W. 2d 680, 685 (Minn. 1990) ("Child abuse is not a new phenomena but its recognition as an appropriate public policy concern is of recent origin."). Accordingly there is a compelling public interest in documents which identify priests accused of sexually molesting children.

If the Court keeps these names sealed, it could pose a present health risk and danger to children. It is possible that some or all of the credibly accused child sex offenders from the Archdiocese could be living in communities with children, none of whom have any idea of the particular person's past sexual abuse of children. To Mr. Pususta's knowledge, none of the priests is behind bars. Each could still be a danger to children. Because there is a compelling interest to protect children and prevent child sex abuse, the list of names should be unsealed by this Court.

III. The Public's Right of Access to Courts Supports Unsealing the Names of Priests Credibly Accused of Child Sex Abuse.

This Court should grant Mr. Pususta's intervention and uphold the public's right of access to the courts by unsealing the names of priests credibly accused of child abuse.

The lists deserve a presumption of access because they were relied upon as part of the entire summary judgment record. The lists were originally filed in the record as part of John Doe 76C's Second Motion to Compel. Even though that motion was a discovery motion, John Doe 76C relied upon the entire record when opposing Defendants' motions for summary judgment. The summary judgment motions went to the merits of the case. Part of John Doe 76C's opposition included a section about Defendants' pattern and practice regarding past sex offenders. Some of the documents filed on summary judgment under seal implicated the priests on the lists and the sheer number of priests on the lists was part of the pattern and practice argument. Accordingly, even though the documents here were originally filed in connection with a discovery motion, they deserve a presumption of openness because they were part of the record for dispositive motions.

Once a document is part of the court record "we cannot ignore that court proceedings and documents enjoy a 'presumption of openness' that generally may be overcome only by showing

that a party's constitutional rights would be at risk if the proceeding or document is made public." In re GlaxoSmithKline PLC, 699 N.W.2d 749, 755 (Minn. 2005) (noting a difference between documents filed in court and documents simply produced in discovery). The Archdiocese cannot credibly argue that any constitutional rights are at issue or provide any evidence that overcomes the strong presumption of openness to courts.

The First Amendment right of access to courts cannot be overcome by fear of publicity alone. Defendants will, no doubt, argue that the release of this information could have negative repercussions for the accused priests. This is not a sufficient reason to overcome the public's right of access to court documents. See Press-Enterprise Co. v. Superior Court of California for Riverside, 478 U.S. 1, 15 (1986) (known as "Press-Enterprise II") (stating that "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [a fair trial]; Condit v. Dunne, 225 F.R.D. 113, 188 (S.D.N.Y. 2004) (denying a protective order which would have barred public dissemination of a deposition and stating "publicity is unlikely to color incurably jurors' views, even in the most high-profile cases."); Anonymous v. C.I.R., 127 T.C. 89, 92 (U.S. Tax Ct. 2006) (stating "[m]erely asserting annoyance, embarrassment, or harm to a person's personal reputation, however, is generally insufficient to demonstrate good cause and overcome the strong common law presumption in favor of access to court records"). Defendants have no right avoid bad publicity or harm to their reputation that can override the public's right of access to court records which concern crucial matters of public safety. Accordingly, the presumption of openness supports unsealing the lists.

CONCLUSION

Because Mr. Pususta meets the four elements for intervening, and because unsealing the records could prevent child abuse and the right of access supports release, Mr. Pususta

respectfully requests that this honorable Court grant his motion to intervene for the limited purpose of seeking to unseal the records regarding priests credibly accused of child sexual abuse.

Respectfully submitted,

Dated: July 10, 2013

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