STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF BROWN | FIFTH JUDICIAL DISTRICT
Case Type: Personal Injury

Doe 6 and Doe 7,

Plaintiffs,

vs.

Diocese of New Ulm,

Defendant.

Court File No.: 08-CV-13-810

PLAINTIFFS' OPPOSITION TO DEFENDANT DIOCESE OF NEW ULM'S MOTION TO DISMISS

INTRODUCTION

The Diocese of New Ulm's ("Diocese") Motion to Dismiss for failure to state a claim should be denied for several reasons. First, Plaintiffs Doe 6 and Doe 7's ("Plaintiffs") Complaint alleges sufficient facts to support a cause of action for the tort of public nuisance because Plaintiffs have alleged special and particular harm apart from that suffered by the general public. Moreover, Plaintiffs' cause of action based on the tort of public nuisance is distinguishable from their claim for private nuisance.

Second, Plaintiffs have a claim for private nuisance because their rights and privileges are infringed upon by the Diocese refusing to release its list of priests accused of sexual abuse of minors. Moreover, such a claim for private nuisance does not require an affected property interest, rather, Plaintiffs have standing to bring such a claim because their enjoyment of life is lessened by the nuisance. In addition, the exhibits referenced by the Diocese to discredit Plaintiffs' public nuisance claim should be excluded because they go outside of the pleadings.

Further, Plaintiffs ask that this Court deny Defendant's Motion to Dismiss because Plaintiffs' nuisance claim was timely filed within the six year statute of limitations governing

nuisance claims and alternatively because any applicable statute of limitations has been revived by the Minnesota Child Victims Act.

Lastly, the only Minnesota court to examine these issues denied similar findings. The Ramsey County District Court allowed an abuse survivor's public nuisance claim to proceed past the Archdiocese of St. Paul and Minneapolis' and Diocese of Winona's Motions to Dismiss. The Court also ordered each to disclose all the names of credibly accused offenders. Accordingly, accepting all facts as alleged by Plaintiffs as true and construing the pleadings in a light most favorable to Plaintiffs, the Diocese's Motion should be denied.

STATEMENT OF FACTS

Father David Roney (hereinafter "Roney") sexually abused the minor Plaintiff Doe 6 from approximately 1972 to 1974 and the minor Plaintiff Doe 7 from approximately 1972 to 1973. (Compl. ¶¶ 31-32.) In 1970, before Roney sexually abused Plaintiffs, Defendant Diocese knew or should have known that Roney sexually molested several children and was a continuing danger to children. (Compl. ¶¶ 5-7, 10.) Despite knowledge of Roney's prior abuse and his dangerous propensities around children, the Diocese continued to allow Roney access to children in various assignments throughout the Diocese. (Compl. ¶¶ 4, 12.)

In 2003, the Diocese publicly admitted that 12 priests who had worked in the Diocese were accused of sexually molesting minors. (Compl. ¶ 34.) Since 2003, the Diocese has refused to release the list of accused priests to the public. (Compl. ¶ 34.)

On September 13, 2013, Plaintiffs filed suit against the Diocese alleging nuisance (among other things) for continuing to conspire and engaging in efforts to conceal the identities of pedophilic priests with credible allegations of sexual abuse. (Compl. ¶¶ 37, 45.) Plaintiffs allege that the deception and concealment of the Diocese was specially injurious to Plaintiffs' health.

(Compl. ¶¶ 38-40, 46-48.) Specifically, as a result of the deception and concealment, Plaintiffs have experienced mental and emotional distress because they were victims of the Diocese's deception and concealment, they were not able to help other minors being molested, and they were not able to receive timely medical treatment. (Compl. ¶¶ 40, 48.) Further, the deception and concealment was specially injurious because Plaintiffs and their family were unaware of the danger posed to young children. (Compl. ¶ 39, 47.)

STANDARD OF REVIEW

Minnesota Rule of Civil Procedure 12.02(e) allows for a party, by motion, to raise a defense for failure to state a claim upon which relief can be granted. In reviewing a motion to dismiss for failure to state a claim, the trial court considers "only those facts alleged in the complaint, accepting those facts as true and considering all reasonable inferences in favor of the non-moving party." *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 180 (Minn. Ct. App. 2012). In considering a Rule 12.02(e) motion, the complaint must be "liberally construed." *Royal Realty Co. v. Lavin*, 69 N.W.2d 667, 671 (Minn. 1955). Whether the plaintiff can prove the facts alleged in the complaint is immaterial in considering a motion to dismiss for failure to state a claim. *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2007). A claim is sufficient "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

ARGUMENT

I. PLAINTIFFS SUFFICIENTLY PLED A CAUSE OF ACTION FOR NUISANCE.

Plaintiffs sufficiently alleged a private and public nuisance, both causes of action in tort. In Minnesota, nuisance is defined by statute as:

> Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

MINN. STAT. § 561.01 (2012).

A. Plaintiffs Have a Cause of Action for Public Nuisance.

Plaintiffs have alleged sufficient facts to maintain a cause of action for public nuisance. Minnesota courts have addressed both claims of public and private nuisance. Minnesota law supports the theories set forth in the Restatement and holds that "[a] nuisance may be public in its general effect upon the public, and at the same time **private** as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury . . . ." *Hill v. Stokely-Van Camp, Inc.*, 260 Minn. 315, 320-22, 109 N.W.2d 749, 752-54 (1961) (citing *Page*, 55 N.W. at 609) (emphasis added). In *Robinson v. Westman*, the court supported the theory of a public nuisance tort claim, stating "a person injuriously affected by a nuisance may bring action in his own name and in behalf of others similarly affected to abate the same. Even if the nuisance to some extent be regarded as a public nuisance, nevertheless, if private rights are affected thereby an action to abate the same may be instituted by the persons whose rights are thus affected." 224 Minn. 105, 110-11, 29 N.W.2d 1, 5 (1947).

Further, in *Jones v. Farnham*, while the plaintiff was unsuccessful on his nuisance claims, the Minnesota Supreme Court mentioned both public *and* private nuisance in the case. 299 Minn. 156, 157, 216 N.W.2d 834, 835 (1974). These cases distinguish between private and public nuisance tort claims, meaning there are necessarily two causes of action for nuisance that can be filed by a private individual. In interpreting these cases, a private cause of action for a public nuisance **does** exist.

Further supporting the fact that a separate tort exists for public nuisance, when specifically referencing private nuisance, the Restatement says:

> *Private nuisance.* When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance **as well as a public one.** In this case the harm suffered by the plaintiff is of a different kind and **he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance.**

Restatement (Second) of Torts § 821C (1979) (emphasis added)[1]. The Restatement indicates that a plaintiff could bring two different causes of action based on the same harm: one for private nuisance and one for public nuisance. This demonstrates that a cause of action for public nuisance filed by an individual does not automatically transform into a claim for private nuisance. Accordingly, Plaintiffs may maintain causes of action for public nuisance.

B. The Diocese's Failure to Release the List and Information About Alleged Abusers Creates a Public Nuisance.

Plaintiffs sufficiently pled public nuisance under Minnesota law and their claims should not be dismissed. Generally, a public wrong "inflicted upon all persons must be redressed by a public prosecution," the original remedy for public nuisance. *Page v. Mille Lacs Lumber Co.*, 53 Minn. 492, 499, 55 N.W. 608, 609 *opinion vacated on reh'g*, 53 Minn. 492, 55 N.W. 1119 (1893); Restatement (Second) of Torts § 821C (1979). However, individuals "**who suffer particular harm from a public nuisance may bring an action in tort.**"[2] Restatement (Second) of Torts § 821C (1979) (emphasis added). A party has a tort action for the "invasion of

[1]While the Restatement discusses land with regard to a private nuisance, such a requirement is not imposed by MINN. STAT. § 561.01.

[2]"Public nuisance actions are brought by a government official with the jurisdiction and authority to represent the public at large, while private nuisance actions are brought by private individuals suffering an interference in the enjoyment of their private property. The exception, of course, is the right of a private citizen to bring an action against a public nuisance if special damages can be shown--**the public nuisance tort**."Robert Abrams Val Washington, The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer, 54 Alb. L. Rev. 359, 364-65 (1990) (emphasis added).

[a] purely public right" if his damages are distinguishable from those sustained by other members of the public. Restatement (Second) of Torts § 821C (1979).

In the case at bar, the Diocese's refusal to release its list of 12 priests who have been accused of sexually molesting minors created and continues to create a nuisance. By keeping the names of priests with credible allegations of sexual abuse against them secret from the public the Diocese is actively concealing the names of molesters and creating a danger for the communities in which the priests live.

While the refusal to release the list creates a nuisance to the general public, this offense converts to a cause of action for public nuisance for Plaintiffs against the Diocese because Plaintiffs' legal rights and privileges have been wrongfully infringed and injuriously affected. *See Hill* at 752-52; *Robinson* at 5. The Diocese's refusal to release the list was and continues to be offensive to Plaintiffs and has interfered with Plaintiffs' enjoyment of life. (Compl. ¶¶ 40-41, 48-49.) By way of their nuisance claims Plaintiffs, on their own behalf and on behalf of members of the public who are similarly affected, seek to abate the nuisance through the release of the Diocese's list.

C. Plaintiffs Suffer Specialized and Particular Harm Due to The Diocese's Failure to Release the List.

Plaintiffs have a valid cause of action based on the public nuisance tort because the Diocese's concealment of the list of accused priests has resulted in harm that is special and particular to Plaintiffs. In Minnesota, "a private action may be maintained to redress an injury of this character [public nuisance] where the plaintiff has suffered some special or peculiar damage not common to the general public, and in such cases only." *N. Star Legal Found v. Honeywell Project*, 355 N.W.2d 186, 189 (Minn. Ct. App. 1984); *see also* Restatement (Second) of Torts § 821C (1) (1979) ("In order to recover damages in an individual action for a public nuisance, one

must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.") In order to constitute a nuisance the harm suffered must also be material and substantial. *Jedneak v. Minneapolis Gen. Elec. Co.,* 4 N.W.2d 326, 329 (Minn. 1942).

As survivors of childhood sexual abuse by a priest of the Diocese, Plaintiffs have been uniquely injured as a result of the Diocese's concealment of the list. Plaintiffs have felt deceived and diminished by the Diocese's act of intentionally keeping the list secret from them and the public. (Compl. ¶¶ 39, 47.) The Diocese's point that sexual abuse of children by ministers is a well-known hazard creates even more guilt for Plaintiffs since they are unable to protect others from sexual abuse when the Diocese continues to conceal the identities of the priests from whom the public is in need of protection.

In addition, Plaintiffs have experienced and continue to experience emotional and psychological distress for feeling as though they are unable to protect the public from the risks posed by offender priests known only to the Diocese. (Compl. ¶¶ 40, 48.) In this respect Plaintiffs are also uniquely harmed: they are survivors of sexual abuse by Roney who have filed a civil case against the Diocese and thus feel emotional stress and obligation to ensure that no other kids suffer abuse by priests of the Diocese. Therefore, it is irrelevant that Roney is only one name on the list of 12. Plaintiffs feel obligated to protect the public from the *experience* of childhood abuse, not necessarily from sexual abuse by Roney exclusively. Accordingly, accepting the exceptionality and particularly of Plaintiffs' damages and all other facts alleged by Plaintiffs as true, the Defendant's Motion should be denied.

D. Recently, a Ramsey County Court Denied a Similar Motion to Dismiss Involving Another Plaintiff's Public Nuisance Claim.

In a December 10, 2013 Order, the Ramsey County Court held that a plaintiff's common law public nuisance claim survived a Rule 12 motion to dismiss brought by both the Archdiocese of St. Paul and Minneapolis and the Diocese of Winona in the case *John Doe 1 v. the Archdiocese of St. Paul and Minneapolis and the Diocese of Winona*, case no. 62-CV-13-4075. (Order of Judge Van de North, attached as Ex. 1 to Finnegan Aff.) Specifically, in denying the Motion to Dismiss, the Court held:

> Given the very early stage of litigation; the long tradition of notice pleading under Minnesota law; the deference given to [the plaintiff] with respect to assuming facts pled and their inferences to be true; and an equally well-established bias to resolve disputes on their merits, it is plausible that [the plaintiff] may be able to demonstrate the uniqueness of his claimed damages at trial.

(Order, p. 9.) Additionally, the Court indicated that whether or not the nuisance statute of limitations was tolled by the continuing nuisance doctrine was not "susceptible to a Rule 12 disposition." (Order, p. 11.) Accordingly, the plaintiff's public nuisance claims were allowed to proceed past the motions to dismiss.

Moreover, in a separate decision that same Ramsey County Court ordered the disclosure of the names on both the Archdiocese of St. Paul and Minneapolis' and the Diocese of Winona's list of credibly accused priests. (Order Modifying Protective Order, attached as Ex. 2 to Finnegan Aff.) The releases had to include the priest's name; their year of birth and current age; their year of ordination; whether the cleric was alive or deceased, and if deceased, their year of their death; the parishes where the priest served, to the extent known by the Diocese; the priest's present ministerial status; and the current city and state where the priest resides, to the extent known by the Diocese. (Order, pp. 2-3.) Additionally, to the extent clerics came onto the defendants' radar after the 2004 lists were compiled, the defendants have until January 6, 2014,

to disclose those names. As such, in a similar case involving motions to dismiss nuisance claims, the only other Minnesota court to face a similar motion allowed the plaintiff's public nuisance claim to defeat a motion to dismiss and further required disclosure of the lists of priests accused of sexually molesting children.

E. Plaintiffs Also Have a Cause of Action for Private Nuisance.

Plaintiffs have a cause of action for private nuisance based on MINN. STAT. § 561.01, for which no property interest is required. The nuisance statute states:

> An action may be brought by any person whose property is injuriously affected **or whose personal enjoyment is lessened by the nuisance**, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

MINN. STAT. § 561.01 (2012) (emphasis added). The statute provides that the action may be brought by someone whose property is affected **or** whose personal enjoyment is lessened. Therefore, Plaintiffs' private nuisance claim is not limited by a lack of property interest.

For instance in *Randall v. Vill. of Excelsior*, 103 N.W.2d 131 (Minn. 1960), a minor plaintiff sued the defendant's municipal liquor store for damages in nuisance alleging that defendant sold alcohol to minors, which plaintiff bought, consumed, and thereafter became intoxicated. The plaintiff then got in an accident and suffered serious injuries as a result. *Id.* at 132. In analyzing the plaintiff's nuisance cause of action the court said: "[i]t is elementary that 'nuisance' denotes the wrongful invasion or infringement of a legal right or interest and comprehends **not only such invasion of property but of personal rights and privileges** and includes intentional harms and harms caused by negligence, reckless or ultrahazardous conduct." *Id.* at 134.[3]

---

[3]Citing *Sweet v. State*, 195 Misc. 494, 500, 89 N.Y.S.2d 506, 514 (Ct. Cl. 1949), which states:

> Nuisance is a form of tort, but it is not restricted to a single type of tortious conduct. It denotes the wrongful invasion of a legal right or interest. It comprehends not only such invasion of property

While Defendant argues that a private cause of action for nuisance must accompany a real property interest, *Randall* states that a nuisance can include *not only* a property interest *but also* invasion of one's personal rights and privileges. *Randall* at 134. The plaintiff in *Randall* had no property interest at stake. Rather, the court looked to whether the plaintiff could establish a wrongful invasion of his legal rights or interests. *Id.* at 135. [4]

Further, the case cited by Defendant, *Anderson v. State, Dept. of Natural Resources*, does not stand for the fact that a real property interest must be affected to maintain a cause of action for nuisance. In that case, commercial beekeepers sued the Department of Natural Resources for spraying land with pesticides. *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). The beekeepers' nuisance claim was denied because they "lacked the requisite property interest to maintain a private nuisance claim." *Id.* The issue in the case stems from the fact that the beekeepers did not actually **own** the land being sprayed, thus, could not maintain an action for private nuisance. Moreover, when cited in full, one of the cases relied upon by the *Anderson* court to reach that conclusion, *Schmidt v. Village of Maplewood* held "[i]t is elementary that the term 'nuisance' denotes an infringement or interference with the free use of property **or the comfortable enjoyment of life** . . ." 293 Minn. 106, 108, 196 N.W.2d 626, 628 (1972).

> but of personal legal rights and privileges generally. It includes intentional harms and harms caused by negligence, reckless or ultra hazardous conduct.

[4]The *Randall* court ultimately found that the plaintiff could not establish a wrongful invasion of his legal rights or interests because the acts that created a nuisance were the very same acts that created a cause of action for negligence. *Id.* The result in *Randall* differs from the case at bar. Here, the nuisance created through the infringement of Plaintiffs' legal rights and interests occurred as a result of conduct separate and distinct from the negligent conduct that caused Plaintiffs damages as a result of his sexual abuse. Plaintiffs allege that the Diocese's refusal to release its list of credibly accused priests created a nuisance. These acts are different from the Diocese's negligent conduct in allowing Roney access to sexually abuse Plaintiffs.

Accordingly, Plaintiffs' private cause of action for nuisance rests on the Diocese's infringement of their personal rights and privileges by not releasing the list of accused priests. Plaintiffs have standing to bring such a private action because their personal enjoyment is lessened by the nuisance. (Compl. ¶¶ 38-39, 47-48.) As such, the Complaint factually supports Plaintiffs' private nuisance claims and should not be dismissed.

II. THE COURT SHOULD EXCLUDE EXHIBITS REFERENCED BY THE DIOCESE WHICH ARE OUTSIDE OF PLAINTIFFS' COMPLAINT.

The Diocese cites four exhibits outside of the pleadings to support its argument that refusing to release the names of accused priests does not constitute a nuisance. Two of the exhibits are unpublished cases from the Minnesota Court of Appeals. However, the other two exhibits are affidavits of officials in the Diocese. Since Plaintiffs state causes of action for nuisance in their Complaint, any exhibits (other than cases) outside of the pleadings should be excluded when considering the Diocese's Motion to Dismiss (hereinafter "Motion"). *See Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (stating that a "Rule 12.02(e) motion raises the single question of whether **the complaint** states a claim upon which relief can be granted." (emphasis added)). While Defendant claims this information is provided solely as "background information," it is clearly subjective and biased toward the Diocese. To consider the exhibits without granting Plaintiffs an opportunity to respond or conduct discovery would result in prejudice to Plaintiffs.

Alternatively, should the Court consider the Diocese's references to matters outside the pleadings, the Motion should be treated as one for summary judgment and Plaintiffs should be given the opportunity to conduct discovery before responding. Minnesota Rule of Civil Procedure 12.02 states:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and **all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.**

Minn. R. Civ. P. 12.02 (*see also Fabio v. Bellomo*, 514 N.W.2d 758, 761 (Minn. 1993) stating, "[w]hen matters outside the pleadings are presented to a court considering a motion to dismiss, and those external matters are not excluded by the court when it makes its determination, the motion to dismiss shall be treated as one for summary judgment.") Rule 56.06 states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Minn. R. Civ. P. 56.06.

Plaintiffs should be given the opportunity to conduct necessary discovery before responding to the Diocese's Motion should its exhibits be considered by the Court. At this time, because no discovery has been done and some of the information is in the Diocese's control, Plaintiffs need discovery of certain evidence before they can properly oppose the Diocese's Motion should it be converted to a motion for summary judgment. (Finnegan Aff., ¶ 10.) For instance, Plaintiffs would need to take the deposition of Archbishop John C. Nienstedt, Bishop John LeVoir, Monsignor Douglas Grams, and Monsignor Eugene Lozinski. (Finnegan Aff., ¶ 8.) These witnesses would likely shed light on the Diocese's list of accused priests, the creation of the list, the decision to keep the list secret, and the continued efforts to keep the names on the list secret. (Finnegan Aff., ¶ 9.) Plaintiffs would also want written discovery before responding to the Motion if it is treated as a summary judgment. Therefore, the Court should exclude the

materials submitted by the Diocese which are not referenced in the Complaint or alternatively, allow for discovery if the motion is treated as one for summary judgment.

III. PLAINTIFFS' NUISANCE CAUSES OF ACTION ARE TIMELY.

Plaintiffs' causes of action for nuisance are timely and not barred by the statute of limitations because of the continuing nuisance doctrine, the fact that the Diocese's nuisance occurs each and every day by keeping the list secret, and because of the Minnesota Child Victims Act (MINN. STAT. § 541.073).

Generally, the applicable statute of limitations for nuisance is six years. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. Ct. App. 2001) (finding that a nuisance claim was governed by MINN. STAT. § 541.05 subd. 1(2), which includes statutorily-created claims such as nuisance or MERA). However, acts that persist over a period of time may constitute continuing violations and serve to toll the statute of limitations. *See Ashtabula River Corp. Grp. II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 984 (N.D. Ohio 2008) (holding that a continuing nuisance "arises when the wrongdoer's tortious conduct is ongoing, perpetually generating new violations." "Minnesota does recognize continuing trespass and continuing nuisance 'when a recurrence of conduct or injury is involved.'" *Minnesota ex rel. N. Pac. Ctr., Inc. v. BNSF Ry. Co.*, 723 F. Supp. 2d 1123, 1129 (D. Minn. 2010). In these instances, "the statute of limitations is tolled, as the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights."); *see also Kohn v. City of Minneapolis Fire Dep't*, 583 N.W.2d 7, 11 (Minn. Ct. App. 1998) and *Sigurdson v. Isanti County,* 448 N.W.2d 62, 66 (Minn. 1989) (noting that discriminatory acts that continue over a period of time may constitute continuing violations for purposes of an unfair discriminatory action claim).

Defendant argues that the continuing nuisance doctrine does not apply because there is no recurring conduct or injury in this case, relying on *Minnesota ex rel. N. Pac. Ctr., Inc. v. BNSF Ry. Co.*, 723 F. Supp. 2d 1123 (D. Minn. 2010) and *Union Pac. R. Co. v. Reilly Indus., Inc.*, 4 F. Supp. 2d 860 (D. Minn. 1998) *aff'd*, 215 F.3d 830 (8th Cir. 2000). These cases are distinguishable from the case at bar. *BNSF* involved a lawsuit brought by a landowner against a prior owner who contaminated the land with pollutants. *Id.* The case is distinguishable, first, because it applied the discovery rule as set forth in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *Id.* at 1128. Under that rule, the claims accrue "on the date the plaintiff knew (or reasonably should have known) the injury was caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* (internal citations omitted). The CERCLA discovery rule does not apply to the Diocese's nuisance claims. Further, *BNSF* was not determined to be a continuing case because the defendant originally deposited contaminants on the land 30 years prior to the court action. *Id.* at 1129. Contamination was determined to be a "permanent condition . . . rather than a continuing tort . . . ." *Id.*

Union Pacific similarly involved the continuous presence of contaminants on land. *Union Pac. R. Co. v. Reilly Indus., Inc.* at 867. The Court in that case held that the presence of contaminants was "insufficient to constitute a recurring damage." *Id.* "To the extent that leakage from storage tanks or basins could constitute a continuing wrong, such wrong ceased when the storage tanks and settling basins no longer existed." *Id.*

The case at bar is distinguishable from both *BNSF* and *Union Pacific* because the Diocese's conduct is recurring and each day the list is kept secret constitutes a distinct act. The Diocese's nuisance can be said to have begun in 2003 when it publicly admitted that there were

12 priests who worked in the Diocese who were accused of sexually molesting minors. (Compl. ¶ 34.) Since 2003, the public has known that the Diocese maintains this secret list. However, unlike the continuous presence of contaminants stemming from a prior act, the Diocese's refusal to disclose the names on the list on each occasion it has been asked creates a distinct, recurring violation that serves to prevent the expiration of the statute of limitations. Moreover, the Diocese's recurring behavior occurs each and every single day by keeping the list secret. As such, the nuisance is still present today and continuing. Accordingly, Plaintiffs' nuisance claims are within the six-year statute of limitations.

In addition, Plaintiffs' nuisance claims are timely under the window recently passed in the Minnesota Child Victims Act ("Act"). The Act states:

> Notwithstanding any other provision of law, in the case of alleged sexual abuse of an individual under the age of 18, **if the action would otherwise be time-barred under a previous version of Minnesota Statutes, section 541.073, or other time limit, an action for damages against a person**, as defined in Minnesota Statutes, section 541.073, subdivision 1, clause (2), **may be commenced no later than three years following the effective date of this section. This paragraph does not apply to a claim for vicarious liability or respondeat superior, but does apply to other claims, including negligence.** This paragraph applies to actions pending on or commenced on or after the effective date.

MINN. STAT. § 541.073 (2013) (emphasis added). The statute excludes certain claims arising out of an action for sexual abuse, including vicarious liability and respondeat superior. However, the statute specifically states that it applies to other claims, including negligence. Under the Act, not only are Plaintiffs' negligence claims timely, but also Plaintiffs' other claims against the Diocese, such as nuisance. Moreover, there is no indication that the legislature intended the window to apply solely to claims for damages rather than injunctive relief, such as Plaintiffs seek in this action. Further, Plaintiffs have initiated an action for damages against the Diocese under MINN. STAT. § 541.073. (Compl. ¶ 53.) There is nothing in MINN. STAT. § 541.073 that prohibits a plaintiff seeking damages from also seeking injunctive relief.

Accordingly, Plaintiffs' nuisance claims are timely based on the statute of limitations for nuisance, the continuing nuisance of the Diocese, and the Minnesota Child Victims Act. As such, Plaintiffs' nuisance claims against the Diocese were timely filed.

IV. ALTERNATIVELY, PLAINTIFFS SHOULD BE ALLOWED TO FILE AN AMENDED COMPLAINT.

In an abundance of caution, should the Court hold that Plaintiffs have not adequately pled nuisance, Plaintiffs respectfully request permission to file an amended complaint. In Minnesota, "[a] party may amend a pleading by leave of court, 'and leave shall be freely given when justice so requires.'" Olson v. Moorhead Country Club, 568 N.W.2d 871, 872 (Minn. App. 1997) (quoting Minn. R. Civ. P. 15.01). Overall, this case is still at a very early stage. No depositions have been taken on either side of the case and any trial of the case is months away. Defendant would not be prejudiced by the amendment. Accordingly, if it proves necessary, Plaintiffs respectfully request permission to file an amended complaint.

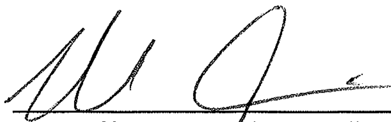
CONCLUSION

Plaintiffs' Complaint states causes of action for public and private nuisance under Minnesota law that were timely filed. Accordingly, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

Dated: December 30, 2013.

JEFF ANDERSON & ASSOCIATES, P.A.



By: Jeffrey R. Anderson, #2057
Michael G. Finnegan, #033649X
366 Jackson Street, Suite 100
St. Paul, MN 55101
(651) 227-9990

Michael Bryant, #218583
Bradshaw & Bryant, PLLC
1505 Division Street
Waite Park, MN 56387
Phone: (320) 259-5414

Attorneys for Plaintiffs