

COMMONWEALTH OF KENTUCKY  
BOONE CIRCUIT COURT  
CASE NO: 03-CI-181  
JUDGE: JOHN POTTER



JOHN DOE, et al.,

PLAINTIFFS

vs.

ROMAN CATHOLIC DIOCESE OF COVINGTON, et al.,

DEFENDANTS

**PLAINTIFFS' DETAILED TRIAL PLAN**

The Court has previously ruled that the trial will proceed in two phases:

In the first phase, the jury will decide whether the Diocese of Covington violated its duty to minors within the Diocese through a course of conduct from 1956 to the present that exposed said minors to sexual abuse and sexual misconduct by Diocesan priests or members of religious orders who were employed by the Diocese. If the jury finds in favor of Plaintiffs on that issue, the jury will also determine in the first phase whether punitive damages should be awarded and the amount. The second phase of the case will involve a determination for each class member whether the Diocese is legally responsible for that class member's personal injuries and, if so, the amount of damages to be awarded to each class member.

Order Certifying Class and Approving Class Notice, pp. 2-3.

Class Counsel respectfully submit herein three alternative proposed trial plans for the first phase trial of this class action litigation, for the Court's consideration. The first plan incorporates a common issues trial that includes a punitive damages determination and several bellwether plaintiff claims. The second proposal incorporates a common issues trial that includes a punitive damages determination but omits bellwether plaintiff claims. The third proposal

incorporates a common issues, or "causation" trial.<sup>1</sup> The object of a first phase class action trial in a mass tort case such as this is to bifurcate the common issues that can be tried in order to save time and expense and to simplify complex proceedings.

The proposed trial plans have been designed to address the specific facts of this case and are derived from Class Counsels' previous class action trial experience<sup>2</sup> and the guidance offered by the MANUAL FOR COMPLEX LITIGATION, FOURTH ED.. In formulating these alternative plans, Class Counsel have been mindful of two primary considerations – expediency (a proper and reasonable use of the Court's time and resources) and simplicity (presentation of a coherent, structured, and understandable case to the jury).

#### **I. DESCRIPTION OF THE FIRST PHASE TRIAL**

There are four types of issues that may, at the Court's discretion, be determined during the first phase trial: (1) common issues of liability; (2) bellwether plaintiffs' claims; (3) common issues of punitive damages; and (4) common statute of limitations issues.

##### **A. THE LENGTH OF TRIAL**

Plaintiffs propose that the entirety of plaintiffs' case in chief, including opening statements, can be presented in ten trial days, with two additional trial

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<sup>1</sup> Trial plans for mass tort cases such as the instant case are described in the FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION, Fourth Ed. (2004), § 22.93, at pp. 464-465.

<sup>2</sup> The trial plans adopted by the Courts in the Beverly Hills Fire Litigation, In Re Fernald I and II and the Copley Pharmaceutical Litigation have been relied upon by Class Counsel in formulating the proposed alternative trial plans in this case.

days needed for rebuttal. Defendant's case should require less than ten trial days.<sup>3</sup>

## **B. THE COMMON ISSUES PRESENTED IN THE FIRST PHASE TRIAL**

The advantage of combining many individual cases as a single class action based on the existence of common issues of law and fact, is that the common issues need only be tried one time.<sup>4</sup> The alternative is the selection of numerous juries to hear the repetitive opening statements and evidence of common issues in numerous individual trials. These common issues will be determined in this case during the first phase trial. By doing so, inconsistent or varying adjudications are avoided and, instead, the fair and efficient adjudication required by Rule 23 is obtained. This is a logical and reasonable approach in that the Court's valuable time is used far more efficiently. From Plaintiffs' standpoint, their claims are more expeditiously resolved without prohibitive expense on the part of each Plaintiff. From the Defendants' point-of-view, closure is provided as to the claims of all Class Members, including absent Class Members. Defendants also benefit from the principles of res judicata and collateral estoppel.

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<sup>3</sup> In order to assure that the parties abide by the time restrictions placed upon them during trial, some Courts have used a "stop watch" approach. Plaintiffs are entitled to a specific amount of time during the entirety of trial to conduct direct and cross-examination and the defendant is entitled to a specific amount of time to do the same. Time used is kept contemporaneously to assure that no party exceeds its specific time limitations. Or, alternatively, time is kept during direct examinations and the party conducting cross-examination is not permitted to exceed the time spent on direct. The same rule would hold true for re-direct and re-cross examinations. Both of these approaches have proved successful in keeping a trial on track and on schedule.

<sup>4</sup> In federal Multidistrict Litigation, where cases involving similar claims filed throughout the country are combined under the management of a single judge, common claims are tried by that judge in a first phase trial and individual compensatory damages issues are returned to be tried in the originating courts throughout the country. See *In re Copley Pharm., Inc., "Albuterol" Prod. Liab. Litig.*, 161 F.R.D. 456, 468-70 (D. Wyo. 1995).

Litigating the common question issues in a first phase for the class as a whole reduces the range of issues in dispute and promotes judicial economy. If the defendant succeeds at this phase and the jury finds no common policy, pattern, or practice, then the class action case ends. If the jury does find that the Diocese engaged in the alleged course of conduct, the remaining issues and evidence relating to individual damages are substantially narrowed. As the Second Circuit Court of Appeals held in a class action case involving allegations of a class-wide pattern or practice of employment discrimination, “[a]t those stages of the case where the interests of class members are essentially identical, the due process rights of absent class members are ensured by adequate class representation alone.” *Robinson v. Metro North Commuter Railroad Co.*, 267 F.3d 147, 167, n.10, 12 (2nd Cir. 2001), citing *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 846 (1999) (other citation omitted).

The bulk of the trial evidence in this case involves common issues, which address the common policies, patterns, or practices of the Diocese relevant to this case and applicable to the entire class.<sup>5</sup> The common issues<sup>6</sup> include:

1. Whether, during the class period,<sup>7</sup> the Diocese improperly allowed known pedophiles, sexual predators, and sexual abusers to continue to represent themselves as respected priests and have contact with minor children.
2. Whether, during the class period, the Diocese tacitly approved the conduct of its priests and religious who were pedophiles, sexual predators.

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<sup>5</sup> Discovery is ongoing; therefore, some change in the common issues may be necessary prior to trial.

<sup>6</sup> Definition of the terms used herein are found *infra*, pp. 17.

<sup>7</sup> The class period set forth in the Court's certification order is 1956 to the present. This may be amended to encompass evidence received during discovery.

3. Whether the Diocesan priests and religious who were pedophiles, sexual predators, and sexual abusers were acting as the alter ego of the Diocese.
4. Whether the Diocese failed to report instances of sexual abuse to the proper authorities as required by law.
5. Whether the Diocese withheld information regarding sexual abuse, physical abuse, and sexual misconduct by Diocesan priests against children from the appropriate law enforcement agencies.
6. Whether the Diocese failed to properly screen, supervise, and/or discipline its priests and religious.
7. Whether the Diocese concealed from the parents of victims and/or the public the fact that children were being exposed to known pedophiles, sexual predators and sexual abusers in its school and religious settings.
8. Whether the Diocese misrepresented to child sexual abuse victims that they had no legal recourse for their claims and/or that they had to submit to pastoral counseling monitored by the Diocese and psychological counseling monitored by the Diocese.
9. Whether the Diocese swore child sexual abuse victims to secrecy.
10. Whether the Diocese failed to warn prospective victims about and protect victims and potential victims from sexual abuse.
11. Whether the Diocese owed a fiduciary duty to the Class Members.
12. Whether one or more of the foregoing acts or omissions of the Diocese constitute fraudulent concealment.
13. Whether one or more of the foregoing acts or omissions of the Diocese constitutes a breach of its fiduciary duty to the Class Members.
14. Whether one or more of the foregoing acts or omissions of the Diocese constitute the tort of outrage.
15. Whether one or more of the foregoing acts or omissions of the Diocese constitute aiding and/or abetting of an assault and/or battery.

16. Whether one or more of the foregoing acts or omissions of the Diocese constitutes ratification of the conduct of its pedophiles, sexual predators, and sexual abusers.
17. Whether the pedophiles, sexual predators, and sexual abusers are agents and/or employees and/or alter egos of the Diocese.
18. Whether any of the foregoing patterns of misconduct caused injury to Class Members

**C. THE MANNER IN WHICH EVIDENCE RELATING TO THE COMMON ISSUES WILL BE PRESENTED**

One benefit of the class action device is that child sexual abuse victims, many of whom are chary of having the fact of their abuse and the details of their abuse made available to the public, are not required to testify in order to establish liability in the first phase trial. The primary sources of evidence are found in discovery documents, admissions of the Defendants' agents that are memorialized in writing, and expert testimony.

Plaintiffs will introduce a number of summary charts<sup>8</sup> that summarize the documents obtained during discovery and through Class Counsels' investigation. There will be a "time line" exhibit, beginning in the year 1938 and tracing the conduct of the Diocese in accepting individuals into its seminary with known sexual issues, allowing them to be ordained, placing them in positions of trust where they had access to children, reassigning them to similar positions after receiving complaints of sexual abuse, and reassigning them or transferring them to similar positions against the advice of doctors and the Kentucky Cabinet For Families And Children. This will be established through Diocesan files obtained in discovery, records of the Kentucky Cabinet For Families and Children obtained

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<sup>8</sup> The records underlying the summary charts will be introduced into evidence for the jury's perusal.

through discovery subpoenas, records of sexual abuse treatment facilities obtained through discovery subpoenas, admissions in deposition transcripts of Diocesan officials, Vatican records, law enforcement records obtained through discovery subpoenas, and other sources of reliable documentary evidence.

Evidence of the volume and repetition of this conduct will be used to demonstrate that it was the result of both formal and informal policies that existed in the Covington Diocese, which were followed by a succession of Bishops and other officials. Plaintiffs will also introduce the expert testimony of a well-qualified Dominican Priest, Thomas Doyle,<sup>9</sup> regarding the laws and policies of the Church and its officials that have played a role in causing the common conduct alleged. Experts in the field of child sexual abuse will testify as to the nature of sexual predators and pedophiles, the common effects of the abuse on Class Members, and the nature of emotional trauma caused by childhood sexual abuse perpetrated by a trusted religious figure.

#### **D. BELLWETHER PLAINTIFFS**

During a class action trial, it is not uncommon for the claims of several Class Representatives to be tried contemporaneously with the common issues. The landmark federal case of *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1217 (6<sup>th</sup> Cir. 1988) endorsed this procedure. *See also Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269, 281-82 (E.D.Tex. 1985), *aff'd* 782 F.2d 468 (5<sup>th</sup> Cir. 1986). Class Counsel select the claims to be presented in the first phase trial upon the basis that they are representative of the claims of the class as a

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<sup>9</sup> Fr. Doyle has been qualified as an expert on this subject by numerous courts. His history is summarized in the current publication *Vows of Silence*, Berry & Renner, Free Press (2004).



whole. The representatives selected are known as bellwether plaintiffs. Plaintiffs propose to present several bellwether plaintiff cases to be tried during the common issues trial in order to facilitate determination of such issues as proximate cause and injury to the Class Members as a result of the common course of conduct alleged. The jury will also assess proximate cause, injury to the bellwether plaintiff, and determine a compensatory damages award for each bellwether plaintiff. The jury's findings as to proximate cause, injuries, and compensatory damages of the bellwether plaintiffs can provide the parties and the Court with an indicator of the potential exposure to the class, which can assist in the resolution of all claims. *Sterling*, 855 F.2d 1188; *In re Chevron U.S.A., Inc.*, 109 F.3d 1019 (5<sup>th</sup> Cir. 1997); MANUAL FOR COMPLEX LITIGATION - FOURTH, § 22.314, Obtaining Information About Common Issues and Case Values, and § 22.315, Test Cases, pp. 358-60 et seq.

*Sterling* was a class action case involving a first phase trial of common issues relating to hazardous chemicals escaping from the defendant's landfill and contaminating the well water of various victims over a course of time. After a bench trial of the claims of five bellwether plaintiffs, the district court found Velsicol liable to them on the legal theories of strict liability, common law negligence, trespass, and nuisance. The court concluded that the defendant's conduct was the proximate cause of the bellwether plaintiffs' injuries. The district court awarded the five individuals compensatory damages totaling \$5,273,492.50 for their respective injuries, plus prejudgment interest of \$8,964,973.25. All damages, except for \$48,492.50 to one plaintiff for property damage claims, were



awarded for personal injuries. The district court also awarded \$7,500,000 in punitive damages to the class as a whole, to be shared with class members who did not participate in the first phase trial. The court deferred to individual hearings, to be held after the first phase trial, the issues of causation and injury to other class members. 855 F.2d at 1194. The Sixth Circuit affirmed class certification and the manner in which the trial court structured the litigation using bellwether plaintiffs.

#### **E. THE MANNER IN WHICH EVIDENCE RELATING TO BELLWETHER PLAINTIFFS WILL BE PRESENTED**

In addition to the evidence set forth in section C above, Plaintiffs will introduce specific documentary exhibits relating to each bellwether plaintiff, including summary charts, and specific documentary evidence relating to the history of each priest identified as abusing the bellwether plaintiffs. Deposition testimony of each abusive priest, if available, will be introduced. Law enforcement records, treatment records, and state agency records relating to each priest will be introduced. The bellwether plaintiffs may testify. Testimony of psychiatric experts in the field of child abuse will be presented relating to the bellwether plaintiffs' past, current, and future emotional injuries.

#### **F. PUNITIVE DAMAGES**

There are actually two issues relating to punitive damages: (1) determination of the defendant's liability for punitive damages (sometimes referred to as "punitive conduct"); and (2) determination of the amount of the punitive damages to be imposed on the defendant. In the instant case, the Court ruled that the award of punitive damages to the entire class (as opposed to

multiple individual punitive damage awards) would be determined during the first phase trial.<sup>10</sup> There is abundant legal authority for this logical approach.

Because punitive damages focus on the nature of the defendant's conduct (see *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 931-32 (W.D. Ky. 1987), the issues of a defendant's liability for punitive damages and of the amount of punitive damages have been routinely treated as class-wide issues. In *Sterling*, 855 F.2d at 1217, the Sixth Circuit approved the class-wide determination of punitive damages in a single first phase common issues trial. In a class action involving workers at the U.S. government's Fernald atomic weapons plant, the court observed:

The only other class wide verdict which we envision allowing the jury to render, if appropriate, is for punitive damages. ***Of all the issues to be decided in this case, the issue of punitive damages is the least dependent upon the individual differences between Plaintiffs.*** "Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48, 99 S.Ct. 2121, 2125, 60 L.Ed.2d 698 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974)); see also Prosser and Keeton on Torts § 2 at 9-15 (5<sup>th</sup> ed. 1984); *Memphis Community School District v. Stachura*, 477 U.S. 299, 306 n. 9, 106 S.Ct. 2537, 2542 n. 9, 91 L.Ed.2d 249 (1986) ("The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior.") . . . The award of punitive damages focuses upon the conduct of the Defendants. In this case that proof, as we have noted, is very similar to the issue of liability for intentional tort. Therefore, for the same reasons, it is fitting that the question of punitive damages be determined class wide.

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<sup>10</sup> The Court agreed to revisit this issue if Defendants submitted authority that determining punitive damages in the first phase trial was not proper.

*Day v. NLO*, 851 F.Supp. 869, 884-85 (S.D. Ohio 1994). (Emphasis added); see also *Chesher v. Neyer*, 215 F.R.D. 544 (S.D. Ohio 2003).

Not only have courts nationwide treated punitive conduct and punitive damages as class-wide issues, they have regularly adopted trial plans requiring these issues to be adjudicated in the first phase trial, along with class-wide liability. Summarizing the practice of courts nationwide when structuring class action trials in cases involving punitive damages, one court observed:

Courts have routinely adopted the approach advocated by plaintiffs in which the first phase of the proceedings focuses exclusively on class wide claims, e.g., whether a defendant has in fact engaged in discriminatory employment practices. A jury verdict in favor of plaintiffs at this phase would result in injunctive and declaratory relief, and possibly, punitive damages. Individual compensatory damages would be resolved in the second phase of the proceedings which, since they would adjudicate individual claims, would not involve the "same issues" as did the first phase.

*Butler v. Home Depot, Inc.*, 1996 WL 421436 (N.D. Cal., Jan. 25, 1996); accord, *Robinson*, 267 F.3d at 168; *Sterling*, 855 F.2d at 1217; *Day*, 851 F.Supp. at 884-85; *Kernan v. Holiday Universal, Inc.*, 1990 WL 289505 (D. Md., Aug. 14, 1990); *Jenkins.*, 109 F.R.D. at 281-82 (E.D.Tex. 1985), *aff'd* 782 F.2d 468 (5<sup>th</sup> Cir. 1986); *Stender v. Lucky Stores, Inc.*, N.D. Cal. No. 88-CV-1467; *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370, 375 (N.D.Ill. 1997) *In re Fibreboard*, 893 F.2d 706 (5<sup>th</sup> Cir. 1990); *Hewlett v. Premier Salons International, Inc.*, 185 F.R.D. 211 (D. Md. 1997). This approach forestalls the danger of the defendant being punished twice for the same punitive conduct. See *In Re Air Crash Disaster at Stapleton International Airport*, 720 F.Supp. 1455 (D. Colo. 1988).

Procedural case management in class action cases is left to the discretion of the trial court. Due deference must be given to the trial court's procedural decisions, because that court routinely handles case management problems and is in the best position to analyze the difficulties that can be anticipated in the litigation of class actions. *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St.3d 200, 201; *Reynolds v. CSX Transportation, Inc.*, (Oh. App. 1989), 55 Ohio App.3d. 19, 24.

In the state of Ohio, where the law provides that punitive damages may not be awarded in the absence of proof of actual damages, it is not error for the court to provide for allocation of punitive damages based on the defendant's overall conduct at a stage prior to the allocation of actual damages. "The relative timing of these assessments is not critical." *Reynolds*, 55 Ohio App. at 24, citing *Jenkins*, 782 F.2d at 474. Where the controlling issue on punitive damages is the common course of conduct by the defendant, "the punitive damages issue can be decided by a jury other than the one that may hear the individual claims of causation and actual damages." *Reynolds*, 55 Ohio App. at 24.

#### **G. THE MANNER IN WHICH EVIDENCE RELATING TO PUNITIVE DAMAGES WILL BE PRESENTED**

The very same evidence that will be used to establish a common course of illegal conduct resulting in injury to Class Members will be used to establish the following punitive damages elements:

1. Evidence of the "duration of the misconduct. KRS 411.186(2)(d);

2. Evidence of the Diocese's concealment of its misconduct and its concealment of those settlements by the secrecy clauses that are in those documents. KRS 411.186(2)(d);
3. Evidence that the Diocese's awareness of future harm to children entrusted to the care of its employees existed to a great "degree of ... likelihood." KRS 411.186(2)(b);
4. Evidence that the Diocese knew that there was a high degree of "likelihood...that serious harm would arise from [The Diocese's] misconduct," in failing to curtail inappropriate sexual activities of its clergy. KRS 411.186(2)(a);
5. Evidence of misrepresentations to victims in order to induce them to secretly settle their claims. KRS 411.186(2)(d).
6. Evidence that the Diocese's misconduct in tolerating child sexual abuse and in hiding it has been highly profitable because the amounts it has paid out to persons harmed has been less of an expense than the proceeds it would have lost in contributions had its reprehensible conduct been known. KRS 411.186(2)(c);
7. Evidence that the Diocese has taken no action to remedy the horrendous effect of its misconduct on the Class Members, KRS 411.186(2)(e), but instead has only settled with victims who have the strength and daring to come forward; and
8. Evidence that the Diocese needs to be discouraged from similar conduct in the future. KRS 411.184(1)(f);

Proof of intentional concealment, minimization, and misrepresentation can support a punitive damages award. *Owens-Corning Fiberglass Corporation v. Golightly*, Ky., 976 S.W. 2d 409 (1998). The Diocese's conduct for over 50 years in concealing, protecting and tolerating perpetrators, goes directly to this point.

Because the identical evidence used to establish the common issues is used to establish liability for punitive damages to the class, it is eminently logical to have punitive damages determined in the first phase trial.

#### **H. STATUTE OF LIMITATIONS ISSUES**

Defendants are asserting the statute of limitations as a defense. This defense assumes that the Class Members all have valid legal claims for child sexual abuse at the hands of the Diocese, but that they have come forward too late to raise these claims.

##### **1. THE ISSUE OF TOLLING THE STATUTE OF LIMITATIONS**

The leading case on this issue is *Roman Catholic Diocese of Covington v. Sectar*, Ky. App., 966 S.W.2d 286 (1998). There, in a virtually identical case involving an individual claim of child sexual abuse against the same defendants, the court of appeals affirmed the trial court's ruling that, because there existed material factual issues regarding application of the statute of limitations defense, that defense had to be determined by the jury. 966 S.W.2d at 288-89. The court held that "the Diocese clearly obstructed the prosecution of Sectar's cause of action against it by continually concealing the fact that it had knowledge of [the abusive priest's] problem well before the time that Sectar was abused as well as the fact that it continued to receive reports of sexual abuse of other students

during part of the time period in which Sector was abused." 966 S.W.2d at 290. Because concealment tolls the statute of limitations and there was evidence of concealment, the jury was required to determine that issue. (Id.). The Sixth Circuit Court of Appeals agrees that the issue of tolling the statute of limitations is a jury question. *Ott v. Midland-Ross Corp.*, 600 F.2d 24,31 (6th Cir. 1979).

## 2. THE ISSUE INVOLVING ESTOPPEL OF DEFENDANTS FROM ASSERTING THE STATUTE OF LIMITATIONS

A legal theory applicable to the statute of limitations issue that was not considered in *Sector*, but is clearly applicable here, is that where there the defendant owes a fiduciary duty to the plaintiff, the defendant is estopped from asserting the statute of limitations. *Strode V. Spoden*, Ky., 284 S.W.2d 663, 665 (1955). The Kentucky Supreme Court has held that where a party occupies a position of a fiduciary or position of special confidence, such a party may not rely upon the statute of limitations and those claiming through him would also be estopped from asserting limitations. (284 S.W.2d at 665. Especially is this true where those relying on the statute of limitations to the detriment of Plaintiffs have, through their own actions, prevented Plaintiffs from discovering and asserting their rights before the statute had run.

Very relevant to the factual development of this issue is the fact that victims of childhood sexual abuse are prevented, by the resulting emotional trauma, from coming forward to make a complaint. Plaintiffs will present expert testimony on this issue. An example of such testimony is contained in the affidavit of Dr. Rena Kay a long-time specialist in treating childhood sexual abuse. "The feelings that result from the sexual abuse experience are sufficient



to silence the victim long after the event. Feelings toward him/herself typically include feelings of being bad, sinful, dirty, tainted, contaminated, unloved, worthless, and different from others. There are feelings of shame, guilt, and social disapproval as well as feelings of helplessness, passivity, powerlessness, and fear." (Ex. A, Affidavit of Dr. Kay). Victims repress their memory of the events and engage in denial. It is often decades later when an adult in psychological distress gains the strength to seek professional help. While the victim may be aware of the abuse he suffered as a child, he may have no knowledge that his current symptoms, such as difficulty in relationships, guilt feelings, feelings of worthlessness, etc., were caused by that abuse. (Id.).

When the abuse was caused by a loved and trusted religious figure such as a priest, it is even more difficult to come forward. "When the perpetrator is a respected and admired person, an authority figure seen as knowing better than the child what is right and wrong, when the perpetrator is someone the child has depended upon, and even loved, reporting the abuse is seen as a betrayal of the adult and of the positive aspects of the relationship." (id.) "Fear of rejection, condemnation, and retaliation will often outweigh any urge to report." (id.). Plaintiffs will argue at trial that, by causing their emotional injury, the diocese has prevented them from coming forward in a timely fashion.

Plaintiffs' expert witness on canon law will establish that a fiduciary duty ran between the Diocese and the children of the Diocese who were indoctrinated to place their complete trust in priests and bishops as representatives of God. He will opine that the Diocese violated that duty by the course of conduct alleged.

He will also establish that a fiduciary duty ran between the priests of the Diocese and the children of the Diocese. Since the Diocese had it within its power to prevent their priests from breaching their duties, it carries the same fiduciary responsibility as the priest. Thus, Plaintiffs will offer evidence that the Diocese may not rely upon the statute of limitations.

Even if the Diocese itself is not found to be a fiduciary, but the abusive priests are found to be fiduciaries, the law holds that where a party has it within its power to act to prevent a fiduciary from breaching his duties and remains passive, it participates in the violation of the fiduciary duty and itself becomes liable. *Steelvest*, 807 S.W.2d 476, 485 (1991).

## **II. SUMMARY JURY TRIAL**

While Class Counsel recommend that Court conduct a first phase trial as discussed above, one alternative utilized by some courts is the Summary Jury Trial. This is not actually a trial that produces a binding result, but it is a settlement device. It was used locally in the case of *In re Teletronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prod. Liab. Litig.*, 137 F.Supp. 985, 993 n. 8 (S.D. Ohio 2001). In the Summary Jury Trial, the attorneys present evidence in a summary fashion without calling witnesses. The attorneys base their presentation on summary charts, excerpts of depositions and affidavits, and exhibits. The jury is selected in the manner as a normal trial, However, the verdict they render is an advisory verdict on all the legal issues. They also assess advisory damages. The verdict is not binding, but it assists the parties in resolving the case through settlement. The summary trial in *Teletronics* lasted

five trial days. The case was settled as a result of the summary trial. The class action case on behalf of residents against the Fernald atomic weapons plant was also settled after a summary trial.<sup>11</sup>

### **III. DEFINITIONS OF TERMS**

#### **A. PATTERN OR PRACTICE/COURSE OF CONDUCT**

A pattern or practice, or course of conduct, is shown when the evidence demonstrates that the conduct alleged is the defendant's standard operating procedure. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336-37 (1977); *Robinson*, 267 F.3d at 158. The conduct must consist of something more than an isolated, insignificant, sporadic incident. It must be a repeated, routine, or generalized procedure. (Id.)

#### **B. NEGLIGENCE HIRING**

The tort of negligent hiring occurs when an employer negligently places a person with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which it should have been foreseeable that the individual posed a threat of injury to others. *Oakley v. Flor-Shin, Inc.*, Ky. App., 964 S.W.2d 438, 441-42 (1998); and Section 302 B, Section 449, Restatement (Second) of Torts; Section 213, Restatement (Second) of Agency (1958).

#### **C. NEGLIGENCE RETENTION**

The tort of negligent retention occurs when an employer is aware, or should have been aware, that an employee poses a threat to others and fails to take

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<sup>11</sup> *Day v. NLO*, referred to earlier in this brief, is the class action case on behalf of employees of the Fernald atomic weapons plant.

remedial measures to ensure the safety of others. *Oakley v. Flor-Shin, Inc.*, Ky. App., 964 S.W.2d 438, 441-442 (1998); and Section 302 B, Section 449, Restatement (Second) of Torts.

#### **D. FIDUCIARY RELATIONSHIP/BREACH OF FIDUCIARY DUTY**

The concepts of a fiduciary relationship and breach of that relationship play a two-fold role in this case. First, they are relevant to whether Defenants are estopped from asserting the statute of limitations and/or whether the statute of limitations is tolled due to fraudulent concealment. Second, breach of fiduciary is a form of negligence and provides the basis for substantive liability.

A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him. *Monumental Life Ins. Co. v. Nationwide Retirement Solutions, Inc.*, 242 F.Supp. 2d 438, 449 (2003), citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 485 (1991). See also *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 420 (2d. Cir. 1999). One who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a duty to protect the other against unreasonable risk of physical harm. The special relationship thus formed between a Diocese and its minor students and parishioners imposes an affirmative duty on the Diocese, its priests, and administrators to take all reasonable steps to prevent foreseeable

harm to these minors. *Williams v. Ky. Dep't of Educ.*, Ky., 113 S.W.3d 145, 148 (2003); Restatement (Second) of Torts, §314(A)(4), Comment d.

Once a fiduciary relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence. Proof of a fiduciary relationship, therefore, generally imposes a twofold burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence. *Monumental Life Ins. Co. v. Nationwide Retirement Solutions, Inc.*, 242 F.Supp. 2d 438, 449 (2003), citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 485 (1991). See also *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 420 (2d. Cir. 1999).

#### **E. TORT OF OUTRAGE**

The tort of Outrage requires that:

1. the wrongdoer's conduct is intentional or reckless;
2. the conduct is outrageous and intolerable in that offends against the generally accepted standards of decency and morality;
3. there is a causal connection between the wrongdoer's conduct and the emotional distress injury of the plaintiffs; and
4. the emotional distress is severe.

*Craft v. Rice*, Ky., 671 S.W.2d 247 (1984), adopting Section 46 of the Restatement (Second) of Torts (1965):

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

See also *Humana of Kentucky, Inc. v. Seitz*, Ky., 796 S.W.2d 1, 2-3 (1990); *Burgess v. Taylor*, Ky. App., 44 S.W.3d 806, 811-12 (2001); *Brewer v. Hillard*, Ky. App., 15 S.W.3d 1 (1999).

The special relationship between a parishioner and his priest can make conduct outrageous. The conduct, combined with the relationship, can form the basis for the tort of Outrage. *Osborne v. Payne*, Ky., 31 S.W.3d 911 (2000).

#### **F. CIVIL BATTERY**

Under Kentucky common law, a civil battery consists of an unlawful touching of any unlawful touching of the person of another, either by the aggressor himself or by any substance set in motion by him. The intent necessary for batter is not necessarily a hostile intent or an intent to cause harm, it is simply the intent to have the contact in question. If the resultant contact is harmful to the person of another, there is liability. *Vitale v. Henchey*, Ky. 24 S.W.3d 651, 657 (2000).

#### **G. ASSAULT IN THE FOURTH DEGREE**

A person is guilty of assault in the fourth degree when:

1. He intentionally or wantonly causes physical injury to another person; or
2. With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

KRS 508.030.

An individual may bring a civil action in Kentucky for damages inflicted by an assault or an assault and battery. KRS 411.010.

#### H. AIDING AND ABETTING/COMPLICITY

A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

1. Solicits, commands, or engages in a conspiracy with such other person; or
2. Aids, counsels, or attempts to aid such person in planning or committing the offense; or
3. Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

KRS 502.020.

#### I. RATIFICATION

Where the principal condones or expresses consent to the actions of its agent, the principal has ratified the actions of the agent. Ratification occurs whether the actions of the agent are beneficial or detrimental to the principal and whether the ratification is express or implied. *Walker v. Norris*, 917 F.2d 1449, 1457 (6th Cir. 1990); Ky. App., *Capurso v. Johnson*, 248 S.W.2d 908, 910 (1952); *Hofgesang v. Silver*, Ky. App., 23 S.W.2d 945, 947 (1930).



## J. PUNITIVE DAMAGES

A plaintiff "shall" recover punitive damages when he proves, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice. KRS 411.184(2).

"Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship. KRS 411.184 (1)(a).

"Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff. KRS 411.184(1)(b).

"Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm. KRS 411.184(1)(c).

"Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future. KRS 411.184(1)(f).

In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question. KRS 411.184(3).

In determining the amount of punitive damages to be assessed, the trier of

fact should consider the following factors:

- (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the misconduct to the defendant;
- (d) The duration of the misconduct and any concealment of it by the defendant; and
- (e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

KRS 411.186.

#### CONCLUSION

Class Counsel understand the Court's order to require a detailed plan of the first phase common issues class trial. Typical jury interrogatories have been provided in Plaintiffs' original Trial Plan. Additional interrogatories will be furnished on request. The second phase trial will consist of individual determinations of compensatory damages for each Class Member. There are numerous methods of efficiently conducting this second phase, which are beyond the scope of this brief. Class Counsel will be pleased to brief the second phase trial whenever the Court wishes.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served by facsimile on April 2, 2004, to Mark D. Guilfoyle, Deters, Benzinger & LaVelle, P.S.C., 2701 Turkeyfoot Road, Crestview Hills, KY 41017, 2003 and Carrie Huff, Esq., Mayer, Brown, Rowe & Maw, LLP, 190 South LaSalle Street, Chicago, IL 60603.



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Robert A. Steinberg

# EXHIBIT A

COMMONWEALTH OF KENTUCKY  
BOONE CIRCUIT COURT  
CASE NO: 03-CI-181  
JUDGE: John W. Potter

CARL COE, et al.

PLAINTIFFS

vs.

ROMAN CATHOLIC DIOCESE OF COVINGTON

DEFENDANT

AFFIDAVIT OF RENA L. KAY, M.D.

STATE OF OHIO            )  
                                  ) ss:  
COUNTY OF HAMILTON )

I, Rena L. Kay, M.D., being first duly cautioned and sworn, hereby state as follows:

1. I am a physician specializing in psychiatry. I was licensed to practice as a psychiatrist in 1971. I completed residency training in adult psychiatry, child psychiatry, and adolescent psychiatry in 1975. I was board certified in 1977 by the American Board of Psychiatry and Neurology. I have been a member of the Faculty of the Cincinnati Psychoanalytic Institute since completing analytic training in 1990. In 1995 I was certified by the Board on Professional Standards of the American Psychoanalytic Association. Later the same year I was appointed a Training and Supervising Analyst, the highest position academically and professionally in psychoanalysis. I have served on the Faculty of the University of Cincinnati College of Medicine, Department of Psychiatry, Cincinnati, Ohio, since 1975. I have served as clinical professor of psychiatry at the Wright State University School of Medicine, Department of Psychiatry, Dayton, Ohio since 1991.



2. I have worked clinically with psychiatric patients continuously for thirty years. Over these thirty years, I have worked with increasing percentages of patients with histories of previous trauma, such as childhood sexual abuse. I have specialized in the treatment of adults who have histories of childhood sexual abuse. I have taught courses on trauma and its treatment. I have written and presented papers on related subjects, both locally and at several other university-sponsored programs around the country. My curriculum vitae are attached hereto as Exhibit A.

3. It is my opinion that it is very unlikely that most victims of childhood sexual abuse will come forward and report that abuse to a court or an attorney. My opinion is based upon authoritative treatises and 30 years of treatment experience with sexual abuse victims. When a child is sexually molested, it is the exception rather than the rule for the child ever to tell anyone about his/her experience. Of those sexual abuse victims who do report the abuse to a court or attorney, it is not unusual that they are unable to make the report until decades later. Post traumatic stress disorder, with its attendant symptoms, makes it very difficult, if not impossible, for sexual abuse victims to come forward. Victims often repress their memory of the events and engage in denial. When an adult in psychological distress seeks professional help, often decades after the childhood abuse, it is commonplace for the patient not to mention the abuse initially. This is so even when the patient is aware of the likely connection between the earlier experience and current symptoms. When the patient does reveal the abuse to a trusted psychological counselor, it is usual for him/her to report having kept the experience secret until that moment. Revealing childhood sexual abuse even to a trusted psychological treater is ordinarily accompanied by intense anxiety and



shame. Often there is guilt and fear of retribution by the perpetrator and fear of being blamed by the treater. Such fears and the years of silence may or may not be in response to specific threats, warnings or pleas for protection voiced by the perpetrator.

4. The feelings that result from the sexual abuse experience are sufficient to silence the victim long after the event. Feelings toward him/herself typically include feelings of being bad, sinful, dirty, tainted, contaminated, unloved and unlovable, worthless, and different from others. There are feelings of shame, guilt, and social disapproval as well as feelings of helplessness, passivity, powerlessness, and fear. Despite understanding that other children and adolescents are not in control and not responsible for events between themselves and abusive adults, a different feeling about one's own experience powerfully persists in the sexual abuse victim. The victim experiences a feeling of having caused the adult's behavior, and the belief that he/she should have been able to stop it. This results in intense and long-lasting guilt. When the perpetrator is a respected and admired person, an authority figure seen as knowing better than the child what is right and wrong, when the perpetrator is someone the child has depended upon, and even loved, reporting the abuse is seen as a betrayal of the adult and of the positive aspects of the relationship. Feelings are at best mixed, and fear of hurting the perpetrator may be very strong. Despite co-existing intense feelings of anger at having been used or betrayed, the fear of being hurtful or mean – "just like him" – if the incident is reported can be paralyzing. If reporting the abuse leads to any gain, financial or

otherwise, the adult child victim is likely to experience even greater conflict. Fear of rejection, condemnation, and retaliation will often outweigh any urge to report.

5. When the abuser is a trusted religious person, whom the victim has been indoctrinated to believe is a God-like figure; and has been told to always obey and trust; who has the religious power to forgive the child; and who is a highly revered figure in the religious organization and among parishioners, the pressure against reporting the event is even greater than as described above.

6. Those who do eventually report childhood sexual abuse incidents often do so after decades of agonizing and repression. It is very unlikely that individuals abused as children during the 1990's will report these incidents at the present time.

7. Of the numerous patients I have treated for childhood sexual abuse over a thirty-year period, only an estimated 6% percentage have reported abuse incidents outside the medically privileged setting.

5. Sexual abuse meets medical criteria outlined in DSM-IV (APA 1994) for events that cause Post Traumatic Stress Disorder (PTSD). PTSD refers to the psychological reactions that typically occur as a result of a disaster or an extreme psychological stressor. The criteria include:

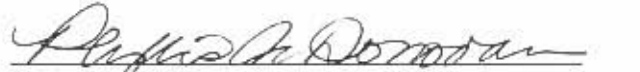
- a. The person experienced, witnesses or was confronted with an event or events that involve actual or threatened death or serious injury or a threat to the physical integrity of self or others and

b. The person's response involves intense fear, helplessness or horror, or in children disorganized or agitated behavior.

Those suffering from PTSD commonly make deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event and to avoid activities or people who arouse recollections of it.

  
Rena L. Kay, M.D.

Sworn to and subscribed to before me this 4<sup>th</sup> day of February 2004.

  
Notary Public  
My Commission Expires: 2/2/2007

COPY LIST OF AUTHORITIES

## LIST OF AUTHORITIES

- (1) Davies, J. and Frawley, M. (1994): *"Treating the Adult Survivor of Childhood Sexual Abuse"*, Basic Books.
- (2) Herman, Judith (1981): *"Father-Daughter Incest"*, Harvard University Press
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- (6) Reviere, Susan (1996): *"Memory of Childhood Trauma"*, Guilford Press.
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- (10) Wilson, Friedman and Lindy (2001): *"Treating Psychological Trauma"*, Guilford Press.