CV 93 0300272S
GEORGE L. ROSADO, ET AL

SUPERIOR COURT

VS.

JUDICIAL DISTRICT
OF FAIRFIELD

BRIDGEPORT ROMAN CATHOLIC
DIOCESAN CORPORATION, ET AL

DECEMBER 8, 1994

MEMORANDUM OF DECISION
RE MOTIONS FOR PROTECTIVE ORDERS

The plaintiff alleges that he was sexually assaulted by the defendant Raymond Pcolka while Pcolka was a priest employed by the defendant Bridgeport Roman Catholic Diocesan Corporation (Diocese). During the times that the plaintiff alleges that he was assaulted by Pcolka, the defendant Bishop Walter Curtis was the chief officer of the Diocese. The plaintiff alleges that the Diocese and Bishop Curtis are liable for his assault based on their negligent supervision of Pcolka and on the doctrine of respondeat superior.

The plaintiff noticed the depositions of Pcolka, Bishop Curtis and Bishop Edward Eagan. Pursuant to Practice Book § 244(f)[1] the plaintiff included in that notice a request that the

[1] Practice Book § 244(f) provides: "The notice [of deposition] to a party deponent may be accompanied by a request made in compliance with Sec. 226 for the production of documents and tangible things at the taking of the deposition. The procedure of Sec. 226 shall apply to the request."

Practice Book § 226 merely is a heading for subsequent sections pertaining to requests for production, inspection and examination. Practice Book § 227 provides: "(a) In any civil action, in any probate appeal, or in any administrative appeal where the court finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sec. 120 upon any other party a request to afford the party submitting the request the opportunity to inspect, copy,

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defendants produce certain documents at those depositions. Pursuant to Practice Book § 221[2], the defendants have moved for

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photograph or otherwise reproduce designated documents (including, but not limited to, writings, drawings, graphs, charts, photographs and phonograph records) or to inspect and copy, test or sample any tangible things in the possession, custody or control of the party upon whom the request is served or to permit entry upon designated land or other property for the purpose of inspection, measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon. Such requests will be governed by the provisions of Sec. 217. In all personal injury actions except those alleging death or product liability, the requests for production served shall be limited to those set forth in Practice Book Forms 106.11A and 106.11B, unless, upon motion, the court determines that such requests for production are inappropriate or inadequate in the particular action.

"Requests for production may be served upon any party without leave of court at any time after the return day.

"The request shall clearly designate the items to be inspected either individually or by category. The request shall specify a reasonable time, place and manner of making the inspection. Unless the court orders otherwise, the frequency of use of requests for production in all actions except those for which requests for production have been set forth in Practice Book Forms 106.11A and 106.11B is not limited.

"(b) The party serving such request shall not file it with the court."

[2] Practice Book "**Sec. 221. Protective Order (Discovery and Depositions)** Upon motion by a party from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

protective orders with respect to those requests to produce and also have moved for a protective order with respect to the "use and dissemination" of discovery information obtained through the depositions.

I.

With respect to the defendants' motion for protective order directed to the plaintiff's request that the defendants produce documents kept by them pertaining to the defendant Pcolka, the court finds that all such documents are contained in what constitutes a "personnel file", as defined in General Statutes § 31-128a(3).[3] This is so notwithstanding evidence that the Diocese, in fact, may not be the "employer" of Pcolka for all purposes. However, the plaintiff has alleged that the Diocese is Pcolka's employer, the Diocese and the Roman Catholic Church are organizations sui generis, and the evidence indicates that, if only for purposes of discovery, it is appropriate to treat the

[3] General Statutes § 31-128a(3) provides: "'Personnel file' means papers, documents and reports pertaining to a particular employee which are used or have been used by an employer to determine such employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee evaluations or reports relating to such employee's character, credit and work habits. 'Personnel file' does not mean stock option or management bonus plan records, medical records, letters of reference or recommendations from third parties including former employers, materials which are used by the employer to plan for future operations, information contained in separately maintained security files, test information, the disclosure of which would invalidate the test, or documents which are being developed or prepared for use in civil, criminal or grievance procedures . . . ."

Diocese as the employer. The contents of that personnel file are subject to disclosure in the discretion of the court pursuant to the express terms of General Statutes § 31-128f, notwithstanding Pcolka's claims to the contrary.

General Statutes § 31-128f provides in relevant part: "No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except . . . where the disclosure is made . . . (2) pursuant to a lawfully issued . . . judicial order, including a . . . subpoena, or in response to . . . defense of personnel-related complaints against the employer. . . ." Notably, neither this statute nor any other to which the court's attention has been directed confers a general privilege or confidential status on the personnel files of private institutions. Compare General Statutes §§ 52-146b to 52-146q; cf.General Statutes § 1-19(b)(2) (restricting the disclosure of personnel files of a public agency; **Hartford v. Freedom of Information Commission**, 201 Conn. 421, 429-30, 518 A.2d 49 [1986]).

That the file is *subject* to disclosure, however, does not end the matter. "'The granting or denial of a discovery request rests in the sound discretion of the court.' *Standard Tallow Corporation v. Jowdy*, 190 Conn. 48, 57, 459 A.2d 503 (1983); *Kiessling v. Kiessling*, 134 Conn. 564, 568, 59 A.2d 532 (1948). That discretion applies to 'decisions concerning whether the information is

material, privileged, substantially more available to the disclosing party, or within the disclosing party's knowledge, possession or power . . . .' *Standard Tallow Corporation v. Jowdy*, supra, 59-60." **Brown v. Housing Authority**, 23 Conn. App. 624, 583 A.2d 643 (1990). "'Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'" **State v. Arbour**, 29 Conn.App. 744, 748, 618 A.2d 60 (1992).

Generally, the rules of civil discovery are liberally construed. **Lougee v. Grinnell**, 216 Conn. 483, 489, 582 A.2d 456 (1990); **Sanderson v. Steve Snyder Enterprises, Inc.**, 196 Conn. 134, 140, 491 A.2d 389 (1985). This judicial policy, however, is qualified where the object of discovery is a personnel file. "The disclosure of such information must be carefully tailored to a legitimate and demonstrated need for such information in any given case. Where disclosure of the personnel file would place in the hands of a [party] irrelevant or personal and sensitive information concerning . . . [another], the entire file should not be disclosed. No . . . [party] has the right to conduct a general 'fishing expedition' into the personnel records of a[nother]. Any request for information that does not directly relate to legitimate issues that may arise in the course of the . . . [trial] ought to be denied. In recognizing the danger of permitting the disclosure of personnel records of any witness or litigant, one court has said: 'It has been widely noted that such

records often contain raw data, uncorroborated complaints, and other information which may or may not be true but may be embarrassing, although entirely irrelevant to any issue in the case, even as to credibility.' *People v. Sumpter*, 75 Misc. 2d 55, 60, 347 N.Y.S.2d 670 (1973) Because discovery of matters contained in a . . . personnel file involves careful discrimination between material that relates to the issues involved and that which is irrelevant to those issues, the judicial authority should exercise its discretion in determining what matters shall be disclosed. An in camera inspection of the documents involved, therefore, will under most circumstances be necessary. See *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Commonwealth v. Dominico*, [1 Mass.App.Ct. 693, 306 N.E.2d 835 (1974)]; *People v. Bottom*, 76 Misc. 2d 525, 351 N.Y.S.2d 328 (1974). . . .[I]n resolving requests for disclosure, routine access to personnel files is not to be had. Requests for information should be specific and should set forth the issue in the case to which the personnel information sought will relate. The trial court should make available to the [party] only information that it concludes is clearly material and relevant to the issue involved. See *People v. Fraiser*, 75 Misc. 2d 756, 757, 348 N.Y.S.2d 529 (1973) (subpoena duces tecum issued for personnel files of police witnesses in prosecution for possession and sale of controlled drugs). In this regard, the trial court should exercise its discretion in deciding the temporal relevancy or remoteness of material sought. Cf. *State v. Carbone*, 172 Conn. 242, 262, 374

A.2d 215, cert. denied, 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977); *State v. Mahmood,* 158 Conn. 536, 540, 265 A.2d 83 (1969); *State v. Towles,* 155 Conn. 516, 523-24, 235 A.2d 639 (1967) (relating to the introduction of evidence at trial); see also 1 Wharton, Criminal Evidence (12th Ed.) 151. Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the teachings of reason and judicial experience." **State v. Januszewski,** 182 Conn. 142, 172-173, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S.Ct. 3159, 69 L.Ed.2d 1005 (1981); see **State v. Harris,** 227 Conn. 751, 765-768, 631 A.2d 309 (1993). Although **Januszewski** involved an attempt by a criminal defendant to subpoena the personnel file of a police officer witness in a criminal prosecution in order to impeach the officer's credibility, the policies and pronouncements in that case are largely applicable here. In camera review by the court reasonably satisfies the plaintiff's need for information necessary to establish his case while respecting a civil defendant's limited expectation of privacy in his personnel file as reflected in the implicit policy of General Statutes § 31-128f that the documents in such files not be cavalierly divulged by an employer.

Accordingly, the court has undertaken an in camera review of Pcolka's personnel file and orders certain documents disclosed to the plaintiff contemporaneously with the filing of this decision. The report of the Institute of Living, to which reference was made during oral argument, shall not be disclosed at this time, there

having been no showing that that report is not protected from disclosure by General Statutes §§ 52-146d to 52-146f.[4]

[4]General Statutes "**Sec. 52-146d. (Formerly Sec. 52-146a). Privileged communications between psychiatrist and patient. Definitions.** As used in sections 52-146d to 52-146i, inclusive:

"(1) 'Authorized representative' means (A) a person empowered by a patient to assert the confidentiality of communications or records which are privileged under sections 52-146c to 52-146i, inclusive, or (B) if a patient is deceased, his personal representative or next of kin, or (C) if a patient is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the patient, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the patient's nearest relative;

"(2) 'Communications and records' means all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any of such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, including communications and records which occur in or are prepared at a mental health facility;

"(3) 'Consent' means consent given in writing by the patient or his authorized representative;

"(4) 'Identifiable' and 'identify a patient' refer to communications and records which contain (A) names or other descriptive data from which a person acquainted with the patient might reasonably recognize the patient as the person referred to, or (B) codes or numbers which are in general use outside of the mental health facility which prepared the communications and records;

"(5) 'Mental health facility' includes any hospital, clinic, ward, psychiatrist's office or other facility, public or private, which provides inpatient or outpatient service, in whole or in part, relating to the diagnosis or treatment of a patient's mental condition;

"(6) 'Patient' means a person who communicates with or is treated by a psychiatrist in diagnosis or treatment;

"(7) 'Psychiatrist' means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified."

General Statutes "**Sec. 52-146e. Disclosure of communications.** (a) All communications and records as defined in section 52-146d shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Except as provided in

sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.

"(b) Any consent given to waive the confidentiality shall specify to what person or agency the information is to be disclosed and to what use it will be put. Each patient shall be informed that his refusal to grant consent will not jeopardize his right to obtain present or future treatment except where disclosure of the communications and records is necessary for the treatment.

"(c) The patient or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the person or office in which the original consent was filed. Withdrawal of consent shall not affect communications or records disclosed prior to notice of the withdrawal."

General Statutes "**Sec. 52-146c. Privileged communications between psychologist and patient.** (a) As used in this section:

"(1) 'Person' means an individual who consults a psychologist for purposes of diagnosis or treatment;

"(2) 'Psychologist' means an individual licensed to practice psychology pursuant to chapter 383;

"(3) 'Communications' means all oral and written communications and records thereof relating to the diagnosis and treatment of a person between such person and a psychologist or between a member of such person's family and a psychologist;

"(4) 'Consent' means consent given in writing by the person or his authorized representative;

"(5) 'Authorized representative' means (A) an individual empowered by a person to assert the confidentiality of communications which are privileged under this section, or (B) if a person is deceased, his personal representative or next of kin, or (C) if a person is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the person, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the person's nearest relative.

"(b) Except as provided in subsection (c) of this section, in civil and criminal actions, in juvenile, probate, commitment and arbitration proceedings, in proceedings preliminary to such actions or proceedings, and in legislative and administrative proceedings, all communications shall be privileged and a psychologist shall not disclose any such communications unless the person or his authorized representative consents to waive the privilege and allow such disclosure. The person or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the

individual with whom or the office in which the original consent was filed. The withdrawal of consent shall not affect communications disclosed prior to notice of the withdrawal.

"(c) Consent of the person shall not be required for the disclosure of such person's communications:

"(1) If a judge finds that any person after having been informed that the communications would not be privileged, has made the communications to a psychologist in the course of a psychological examination ordered by the court, provided the communications shall be admissible only on issues involving the person's psychological condition;

"(2) If, in a civil proceeding, a person introduces his psychological condition as an element of his claim or defense or, after a person's death, his condition is introduced by a party claiming or defending through or as a beneficiary of the person, and the judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the person and psychologist be protected;

"(3) If the psychologist believes in good faith that there is risk of imminent personal injury to the person or to other individuals or risk of imminent injury to the property of other individuals;

"(4) If child abuse, abuse of an elderly individual or abuse of an individual who is disabled or incompetent is known or in good faith suspected;

"(5) If a psychologist makes a claim for collection of fees for services rendered, the name and address of the person and the amount of the fees may be disclosed to individuals or agencies involved in such collection, provided notification that such disclosure will be made is sent, in writing, to the person not less than thirty days prior to such disclosure. In cases where a dispute arises over the fees or claims or where additional information is needed to substantiate the claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact receiving psychological services, (B) the dates of such services, and (C) a general description of the types of services; or

"(6) If the communications are disclosed to a member of the immediate family or legal representative of the victim of a homicide committed by the person where such person has, on or after July 1, 1989, been found not guilty of such offense by reason of mental disease or defect pursuant to section 53a-13, provided such family member or legal representative requests the disclosure of such communications not later than six years after such finding, and provided further, such communications shall only be available during the pendency of, and for use in, a civil action relating to such person found not guilty pursuant to section 53a-13."

General Statutes "**Sec. 52-146f. Consent not required for disclosure, when.** Consent of the patient shall not be required for

the disclosure or transmission of communications or records of the patient in the following situations as specifically limited:

"(1) Communications or records may be disclosed to other persons engaged in the diagnosis or treatment of the patient or may be transmitted to another mental health facility to which the patient is admitted for diagnosis or treatment if the psychiatrist in possession of the communications or records determines that the disclosure or transmission is needed to accomplish the objectives of diagnosis or treatment. The patient shall be informed that the communications or records will be so disclosed or transmitted. For purposes of this subsection, persons in professional training are to be considered as engaged in the diagnosis or treatment of the patients.

"(2) Communications or records may be disclosed when the psychiatrist determines that there is substantial risk of imminent physical injury by the patient to himself or others or when a psychiatrist, in the course of diagnosis or treatment of the patient, finds it necessary to disclose the communications or records for the purpose of placing the patient in a mental health facility, by certification, commitment or otherwise, provided the provisions of sections 52-146d to 52-146j, inclusive, shall continue in effect after the patient is in the facility.

"(3) Except as provided in section 17-295c, the name, address and fees for psychiatric services to a patient may be disclosed to individuals or agencies involved in the collection of fees for such services. In cases where a dispute arises over the fees or claims or where additional information is needed to substantiate the fee or claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact a patient; (B) the diagnosis; (C) the dates and duration of treatment; and (D) a general description of the treatment, which shall include evidence that a treatment plan exists and has been carried out and evidence to substantiate the necessity for admission and length of stay in a health care institution or facility. If further information is required, the party seeking the information shall proceed in the same manner provided for hospital patients in section 4-105.

"(4) Communications made to or records made by a psychiatrist in the course of a psychiatric examination ordered by a court or made in connection with the application for the appointment of a conservator by the probate court for good cause shown may be disclosed at judicial or administrative proceedings in which the patient is a party, or in which the question of his incompetence because of mental illness is an issue, or in appropriate pretrial proceedings, provided the court finds that the patient has been informed before making the communications that any communications will not be confidential and provided the communications shall be admissible only on issues involving the patient's mental condition.

"(5) Communications or records may be disclosed in a civil

II.

In his notices of deposition the plaintiff also has requested "[a]ll documents, correspondence, memoranda, notes, communications, concerning any complaints, investigations, disciplinary proceedings, or dispositions ever received by the diocese, the bishop or any agent of [sic] employee of the Diocese regarding sexual misconduct by [*any*] priests who at any time were members of the Diocese. Any records concerning any documents concerning sexual misconduct by [*any*] priests which may have been transferred or destroyed and are thus no longer in the possession of the Diocese." (Sic)

A request for production of documents whether made in connection with a notice of deposition or made independent of such

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proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when his condition is introduced by a party claiming or defending through or as a beneficiary of the patient and the court or judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between patient and psychiatrist be protected.

"(6) Communications or records may be disclosed to the commissioner of health services in connection with any inspection, investigation or examination of an institution, as defined in subsection (a) of section 19a-490, authorized under section 19a-498.

"(7) Communications or records may be disclosed to a member of the immediate family or legal representative of the victim of a homicide committed by the patient where such patient has, on or after July 1, 1989, been found not guilty of such offense by reason of mental disease or defect pursuant to section 53a-13, provided such family member or legal representative requests the disclosure of such communications or records not later than six years after such finding, and provided further, such communications shall only be available during the pendency of, and for use in, a civil action relating to such person found not guilty pursuant to section 53a-13."

a notice must be within the ambit of the scope of discovery as defined in Practice Book §218. See Practice Book §§ 227, 244(f). Practice Book § 218 provides in relevant part: "In any civil action . . . a party may obtain in accordance with the provisions of this chapter discovery of information or disclosure, production and inspection of papers, books or documents *material to the subject matter* involved in the pending action, *which are not privileged*, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of an other party, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*." (Emphasis added.)

It is axiomatic that whether evidence is admissible is a function of the manner in which that evidence is presented and the rules of evidence. However, in general, unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of an issue. **Burns v. Gould,** 172 Conn. 210, 214, 374 A.2d 193 (1977). The scope of discovery, therefore, must be ascertained with reference to the

issues in the case, recognizing, however, that "[i]nformation material to the subject matter of a lawsuit certainly includes a broader spectrum of data than that which is material to the precise issues raised in the pleadings." **Lougee v. Grinnell,** supra, 216 Conn. 489. (1990).

In his complaint, the plaintiff alleges that the Diocese and Bishop Curtis are liable to him for Pcolka's acts under the doctrine of respondeat superior and also because they were negligent in that they knew or should have known of Pcolka's aberrant conduct or nature yet permitted him to have access to young people.

"'The underlying rationale of the modern doctrine of respondeat superior . . . is that "every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others *while they are engaged upon his business* and within the scope of their authority." *Wolf v. Sulik,* 93 Conn. 431, 436, 106 A. 443 [1919]; *Durso v. A.D. Cozzolino, Inc.,* 128 Conn. 24, 27, 20 A. 2d 392 [1941]. But *it must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered* in order for the doctrine to apply.' (Emphasis added.) *Mitchell v. Resto,* 157 Conn. 258, 262, 253 A. 2d 25 (1968); see also *Cardona v. Valentin,* 160 Conn. 18, 22, 273 A. 2d 697 (1970) (employer liable for wilful torts of his employee when they are committed in furtherance of the employer's business)." **Gutierrez v. Thorne,** 13 Conn. App. 493, 537 A.2d 527 (1988). The

plaintiff has not explained, nor has the court divined, how pouring through the personnel files of numerous clergymen other than Pcolka could reasonably lead to the discovery of evidence material to the issue of respondeat superior.

With respect to the plaintiff's claim that the Diocese and Bishop Curtis were negligent in their supervision of Pcolka, the plaintiff argues that if they were allowed to uncover numerous other incidents of sexual abuse of children by other priests this would be evidence that the Diocese should have promulgated policies proscribing priests from bringing children to their private rooms. Firstly, that is not what he plaintiff has alleged. Secondly, assuming ad arguendo that Pcolka performed the heinous acts alleged against him, and that those acts were outside the scope of his employment; **Gutierrez v. Thorne**, supra, 13 Conn.App. 493-499; the Diocese and Bishop Curtis would be liable only if they knew or had reason to know that Pcolka had the propensity for such conduct. Restatement (Second) Torts § 317(b)(ii)[5], and Comment *c* of the Reporter's Notes thereto; **Simmons v. Baltimore Orioles, Inc.**, 712 F.Sup. 79, 81 (W.D.Va. 1989); **Peck v. Siau**, 65

[5] Restatement (Second) Torts § 317, entitled "Duty of Master to Control Conduct of Servant", provides: "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) *knows or should know of the necessity and opportunity for exercising such control.*" (Emphasis added.)

Wash.App. 285, 293-94, 827 P.2d 1108, 1113 (1992); **Broderick v. King's Way Assembly of God Church,** 808 P.2d 1211, 1221 (Alaska 1991); **Bender v. First Church of the Nazarene,** 59 Ohio App.3d 68, 571 N.E.2d 475 (1989); **Destefano v. Grabian,** 763 P.2d 275, 287-288 (Colo. 1988).

The plaintiff relies on **Hutchinson v. Luddy,** 606 A.2d 905 (Pa.Super. 1992), involving claims against a priest, a bishop and a diocese similar to those here. In that case, the trial court granted a widesweeping request for production, such as that sought here, and the appeals court affirmed. In **Hutchinson**, however, the issue was not whether such a request was within the scope of permissible discovery. Rather, the issue, as framed by the court on appeal was "whether a church can avoid the discovery of relevant information in a civil action against the church by putting it in a place which is designated by canon law as a 'secret archive.'" Id., 906. "It is the general rule that a case resolves only those issues explicitly decided in the case." **State v. Ouellette,** 190 Conn. 84, 91, 459 A.2d 1005 (1983).

It is, of course, *possible* that admissible evidence might be discovered were the court to allow the plaintiff to scour the personnel files of the many priests who have served the Diocese since its inception. That, however, is not the test to which this court is duty-bound to adhere. Broadly construing both the allegations of the complaint and the scope of discovery, the court finds that this request for documents is not *reasonably* calculated to lead to the discovery of admissible evidence. Practice Book §

218. Moreover, the evidence adduced by the Diocese established that attempting to comply with such a request would impose undue burden and expense on the Diocese. Practice Book § 221. As to this aspect of the subpoenas, the defendants' motion for a protective order is granted.

III.

The defendants seek a protective order prohibiting the disclosure to others of information and documents obtained through the depositions of the defendants and Bishop Eagan.

"At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective order, such as the one at issue here, may cause. As in all civil litigation, [the plaintiffs will obtain] the information they wish to disseminate only by virtue of the court's discovery processes." **Seattle Times Co. v. Rhinehart**, 467 U.S. 20, 32, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). In Connecticut, the rules authorizing such discovery are adopted by the legislature; see General Statutes §§ 52-148 to 52-159; and by the judiciary. Practice Book § 216 et seq; see **State v. Clemente**, 166 Conn. 501, 512-516, 353 A.2d 723 (1974). "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . . Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." **Seattle Times Co. v. Rhinehart**, supra.

"Moreover, pretrial depositions and interrogatories are not

public components of a civil trial. Such proceedings were not open to the public at common law . . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." (Footnote omitted.) **Seattle Times Co. v. Rhinehart,** supra, 467 U.S. 33.

"Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny . . . . In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." **Seattle Times Co. v. Rhinehart,** supra, 467 U.S. 33-34.

"Because of the liberality of pretrial discovery permitted by . . . [Practice Book § 216 et seq.], it is necessary for the trial court to have authority to issue protective orders conferred by . . . [Practice Book § 221]. It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. . . . There is an opportunity, therefore, for litigants to obtain -

incidentally or purposefully - information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. . . . The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders." (Footnotes omitted.) **Seattle Times Co. v. Rhinehart**, supra, 467 U.S. 34-36. "[T]herefore . . . where . . . a protective order is entered on a showing of good cause as required by . . . [Practice Book § 221], is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." Id., 37.

The defendants have advanced two principal grounds which, they claim, rise to the level of good cause for the issuance of a protective order. The first ground is that such an order is necessary to protect the reputation of the defendants, especially the Diocese, and persons affiliated with them. The Diocese claims that its ability to obtain young people as volunteers in its religious ceremonies and its ability to perform good works has already been hampered by the publicity surrounding this case and that such damage will continue unless the requested protective order issues. Having heard the evidence, the court is not persuaded that disclosure of the products of pretrial discovery will visit such serious permanent damage on the defendants which,

alone, would warrant, a protective order. In so holding, however, this court recognizes that at least one other court has held otherwise in an analogous situation; **Shenandoah Publishing House, Inc. v. Fanning**, 368 S.E.2d 253, 257-58 (Va. 1988); and that the Second Circuit Court of Appeals has observed that "[p]rotective orders are useful to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial. Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titilate the public." **Joy v. North**, 692 F.2d 880, 893 (2d Cir. 1982).

The second principal ground asserted by the defendants for a protective order is that such an order is necessary to protect the right and opportunity of each of the defendants to obtain a fair trial by jury. The evidence was that this case, and the plaintiff's allegations, have received significant and responsible media coverage. Yet, the media coverage which those allegations have received may pale in comparison to the exposure which the products of pretrial discovery would yield. Not inappropriately, much of that information would be republished or rebroadcast by the media prior to trial. Such exposure may well have a salutary effect, as the plaintiff claims, but that is not the purpose of pretrial discovery. **Joy v. North**, supra, 692 F.2d 893. Such pretrial media exposure of a case such as this indeed could impair the rights of the parties to receive a fair trial. **State v. Crafts**, 226 Conn. 237, 257-59, 627 A.2d 877 (1993); **State v.**

Townsend, 211 Conn. 215, 225-26, 558 A.2d 669 (1989). It is, after all, the business of the Superior Court to provide private litigants an opportunity to adjust their grievances on their merits in a fair trial culminating in a final judgment. **Killingly v. Connecticut Siting Council**, 220 Conn. 516, 532, 600 A.2d 752 (1991); **Corey v. Avco-Lycoming Division**, 163 Conn. 309, 316-17, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S.Ct. 903, 34 L.Ed2d 699 (1972). A fair and impartial jury obtained from a fair cross section of the community, is an indispensable component of a fair jury trial. **State v. Castonguay**, 194 Conn. 416, 420, 481 A.2d 56 (1985); **State v. Townsend**, 167 Conn. 539, 551, 356 A.2d 12, cert. denied, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 62 (1975); see Conn. Constit., art. I, § 19; see also **J.E.B. v. Alabama ex rel. T.B.**, U.S. , 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); **Georgia v. McCollum**, 505 U.S. , 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); **Edmondson v. Leesville Concrete Co.**, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); **Powers v. Ohio**, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); **Martins v. Connecticut Light & Power Co.** 35 Conn.App. 212, 222-226, 645 A.2d 557, cert.denied, 231 Conn. 915, 648 A.2d 154 (1994). We should aspire to achieve as impartial a jury from as broad a cross-section of the community for the fairest trial possible. Where, as here, prophylactic measures may be timely employed, settling for the minimum in fairness ought not to be the goal of any court.

"Even if the pending litigation is a matter of public interest rather than an ordinary dispute between private

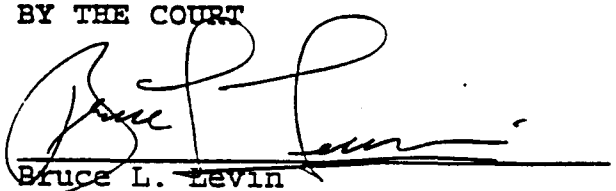
litigants," Practice Book § 221 provides that a protective order may be issued "for good cause shown"; a higher standard, such as compelling cause, need not be satisfied. **Bowlen v. District Court,** 733 P.2d 1179, 1183 (Colo. 1987). "A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements." (Authorities omitted.) **Anderson v. Cryovac, Inc.,** 805 F.2d 1, 7-8 (1st Cir. 1986).

Specific evidence of widespread media coverage was presented to the court. This court also takes judicial notice of media coverage of this case after the close of the evidence and at the end of the hearing, albeit not for the truth of the matters asserted therein. **Anderson v. Cryovac, Inc.,** supra, 805 F.2d 8; **State v. Boucher,** 207 Conn. 612, 615-616, 541 A.2d 865 (1988). The parties' right to a fair and impartial jury comprised of a fair cross section of the community, already problematical because of the classic collision between that right and the right, and necessity, for a free and open press, will become further imperiled unless that right is protected by an appropriate order of the court. For this good cause, and because edification of the public is not a proper purpose of pretrial discovery; **Joy v. North,** supra, 692 F.2d 893; the motion of defendants Diocese and Bishop Curtis for a protective order is granted, pursuant to Practice Book § 221 and **Seattle Times Co. v. Rhinehart,** supra, until further order of the court and with the caveat that it shall "not restrict the dissemination of the information if gained from other sources. . . ." **Seattle Times Co. v. Rhinehart,** supra, 37.

The text of that protective order is an addendum hereto.

In summary, the parties shall be permitted access to certain of the contents of the defendant Pcolka's personnel file, which has been examined by the court in camera, and the defendants' motions for a protective order with respect to personnel files other than that of Pcolka and with respect to the disclosure of information and documents obtained by way of pretrial discovery from any of the defendants or from Bishop Eagan are granted.

BY THE COURT



Bruce L. Levin
Judge of the Superior Court