STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPREME COURT

CHRISTOPHER YOUNG

V.

No. 7-11-07

LOUIS E. GELINEAU; DANIEL P. REILLY; KENNETH A. ANGELL; ROBERT E. MULVEE; THOMAS J. TOBIN; CHURCH OF THE HOLY FAMILY; THE ROMAN CATHOLIC BISHOP OF PROVIDENCE, a Corporation Sole; JOHN PETROCELLI; and JOHN/JANE DOE 1-250, AND XYZ CORPORATIONS 1-250

THOMAS J. TOBIN'S
PETITION FOR WRIT OF CERTIORARI

Introduction

With respect to discovery matters: "Practical considerations dictate that parties not be permitted to roam in shadow zones of relevance and to explore a matter which does not appear germane merely on the theory that it might be so."[1]

Bishop Thomas J. Tobin, the Roman Catholic Bishop of Providence, seeks this Court's review of an order requiring him to produce to plaintiff Christopher Young, statements, memoranda and other documents concerning allegations, substantiated or not, made over the last

[1] *Amcast Industrial Corporation v. Detrex Corporation*, 138 F.R.D. 115, 118 (N.D. Ind. 1991) (quoting *Shepard's Discovery Proceedings in Federal Court*, §14.4 at 221 (2d ed. 1991)).

35 years against 83 priests - - whenever made - - who are not parties to this or any other pending action, and who are not alleged to have harmed him. Young's production request was nothing less than an attempt to "roam in the shadow zones of relevance" in the hopes of finding evidence of "cover-ups" of alleged priest misconduct sufficient to establish a Rule 406 "habit" or "routine practice" of covering up such allegations – so he can argue that the defendants acted in accordance with that "habit" or "routine practice" in his case. It is a request, sanctioned by the trial judge, that goes far beyond any probative evidence, and into large quantities of documents of, at best, marginal significance.

The trial judge ordered Bishop Tobin to produce the material, not on Rule 406 habit or routine practice grounds as asserted by Young, however, but rather on the grounds that it may fall within Rule 404(b)'s "common plan" exception to the general rule against admitting other bad acts evidence. But much of the material, over 90% in fact, concerns allegations made years after the assaults at issue in the underlying civil suits, and is devoid of any legitimate probative value to prove an existing "habit," "routine practice" or "common plan or scheme," prior to the assault on Young or any plaintiff in any of the pending lawsuits.

Bishop Tobin applies to this Court for relief for three basic reasons. First, the materials ordered to be produced contain very personal, private and confidential matters from the alleged victims' point of view, and are defamatory or reputation harming matters from the priests' point of view.[2] Second, production will require substantial costs in attorney review time,

[2] Compliance with the request would likely violate the privacy right of both accuser and accused. The right to privacy, guaranteed by Rhode Island General Laws §9-1-28.1, protects the right of third parties to be secure from unreasonable intrusion upon their physical solitude or seclusion; their right to be secure from appropriation of their name or likeness; their right to be secure from unreasonable publicity given to one's private life; and, their right to be secure from publicity that unreasonably places one in a false light before the public; and, other privacy rights

reproduction, and preparation of privilege logs. Third, and not least important, the requested discovery is irrelevant to the issues in the underlying claim as a matter of law.

Statement of the Case

Nature of Plaintiffs' Claims

Christopher Young and Marc Banville each have filed suit against several bishops who were incardinated within the Diocese of Providence. Each plaintiff alleges they were sexually molested by a priest in the Diocese – Young by John Petrocelli and Banville by Roland Lepire. Young alleges the individual Hierarchy defendants knew or should have known Petrocelli posed a danger prior to his assault on Young, but failed to take reasonable steps to prevent it. Banville alleges the same with respect to Lepire.

Banville claims he was molested by Lepire on a single occasion in 1981 when he was thirteen years old. He did not file suit, however, until 2003 when he was 34, and defendants' motion for summary judgment based on the statute of limitations bar is pending. Young alleges Petrocelli molested him on several occasions over a two year period - - beginning possibly as early as 1987 when he was eight years old. Young's claims, filed the day before his 24th birthday, are also the subject of a pending summary judgment motion based on the statute of limitations, and defendants are in the process of preparing a summary judgment motion on the separate

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applicable and available to non-parties to this litigation. Defendants are aware of several individuals who, upon alleging sexual assaults by one of the non-party priests, submitted claims for compensation privately within a pastoral compensation program initially established by defendant Bishop Mulvee. These individuals may have participated in the pastoral program with the expectation of continued confidentiality. Their right to privacy and the continued success of the pastoral program for assisting victims of sexual abuse will be jeopardized if their identities and personal information is divulged in this civil litigation.

grounds that there is no evidence that any of the Hierarchy defendants knew or should have known Petrocelli was a danger prior to his sexual assaults on Young.

Compelled Discovery at Issue

In December 2003, shortly after filing suit, Young filed the broadest possible request for production for the purpose of discovering other bad acts evidence. The request was made to each Hierarchical defendant[3] with the exception of Bishop Thomas J. Tobin who was not a named defendant at the time, and sought decades' worth of evidence hoping to discover failure to supervise evidence with respect to other non-party priests and alleged victims of sexual abuse. The request sought:

> Any and all documents *in the possession or control of Robert N. McCarthy*, as an employee or agent of the responding Defendant, including notes, memoranda, and any other documents of any description that refer or pertain to *any priest incardinated to any Roman Catholic Bishop of Providence* and/or any employee or agent of the responding Defendant.

(App. at 2) (emphasis added). Robert McCarthy had been appointed by defendant Bishop Gelineau in 1993 as the "suitable person" under the Canon Law to inquire, on the Bishop's behalf pursuant to Canons 1717-1719, into the facts and circumstances of alleged sexual misconduct by priests. (App. at 57-58, 72). Consequently, Young's request sought records concerning *any priest* McCarthy had conducted canonical investigations into on behalf of the Roman Catholic Bishop of Providence since 1993, as well as any records concerning allegations against any priest prior to 1993 that McCarthy had taken possession of during the course of his

[3] Louis E. Gelineau; Daniel P. Reilly; Kenneth A. Angell; Robert E. Mulvee; Church of the Holy Family; and the Roman Catholic Bishop of Providence, a Corporation Sole.

canonical investigations - - regardless of when they occurred in relation to when the defendants allegedly had notice Petrocelli and Lepire posed a danger. It was more than a mere fishing expedition, it was what one court has characterized as an effort to "drain the pond and collect the fish from the bottom." *Amcast*, 138 F.R.D. at 121 (quoting *In re: IBM Peripheral EDP Devices Anti-Trust Litigation*, 77 F.R.D. 39, 41-42 (N.D. Ca. 1977)).

Travel of the Production Request

After the request for production was filed in December 2003 nothing further was done on the case for approximately two years. (App. at 17-20). Stipulations extending the time to respond to the request were regularly filed during this time because a pastoral program had been instituted by Bishop Mulvee in accordance with advice from the Diocesan Review Board for the Protection of Children and Youth. (*Id.*). The program provided for payment of $25,000 to individuals claiming to have suffered any sexual abuse by a priest simply upon verification of the abuse, or if that amount was unsatisfactory, the claimant could ask for an arbitration proceeding where a retired trial judge from Massachusetts would determine an appropriate level of compensation between a minimum of $10,000 and a maximum of $50,000. (*Id.*). While many claimants participated in the program without counsel, many who appeared with counsel were represented by one or the other of the two counsel representing Banville and Young.

In the spring of 2005, Young requested mediation. (*Id.*). When the matter failed to resolve after the first mediation session, Young followed with a motion to compel production of the requested documents, but the parties agreed the defendants would "produce or otherwise respond to the Request for Production of Documents on or before July 15, 2005." (App. at 8). The Hierarchy defendants objected to the request, asserting that the requested discovery was

"overly broad," "unduly burdensome," "irrelevant" and "unlikely to lead to the discovery of admissible evidence." (App. at 9, 11). Moreover, none of the defendants had care or custody of any documents responsive to the request. (App. at 11-12).

On September 28, 2005 the Presiding Justice of the Superior Court assigned a single justice to manage several cases including *Banville* and *Young*. (App. at 13). Young then filed a motion to default[4] the named Hierarchy defendants, (App. at 14), and the defendants' objection once again reiterated that none of the named defendants had care, custody and control of the requested documents, and they therefore had no documents responsive to the request. (App. at 17-20). The trial judge assigned to manage these cases scheduled a January 30, 2006 hearing on the motion for default, (App. at 22), at which she also intended to hear the defendants' objection to an equally overbroad interrogatory, which asked the defendants to:

> List each incident of notice regarding *every allegation* of sexual assault or sexual misconduct *made against any* Roman Catholic priest incardinated under or serving within the Diocese of Providence *since 1971*, by date of notice, name and title of recipient of each notice, and name of each alleged perpetrator.

(App. at 5) (emphasis added).

Prior to the hearing the plaintiffs submitted memoranda to the trial judge asserting the information concerning allegations made against other non-party priests, both before and after the assaults on Young and Banville, was relevant because "*any information that pertains to how the Defendants treated or treat accusations against priests is relevant to Defendant's routine practice and is relevant and admissible under RIRE 406.*" (App. at 35) (emphasis added). Plaintiffs asserted that the defendants "engaged in a conspiracy to hide the conduct of priest[s]

[4] No motion to default was filed in *Banville* as no motion to compel production had previously been made in that case. (App. at 66).

who abused children in order to protect the priest[s] and themselves[,]" and that the defendants' "conduct in regard to the dozens of other priests who have been accused of sexual misconduct with a minor is relevant to, among other things, proving whether or not they had an express or implied policy that breached their duty to plaintiffs." (App. at 51). The defendants submitted a memorandum of law objecting to the discovery regarding the non-party priests, first arguing that the information gathered by McCarthy in the conduct of a Canon 1717 investigation into cleric misconduct fell within the clergy communicant privilege of R.I.G.L. §9-17-23.

Second, defendants disputed the plaintiffs' claim that evidence as to the misconduct of priests other than Lepire or Petrocelli, both before and after the assaults on Banville and Young, was somehow relevant to the claims or would lead to the discovery of relevant and admissible evidence. (App. at 42-45). Defendants also specifically disputed plaintiffs' reliance on Rule 406, and plaintiffs' claim that any evidence of a failure to supervise non-party priests in unrelated cases would constitute admissible "habit" or "routine practice" evidence under the rule. (*Id.*).

The trial judge first considered the defendants' contention that the requested documents were not in the defendants' care, custody and control. (App. at 67). The Hierarchy defendants' counsel explained to the trial judge that the requested documents were under the custody and control of the current Bishop of Providence, Thomas J. Tobin, held either by the Chancellor of the Diocese of Providence, his appointee, or by his canonical investigator, Robert McCarthy. (App. at 72-77). Consequently, the parties agreed to amend the complaint to add Bishop Tobin as a defendant and to "consider Bishop Tobin as a person who is in the custody, care and control of the documents requested in the request for production." (App. at 80-82). An oral motion to amend the complaint was granted and the trial judge acknowledged the request for production would be "considered as though it's served upon Bishop Tobin," and there was therefore no

formal resolution of the motion to default. (App. at 83). The trial judge then overruled the defendants' privilege objection to the requested discovery, finding that the information acquired by McCarthy in conducting Canon 1717 investigations was not privileged under 9-17-23. (App. at 83-86). She deferred any ruling on "nonprivilege" objections until the parties had a further chance to confer on them. (App. at 92-93).

Substance of Trial Judge's Ruling on Other Bad Acts Evidence

On February 2, 2006 the parties returned to Court and addressed the "non-party priest" interrogatory. (App. at 98). The trial judge began by explaining her understanding of the plaintiffs' position, stating:

> . . . the theory, as I understand it, that would prompt you to ask this very broad interrogatory is that there was a *pattern of conduct or a plan or design* on the part of the defendants to deal with perpetrators a certain way that would be *sort of a 404(b) type exception* . . .

(App. at 100) (emphasis added).[5] Overruling the defendants' objection, the trial justice reasoned:

> The allegations against the defendants other than the alleged perpetrators are such that it would be calculated to lead to the discovery of admissible evidence *to determine how those defendants reacted and responded when they received allegations of sexual molestation, third degree sexual assault against a cleric.* Was there *a set pattern of responding* that may well subject the defendants to liability under our law of civil litigation?
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> In other words,. . . what exactly is in issue is. . . how the defendants handled the allegations. . . received pertinent to these particular plaintiffs, [the discovery] may well be calculated to lead to the

[5] Young had in fact asserted by memoranda that it would constitute admissible evidence under Rule 406, but agreed with the trial justice's *sua sponte* suggestion during the hearing.

> discovery of admissible evidence to determine whether there is a *pattern of conduct* [on] the part of the defendants as they did, indeed, handle such complaints.

(App. at 117b, 117c-117d). Notwithstanding that no one yet knew the actual scope of the discovery sought, and that privilege logs may have to be made for each non-party priest investigated with respect to attorney client, work product, medical record and appropriate clergy-communicant privilege, the trial judge still found the burden to the defendants did not outweigh the benefit to the plaintiff. (App. at 117d). She did, however, modify the interrogatory so it would only apply to notice of conduct that would constitute first or second degree child molestation or third degree sexual assault as set forth in Chapter 37 of Title 11.

Although the trial justice's ruling was specifically directed at the defendants' objection to interrogatory No. 3, those objections were the same substantive objections defendants made to the substantially similar request for production No. 39, and thus effectively overruled those objections as well.

The Scope of the Discovery Ordered by the Court

Defendants began the attempt to comply with the required discovery by: 1) collecting for production all requested documents with respect to the two party-defendant priests, Lepire and Petrocelli; 2) preparing privilege logs with respect to those documents; and 3) beginning a review of 35 years of records to determine the number of priests and investigatory files that would be responsive to the requests related to non-party priests in interrogatory No. 3 and request for production No. 39.

In May 2006, the defendants produced a number of documents related to Lepire and Petrocelli to which no claim of privilege was made, and produced to the trial justice two

privilege logs – one with respect to each priest – and the documents claimed to be privileged. (App. at 141; 145-146). With respect to the interrogatory, the number of priests referenced in one way or another in the Diocese files was approximately 125. By November 1, 2006 when the non-party discovery was considered by the trial judge, the number had been reduced to 95 by excluding priests who were not alleged to have committed sexual assaults as previously defined by the Court. (App. at 134).

As a result of the more concretely known scope of the task, approximately two weeks before the compliance date the Hierarchy defendants filed affidavits and a motion asking the trial judge to reconsider the production order. (App. at 147). The affidavits and motion notified the Court that the requested documents involved 90 plus priests over a 35 year period, and an estimated 77-87 linear feet of documents which document management experts translated to 100,000 to 130,000 pages of documents to be reviewed and potentially copied if required to be produced. (App. at 150). Various estimates on the cost of reproducing one set of copies based on an estimate of 100,000 pages ranged from approximately $30,000 to $60,000. (App. at 150-151).

The Hierarchy defendants asked the trial judge to reconsider her production order and implement a tiered approach to *inter alia*,

- address the pending summary judgment motions prior to requiring production;
- if the claims survived summary judgment, limit discovery to evidence that would constitute notice Lepire and Banville posed a danger prior to their assaults on Banville and Young;
- if there was sufficient evidence of notice for the claims to go forward, stay the production order so the defendants could seek appellate review of the objections to discovery the trial judge had overruled.

(App. at 151-152). The defendants also requested that if appellate review was denied, or the objections remained overruled, that Bishop Tobin only be required to permit the plaintiffs access to inspect the original, non-privileged documents, and copy the documents they desired at their own expense as provided for in Rule 34. (App. at 152).

Subsequent to the filing of the motion, but prior to the hearing, the defendants presented an answer to interrogatory No. 3 prepared on behalf of Bishop Tobin with regard to claims against non-party priests. (App. at 155). Over 100 hours of attorney review time had revealed information concerning 83 clerics against whom such allegations had been made since 1971. (*Id.*). The information was presented without waiving objections previously asserted, and Bishop Tobin noted that the information:

> often involves mere allegations, sometimes neither corroborated or substantiated, against non-parties who have no opportunity to defend or respond to them, and frequently are deceased or retired or no longer in the active priesthood, and who have families who may be unaware of the allegations[.]

(App. at 156). The answer also asserted Bishop Tobin had an obligation under the law and doctrine of the Church to protect the privacy interests of the non-parties. (*Id.*).

As indicated earlier, plaintiff Banville's alleged molestation occurred in 1981. Analysis of the interrogatory response shows evidence of only *one* priest of whom there had been notice of sexual misconduct prior to 1981. Notice with respect to the remaining 82 priests occurred subsequent to Banville's molestation, with three between 1982 and 1987, three between 1987 and 1991, *and 76 after 1992 – with 34 of those occurring after 2002.* The analysis is very similar with respect to Young. Assuming his abuse began in 1987, there was notice with respect to only four priests prior to 1987, only three between 1987 and 1991, and again, 76 after 1992 and 34 after 2002.

Order Denying Reconsideration

The trial judge denied defendants' motion for reconsideration and ordered Bishop Tobin to produce non-privileged documents concerning all 83 priests by January 12, 2007. For all documents claimed to be privileged, he is to present a privilege log for each priest by that same date.

Necessity for the Writ

This Court has repeatedly held that it will issue the common law writ of certiorari on occasions in which the petitioner's right of appeal from a final judgment will be inadequate to safeguard the litigant from substantial harm or injustice, and the remedy at law would be inadequate to address that harm or injustice.[6] Here the court-ordered discovery is the very definition of substantial harm or injustice.

- It will entail significant costs in attorney review time, reproduction of records, and preparation of an unknown number of privilege logs – perhaps as many as 83.

- It's potential relevance to the action before the trial court is marginal if it exists at all. It is unlimited in time or scope, spanning 35 years and not limited to circumstances substantially similar to the notice defendants had with respect to the actual claims of Young and Banville. In

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[6] *See, e.g., U.S. v. Public Utilities Com'n*, 635 A.2d 1135, 1138 (R.I. 1993); *Testa v. City of Providence*, 572 A.2d 1336, 1337 (R.I. 1990); *Concannon v. Concannon*, 116 R.I. 323, 327, 356 A.2d 487, 490 (1976); *Barletta v. Kilvert*, 111 R.I. 485, 487, 304 A.2d 353, 345-55 (1973); *Schiller v. Gemma*, 106 R.I. 103, 256 A.2d 487 (1969).

fact, the plaintiffs have not yet been required to demonstrate that notice did exist in the two cases, or what the nature of that notice was.

- It involves evidence of other bad acts – the failure to reasonably supervise priests the defendants knew or should have known posed a danger – wholly unrelated to the claims of Banville and Young and inadmissible as a general matter.

- It is not even limited to evidence of bad acts close in time to the alleged tortious conduct in the underlying cases, requiring disclosure of bad acts up to 14 years after Young's molestation occurred, and 25 years after Banville's single molestation occurred. That evidence is not remotely relevant to showing a "habit," "routine practice" or "common plan or scheme" existing at the time of the assaults on Young or Banville, or when the defendants allegedly had notice that Petrocelli and Lepire posed a threat to children.

- It involves information of a very sensitive and personal nature, frequently given in confidence, as well as allegations of the most damning nature, frequently uncorroborated and unsubstantiated.

In sum, the discovery Bishop Tobin has been ordered to produce is inherently private and confidential, demonstrably burdensome and expensive, and, petitioner asserts, wholly irrelevant to the legal claims made as a matter of law as set forth in the accompanying memorandum of law. Immediate review by writ of certiorari is necessary to avoid disclosure of evidence concerning non-parties that is both personal and damning, and the production of which will be significantly burdensome and costly. Petitioner asserts that both the disclosure of private information and the burden constitutes an abuse of discretion, and review by way of appeal after final judgment will be no remedy at all. This Court should review the legality and propriety of the court-ordered discovery, and the petitioner's objection thereto, while it still matters.

Conclusion

For the above-stated reasons, and those set forth in the accompanying memorandum of law, petitioner Thomas J. Tobin asks this Court to grant this petition, issue the writ, and review the lower court's discovery order.

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PROOF OF SERVICE

I hereby certify that on this 9 day of January, 2007, I mailed a true and exact copy of the within to **Timothy Conlon, Esq.**, 76 Westminster St., Turks Head Bldg., Suite 420, Providence, RI 02903; and **Carl DeLuca, Esq.**, DELUCA & DELUCA LAW OFFICES, INC., 631 Jefferson Boulevard, Warwick, RI 02886.

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