IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ARCHDIOCESE OF ST. LOUIS, *et al.*,	)	
	)	
Relators,	)	
	)	Case No.
vs.	)	
	)	
HONORABLE ROBERT H. DIERKER, JUDGE, CIRCUIT COURT FOR THE CITY OF ST. LOUIS,	)	
	)	**FILED UNDER SEAL**
Respondent.	)	

SUGGESTIONS IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION

Relators Archdiocese of St. Louis and Archbishop Robert J. Carlson ("Defendants" or "Archdiocese"), have set forth in the accompanying Petition for Writ of Prohibition an introduction to this case, summary of the facts, and the reasons the Writ should issue.

In these Suggestions in Support, Relators provide a more thorough factual and procedural history and discussion of the legal errors justifying issuance of the writ to restrain Respondent Judge from striking defenses in the Archdiocese's answer, entering partial judgment against Relators, imposing even further sanctions, and ordering production of hundreds of confidential names of third parties for Plaintiff's state-actor agent to begin cold-calling about their past histories of sexual abuse.

FACTUAL AND PROCEDURAL HISTORY

A. Plaintiff Alleges Sexual Abuse, Prosecutors Dismiss the Criminal Charges, and the Archdiocese Disputes the Civil Case

Plaintiff, who is proceeding under the pseudonym "Jane Doe 92," alleges that she was abused by a former priest, Joseph Ross, at St. Cronan's Parish between 1997 and 2001.[1] It bears reinforcing that the timeframe of Plaintiff's alleged abuse is four years, not 20, and certainly not 50 or 60 years.

While plaintiff and her counsel have spent most of this case pointing to the fact that Ross was a bad actor and pled guilty to touching other children, the Archdiocese's position in this case is that this Plaintiff was *not* abused. Plaintiff was urged by others to accuse Ross, which led to a criminal case based on her alleged abuse by Ross. In her January 28, 2010 deposition in the criminal case, Plaintiff admitted to a history of making false claims of sexual abuse, which the police and prosecutors have repeatedly investigated and found not reliable.

For example, Plaintiff previously had told the police her neighbor raped her, twice, but (like this case) there was no supporting evidence, physical or otherwise—and in fact, at the time of the second alleged assault, the neighbor had an alibi at a public event "in front of several people."[2] The police filed no charges—publically noting there was no evidence to support the Plaintiffs' allegations of rape.

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[1] *See* Exhibit 1 (Petition) ¶¶ 4, 23, 40.

[2] Exhibit 18 (Tender of Discovery and Motion for Modification of Order) ex. A at 22:10-22:18, 24:12-25:17, 29:15-30:2.

Plaintiff has been diagnosed with obsessive compulsive disorder, among other mental troubles, including episodes of disassociation, disorientation, and seizures, and as a result she is sometimes "detached from reality."[3] The conduct at issue here was the subject of a criminal prosecution that was initiated and later dismissed by the Circuit Attorney's office. Plaintiff testified in her deposition in that case *that she had wanted to recant her allegations against Ross*, but she was dissuaded from doing so on "numerous occasions" by representatives of an advocacy group she had joined called SNAP.[4] Plaintiff, for instance, wrote emails on "numerous occasions" discussing her desire to recant, but she was repeatedly "persuaded not to" by SNAP's outreach director and her civil lawyer.[5]

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[3] Exhibit 18 (Tender of Discovery and Motion for Modification of Order) ex. A at 56:8-11, 188:8-13.

[4] Exhibit 18 (Tender of Discovery and Motion for Modification of Order) ex. A at 106:18-107:1. SNAP is the "Survivors Network of those Abused by Priests," and it routinely attacks the Catholic Church and seeks to publish discovery from clergy sexual abuse cases on its website. Plaintiff joined SNAP prior to bringing this lawsuit, and SNAP's Outreach Director became her personal contact. *Id.* at 54:10-12, 54:19-21. At the Outreach Director's suggestion, plaintiff told law enforcement of Ross' alleged assault of her. *Id.* at 108:25-109:10.

[5] Exhibit 18 (Tender of Discovery and Motion for Modification of Order) ex. A at 106:18-25.

After Plaintiff's deposition, the prosecutor dismissed the criminal charges, publicly saying there was not sufficient evidence of abuse to proceed. Nevertheless, on October 24, 2011, Plaintiff filed this civil suit against the Archdiocese of Saint Louis and its Archbishop alleging the intentional failure to supervise Ross.[6] The Archdiocese and Archbishop both answered and denied the allegations.[7] Plaintiff also sued Ross, although she has not served him.

B. Plaintiff Makes Extensive Discovery Requests, Including for "Each and Every Allegation of Sexual Contact with a Minor Made Against any Priest And/Or Employee" Going Back To The 1970s

The core of this entire writ issue starts with Plaintiff's vast discovery requests against the Archdiocese. Plaintiff served a set of *one hundred and twenty* separate requests for production, plus *thirty-six interrogatories*, many of which were themselves comprised of abundant sub-parts.[8]

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[6] Exhibit 1 (Petition) ¶¶ 5, 7, 47-57. Plaintiff also brought battery and negligence claims against the Archdiocese and Archbishop, but the trial court recognized that the only potentially viable claim Plaintiff can bring in this kind of case under *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997), and its progeny is the intentional failure to supervise claim. *See* Exhibit 22 (Dec. 31, 2013 Order) at 3.

[7] *See generally* Exhibit 2 (Archdiocese Answer), Exhibit 3 (Archbishop Answer).

[8] *See* Exhibit 4 (Plaintiff's Requests for Production), Exhibit 5 (Plaintiff's Interrogatories).

Included in the interrogatories were requests to describe "each and every allegation of sexual contact with a minor made against any priest and/or employee serving within Defendant Archdiocese" going back twenty years prior to, as well as following, the alleged sexual contact in this case.[9] Notably, the interrogatory contained no request for complainants' specific names, nor any request for contact information for such persons. The Archdiocese timely served responses and objections to Plaintiff's discovery requests.[10]

C. Plaintiff Moves to Compel, and Respondent Judge Orders that Information be Produced Subject to a Protective Order

In response to the Archdiocese's objections, Plaintiff filed a Motion to Compel asking the Court to order production of other reports of sexual misconduct, as well as production of Ross's personnel file *without a protective order*.[11] Of course, the Archdiocese could not do that. Personnel files, for instance, are subject to a "fundamental" right of privacy,[12] and privacy interests of non-parties in protecting their names from disclosure are even more acute.

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[9] Exhibit 5 (Plaintiff's Interrogatories) at 7.

[10] *See* Exhibit 6 (Archdiocese's Responses to Requests for Production), Exhibit 7 (Archdiocese's Responses to Interrogatories).

[11] Exhibit 8 (Plaintiff's Motion to Compel).

[12] *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611 (Mo. 2007).

On May 13, 2013, just seven months ago**,** Respondent Judge entered an order (1) granting the Archdiocese's request for a protective order, (2) ordering "discovery of complaints of sexual abuse by others" but that the information "shall be subject to a protective order," and (3) ordering the parties to "attempt to agree on the terms of said order."[13] The Court ordered production within 60 days.

D. Plaintiff Delays Entry of the Protective Order, and the Calling of the Motion for Reconsideration for a Hearing, for Almost Six Months

Pursuant to the Court's Order, the Archdiocese could not produce any of this material until there was a protective order in place—a Protective Order that would, because of Plaintiff's months of stonewalling, not be entered until November 15, 2013.[14]

The Archdiocese was proactive. Weeks before the date for disclosure, the Archdiocese (1) filed a Motion for Partial Reconsideration (on June 28, 2013), seeking to

[13] Exhibit 10 (May 13, 2013 Order) at 1. Specifically, Respondent Judge ordered the Archdiocese to provide, for all priests and all lay employees, for the period 1983-2003, the following information: (a) the date of the complaint or allegation of sexual abuse, (b) the nature of the complaint, (c) the identity of the complainant, (d) to whom the complaint was made, (e) the identity of the alleged abuser, and (f) the outcome of the complaint.

[14] Exhibit 17 (Nov. 15. 2013 Protective Order).

protect from disclosure allegations of sexual abuse involving third parties,[15] and (2) emailed a proposed Protective Order to Plaintiff's Counsel (on July 2, 2013), attempting to satisfy the Court's requirement that the parties attempt to agree on the terms of the order.[16]

Plaintiff, however, refused to provide any counter-proposal on the protective order until October 2, 2013, *three months* after the Archdiocese's request. Importantly, this was just three months ago. In fact, the Archdiocese sought to call up both the Motion for Partial Reconsideration and any outstanding issues on the protective order as early as July 30, 2013—but Plaintiff, without responding to the Archdiocese's request for hearing dates, and without responding to the proposed Protective Order, ignored the Archdiocese's requests and filed a "Motion for Contempt" on August 1, 2013, seeking sanctions for the failure to provide the discovery.

On August 8, the Archdiocese again sought hearing dates from Plaintiff's counsel, noting if it did not hear back it would set all pending matters for hearing on August 23, 2013. Plaintiff finally responded, requesting the latest dates in September 23-27, 2013.

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[15] Exhibit 11 (Archdiocese's Motion for Partial Reconsideration). The Motion was ultimately fully briefed. *See* Exhibit 13 (Opposition), Exhibit 14 (Reply).

[16] *See* Exhibit 15 (Archdiocese's Timeline Memorandum) at 2-3 & ex. A. The emails documenting Plaintiff's stonewalling, as described in the rest of this subsection, were provided below with the Timeline Memorandum. *Id.* ex. A.

The Archdiocese accommodated Plaintiff, and the parties eventually settled on September 24, 2013—but that had to be vacated because the Eighth Circuit subsequently set appellate oral argument in a different case for that date which counsel for the Archdiocese had to attend. The parties then settled on October 10—but Plaintiff requested to vacate that date too, due to a death in the family. The Archdiocese accommodated Plaintiff. Plaintiff then requested November 15, 2013. Again, the Archdiocese accommodated Plaintiff and agreed to the requested date.

In sum, the months of delay between the May 13, 2013 Order and November 15, 2013, when the Motion for Reconsideration was heard and the Protective Order was finally entered, were due to *Plaintiff's* stonewalling of Defendants' attempts to meet and confer on the Protective Order and *Plaintiff's* requests for delays of the hearing, including on plea of a family death. Plaintiff would later contend that these were months of "contumacious" delay *by the Archdiocese* that supposedly justified the extreme sanction of striking pleadings.

E. Respondent Judge Finally Enters the Protective Order—Unilaterally Including a Five-Year Expiration Date—and Grants the Motion for Reconsideration in Part and Denies it in Part

On November 15, 2013, Respondent Judge entered (1) the Protective Order, and (2) an Order on the Motion for Partial Reconsideration.[17] The Archdiocese's Motion for Partial Reconsideration was not in vain, for Respondent Judge limited disclosure for non-clergy employees to a five-year period, but Respondent Judge otherwise denied the

[17] *See* Exhibit 16 (Nov. 15, 2013 Order), Exhibit 17 (Protective Order).

Motion and apparently accepted Plaintiff's erroneous contention that the previous delays were the fault of the Archdiocese. In a drastic and totally unexpected move, the Court ordered defendants to "produce all such information within 30 days of this Order or Defendant's pleadings will be stricken."[18]

Respondent Judge provided that these disclosures would be subject to the Protective Order—but to both parties' surprise, he also unilaterally inserted into the Acknowledgement of Confidentiality his own handwritten language that "the obligations under this Acknowledgement will terminate 5 years after the date of final disposition of the above-referenced cause in the above-captioned Court."[19] Thus, the identities of everyone in the matrix could be circulated around the world without any limitations. This is the very same five-year provision that just this week the trial court acknowledged caused much problems here, and he reversed himself on that wrongful change to the parties' protective order.

F. The Archdiocese Timely Tenders the Information, Redacting Only the Names of Third Parties, and Tenders Unrebutted Evidence of Looming Constitutional Violations, Privacy Invasion, and Emotional Harm

Even though the Protective Order now contained a completely unexpected "sunset clause" that would remove confidentiality protection in five years, the Archdiocese did not take the Order lightly. Despite lacking the authority to command compliance, and

[18] Exhibit 16 (Nov. 15, 2013 Order) at 1.

[19] Exhibit 17 (Protective Order) ex. A.

despite hiring new counsel in the interim,[20] the Archdiocese nevertheless collected and produced within the thirty days virtually all of the information Respondent Judge ordered disclosed.

Specifically, on Monday, December 16, 2013, the Archdiocese made an extensive tender of documents and information—accompanied by a tender of *unrebutted* evidence from mental health professionals that disclosure of the names of third parties would be emotionally and reputationally harmful, as well as *unrebutted* evidence from ecclesiastical officials that such disclosure would violate church doctrine.[21] This included the:

1. ***Tender of Ross' Personnel File.*** The Archdiocese delivered to Plaintiff Ross's personnel file, consisting of approximately 531 pages.

2. ***Tender of Ross' Correspondence with the Archbishop.*** The Archdiocese delivered to Plaintiff certain handwritten letters from Ross to the Archbishop that had previously been withheld as privileged.

3. ***Tender of Laicization File.*** The Archdiocese delivered to Plaintiff the laicization file, consisting of 129 pages.

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[20] The undersigned counsel have been engaged only recently and were able to appear only in mid-December (in fact, some pro hac vice applications still have not been granted).

[21] Exhibit 18 (Tender of Discovery and Motion for Modification of Order).

4. ***Tender of Privilege Log.*** The Archdiocese delivered to Plaintiff a privilege log regarding the production of Ross' personnel file, with the only privileged asserted being the attorney-client privilege.

5. ***Tender of Matrix of Accusations.*** In our understanding, no Missouri court has ever ordered production so broad in a case involving one person alleged to have been sexually abused by a second person. Nevertheless, the Archdiocese delivered to Plaintiff a Matrix, prepared by prior counsel, which is as far as we know an unprecedented disclosure regarding prior allegations of sexual abuse.[22] It contains, for the period 1983-2003, (a) the date of the complaint or allegation of sexual abuse, (b) the date the abuse allegedly occurred (some of which dates back to the 1950s), (c) the nature of the allegation, (d) a unique identifier for each complainant (as an example, "Complainant # __ – Mother"), (e) the person to whom the complaint was made, (f) a unique identifier for each accused person, and (g) a statement of the outcome.[23] This includes information despite whether the allegations have any similarity to the present case, any realistic

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[22] Exhibit 23 (Matrix). As explained below, to the knowledge of the Archdiocese, this type of information has never been ordered disclosed by another court. *See* Exhibit 20, Response to Motion for Sanctions and Reply in Support of Motion for Modification of Order, at pp. 15-19.

[23] As a few examples, "Unsubstantiated: a hotline report was made by the Archdiocese"; or "Accused individual sued for defamation. All matters settled by providing limited assistance to Complainant."; or "Lawsuit"; or "Settlement."

temporal proximity to the present case, or involve priests or lay persons. The ***only*** information ordered to be provided that was redacted was the specific names of accused and accusers, and it was replaced with unique identifiers.

6. ***Tender Of Affidavits & Other Evidence.*** In support of redacting these names, the Archdiocese tendered (a) selected portions of the transcript of Plaintiff's testimony in *State of Missouri v. Joseph Ross*, with Plaintiff's name redacted, (b) the Affidavit of Barbara Ziv, M.D., an expert in the field attesting to the emotional and reputational harm and invasion of privacy to of third parties whose names are disclosed in this kind of litigation, (c) the Affidavit of Barry Zakireh, Ph.D., another expert on the same issue, (d) the Affidavit of Msgr. John Shamleffer, J.C.L., M.C.L., regarding canon law and pastoral concerns as to disclosure of names and other confidences, and regarding church polity, and (e) the Affidavit of Archbishop Robert J. Carlson, affirming Msgr. Shamleffer's analysis for the Archdiocese.

7. ***Motion for Modification of Order***. The Archdiocese did not stop with just this tender of discovery and evidence. It also cited and explained the common law, the statutes, and the constitutional provisions that justified their protection of the names of unrelated nonparties. It expounded upon the Affidavits of Dr. Ziv, Dr. Zakireh, and Msgr. John Shamleffer in great detail. Finally, the Archdiocese further provided extensive law as to why the sunset provision Respondent Judge had, on his own initiative,

inserted into the Protective Order was both unprecedented and at cross-purposes with the Protective Order itself.[24]

G. A Falsely-Accused Priest Seeks Intervention

Bearing out the significant risk of reputational and emotional harm, plus invasion of privacy, the Order occasions to third parties, as well as the lack of any marginal similarity to many of the incidents on the Matrix, one of the priests against whom an accusation had been made, falsely, sought to intervene in the case to contest the Court's Order that his name be produced to Plaintiff in this case.[25]

[24] Exhibit 18 (Tender of Discovery and Motion for Modification of Order). Plaintiff in response asked Respondent Judge to strike the Archdiocese's pleadings simply because it redacted the names—despite providing all this other information, as well as Ross's personnel and laicization files, and despite Plaintiff herself conceding in her Response that "victims of sexual abuse and falsely accused individuals might be harmed by unwelcome publicity and involvement in legal proceedings." Exhibit 19 (Motion for Sanctions and Response to Motion for Modification) at 13. The Archdiocese filed a Reply. Exhibit 20 (Response to Motion for Sanctions and Reply in Support of Motion for Modification of Order).

[25] Exhibit 21 (Motion to Intervene).

H. Respondent Judge Sanctions the Archdiocese, Striking a Key Defense, and Orders Further Relief that Plaintiff Did Not Even Request

On December 31, 2013, Respondent Judge entered the Order from which this writ petition derives. Respondent Judge agreed that his *sua sponte* insertion of a sunset provision into the Protective Order was improvident, and he also agreed that disclosure of allegations against lay employees was improper, recognizing that prior incidents "requires some symmetry between the prior incidents and the incident at issue."[26] Respondent Judge even "acknowledge[d] that [the Archdiocese's] motion to modify, coupled with the motion to intervene, did persuade the Court to modify its orders, and so the position of the [Archdiocese] cannot be found to be wholly contumacious, frivolous, or in bad faith."[27]

Nevertheless, Respondent Judge still entered extraordinary, internally inconsistent, and crippling sanctions on the Archdiocese. First, he ordered the striking of part of the Archdiocese's Answer, saying "judgment is entered in favor of plaintiff," as to the denial that the Archdiocese was aware "that future harm was certain or substantially certain to result" and that it "disregarded the known risk of sexual abuse."[28] In other words,

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[26] Exhibit 22 (Dec. 31, 2013 Order) at 6-7.

[27] Exhibit 22 (Dec. 31, 2013 Order) at 9-10 (emphasis added). Respondent also denied the Motion to Intervene as moot by denying discovery of the identities of persons listed as "unsubstantiated" on the Matrix. Id. at 10-11.

[28] Exhibit 22 (Dec. 31, 2013 Order) at 11; Exhibit 2 (Archdiocese's Answer) at 13.

Respondent Judge precluded the Archdiocese from contesting Plaintiff's intentional failure to supervise clergy claim that it *intentionally* failed to supervise clergy.

Second, despite deeming established the only element to which he found the identities of third parties relevant, Respondent Judge *still* ordered that "Defendant Archdiocese shall forthwith disclose the identities and locations (including last known addresses and telephone numbers or e-mail addresses) of complainants identified in the 'matrix'" for hundreds of separate complainants.[29] Plaintiff's discovery had never sought the "locations" or "last known addresses and telephone numbers or e-mail addresses" of complainants, nor had the Respondent Judge's prior orders ever required collection or disclosure of such things. That information ostensibly is to be collected and distributed in only three days' time—one of them New Year's Day—by January 3, 2014, lest "further sanctions" be imposed.

Third, Respondent Judge held that the Matrix "shall be deemed admissible in evidence on request of plaintiff without further authentication or foundation."[30] This despite the fact that Plaintiff had never requested to admit the Matrix at trial, despite the absence of any finding of substantial similarity between any entry on the Matrix and Plaintiff's lawsuit, and despite the fact that the Respondent Judge's own Order recognizes that it contains irrelevant information into which there should not even be discovery, much less admission of evidence (to wit, "unsubstantiated" claims, claims against lay employees, etc.).

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[29] Exhibit 22 (Dec. 31, 2013 Order) at 10-11.

[30] Exhibit 22 (Dec. 31, 2013 Order) at 11.

Fourth, the Archdiocese has to pay Plaintiff $5,000 in attorneys' fees for bringing its motions—which, again, successfully limited numerous aspects of Respondent Judge's Orders and which, where unsuccessful, were brought in good faith to protect the names of third parties from disclosure as supported by sworn, uncontested Affidavits from two doctors who work with sexual abuse victims that such disclosure would be harmful.

Fifth, the Archdiocese has to pay a Special Master $275 per hour, starting with an initial deposit of $1,000 to the Court, for the Special Master to "contact complainants by any reasonable means" and to "report responses to the Court"' and also to Plaintiff.[31] Plaintiff may, "in [Plaintiff's] counsel's discretion," contact any "complainants reported as willing to cooperate," and any "complainants reported as unwilling to cooperate may be subpoenaed by leave of Court."[32]

[31] Exhibit 22 (Dec. 31, 2013 Order) at 12.

[32] Exhibit 22 (Dec. 31, 2013 Order) at 11-12.

ARGUMENT[33]

1. The trial court abused its discretion by sanctioning the Archdiocese for repeatedly *succeeding* in narrowing its overbroad discovery orders, despite a good faith basis to seek to protect these third parties' names

The trial court's December 31 order contains strong language about the Defendants' conduct during the course of discovery over the last year. However, it is undisputed that none of this information could have been produced until a protective order was entered, which only happened a month and half ago, on November 15, 2013, and that delay was in no way the fault of Defendants.[34]

It is also clear from the record that a pending motion for reconsideration on the scope of this precise discovery was not ruled on by the Court until November 15, 2013—

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[33] This Court reviews discovery orders for an abuse of discretion. *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583, 586 (Mo. 2007). The trial court abuses its discretion if "its order is clearly against the logic of circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." *Id.* at 586-87. This Court also reviews discovery sanctions for an abuse of discretion. *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 870 (Mo. App. 1986). This Court will "find abuse [of discretion where] the sanctions imposed were unnecessarily excessive and lesser sanctions were available to fully accomplish the purposes of discovery." *Id.* at 872.

[34] *See* Exhibit 15 (Timeline Memorandum). See also Statement of Facts § D.

and the trial court agreed with defendants that its prior order was overly broad. Finally, even in its December 31, 2013 order the trial court (a) found it had wrongly limited the parties' stipulated protective order to five years (an insertion the Court made unilaterally) raising the specter that all of this information would become public, (b) found it had wrongly included secular employees in the information ordered to be produced, and (c) found it had wrongly included unsubstantiated claims, which would require the potential intervention of dozens of falsely accused individuals to protect their reputations (and one priest had filed to intervene to do just that). In other words, the trial court, just two days ago, admitted it committed error on a massive level, error revealed and reversed only because of Defendants' willingness to pursue the matter.

In the light of an objective review of the procedural history here, and especially the Affidavits of the medical professionals, it is clear that Defendants have acted in good faith, and much of their work to curtail the prior orders has been proven valid. Yet the trial court entered draconian sanctions, striking out portions of the Archdiocese's pleadings and entering judgment in favor of Plaintiff on those elements.

"[I]t is error and an abuse of discretion for a trial court to impose such a harsh sanction without a finding that the errant party has shown a contumacious and deliberate disregard for the authority of the court."[35] It certainly cannot be contumacious conduct to bring (1) motions that succeed in convincing the Court to walk back its orders, and (2) motions seeking to protect the privacy and other rights relevant to third parties.

[35] *State ex rel. Missouri Highway & Transp. Comm'n v. Pully*, 737 S.W.2d 241, 245 (Mo. App. 1987).

Contrary to the trial court's statement that there has been a "dogged refusal of defendant Archdiocese to comply with the Court's orders," this is not the kind of case where a party has wholly failed to respond to discovery, to show up for hearings, to respond to sanctions motions, and the like. Rather, once the Protective Order was entered on November 15, 2013, the Archdiocese produced, by Respondent Judge's very short deadline of thirty days, an enormous volume of personnel and laicization files, letters previously withheld under privilege, a matrix containing all information required by the Order, with one exception only: the names of third parties who would be harmed by disclosure. The Archdiocese, in a contemporarily-filed motion, supported its concerns on this with argument, law, and unrebutted evidence, including no fewer than four evidentiary affidavits.

Furthermore, each and every one of the Archdiocese's objections to Plaintiff's invasive discovery requests was successful in critical ways. The Archdiocese's opposition to Plaintiff's Motion to Compel succeeded in obtaining a protective order. When Respondent Judge issued his November 15, 2013 Order, he accepted arguments in the Motion for Reconsideration, decreasing the years of information for production of lay employee records from 20 years to 4 years.

In the December 31, 2013 Order, Respondent Judge agreed that it was proper not to require any lay information, agreed that it was not proper to require disclosure of wrongfully accused priests, and agreed that the "sunset clause" he unilaterally inserted into the Protective Order—which complexly undermined its nature as a protective order—was improvident.

Respondent Judge even "acknowledge[d] that [the Archdiocese's] motion to modify, coupled with the motion to intervene, did persuade the Court to modify its orders, and so the position of the [Archdiocese] cannot be found to be wholly contumacious, frivolous, or in bad faith."[36] It is inexplicable and arbitrary for Respondent Judge to have nevertheless sanctioned Defendants by, among the other onerous sanctions, striking out a key defense from their pleadings.[37]

2. The trial court should not have appointed a state officer, at Defendant's expense, to work for Plaintiff cold-calling sexual abuse victims

Adding on yet more sanctions, the trial court ordered the Archdiocese to pay a Special Master $275 per hour to receive requests from Plaintiff to "contact complainants by any reasonable means" and to "report responses" back. Plaintiff then may, "in [Plaintiff's] counsel's discretion," contact any "complainants reported as willing to cooperate," and any "complainants reported as unwilling to cooperate may be

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[36] Exhibit 22 (Dec. 31, 2013 Order) at 9-10 (emphasis added). Respondent also denied the Motion to Intervene as moot by denying discovery of the identities of persons listed as "unsubstantiated" on the matrix. *Id.* at 10-11.

[37] Moreover, the Archdiocese has acted promptly—indeed, deferentially to Plaintiff's counsel's schedule—in doing so. As explained in detail in the Statement of Facts § D, it was Plaintiff who refused to respond to the Archdiocese's proposed Protective Order for months and months and Plaintiff who made multiple requests to push back the hearing dates.

subpoenaed by leave of Court." The Order also authorizes *ex parte* communications between Plaintiff and the Special Master regarding the names she seeks to have him reach out to solicit "cooperat[ion]."[38]

The trial court's Order is tantamount to ordering the Archdiocese to finance Plaintiff's counsel's litigation against efforts it. It makes use of the organs of the state court system, a special master, to reach out on behalf of one party to solicit "cooperation" with a civil claim. And it does so by enshrining Plaintiff's *ex parte* communications with the special master as standard operating procedure.

Special masters exist to resolve discovery and litigation disputes, not to contact witnesses for a party or otherwise to be drafted for one particular party's purposes. *See* Mo. R. Civ. P. 68.01. It is not even clear how, under the ethical rules, a special master could undertake to act on behalf of one party (Plaintiff) in seeking cooperation. And the phone call of a court-designated state actor doubtless will have a subtle (or perhaps not so subtle) influence on recipients, who may well feel obligated to respond rather than just hanging up the phone.

3. The court should not have admitted as trial evidence a document (the matrix) that the court's own order recognizes contains irrelevant information

The trial court also admitted into evidence, at a trial that is far from imminent, evidence of admittedly *dissimilar* events, without even being asked to do so. The trial court held that the matrix the Archdiocese tendered as a sign of its good faith efforts at

[38] Exhibit 22 (Dec. 31, 2013 Order) at 11-12.

substantial compliance "shall be deemed admissible in evidence on request of plaintiff without further authentication or foundation."[39]

The matrix could not possibly be helpful to the jury in evaluating whether Plaintiff can show sufficient "intent" to satisfy her intentional failure to supervise clergy claim. Not only did Respondent Judge strike that defense from the Archdiocese's Answer anyway, thus making the presentation of evidence superfluous, but such evidence could never be admissible. "Evidence of other events has been held to be admissible . . . to show motive or intent if the other events are not 'too remote in time or dissimilar in circumstances.'"[40] Respondent Judge even himself agreed that prior incidents evidence "requires some symmetry between the prior incidents and the incident at issue."[41]

Yet Respondent Judge's own Order recognizes that the matrix contains irrelevant information into which there should not even be discovery, much less admission of evidence, because it is dissimilar to Plaintiff's allegations—to wit, admittedly "unsubstantiated" claims and claims against lay employees, not priests.

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[39] Exhibit 22 (Dec. 31, 2013 Order) at 11.

[40] 22 Mo. Prac., Missouri Evidence § 404:5 (4th ed. West 2013) (emphasis added) (quoting *Galvan v. Cameron Mut. Ins.*, 733 S.W.2d 771, 774 (Mo. App. 1987) ("In an arson case, history of other fires, if not too remote in time or dissimilar in circumstances, is admissible to show motive and intent …. The five year period involved is not too remote, and the fires are not dissimilar.") (emphasis added).

[41] Exhibit 22 (Dec. 31, 2013 Order) at 6-7.

4. The trial court should not have sanctioned the Archdiocese in the absence of any colorable prejudice

Other than two minor preservation depositions taken before the Plaintiff filed her case, Plaintiff has not served Defendant Ross, has not deposed Ross, has taken no depositions of Defendants' employees or agents, and has not endorsed a single expert. Indeed, her primary effort to date has been to file motions to block discovery of all communications she had with the advocacy group SNAP. In short, Plaintiff has done almost nothing to advance this case other than try to expand the scope of discovery through this hoped-for audit of more than 60 years of unrelated information. This all goes to the absence of any prejudice, which is required for any sanction, let alone the types of sanctions that have been imposed here.[42]

Even more importantly in terms of the lack of any prejudice, Plaintiff has received all information about Ross, including his entire personnel file, privileged communication about Ross, and all documents about minors allegedly abused by Ross, including their names. In other words, she has received all information about all substantially similar incidents. She has not done anything with that information (no depositions, subpoenas, or further attempts at discovery). The notion that she has been prejudiced is disingenuous.

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[42] *See State ex rel. Missouri Highway & Transp. Comm'n v. Pully*, 737 S.W.2d 241, 245 (Mo. App. 1987); *Karolat v. Karolat*, 151 S.W.3d 852, 858 (Mo. App. 2004).

On top of all of this, again demonstrating a complete lack of prejudice, Plaintiff has received a matrix of information covering 20 years of complaints and more than 60 years of alleged abuse information, including details of date of the allegation, the date of the alleged occurrence, the nature of the allegation, the person to whom the complaint was made, and the outcome. The only thing she did not receive was specific names. Not only are the names of these third parties wholly irrelevant—these all involved different people, in different parishes, in many different decades—but the notion that she could not move forward with her case at all on the intent element without those specific names is specious.

Finally, there is insufficient prejudice because the December 31, 2013 Order was not entered on the eve of trial, and Plaintiff has made no utterance suggesting that she would need more time. Thus, the present date could not provide justification for such severe sanctions as the court ordered here.[43]

[43] *Fairbanks v. Weitzman*, 13 S.W.3d 313, 327-28 (Mo. App. 2000) (additional monetary sanctions "unnecessarily excessive" and were not necessary to accomplish the purposes of discovery where trial continuance and further discovery were available).

5. The trial court should not have ordered the release of hundreds of names of accused and victims spanning up to sixty years of allegations

There are numerous, independent reasons that the trial court acted improperly in ordering that these third parties' names be injected into this case for Plaintiff's private litigation strategy:

- **Invasion of Third Party Privacy Rights**

It is abusive to compel that third parties' names be passed along to plaintiff lawyers—ultimately to be targeted for a call by a state actor soliciting participation in a personal injury action that has nothing to do with them. One can only imagine what it would be like for, say, someone who was a victim of sexual assault 30 years ago, and put the event behind her, to get that phone call out of the blue. On the other end of the line is someone saying he has been appointed by the state to call her, that her name and history have been disclosed both to agents of the state and to a plaintiff in a civil suit, and that the Plaintiff intends to make use of her past trauma to seek civil damages.

Plaintiff's desire to take command of these third parties' past lives for her own litigation purposes is an affront to their right to keep their names private. The constitutional right to privacy protects "the individual interest in avoiding disclosure of personal matters."[44] As the Supreme Court has noted, "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his

[44] *Whalen v. Roe*, 429 US 589, 599 (1977).

suit."[45] Discovery requests "may seriously implicate privacy interests of litigants and third parties" and thus carry "significant potential for abuse."[46] As a result, both federal and state courts have held that individuals have a privacy interest in not having their names and addresses disclosed.[47]

[45] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.")).

[46] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (emphasis added); *see also Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994).

[47] *See, e.g.*, *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 529-30 (6th Cir. 1984); *Wine Hobby, U.S.A. v. IRS*, 502 F.2d 133, 137 (3rd Cir. 1974); *Denari v. Superior Court*, 264 Cal.Rptr. 261 (App. 1989).

In Missouri, likewise, the "privacy rights of non-parties must be considered" in weighing a request for discovery.[48] The Missouri Supreme Court has cautioned, in granting a writ of prohibition on a trial court's erroneous order to compel production of a third party's personnel file, that fundamental privacy interests of third parties "should not be lightly disregarded or dismissed," and indeed that unnecessary discovery into third party confidential material for collateral matters in another's civil case "would eviscerate the right of privacy" these persons enjoy and "could also discourage witnesses from reporting incidents of misconduct, for fear that their private personnel information be might later be discoverable."[49]

The trial court, however, dismissed as "hollow" the privacy interests of complainants, saying giving their names to Plaintiff to be contacted, and then embroiled as subjects of discovery in this civil suit, "creates no greater risk to complainants' well-

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[48] *State ex rel. Blue Cross & Blue Shield of Mo. v. Anderson*, 897 S.W.2d 167, 171 (Mo. App. 1995) (denying plaintiff's request for financial documents in part because "invasion of non-party privacy rights outweighs [plaintiff's] need for the requested documents"); *see also State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App. 1985) (denying document request; "in ruling upon objections to discovery requests, trial judges must consider . . . the extent of an invasion of privacy, particularly the privacy of a non-party").

[49] *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611-12 (Mo. 2007).

being than a 'hot line' report."[50] In addition to being counterfactual (people who have put past allegations behind them, sometimes decades ago, do not stand in the shoes of a minor about whom a hotline report is being made), the trial court's dismissal of the risk to complainants ignores the unrebutted Affidavits of actual mental health professionals submitted below.

- ***Unrebutted* Evidence of Actual Harm to Third Parties.**

The violation of the third parties' rights to keep their names from disclosure, and from having their pasts dredged up in this civil suit, is not just an academic question. Although Respondent Judge ignored them, the Archdiocese proffered Affidavits of Drs. Barry Zakireh and Barbara Ziv, who attested under oath—with no contrary or rebuttal opinions—that the Court's Order of disclosure of the names of complainants and accused persons will significantly harm those persons.

Plaintiff's counsel admitted in open court on December 17, 2011, that he fully intended to seek to contact everyone on the matrix. In Plaintiff's subsequent written motion, her counsel reiterated that promise, and forecast a broad array of extraordinary discovery about these other claims.[51] Thus, the harms established by the Affidavits of these doctors will be visited upon virtually all these third parties.

[50] Exhibit 21 (Dec. 31, 2013 Order at 6-7.)

[51] *See* Exhibit 19 (Plaintiff's Motion for Sanctions) at 8-9, 11-15.

- **No Relevance**

The specific names of third parties are not relevant. While the "standard of relevancy as limitation upon discovery is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy."[52] Again, Plaintiff already has been provided extensive evidence about other persons allegedly abused by Ross, including their names. How can there possibly be relevance for a complaint involving a different priest in a different parish reported to different people in a different decade (itself referring to actions that may have happened in even earlier decades)? It is especially incongruous to continue allow such discovery, ostensibly to prove intentional conduct, when the trial court itself removed the intent element by striking the Archdiocese's defense to it.[53]

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[52] 8 Wright, Miller & Marcus, *Federal Practice and Procedure* §2008 n.39 (3d ed. 2010) (citing *In re Fontaine*, 402 F. Supp. 1219 (E.D.N.Y. 1975)). "The party seeking discovery shall bear the burden of establishing relevance." Mo. R. Civ. P. 56.01(b)(1).

[53] Respondent Judge also included a sentence in his Order stating that "[s]ubsequent conduct also appears relevant to the claim for punitive damages." Exhibit 21 (Dec. 31, 2013 Order) at 4. Not only is that untrue, but the United States Supreme Court has been highly circumspect about the use of punitive damages to punish for wrong allegedly done to non-parties; this is not a legitimate purpose. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("the

Moreover, whether or not some or all prior claims may be relevant is unresponsive to whether the specific names of third parties, that are otherwise provided to or learned by the Church in confidence, would be. The overwhelming weight of authority provides that even where prior claims may be similar enough to be relevant, the specific names of third party individuals are to be redacted.[54] There are many, many cases limiting discovery to a particular accused person or institution and his or its alleged victims with the names and contact information for the latter redacted, both because it is of marginal relevance and to protect their important privacy rights.[55, 56]

Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 418 (2003) (same principle).

[54] *See, e.g.*, *Walence v. Treadwell*, 165 F.R.D. 43 (E. D. Pa. 1995) (summary of prior sexual harassment allegations appropriately redacted names of complainants and accused persons); *Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226 (Mo. App. 1996) (discovery permitted regarding the particular sexual assailant, but names of unrelated victims not discoverable); *Myers v. Casino Queen, Inc.*, 2013 WL 3321865 (E.D. Mo. 2013) (names of other victims suppressed).

[55] *See, e.g.*, *Morales v. Superior Court*, 99 Cal.App.3d 283, 291-92 (Cal. App. 1979); *Fullbright v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 300436, at *6 (W.D. Okla. Jan. 20, 2010); *Smith v. Walley*, 2011 WL 3108329, at *5 (E.D. Ark. July 26, 2011); *Jacobs v. Sullivan*, 2012 WL 3704743 (E.D. Cal. Aug. 27, 2012); *Waters v.*

CONCLUSION

The Court should grant a writ of prohibition to bar Respondent Judge from enforcing its Order compelling disclosure of the names of third-party complainants and accused and sanctioning Relators under his December 31, 2013 Order.

Respectfully submitted,

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U.S. Capitol Police Bd., 216 F.R.D. 153, 160-61 (D.D.C. 2003); *Laurenzano v. Lehigh Valley Hosp., Inc.*, 2001 WL 849713, at *2 (E.D. Pa. 2001); *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 505 S.E.2d 210 (W. Va. 1998); *Austin v. Calhoon*, 381 N.Y.S.2d 508 (N.Y. App. Div. 1976).

[56] The Archdiocese also submits that the Order runs afoul of the Religious Freedom Restoration Act, R.S.Mo. § 1.302(1), the First Amendment to the U.S. Constitution and the Religious Clause of the Missouri Constitution.

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