

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

TRIAL COURT  
SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. 94-1158

EDWARD L. GAGNE,  
Plaintiff,

VS.

BRENDON O'DONAHUE, PETER J.  
INZERILLO, BERNARD J. FLANAGAN,  
TIMOTHY J. HARRINGTON, and  
ROMAN CATHOLIC BISHOP OF WORCESTER,  
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS TIMOTHY J.  
HARRINGTON, BERNARD J. FLANAGAN AND ROMAN  
CATHOLIC BISHOP OF WORCESTER'S OPPOSITION TO  
PLAINTIFF'S MOTION TO COMPEL FURTHER ANSWERS  
OF DEPONENT THOMAS A. KANE TO DEPOSITION QUESTIONS

I. STATEMENT OF THE CASE

This is a tort action which arises out of allegations that the plaintiff Edward L. Gagne (hereinafter "Gagne") was sexually molested by the defendant, Brendan O'Donahue (hereinafter "O'Donahue") in 1978 and by the defendant Peter J. Inzerillo (hereinafter "Inzerillo") in 1985 and 1986. Both of these defendants were priests associated with defendant Roman Catholic Bishop of Worcester (hereinafter the "Diocese") and deny the accusations made by Gagne. The defendant Bernard J. Flanagan (hereinafter "Flanagan") was the Bishop of the Diocese during 1978. The defendant Timothy P. Harrington (hereinafter "Harrington") was the Bishop of the Diocese during 1985 and 1986.

On July 9, 1997, Gagne's attorney took the deposition of Father Thomas A. Kane (hereinafter "Kane"). Kane was ordained as a Catholic priest on May 15, 1969. See Exhibit "A", Kane deposition, pp. 13-14, attached hereto. From 1972 to 1986, Kane was Executive Director of the House of Affirmation, (hereinafter the "House") a treatment center for the "religious" in Whitinsville, Massachusetts that offered therapy, including psychotherapy, in a "milieu" or community format. See Exhibit "A", Kane deposition pp. 53, 98, attached hereto. After the House opened in Whitinsville, two other Houses were opened in Missouri and Florida. See Exhibit "A", Kane deposition p. 66, attached hereto. The House treated priests for a variety of spiritual problems, including but not limited to psychosexual disorders. Upon information and belief, Kane's testimony was elicited by Gagne's attorney ostensibly to show that the Diocese had notice that pedophilia was a problem affecting some priests in the Diocese.

Gagne's attorney now brings his motion to compel Kane's further deposition testimony on three subjects that surfaced during Kane's deposition and which Kane was instructed not to expound upon by his attorney: 1) evidence of the Diocese's notice and knowledge of the treatment of pedophilic priests at the House during a specific time frame; 2) allegations that Kane misappropriated funds while he was Executive Director

of the House, which, according to Gagne's attorney, pertain to Kane's credibility as a witness; and 3) Kane's condoning or encouragement of sexual relationships between priests and minors while he was Executive Director of the House.

The Diocese, Harrington and Flanagan continue to take the position that Gagne's attorney's questioning of Kane on these issues and the issues themselves were outrageous, inappropriate, irrelevant, immaterial, not reasonably calculated to lead to the discovery of admissible evidence and privileged to the point Kane was rightfully instructed not to answer.

II. ARGUMENT

A. KANE'S TESTIMONY IN GENERAL AND SPECIFIC TESTIMONY CONCERNING THE DIOCESE, HARRINGTON OR FLANAGAN'S NOTICE OF THE PROBLEM OF PEDOPHELIA AMONGST PRIESTS OF THE DIOCESE IS WHOLLY IRRELEVANT AND/OR PRIVILEGED WITH RESPECT TO THE ISSUES OF THIS CASE

Gagne's counsel's questioning directed at Kane's knowledge of the treatment of priests not involved in this civil action for pedophilia at the House was not only irrelevant, but was so far beyond proper discovery as to constitute the very kind of harassment and discovery abuse which would have warranted the suspension of the deposition under Mass.R.Civ.P. 26(c).

Kane testified that he had no memory of any specific instance where the House in Whitinsville undertook treatment of a priest where allegations involved sexual contact with a child. See Exhibit

"A", Kane deposition p. 157, attached hereto. Kane did recall that a House outside of Massachusetts had undertaken the treatment of a priest or priests where it was alleged that the priest had engaged in sexual misconduct with a child, but such treatment is wholly irrelevant to the issue of this Diocese's notice of the problem of pedophilia amongst the priests of its Diocese. See Exhibit "A", Kane deposition pp. 155-156, attached hereto.

Kane had no memory of personally counseling any person at the House for pedophilia. See Exhibit "A", Kane deposition pp. 64-65, attached hereto. Kane recalled having one discussion with Harrington or Flanagan regarding patients in the House who were treated for pedophilia. See Exhibit "A", Kane deposition pp. 84-86, attached hereto. However, Father Kane cannot be compelled to answer further questions concerning such discussions, including its time frame, because such information is privileged. Discovery is permissible only of nonprivileged material which is reasonably calculated to lead to the discovery of evidence which might be admissible in the pending action. See Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609, 609 N.E.2d 460 (1993). Mass. R. Civ. P. 30(c) does not mandate the disclosure of privileged information merely because a deposition question calling for such information has been asked and a witness may properly

refuse to disclose such information. Paparelli v. Prudential Ins. Co. of Amer., 108 F.R.D. 727, 730-731 (D. Mass. 1985).

Although it is true that Kane was not a licensed psychotherapist during his tenure as the Executive Director of the House, thus preventing him from invoking the psychotherapist/patient privilege, Kane was a priest during that time and cannot respond further to Gagne's counsel's questions concerning his discussions of a patient of the House's suffering from pedophilia due to the priest/penitent privilege and the stringent safeguards concerning the patient confidentiality imposed by the House. G.L. c. 233 20A created a privilege designed to protect against forced disclosure of communications made to a priest by any person "in seeking religious advice or comfort." M.G.L. c. 233 §20A. See also, Com. v. Zezima, 365 Mass. 238, 310 N.E.2d 590 (1974). Anything said to Kane by a patient at the House is inherently covered by this privilege and, therefore, Kane cannot reveal communications by patients of the House. Furthermore, a patient treating at the House was assured that such treatment and reports of treatment would be strictly confidential, with only those persons given license by the patient to receive written reports regarding that patient's treatment ever receiving any information about a particular

patient's treatment. See Exhibit "A", Kane deposition pp. 75-78, attached hereto.

The specific discussion that Gagne's counsel seeks to pose and have Kane answer further questions about, including the time frame of such discussion, is statutorily privileged, as well as confidential under the House's governing policy of anonymity, as such questions may overtly or implicitly reveal the identity of a particular patient and/or reveal the nature, substance or circumstances of the communications involving "religious or spiritual advice or comfort" that were sought by said patient.

Furthermore, testimony from Kane relating to what priests, other than Inzerillo and O'Donahue, received treatment for or did is simply not relevant to the present case and is not going to help Gagne's counsel locate admissible evidence. Discovery is not a "fishing expedition". Surpitski v. Hughes-Keenan Corp., 362 F.2d 254 (1st Cir. 1966). Discovery is not allowed where the information sought has no possible bearing on the subject matter of the action. Gagne v. Reddy, 104 F.R.D. 454 (D. Mass. 1984).

Evidence of one priest's misconduct does not prove notice of another priest's misconduct. Pedophilia is not a contagious disease or the equivalent of an unsafe condition in rental housing. The fact that a priest may have been treated at the House for pedophilia has no bearing on whether

O'Donahue and Inzerillo sexually abused the plaintiff or whether the Diocese, Harrington or Flanagan should be held accountable therefor.

Kane's only knowledge of the allegations against Inzerillo stemmed from what he read in the paper and Kane had no knowledge regarding whether Inzerillo ever treated at the House. See Exhibit "A", Kane deposition p. 206, attached hereto. Kane never counseled O'Donahue at the House concerning allegations of pedophilia against O'Donahue. See Exhibit "A", Kane deposition, pp. 64-65. Knowledge or information Kane may have, if any, with respect to O'Donahue's treatment at the House by others would be privileged under G.L. c. 233 §20A and confidential under the House's strict policy. Moreover, Kane testified that he had no memory of any priest being treated at the House in Whitinsville for pedophilia. See Exhibit "A", Kane deposition, p. 157, attached hereto. The report concerning O'Donahue referred to by Gagne's counsel does not mention sexual contact with boys and was not even written by Kane.

B. FURTHER DEPOSITION TESTIMONY FROM KANE CONCERNING ACCUSATIONS OF FINANCIAL IMPROPRIETIES WHILE KANE WAS EXECUTIVE DIRECTOR OF THE HOUSE SHOULD NOT BE COMPELLED AS SUCH TESTIMONY IS IRRELEVANT AND/OR CONFIDENTIAL

Gagne's counsel seeks to pose further questions to Kane regarding allegations that Kane misappropriated House funds while he was Executive

Director of the House. Gagne's counsel argues that such testimony relates to Kane's credibility or bias as a witness. However, as argued supra, Kane's entire deposition testimony is irrelevant to the issues of this action. Therefore, Kane's credibility as a witness is irrelevant to the subject matter of this action and Gagne's counsel's efforts to discredit Kane are designed merely to embarrass, harass and humiliate him.

Gagne's counsel in his Motion maintains that "Massachusetts case law permits cross-examination concerning prior discreditable conduct by a witness provided that there is a good faith basis to support such questioning." Commonwealth v. Homer, 235 Mass. 526, 534-535 (1920). However, it is equally well settled in Massachusetts case law that a witness cannot be asked on cross-examination, in order to affect credibility, about his part in matters irrelevant to issues on trial. Jones v. Commonwealth, 327 Mass. 491, 99 N.E.2d 456 (1951); Commonwealth v. Gonzalez, 11 Mass. App. Ct. 932, 416 N.E.2d 539 (1981); Benjamin v. Felton & Sons, 404 N.E.2d 125 (1980); Commonwealth v. Schaffner, 146 Mass. 512, 515-516, 16 N.E. 280 (1888). Whether or not Kane misappropriated funds has absolutely no bearing on the issues of this action and Kane should not be pressed to answer further deposition questions on that subject.



Furthermore, Kane testified at his deposition that he resigned and was not terminated from his position as Executive Director of the House. See Exhibit "A", Kane deposition p. 101, attached hereto. He resigned because of "burnout" after 15 years. See Exhibit "A", Kane deposition p. 102, attached hereto. The only allegation of financial impropriety that Kane heard about came from the media, not from anyone else. See Exhibit "A", Kane deposition p. 103, attached hereto. Additionally, a confidentiality agreement exists between Kane and the Diocese concerning these matters. See Exhibit "A", Kane deposition pp. 104-105, attached hereto. A deposition witness may be instructed not to answer questions pertaining to confidential matters. See Paperelli v. Prudential Ins. Co. of America, 108 F.R.D. at 731. Kane answered several questions posed by Gagne's counsel relating to his alleged misappropriation of House funds, despite the existence of the confidentiality agreement with the Diocese. That confidentiality agreement allowed Kane's attorney to rightfully instruct him not to answer any questions probing this issue and that confidentiality agreement precludes Kane from being compelled to answer any other questions on the misappropriation matter.

Gagne's attorney contends that the confidentiality agreement, coupled with the fact that Kane is still a priest in good standing in the Diocese

and receives a monthly stipend, indicates the "likelihood of bias on Kane's part in favor of some of the defendants in this case." This argument is tenuous, at best. Where the tendency of evidence to show bias becomes attenuated, then that evidence may be excluded. See Commonwealth v. Russo, 30 Mass. App. Ct. 923, 567 N.E.2d 1255, 1259 (1991). Moreover, examination of a witness in an attempt to show bias may be excluded based on the immateriality of the testimony. See Commonwealth v. Huertas, 34 Mass. App. Ct. 939, 941, 613 N.E.2d 113 (1993) quote from Commonwealth v. Johnson, 16 Mass. App. Ct. 935, 936-937, 450 N.E.2d 1087 (1983). Where neither the witness nor his credibility is critical to the issues of a case, testimony elicited to show bias will not be deemed essential to the case and the testimony will be properly excluded. See Commonwealth v. Quegan, 35 Mass. App. Ct. 129, 617 N.E.2d 651 (1993). Kane's deposition testimony is irrelevant to the issues of this case. He is not a key witness. Therefore, any testimony as to his credibility or bias should be excluded as immaterial and irrelevant to the issues of this action.

C. ANY ALLEGATIONS OF SEXUAL MISCONDUCT ATTRIBUTED TO KANE IS WHOLLY IRRELEVANT TO THIS MATTER.

Potential deposition testimony by Kane regarding allegations of sexual misconduct against him is completely irrelevant to the issues in this action and

represent Gagne's counsel's efforts to embarrass, harass and humiliate Kane. There is no link between any allegations made against Kane regarding sexual contact with children and the allegations made against Inzerillo or O'Donahue. Kane's sexual activity, if any, is not relevant to the allegations brought against Inzerillo and O'Donahue by Gagne.

Gagne's counsel argues that evidence of Kane's sexual activity and/or allegations of sexual abuse of boys is "probative of whether the [House] was in fact a facility dedicated to treating pedophilic priests in the Diocese or whether its own chief executive officer used it as an underground network for perpetuating and encouraging the very behavior that he claimed was his mission to alter." Gagne's counsel's concern is whether Kane encouraged or condoned improper sexual contact with boys through his actions while he was Executive Director of the House.

First, O'Donahue did not go to the House until after he allegedly molested Gagne. Therefore, Kane could not have encouraged or condoned any of O'Donahue's alleged sexual contact(s) with Gagne, when such alleged contact was over by the time O'Donahue was treated at the House.

Second, Kane's only knowledge of the allegations made by Gagne against Inzerillo came from the media, he has no knowledge regarding whether Inzerillo was treated at the House and Gagne has offered no evidence

that Inzerillo was ever a patient at the House. Therefore, Kane could not have encouraged or condoned Inzerillo's alleged behavior with Gagne.

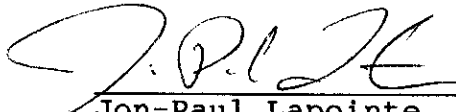
Third, in Barry v. The Roman Catholic Bishop of Worcester, et als., (Suffolk Superior Court No. 93-2438F), wherein the plaintiff alleged that Kane had sexually abused him, Kane denied all of the plaintiff's allegations. See Exhibit "B", Confidentiality Agreement, attached hereto. That suit was resolved subject to a confidentiality agreement and Kane cannot be compelled to testify at his deposition concerning the allegations underlying the agreement, which are confidential. See Exhibit "B", Confidentiality Agreement, attached hereto; See also Paparelli v. Prudential Ins. Co. of Amer., 108 F.R.D. at 731.

Finally, Gagne's counsel asked Kane if he encouraged or condoned sexual activity between priests and children at Kane's deposition. See Exhibit "A", Kane deposition p. 161, attached hereto. Kane responded in the negative. See Id. Gagne's query whether Kane encouraged or condoned such activity has been asked and answered. Any further inquiry into Kane's sexual activity is merely a guise by Gagne's attorney to embarrass, humiliate and harass Kane and waste Kane's time with more irrelevant questions.

III. CONCLUSION


For the foregoing reasons, defendants the Diocese, Flanagan and Harrington respectfully request that this Honorable Court deny the Plaintiff's Motion to Compel.

Defendants,  
Timothy J. Harrington,  
Bernard J. Flanagan and  
Roman Catholic Bishop of  
Worcester,  
By their attorneys,  
GRIFFIN & GOULKA

  
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CERTIFICATION

I, Jon-Paul Lapointe, attorney for the defendants in the above entitled action hereby certify that a true copy of this document was served upon attorney of record for the plaintiff by hand and upon all other attorneys by regular mail on August 26, 1997.

  
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Jon-Paul Lapointe