

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Doe 30,

Plaintiff,

v.

Diocese of New Ulm; Diocese of Duluth;
and Oblates of Mary Immaculate, a/k/a
and d/b/a Oblates of Mary Immaculate,
United States Province, a/k/a and d/b/a
Missionary Oblates of Mary Immaculate,
a/k/a and d/b/a Missionary Oblates of
Mary Immaculate, United States
Province, a/k/a and d/b/a Oblate Fathers
of Mary Immaculate (Central Prov.),

Defendants.

Case Type: Personal Injury
File No.: 62-CV-14-871
Judge: John H. Guthmann

**ORDER GRANTING AND
DENYING PLAINTIFF'S MOTION
TO COMPEL DISCOVERY AND
AMENDED SCHEDULING ORDER**

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on January 26, 2015, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue was plaintiff's motion to compel discovery from defendants. Michael G. Finnegan, Esq., and Elin M. Lindstrom, Esq., appeared on behalf of plaintiff. Susan E. Gaertner, Esq., appeared on behalf of defendant Diocese of Duluth. John C. Gunderson, Esq., appeared on behalf of defendant Diocese of New Ulm. Andrew T. Shern, Esq., appeared on behalf of defendant Oblates of Mary Immaculate. Based upon all of the files, records, submissions, and the arguments of counsel herein, the Court issues the following:

ORDER

1. Plaintiff's motion to compel discovery is **GRANTED in part and DENIED in part** as more fully set forth in the following paragraphs.

2. Plaintiff is entitled to all of the information sought in his discovery requests to the extent the discovery seeks information about alleged abuse of underage individuals by clergy,¹ reports of such alleged abuse, and priests accused of such abuse, occurring no later than the date(s) of plaintiff's abuse.

3. The discovery compelled in paragraph 2 shall not be limited to Fr. Fitzgerald and shall include alleged abuse by any priest as long as the priest was employed by, arguably under the supervision or control of any defendant, or present at any facility owned, operated, controlled, or supervised by a defendant with a defendant's knowledge and consent.

4. Any document referencing clergy abuse occurring under the circumstances of and within the time parameters described in paragraphs 2 and 3 is discoverable regardless of the date the document was prepared.

5. To the extent plaintiff's disputed discovery falls outside the scope of discovery expressly permitted in paragraphs 2-4 above, plaintiff's motion is **DENIED**.

6. Defendant Diocese of Duluth shall produce to the court for *in camera* review, no later than January 30, 2015 at 4:00 p.m., all handwritten notes, letters, and other documentation of the February 2014 reports of sexual misconduct by Fr. Fitzgerald that

¹ For purposes of this Order and defendants' discovery obligations, "abuse", "clergy abuse", or "sexual misconduct" shall be defined as any unwelcome physical contact between a priest and a person under the age of eighteen.

were made to Rev. Bissonette. Only the names of the individuals making the report may be redacted. The documents subject to in camera review shall not be filed. Rather they shall be hand delivered to Chambers 1680 in an envelope plainly marked “CONFIDENTIAL—JUDGE GUTHMANN’S EYES ONLY.” Upon receipt, the issue of whether the documents are discoverable, or whether Rev. Bissonette may be deposed about the reports referenced in the documents, will be taken under advisement.

7. If any defendant withholds discovery based upon a privilege, including clergy privilege, the withheld discovery shall be listed on a privilege log and described with sufficient specificity to permit plaintiff to decide whether to file a motion to compel. The log shall be furnished, or updated, within fourteen days of asserting the privilege.

8. Defendants shall supplement their discovery responses in accordance with the following Amended Scheduling Order:

a. The Diocese of New Ulm and the Diocese of Duluth shall supplement their discovery responses by February 17, 2015.

b. The Oblates of Mary Immaculate shall supplement their discovery responses by March 27, 2015. However, as the Oblates of Mary Immaculate complete their document review, it shall produce documents on a rolling basis every two weeks.

c. The discovery and non-dispositive motion deadlines are extended to April 30, 2015.

d. The dispositive motion deadline is also extended. Dispositive motions shall be filed and responded to in time to conduct a dispositive motion hearing on May 22, 2015 at 1:30 p.m.

e. Through a separate Order, the Pre-trial/Settlement Conference shall be moved to the end of August 2015.

9. The following Memorandum is made part of this Order.

Dated: January 27, 2015

BY THE COURT:

John H. Guthmann
Judge of District Court

MEMORANDUM

The Minnesota Rules of Civil Procedure govern the parties' discovery dispute. Subject to the limitations of proportionality, expense, undue burden, the amount in controversy, and the issues in the case, rule 26.02(b) provides that:

parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party Upon a showing of good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Minn. R. Civ. P. 26.02(b). Under, Rule 26.02(b) there are two categories of obtainable discovery. First, a party may obtain discovery relevant to a claim or defense of any party. Second, a party is entitled to discovery that is relevant "to the subject matter involved in the action," rather than a specific claim or defense, if the party seeking the information makes the requisite showing. The court has broad discretion in ruling on discovery-related motions. *Erickson v. MacArthur*, 414 N.W.2d 406, 408 (Minn. 1987) (citing *Baskerville v. Baskerville*, 246 Minn. 496, 506, 75 N.W.2d 762, 769 (1956)).

At the core of the parties' disagreement is the discoverability of information related to abuse and reports of abuse by Fr. Fitzgerald and other priests after the date of the abuse experienced by plaintiff. Also in dispute is the discoverability of information related to abuse and reports of abuse by priests other than Fr. Fitzgerald before the abuse experienced by plaintiff.

The court concludes that alleged abuse by any priest prior to the abuse experienced by plaintiff is probative of plaintiff's viable claims and potentially admissible. First, any reported priest abuse by any priest occurring before the abuse experienced by plaintiff arguably placed the archdiocese on notice that a priest may engage in such abuse despite any vow he took. Second, prior abuse and any ensuing investigation may have provided information to the archdiocese regarding the circumstances under which the abuse took place, how children are groomed for abuse, the public warning signs that private abuse may be occurring, the vulnerability of underage parishioners, the existence of training, supervision, and counseling opportunities, and the steps to take in order to guard against future abuse by priests. At the discovery stage, information about any and all alleged priest abuse, reports of priest abuse, the investigation of priest abuse, or the failure to act upon reports of alleged priest abuse is directly relevant to what defendants knew or should have known prior to the abuse experienced by plaintiff. It does not matter who engaged in the abuse as long as the alleged events occurred before the abuse experienced by plaintiff. *Cf. M.L. v. Magnuson*, 531 N.W.2d 849, 860 (Minn. Ct. App.) (evidence of other sexual abuse victims prior to the alleged abuse at issue may be relevant against the employer), *rev. denied* (Minn.

1995). There is simply no meaningful way for plaintiff to discover whether Fr. Fitzgerald’s conduct created a “specific danger [that was] objectively reasonable to expect” unless plaintiff is permitted to find out what defendants knew or arguably should have known before the abuse took place. *Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014). In other words, depending upon the totality of the circumstances, what one or more of the defendants knew about instances of sexual abuse by other priests may have informed them about the danger arguably posed by Fr. Fitzgerald.

Defendants’ briefs speak at some length about the likely inadmissibility of the evidence sought by plaintiff. The fact that some or all of the produced information may later prove to be inadmissible is not germane in the context of discovery.² Minn. R. Civ. P. 26.02(b).

At the same time, plaintiff is not entitled to the same scope of discovery that the court might have permitted had the nuisance claims survived. What happened after the date(s) of plaintiff’s abuse has “no possible bearing” on or even a remote relationship to the surviving causes of action.³ *Jeppesen v. Swanson*, 243 Minn. 547, 560, 68 N.W.2d 649, 657 (1955). What occurred after the abuse cannot possibly shed any light on what defendants knew, should have known, or did, by custom, practice, habit, or otherwise,

² Accordingly, defendants’ citation to *Doe 169* and other abuse cases discussing the admissibility of evidence at trial are inapposite.

³ It remains to be seen how plaintiff plans to present or characterize the general “negligence” claims set forth against each defendant in Counts II, VI, and IX of the Amended Complaint. In the employment context, the only negligence-based causes of action viable in Minnesota are for negligent hiring, negligent retention, and negligent supervision. *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007) (citing *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn. Ct. App.), *rev. denied* (Minn. 1995)). Plaintiff includes claims for negligent supervision and negligent retention against each of the defendants in Counts III, VII, and X and IV, VIII, and XI of the Complaint, respectively.

prior to the abuse. Only two exceptions are envisioned by the court. First is information prepared after plaintiff's abuse that directly involves events pre-dating plaintiff's abuse. For example, one or more defendants may possess a post-1978 writing documenting that abuse took place and was reported prior to the abuse experienced by plaintiff. Second is information that arguably constitutes an exception to the evidentiary rule precluding admission of subsequent remedial measures.⁴ Minn. R. Evid. 407.

Plaintiff also rationalizes the validity of his unlimited requests by citing the possibility of a punitive damages claim. However, a motion for punitive damages may only be based upon evidence admissible at trial. Thus, if the evidence cannot be used to support an available cause of action, it is of no use when asserting a claim for punitive damages. Moreover, contrary to plaintiff's assertion, a claim for punitive damages will not lie unless the conduct causing plaintiff's injuries meets the statutory deliberate disregard standard. Minn. Stat. § 549.20, subd. 1(b) (2014). If plaintiff can demonstrate that a defendant's statutory deliberate disregard harmed another, but plaintiff's harm was

⁴ Citing Rule 404(b) of the Minnesota Rules of Evidence, plaintiff argues that he should be permitted broad discovery in connection with the conduct of other priests and the defendants' handling of allegations related to other priests even if the conduct took place following the abuse experienced by plaintiff. Plaintiff accurately notes that evidence of post-incident conduct is potentially admissible under with Rule 404(b) of the Rules of Evidence. *E.g.*, *State v. Lynard*, 294 N.W.2d 322, 323 (Minn. 1980) (citations omitted). Nevertheless, Rule 404(b) cannot help plaintiff broaden the scope of discovery. Fr. Fitzgerald's conduct is not disputed for purposes of the instant motion. Thus, there is no conceivable use for evidence of his post-incident conduct. With regard to defendants, plaintiff only claims negligence. Rule 404(b) evidence is potentially admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). None of the listed items relate to an element of plaintiff's negligence-based claims. To the extent items like "preparation", "plan", "knowledge" or "identity" sound like they might relate to a negligence-based claim, they are at most relevant to building a "should have known" case with pre-incident evidence. Absent an intentional tort claim against defendants, there is no legitimate use for Rule 404(b) evidence against defendants. Accordingly, the court rejects plaintiff's citation of Rule 404(b) as a basis to expand the scope of discovery to otherwise non-discoverable post-incident events.

not result of conduct meeting the statutory standard, there can be no punitive damages claim. For example, the court stated in *Jensen v. Walsh*:

The purposes of punitive damages are to punish the perpetrator, to deter repeat behavior and to deter others from engaging in similar behavior. Without punitive damages, one who acts with deliberate disregard of the rights or safety of others faces no greater penalty than a well-meaning but negligent offender. It is therefore appropriate, in determining whether punitive damages should be allowed, to focus on the wrongdoer's conduct rather than to focus on the type of damage that results from the conduct.

623 N.W.2d 247, 251 (Minn. 2001) (citations omitted) (discussing whether punitive damages are available in property damage cases). As *Jensen* makes clear, punitive damages are intended to deter a defendant from engaging in the type of conduct that injured plaintiff, not someone else. A possible future motion to amend to seek punitive damages has no bearing on the scope of discovery that is available to plaintiff.

J H G