IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

In re:	)	Chapter 11
	)	
ARCHDIOCESE OF MILWAUKEE,	)	Case No. 11-20059-SVK
	)	
Debtor.	)	
	)	

JOINT MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS' AND JEFFREY ANDERSON & ASSOCIATES FOR AN ORDER PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 2004 DIRECTING THE ORAL EXAMINATION OF BISHOP SKLBA, ARCHBISHOP WEAKLAND, AND DANIEL BUDZYNSKI AND FOR PRODUCTION OF DOCUMENTS

By and through its undersigned counsel, the Official Committee of Unsecured Creditors (the "Committee") and Jeffrey Anderson & Associates PA on behalf of certain Survivors ("Anderson", together with Committee, the "Movants"), in the above-captioned bankruptcy case (the "Bankruptcy Case") of the Archdiocese of Milwaukee ("Debtor" or "ADOM") respectfully move (the "Motion") pursuant to Federal Rule of Bankruptcy Procedure 2004 for the entry of an order directing (1) the oral examinations (the "Examinations") of Bishop Sklba, Archbishop Weakland, and Daniel Budzynski (collectively, the "Witnesses") by September 16, 2011, in order to preserve their

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testimony regarding the Debtor's liability for sexual abuse, the health of other potential witnesses regarding sexual abuse, and the identity of potential survivors of sexual abuse in the Archdiocese of Milwaukee (2) the Debtor to produce documents (the "Document Production"), at least 5 business days prior to the first Examination, but no later than August 24, 2011, responsive to the requests for production relating to the subject matter of the oral examinations of the Witnesses (the "Document Requests"), attached hereto as **Exhibit A**. In support of this Motion, the Movants state as follows:

PRELIMINARY STATEMENT

1. The Movants seek an order of this Court permitting them, or either of them, to take three oral examinations relating to the Debtor's liability for sexual abuse, the health of other potential witnesses regarding sexual abuse, and the identity of potential survivors of sexual abuse in the Archdiocese of Milwaukee. In conjunction with the Examinations, the Movants also seek a limited Document Production from the Debtor regarding the Examination topics. The Movants have selected three Witnesses with care, anticipating their expected knowledge regarding these issues of concern to the bankruptcy case due to their involvement with ADOM dealing with sexual abuse issues (Bishop Sklba and Archbishop Weakland) and as an actual perpetrator of sexual abuse (Daniel Budzynski).

2. These Examinations and the Document Production are important for three primary reasons. First, the Examinations are critical for the preservation of evidence relating to sexual abuse in the Archdiocese of Milwaukee. The Debtor itself, in underlying tort cases, has asserted that the deaths of witnesses (ostensibly where

depositions were not taken to preserve their testimony) prejudices the Debtor's ability to defend itself. Similarly, the loss of evidence of abuse due to the death of a witness impacts the Committee's ability to capture information regarding abuse claims in this bankruptcy case. Thus, preservation of this evidence benefits *all* parties in interest to this bankruptcy case. Each of the Witnesses is more than 75 years old; therefore, the risk of their deaths or memory impairment is considerable. The Debtor's website lists 44 perpetrators of abuse, of which 19 are listed as deceased. Of those 19 deceased perpetrators, 11 of them died before the age of 75. This fact highlights the considerable risk of losing these Witnesses' testimony given their age.

3. Second, the Witnesses' testimony will be important to the resolution of this bankruptcy case because it will be utilized, whether by the Debtor, the Committee, or other parties in interest, to determine whether claims should be objected to and the value of claims. This information regarding claims is critical to the formulation and confirmation of a plan of reorganization. This information may be lost forever if the Witnesses' Examinations are not taken immediately. The Movants will take care that the identities of survivors be kept under strictest confidentiality and that the discussion of survivors' identities at the Examinations be sealed so that it is available only to those parties permitted by the Court's confidentiality orders.

4. Third, the Examinations may well provide an opportunity to learn the identities of sexual abuse survivors. To the extent these survivors were not served with the bar date notice, newly-discovered survivors can be served with actual notice of the February 1, 2012 abuse claims bar date.

5. For these reasons, the Movants seek to take the Examinations as soon as possible, but no later than September 16, 2011, and at least 5 business days after the Debtor's Document Production of information relating to the subject matter of these Examinations.

JURISDICTION AND VENUE

6. This Court has jurisdiction of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested is predicated upon 11 U.S.C. §§ 105(a) and Federal Rule of Bankruptcy Procedure 2004.

BACKGROUND

A. The Bankruptcy Case

7. On January 4, 2011 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §101 et seq. (the "Bankruptcy Code"). The Debtor continues to operate its business as a debtor in possession.

8. On or about January 24, 2011, the United States Trustee appointed the Committee to represent the Debtor's unsecured creditors pursuant to 11 U.S.C. § 1102(a)(1).

9. On February 5, 2011, the Committee filed an application with this Court for authorization to employ Pachulski Stang Ziehl & Jones LLP ("PSZJ"), pursuant

to 11 U.S.C. §§328, 504, 1102 and 1103, and Federal Rules of Bankruptcy Procedure 2014 and 2016.

10. On February 5, 2011, the Committee filed an application with this Court for authorization to employ Howard, Solochek & Weber, S.C. ("HSW"), pursuant to 11 U.S.C. §§328, 504, 1102 and 1103, and Federal Rules of Bankruptcy Procedure 2014 and 2016.

11. On February 24, 2011, this Court entered an order authorizing the Committee to employ PSZJ and HSW as counsel for the Committee effective as of January 25, 2011.

B. The State Court Cases

12. As of the Petition Date, the Archdiocese was a defendant in 12 state-court lawsuits (the "State Court Cases") brought by 17 individuals who were sexually abused within the Archdiocese of Milwaukee. Also as of the Petition Date, additional survivors of sexual abuse were preparing lawsuits against the Archdiocese.

13. The State Court Cases have been pending for years. Therefore, there is an increasing likelihood of death and compromised memories of witnesses. Indeed, the Debtor itself has recognized the risk to the parties if witnesses' testimony is not preserved.

14. The Debtor has argued that public policy should bar survivors recovery in part because witnesses were dead. The Archdiocese had a section of its summary judgment brief in one State Court Case titled, **"The Archdiocese of Milwaukee Is Irreparably Prejudiced By The Long Passage Of Time Because Virtually All Witnesses Are Dead."** *See* ADOM Summary Judgment Brief at 5 in

Essenberg v. Archdiocese of Milwaukee, attached hereto as **Exhibit B.** ADOM then went on in its brief to list 25 priests or bishops who are deceased. *See id.*. at 5-6. Similarly, in the only other State Court Case to reach the summary judgment stage, ADOM argued that the case should be dismissed because witnesses were dead. *See* ADOM Summary Judgment Brief at 11 in Jane Doe 2 and Jane Doe 3 vs. Archdiocese of Milwaukee, et. al., attached hereto as **Exhibit C.**

15. In 2007, the Wisconsin Supreme Court held that allegations of fraud against the Archdiocese, arising from decades of child abuse, were not barred by the statute of limitations. After this ruling, additional lawsuits were brought against the Debtor. In the years since, additional perpetrators of sexual abuse have been identified and additional abuse survivors have come forward.

RELIEF REQUESTED

16. The Movants respectfully request that the Court enter an Order directing (1) the Witnesses' Examinations relating to the Debtor's liability for sexual abuse, the health of other potential witnesses regarding sexual abuse, and the identity of potential survivors of sexual abuse in the Archdiocese of Milwaukee, all to be taken no later than September 16, 2011; and (2) the Debtor to make a Document Production responsive to the Document Requests within 5 business days prior to the first Examination, but by no means later than August 24, 2011. The Document Requests are set forth at **Exhibit A** hereto. The Document Production relates to the limited subject matter of the Examinations.

17. The Movants reserve their rights to seek additional documents and, if necessary, oral examinations of the Debtor and of any other person based on any information that may be revealed as a result of the Examinations and the Document Requests.

18. In addition, the Committee reserves the right to seek additional documents and oral examinations of the Debtor, the Witnesses, and any other person with regard to issues other than those at issue in this Motion. Such issues may include, but are not limited to, the Debtor's financial condition.

BASIS FOR RELIEF

19. Pursuant to section 1103(c)(2) of the Bankruptcy Code, the Committee is charged with the duty to:

> investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.

11 U.S.C. § 1103(c)(2).

20. Moreover, section 105(a) of the Bankruptcy Code permits the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

21. The Examinations and Document Requests directly pertain to the Debtors' creditors, claims, and the formulation of a plan as it relates to claims. The Committee, in its fiduciary capacity for all unsecured creditors, and Anderson as the representative of numerous Survivors who have filed State Court Cases and conducted at

least some discovery in those cases, are the most appropriate parties to conduct this analysis.

A. The Examinations Should Take Place Immediately

22. The Witnesses' Examinations should take place immediately. First, there exists a heightened risk that evidence concerning sexual abuse in the Archdiocese of Milwaukee will be lost due to the passage of time. This risk is compounded here by the fact that the Witnesses are all over the age of 75.

23. The Debtor lists on its website 44 Archdiocesan priests whom it has substantiated as having sexually abused minors. Of those, the Debtor lists 19 as deceased. ADOM should have exact records to reflect the ages of these priests at the time of death. Anderson's own investigation using public Internet sources shows that 11 of the 19 deceased abuser priests died before the age of 75, and the average age at death for the 19 deceased priests was approximately 73 years. See **Exhibit D,** attached hereto.[1] Accordingly, the risk is very real that the Witnesses may pass away or else their memories may be compromised as a result of their advanced age.

24. Second, the preservation of evidence relating to sexual abuse claims is critical to resolution of this bankruptcy case. The parties in interest all require as much information as possible in this regard to utilize in potential negotiations with the Debtor's insurers, and in crafting a plan of reorganization that will address the value and treatment of sexual abuse claims, among other claims. The information that the Movants seek to preserve by way of the Examinations is very likely to claim objections and the claims valuation process.

[1] In the event that the Debtor disputes the information contained on **Exhibit D**, the Movants will provide the underlying data from Anderson's internet searches, which was summarized in this **Exhibit D**.

25. The Movants anticipate that the Debtor may argue that these Examinations are not necessary because the Debtor will object to all sexual abuse claims on statute of limitations grounds. However, the Debtor has not yet filed a single claim objection, nor has this Court ruled on any such argument. Therefore, given the real risk of losing the Witnesses' evidence as compared with the Debtor's possible statute of limitations argument that the Court has not even entertained, the need to preserve evidence should triumph.

26. Moreover, the Movants expect that the Debtor may argue that evidence concerning sexual abuse claims is unnecessary because the Debtor may not object to any sexual abuse claims. That conclusion does not follow. A plan of reorganization in this case will require at least informal estimation of the value of claims, including sexual abuse claims. Whether or not any party in interest objects to claims, the value of those claims is key to determining how claims will be treated and paid under a plan. In order to do that, information relating to these claims must be available. Preserving the Witnesses' testimony via Examinations is the best way to do this.

27. Third, because of the Witnesses' knowledge of sexual abuse in the Archdiocese of Milwaukee, they may well recall survivor names or other identifying information. Those identities may not be known to the Debtor. Therefore, those individuals may not have received the bar date notice in this case. Any information regarding survivors' names or identifies can be used – in strictest confidence -- to ensure that the Committee's constituents receive actual notice of the February 2, 2011 abuse claims bar date in this bankruptcy case.

B. The Witnesses Are Important to the Bankruptcy Case

28. The Movants selected these particular Witnesses for Examination for the reasons provided below:

1. Bishop Richard Sklba (born September 11, 1935; 75 years old)

29. As of the Petition Date, the deposition of Bishop Richard Sklba was set for January 6, 2011, but was stayed by the commencement of this case.

30. The sex abuse survivor plaintiffs were unable to depose Bishop Sklba earlier because a stay in the State Court Cases was in force, permitting depositions only of witnesses age 75 or older. Bishop Sklba turned 75 last fall.

31. Bishop Sklba is a key witness who should be deposed as soon as possible. From 1979 to 2002, Bishop Sklba served as an auxillary bishop in the AOM and worked with then-Archbishop Weakland's regarding sex abuse issues.[2]

32. Further, Bishop Sklba taught at St. Francis De Sales Seminary from approximately 1965 to 1972, and was its rector from 1972 to approximately 1979. The vast majority of priests who were ordained in the Archdiocese of Milwaukee attended St. Francis De Sales Seminary. Therefore, it is likely that the 19 Archdiocesan priests who have been publicly accused of molesting children and who were ordained during Bishop Sklba's tenure at St. Francis De Sales Seminary, also attended St. Francis De Sales Seminary. It is likely that Bishop Sklba knows these perpetrators. Further, Bishop Sklba may disclose potential survivors, who should receive notice of the February 1, 2012 abuse claim bar date.

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[2] See Exhibit C to the *Motion of the Official Committee of Unsecured Creditors for Limited Relief from the Automatic Stay to Permit Taking of Certain Depositions*, filed May 20, 2011 (Docket No. 240).

2. Former Archbishop Rembert Weakland (born April 27, 1927; 84 years old)

33. Archbishop Weakland was the Archbishop of the Debtor from 1979 to 2002. Archbishop Weakland was deposed in June 2008 in the State Court Cases (when he was 81 years old). However, critical information has emerged since that deposition which requires the deposition of Archbishop Weakland on these new facts.

34. In 2010, the plaintiffs in the State Court Cases finally received documents regarding Fr. Lawrence Murphy, who died in 1998. Murphy sexually abused as many as 200 deaf boys over a 24-year period, from 1950 to 1974, while working at St. John's School for the Deaf within the Archdiocese. After a number of years, Archbishop Weakland undertook efforts to have Fr. Murphy defrocked. Therefore, Archbishop Weakland should have facts regarding this perpetrator that must be preserved.

35. Since Archbishop Weakland's deposition in 2008, additional survivors have made claims regarding Fr. Murphy and other perpetrators. The Movants must preserve that testimony.

3. Fr. Daniel Budzynski (born in 1928; at least 82 years old)

36. The Debtor has identified Fr. Budzynski as having substantiated allegations of sexual abuse of minors made against him. Survivors of Budzynski have only recently come forward with their claims.

37. Fr. Budzynski's testimony should be taken immediately because he may disclose potential survivors who should be added to the list of recipients receive notice of this Bankruptcy proceeding. He may also have information about reports about

him to the ADOM and the ADOM's response, which impact claims regarding the abuse he perpetrated on children.

C. The Examination Topics

38. The scope of a Rule 2004 inquiry is "unfettered and broad," as the wording of the rule indicates. *See* 9 COLLIER ON BANKRUPTCY ¶ 2004.02[1] at 2004-6 (15th ed. rev. 1997) (quoting *In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985)). *See also In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984) (providing that scope of inquiry under Rule 2004 is very broad and great latitude of inquiry is permitted). Indeed, the scope of Rule 2004 is far broader than the scope of discovery under Federal Rule of Civil Procedure 26. *See Moore v. Lang (In re Lang)*, 107 B.R. 130, 132 (Bankr. N.D. Ohio 1989). The well-settled scope of discovery conducted under Rule 2004 is so fundamental to the bankruptcy process that courts have approvingly described it as a "fishing expedition," "exploratory and groping," and "inquisition." See, *e.g., Keene Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 42 B.R. 362, 364 (S.D.N.Y. 1984); *In re Drexel Burnham Lambert Group*, 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991).

39. Rule 2004 may be used to determine what grounds, if any, exist to commence an action, to discover assets, and to investigate fraud. *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (S.D.N.Y. 1993); *Table Talk*, 51 B.R. at 143. Additionally, a Rule 2004 request concerns a proper area of inquiry when it "pertains to the debtor's financial affairs and would affect the administration of the debtor's estate." *In re Mittco, Inc.*, 44 B.R. 35, 37 (Bankr. E.D. Wis. 1984) The Examinations and Document Requests are directed at matters that affect the administration of the Debtor's estate because it

focuses on the Debtor's liability for sexual abuse and the value of sexual abuse claims. The Examination and Document Requests, therefore, seek documents that will provide the Committee with information it needs to fulfill its fiduciary role for the unsecured creditors. Accordingly, "good cause" exists to permit the Committee (and Anderson) to conduct discovery pursuant to Rule 2004.

D. The Examinations Will Address Specific Topics

40. Pursuant to the Court's direction at the hearing held July 15, 2011 that this Motion should suggest parameters for the Examinations, the Movants expect the following topics to be addressed at the Witnesses' Examinations relating to abuse and health of witnesses:

a. ABUSE:

i Information about all priests, Bishops, teachers, and lay employees of the ADOM accused of sexually molesting children.

ii The identify of survivors of sexual abuse by priests, Bishops, teachers, and lay employees of the ADOM. *Any identification of survivors shall be kept under seal in the Examination transcript, and will be available only to those parties permitted by the Court's confidentiality orders.*

iii All information about the ADOM's knowledge or constructive knowledge of child molesting priests, Bishops, teachers, and lay employees

iv All information regarding the ADOM's representations to parishioners, those associated with its schools and other facilities, and children.

v All information about the ADOM's duties and responsibilities to children in its care, in its facilities, and to children interacting with its agents.

vi All information about the ADOM's response to reports of child molestation by priests, Bishops, teachers and lay employees.

vii All information about the ADOM's actions after a survivor was abused.

viii The ADOM's policies, practices and procedures regarding child sex abuse.

ix The ADOM's policies, practices and procedures regarding priests, Bishops, teachers, and lay employees accused of sexually molesting children.

x All information regarding religious order priests and clerics working within the ADOM, including but not limited to the ADOM's control and authority over those priests and clerics.

xi All information regarding priests from other Dioceses who worked in the ADOM and are accused of sexually molesting children, including but not limited to the ADOM's control and authority over those priests.

b. HEALTH:

i Information about the health of priests, Bishops, teachers, and lay employees of the ADOM accused of sexually molesting children;

ii Information about the health of any person who may have have information about the sexual abuse of children in the ADOM.

iii Information about the health of ADOM's agents who have information relating to the sexual abuse of children in the ADOM.

CONCLUSION

WHEREFORE, the Movants respectfully request that this Court grant the Motion; and enter an Order directing (1) that the Witnesses' Examinations be taken immediately, but no later than September 16, 2011, in Milwaukee, Wisconsin or at some other location as the Movants and the Debtor may later agree; and (2) the Debtor to produce at least 5 business days before the first Examination, and at the latest by August 24, 2011, all non-privileged documents responsive to the Document Requests attached hereto as

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Exhibit A; and that the Court grant such other and further relief as it may deem just and equitable.

Dated: July 20, 2011

Respectfully submitted,

PACHULSKI STANG ZIEHL & JONES LLP

By */s/ Gillian N. Brown*

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EXHIBIT A

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INSTRUCTIONS

A. YOU are required to conduct a thorough investigation and produce all DOCUMENTS (as defined below) in your possession, custody, and control including all DOCUMENTS in the possession, custody and control of your attorneys, investigators, experts, officers, directors, employees, agents, representatives, and anyone acting on your behalf.

B. The use of either the singular or plural shall not be deemed a limitation. The use of the singular should be considered to include the plural and vice versa.

C. The words "and," "or," and "and/or" are interchangeable and shall be construed either disjunctively or conjunctively or both, as broadly as necessary to bring within the scope of the Request those responses that might otherwise be construed to be outside the scope.

D. If YOU are unable to comply with a particular category(ies) of the requests below and DOCUMENTS responsive to the category are in existence, state the following information:

1. The date of the DOCUMENT;

2. The type of DOCUMENT (e.g., letter, memorandum, report, etc.);

3. The name, address, telephone number and title of the author(s) of the DOCUMENT;

4. The name, address, telephone number and title of each recipient of the DOCUMENT;

5. The number of pages in the DOCUMENT;

6. The document control number, if any;

7. The present location(s) of the DOCUMENT and the name, address and telephone number of the person(s) who has (have) possession of the DOCUMENT;

8. A specific description of the subject matter of the DOCUMENT;

9. The reason why the DOCUMENT cannot be produced or why you are unable to comply with the particular category of request.

E. YOU are under a continuing duty to seasonably amend your written response and to produce additional DOCUMENTS if you learn that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the Plaintiff during the discovery process or in writing.

F. YOU are required to produce the full and complete originals, or copies if the originals are unavailable, of each DOCUMENT responsive to the categories below along with all non-identical copies and drafts in its or their entirety, without abbreviations, excerpts, or redactions. Copies may be produced in lieu of originals if the entirety (front and back where appropriate) of the DOCUMENT is reproduced and the Responding Party or its authorized agent or representative states by declaration or affidavit under penalty of perjury that the copies provided are true, correct, complete, and an accurate duplication of the original(s).

G. You are required to produce the DOCUMENTS as they are kept in the usual course of business, or to organize and label them to correspond with each category in these requests.

H. You are required to produce ELECTRONICALLY STORED INFORMATION in searchable form on DVDs or CD-ROMs.

I. For DOCUMENTS that are currently in paper format:

1. Documents must be scanned and produced electronically in single page TIFF format with corresponding OPT file, DAT file, as well as OCR or extracted text and .lst file.

2. To the extent available, please provide Beginning Production Number, Ending Production Number, Folder information, custodian information and family information.

J. For DOCUMENTS that contain ELECTRONICALLY STORED INFORMATION, the following guidelines are to apply:

1. Single page, Group IV TIFFs with links to native files (for excel files, at a minimum) with corresponding OPT file, DAT file, as well as OCR or extracted text and .lst file.

2. Maintain family integrity.

3. Perform custodian-level deduplication.

4. Concordance standard delimited DAT load file with the following metadata fields: Beginning Production Number, Ending Production Number, Beginning Attachment Number, End Attachment Number, Family ID, Page Count, Custodian, Original Location Path, Email Folder Path, Document Type, Doc Author, Doc Last Author, Comments, Categories, Revisions, File Name, File Size, MD5 Hash, Date Last Modified, Time Last Modified, Date Created, Time Created, Date Last Accessed, Time Last Accessed, Date Sent, Time Sent, Date Received, Time Received, To, From, CC, BCC, Email Subject, Path to Native, Path to Full Text, Original Time Zone.

5. OCR or extracted text for all ESI: (a) Separate .txt files corresponding to beginning production number of each document; (b) Separate .lst file for fulltext.

6. Process all data in GMT and provide a metadata field indicating original time zone.

K. If you withhold or redact a portion of any DOCUMENT under a claim of privilege or other protection, each such DOCUMENT must be identified on a privilege log, which shall be produced contemporaneously with the non-privileged DOCUMENTS responsive

to this Request for Production, and which privilege log shall state the following information:

1. The date of the DOCUMENT;

2. The type of DOCUMENT (e.g., letter, memorandum, report, etc.);

3. The name, address, telephone number and title of the author(s) of the DOCUMENT;

4. The name, address, telephone number and title of each recipient of the DOCUMENT;

5. The number of pages in the DOCUMENT;

6. The document control number, if any;

7. The present location(s) of the DOCUMENT and the name, address and telephone number of the person(s) who has (have) possession of the DOCUMENT;

8. A general description of the subject matter of the DOCUMENT or the portion redacted without disclosing the asserted privileged or protected communication;

9. The specific privilege(s) or protection(s) that you contend applies.

11. YOU may redact DOCUMENTS provided in response to this request to maintain the confidentiality of victim/survivor names and personal information which may reveal the identity of victims/survivors. To the extent that YOU identify information concerning individual victims/survivors, YOU may assign a claim number or letter to each individual victim/survivor for the purposes of identifying the PARTICIPANT in each instance.

DEFINITIONS

Unless otherwise stated, the following definitions shall apply to these Requests for Production:

1. "ADOM" or "ARCHDIOCESE" means and refers to the Archdiocese of Milwaukee, the debtor in the above-referenced bankruptcy case; and EACH of its predecessors and successors in interest; EACH of its present and former officers, directors, attorneys, agents, servants, employees, representatives, priests, DIOCESAN COUNCILS, committees within the Archdiocese of Milwaukee, and any other PERSON acting on its behalf or otherwise subject to its control. Upon information and belief, the ARCHDIOCESE is corporation organized under the laws of the State of Wisconsin. The ARCHDIOCESE is the debtor in the above-captioned chapter 11 bankruptcy case and the legal entity through which the Archbishop of Milwaukee conducts the temporal affairs of the Roman Catholic Archdiocese of Milwaukee. Upon information and belief, the ARCHDIOCESE uses the "Roman Catholic Archdiocese of Milwaukee" to refer to the juridic person of the Archdiocese under Canon law. The term ARCHDIOCESE refers to both the secular legal entity and the juridic person.

2. "COMMUNICATIONS" means and includes all oral and written communications of any nature, type or kind including, but not limited to, any DOCUMENTS, telephone conversations, discussions, meetings, facsimiles, e-mails, pagers, memoranda, and any other medium through which any information is conveyed or transmitted.

3. "CONCERNING" means and includes RELATING TO, constituting, defining, evidencing, mentioning, containing, describing, discussing, embodying, reflecting, edifying, analyzing, stating, referring to, dealing with, or in any way pertaining to.

4. "DOCUMENT" means and includes all written, recorded, transcribed or graphic matter of every nature, type and kind, however and by whoever produced, reproduced, disseminated or made. This includes, but is not limited to, any and all originals, copies or drafts of any and all of the following: ELECTRONICALLY STORED INFORMATION; papers;

books; letters; correspondence; telegrams; cables; telexes; messages; memoranda; notes; notations; transcripts; minutes; reports; recordings of telephone conversations; any other recordings; interviews; affidavits; declarations; statements; summaries; studies; analyses; evaluations; appraisals; estimates; projections; charts, graphs and tables; schedules; proposals; offers; acceptances; purchase orders; invoices; contracts; agreements; checks and canceled checks; bills of lading; insurance binders, policies or certificates; receipts; statements; pamphlets; diagrams; statistical records; any other records; calendars; appointment books; diaries; lists; tabulations; any information contained in any computer tape, card, disk, drive, program or other device; computer print-outs; CDs; videotapes; DVDs; facsimiles; e-mails; microfilm; microfiche; any other tangible or intangible thing or item that contains any information; and, all "writings and recordings" and "photographs" (and all negatives thereof) as defined in and by the Federal Rules of Evidence 1001. Any DOCUMENT that contains any comment, notation, addition, insertion or marking of any type or kind which is not part of another DOCUMENT, is to be considered a separate DOCUMENT.

5. "EACH" shall mean each and every.

6. "ELECTRONICALLY STORED INFORMATION" or "ESI" shall have the meaning ascribed to it in Federal Rules of Civil Procedure 16, 26, and 34.

7. "PERSON" means and includes individuals, for profit and not for profit corporations, corporations sole, partnerships, unincorporated associations, limited liability companies, trusts, firms, cooperatives, fictitious business names, and any and all legal entities, their agents, representatives, and/or employees.

8. "PETITION DATE" means and refers to January 4, 2011.

9. "RELATING TO" shall mean describing, discussing, evidencing, referring to, CONCERNING, constituting, regarding, bearing upon, supporting, summarizing, pertaining to, alluding to, depicting, summarizing, involving, embodying, containing, suggesting, mentioning, arising out of, in connection with, or having any logical or factual connection with the matter in question.

10. "YOU", "YOUR", and "YOURS" means and refers to ADOM or the ARCHDIOCESE.

REQUESTS FOR PRODUCTION

1. All DOCUMENTS and COMMUNICATIONS RELATING TO priests, Bishops, teachers, and lay employees of the ADOM accused of sexually molesting children.

2. All DOCUMENTS from all files for each priest, Bishop, teacher, and lay employee of the ADOM accused of sexually molesting children, including but not limited to any priest file, personnel file, member file, employee file, sub-secreto file, secret file, Canon 489 file, seminary file, parish file, hospital file, school file, Personnel Board file or historic file.

3. All DOCUMENTS from any log or minutes for each priest, Bishop, teacher, and lay employee of the ADOM accused of sexually molesting children, including, but not limited to, any vicar log, Ombudsman log, Bishop log, Archbishop log, priest personnel log, any diaries, any calendars, or similar writings.

4. All DOCUMENTS and COMMUNICATIONS RELATING TO the health of priests, Bishops, teachers, and lay employees of the ADOM accused of sexually molesting children.

5. All DOCUMENTS and COMMUNICATIONS RELATING TO names, contact information and potential claims of survivors of sexual abuse by priests, Bishops,

teachers, and lay employees of the ADOM, including but not limited to any and all databases of PERSONS who have contacted the ADOM with regard to sexual abuse by priests.

6. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's knowledge or constructive knowledge of child molesting priests, Bishops, teachers, and lay employees

7. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's representations to parishioners, those associated with its schools and other facilities, and children.

8. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's duties and responsibilities to children in its care, in its facilities, and to children interacting with its agents.

9. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's concealment child molesting priests, Bishops, teachers, and lay employees.

10. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's actions after a survivor was abused.

11. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's policies, practices and procedures regarding child sex abuse.

12. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's policies, practices and procedures regarding documents and document retention.

13. All DOCUMENTS and COMMUNICATIONS RELATING TO the ADOM's policies practices and procedures regarding agents and employees.

14. All DOCUMENTS and COMMUNICATIONS RELATING TO priests, Bishops, teachers, and lay employees accused of sexually molesting children.

15. All DOCUMENTS and COMMUNICATIONS RELATING TO religious order priests and clerics working within the ADOM, including but not limited to the ADOM's control and authority over those priests and clerics.

16. All DOCUMENTS and COMMUNICATIONS RELATING TO priests from other Dioceses who worked in the ADOM, including, but not limited to, the ADOM's control and authority over those priests.

EXHIBIT B

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JAMES ESSENBERG,

Plaintiff,

v.

Case No. 08-CV-9050
Case Code: 30107

ARCHDIOCESE OF MILWAUKEE,

Defendant.

DEFENDANT ARCHDIOCESE OF MILWAUKEE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Submitted by:

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I. INTRODUCTION

In *John Doe 1 v. Archdiocese of Milwaukee*, the Wisconsin Supreme Court found that the issue of when a reasonable person knew or should have known of the Archdiocese's alleged "fraud" involving allegations of childhood sexual abuse by one of its priests could not be decided on a bare motion to dismiss. 2007 WI 95, ¶ 13, n.7, 303 Wis. 2d 34, 734 N.W.2d 827 (2007). In saying this, however, the Supreme Court took pains to note that it was not precluding summary judgment once "undisputed facts demonstrate that the fraud claims accrued more than six years prior to the dates on which the claims were filed." *Id.* ¶ 63.

There was no elaboration by the *John Doe 1* Court on what "representations" or "reliance" would be required to present a sustainable fraud claim. Instead, the Supreme Court remanded the *John Doe 1* case back to the trial court to decide those matters once a record was offered. *Id.* ¶ 49. Thus, in issuing its *John Doe 1* decision, the Supreme Court made clear that sexual abuse allegations – even if framed in fraud language – like any other count, would still be subject to an appropriately filed summary judgment motion:

> [B]ased solely on the Complaints, we cannot determine when the plaintiffs knew or should have known of the Archdiocese's alleged knowledge of the priests' past histories of sexual molestation of children. Therefore, their claims may or may not be time barred by Wis. Stat. § 893.93(1)(b) depending on when the claims for fraud accrued. . . . . Since a Motion to Dismiss does not present the opportunity to fully develop the facts surrounding the Archdiocese's arguments that the plaintiffs' fraud claims accrued more than six years before the date on which they were filed, we conclude that the claims for fraud survive a Motion to Dismiss. *However, we want to clarify that we are not precluding summary judgment if undisputed facts demonstrate that the claims for fraud accrued more than six years prior to the dates on which the claims were filed.*

Id. ¶¶ 62-63 (emphasis added).

Shortly after the Supreme Court's decision in *John Doe 1* was published, Plaintiff filed his lawsuit casting his 35 year old sexual abuse allegations as "fraud" counts. Plaintiff asserts that he was sexually abused by Franklyn Becker. According to his complaint, the abuse he suffered occurred from 1971-73, more than 35 years before he filed his action. Plaintiff did not sue his alleged attacker, Franklyn Becker. Instead, he named only the Archdiocese of Milwaukee. Plaintiff's 35 year old lawsuit is untimely or unsustainable for the following reasons:

1. Plaintiff's claims are time barred. What the Plaintiff will now admit he *personally* knew (or didn't know) is irrelevant, although in this case Plaintiff's clear admissions establish the duty to investigate accrued no later than 1994 even under Plaintiff's extended tolling theories. The legal test for starting the 6 year clock on commencing fraud suits is what the law determines an *objective* person would have known had he or she conducted a *diligent inquiry*. Here, objectively speaking, Plaintiff's "inquiry notice" to investigate his rights against the Archdiocese for legal claims (including fraud) accrued far more than six years before this Plaintiff filed this 2008 action.

2. Public policy also separately requires the dismissal of Plaintiff's 35 year old claims pursuant to Wisconsin Supreme Court authority. It is undisputed that virtually all defense witnesses who would have any ability to defend this matter are now dead or unavailable, and further, critical exculpatory testimony and documents no longer exist or are unavailable.

II. STATEMENT OF FACTS

A. Plaintiff Admits In His Deposition He Knew All Necessary Facts To Investigate And Bring His Claims Well Before 2008.

Essenberg alleges in his complaint that he was abused by Becker in 1971-73. (Compl. ¶ 17.) At his deposition, Essenberg admitted that he has always known these four undisputed facts: (a) the sexual abuse he claims occurred to him (no repressed memory); (b) the identity of the person who committed it (Franklyn Becker); (c) that Becker was a Catholic priest at that time and employed by the Archdiocese of Milwaukee; and finally (d) that what Becker did to him was wrong. (Affidavit of David P. Muth ¶ 2 Ex. A at 68:1-4, 81:10-15, 133:9-16.)

Despite the knowledge of all these ultimate facts, Essenberg – for decades – took no steps to seek out any additional information about Franklyn Becker or Essenberg's potential claims against the Archdiocese of Milwaukee. And Essenberg's own testimony establishes he began talking about his claims more than 15 years before filing suit. Specifically, Essenberg first told his therapist about the abuse in 1993 or 1994. (*Id.* at 102:2-13.) In 1995 or 1996, before he married his now ex-wife, he told her that he had been abused by a priest. (*Id.* at 127:23-128:4.)

Essenberg even talked to the Archdiocese in 1994 about his abuse. (*Id.* at 94:10-15, 97:9-98:12.) Between 1994-2002, Essenberg spoke to directors of Project Benjamin, an Archdiocesan organization created in response to the clergy sexual abuse claims to assist victims. Specifically, Essenberg spoke with Dr. Elizabeth Piasecki and her successor, Dr. Barbara Reinke, on several occasions related to his abuse. (*Id.* at 97:9-98:12, 98:21-99:11, 107:4-23, 109:8-12, 111:1-4.) During those conversations, Essenberg confirmed that Becker was no longer assigned and that he had no contact with children. (*Id.* at 107:4-23.) He was told that a mother of another child had called to say she thought her son may have been abused by Becker. (*Id.* at 107:24-108:10.) Essenberg also admits that the Archdiocese did not threaten or in any way intimidate him to keep

him from bringing a claim against the Archdiocese sooner. (*Id.* at 133:17-22.) To the contrary, the Archdiocese offered to and then paid for Essenberg's therapy expenses relating to the abuse. (*Id.* at 117:9-118:14.)

In addition to talking about the abuse to the Archdiocese, Essenberg was also able to report it to the Milwaukee District Attorney's office in the late 1990's. (*Id.* at 81:16-82:15.) The district attorney he spoke to informed him that the statute of limitations for criminally prosecuting the abuse had run out, and therefore they could not criminally pursue Becker. (*Id.* at 82:16-19.) A few years later, after numerous sexual abuse lawsuits were filed in California, Essenberg received a call from the San Diego police department and spoke to a detective about his abuse. (*Id.* at 83:16-84:21.)

Also in the late 1990's or early 2000, Essenberg saw a news story involving a classmate of his from St. John de Nepomuc, Mark Salmon, making allegations of sexual abuse against a teacher there, Gary Kazmarek. Essenberg contacted Mr. Salmon, who was then the director of the Milwaukee chapter of the Survivors Network for those Abused by Priests (SNAP). (*Id.* at 92:14-23, 115:6-17.) At Mr. Salmon's suggestion, Essenberg joined the SNAP organization and was in contact with other members. (*Id.* at 92:24-94:8.)

Essenberg also did investigations about other claims of sexual abuse by Milwaukee priests. In 2002, after news of the Boston clergy sexual abuse scandal broke, Essenberg went online and reviewed articles in the Milwaukee Journal Sentinel about clergy sexual abuse claims in Milwaukee. (*Id.* at 80:8-15.)

Essenberg testified that he was aware in 2002 that Catholic "priests had been transferred from one place to another to cover up their deeds." (Muth Aff. ¶ 2 Ex. A at 143:7-14.) He also admitted that in June 2002 he read media coverage talking about other victims of sexual abuse

suing the church. (*Id.* at 146:13-16.) Yet Essenberg admits he took no steps at that time in 2002 to investigate what the Archdiocese had allegedly done to cover up its deeds with respect to Becker. (*Id.* at 143:16-19.) Nor did he take any steps to investigate prior to that between 1978 – 2001. (*Id.* at 143:20-144:6.)

B. The Archdiocese of Milwaukee Is Irreparably Prejudiced By The Long Passage Of Time Because Virtually All Witnesses Are Dead.

Keeping in mind that this motion deals with Plaintiff's claims of *intentional* fraud (i.e., a tort requiring a knowing and intentional state of mind by the defendants to deceive and cause injury) here are the defense personnel and witnesses against whom Plaintiff's accusations are leveled, and yet whom the defense – because of death and unavailability – can no longer call to defend or rebut the charges of *knowing* and *intentional* wrongdoing on their parts:

- Archbishop William E. Cousins, Archbishop of Milwaukee until 1977 (died in 1988).
- Auxiliary Bishop of Milwaukee, Roman R. Atkielski (died in 1969).
- Father Francis M. Beres, Vice Chancellor of Milwaukee (died in 1990).
- Father Philip Rose, assigned to Holy Assumption when Becker was there (died 1991).
- Father James Koneazny, who was assigned to Holy Assumption when Becker was there, left active ministry in 1970 and his whereabouts are unknown.
- Rev. Carroll Straub, assigned to Holy Assumption when Becker was there (died 1997).
- Father Alphonse Rumbac, assigned to Holy Assumption when Becker was there (died 2000).
- Father Louis Zich, assigned to Holy Assumption when Becker was there (died 1992).
- Father Eldred Lesniewski, assigned to Holy Assumption when Becker was there (died 1996).

- Father Joseph Wamser, assigned to St. John de Nepomuc when Becker was there (died 1972).

- Farther Wendell Badem, assigned to St. John de Nepomuc when Becker was there (died 2001).

- Father George Wollett, assigned to Holy Family Parish when Becker was there (died 1998).

- Father Harold Ide, assigned to Holy Family Parish when Becker was there (died 2003).

- Father Robert McCormick, assigned to Holy Family Parish when Becker was there (died 2003).

- Father Donald Reiff, a member of the Archdiocesan Priest Personnel Board in 1970, is dead (died 1994).

- Father Murphy, a member of the Archdiocesan Priest Personnel Board in 1970, is dead (died 2005).

- Father Frank Schneider, a member of the Archdiocesan Priest Personnel Board in 1970, is dead (died 1973).

- Father Voelker, a member of the Archdiocesan Priest Personnel Board in 1970, is dead (died 1971).

- Father Czachowski, a member of the Archdiocesan Priest Personnel Board in 1971, is dead (died 1987).

- Father Gunther, a member of the Archdiocesan Priest Personnel Board in 1971, is dead (died 1996).

- Father Waldbauer, a member of the Archdiocesan Priest Personnel Board in 1971, is dead (died 2003).

- Father Emmeneger, a member of the Archdiocesan Priest Personnel Board in 1972, is dead (died 2000).

- Father Dorczynski, a member of the Archdiocesan Priest Personnel Board in 1973, is dead (died 1990).

- Father Norbert Kieferle, a member of the Archdiocesan Priest Personnel Board in 1973, left active ministry and we do not know his present whereabouts. He is not listed in the current Official Catholic Directory.

- Fr. Robert Sampon, Chancellor of the Archdiocese for 1970-73, is dead (died 2006).

(Cusack Aff. ¶¶ 4 - 27.)

III. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Wis. Stat. § 802.08(2) (2005-2006).

IV. ARGUMENT: PLAINTIFF'S FRAUD CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

A. Plaintiff's Knowledge Of His Abuse And The Identity Of The Person Who Abused Him, Together With Knowing That He Was A Priest, Commenced His 6 Year Time Period Decades Ago.

The Archdiocese recognizes the despicable conduct of childhood sexual abuse. The Archdiocese has repeatedly, and in no uncertain terms, condemned such acts and commiserated with victims, removed priests like Becker from the priesthood, and created an independent mediation program to address these types of claims. But returning to this matter, it was this Plaintiff's choice to invoke the Wisconsin legal system procedures. Under the limitations of those procedures, however, claimants alleging fraud are obligated to act promptly and *diligently.* Further, claimants alleging fraud may not delay the day on which they have to act by asserting that they did not *know the details of the fraud.*

Just as persons who have family members who suffered death, serious injury, or dismemberment have 3 years in which to sue, persons who seek to allege fraud have a limited period in which to file suit. It is 6 years. Moreover, that 6-year limitation commences as soon as the claimant knows or learns of sufficient facts (not all of them), which if diligently investigated, would have indicated where the facts constituting the fraud could have been discovered. *John*

Doe 1, 2007 WI 95 at ¶ 51. The difference is between first discovering any smoke versus proving fire.

Statutes of limitation find their justification in necessity and experience rather than in logic. They are essential devices that spare the courts from litigation of stale claims and citizens from being put to defenses after memories have faded, crucial witnesses have died or disappeared, and evidence has been lost. They are not based on any universally recognized or accepted time frames or duration. They are based on necessary pragmatism. Bright lines have to be drawn and those lines are based on time. Importantly, those lines do not – and cannot – undertake to discriminate between the good and not-so-good claims. To do so would only defeat the very purpose of having the limitation. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). In the end, statutes of limitation represent a strong public policy about the limitations attendant to any civil method of litigating disputes and the burdens that must go with that privilege.

Most importantly, the test of a diligent inquiry is an *objective* one. It cannot be avoided by the non-diligent claimant conveniently asserting that he did not know that he should have pursued the matter earlier. In the words of the *John Doe I* Court:

> *Actual and complete knowledge* of the fraud on the part of the plaintiff is *not* necessary in order to set the limitation period running.
>
> When the information brought home to the aggrieved party is such as to indicate where the facts constituting the fraud can be effectively discovered upon diligent inquiry, it is the duty of such party to *make the inquiry*, and if he fails to do so within a reasonable time he is, nevertheless, chargeable with notice of all facts to which such inquiry might have led.

John Doe 1, 2007 WI 95 at ¶ 51 (emphasis added, citations omitted).

Further, when the dispositive historical facts are established, the question of whether a plaintiff exercised *objective* reasonable diligence in discovering his or her cause of action is a question of law for the court to decide. *Id.* ¶ 13.

In this case, given the admitted deposition facts of this Plaintiff and his undisputed knowledge of the persons, positions and circumstances surrounding his abuse, courts throughout the country have uniformly ruled that these basic facts start the statute of limitation clocks running for a claimant to investigate and then make a decision to bring his claim – even for fraud.

For instance, as one court observed about other sexual claimants attempting to take refuge in fraud allegations to excuse untimely lawsuits:

> In making these claims [of fraud and fraudulent concealment] plaintiff-appellants do not allege that the hierarchy defendants' [i.e, the Church] silence misled them into believing that the alleged *sexual abuse* did *not* occur, that it had *not* been committed by the priest, or that it had *not* resulted in injury to plaintiff-appellants. In other words, the hierarchy defendants never concealed from any of the plaintiff-appellants the fact of the injury itself. Rather, the essence of the plaintiff-appellants' fraudulent concealment argument is that the hierarchy defendants' silence concealed from them an *additional theory* of liability for the alleged sexual abuse. This argument misses the mark. For a cause of action to accrue the entire theory of the case need not be immediately apparent . . . . Once injured, a plaintiff is under an affirmative duty to investigate diligently all of his potential claims . . . . To postpone the accrual of their causes of action until plaintiff-appellants completed their investigation of all potential liability theories would destroy the effectiveness of the limitations period.

Kelly v. Marcantonio, 187 F.3d 192, 200-01 (1st Cir. 1999) (emphasis added, citations omitted).

Similarly, in *Meehan v. Archdiocese of Philadelphia*, the court re-confirmed that merely casting a church's nondisclosure of an offender's past abuse as "fraudulent" conduct does not avoid the statute of limitations where the victims always knew *the identity of the abuser as well as his status as a priest*. 2005 PA Super. 91, 870 A.2d 912 (2005). Specifically, 17 claimants in

Meehan alleged that a diocese had reassigned several known priest abusers to new parishes without telling the parishioners. *Id.* at 920. *Like in this case, they asserted that their statute of limitation should not run until they discovered the fact that the Archdiocese also had knowledge in this regard. Id.* Finally the claimants asserted that whether they exercised appropriate diligence to discover their claims was a jury question. *Id.* At the same time, as in this case, it was undisputed that all of their claims had been delayed between *2 and 4 decades* in finally filing their actions.

Rejecting these arguments, the court held:

> [T]he discovery rule is not applicable here. The child *abuse* is the injury in this matter, not the alleged cover-up by the Archdiocese (otherwise, any member of the Catholic Church could conceivably bring suit against the Archdiocese, absent any abuse, alleging injury from the Archdiocese's general conduct). Unlike traditional discovery rule cases where the injury, itself, is not known or cannot be reasonably ascertained, the plaintiffs' injuries, here, were known when the abuse occurred.
>
> . . . .
>
> It is undisputed that the plaintiffs were aware that the Archdiocese employed their abusers and that the abuses all occurred on church property. These facts alone were sufficient to put the plaintiffs on notice that there was a possibility that the Archdiocese had been negligent. Neither the plaintiffs' lack of knowledge of the Archdiocese's conduct, not the plaintiffs' reluctance, as members of the Catholic Church, to investigate the possible negligence of the Archdiocese of Philadelphia after having been abused by one of its priests or nuns, tolls the statute of limitations when the plaintiffs had the means of discovery but neglected to use them.

Id. at 920-21.

As to the *17* claimants' alternative stratagem of casting their claims as "fraud", that strategy was equally unsustainable:

> We agree with the Archdiocese that the doctrine of fraudulent concealment does not toll the statute of limitations here. The plaintiffs have not put forth any evidence to indicate that they

> made any inquiries to the Archdiocese prior to 2002 regarding their potential causes of action. The plaintiffs do not allege that the defendants' silence misled them into believing that the alleged sexual abuse did not occur, that it had not been committed by the priests or nuns, or that it had not resulted in injury to the appellants. The defendants never concealed the injury itself. Nor do the plaintiffs allege that they were lied to by the Archdiocese with regard to the identity of their abusers or their abuser's place within the Archdiocese, which if relied upon, would have caused them to suspend pursuit of their claims.
>
> Again, the essence of the plaintiffs' fraudulent concealment argument is that the defendants' general conduct and/or silence concealed from them an additional theory of liability for the alleged sexual abuse. As noted in the federal case, *Kelly v. Marcantonio*, 'this argument misses the mark . . . as soon as the plaintiffs became aware of the alleged abuse, they should also have been aware that the defendants, as the priests' employers, were potentially liable for that abuse."

Id. at 922.

Still another example is the case of *Mark K. v. Roman Catholic Archbishop of Los Angeles,* 67 Cal. App. 4th 603, 79 Cal. Rptr. 2d 73 (Ct. App. 1999), *petition for review denied.* In *Mark K.* the court, on a motion to dismiss (demurrer) was equally presented with a clergy sexual abuse case wherein 9 claimants sued the employer diocese alleging "Fraud: Conspiracy to Suppress Facts" as well as "Delayed Discovery – Equitable Estoppel." In their complaints the 9 claimants alleged that wholly apart from what they plainly knew of their *own* abuse by the abuser priest and his identity, it was not until 23 years later in 1996 that they discovered the *diocese's* prior knowledge of the cleric's abuse of other children. Thus, they argued that their fraud statute of limitation against the *diocese* could not commence until 1996. *Id.* at 609.

Rejecting these arguments the court observed that that "it is also important to note what the plaintiff has *not* alleged." *Id.* at 612. They did not allege that they were at any time unaware of the fact that they had been molested. They also did not allege that they were unaware that the person who committed the molestation was a cleric. And finally, they had not alleged that they

were unaware of the abuser's identity or of his connection to the Catholic Church. Thus the court ruled:

> Plaintiff asserts that, as his fiduciary, the church had an obligation to disclose the 1973 and 1974 accusations against [the abuser] and breached that duty by failing to come forward with this information. This assertion begs the question. The wrongful conduct alleged against the church was its inaction in the face of the accusations against [the abuser]. Thus, what the church failed to disclose was merely evidence that the wrong had been committed. If plaintiff's approach were to prevail, then any time a tortfeasor failed to disclose evidence that would demonstrate its liability in tort, the statute of limitations would be tolled under the doctrine of concealment. Regardless of whether the issue is characterized as fraud by concealment or equitable estoppel, this is not the law.

Id. at 613.

Instead the *Mark K.* court recognized that the discovery rule is triggered as soon as a person has notice or information sufficient to put a person on inquiry. *Id.* at 610, 613. And accordingly, in agreement with the Wisconsin Supreme Court's holding in *John Doe I,* a plaintiff *"need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery."* *Id.* at 610. Smoke; not fire. Rather, once the plaintiff has a suspicion of wrongdoing, he must act. "So long as that suspicion exists, it is clear that the plaintiff must go find the facts; *he cannot wait for the facts to find him.*" *Id.*

There is no need to belabor the point. The law simply rejects the strategy of trying to expand or excuse the time period for bringing claims by alleging that a claimant did not know he could additionally sue under a fraud theory, or because the claimant did not additionally know what the priest's employer/supervisor allegedly knew or didn't know. In all cases, the claimant still knew of his *own* abuse, who did it, and that the person was related to the supervising organization. That is enough. *Marshall v. First Baptist Church of Houston*, 949 S.W.2d 504, 507-08 (Tex. App. 1997) ("[plaintiff] was fully aware of the abuse and his resulting

psychological injuries. No one associated with the church attempted to conceal them from him. In such case, there can be no fraudulent concealment"); *Baselice v. Franciscan Friars*, 2005 PA Super 246, 879 A.2d 270, 279 (2005) ("Again, the essence of appellant's fraudulent concealment argument is that the defendants' general conduct and/or silence concealed from him an additional theory of liability for the alleged sexual abuse....this argument misses the mark."); *Aquilino v. Philadelphia Catholic Archdiocese*, 2004 PA Super 339, 884 A.2d 1269 (2005); *Doe v. O'Connell*, 146 S.W.3d 1 (Mo. Ct. App. E.D. 2004), *reh'g and/or transfer denied* (Oct. 6, 2004); *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich. App. 632, 692 N.W.2d 398 (2004), *appeal denied*; *John Doe v. Linam and The Roman Catholic Diocese of Galveston-Houston*, 225 F.Supp.2d 731 (S.D. Tex. 2002); *Parks v. Kownacki*, 193 Ill.2d 164, 737 N.E.2d 287 (Ill. 2000) (equitable estoppel); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 772 (App. D.C. 1998); *Doe v. Archdiocese of Washington*, 114 M.D. App. 169, 689 A.2d 634, 644 (Md. App.1997); *E. W. v. D.C.H.*, 231 Mont. 481, 488, 754 P.2d 817, 821 (1988).

Given the "diligent inquiry" requirement, and the objective "should have known" limitation embedded in the 6 year limitation period for fraud claims in this state, in conjunction with what Plaintiff now admits of record knowing since no later than 1971-73, it is plain that the time limit for him to have filed his claims occurred far earlier than the decades he delayed. As shown by the deposition admissions now of record (see citations above), Plaintiff knew all of the facts necessary to start his 6 year diligent inquiry period back at the time he first became an adult in the late 1970's.

B. Wisconsin's *Dakin v. Marciniak* Additionally Requires The Dismissal Of Plaintiff's Claims Because It Held The Law Does Not Toll The Limitations Until A Tortfeasor's Employer Is Known.

In *Dakin v. Marciniak, et al.*, 2005 WI App 67, 280 Wis.2d 491, 695 N.W.2d 867, our judicial system was presented with the direct question of whether a claimant who admittedly

knew the identity of the immediate tortfeasor who caused his or her bodily injuries, could nevertheless expand the time for suing the principal or employer of that person by alleging he or she did not know of the employer's liability or role until sometime later. The answer was a clear "no." *Id.* ¶¶ 15-19.

In *Dakin*, a claimant riding a bus fell from her seat and suffered injuries when the bus had to swerve to avoid a car. There was no collision, but the swerve was caused by the driver of the car negligently pulling out. *Id.* ¶ 2. Within the statutory time period, the claimant learned and confirmed the identity of the tortfeasor driver. She sued. *Id.* ¶ 3. After the statute of limitation passed, she deposed the driver and learned that he had an employer. *Id.* Accordingly, after the statute of limitations had passed she attempted to sue the employer, arguing that under the Wisconsin discovery/diligent inquiry rule, her cause of action against that *employer* could not be deemed to have accrued until she discovered that particular defendant's identity and its involvement.

Flatly rejecting this gambit, the *Dakin* court observed that just because a claim does not accrue until a plaintiff has knowledge of a suable party, does not mean that it does not accrue until *all* parties are known. *Id.* ¶ 15. As recognized in *Dakin*, the purpose of the discovery rule is to limit the manifest injustice that arises when application of the statute of limitation destroys the rights of parties who could not have brought their claims earlier. *It is not a promise to delay limitations "until optimal litigation conditions are established" or until all the parties who might be sued are confirmed. Id.* (emphasis added). There the plaintiff could have sued the employee years earlier and demanded discovery. Obviously, so too could have the Jane Doe Plaintiff in this case.

The plaintiff next argued that the auto driver's failure to report the accident to his employer (and then to her) should lessen or satisfy her duty of diligent inquiry. Not so. As observed by the court, such an argument is circular. *Id.* ¶ 18. The driver and his employer's alleged silence on the subject had nothing to do with an investigation that the plaintiff never conducted. The law places the duty of *diligent inquiry* upon the person alleging the delay; not the upon the claimant's target. *Id.*

Given the dictates of Wisconsin law, the *Dakin* court affirmed the dismissal of the plaintiff's untimely suit against the employer. *Id.* ¶ 19.

In this case, it is simply an undeniable effect of law that a person such as this Plaintiff was under a duty to investigate diligently his potential claims against all targets *decades* ago. It is beyond argument that the very *first* focus of even the most inexperienced lawyer consulted on any personal injury case is the question of whether the tortfeasor had an employer (and thus, an investigation into the employer's exposure). To suggest otherwise would make a mockery of the diligent inquiry rule and the uncontroverted principle that the discovery rule was never adopted to be an excuse for plaintiffs to *avoid* their obligations.

Precisely because the tort implications of the agent-principal, employer-employee relationship are so universally known (or knowable with any minimum inquiry or diligence), as well as the immediate wrongfulness of any sexual abuse, our State has rejected the notion that plaintiffs can extend the legislatively mandated limitations period for lawsuits by alleging ignorance about the possibility of pursuing an employer or principal for injuries arising from the acts of an agents. Given the facts of record now confirmed on this summary judgment record, Plaintiff has no basis upon which he may be asked to be excused from the same 6-year time limitation requirements that every other litigant in this state is obligated to meet.

C. Even If Plaintiff's Knowledge Of His *Own* Abuse Could Be Set Aside, As Well As The Ruling Of The *Dakin* Case, Other Facts Of Judicial Notice Equally Compel A Dismissal Of This 2008 Lawsuit.

As already noted, embedded in the duty to exercise reasonable diligence, is the duty to *inquire*. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶ 85, 249 Wis.2d 142, 638 N.W.2d 355 (Fine, J., dissenting); *Tele-Port v. Ameritech Mobile Comm.*, 2001 WI App 261, ¶ 11, 248 Wis.2d 846, 858, 637 N.W.2d 782. Indeed, as the federal appellate court for our State aptly summed it up, persons wishing to claim the right to assert fraud, cannot merely wait "until the facts find them." *Stockman v. LaCroix*, 790 F.2d 584, 587-89 (7th Cir. 1986). They are obligated to act upon information that daily is made available to the world.

Here, a review of judicially noticeable historical facts shows that any person exercising any effort to investigate sex abuse claims, much less conduct any diligent *inquiry*, could not help but observe throughout all of the 1990's, and before, that not only *could* churches be sued for sexual assaults of clerics, but that they *were* being sued – by hundreds of claimants throughout the country.

Consider just the City and County of Milwaukee where this Plaintiff filed this lawsuit. From 1990 to 1998, the Milwaukee Journal and Milwaukee Sentinel prepared no less than *150* articles on the very subject of Wisconsin clergy sexual abuse and all the resulting consequences *and lawsuits*. This is a matter of undisputed historical fact per judicial notice. Wis. Stat. § 902.01(4). A bibliography and those articles and their dates is reprinted in the Affidavit of David Muth. (Muth Aff. ¶ 5 Ex. D.) And these are just the articles from the widely available Milwaukee newspaper to say nothing of other newspapers around the state, in addition to all of the additional *national* sources also present from such ubiquitous sources as ABC, NBC, CBS, CNN, National Public Radio, television news reports, television magazine shows, television talk shows, traditional magazines, books, radio, radio talk shows, USA Today, The Chicago Tribune,

The New York Times, The Wall Street Journal, and all the other permutations of national news coverage that have exited since the 1980's. P. Jenkins, *Pedophiles and Priests, Anatomy of a Contemporary Crisis* 53-54, 74-75 (Replica Books, 1996).

As one leading book on the subject observed in *1996*, "By the early 1990's reports of sexual misbehavior by priests had become so numerous as to be almost commonplace of news coverage." *Id.* He noted that by 1996, hundreds of articles had appeared (and were continuing) in religious and secular periodicals of every possible political and cultural persuasion including Newsweek, People Weekly, Redbook, Ms., The Nation, Vanity Fair, National Review, National Catholic Reporter, Playboy, Christian Century, Rolling Stone, U S Catholic, the New Yorker, Episcopal Life, America, Commonweal, Time, MacLean's, PrimeTime Live (ABC), Nightline (ABC), 20/20 (ABC), 60 Minutes (CBS), Dateline (NBC), Court Television, Investigative Reports (Arts & Entertainment), and CNN Reports (CNN). *Id.*; *see also* Muth Aff. ¶ 6 Ex. E.

As just one example, here is the introductory excerpt of what the universally known and distributed magazine "Time" observed as an obvious fact in *August of 1991*:

SINS OF THE FATHERS
August 19, 1991

> Without doubt it is the worst wave of moral scandal ever to beset Roman Catholicism in North America. Dozens upon dozens of priests have been accused of sexually abusing underage boys. Case have erupted in most U.S. states and two Canadian provinces since the 1985 conviction of Louisiana's Father Gilbert Gauthe, who had molested 35 youths. *So widespread are the cases that by one informed estimate, Catholic institutions have paid $300 million in settlements – and no end in sight.*
>
> . . . .
>
> One attorney in the Hawaii suit, Jeffrey R. Anderson of St. Paul, has become a specialist in civil damage suits involving alleged priestly sex abuse and is pursuing more than *a 100 cases at present.*

Time Magazine, "Sins of The Fathers," Aug. 19, 1991, 1991 WL 3117669 (*see* attached Table of Non-Wisconsin Authorities) (emphasis added).

Plaintiff's attorney alone had more than 100 cases in *1991*.

Returning to Wisconsin here is a *sampling* of just some of the headlines of articles that appeared in the same 2 year time period of 1991-92 in the Milwaukee Journal/Sentinel, which are also matters of judicial notice that every person just scanning the headlines – without any additional searching or inquiry – understood and knew:

Woman Files Suit Alleging Abuse by Priest (10-31-91)

Misconduct By Priest Is Alleged (1-21-92)

Priest Gets 7 Years in Prison in Sex Case (4-25-92)

Priest Charged With Molesting 2 Alter Boys (7-8-92)

Former Alter Boy Alleges Sex Abuse (5-5-92)

Former Student Sues High School, Alleging Abuse (7-14-92)

Man Sues Over Alleged Assaults (8-21-92)

Anguish Of Child Sexual Abuse Lingers Long After the News Fades (10-18-92)

Weakland Says He Knew of Sexual Allegations Against Priest (1-28-92)

At Least 3 Lawsuits Here Allege Sex Abuse By Priests (10-29-92)

Kenosha Officials Get 25 Calls Regarding Sex Abuse By Priest (10-29-92)

15 Tell Authorities Sheboygan Priest Assaulted Them, Several Allege He First Served Martinis (10-29-92)

Student Says Priest Tried to Molest Him 8 Years Ago (10-30-92)

Sex-Abuse Victims Urged To Come Forth (11-1-92)

Priests Who Become Problems (11-2-92)

Lawmaker Wants Longer Time for Filing Charges (11-3-92)

Parishioners Worry About Ex-Pastor's Victims (11-3-92)

$10,000 Bail Set For Priest In Sex Case (11-6-92)

Priest Sex Cases have Cost $650,000, Weakland Reveals (11-6-92)

Man Files Suit in Sex Abuse By Priest (11-13-92)

Dear Archbishop: A Survivor Of Sex Abuse Replies (11-15-92)

Sex Allegations Against Priest Escalate (12-6-92)

Priest Serving Time For Sex With Boy, 15 (12-18-92)

8 Men Tell of Sex Abuse By Friars (12-20-92)

Former Seminary Students Demand Action on Abuse (12-21-92)

Priest Urges all Clergy To Report Abuse (12-24-92)

Capuchins Dragging Feet on Sex Abuse Inquiry, Ex-Student Says (12-21-92)

(Muth Aff. ¶ 5 Ex. D.)

The news coverage of the sexual abuse scandal in the Church continued throughout the 1990's and into the 2000's. Below is a sampling of headlines of the articles that appeared in The Milwaukee Journal/Sentinel during that time frame, when Plaintiff was talking to his therapist about the abuse, was in touch with the Archdiocese and was actively scanning headlines to read about the abuse scandal:

Sexual-Abuse Lawsuit Names Priest (1-5-93)

4 Adults File New Lawsuit Alleging Abuse by Effinger (1-20-93)

Effinger Found Guilty of '87, '88 Sex Assaults (2-27-93)

Alleged Victim Sues Priest (3-10-93)

Report Details Seminary Abuse (5-27-93)

Bishops Create Sex Abuse Task Force (6-18-93)

Diocese sets aside $2 million Fund To Cover Abuse Claims (1-7-94)

Allegation in the 1980s Named Priest (4-14-94)

Church's Carefully Crafted Words Don't Excuse Priests' Vile Behavior (11-28-94)

Archdiocese Defends Secrecy; Church Tries to Assure That Minors Are Safe From Abuse (3-17-02)

6 Priests Linked To Abuse; New Task Force Will Review Allegations Submitted By Milwaukee Archdiocese (3-25-02)

Bucher Orders Sex Abuse Investigation; Accusations Against Priest Date Back 30 Years (5-15-02)

Ex-West Allis Priest Charged With Sexual Assault Of 3 Boys in '70s (5-24-02)

(Muth Aff. ¶¶ 5, 7, Exs. D, F.)

Next, in addition to the relentless multi-media coverage since the 1980's and ever since, any minimal inquiry into the *legal* field would have additionally shown that by 1999 more than half of the 50 states had already processed actual civil lawsuits to the advanced stage of *published* appellate decisions by which other litigants had already demonstrably *sued* supervising organizations for clergy sexual abuse. A copy of a bibliography of these cases is attached to the Affidavit of David Muth. (Muth Aff. ¶ 8 Ex. G.) Plaintiff did not have to contact attorneys just concentrating their practices to suits against churches (such as Plaintiff's own lawyer) to find out that the Church had exposure and could be sued. Before the turn of the century, there were more than thirty (30) published cases exemplifying and proving that fact. Prominently numbered among those states was Wisconsin with no less than 4 published cases. And in each of those Wisconsin cases, the question was not whether the claimant could sue the supervising organization, but rather, like here, was the action timely. *See e.g., Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 325-26, 533 N.W.2d 780 (1995); *John BBB Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 565 N.W.2d 94 (1997); *L.L.N. v. Clauder*, 209 Wis. 2d 674, 685, 563 N.W.2d 434 (1997); *Joseph W. v. Diocese of Madison*, 212 Wis. 2d 925, 569 N.W.2d 795 (Ct. App. 1997).

Given all of the TV coverage, the radio coverage, the newspaper articles, the books, and the other sources of popular information, as well as the officially *published* appellate examples of such claims by courts both within Wisconsin and outside of it, it is perfectly plain that no other tort claimant, exercising any diligence, would be allowed to defer his or her 6 year period in which to conduct and complete his or her "diligent inquiry." To rule otherwise would mean that persons possessing claims need not consider publicly available judicial decisions and everyday news reports and information coming out on a daily basis.

Contrary to any opposing argument, the Wisconsin statute of limitations, whether for fraud or otherwise, do not wait until the person claiming a right to sue eventually decides to consult a lawyer (or has a lawyer specializing in these claims contact him), or claims he or she has found the final facts to prevail at trial, or decides to obtain a expert confirmation of his or her injuries. That is the work to be done *within* the 6 year inquiry period. Not after it. Again, as our federal appellate court best put it:

> "[The 6 years] provided by a statute of limitations is not for recuperation after learning enough *to prevail at trial. It is for investigation*, and because fraud may be hard to unravel the statutory period is substantial."

Stockman, 790 F.2d at 588 (applying Wis. law).

Plaintiff, having known about his abuse since the early 1970's, the precise person who did it, the fact that he was a Catholic priest, and then being subject to the same barrage of lawsuit information that has been broadcasted to the entire American population over the last 27 years, was not entitled to wait 35 years before bringing this lawsuit.

V. ARGUMENT: PUBLIC POLICY LAW SIMILARLY REQUIRES DISMISSAL OF THIS 2008 ACTION

Wholly apart from the numerical years set by the legislature for limitation periods which this Plaintiff cannot meet, our Supreme Court has ruled that any extension to those time limits by

the "discovery" exception is subject to judicial supervision through public policy limitations. For instance, on a dispositive motion in the Supreme Court case of *Pritzlaff v. Archdiocese of Milwaukee*, the Court held that regardless of any other rule, order or provision, allowing a twenty-seven year old claim to go forward against a defendant was simply contrary to public policy. Such a case would be irreparably unfair and could not be permitted.

> [T]o allow the claim to proceed against the Archdiocese based on Ms. Pritzlaff's allegations concerning Fr. Donovan despite the passage of twenty-seven years since the end of the alleged relationship would be contrary to the public policy of the State.
>
> . . . .
>
> This court has stated that *the discovery rule* will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. *Hansen*, 113 Wis.2d at 559, 335 N.W.2d 578. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged conduct took place over twenty-seven years ago and increase the potential for fraud.

194 Wis. 2d at 306, 322 (emphasis added).

Two years later in the case of *John B.B.B. Doe v. Archdiocese of Milwaukee*, the Supreme Court ruled again that even in the face of assertions of "repressed memory" it would be against public policy to allow claims as old as 20 years to proceed.

> When such allegations are made long after the alleged occurrence, the potential for fraud is heightened. The opportunity to fairly prosecute, and defend against, these claims is frustrated....
>
> Based upon these considerations, *as a matter of law*, we conclude that it would be contrary to public policy, and would defeat the purposes of limitation statutes to allow claims of repressed memory to invoke the discovery rule and to indefinitely toll the statutory limitations for these plaintiffs.

211 Wis. 2d at 364, 56 N.W.2d 94.

In this case, the delay that Plaintiff is attempting to justify is even longer: 35 years. At this level, not only would the delay be exponentially greater than the 20 years and 27 years rejected in *Doe* and *Pritzlaff,* but further, it would violate even the most liberalized statute of limitations recently enacted by the legislature for childhood sexual abuse claims. Specifically, under the newest and most expanded statute of limitations enacted for childhood sexual abuse, the very latest date any new childhood victim of abuse may sue *today* is for 17 years after reaching his or her majority age (until age 35). Wis. Stat. § 893.587. Section 893.587 became effective in this State on April 30, 2004. In contrast to this statute, here Plaintiff waited 35 years and was 51 years of age when he filed his 2008 suit: 16 years *longer* than what even the longest statutes would allow childhood victims *of today.*

While this Motion does not contend that the 2004 law binds this Plaintiff, still, section 893.587 evinces the best evidence possible of what the legislature concretely believes is the best public policy of this state, and the outermost time period in which any victim – even of today – should be able to invoke the judicial system for such old claims. Moreover, regardless of the application of section 893.587, Plaintiff *does* remain bound to the prior judicial declarations establishing the objectionableness of 20 and 27 year delays as set forth by the Supreme Court in the *Doe* and *Pritzlaff* cases.

Finally, unlike the *Doe* and *Pritzlaff* cases which were dismissed on the pleadings and thus depended upon the prejudice that could only be judicially forecasted experientially from such obvious delays, this is a summary judgment motion, with proven *facts of record,* establishing the loss of the most critical witnesses to the defense. Under such circumstances it is perfectly evident that even if Plaintiff could excuse all of his delays in bringing this case, those

excuses cannot undo the irreparable prejudice to the defense in this case or overrule the public policy requirements handed down in *Pritzlaff* and *Doe*.

Although the foregoing rulings alone compel a dismissal of this case, there are other public policy considerations which lead to the same result. For example, courts have relied upon the impossible task of predicting foreseeable harm by an employee for his propensity to abuse children in dismissing third party duty-to-warn claims founded in negligence. *See Gritzner v. Michael R.*, 2000 WI 68, ¶ 44, 235 Wis. 2d 781, 611 N.W.2d 906 (holding that public policy precludes a negligent failure to warn claim in connection with the inappropriate sexual acts of a child, because there would be "no just and sensible stopping points for liability."); *Kelli T-G v. Charland*, 198 Wis. 2d 123, 130, 542 N.W.2d 175, 178 (Ct. App. 1995) (holding the ex-wife of a child molester did not have a duty to warn the mother of a child that was playing under the molester's care, because "recovery would enter a field not only with no definable, sensible stopping point, but no sensible starting point as well."); *see also Estate of Paswaters v. American Family Mut. Ins. Co.*, 277 Wis. 2d 549, 560, 692 N.W.2d 299, 304 (Ct. App. 2004) ("It is unreasonable to expect people in [defendant]'s position to attempt to predict erratic and irrational human behavior.") If public policy precludes *negligence* claims based on an alleged failure to warn, the same principles must apply with even greater force to fraud claims alleging *intentional* misconduct based on virtually identical allegations.

Further our Supreme Court drew a line in *Hornback v. Archdiocese of Milwaukee* that must be honored here as well. Allowing recovery on this state of record would begin "a descent down a slippery slope with no sensible or just stopping point." 2008 WI 98, ¶ 54, 752 N.W.2d 862. Again, what the court in *John Doe 1* did *not* decide was whether the Archdiocese of Milwaukee defrauded any plaintiffs at all. Instead, it ruled only that the parties should have an

opportunity to conduct discovery under a fraud theory. *John Doe 1*, 2007 WI 95 ¶¶ 62-64. Now that discovery has taken place, would the Archdiocese (and by expansion, every employer in Wisconsin) be required to notify every parishioner (or citizen) in every parish (or county) of an employee's past misconduct? Would it have to notify every parishioner in the Archdiocese in case that priest attended services or other events outside of his parish? Would it have to notify every person in the city in which the priest works, regardless of whether he or she is Catholic? Would it have to notify every person in the state in case the priest travels? Or the country or world for that matter? What if the priest had been cared for psychologically, been certified as medically okay, and had no further reports of misconduct of any kind?

And what would constitute appropriate notice? Would notice in the newspapers be sufficient? Indeed, in this case, if Plaintiff claims that it wasn't until sometime *after the 1980's and 1990's* that he first noticed, saw and heard all of the plethora of articles, talk radio segments, television news reports or lawsuits that had been broadcasted in the public domain since 1985, how then could any court hold that any notice – 35 years earlier – and without the benefit of hindsight on the part of the Archdiocese of Milwaukee, ever been sufficient to satisfy some alleged, but never defined, duty owed by the Archdiocese to the entire world? Where, as a matter of public policy, is the reasonable stopping point if such bare assertions are allowed to proceed in the face of the factual record now established on this motion?

And would the line for such notification be limited to sexual abuse? Would employees have to notify the public regarding employees who may drink alcohol in excess or have a previous conviction for drunken driving? Would the notice requirement encompass unsubstantiated claims, exposing the Archdiocese to potential defamation claims? Opening the

window for these types of unending fraud claims – in the face of this record – would eliminate any statute of limitation.

Similarly, fraud claims against an employer for failing to disclose all potential "scarlet letters" of all employees would exist in perpetuity. There would be no sensible or just stopping point, and the Archdiocese, or indeed, any employer, would have no way of knowing whether it had fully complied with such an open ended, immeasurable duty. Moreover, imposing such a requirement years later after the proven loss of witnesses, memory, medical records and other evidence eliminates any possible opportunity for a party to have any chance of fairly defending such claims.

When allegations are made long after the alleged occurrence, the ability to defend against such claims is destroyed. *John BBB Doe*, 211 Wis. 2d at 355, 565 N.W.2d at 111. Allowing decades-old claims to go forward would be unfair to the Archdiocese and contrary to longstanding principles of public policy, because, as now proven by the record, the Archdiocese is quite literally unable to investigate and defend the very claims now being made. *See Pritzlaff*, 194 Wis. 2d at 322, 533 N.W.2d at 788.

Further, the 35 years of delay make it impossible to realistically defend against any type or amount of *damages* claimed in this case given all of the intervening and superseding causes that certainly will have affected vocational opportunities, lost wages claims and emotional health between the time of the alleged abuse and the filing of the lawsuit, thereby placing the finder-of-fact in a quagmire as to any damage that would be demanded.

VI. CONCLUSION

Statutes of limitation are based on the reality that even for persons with just claims, it is unjust not to put those matters promptly to the civil litigation system due to the unavoidable deleterious effects of time and the limitations inherent in any human judicial system. Balancing

the right of persons accused of wrongdoing (especially those accused of *intentional* wrongs) to be free from stale claims, against the right of injured persons to have a reasonable period of time in which to sue, represents no less than the legislature's declaration on when the right to be free of stale claims must prevail over any right to sue. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). Further, the Wisconsin Supreme Court's public policy limitations from *Pritzlaff* and *Doe* on the furthest extent any "discovery" rule can be expanded, impose the same limitations (judicially) upon that rule.

Here Plaintiff's 35 year old lawsuit is plainly time barred. The time to investigate and bring a fraud claim was 6 years. Plaintiff has always known about the acts of abuse and the person who committed it from the 1970's onward. Plaintiff also knew the precise identity of his abuser and that he was a priest associated with a supervising religious organization. Finally, like everyone else, Plaintiff knew about the reality of the Catholic Church being sued time and time again for sexual abuse acts of its priests from at least 1990 and onward. In *John Doe 1,* the Supreme Court charged all lower courts with the obligation to review and then decide this question once a properly made and supported summary judgment motion was brought.

Under the obligation of diligent inquiry the Plaintiff was not entitled to delay his required investigations until after the start of a new millennium and until more facts "found him." Given the admitted knowledge and the proven facts of record from the early 1990's, his 6 year investigative period started and lapsed no later than the end of the 1990's.

Finally, even if Plaintiff could erase all of the record facts of his own knowledge and the proven historical facts of judicial notice, that erasure still would be unable to change or eliminate the undeniable prejudice caused to the defense in this case. This case is not even close. The longest claim allowed by the public policy of today's legislature can be made 17 years after

reaching majority age. The Supreme Court, in turn, has declared that for older cases, the civil system can and must dismiss lawsuits where claimants attempt to prosecute cases as old as 20 years. Here this case is 35 years old.

This is not a motion to dismiss testing only pleadings. Here, there is a motion for summary judgment. The Plaintiff's admissions and knowledge are matters of record. As conclusively established by the factual record, all of the anticipated unfairnesses predicted in the *Pritzlaff* and *Doe* cases now exists in proven and overwhelming measure. The record in this case, the law of diligent inquiry and limitation of public policy each require a ruling that this case was not timely pursued or brought. The Archdiocese's motion for summary judgment dismissing Plaintiff's complaint should be granted.

Dated this 1st day of June, 2009.

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EXHIBIT C

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JANE DOE 2 AND JANE DOE 3,

Plaintiffs,

v.

Case No.: 07-CV-10888
Case Code: 30107

ARCHDIOCESE OF MILWAUKEE AND DIOCESE OF SIOUX FALLS,

Defendants.

DEFENDANT ARCHDIOCESE OF MILWAUKEE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In *John Doe 1 v. Archdiocese of Milwaukee*, the Wisconsin Supreme Court found that the issue of when a reasonable person knew or should have known of the Archdiocese's alleged "fraud" involving allegations of childhood sexual abuse by one of its priests could not be decided on a bare motion to dismiss. 2007 WI 95, ¶ 13, n.7, 303 Wis. 2d 34, 734 N.W.2d 827 (2007). In saying this, however, the Supreme Court took pains to note that it was not precluding summary judgment once "undisputed facts demonstrate that the fraud claims accrued more than six years prior to the dates on which the claims were filed." *Id.* ¶ 63.

There was no elaboration by the *John Doe 1* Court on what "representations" or "reliance" would be required to present a sustainable fraud claim. Instead, the Supreme Court remanded the *John Doe 1* case back to the trial court to decide those matters once a record was offered. *Id.* ¶ 49. Thus, in issuing its *John Doe 1* decision, the Supreme Court made clear that sexual abuse allegations – even if framed in fraud language – like any other count, would still be subject to an appropriately filed summary judgment motion:

> [B]ased solely on the Complaints, we cannot determine when the plaintiffs knew or should have known of the Archdiocese's alleged knowledge of the priests' past histories of sexual molestation of children. Therefore, their claims may or may not be time barred by Wis. Stat. § 893.93(1)(b) depending on when the claims for fraud accrued. . . . . Since a Motion to Dismiss does not present the opportunity to fully develop the facts surrounding the Archdiocese's arguments that the plaintiffs' fraud claims accrued more than six years before the date on which they were filed, we conclude that the claims for fraud survive a Motion to Dismiss. *However, we want to clarify that we are not precluding summary judgment if undisputed facts demonstrate that the claims for fraud accrued more than six years prior to the dates on which the claims were filed.*

Id. ¶¶ 62-63 (emphasis added).

Shortly after the Supreme Court's decision in *John Doe 1* was published, the two Plaintiffs filed this lawsuit casting their 37 year old sexual abuse allegations as "fraud" counts. Plaintiffs assert that they were sexually abused by Bruce MacArthur. According to their complaint, the abuse they suffered occurred in the 1960's, more than 37 and 40 years before they filed their action. The Plaintiffs did not sue their alleged attacker, Bruce MacArthur. Instead, they named only the Diocese of Sioux Falls, South Dakota, and the Archdiocese of Milwaukee. Concerning their lawsuit against the Archdiocese of Milwaukee, the Plaintiffs alleged intentional fraud, and more recently, added a claim for "negligent misrepresentation." Because the claim for "negligent misrepresentation" is new, that count will be subject to a motion to dismiss for failure to state a claim because of clear existing Wisconsin Supreme Court precedent. Hence, that count will not be discussed in this brief. Meanwhile, this brief will address the summary judgment motion directed by the *John Doe 1* Court on the untimeliness of these Plaintiffs' 37 and 40 year old "fraud" claims. Those claims are plainly barred by the 6 year limitation prescribed by law.

Plaintiffs' 37 and 40 year old lawsuit is untimely or unsustainable for the following reasons:

1. Plaintiffs' claims are time barred. What the Plaintiffs will now admit they *personally* knew (or didn't know) is irrelevant. The legal test for starting the 6 year clock on commencing fraud suits is what the law determines an *objective* person would have known had he or she conducted a *diligent inquiry*. Here, objectively speaking, any person who knew by no later than the 1990's that they had been sexually abused by a clergy member during the 1960's, '70's or '80's certainly would have been on legal "inquiry notice" to investigate their rights against the Archdiocese for legal claims (including fraud) for far more than six years before these Plaintiffs filed this 2007 action.

2. Public policy also separately requires the dismissal of Plaintiffs' 37 and 40 year old claims pursuant to Wisconsin Supreme Court authority. It is undisputed that most, if not all, defense witnesses who would have any ability to defend this matter are now dead or unavailable, and further, critical exculpatory testimony and documents no longer exist or are unavailable.

II. STATEMENT OF FACTS

A. Bruce MacArthur Came To Milwaukee In 1965 And There Is Almost No Evidence Regarding His Conduct Or Activities In Wisconsin From 1965-70.

In 1953, Bruce MacArthur was ordained and incardinated as a Roman Catholic priest in the Diocese of Sioux Falls. (Pls.' Am. Compl. ¶ 6.) Incardination is a religious term used in the Roman Catholic Church which identifies the formal "attachment" of a priest to a particular diocese, and more specifically, to the presiding Bishop of that Diocese. (Cusack Aff. ¶ 2.) All diocesan priests are incardinated to one, and only one Bishop to whom they owe their religious duties. *(Id.)* Throughout all of the events alleged in Plaintiffs' lawsuits, Bruce MacArthur was incardinated to the Bishop of Sioux Falls.

Next, for purposes of *Milwaukee's* role in this lawsuit, the relevant records that still exist on MacArthur's introduction and presence in Wisconsin consist of but 4 documents. The first document is a letter dated February 28, 1965. This letter was from Bishop Lambert Anthony Hoch of Sioux Falls to an Auxiliary Bishop in the Archdiocese of Milwaukee (Auxiliary Bishop Roman Atkielski). (Cusack Aff. ¶ 4 Ex. A.) The letter was about MacArthur.

Bishop Hoch has been dead for more than 18 years. (Cusack Aff. ¶ 22.) Similarly, the recipient of the letter, Milwaukee Auxiliary Bishop Atkielski, has been dead for even longer. Auxiliary Bishop Atkielski died nearly 40 years ago. (Cusack Aff. ¶ 11.) Hence, apart from the two page letter deceased Bishop Hoch penned to deceased Auxiliary Bishop Atkielski, there is

no other background, explanation or follow-up that can be asked of, concerning what was told or not told, or discussed or not discussed by Bishop Hoch to or with Auxiliary Bishop Atkielski.

Returning then to the letter, Bishop Hoch wrote that Sioux Falls' priest, Bruce MacArthur, had a "problem" and accordingly had been sent to Via Coeli (Servants of the Paraclete). Internet research has shown that at the time Via Coëli was a Catholic institution which in 1948 opened its doors for clerics with problems of substance abuse and addictive behavior (e.g., alcoholism).[1] Later, in 1976 it devised and initiated specific treatment protocols for clergy sexual abuse issues. According to public sources, lawsuits and bad publicity forced the facility to stop treating sexual disorders in 1994.[2] Hence, all information and documentation that would have existed at the time no longer exists or is available on Bruce MacArthur's treatment, dates, tests, diagnoses made, and most importantly, the medical opinions rendered to Sioux Falls upon his presumed favorable discharge when he returned to Sioux Falls. (Muth Aff. ¶ 2 Ex. A.). There is no evidence suggesting that any of this information was ever sent to the Archdiocese of Milwaukee.

Next, the language of Bishop Hoch's February 28, 1965 letter states that sometime later, after Bruce MacArthur returned to Sioux Falls, the Diocese gave him a parish reassignment. (Cusack Aff. ¶ 4 Ex. A.) While there Sioux Falls became alerted to a recurrence of the "same problem." Again, however, apart from mentioning the "recurrence", what the nature of the recurrent problem was, how it recurred, what was involved, and who – if anyone – was affected, were not stated. The February 28, 1965 letter then goes on to state that MacArthur was then sent to "Blue Cloud Abbey" to make a retreat and that he was willing to undergo psychiatric

[1] http://www.daytonvotf.org/articles/2007/May/Patterns%20of%20Institutional%20Secrecy.pdf at p. 3. (Attached to Archdiocese's Table of Non-Wisconsin Authorities, filed simultaneously with this brief.)

[2] http://www.bishopaccountability.org/news2003_01_06/2003_04_22_Cooperman_OneDioceses.htm. (Attached to Archdiocese's Table of Non-Wisconsin Authorities, filed simultaneously with this brief.)

treatment. Blue Cloud Abbey is a monastery located in South Dakota. Again, however, no details are memorialized as to what treatment (if any) or discharge was made of MacArthur when he left. Blue Cloud Abbey has not produced any documents on MacArthur from that time period or from any other time period. Again, in all cases there is no evidence that whatever information that existed was ever forwarded to anyone within the Archdiocese of Milwaukee.

The second piece of correspondence is dated March 5, 1965. On this date Milwaukee Auxiliary Bishop Atkielski returned a letter to Bishop Hoch stating that MacArthur could be supervised by Milwaukee priest Paul Bertrand and placed in a parish with that priest.[3] (Cusack Aff. ¶ 5 Ex. B.) Atkielski's note, however, contains no further details on those matters. Auxiliary Bishop Atkielski's letter does, however, memorialize that MacArthur could be directed to "*a competent psychologist and medic at our St. Michael's Hospital where the Sisters maintain a ward for these purposes and where we have directed many a priest with great success.*" (*Id.*) Who the competent psychologist was (or is) is unknown. Further, discovery propounded to St. Michael's Hospital similarly failed to provide any information or documents on Bruce MacArthur or his treatment and the approvals he received from that third institution from so many years past.[4] (Muth Aff. ¶ 3 Ex. B.)

The third piece of correspondence is from a Monsignor Beres of Milwaukee from March 25, 1965 back to deceased Bishop Hoch. (Cusack Aff. ¶ 6 Ex. C.) Beres at the time was a Vice Chancellor of the Diocese. Monsignor Beres is similarly deceased. (Cusack Aff. ¶ 13.) Back in 1965 Monsignor Beres wrote Bishop Hoch informing him that MacArthur had been

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[3] Father Paul Bertrand is similarly long since deceased, having died in 1992. (Cusack Aff. ¶ 12.)

[4] The absence of any records from St. Michael's from so long ago is also not surprising. The Business Journal of Milwaukee in 2006 reported that St. Michael Hospital closed its entire behavior health unit on June 14, 2006, along with its entire medical/surgical unit and its intensive care units within that same month and year. The Business Journal of Milwaukee, May 8, 2006 ("Wheaton to Close Most of St. Michael's Hospital").

assigned to a parish in Milwaukee and that arrangements had been made for "Father to receive good professional help." (*Id.*) Nothing further is added by the Beres letter.

Finally, the fourth piece of correspondence is dated May 13, 1965. (Cusack Aff. ¶ 7 Ex. D.) This document was from the priest who was earlier identified as the one who would supervise Bruce MacArthur (namely Fr. Paul Bertrand). Fr. Bertrand has been dead for the past 17 years. (Cusack Aff. ¶ 12). Bertrand wrote Bishop Hoch a note reflecting that Father MacArthur had indeed "completed his medical treatment. . . ." (*Id.*) But apart from his written words confirming the treatment and its completion, there is no longer any access to Fr. Bertrand or any medical documents or information from that treatment disclosing the medical tests, duration, clinics, practitioners, course of treatments, and again most importantly, the approvals and clearances that the medical practitioners then undoubtedly gave to Bishop Atkielski. Whatever discharges and approvals the medical health care professionals gave, and on which the Archdiocese then had to rely, can no longer be inquired about and are unavailable to the Archdiocese (or this Court or to the finder of fact).

Returning to the few remaining pieces of information that can be gleaned from the written record, measured from 1965 forward, MacArthur performed services in the geography of the Archdiocese of Milwaukee for just five years. During those five years there is no information of any sort suggesting any kind of untoward event or act by MacArthur ever occurred or was brought to the attention of the Archdiocese. (Cusack Aff. ¶ 3.) In 1970, after five years of working in Wisconsin, MacArthur was recalled by his incardinating Diocese and he returned to South Dakota of his own accord. (Cusack Aff. ¶ 8 Ex. E.) As far as the records show, and Milwaukee is aware, Bruce MacArthur never did any further work in the State of Wisconsin. Bruce MacArthur left and was forgotten. Years moved on; and then decades.

The next event involving Milwaukee and Bruce MacArthur was a full three *decades* later. In 2002, for the first time, the Milwaukee Archdiocese was notified of an allegation regarding alleged misconduct by MacArthur when he was situated here in the Milwaukee geography. (Cusack Aff. ¶¶ 3, 9 Ex. F.). That was news to Milwaukee – especially to the entirely new set of people who now make up the Archdiocese.

B. The Plaintiffs Admit In Their Depositions They Knew All Necessary Facts To Investigate And Bring Their Claims Well Before 2007.

1. Jane Doe 2's Admissions.

Jane Doe 2 alleges in her complaint that she was abused by MacArthur in 1966 or 1967. (Pls.' Am. Compl. ¶ 30.) In her deposition, Jane Doe 2 admits that ever since 1966-67, she has always had the abuse event present in her mind. This is not a case of failed or lost memory. (See citations below). Thus, the factual record confirms that from 1966-67 forward she has always known these four undisputed facts: (a) the sexual abuse she claims; (b) the identity of the person who committed it (Bruce MacArthur); (c) that Bruce MacArthur was a Catholic priest; and finally (d) that what MacArthur did to her was wrong. Further, not only did *she* know these facts but it is undisputed her *family* knew them too.

> Q. You've known about these events with Bruce MacArthur your whole life –
>
> A. Yes.
>
> Q. – since they occurred?
>
> A. Yes.
>
> Q. And you've not talked about it. You've talked about it with family members over the years, right?
>
> A. Yes.
>
> Q. So this was not an event that just Judy [DeLonga] put together with you?

A. No.

Q. And this say "I never put the past and present." Did you ever have a problem putting the past and present together?

A. No.

Q. Did you ever have a problem putting the past and present together about Bruce MacArthur?

A. No.

....

Q. Okay. You say the other time. As I recollect, you told your mom and dad of these events with Bruce MacArthur when you were 16?

A. Yes.

(Muth Aff. ¶ 4 Ex. C at 168:5-25, 124:10-13.)

Jane Doe 2's mother was a registered nurse. (*Id.* at 126:25-127:1.) It was approximately 1972 when she told her mother, who in turn told her father. (*Id.* at 126:22-24.) This was the same age and year when she also told her brother. (*Id.* at 127:13-19.) At the time her brother was 22 years old. (*Id.* at 128:6-7.) Finally, after making these disclosures to her family, and while she was still in her teens, she was further present when her father and a neighbor held a discussion about a priest in town who abused yet other children whom she understood as MacArthur. (*Id.* at 144:23-145:25.)

Despite the knowledge of all these ultimate facts, Jane Doe 2 – for years – took no steps to seek out any additional information about Bruce MacArthur or what liabilities she could assert against the Diocese of Sioux Falls or Archdiocese of Milwaukee.

Q. . . . Did you call anybody to find out if there's any information available about Bruce MacArthur from the Archdiocese of Milwaukee?

A. Not that I remember.

Q. Did you call anybody from the Diocese of Sioux Falls to ask if –

A. No.

Q. – there's any information about Bruce MacArthur?

A. No.

Q. Did you ask anybody as to how you might find some information about Bruce MacArthur?

A. No.

(*Id.* at 213:7-19.)

Q. Sure. I just want to know is that you've gone through these events, you told the people that you told. I want to know do you have any information to suggest that the Archdiocese of Milwaukee knew this was happening to you at the time it was happening?

A. Not until the article in the paper.

Q. In the year – sometime in the 2000's?

A. Right.

(*Id.* at 220:8-15.)

Q. . . . Ma'am, in bringing this lawsuit, did you personally take any steps in terms of trying to find out what care or treatment Bruce MacArthur received in Wisconsin while he was here?

A. Not that I can recall.

Q. Do you have any information whatsoever as to what treatment was rendered to Bruce MacArthur while he worked in Wisconsin through the Archdiocese of Milwaukee?

A. No.

(*Id.* at 218:14-23.)

Q. Do you know if the Diocese of Milwaukee, or the Archdiocese of Milwaukee had any information back at the time that any of the events with Bruce MacArthur that you've described had occurred?

A. No.

(*Id.* at 219:24-220:3.)

> Q. Did you ask anybody as to how you might find some information about Bruce MacArthur?
>
> A. No.

(*Id.* at 213:17-19.)

2. Jane Doe 3's Admissions.

The facts concerning Jane Doe 3 are virtually identical. She too claims that she was molested by MacArthur when she was in a local hospital in Beaver Dam. (Muth Aff. ¶ 5 Ex. D at 81:2-82:25). She alleges the molestation lasted between 5 and 10 minutes. (*Id.* at 82:11-12, 138:21-22, 152:2-7). The abuse consisted of MacArthur fondling her thigh and genital area over her hospital pajamas. (*Id.* at 81:2-82:10, 138:13-20, 152:8-14.)

She too has never forgotten the event. There is no claim of a failed or repressed memory. Shortly after the molestation, she told her mother. (*Id.* at 75:6-8.) Later during high school she told her high school girl friend as well as her boyfriend. (*Id.* at 75:22-76:2, 109:8-110:19.) In the 1970's she further told her sister and also told various of her friends over the years. (*Id.* at 75:15-20.) Once she started working at a local bank she told her friend at the bank. (*Id.* at 76:3-17.) She also told discussed the event with each of her husbands during her respective marriages to them (1st husband from 1979-1981; 2nd husband 1985-1994; 3rd husband 1996-2004). (*Id.* at 109:6-24, 110:20-24, 112:15-16). She also told her current boyfriend. (*Id.* at 86:13-21).

Regarding the lack of an efforts at investigation, she similarly disclosed:

> Q. Just some follow-up. Ms. [Jane Doe 3], you were asked about Sioux Falls. Have you ever talked to anybody from the Diocese of Milwaukee?
>
> A. No.
>
> Q. Have you received any information from the Diocese of Milwaukee?

A. No.

(*Id.* at 148:7-13.)

> Q. Have you done any research or asked anybody about what Milwaukee did or did not know about Bruce MacArthur when he came to the Milwaukee Diocese?
>
> A. No.

(*Id.* at 149:17-20.)

> Q. Do you know when Bruce MacArthur came to Wisconsin whether or not psychological care was arranged for him?
>
> A. No, I don't know.
>
> Q. Do you know if when Bruce MacArthur came that psychological care was given to him and he was given the okay, in other words, whoever was treating him, the psychologist or psychiatrist said he's okay?
>
> A. I'm not aware of that.

(*Id.* at 153:1-9.)

C. The Archdiocese of Milwaukee Is Irreparably Prejudiced By The Long Passage Of Time Because Virtually All Witnesses Are Dead And The Critical Exculpatory Documents Are Gone.

Keeping in mind that this motion deals only with Plaintiffs' claim of *intentional* fraud (i..e., a tort requiring a knowing and intentional state of mind by the defendants to deceive and cause injury) here are the defense personnel and witnesses against whom Plaintiffs' accusations are leveled, and yet whom the defense – because of death and unavailability – can no longer call to defend or rebut the charges of *knowing* and *intentional* wrongdoing on their parts:

- Archbishop William E. Cousins, Archbishop of Milwaukee (died in 1988).
- Auxiliary Bishop of Milwaukee, Roman R. Atkielski (died in 1969).
- Father Paul J. Bertrand, the priest first assigned to monitory MacArthur (died in 1992).

- Father Francis M. Beres, Vice Chancellor of Milwaukee at that time (died in 1990).

- Father John J. Waldbauer, Executive Secretary of the Priest Personnel Board of Milwaukee at that time (died in 2003).

- Father Donald E. Reiff, Executive Secretary of the Milwaukee Archdiocese and member of the Priest Personnel board at that time (died in 1994).

- Father John Murphy, member Milwaukee Archdiocese's Priest Personnel board at the time (died in 2005).

- Father Frank Schneider, member Milwaukee Archdiocese's Priest Personnel board at the time (died in 1973).

- Father John Voelker, member Milwaukee Archdiocese's Priest Personnel board at the time (died in 1971).[5]

- Father Aloysius Ahler, Pastor of St. Philip Neri at the time MacArthur served there (died in 1984).

- All other priests that worked with MacArthur at any parish assignments in the Archdiocese, (dead or are no longer with the Archdiocese and their whereabouts are unknown).[6]

- Bishop Lambert A. Hoch, Bishop of Sioux Falls, South Dakota (died in 1990).

- Monsignor Lewis Delahoyde, Chancellor of Sioux Falls, South Dakota during the relevant time period (died in 1984).

- The South Dakota priests and personnel who were knowledgeable of MacArthur's "problem" and the "recurrence" which occurred prior to 1965 (deaths and details unknown).

- Personnel on duty at St. Joseph's Hospital, Beaver Dam, where molestations took place (unavailable or presumed dead)[7]

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[5] The only living survivor of the Priest Personnel Board from the time is Father Paul Lippert. But Father Lippert was already deposed in this case and he was unable to offer any help. With events being 40 years distant in time, he had no recollection of this South Dakota priest even being in the Archdiocese of Milwaukee. (See Muth Aff. ¶ 6 Ex. E at 23:4-5, 26:16-22.)

[6] The one exception to the category of still "living" is Father Wayne Bittner. Fr. Bittner was an assistant pastor at the same Wisconsin parish when MacArthur first came to Wisconsin. Plaintiffs deposed Fr. Bittner and the only light he could shed is that he met MacArthur on a very few limited occasions when he came to say mass at St. Therese parish. As far as he knew, MacArthur did not have any contact with children while he was saying those masses, and Fr. Bittner never received any complaints from parishioners about MacArthur. Father Bittner had no role in the placement of MacArthur or the monitoring of his work or his psychological care. (Muth Aff. ¶ 7 Ex. F at 5:14-9:6.)

(Cusack Aff. ¶¶ 10-25.)

- The psychologists/psychiatrists who treated and discharged MacArthur from Via Coeli prior to 1965 (deaths and details unknown).

(Muth Aff. ¶ 2 Ex. A.)

- The psychologists/psychiatrists who treated and discharged MacArthur from St. Michael's Hospital in Glendale, Wisconsin in 1965 (deaths and details unknown).

(Muth Aff. ¶ 3 Ex. B.)

- The care givers from Blue Cloud Abbey who cared for and discharged MacArthur from the Abbey prior to 1965 (deaths and details unknown)

In addition, the critical exculpatory records that no longer existent or are available are:

- Psychological/medical discharge and advice papers on MacArthur in 1965[8]
- Psychological test results on MacArthur in 1965
- Psychological treatment papers of MacArthur in 1965
- Clinic notes on MacArthur in 1965
- Medication logs and scripts for MacArthur, 1965-1970
- Via Coeli psychological discharge and advice papers, pre-1965
- Via Coeli tests and treatment papers, pre-1965
- Via Coeli clinic notes on MacArthur, pre-1965
- Blue Cloud Abbey records on discharge, advice, treatment, conduct, pre-1965
- Personnel records of St. Joseph's Hospital in Beaver Dam, 1965-70
- Security records of St. Joseph's Hospital in Beaver Dam, 1965-70

Finally, portions of Plaintiffs' own medical histories, critical to investigate the claims and injuries for which they seek damages, are incomplete and forever lost. (Muth Aff. ¶ 9 Ex. H.)

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[7] St. Joseph's Hospital similarly closed its doors long before this lawsuit was started.

[8] MacArthur testified that he received therapy while in Milwaukee but he cannot remember the name or location of the therapist. (Muth Aff. ¶ 8 Ex. G at 26:4-27:19).

III. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Wis. Stat. § 802.08(2) (2005-2006).

IV. ARGUMENT: PLAINTIFFS' FRAUD CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

A. Plaintiffs' Knowledge Of Their Abuse And The Identity Of The Person Who Abused Them, Together With Knowing That He Was A Priest, Commenced Their 6 Year Time Period Decades Ago.

The Archdiocese recognizes the despicable conduct of childhood sexual abuse. The current governing Archbishop of Milwaukee, Timothy M. Dolan, who was himself but a high school student in 1965, has repeatedly, and in no uncertain terms, condemned such acts and commiserated with victims. But returning to this matter, it was by the choice of these two Plaintiffs that this matter was placed in the Wisconsin legal system. Under the limitations of that system, however, claimants alleging fraud are obligated to act promptly and *diligently*. Further, claimants alleging fraud may not delay the day on which they have to act by asserting that they did not *know the details of the fraud.*

Just as persons who have family members who have suffered injury, dismemberment or death have but 3 years in which to sue, persons who seek to allege fraud are given a longer period; but it too is not unlimited. It is 6 years. Moreover, that 6 year limitation commences as soon as the claimant knows or learns of sufficient facts (not all of them), which if diligently investigated, would have indicated where the facts constituting the fraud could have been discovered. *John Doe 1*, 2007 WI 95 at ¶ 51. The difference is between discovering smoke versus proving fire.

Statutes of limitation find their justification in necessity and experience rather than in logic. They are essential devices that spare the courts from litigation of stale claims and citizens from being put to defenses after memories have faded, crucial witnesses have died or disappeared, and evidence has been lost. They are not based on any universally recognized or accepted time frames or duration. They are based on necessary pragmatism. Bright lines have to be drawn and those lines are based on time. Importantly, those lines do not – and cannot – undertake to discriminate between the good and not-so-good claims. To do so would only defeat the very purpose of having the limitation. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). In the end, statutes of limitation represent a strong public policy about the limitations attendant to any civil method of litigating disputes and the burdens that must go with that privilege.

Most importantly, the test of a diligent inquiry is an *objective* one. It cannot be avoided by the non-diligent claimant asserting that he did not know that he should have pursued the matter earlier. In the words of the *John Doe 1* Court:

> *Actual and complete knowledge* of the fraud on the part of the plaintiff is *not* necessary in order to set the limitation period running.
>
> When the information brought home to the aggrieved party is such as to indicate where the facts constituting the fraud can be effectively discovered upon diligent inquiry, it is the duty of such party to *make the inquiry*, and if he fails to do so within a reasonable time he is, nevertheless, chargeable with notice of all facts to which such inquiry might have led.

Id. at ¶ 51 (emphasis added, citations omitted).

Further, when the dispositive facts are incontestable, the question of whether a plaintiff exercised objective reasonable diligence is discovering his or her cause of action is a question of law for the court to decide. *Id.* ¶ 13.

In this case, given the admitted deposition facts of these two Plaintiffs and their undisputed knowledge of the persons, positions and circumstances surrounding their abuse, courts throughout the country have uniformly ruled that these basic facts start the statute of limitation clocks running for a claimant to investigate and then make a decision to bring his or her claim – even for fraud.

For instance, as one court observed about other sexual claimants attempting to take refuge in fraud allegations to excuse untimely lawsuits:

> In making these claims [of fraud and fraudulent concealment] plaintiff-appellants do not allege that the hierarchy defendants' [i.e, the Church] silence misled them into believing that the alleged *sexual abuse* did *not* occur, that it had *not* been committed by the priest, or that it had *not* resulted in injury to plaintiff-appellants. In other words, the hierarchy defendants never concealed from any of the plaintiff-appellants the fact of the injury itself. Rather, the essence of the plaintiff-appellants' fraudulent concealment argument is that the hierarchy defendants' silence concealed from them an *additional theory* of liability for the alleged sexual abuse. This argument misses the mark. For a cause of action to accrue the entire theory of the case need not be immediately apparent. . . . Once injured, a plaintiff is under an affirmative duty to investigate diligently all of his potential claims. . . . To postpone the accrual of their causes of action until plaintiff-appellants completed their investigation of all potential liability theories would destroy the effectiveness of the limitations period.

Kelly v. Marcantonio, 187 F.3d 192, 200-01 (1st Cir. 1999) (emphasis added, citations omitted).

Similarly, in *Meehan v. Archdiocese of Philadelphia*, the court re-confirmed that merely casting a church's nondisclosure of an offender's past abuse as "fraudulent" conduct does not avoid the statute of limitations where the victims always knew *the identity of the abuser as well as his status as a priest.* 2005 PA Super. 91, 870 A.2d 912 (2005). Specifically, 17 claimants in *Meehan* alleged that a diocese had reassigned several known priest abusers to new parishes

without telling the parishioners. *Id.* at 920. *Like in this case, they asserted that their statute of limitation should not run until they discovered the fact that the Archdiocese also had knowledge in this regard. Id.* Finally the claimants asserted that whether they exercised appropriate diligence to discover their claims was a jury question. *Id.* At the same time, as in this case, it was undisputed that all of their claims had been delayed between *2 and 4 decades* in finally filing their actions.

Rejecting these arguments, the court held:

> [T]he discovery rule is not applicable here. The child *abuse* is the injury in this matter, not the alleged cover-up by the Archdiocese (otherwise, any member of the Catholic Church could conceivably bring suit against the Archdiocese, absent any abuse, alleging injury from the Archdiocese's general conduct). Unlike traditional discovery rule cases where the injury, itself, is not known or cannot be reasonably ascertained, the plaintiffs' injuries, here, were known when the abuse occurred.
>
> . . . .
>
> It is undisputed that the plaintiffs were aware that the Archdiocese employed their abusers and that the abuses all occurred on church property. These facts alone were sufficient to put the plaintiffs on notice that there was a possibility that the Archdiocese had been negligent. Neither the plaintiffs' lack of knowledge of the Archdiocese's conduct, not the plaintiffs' reluctance, as members of the Catholic Church, to investigate the possible negligence of the Archdiocese of Philadelphia after having been abused by one of its priests or nuns, tolls the statute of limitations when the plaintiffs had the means of discovery but neglected to use them.

Id. at 920-21.

As to the *17* claimants' alternative stratagem of casting their claims as "fraud", that strategy was equally unsustainable:

> We agree with the Archdiocese that the doctrine of fraudulent concealment does not toll the statute of limitations here. The plaintiffs have not put forth any evidence to indicate that they made any inquiries to the Archdiocese prior to 2002 regarding their potential causes of action. The plaintiffs do not allege that the

> defendants' silence misled them into believing that the alleged sexual abuse did not occur, that it had not been committed by the priests or nuns, or that it had not resulted in injury to the appellants. The defendants never concealed the injury itself. Nor do the plaintiffs allege that they were lied to by the Archdiocese with regard to the identity of their abusers or their abuser's place within the Archdiocese, which if relied upon, would have caused them to suspend pursuit of their claims.
>
> Again, the essence of the plaintiffs' fraudulent concealment argument is that the defendants' general conduct and/or silence concealed from them an additional theory of liability for the alleged sexual abuse. As noted in the federal case, *Kelly v. Marcantonio*, 'this argument misses the mark . . . as soon as the plaintiffs became aware of the alleged abuse, they should also have been aware that the defendants, as the priests' employers, were potentially liable for that abuse."

Id. at 922.

Still another example is the case of *Mark K. v. Roman Catholic Archbishop of Los Angeles,* 67 Cal. App. 4th 603, 79 Cal. Rptr. 2d 73 (Ct. App. 1999), *petition for review denied.* In *Mark K.*, the court, on a motion to dismiss (demurrer) was equally presented with a clergy sexual abuse case wherein 9 claimants sued the employer diocese alleging "Fraud: Conspiracy to Suppress Facts" as well as "Delayed Discovery – Equitable Estoppel." In their complaints the 9 claimants alleged that wholly apart from what they plainly knew of their *own* abuse by the abuser priest and his identity, it was not until 23 years later in 1996 that they discovered the *diocese's* prior knowledge of the cleric's abuse of other children. Thus, they argued that their fraud statute of limitation against the *diocese* could not commence until 1996. *Id.* at 609.

Rejecting these arguments the court observed that that "it is also important to note what the plaintiff has *not* alleged." *Id.* at 612. They did not allege that they were at any time unaware of the fact that they had been molested. They also did not allege that they were unaware that the person who committed the molestation was a cleric. And finally, they had not alleged that they

were unaware of the abuser's identity or of his connection to the Catholic Church. Thus the court ruled:

> Plaintiff asserts that, as his fiduciary, the church had an obligation to disclose the 1973 and 1974 accusations against [the abuser] and breached that duty by failing to come forward with this information. This assertion begs the question. The wrongful conduct alleged against the church was its inaction in the face of the accusations against [the abuser]. Thus, what the church failed to disclose was merely evidence that the wrong had been committed. If plaintiff's approach were to prevail, then any time a tortfeasor failed to disclose evidence that would demonstrate its liability in tort, the statute of limitations would be tolled under the doctrine of concealment. Regardless of whether the issue is characterized as fraud by concealment or equitable estoppel, this is not the law.

Id. at 613.

Instead, the *Mark K.* court recognized that the discovery rule is triggered as soon as a person has notice or information sufficient to put a person on inquiry. *Id.* at 610, 613. And accordingly, in agreement with the Wisconsin Court's holding in *John Doe 1,* a plaintiff *"need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery."* *Id.* at 610. Smoke; not fire. Rather, once the plaintiff has a suspicion of wrongdoing, he must act. "So long as that suspicion exists, it is clear that the plaintiff must go find the facts; *he cannot wait for the facts to find him.*" *Id.*

There is no need to belabor the point. The law simply rejects the strategy of trying to expand or excuse the time period for bringing claims by alleging that a claimant did not know he could additionally sue under a fraud theory, or because the claimant did not additionally know what the priest's employer/supervisor allegedly knew or didn't know. In all cases, the claimant still knew of their *own* abuse and who did it and that the person was related to the supervising organization. That is enough. *Marshall v. First Baptist Church of Houston*, 949 S.W.2d 504, 507-08 (Tex. App. 1997) ("[plaintiff] was fully aware of the abuse and his resulting

psychological injuries. No one associated with the church attempted to conceal them from him. In such case, there can be no fraudulent concealment"); *Baselice v. Franciscan Friars*, 2005 PA Super 246, 879 A.2d 270, 279 (2005) ("Again, the essence of appellant's fraudulent concealment argument is that the defendants' general conduct and/or silence concealed from him an additional theory of liability for the alleged sexual abuse....this argument misses the mark."); *Aquilino v. Philadelphia Catholic Archdiocese*, 2004 PA Super 339, 884 A.2d 1269 (2005); *Doe v. O'Connell*, 146 S.W.3d 1 (Mo. Ct. App. E.D. 2004), *reh'g and/or transfer denied* (Oct. 6, 2004); *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich. App. 632, 692 N.W.2d 398 (2004), *appeal denied*; *John Doe v. Linam and The Roman Catholic Diocese of Galveston-Houston*, 225 F.Supp.2d 731 (S.D. Tex. 2002); *Parks v. Kownacki*, 193 Ill.2d 164, 737 N.E.2d 287 (Ill. 2000) (equitable estoppel); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 772 (App. D.C. 1998); *Doe v. Archdiocese of Washington*, 114 M.D. App. 169, 689 A.2d 634, 644 (Md. App.1997); *E. W. v. D.C.H.*, 231 Mont. 481, 488, 754 P.2d 817, 821 (1988).

Given the "diligent inquiry" requirement, and the mandatory "should have known" limitation embedded in the 6 year limitation period for fraud claims in this state, in conjunction with what these two claimants (and their parents, siblings and friends) now admit of record knowing since no later than 1967 to 1970, it is plain that the time limit for them to have filed their claims occurred far earlier than the decades they delayed. As shown by the deposition admissions now of record, these Plaintiffs knew all of the facts necessary to start their 6 years diligent inquiry period back at the time they first became adults in the 1970's.

B. Wisconsin's *Dakin v. Marciniak* Additionally Requires The Dismissal Of Plaintiffs' Claims Because It Held The Law Does Not Toll The Limitations Until A Tortfeasor's Employer Is Known.

In *Dakin v. Marciniak, et al.*, 2005 WI App 67, 280 Wis.2d 491, 695 N.W.2d 867 (Ct. App. 2005), our judicial system was presented with the direct question of whether a claimant

who admittedly knew the identity of the immediate tortfeasor who caused his or her bodily injuries, could nevertheless expand the time for suing the principal or employer of that person by alleging he or she did not know of the employer's liability or role until sometime later. The answer was a clear "no." *Id.* ¶¶ 15-19.

In *Dakin*, a claimant riding a bus fell from her seat and suffered injuries when the bus had to swerve to avoid a car. There was no collision, but the swerve was caused by the driver of the car negligently pulling out. *Id.* ¶ 2. Within the statutory time period, the claimant learned and confirmed the identity of the tortfeasor driver. She sued. *Id.* ¶ 3. After the statute of limitation passed, she deposed the driver and learned that he had an employer. *Id.* Accordingly, after the statute of limitations had passed she attempted to sue the employer, arguing that under the Wisconsin discovery/diligent inquiry rule, her cause of action against that *employer* could not be deemed to have accrued until she discovered that particular defendant's identity and its involvement.

Flatly rejecting this gambit, the *Dakin* court observed that just because a claim does not accrue until a plaintiff has knowledge of a suable party, does not mean that it does not accrue until *all* parties are known. *Id.* ¶ 15. As recognized in *Dakin*, the purpose of the discovery rule is to limit the manifest injustice that arises when application of the statute of limitation destroys the rights of parties who could not have brought their claims earlier. *It is not a promise to delay limitations "until optimal litigation conditions are established" or until all the parties who might be sued are confirmed. Id.* (emphasis added). There the plaintiff could have sued the employee years earlier and demanded discovery. Obviously, so too could have the Jane Doe Plaintiffs in this case.

The plaintiff next argued that the auto driver's failure to report the accident to his employer (and then to her) should lessen or satisfy her duty of diligent inquiry. Not so. As observed by the court, such an argument is circular. *Id.* ¶ 18. The driver and his employer's alleged silence on the subject had nothing to do with an investigation that the plaintiff never conducted. The law places the duty of *diligent inquiry* upon the person alleging the delay; not the upon the claimant's target. *Id.*

Given the dictates of Wisconsin law, the *Dakin* court affirmed the dismissal of the plaintiff's untimely suit against the employer. *Id.* ¶ 19.

In this case, it is simply an undeniable effect of law that persons such as these Plaintiffs were under a duty to investigate diligently their potential claims against all targets *decades* ago. It is beyond argument that the very *first* focus of even the most inexperienced lawyer consulted on any personal injury case is the question of whether the tortfeasor had an employer (and thus, an investigation into the employer's exposure). To suggest otherwise would make a mockery of the diligent inquiry rule and the uncontroverted principle that the discovery rule was never adopted to be an excuse for Plaintiffs to *avoid* their obligations.

Precisely because the tort implications of the agent-principal, employer-employee relationship are so universally known (or knowable with any minimum inquiry or diligence), as well as the immediate wrongfulness of any sexual abuse, our State has rejected the notion that Plaintiffs can extend the legislatively mandated limitations period for lawsuits by alleging ignorance about the possibility of pursuing an employer or principal for injuries arising from the acts of an agents. Given the facts of record now confirmed on this summary judgment record, these Plaintiffs have no basis upon which they may be asked to be excused from the same time limitation requirements that every other litigant in this state is obligated to meet.

C. Even If Plaintiffs' Knowledge Of Their *Own* Abuse Could Be Set Aside, As Well As The Ruling Of The *Dakin* Case, Other Facts Of Judicial Notice Equally Compel A Dismissal Of This 2007 Lawsuit.

As already noted, embedded in the duty to exercise reasonable diligence, is the duty to *inquire*. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶ 85, 249 Wis.2d 142, 638 N.W.2d 355 (Fine, J., dissenting); *Tele-Port v. Ameritech Mobile Comm.*, 2001 WI App 261, ¶ 11, 248 Wis.2d 846, 858, 637 N.W.2d 782. Indeed, as the federal appellate court for our State aptly summed it up, persons wishing to claim the right to assert fraud, cannot merely wait "until the facts find them." *Stockman v. LaCroix*, 790 F.2d 584, 587-89 (7th Cir. 1986). They are obligated to act upon information that daily is made available to the world.

Here, a review of judicially noticeable historical facts shows that any person exercising any effort to investigate sex abuse claims, much less conduct any diligent *inquiry*, could not help but observe throughout all of the 1990's, and before, that not only *could* churches be sued for sexual assaults of clerics, but that they *were* being sued – by hundreds of claimants throughout the country.

Consider just the City and County of Milwaukee where these Appellants filed this lawsuit. From 1990 to 1998, the Milwaukee Journal and Milwaukee Sentinel prepared no less than *150* articles on the very subject of Wisconsin clergy sexual abuse and all the resulting consequences *and lawsuits*. This is a matter of undisputed historical fact subject to judicial notice. Wis. Stat. § 902.01(4). A bibliography and those articles and their dates is reprinted in the Affidavit of David Muth. (Muth Aff. ¶ 10 Ex. I.) And these are just the articles from the widely available Milwaukee newspaper to say nothing of the Madison papers and the other newspapers around the state, in addition to all the additional *national* sources also present before every Wisconsin resident from such ubiquitous sources as ABC, NBC, CBS, CNN, National Public Radio, television news reports, television magazine shows, television talk shows,

traditional magazines, books, radio, radio talk shows, USA Today, The Chicago Tribune, The New York Times, The Wall Street Journal, and all the other permutations of national news coverage that have exited since the 1980's. P. Jenkins, *Pedophiles and Priests, Anatomy of a Contemporary Crisis* 53-54, 74-75 (Replica Books, 1996).

As one leading book on the subject observed in *1996*, "By the early 1990's reports of sexual misbehavior by priests had become so numerous as to be almost commonplace of news coverage." *Id.* He noted that by 1996, hundreds of articles had appeared (and were continuing) in religious and secular periodicals of every possible political and cultural persuasion including Newsweek, People Weekly, Redbook, Ms., The Nation, Vanity Fair, National Review, National Catholic Reporter, Playboy, Christian Century, Rolling Stone, U S Catholic, the New Yorker, Episcopal Life, America, Commonweal, Time, MacLean's, PrimeTime Live (ABC), Nightline (ABC), 20/20 (ABC), 60 Minutes (CBS), Dateline (NBC), Court Television, Investigative Reports (Arts & Entertainment), and CNN Reports (CNN). *Id.*

As just one example, here is the introductory excerpt of what the universally known and distributed magazine "Time" observed as an obvious fact in *August of 1991*:

SINS OF THE FATHERS
August 19, 1991

> Without doubt it is the worst wave of moral scandal ever to beset Roman Catholicism in North America. Dozens upon dozens of priests have been accused of sexually abusing underage boys. Case have erupted in most U.S. states and two Canadian provinces since the 1985 conviction of Louisiana's Father Gilbert Gauthe, who had molested 35 youths. *So widespread are the cases that by one informed estimate, Catholic institutions have paid $300 million in settlements – and no end in sight.*
>
> . . . .
>
> One attorney in the Hawaii suit, Jeffrey R. Anderson of St. Paul, has become a specialist in civil damage suits involving alleged

> priestly sex abuse and is pursuing more than *a 100 cases at present.*

Time Magazine, "Sins of The Fathers", Aug. 19, 1991, 1991 WL 3117669 (Muth Aff. ¶ 10 Ex. I) (emphasis added).

Plaintiffs' attorney alone had more than 100 cases in *1991*.

Returning to Wisconsin here is a *sampling* of just some of the headlines of articles that appeared in the same 2 year time period of 1991-92 in the Milwaukee Journal/Sentinel which are also matters of judicial notice that every person just scanning the headlines – without any additional searching or inquiry – understood and knew:

Woman Files Suit Alleging Abuse by Priest (10-31-91)

Misconduct By Priest Is Alleged (1-21-92)

Priest Gets 7 Years in Prison in Sex Case (4-25-92)

Priest Charged With Molesting 2 Alter Boys (7-8-92)

Former Alter Boy Alleges Sex Abuse (5-5-92)

Former Student Sues High School, Alleging Abuse (7-14-92)

Man Sues Over Alleged Assaults (8-21-92)

Anguish Of Child Sexual Abuse Lingers Long After the News Fades (10-18-92)

Weakland Says He Knew of Sexual Allegations Against Priest (1-28-92)

At Least 3 Lawsuits Here Allege Sex Abuse By Priests (10-29-92)

Kenosha Officials Get 25 Calls Regarding Sex Abuse By Priest (10-29-92)

15 Tell Authorities Sheboygan Priest Assaulted Them, Several Allege He First Served Martinis (10-29-92)

Student Says Priest Tried to Molest Him 8 Years Ago (10-30-92)

Sex-Abuse Victims Urged To Come Forth (11-1-92)

Priests Who Become Problems (11-2-92)

Lawmaker Wants Longer Time for Filing Charges (11-3-92)

Parishioners Worry About Ex-Pastor's Victims (11-3-92)

$10,000 Bail Set For Priest In Sex Case (11-6-92)

Priest Sex Cases have Cost $650,000, Weakland Reveals (11-6-92)

Man Files Suit in Sex Abuse By Priest (11-13-92)

Dear Archbishop: A Survivor Of Sex Abuse Replies (11-15-92)

Sex Allegations Against Priest Escalate (12-6-92)

Priest Serving Time For Sex With Boy, 15 (12-18-92)

8 Men Tell of Sex Abuse By Friars (12-20-92)

Former Seminary Students Demand Action on Abuse (12-21-92)

Priest Urges all Clergy To Report Abuse (12-24-92)

Capuchins Dragging Feet on Sex Abuse Inquiry, Ex-Student Says (12-21-92)

(Muth Aff. ¶ 10 Ex. I.)

All these articles were from just 1991 and 1992. Countless other articles and stories appeared in the Madison Capital Times, the Beaver Dam Daily Citizen, on Primetime Live, Nightline, CNN, etc. (Muth Aff. ¶¶ 11-13, Exs. J-L).

Next, in addition to the relentless multi-media coverage since the 1980's and ever since, any minimal inquiry into the *legal* field would have additionally shown that by 1999 more than half of the 50 states had already processed actual civil lawsuits to the advanced stage of *published* appellate decisions by which other litigants had already demonstrably *sued* supervising organizations for clergy sexual abuse. A copy of a bibliography of these cases is attached to the Muth Affidavit at ¶ 14, Ex. M. Claimants did not have to contact attorneys just concentrating their practices to suits against churches (such as Plaintiffs' own lawyer) to find out that the Church had exposure and could be sued. Before the turn of the century, there were more than thirty (30) published cases exemplifying and proving that fact. Prominently numbered among

those states was Wisconsin with no less than 4 published cases. And in each of those Wisconsin cases, the question was not whether the claimant could sue the supervising organization, but rather, like here, was the action timely. *See e.g., Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 325-26, 533 N.W.2d 780 (1995); *Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 565 N.W.2d 94 (1997)*; *L.L.N. v. Clauder*, 209 Wis. 2d 674, 685, 563 N.W.2d 434 (1997); *Joseph W. v. Diocese of Madison*, 212 Wis. 2d 925, 569 N.W.2d 795 (Ct. App. 1997).

Given all the TV coverage, the radio coverage, the newspaper articles, the books, and the other sources of popular information, as well as the officially *published* appellate examples of such claims by courts both within Wisconsin and outside of it, it is perfectly plain that no other tort claimant, exercising any diligence, would be allowed to defer his or her 6 year period in which to conduct and complete his or her "diligent inquiry." To rule otherwise would mean that persons possessing claims need not consider publicly available judicial decisions and everyday news reports and information coming out on a daily basis.

Contrary to any opposing argument, the Wisconsin statutes of limitation, whether for fraud or otherwise, do not wait until the person claiming a right to sue eventually decides to consult a lawyer, or claims he or she has found the final facts to prevail at trial, or decides to obtain a expert confirmation of his or her injuries. That is the work to be done *within* the 6 year inquiry period. Not after it. Again, as our federal appellate court best put it:

> "[The 6 years] provided by a statute of limitations is not for recuperation after learning enough *to prevail at trial. It is for investigation*, and because fraud may be hard to unravel the statutory period is substantial."

Stockman, 790 F.2d at 588 (applying Wis. law).

These Plaintiffs, having known about their abuse since the 1960's, the precise person who did it, the fact that he was a cleric, and then being subject to the same barrage of lawsuit

information that has been broadcasted to the entire American population over the last 27 years, were not entitled to wait – to the prejudice of the target defendants and the court system – 37 and 40 years before bringing this lawsuit.

V. ARGUMENT: PUBLIC POLICY LAW SIMILARLY REQUIRES DISMISSAL OF THIS 2007 ACTION

Wholly apart from the numerical years set by the legislature for limitation periods which these Plaintiffs cannot meet, our Supreme Court has ruled that any extension to those time limits by the "discovery" exception is subject to judicial supervision through public policy limitations. For instance, on a dispositive motion in the Supreme Court case of *Pritzlaff v. Archdiocese of Milwaukee*, the Court held that regardless of any other rule, order or provision, that allowing a twenty-seven year old claim to go forward against a defendant was simply contrary to public policy. Such a case would be irreparably unfair and could not be permitted.

> [T]o allow the claim to proceed against the Archdiocese based on Ms. Pritzlaff's allegations concerning Fr. Donovan despite the passage of twenty-seven years since the end of the alleged relationship would be contrary to the public policy of the State.
>
> . . . .
>
> This court has stated that *the discovery rule* will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. *Hansen*, 113 Wis.2d at 559, 335 N.W.2d 578. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged conduct took place over twenty-seven years ago and increase the potential for fraud.

194 Wis. 2d at 306, 322 (emphasis added).

Two years later in the case of *John B.B.B. Doe v. Archdiocese of Milwaukee*, the Supreme Court ruled again that even in the face of assertions of "repressed memory" it would be against public policy to allow claims as old as 20 years to proceed.

> When such allegations are made long after the alleged occurrence, the potential for fraud is heightened. The opportunity to fairly prosecute, and defend against, these claims is frustrated....
>
> Based upon these considerations, *as a matter of law*, we conclude that it would be contrary to public policy, and would defeat the purposes of limitation statutes to allow claims of repressed memory to invoke the discovery rule and to indefinitely toll the statutory limitations for these plaintiffs.

211 Wis. 2d 312, 364, 56 N.W.2d 94 (1997).

In this case, the delays that these two Plaintiffs are attempting to justify are even longer: 37 and 40 years. At this level, not only would the delay be exponentially greater than the 20 years and 27 years rejected in *Doe* and *Pritzlaff,* but further, it would violate even the most liberalized statute of limitation recently enacted by the legislature for childhood sexual abuse claims. Specifically, under the newest and most expanded statute of limitation enacted for childhood sexual abuse, the very latest date any new childhood victim of abuse may sue *today* is for 17 years after reaching his or her majority (until age 35). Wis. Stat. § 893.587. Section 893.587 became effective in this State on April 30, 2004. In contrast to this statute, here the two Plaintiffs waited 37 and 40 years and were respectively 47 and 52 years of age when they filed their 2007 suit: twelve and seventeen years *longer* than what even the longest statutes would allow childhood victims *of today.*

While this motion does not contend that the 2004 law binds these Plaintiffs, still, section 893.587 evinces the best evidence possible of what the legislature concretely believes is the best public policy of this state, and the outermost time period that any victim – even of today – should be able to invoke the judicial system for such long ago claims. Moreover, regardless of the application of section 893.587, these two Plaintiffs *do* remain bound to the prior judicial declarations establishing the objectionableness of 20 and 27 year delays as set forth by the Supreme Court in the *Doe* and *Pritzlaff* cases.

Finally, unlike the *Doe* and *Pritzlaff* cases which were dismissed on pleading motions and thus depended upon the prejudice that could only be judicially forecasted experientially from such obvious delays, here there is a summary judgment motion, and proven *facts of record,* establishing the loss of the most critical witnesses to the defense, and the most dispositive documents that would exculpate the very Archdiocesan personnel who stand accused of committing not merely negligent acts of bad judgment or oversight, but *intentional* acts of wrongdoing. Under such circumstances it is perfectly evident that even if the Plaintiffs could excuse all of their delays in bringing this case, those excuses cannot undo the irreparable prejudice to the defense in this case nor overrule the public policy requirements handed down in *Pritzlaff* and *Doe.*

Although the foregoing rulings alone compel a dismissal of this case, there are other public policy considerations which lead to the same result. For example, courts have relied upon the impossible task of predicting foreseeable harm by an employee or his or her propensity to abuse children in dismissing third party duty-to-warn claims founded in negligence. *See Gritzner v. Michael R.*, 2000 WI 68, ¶ 44, 235 Wis. 2d 781, 611 N.W.2d 906 (holding that public policy precludes a negligent failure to warn claim in connection with the inappropriate sexual acts of a child, because there would be "no just and sensible stopping points for liability."); *Kelli T-G v. Charland*, 198 Wis. 2d 123, 130, 542 N.W.2d 175, 178 (Ct. App. 1995) (holding the ex-wife of a child molester did not have a duty to warn the mother of a child that was playing under the molester's care, because "recovery would enter a field not only with no definable, sensible stopping point, but no sensible starting point as well."); *see also Estate of Paswaters v. American Family Mut. Ins. Co.*, 277 Wis. 2d 549, 560, 692 N.W.2d 299, 304 (Ct. App. 2004) ("It is unreasonable to expect people in [defendant]'s position to attempt to predict erratic and irrational

human behavior.") If public policy precludes *negligence* claims based on an alleged failure to warn, the same principles must apply with even greater force to fraud claims alleging *intentional* misconduct based on virtually identical allegations.

Further our Supreme Court drew a line in *Hornback v. Archdiocese of Milwaukee* that must be honored here as well. Allowing recovery on this state of record would begin "a descent down a slippery slope with no sensible or just stopping point." 2008 WI 98, ¶ 54, 752 N.W.2d 862. Again, what the court in *John Doe 1* did *not* decide was whether the Archdiocese of Milwaukee defrauded any plaintiffs at all. Instead, it ruled only that the parties should have an opportunity to conduct discovery under a fraud theory. *John Doe 1*, 2007 WI 95 ¶¶ 62-64. Now that discovery has taken place, would the Archdiocese (and by expansion, every employer in Wisconsin) be required to notify every parishioner (or citizen) in every parish (or county) of his past misconduct? Would it have to notify every parishioner in the Archdiocese in case that priest attended services or other events outside of his parish? Would it have to notify every person in the city in which the priest works, regardless of whether he or she is Catholic? Would it have to notify every person in the state in case the priest travels? Or the country or world for that matter? What if the priest had been cared for psychologically, been certified as medically okay, and had no further reports of misconduct of any kind?

And what would constitute an appropriate notice? Would notice in the newspapers be sufficient? Indeed, in this case, if these Plaintiffs claim that it wasn't until sometime *after the 1980's and 1990's* that they first noticed, saw and heard all of the plethora of articles, talk radio segments, television news reports or lawsuits that had been broadcasted in the public domain since 1985, (Muth Aff. ¶ 15 Ex. N; Muth Aff. ¶ 4 Ex. C at 178:20-21, 210:4-217:9.) how then could any court hold that any notice – 40 years earlier – and without the benefit of hindsight on

the part of the Archdiocese of Milwaukee, ever been sufficient to satisfy some alleged, but never defined, duty owed by the Archdiocese to the entire world? Where, as a matter of public policy, is the reasonable stopping point if such bare assertions are allowed to proceed in the face of the factual record now established on this motion?

And would the line for such notification be limited to sexual abuse? Would employees have to notify the public regarding employees who may drink alcohol in excess or have a previous conviction for drunken driving? Would the notice requirement encompass unsubstantiated claims, exposing the Archdiocese to potential defamation claims? Opening the window for these types of unending fraud claims – in the face of this record – would eliminate any statute of limitation.

Similarly, fraud claims against an employer for failing to disclose all potential "scarlet letters" of all employees would exist in perpetuity. There would be no sensible or just stopping point, and the Archdiocese, or indeed, any employer, would have no way of knowing whether it had fully complied with such an open ended, immeasurable duty. Moreover, imposing such a requirement years later after the proven loss of witnesses, memory, medical records and other evidence eliminates any possible opportunity for a party to have any chance of fairly defending such claims.

When allegations are made long after the alleged occurrence, the ability to defend against such claims is destroyed. *John BBB Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 355, 565 N.W.2d 94, 111 (1997). Allowing decades-old claims to go forward would be unfair to the Archdiocese and contrary to longstanding principles of public policy, because, as now proven by the record, the Archdiocese is quite literally unable to investigate and defend the very claims now being made. *See Pritzlaff*, 194 Wis. 2d at 322, 533 N.W.2d at 788.

Further, the 37 and 40 years of delay make it impossible to realistically defend against any type or amount of *damages* claimed in these cases given all the intervening and superseding causes that certainly will have affected vocational opportunities, lost wages claims and emotional health between the time of the alleged abuse and the filing of the lawsuit as well, placing the finder-of-fact in a quagmire as to any damage that would be demanded.

VI. CONCLUSION

Statutes of limitation are based on the reality that even for persons with just claims, it is unjust not to put those matters promptly to the civil litigation system due to the unavoidable deleterious effects of time and the limitations inherent in any human judicial system. Balancing the right of persons accused of wrongdoing (especially those accused of *intentional* wrongs) to be free from stale claims, against the right of injured persons to have a reasonable period of time in which to sue, represents no less than the legislature's declaration on when the right to be free of stale claims must prevail over any right to sue. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). Further, the Wisconsin Supreme Court's public policy limitations from *Pritzlaff* and *Doe* on the furthest extent any "discovery" rule can be expanded, impose the same limitations (judicially) upon that rule.

Here Plaintiffs' 37 and 40 year old lawsuit is plainly time barred. The time to investigate and bring a fraud claim was 6 years. Here, Plaintiffs have always known about their transient acts of abuse and the person who committed it from the 1960's onward. Their parents and siblings also knew the facts. They also knew the precise identity of their abuser and that he was a priest associated with a supervising religious organization. Finally, they like everyone else, knew about the reality of the Catholic Church being sued time and time again for sexual abuse acts of its priests from at least 1990 and onward. In *Doe,* the Supreme Court charged all lower

courts with the obligation to decide this matter once a properly made and supported summary judgment motion was brought.

Under the obligation of diligent inquiry the Plaintiffs were not entitled to delay their required investigations until after the start of a new millennium and until more facts "found them." Given the admitted knowledge and the proven facts of record from the early 1990's, their 6 year period investigative period started and lapsed no later than the end of the 1990's.

Finally, even if these Plaintiffs could erase all of the record facts of their own knowledge and the proven historical facts of judicial notice, that erasure still would be unable to change or eliminate the undeniable prejudice caused to the defense in this case. This case is not even close. The longest claim allowed by the public policy of today's legislature only allows such claims to be brought for 17 years after majority. The Supreme Court, in turn, has declared that for older cases, the judicial system can and must step in where claimants attempt to prosecute cases as old as 20 years. Here these cases are 37 and 40 years old.

This is not a motion to dismiss testing only pleadings. Here, there is a motion for summary judgment. The Plaintiffs' admissions and knowledge are matters of record. As conclusively established by the factual record, all of the anticipated unfairnesses predicted in the *Pritzlaff* and *Doe* cases, now exists in proven and overwhelming measure. The record in this case, the law of diligent inquiry and limitation of public policy each require a ruling that this case was not timely pursued or brought. The Archdiocese's motion for summary judgment dismissing Plaintiff's intentional fraud counts must be granted.

Dated this 22nd day of January, 2009.

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EXHIBIT D

Name	Date of Birth	Age at time of Death	Date of Death	Year Ordained	Comments
Bandle, Ronald J.	9/24/1941	59	1/6/2001	1968	
Bistricky, Frederick J.	8/19/1938	68	12/17/2006	1965	
Doyle, Andrew P.	12/1949	60	6/17/2010	1976	
Effinger, William J.	12/1932	64	12/4/1996	1960	
Etzel, George A.	5/1917	85	4/11/2003	1942	
Farrell, William J.	5/1923	76	9/18/1999	1947	
Haen, Edmund H.	5/1916	81	10/23/1997	1940	
Herbst, Harold A.	10/1915	63	9/1979	1941	
Hopf, George S.	5/1924	80	10/16/2004	1949	
Knotek, John T.	9/1912	93	1/06/2006	1938	
Kreuzer, Eugene T.	1/1926	81	5/16/2007	1952	
Krusing, Oswald G.	4/1899	96	10/15/1995	1927	
Lesniewski, Eldred B.	5/1928	68	8/22/1996	1953	
Murphy, Lawrence C.	11/1925	72	8/21/1998	1950	
Nichols, Richard W.	7/1932	63	1993 or 7/25/1996	1958	
Nuedling, George A.	12/22/1922	71	1/29/1994	1948	
Schouten, Clarence J.			1/14/1978	1929	DOB and age at death unknown - ordained 1929 (had to be at least 24 years old when he was ordained, so he would have been at least **73** years old when he passed away)
Silvestri, Vincent A.	10/1936 or 7/1937	63 or 64	7/17/2000	1964	
Widera, Siegfried F.	1941	62	2003	1967	