

**IN THE SUPREME COURT OF MISSOURI**

<b>STATE EX REL.</b>	)	
<b>DAVID CLOHESSY, in his capacity</b>	)	
<b>as director of the Survivors Network</b>	)	
<b>of Those Abused by Priests,</b>	)	
	)	<b>Case No. SC _____</b>
<b>Relator,</b>	)	
	)	<b>(Western District Court of Appeals</b>
<b>v.</b>	)	<b>Case No. WD75382)</b>
	)	
<b>THE HONORABLE ANN J. MESLE,</b>	)	<b>(Circuit Court of Jackson County</b>
	)	<b>Case No. 1016-CV-29995)</b>
<b>Respondent.</b>	)	

**PETITION FOR WRIT OF PROHIBITION**

Comes now Appellant David Clohessy in his capacity as Director of the Survivors Network of Those Abused by Priests, by and through his undersigned counsel, and pursuant to Mo. S. Ct. R. 84.22 to 84.26 and 97.01 and hereby files this Petition for a Writ of Prohibition. In support of his Petition, Appellant respectfully states:

**I. Facts**

1. The relator is David Clohessy (“Clohessy”), in his capacity as Director of the Survivors Network for Those Abused by Priests (“SNAP”). Neither Clohessy nor SNAP is a party to the underlying lawsuit, *John Doe, B.P. v. Fr. Michael Tierney, et al.*, 1016-cv29995 currently pending in the Circuit Court of Jackson County, or to any of the no fewer than seven additional pieces of litigation in which Clohessy has been cross-noticed for deposition. Respondent is the Honorable Ann J. Mesle, trial judge in the underlying lawsuit.

2. John Doe B.P. (“B.P.”) is the Plaintiff in the underlying action and the Defendants are Fr. Michael Tierney (“Tierney”) and the Diocese of Kansas City-St. Joseph (the “Dioceses”).

3. B.P.’s allegations in his Third-Amended Petition, filed on June 18, 2012, revolve around his claim that Tierney sexually assaulted him in 1971 or 1972 and that the Dioceses had prior knowledge of Tierney’s propensity to abuse children before that time, but despite that knowledge, continued to assign Tierney to positions where he worked around children and continued to hold him out as a priest who was safe around children. B.P. also claims that the Diocese concealed its knowledge of Tierney and other priests serving at St. Elizabeth, the parish where Tierney was assigned in 1971-1972. B.P. further contends in his Third Amended Petition that he repressed the memory of the sexual abuse until 2008. Exh A, Appx at 1-27.

4. As its name indicates, SNAP has faithfully served for over 24 years the needs of victims of sexual abuse, their loved ones, their advocates, police, prosecutors, whistleblowers, and concerned citizens and Catholics, acting as a support group, a lifeline, and an advocacy group for those in need of SNAP’s help. Clohessy has been the director of this organization for 23~~2~~ of these years. In Clohessy’s valuable time with SNAP, the organization has assisted at least 20,000 victims of sexual abuse and their family members both in the United States and internationally.

5. On October 27, 2011, Defendant Father Michael Tierney (“Tierney”) issued a subpoena duces tecum and notice of videotaped deposition to non-party Clohessy, instructing him to bring to his deposition eight categories of documents, ostensibly

covering every communication in his possession dealing even tangentially with repressed memories, mentioning any clergy in the entire Diocese of Kansas City-St. Joseph, and, indeed, including all communication with the press on these issues and others. Specifically, the subpoena purported to require:

- a. Any documents or correspondence, including but not limited to electronic mail, that mention or refer to Tierney or the Diocese of Kansas City-St. Joseph;
- b. Any press releases or drafts of press releases that mention Tierney or the Diocese of Kansas City-St. Joseph;
- c. Any correspondence to or from members of the press that mentions or refers to Tierney or the Diocese of Kansas City-St. Joseph;
- d. Any correspondence to or from Rebecca Randles that mentions or refers to Tierney or the Diocese of Kansas City-St. Joseph;
- e. Any correspondence, including but not limited to electronic mail, to or from members of the public (including plaintiffs in any litigation), that mentions or refers to Tierney or the Diocese of Kansas City-St. Joseph;
- f. Any documents or correspondence, including but not limited to electronic mail, that mention or refer to any priest currently or formerly associated with the Diocese of Kansas City-St. Joseph;
- g. Any correspondence, including but not limited to electronic mail, to or from John Doe B.P. of Kansas City, Missouri;

h. Any correspondence, including but not limited to electronic mail, to or from members of the public that discuss or relates to repressed memory. Exh B, Appx. at 28-32.

6. Never in SNAP's history has a party sought – let alone obtained – the type of voluminous documentation or free-ranging deposition testimony sought by Tierney's subpoena and notice of videotaped deposition.

7. To date, Tierney has not taken B.P.'s deposition.

8. On November 14, 2011, Clohessy moved to quash this subpoena and for a protective order barring production of documents. Exh C, Appx. at 33-40.

9. Of importance to this matter only as it relates to the arguments of Tierney, on August 2, 2011, Respondent entered an Order that barred counsel for B.P. and the Defendants from making extrajudicial statements that might have a substantial likelihood of materially prejudicing the litigation. (the "Gag Order"). Exh D, Appx. at 41-43.

10. As Tierney's suggestions in opposition to John Doe B.P.'s and Clohessy's motions to quash reveals, Tierney's principal motive and justification for the October 27, 2011 subpoena is a press release issued by SNAP on October 20, 2011, which Tierney contends is a violation of the Court's August 2, 2011 Order. Exh E, Appx. at 44-53.

11. On November 29, 2011, Respondent issued an Order Granting in Part and Denying in Part Motions to Quash Deposition of David Clohessy in which she ordered Clohessy to appear at the deposition and to produce the documents as set forth in the subpoena notice. Exh F, Appx. at 54-57.

12. On December 6, 2011, Clohessy filed a Motion to Reconsider and Clarify Respondent's Order. Exh G, Appx. at 58-65. On December 12, 2011, Tierney filed suggestions in opposition to this motion (Exh H, Appx. at 66-72) and Clohessy timely filed reply suggestions on December 20, 2011. Exh I, Appx. at 73-80.

13. On December 28, 2011, Respondent issued an Order Denying Clohessy's Motion to Reconsider and Clarify the Respondent's Order denying the motion to quash the subpoena. Exh J, Appx. at 81-83.

14. On the same date, Clohessy filed a Writ Summary, Petition for Writ of Prohibition, Suggestions in Support, and Motion to Shorten Time Pursuant to Rule 84.24(d) with the Court of Appeals, *State of Missouri ex rel. David Clohessy v. The Honorable Ann J. Mesle*, WD74692. Exh K, Appx. at 84-106.

15. Plaintiff John Doe B.P. also filed a Writ of Prohibition and Suggestions in Support thereof. Exh L-N, Appx. at 107-141.

16. On December 29, 2011, the Court of Appeals issued two Orders, denying both Relator's and Plaintiff John Doe B.P.'s Petitions for Writ of Prohibition and Suggestions in Support thereof. WD74691. Exh O, Appx. at 142-145.

17. Relator then filed a Petition for Writ of Prohibition and Suggestions in Support with this Court on December 29, 2011. Exh P, Appx. at 146-153.

18. On January 2, 2012, this Court denied the Petition for Writ of Prohibition without prejudice stating that Respondent had not ruled on objections to specific questions with respect to the information Defendant Tierney sought in the subpoena duces tecum. Exh Q, Appx. at 154-155.

19. The parties to the case conducted the deposition of Clohessy on January 2, 2012. Clohessy asserted objections to most of the questions asked of him. Clohessy did testify, however, that neither he nor anyone connected with SNAP has ever had contact with B.P. Exh R, Appx. at156-211. Further, B.P. has stated under oath in interrogatory answers that he has had no contact with SNAP. Exh CC, Appx. at556.

20. On February 10, 2012, Defendant Tierney filed a Motion to Compel Clohessy to answer questions he had refused to answer in the January 2, 2012 deposition. Exh S, Appx. at212-404.

21. On April 6, 2012, Clohessy and SNAP filed a response along with suggestions in opposition to Defendant Tierney's Motion to Compel. Exh T, Appx. at405-431.

22. On April 10, 2012, Plaintiff John Doe B.P. also filed suggestions in opposition to Defendant Tierney's Motion to Compel. Exh U, Appx. at432-450.

23. Respondent conducted a hearing on Defendant Tierney's Motion to Compel on April 20, 2012. Exh V, Appx. at451-487.

24. Respondent entered an Order on April 23, 2012, granting Defendant Tierney's Motion to Compel (the "Discovery Order"). The Discovery Order does allow SNAP to redact all personally identifiable information relating to victims who have not filed suit. Additionally, the Discovery Order recites that the question of whether SNAP is a "rape crisis center" under Mo. Rev. Stat. §455.003 was premature so Respondent crafted the Discovery Order as if the statute applied. The Discovery Order specifically requires Relator to provide information concerning:

- a. Documents that refer to the Diocese of K.C.-St. Joseph re sexual and other misconduct of priests and other claims;
- b. Press releases or drafts of press releases that mention Tierney or the Diocese of K.C.-St. Joseph;
- c. Correspondence to and from the press that mention or refer to Tierney or the Diocese of K.C.-St. Joseph re sexual misconduct and other misconduct of priests;
- d. Correspondence to or from Randles that mention or refer to Tierney or the Diocese of K.C.-St. Joseph. To the extent counsel claims work product protection, Plaintiffs shall provide a detailed privileged log as specified elsewhere in this order;
- e. E-mails to and from members of the public and plaintiffs that mention or refer to Tierney or the Diocese of K.C.-St. Joseph re sexual misconduct and other claims;
- f. Documents or correspondence that mention or refer to any priest currently or formerly associated with the Diocese of K.C.-St. Joseph re sexual conduct or related claims;
- g. Correspondence to or from John Doe B.P.; and
- h. Correspondence to or from members of the public that discusses or relates to repressed memory in conjunction with cases involving the Diocese of K.C.-St. Joseph. Exh W, Appx. at488-492.

25. The Discovery Order also requires Relator's deposition to be reconvened. Clohessy and SNAP filed a motion to reconsider the Discovery Order on May 3, 2012 (Exh X, Appx. at 493-503) and Plaintiff John Doe B.P. filed a Motion to Clarify the Discovery Order on May 1, 2012. Exh Y, Appx. at 504-508.

26. Respondent entered an Order on June 1, 2012 granting SNAP's Motion to Reconsider the Discovery Order in part only with respect to clarify that counsel for B.P. was to assist SNAP with the identity of persons who ~~that~~ have brought suit with respect to Tierney and that information produced was to be treated as highly confidential. Respondent otherwise denied SNAP's motion to reconsider. Exh Z, Appx. at 509-511.

27. Clohessy filed a petition for a writ of prohibition on July 12, 2012 requesting that the Court of Appeals prohibit Respondent from enforcing the Discovery Order. Exh AA, Appx. at 512-553.

28. The Court of Appeals denied Clohessy's petition July 13, 2012. Exh BB, Appx. at 554-555.

29. Respondent entered an order on July 17, 2012 ordering Relator to produce documents responsive to the Discovery Order by July 30, 2012 and appear at a deposition by July 30, 2012. Exh DD, Appx. at 557-558.

## **II. Relief Sought**

29. Relator requests that this Court issued a preliminary and permanent writ in prohibition prohibiting Respondent from enforcing the April 23, 2012 Discovery Order. Additionally, by separate motion, Relator is requesting that this Court reduce or dispense with the time limitations contained in Rule 84.24(c) and Rule 84.24(d).



### III. Reasons for Granting Relief

30. The extraordinary remedy of a writ of prohibition is available to remedy an “abuse of discretion” or where “a party may suffer irreparable harm if relief is not granted.” *State ex rel. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 879, 888 (Mo. banc 2009). A writ of prohibition is appropriate to prevent a court from ordering discovery or enforcing motions that constitute an abuse of discretion, cause irreparable harm, or are an exercise of extra-judicial power. *State ex rel. Barker v. Tobben*, 311 S.W.3d 798, 800 (Mo. banc 2010). Further, a trial court’s denial of a motion to quash a *subpoena ducestecum* is ripe for review by this Court by way of a petition for an extraordinary writ. *See State ex. rel Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 410 (Mo. banc 1996) (issuing a permanent writ of prohibition with respect to the trial court’s denial of a motion to quash an overly broad subpoena *ducestecum*).

31. Defendants, as the proponents of the discovery, have the burden to establish that the information they seek to discover and contained in the Discovery Order is discoverable under Rule 56.01(b). *State ex. rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). The Defendants, to meet this burden, must demonstrate that the information they seek to discover is more than remotely relevant in light of the ultimate factual issues framed in the pleadings and does not constitute a fishing expedition based on what “might” be in the documents. *State ex rel. BNSF R. R. Co. v. Neill*, 356 S.W.3d 169, 175 (Mo. banc 2012); *State ex rel. MacDonald v. Franklin*, 149 S.W.3d 595, 599 (Mo. Ct. App. 2004). Further, the relevancy threshold established in Rule 56.01(b)(1) applies to a subpoena *ducestecum*. *Wilfong*, 933 S.W.2d at 410. Thus, as

this Court has noted, information sought in a subpoena *ducestecum* must be relevant to issues raised in the parties' pleadings in order for the information to be discoverable. *Id.*

32. The Discovery Order allows Defendants to discover from Relator every bit of information Relator has in its possession relating to the Diocese, including information is has shared with third-parties, and every "discussion" of repressed memory relating to the Diocese. The issues contained in the pleadings, however, center around: (1) did Tierney abuse B.P. in 1971 or 1972; (2) did the Diocese know about Tierney's abuse of other children before that time but fail to adequately supervise Tierney; (3) did the Dioceses conceal its knowledge of Tierney and other priests serving at St. Elizabeth parish with Tierney in the 1971-1972 time frame; (4) did B.P. repress his memory of the abuse until 2008? Defendants have utterly failed to make a threshold showing that the incredibly broad spectrum of information they seek in the subpoena, and which Respondent compelled Relator to produce in the Discovery Order, is related to the factual issues in dispute as framed by the parties' pleading as required by Rule 56.01(b).

33. Further, even if the Discovery Order contains some information that may be relevant to the issues in dispute, it fails to contain any geographical, temporal, or subject matter limitations that is related to the specific issues in dispute in the underlying action and therefore constitutes an abuse of Respondent's discretion. *State ex rel. General Motors Acceptance Corp. v. Stanridge*, 181 S.W.3d 76, 78 (Mo. banc 2006).

34. Additionally, any potential information concerning victims who reported to the Diocese that they had been abused by Defendant Tierney before B.P. was abused in 1971, which would be relevant to Plaintiff's fraud and intentional failure to supervise claims, should already be in the Diocese's possession and is much narrower than the information Respondent has required Relator to produce in the Discovery Order. Therefore, requiring Relator to comply with the Discovery Order is not the least intrusive method possible of discovering such relevant information. *Messina*, 71 S.W.3d at 606.

35. Finally, requiring Relator to divulge the painful stories of the victims of sexual abuse that it serves, even without personally identifiable information, amounts to a violation of Relator's and the victims' right to freely associate under the First Amendment, incorporate against the states under the Fourteenth Amendment. *NAACP v. State of Alabama*, 357 U.S. 449, 466 (1958).

36. In conclusion, for the reasons stated above and as more fully set forth in Relator's Suggestions in Support filed herewith, Respondent abused her discretion in entering the Discovery Order. Accordingly, this Court should issue a preliminary and permanent writ of prohibition prohibiting Respondent from enforcing the Discovery Order.

Respectfully submitted,

/s/ Bryan C. Bacon

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ATTORNEYS FOR RELATOR

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was sent via U.S. Mail, postage prepaid, on July 19, 2012, to:

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