

HAMPDEN, SS

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT

CIVIL ACTION No. 05-602

THE ROMAN CATHOLIC BISHOP OF
SPRINGFIELD, A CORPORATION SOLE,
PLAINTIFF

v.

TRAVELERS PROPERTY CASUALTY COMPANY,
MASSACHUSETTS INSURERS INSOLVENCY FUND,
NORTH STAR REINSURANCE CORPORATION,
UNDERWRITERS AT LLOYD'S, LONDON,
CENTENNIAL INSURANCE COMPANY,
INTERSTATE FIRE & CASUALTY COMPANY, AND
COLONIAL PENN INSURANCE COMPANY,
DEFENDANTS

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JAN 24 2007

Brian P. Lee
CLERK-MAGISTRATE

**PLAINTIFF'S EMERGENCY MOTION TO PERMIT
PRODUCTION OF DISCOVERY UNDER A PROTECTIVE ORDER
IN LIEU OF FURTHER IN CAMERA REVIEWS AND APPELLATE REVIEW.**

Now comes the plaintiff in the above matter and moves this Honorable Court on an emergency basis to permit the plaintiff to produce discovery which was the subject of this Court's January 3, 2007 to the defendants under the terms of the attached proposed protective order, in order to obviate need for the Court to conduct further in camera reviews of documents, and to obviate the need for the plaintiff to seek appellate review with either the Single Justice or the full bench of the Appeals Court or Supreme Judicial Court. The plaintiff assigns as reasons therefore the following:

1. The Court's January 3, 2007 order determined that certain documents in plaintiff's possession sought by defendants in discovery were not protected from discovery by any privilege asserted by plaintiff.
2. By order dated January 19, 2007, the Court allowed Plaintiff's Motion to Enlarge Time to Respond the Court's January 3rd Discovery Order giving the plaintiff un-

*2-13-07 Denied. See ct's memo of decision + order
As soon as possible
attach Dan in Clerk out Clerk*

til February 5th to seek review by the Single Justice of the Court's Order and a stay of the same, or to otherwise respond.

3. The Court's January 3rd order is at odds with an impounded finding and order of another Superior Court judge pertaining to the same documents, which order was entered in In the Matter of a Grand Jury Proceeding in 2004, and is on file with the Hampden County Superior Court Clerk.
4. The Court is already presently reviewing, in camera, numerous documents filed by plaintiff with the Court to determine if the documents are privileged.
5. All parties to this action are anxious to expedite its progress and that goal will not be facilitated by either an appeal of this Court's January 3rd order to resolve the conflict between that order and the aforementioned impounded order (which appeal may have to be heard by a full appellate bench as opposed to a Single Justice) and/or by asking this Court to conduct further in camera examinations of these remaining documents.
6. As the court is already aware, the documents in question contain highly personal and sensitive information, including sexual abuse descriptions by individuals who requested that all such information be kept strictly confidential and have not been made public. Some of the documents contain counseling or psychiatric information, some involve claims against deceased individuals who have never had the opportunity to respond, and some contain confidential statements by individual members of the plaintiff Church on these matters. The documents also contain attached copies of public information which was described in detail and consequently readily available to the defendants from other sources but was not pro-

duced by the plaintiff because of dicta by the Supreme Judicial Court in the Society of Jesus of New England v. Commonwealth, 441 Mass. 662 (2004). In Society of Jesus the court cautioned that production of even portion of a file might constitute waiver of the claimed privilege. 441 Mass at 670, footnote 8. Having promised these individuals as much confidentiality as it could legally provide, plaintiff feels compelled to take any and all actions to fulfill that promise.

7. On January 12, 2007, in order to facilitate progress of this litigation, avoid time consuming appeals, satisfy this Court's order and the legitimate interests of discovery, and to maintain confidentiality of these highly personal records, prior to filing Plaintiff's Motion to Enlarge Time to Respond the Court's January 3rd Discovery Order, plaintiff's counsel, Edward J McDonough, Esq., contacted by telephone lead counsel for the defendants, John Graceffa, Esq., with a proposal to release all of the subject documents to the defendants under a protective order to be negotiated between the parties. The protective order option would allow immediate access and review by defendants of all the documents in question without the need for in camera reviews and any appellate review of the January 3rd order. Plaintiff believed that producing all of the documents under a protective order would serve both the defendants' legitimate discovery needs while still respecting the sensitivity to the personal and confidential nature of the information involved. Surprisingly, in defendants' January 17, 2007 opposition to the Plaintiff's Motion to Enlarge Time to Respond the Court's January 3rd Discovery Order, defendants responded to the plaintiff's proposal, not through communication with plaintiff's counsel, but rather by incorrectly claiming (opposition page 3, ¶3) that defendants

had already rejected the proposal and that defendants had already conveyed its rejection to plaintiff's counsel before the filing of plaintiff's motion to enlarge. On the contrary, Attorney Graceffa had advised Attorney McDonough to leave in plaintiff's motion to enlarge the reference to their discussion about the protective order proposal (even though Attorney McDonough had offered to remove the proposed option from the motion) because Attorney Graceffa had yet to hear back from defendant carriers other than the Massachusetts Insurers Insolvency Fund and The Travelers who had rejected the protective order option. Pursuant to Attorney Graceffa's direction, the language concerning the proposed protective order alternative remained in plaintiff's motion to enlarge time. Thus, the defendants' January 17th opposition to plaintiff's motion to enlarge time is unfairly critical of the plaintiff for the very language which their lead counsel suggested should remain in the motion to enlarge.

8. Since the defendants have, without explanation, eschewed the protective order option, plaintiff now moves this Court to permit the production of all the subject documents subject to the terms of the proposed attached protective order which protective order will in no way impede the legitimate use of the documents for discovery purposes and will permit defendants to review forthwith all the documents, while preserving the defendants' right to seek relief from the protective order's provision for any particular document.
9. The plaintiff's proposal is consistent with the new in camera review rules set down by the Supreme Judicial Court on December 29, 2006 in Commonwealth v. Dwyer, 448 Mass. 122 (2006) (copy attached) which recognizes that statutorily

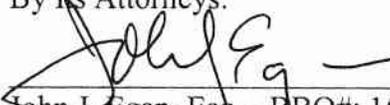
privileged records pertaining to sexual abuse are more appropriately reviewed first by defense counsel, rather than the trial judge. The Dwyer rules promote judicial economy by first permitting defense counsel to review the otherwise privileged documents under confidentiality restrictions while permitting counsel to return to the court after identifying any documents deemed necessary to its case.¹

Wherefore, in the interest of judicial economy, and for all the reasons set forth herein, plaintiff prays that its motion to produce all of the subject documents pursuant to the attached protective order be allowed.

Respectfully submitted,

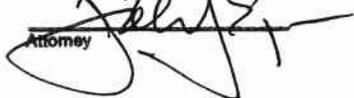
The Plaintiff, The Roman Catholic
Bishop of Springfield, A Corporation Sole

By Its Attorneys:



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I certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party by mail (by hand) on 1/24/07



Attorney

¹ Although the new Dwyer protocol is in the context of a criminal action replacing the Bishop/Fuller in camera review protocol, it provides instructive and helpful insight into the Supreme Judicial Court's likely approach with respect to the statutorily privileged documents now before the court. First, Dwyer eliminates the need for the trial judge to conduct the document review. Second, and perhaps most significantly, the Dwyer protocol limits the initial inspection to ". . . defense counsel (and only defense counsel in the first instance) to inspect pretrial presumptively privileged records produced by a third party, subject to a stringent protective order." Dwyer, at 145. The attached proposed protective order is not nearly as restrictive as the Dwyer confidentiality restrictions on counsel. See limitations on inspection of non-presumptively privileged records, 448 Mass at 149).

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INTERSTATE FIRE & CASUALTY COMPANY, AND
COLONIAL PENN INSURANCE COMPANY,
DEFENDANTS

**PROTECTIVE ORDER
CONCERNING PRIVILEGED AND CONFIDENTIAL INFORMATION**

Counsel for defendants have requested discovery of certain documents and information that the plaintiff contends are privileged and/or confidential. To the extent that plaintiff produces any discovery responses that it designates as "Protected Responses," as defined below, in this action, such production shall be subject to this Protective Order Concerning Privileged and Confidential Information (the "Order").

The purpose and intent of the Order is to assure that: 1) the Protected Responses shall be used only for legitimate purposes in The Roman Catholic Bishop of Springfield, A Corporation Sole v. Travelers Property Casualty Company, et al, Commonwealth of Massachusetts Superior Court, Civil Action No. 05-602 (the "Action"); 2) the Protected Responses and the privileged or confidential information contained therein shall not be disclosed to any persons or entities other than those expressly permitted to obtain them

pursuant to the terms of this Order; and 3) the Protected Responses, all copies (complete or partial) of the Protected responses, and all documents revealing or discussing the privileged or confidential information in the Protected Responses shall be returned to the plaintiff or destroyed at the conclusion of this Action. (The Protected Responses, all copies (complete or partial) of the Protected Responses, and all documents revealing or discussing the privileged or confidential information in the Protected Responses are hereinafter referred to as "Protected Materials.")

THEREFORE, FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED AS
FOLLOWS:

1. Every document or thing marked as "Subject to Protective Order - The Roman Catholic Bishop of Springfield, A Corporation Sole v. Travelers Property Casualty Company, et al," that is produced by plaintiff in this Action shall be deemed a "Protected Response" containing privileged and/or confidential information. (Plaintiff's inadvertent failure to designate any document or thing as a protected document may be corrected by a supplemental written notice to all recipient(s).)

2. If plaintiff designates any discovery response as a Protected Response which the defendants believe should not be treated as such, they shall so notify the plaintiff's counsel in writing within 90 days of receipt of the discovery response. If the parties are unable to resolve the issue thereafter by agreement, defendants shall file within 90 days a motion to determine the confidential status of the Protected Response at issue. Until a Court orders otherwise, the Protected Response shall be treated as confidential in accordance with this Order.

3. Except as set forth in paragraph 4, access to Protected Materials shall be strictly limited to the attorneys of record representing defendants or the claimants in the underlying cases, their clients, and the representatives of their clients, including experts, (these attorneys, clients, representatives and experts are collectively referred to as the "authorized recipients"). All persons subject to this Order shall strictly comply with its terms and no such person receiving Protected Materials subject to this Order shall provide such materials to anyone not subject to this Order unless the recipient is an authorized recipient, a copy of this Order is provided to the authorized recipient and the authorized recipient expressly agrees to strictly comply with its terms.

4. The use of any Protected Material in the course of this litigation or in the handling of the underlying claims, and/or the filing of any Protected Material in court shall be accomplished in a manner designed to protect and preserve the confidentiality of the information. If any Protected Material is to be filed with the Court, the parties shall first adhere to the procedures set forth in Trial Court Rules VIII, Uniform Rules on Impoundment Procedure.

5. No release of any Protected Material or any confidential information contained therein shall be made to any person other than the authorized recipients without the written consent of plaintiff's attorney or an order of the court.

6. On final termination of this Action, the authorized recipients shall promptly assemble all Protected Material (including material provided to experts and other persons) and return them to counsel for plaintiff or destroy them. Each authorized recipient who has received Protected Material shall, within 30 days from the final termination of this case, certify to plaintiff's counsel in writing as follows:

I certify that, after a diligent search, to the best of my knowledge, all Protected Material subject to the Protective Order Concerning Privileged and Confidential Information have been returned to the plaintiff's counsel or have been destroyed.

7. Any party seeking enforcement of this Order against any other party may petition the Court by properly noticed motion including a concise statement of the specific relief sought.

8. This Order is subject to revocation or modification by further order of the Court upon written stipulation of the parties, or upon motion and reasonable notice, including opportunity for hearing and, if appropriate, the presentation of evidence.

9. Nothing in this Order shall be construed as a ruling concerning the relevance, admissibility, or authenticity of any discovery response and nothing in this Order shall alter or restrict any party's right to assert a privilege or other objections to a discovery demand. Nothing contained herein affects the parties' rights to either petition the Court for an Order to compel the production of documents or for an Order to prevent the production of documents, all subject to appropriate safeguards and Orders of the Court.

IT IS SO ORDERED.

J.,

Dated: _____