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8/23/2017 2:01 PM
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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF POLK **NINTH JUDICIAL DISTRICT**

Case Type: Personal Injury

Ronald Vasek,

Plaintiff,

v.

Court File No.60-CV-17-921
Judge Kurt J. Marben

Diocese of Crookston and Bishop Michael Joseph Hoeppner,

Defendants,

DEFENDANT DIOCESE OF CROOKSTON'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISMISSAL OF COUNTS III, IV, V, VI, AND VII

INTRODUCTION

In this action, Plaintiff Ronald Vasek seeks damages for sexual abuse he alleges occurred in 1971 when he was a minor. The Defendants are the Diocese of Crookston ("Crookston Diocese") and its Bishop, Michael Joseph Hoeppner. The person whom Plaintiff alleges committed the abuse, Msgr. Roger Grundhaus, is not a party.

The Crookston Diocese brings this Motion to Dismiss Counts III through VII of the Complaint, which allege negligence, negligent supervision, negligent retention, private nuisance, and public nuisance. Counts I and II are against Bishop Hoeppner, who is represented by separate counsel.

In a prior action against the Crookston Diocese, Judge Tamara L. Yon ordered Rule 12 dismissal of public nuisance and private nuisance claims for lack of standing and/or failure to state a claim. (*See* Jan. 7, 2014 Order in *Doe 4 v. Diocese of Crookston et al.*, No. 60-CV-13-1261, & *Doe 4* Amended Compl., Kate Homolka Aff. Exs. 1-2.) There have been no intervening legal developments. As in *Doe 4*, the nuisance claims must be dismissed for lack of standing and/or failure to state a claim.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

Counts V-VII are the negligence-based claims. In *Doe 4*, the Crookston Diocese did not seek Rule 12 dismissal of them because they fit within a three-year window for commencing actions that seek damages for a minor's sexual abuse irrespective of a statute of limitations. The window closed in May 2016. Plaintiff alleges that he was prevented from bringing his claims due to threats and coercion, which first presented in 2015. (Compl. ¶ 17.) There are no allegations in Plaintiff's Complaint, and no legal authority, to support a claim that Plaintiff was prevented from bringing the action during the three-year window. Counts V-VII are time-barred.

Accordingly, Rule 12 dismissal of the claims against the Crookston Diocese is required.

COMPLAINT'S ALLEGATIONS

The relevant allegations in Plaintiff's Complaint, which the Court must take at true at this stage, are as follows:

A. Facts

Plaintiff attended Holy Trinity in Tabor, Minnesota, in the Diocese of Crookston, where he came in contact with Rev. Msgr. Roger Grundhaus. (*Id.* ¶ 5.) In approximately 1971, when Plaintiff was approximately 16 years old, Msgr. Grundhaus allegedly engaged in unpermitted sexual contact with Plaintiff in Columbus Ohio, while he accompanied Msgr. Grundhaus to a meeting of canon lawyers. (*Id.* ¶ 8.) In or about 2009 or 2010, Plaintiff disclosed the abuse to a priest in another diocese while considering becoming a member of the diaconate program in the Diocese of Crookston. (*Id.* ¶ 9.) That priest reported the alleged abuse to his Vicar General, who contacted Bishop Hoeppner regarding the alleged abuse. (*Id.*)

Bishop Hoeppner subsequently scheduled a meeting with Plaintiff. (*Id.* ¶ 10.) At the meeting, Plaintiff disclosed to Bishop Hoeppner that Msgr. Grundhaus sexually abused him in Ohio when Plaintiff was a minor. (*Id.*) Bishop Hoeppner indicated to Plaintiff it would be

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

detrimental to Msgr. Grundhaus if the accusations were made public. (*Id.*) Bishop Hoeppner then told Plaintiff not to tell anyone about the abuse. (*Id.* ¶ 11.)

In 2011, Plaintiff entered the diaconate program in the Crookston Diocese. (*Id.* ¶12.) Plaintiff's son became a priest in the Crookston in approximately 2010. (*Id.* ¶ 13.)

In 2015, Plaintiff received a phone call from Bishop Hoeppner inviting him to the Bishop's private residence for a meeting. (*Id.* ¶ 14.) Plaintiff alleges the following occurred at that meeting:

> When Plaintiff arrived for the meeting, the Bishop indicated to Plaintiff that Msgr. Grundhaus was unable to minister in the other diocese because they had Plaintiff's report of abuse in their files. Bishop Hoeppner handed Plaintiff a letter authored by Msgr. Michael Foltz, Vicar General of the Diocese of Crookston, which essentially retracted Plaintiff's statements regarding the sexual abuse involving Msgr. Grundhaus and indicated that the abuse in Ohio never happened. The Bishop told Plaintiff that he should sign the letter and that they needed it for the Diocese's files. The Bishop indicated to Plaintiff that if he should refuse to sign the letter, the Bishop would have difficulty ordaining Plaintiff as a deacon for the Diocese of Crookston and that Plaintiff's son's priesthood in the Diocese of Crookston would be negatively impacted. Plaintiff perceived this as a threat by the Bishop against both his career as a deacon and his son's priesthood in the Diocese of Crookston.

(*Id.* ¶ 14.) Bishop Hoeppner insisted several times that Plaintiff sign the letter despite Plaintiff's initial refusal. (*Id.* ¶ 15.) In light of the Bishop's statement to Plaintiff's profession as a deacon and his son's priesthood, Plaintiff felt that he had no choice and eventually signed the letter. (*Id.*)

Plaintiff claims that due to Bishop Hoeppner's threats to Plaintiff's participation and success in the diaconate program and to his son's priesthood and his coercion in obtaining Plaintiff's signature on the letter retracting the report of abuse, Plaintiff was prevented from reporting the incident of abuse by Msgr. Grundhaus to civil authorities and from obtaining legal counsel prior to May 25, 2016, in order to file a timely civil claim under the Minnesota Child Victims Act (Minn. Stat. § 541.073, subd. 5(b). (*Id.* ¶ 17.)

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

B. Nuisance claims

Count III of Plaintiff's Complaint seeks damages for public nuisance under Minnesota's common law and Minn. Stat. § 609.74. The statute makes "maintaining a public nuisance" a misdemeanor and contains no private right of action. Count IV seeks damages for a private nuisance under Minn. Stat. § 561.01, which relates to harm to real property. Plaintiff alleges no harm to real property. These allegations are identical in both counts:

> Defendant Diocese continues to conspire and engage and/or has conspired and engaged in efforts to: 1) conceal from the general public the sexual assaults committed by, the identities of, and the pedophilic/ephebophilic tendencies of Msrg. Grundhaus and the Diocese's other accused priests; and/or 2) conceal from proper civil authorities sexual assaults and abuse committed by Msgr. Grundhaus and the Diocese's other agents against minor children; and/or 3) attack the credibility of victims of the Diocese's agents; and/or 4) protect the Diocese's agents from criminal prosecution for their sexual assaults and abuse against children; and/or 5) allow known child molesters to live freely in the community without informing the public.

(Compl. ¶¶ 49, 58.) Doe 4 made substantially similar allegations in Paragraph 57 of her Amended Complaint, which was dismissed on Rule 12. (Homolka Aff. Exs. 1 & 2.)

Count III alleges the public is endangered by the Diocese's "failure to report multiple alleges of sexual assault and abuse of children to proper civil authorities, and by a "failure to inform the public about sexual abuse." (Compl. ¶ 50.) Count IV alleges the "deception and concealment" was and is injurious to "the senses of the general public." (*Id*. ¶ 59.) The plaintiff in *Doe 4* make similar allegations of public harm.

Regarding Plaintiff Vasek's claimed harm, he alleges that the Crookston Diocese's "deception and concealment" was "injurious" or "specially injurious" to his health because he was "sexually assaulted by Defendant Diocese's agent, Msgr. Grundhaus" and because he experienced mental, emotional, and/or physical distress including to his "personal enjoyment of

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

life" when he "discovered the negligence and/or deception and concealment of Defendant[.]" (*Id*. ¶¶ 51-52, 60-61.) Doe 4 made substantially similar allegations.

The counts allege the nuisance is "continuing." (*Id*. ¶¶ 55, 62.) Doe 4 made the same claim.

With respect to the public-nuisance claim in Count III, Plaintiff alleges the damages are "different in kind from the general public" because upon learning of "Defendant Diocese's concealment of names and information" he experienced "special, particular, and peculiar psychological and emotional harm and/or peculiar pecuniary" harm. (*Id*. ¶ 52.) He further alleges the damages are "particular to him and different from certain members of the public" who have not been harmed or experienced injury, who "are unaware of the nuisance," who "do not believe that the Defendant Diocese ever concealed anything," and who "think that any concealment only occurred decades ago." (*Id*. ¶ 53.)

C. Negligence-based claims

Count V of Plaintiff's Complaint seeks damages for common-law negligence against the Diocese. Plaintiff alleges the following to support this claim:

> By establishing and operating the Diocese of Crookston, accepting the minor Plaintiff as a participant in their programs, holding their facilities and programs out to be a safe environment for Plaintiff, accepting custody of the minor Plaintiff *in loco parentis,* and by establishing a fiduciary relationship with Plaintiff, Defendant entered into an express and/or implied duty to properly supervise Plaintiff and provide a reasonably safe environment for children, who participated in their programs. Defendant owed Plaintiff a duty to properly supervise Plaintiff to prevent harm from foreseeable dangers.

(*Id*. ¶ 70.) Further, Plaintiff alleges:

> By establishing and operating the Diocese of Crookston, which offered educational programs to children and which may have included a school, and by accepting the enrollment and participation of the minor Plaintiff as a participant in those educational programs, Defendant owed Plaintiff a duty to properly supervise Plaintiff to prevent harm from generally foreseeable dangers.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

(*Id.* ¶ 71.)

Count VI seeks damages for negligent supervision and Count VII seeks damages for negligent retention.

In support of Count VI, Plaintiff claims Msgr. Grundhaus engaged in the wrongful conduct while acting in the course and scope of his employment with the Diocese and/or accomplished the sexual abuse by virtue of his job-created authority, and that the Diocese failed to exercise ordinary care in supervising Msgr. Grundhaus in his assignments and failed to prevent the foreseeable misconduct of Msgr. Grundhaus from causing harm to Plaintiff. (*Id*. ¶ 75.)

To support Count VII, Plaintiff alleges that the Diocese became aware, or should have become aware, of problems indicating that Msgr. Grundhaus was an unfit agent with dangerous and exploitive propensities, yet failed to take any further action to remedy the problem and failed to investigate or remove Msgr. Grundhaus from working with children. (*Id.* ¶ 77.)

These claims are patently barred by the applicable statute of limitations and Plaintiff has not alleged why he was unable to timely bring these claims against the Crookston Diocese.

D. Prayer for relief

In the Prayer for Relief, Plaintiff seeks a money judgment against the Diocese and Bishop Hoeppner. Plaintiff also seeks an order requiring the Diocese to "publicly release" the names and other information regarding "all agents, including priests, accused of child molestation" and an order requiring the Diocese to "discontinue its current practice and policy of dealing with allegations of child sexual abuse by its agents secretly," and that the Diocese "work with civil authorities" in matters involving alleged sexual abuse to minors.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

ARGUMENT

I. STANDARD FOR DISMISSAL

On a motion to dismiss, the only question before the court is whether the petition states a legally sufficient claim for relief. *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 811 (Minn. 2004). The court must presume all facts alleged in the complaint to be true, and construe all reasonable inferences in favor of the nonmoving party. *See Loftus v. Hennepin County*, 591 N.W.2d 514, 516 (Minn. App. 1999); *Bodah v. Lakeville Motor Express, Inc*., 663 N.W.2d 550, 553 (Minn. 2003).

"[S]tanding is essential to [the Court's] exercise of jurisdiction." *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007). "[I]f a plaintiff lacks standing, the district court has no subject matter jurisdiction." *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002). "Whether a party has standing to sue is a question of law." *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004) (quotation omitted). If the party lacks standing, dismissal for lack of standing under Minn. R. Civ. P. 12.02(a) is required. *See Enright*, 735 N.W.2d at 329; *Faibisch*, 304 F.3d at 801. It is "immaterial whether or not the plaintiff can prove the facts alleged." *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000).

In addition, Minnesota law does not provide a remedy for the facts as alleged, dismissal under Rule 12(e) is required. *Bodah, Inc*., 663 N.W.2d at 558-59. This includes claims barred by the statute of limitations. *Nolan and Nolan v. City of Eagan*, 673 N.W.2d 487, 496-97 (Minn. App. 2003).

II. PLAINTIFF'S NEGLIGENCE-BASED CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

When "pleaded facts established that a claim was barred by the statute of limitations and no facts were pleaded to forestall its operation," the claim fails as a matter of law and judgment

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

on the pleadings is required. *Pederson v. American Lutheran Church,* 404 N.W.2d 887, 889 (Minn. App. 1987) (affirming district court's Rule 12.03 dismissal but applying Minn. R. Civ. P. 12.05(5)). Plaintiff's negligence-based claims are time-barred and should be dismissed with prejudice.

A. Plaintiff's claims fall outside the legislatively created "window."

Statutes of limitations are, by definition, statutes enacted by the legislature. Under Minnesota law, negligence claims are generally subject to a six-year statute of limitations. *See, e.g.*, *D.M.S. v. Barber*, 645 N.W.2d 383, 386 (Minn. 2002) (citing Minn. Stat. § 541.05, subd. 1(5)). Before 2013, claims based on sexual abuse of a minor were subject to a six-year statute of limitations that ran from the plaintiff's 18th birthday. *Doe v. Order of St. Benedict*, 836 F. Supp. 2d 872, 876 (D. Minn. 2011) (citing *D.M.S.*, 645 N.W.2d at 389 (citing statutes)). Thus, under those statutes, the time for Plaintiff to bring his claim against the Diocese of Crookston expired when he turned 24. There was no provision in the common law or law of equity that exempted claims from the statute.

In 1989, the limitations period was subject to a "delayed discovery" provision, reflected in the special statute of limitations for sexual abuse claims, Minn. Stat. § 541.073 (1989), which stated:

> An action for damages based on personal injury caused by sexual abuse must be commenced, in the case of an intentional tort, within two years, or, in the case of an action for negligence, within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse. The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury. The knowledge of a parent or guardian may not be imputed to a minor. This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.

See also K.E. v. Hoffman, 452 N.W.2d 509, 511 (Minn. App. 1990) (citing the applicable session laws). Under the 1989 version of the statute, claims for intentional torts had to be commenced

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

within two years, while a claim alleging a third party "negligently permit[ted] sexual abuse against the plaintiff to occur" had to be commenced within six years. Minn. Stat. § 541.073 (1989). Again, the courts had and have no authority to apply common-law or equitable exceptions to the statute of limitations. Minnesota's appellate courts have said so repeatedly.

In 2013, the Minnesota Legislature passed the Child Victims Act ("CVA"), which amended the statute of limitations' application to claims arising from sexual abuse and removed the delayed-discovery provision. 2013 Minn. Laws ch. 89, § 1 (codified at Minn. Stat. § 541.073). The Child Victims Act opened a three-year window for claims that were time-barred before the enactment of the Act to be commenced:

> Notwithstanding any other provision of law, in the case of alleged sexual abuse of an individual under the age of 18, if the action would otherwise be time-barred under a previous version of Minnesota Statutes, section 541.073, or other time limit, an action for damages against a person, as defined in Minnesota Statutes, section 541.073, subdivision 1, clause (2), may be commenced no later than three years following May 25, 2013. This paragraph does not apply to a claim for vicarious liability or respondeat superior, but does apply to other claims, including negligence.

Id. ed. note.

Plaintiff alleges negligence, negligent supervision, and negligent retention claims against the Diocese. All of these claims fall squarely within the three-year window. Consequently, the time for Plaintiff to bring these claims against the Diocese of Crookston expired in May 2016. Plaintiff's Complaint cites no statute or other controlling authority that would constitute an exception to the limitations period. On the plain language of the CVA, the claims are barred.

B. There is no authority for tolling the statute of limitations.

While not specifically requesting, Plaintiff appears to ask the Court to act in equity by ignoring the plain statutory language and creating a unique additional "window" for his claim. He alleges in his Complaint that beginning in approximately 2010 Bishop Hoeppner asserted

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

undue influence or coercion over him, which prevented him from reporting the incident of abuse by Msgr. Grundhaus to civil authorities and from obtaining legal counsel prior to May 25, 2016, due to Bishop Hoeppner's threats to Plaintiff's participation and success in the diaconate program and to his son's priesthood and his coercion in obtaining Plaintiff's signature on the letter retracting the report of abuse. (*See* Compl. ¶ 17.) There is no statutory, legal, or equitable authority authorizing the statute of limitations to be tolled in this case, so Plaintiff's claims are time-barred and Rule 12 dismissal with prejudice is required.

In Paragraph 17 of the Complaint, Plaintiff concedes the negligence causes of action fall outside the CVA's three-year window. He alleges the claims are timely because "the threats made against Plaintiff by Bishop Hoeppner created pressure on Plaintiff not to report Msgr. Grundhaus's abuse until recently." (Compl. ¶ 17.) However, this alleged conduct occurred in October 2015, or 2.5 years into the CVA's three-year window. There are no allegations that support a claim that Plaintiff was prevented from bringing the action during that time. His reliance on anything other than the statutory statute of limitation fails.

III. THE NUISANCE CLAIMS FAIL AS A MATTER OF LAW.

A. With no alleged harm to real property, Plaintiff has no cognizable private-nuisance claim.

In *Doe 4*, the court dismissed the private-nuisance claim because no harm to real property was alleged as is required to survive Rule 12 dismissal. (*Doe 4* Order at 6-7 (citing *Anderson v. State Dep't of Nat'l Res.*, 693 N.W.2d 181 (Minn. 2005); *Lead v. Inch*, 134 N.W. 218 (1912); *Johnson v. Shiely*, 155 N.W. 390 (1915)). That is the case here. As in *Doe 4*, the claim fails as a matter of law with "no discernible harm to an interest in real property." (*Id*.) At least a dozen courts have confronted this legal issue in cases against the State's other Catholic Dioceses.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

Without exception, the courts have dismissed private-nuisance claims.[1] There have been no intervening legal developments. The Court must dismiss Count IV with prejudice.

B. Because Plaintiff is not a prosecuting attorney, Plaintiff has no standing to maintain a statutory public-nuisance claim.

The statutory basis for Plaintiff's public-nuisance claim is Minn. Stat. § 609.74. Section 609.74 reads:

> Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:
>
> (1) maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or
>
> (2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public; or
>
> (3) is guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided.

In dismissing Doe 4's nuisance count, Judge Yon's Memorandum explained that only a "prosecuting attorney" has standing to maintain a § 609.74 claim:

> [T]he ability to pursue a civil action under this public nuisance statute does not extend to private citizens: instead, only the "prosecuting attorney" has standing to abate a public nuisance under the statute. *See* Minn. Stat. § 617.81; *see also Hill v.*

[1] *Doe 1 v. Archdiocese of St. Paul and Minneapolis*, No. 62-CV-13-4075, slip op. Dec. 10, 2013 (Minn. Dist. Ct. Ramsey Co.) (Homolka Aff. Ex. 3); *Doe 6 & Doe 7 & Doe 18 v. Diocese of New Ulm*, Nos. 08-CV-13-810 & 08-CV-13-811, slip op. Feb. 10, 2014 (Brown County Dist. Ct.) (Homolka Aff. Ex. 4); *Doe 5 & Doe 28 v. Diocese of Duluth*, Nos. 69DU-CV-13-1654 & 69DU-CV-13-2995, slip op. Mar. 17, 2014 (Minn. Dist. Ct. St. Louis Co.) (Homolka Aff. Ex. 5); *Doe 16 v. Diocese of Winona*, No. 85-CV-13-1855, slip op. Apr. 22, 2014 (Minn. Dist. Ct. Winona Co.) (Homolka Aff. Ex. 6); *Doe 30 v. Diocese of New Ulm*, No. 62-CV-14-871, slip op. Aug. 6, 2014 (Minn. Dist. Ct. Ramsey Co.) (Homolka Aff. Ex. 7); *Doe 10 & Doe 37 & Doe 38 v. Diocese of New Ulm*, Nos. 08-CV-14-863 & 08-CV-13-1084, slip op. Mar. 27, 2015 (Homolka Aff Ex. 8); *Doe 50 v. Diocese of St. Cloud*, No. 73-CV-15-276, slip op. Jun. 22, 2015 (Homokla Aff. Ex. 9): *Doe 65 v. Diocese of St. Cloud*, No. 73-CV-15-7611, slip op. Apr. 1, 2016 (Homolka Aff. Ex. 10); *Doe 75 v. Diocese of St. Cloud et al.*, No. 73-CV-15-9282, slip op. May 5, 2016 (Homolka Aff. Ex. 11); *Doe 33 & Doe 34 v. The Order of St. Benedict a/k/a and d/b/a St. John's Abbey*, No. 73-CV-14-4076, slip op. Feb. 24, 2017 (Homolka Aff. Ex. 12).

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

> *Stokely-Van Camp, Inc.*, 109 N.W.2d 749, 752 (Minn. 1961). In this case, Doe 4 is not a prosecuting attorney. Accordingly, she does not have standing to sue the defendants for statutory public nuisance under either Minnesota Statute § 617.81 or § 609.74 and the Court is required by law to dismiss her claims for lack of standing. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Aldrich v. Wetmore*, 53 N.W. 1072, 1073 (Minn. 1893).

(*Doe 4* Jan. 7, 2014 Order at 9.)

Plaintiff has no standing to maintain a statutory public-nuisance claim. As in *Doe 4*, dismissal for lack of standing is required. *See State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (dismissal on the pleadings required when plaintiff lacks standing). Alternatively, Plaintiff's claim premised on Minn. Stat. § 609.74 fails to state a claim for which relief can be granted. *Opay v. Howard Lake Liquor Store*, No. C9-94-1447, 1995 Minn. App. LEXIS 142, *14-*15 (Minn. App. Jan. 31, 1995), *rev'd on other grounds*, 531 N.W.2d 845 (Minn. 1995) ("the public nuisance statute is designed to protect the general public and, as such, does not create a private cause of action for negligence per se when violated") (citing authority).

C. Plaintiff's common-law claim alleging a public nuisance fails as a matter of law for lack of standing and/or failure to state a claim.

"Besides statutory public nuisance, there is also common law public nuisance." (*Doe 4* Order at 9.) As explained in the *Doe 4* memorandum, under the common law a plaintiff may seek an injunction to abate a nuisance as long as the injury is "special or peculiar" to the plaintiff:

> A private individual may enjoin a public nuisance that is a private nuisance as to him/her under common law. *Robinson v. Westman*, 29 N.W.2d 1 (Minn. 1947); *Anderson v. Landers-Morrison-Christenson Co.*, 149 N.W. 669 (Minn. 1910); *Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n*, 126 N.W. 723 (Minn. 1919), *aff'd on reh'g* 127 N.W. 626 (1910). However, an individual cannot maintain a private action for a public nuisance because of any injury that he or she suffers in common with the public. *Hill v. Stokley-Van Camp, Inc.*, 109 N.W.2d 749; *Guiford v. Minneapolis & St. L. R.R.*, 102 N.W. 365 (Minn. 1905); *North Star Legal Foundation v. Honeywell Project*, 355 N.W.2d 186. Instead, the individual must show that he or she has suffered an injury special or peculiar to himself or herself that is not common to the general public.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

(*Doe 4* Order at 9 (emphasis is original).)

Plaintiff has no legal basis for obtaining monetary damages under nuisance law. Availability of damages is relevant at the Rule 12 stage because without a legal basis to recover for an injury, it does not matter whether the injury is "special or peculiar." As for the injunctive relief sought—a court order requiring release of names and information and directing the Crookston Diocese to "work with civil authorities"—as in *Doe 4*, the underlying alleged harm is different only in *degree* and not *kind* from what the general public might experience. As in *Doe 4*, the Court must dismiss Count III standing and/or failure to state a claim.

1. Plaintiff has failed to state a nuisance claim for monetary damages.

As reflected in the authority cited in Judge Yon's *Doe 4* memorandum, the relief for a nuisance claim generally is an injunction, typically against use of real property. *See Robinson v. Westman,* 29 N.W.2d 1, 4, 224 Minn. 105, 107 (1947) (injunction against operation of horse-riding academy); *Anderson v. Landers-Morrison-Christenson Co.,* 149 N.W. 669, 670, 127 Minn. 440, 442 (1914) (injunction against tunnel construction); *Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n,* 126 N.W. 723, 723 111 Minn. 149, 151 (1910) (injunction against cemetery); *Guilford v. Minneapolis & S. L. R. Co.,* 102 N.W. 365, 365, 94 Minn. 108, 109 (1905) (injunction against use of streets for railroad).

To have standing and/or to state a claim for monetary damages, the plaintiff must have an underlying real-property or business interest. *See Hill v. Stokely-Van Camp,* 260 Minn. 315, 109 N.W.2d 749 (1961) (affirming monetary damages where plaintiffs had real-property interests and alleged harm from canning-factory operation); *Viebahn v. Bd. of Crow Wing County Comm'rs,* 96 Minn. 276, 104 N.W. 1089 (1905) (reversing dismissal of public-nuisance claim where bridge affected steamboat business). Without such an interest, Rule 12 dismissal is ordered and affirmed. See *N. Star Legal Found. v. Honeywell Project,* 355 N.W.2d 186, 189 (Minn. App.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

1984) (affirming Rule 12 dismissal of nuisance claims where taxpayers sought damages for protest at property in which they had no interest).

No such property or business interest is pled here. Count III seeks to push the common law of public nuisance far beyond its recognized bounds. As the district court explained in granting Rule 12 dismissal of a public nuisance claim against the Diocese of Duluth: "this issue is difficult because it bears no resemblance to caselaw identified by the parties or the Court." *Doe 5 & Doe 28 v. Diocese of Duluth,* Nos. 69DU-CV-13-1654 & 69DU-CV-13-2995, slip op. Mar. 17, 2014 (Minn. Dist. Ct. St. Louis Co.), at 9. (Homolka Aff. Ex. 5) (citing authority). "The cases acknowledging a possible private claim all involve a plaintiff whose damages were different in kind because the plaintiff could point to a tangible … proximity or connection between plaintiff's business or property and the source of the nuisance at the time it occurred." *Id*. at 9-10 (citing authority). "No such proximate connection exists in this case." *Id*. at 10.

Plaintiff's basis for "peculiar pecuniary harm" is limited to Paragraph 53 of the Complaint. Plaintiff alleges that the Crookston Diocese's "concealment of names and information" has caused "lessened enjoyment of life, and/or impaired health, and/or emotional distress, and/or physical symptoms of emotional distress and/or pecuniary loss including medical expenses and/or wage loss." But the alleged "nuisance" and the claimed monetary damages bear no resemblance to the case law that defines the parameters of a common-law public-nuisance claim. As the Minnesota Supreme Court explained in *Hill,* damages are available when "things" such as a canning factory cause damage to the plaintiff's "property":

> Whether a private nuisance exists for which damages may be recovered by a private person presents a question of fact. To establish that fact, proof is necessary as to the *effect and consequences of the thing claimed to affect such person or his property injuriously*. It is obvious that in this case the location of the alleged nuisance with respect to the location of *plaintiff's property*; whether *plaintiff's property* lies upstream or downstream from the alleged pollution; the distance of

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

> *plaintiff's property* from the source of the trouble; and many other factors may have a bearing upon a determination of whether the acts of defendant constitute a nuisance to plaintiff as distinguished from the general public. . . . In the field of a private nuisance, *it must be shown in each case that the operation of the thing claimed to be a nuisance is such a nuisance as to him that he is entitled to recover damages.*

Id. at 321-22, 109 N.W.2d at 753 (emphasis added).

Alleged "deception and concealment" are *acts*, not *things*. Medical expenses and emotional harm bear no relation to property. In the nuisance context, such damages have been characterized as "impermissible emotional-distress damages." *Norman v. Crow Wing Coop. Power & Light Co.*, No. A15-0983, 2016 Minn. App. Unpub. LEXIS 184 (Minn. App. Feb. 22, 2016) at *13; *accord State by Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. App. 1988) (rejecting theory that "damages for emotional distress could properly be based on an 'implied finding of nuisance'").

Plaintiff seeks nuisance-based damages for wage loss, but the claim fails because there is no alleged nexus between his wage-earning profession and the alleged nuisance. He does not claim to be in the business of obtaining or using the names and information he claims are being "concealed." He does not "work with civil authorities" in his profession. Plaintiff bears no resemblance to a Mississippi River steamboat operator whose business is affected by "an immovable bridge over and across said river at a point other than a town or village or landing place for boats, thereby effectually obstructing navigation upon the river and preventing plaintiffs from continuing their said business." *Viebahn*, 96 Minn. at 277-28, 104 N.W. at 1090.

Plaintiff has no standing for recovering monetary damages under Count III and/or he has failed to state a claim. The allegations in Paragraph 53 supporting such a claim are therefore insufficient for overcoming Rule 12 dismissal.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

2. To the degree Plaintiff has viable public-nuisance claims, Plaintiff alleges harm that is different only in *degree* and not *kind*.

To overcome Rule 12 dismissal of the public-nuisance claim as it relates to the injunctive relief sought, the alleged harm must consist of "some special or peculiar injury" that is different in kind and not only degree from what the general public experiences. *North Star Legal Found.*, 355 N.W.2d at 189.

Plaintiff's Complaint contains terms of art that the alleged harm is "specially injurious"; "special, particular, and peculiar"; and/or "different in kind from the general public." (Compl. ¶¶ 51-54.) But when measured against the legal requirements for a public-nuisance claim and injunctive relief, the allegations fall short.

It is hornbook law that only *ongoing and continuing harm* can be enjoined as a nuisance. Minn. R. Civ. P. 65. Harm that has been *completed* cannot form a basis for a public-nuisance claim that seeks injunctive relief because there is nothing to abate. More fundamentally, nuisance claims are subject to a six-year statute of limitations. *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 705 (citing Minn. Stat. § 541.05, subd. 1(2), (3)). A claim for damages stemming from harm that was completed more than six years ago is time-barred.

Plaintiff's Complaint contains several allegations related to completed harm, but these are irrelevant for purposes of determining whether the harm alleged is different *in kind* as opposed to *in degree*:

- In Paragraph 51, Plaintiff alleges the Crookston Diocese's "deception and concealment" was "specially injurious" to him because he was sexually assaulted in 1971. (*Id.* ¶ 51.) The allegation that he was sexually assaulted 47 years ago, even if true, is irrelevant because there is no allegation of *ongoing contact* let alone abuse between Msgr. Grundhaus and Plaintiff.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

There simply is no nuisance to abate with respect to Msgr. Grundhaus. Any nuisance claim premised on acts of so long ago is time-barred. *Johnson,* 817 N.W.2d at 705/

- In Paragraph 52, Plaintiff alleges he experienced "mental, emotional and/or physical distress" that was "specially injurious" to him when he "finally discovered the negligence and/or deception and concealment." On the Complaint's plain language, Plaintiff's discovery *has been made* so again there is no nuisance to abate.

- In Paragraph 53, Plaintiff alleges emotional damages "different in kind from the general public" based on what he experienced "after learning of Defendant Diocese's concealment of names and information[.]" Based on the Complaint, the alleged "concealment" *has been learned* and Plaintiff's damages already experienced. The allegations form no basis for a nuisance claim.

The allegations in Paragraph 54 are wholly irrelevant. Plaintiff alleges he has experienced injuries "particular to him" because his injuries are distinguishable from "certain members of the public who have not been harmed by the nuisance" because they were not injured, are not aware of the alleged nuisance, do not believe the Crookston Diocese concealed anything, and/or believe "any concealment only occurred decades ago." The question is whether Plaintiff's injuries are different from those who *have* been injured by sexual abuse or failure to disclose, not from those who *have not* been injured.

The only allegation involving ongoing harm is in Paragraph 53 of the Complaint where Plaintiff generally alleges his harm "continues as long as decisions are made and actions are taken to keep the information about the abuse and/or the accused priests concealed." Alleged harm resulting from the Crookston Diocese's "decisions" and "actions" is different only in

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

degree and not *kind* from what the public might experience. The rationale underlying dismissal of the public-nuisance claims in *Doe 4* applies equally here:

> Taking Doe 4's allegations as true, and in a light most favorable to her, this Court finds that the alleged harm to Doe 4 is the same kind as alleged to the general public. While it may be of a higher degree to Doe 4 ("specially injurious"), a plain reading of the complaint finds the harm to be essentially the same: both the general public and Doe 4 are unable to trust the defendants or identify credibly accused priests; both the general public and Doe 4 are unable to help other victims; and both the general public and Doe 4 are unable to obtain medical treatment due to concealment. Doe 4 may experience a higher degree of harm / anxiety given her particular history, but the threat of harm of the general public and anticipated consequences, in varying degrees, are the same. Thus, after careful consideration of Doe 4's complaint and the applicable law, *the Court finds Doe 4 lacks standing for common law public nuisance.*

(*Id.* at 9-10 (emphasis added).)

Numerous Minnesota courts have ordered Rule 12 dismissal of public-nuisance claims against Minnesota Catholic Dioceses for comparable reasons on grounds of lack of standing and/or failure to state a claim. As courts in Ramsey and Brown Counties concluded when granting Rule 12 dismissal of public-nuisance claims against the Diocese of New Ulm:

> Only plaintiff's susceptibility to emotional harm due to his prior abuse differentiates his damages from those sustained by the general public. He alleges nothing that is different in type or in kind from what the general public endured. Accordingly, plaintiff has no standing to maintain a private action for the allege public nuisance. A public nuisance action arising out of defendants' alleged conduct is available only to public prosecutors.

Doe 30 v. Diocese of New Ulm, No. 62-CV-14-871, slip op. at 26 (Homolka Aff. Ex. 7).

> The Plaintiffs have not pled sufficiently different damages as compared to the general public to sustain claims as individuals. For these reasons, Plaintiffs' private claims for public nuisance cannot stand.

Doe 6 & Doe 7 & Doe 18 v. Diocese of New Ulm, Nos. 08-CV-13-810 & 08-CV-13-811, slip op. at 10 (Homolka Aff. Ex. 4).

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

Courts in St. Louis and Stearns Counties have ordered Rule 12 dismissal of common-law public-nuisance claims against the Duluth and St. Cloud Dioceses premised on alleged "concealment" of information:

> Assuming the general public has a right to know the information being concealed, the harms suffered by Plaintiffs as a result of the violation of that public right are not different in kind from the harm suffered by the general public. Therefore, Plaintiffs may not maintain a private action for public nuisance.

Doe 5 & Doe 28 v. Diocese of Duluth, Nos. 69DU-CV-13-1654 & 69DU-CV-13-2995, slip op. at 10 (Homolka Aff. Ex. 5).

> Essentially, Plaintiff alleges that the concealment of information related to credibly accused priests is a re-traumatization of the sexual abuse he suffered years ago. In the court's view, this is not an injury which can be characterized as different in "degree" or in "kind" from the risk posed to the community.

Doe 75 v. Diocese of St. Cloud et al., No. 73-CV-15-9282, slip op. at 9.[2]

Courts outside Minnesota have rejected alleged "concealment" as a basis for private prosecution of a public-nuisance claim in other contexts. As the Third Circuit held when affirming Rule 12 dismissal of a public-nuisance claim alleging that tobacco companies and trade associations had concealed information: "the source of the conspiracy [to conceal information] is more properly a task for public officials." *Allegheny Gen. Hosp. v. Philip Morris,* 228 F.3d 429, 446 (3d Cir. 2000). Numerous other courts, including the Eighth Circuit, have

[2] The Diocese has provided the district court memoranda in which courts in other judicial districts have denied dismissal of public-nuisance claims. (*See* Homolka Aff. Exs. _ - _.) The Diocese can discern no distinguishing factors that supported those contrary decisions. The Diocese respectfully submits that the memorandum in *Doe 4*, which arose from a prior case in this judicial district against this Defendant, is legally the most persuasive and factually the closest on point. Accordingly, the result should be the same: dismissal of all nuisance claims as a matter of law.

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

rejected attempts to extend the common law of public nuisance outside its recognized bounds and have affirmed or ordered Rule 12 dismissal.[3]

This Court must do the same and dismiss Count III in its entirety for lack of standing and/or failure to state a claim.

CONCLUSION

There are no allegations in Plaintiff's Complaint, and no legal authority, to support a claim that Plaintiff was prevented from bringing this action during the three-year window, and consequently, Plaintiff's negligence claims are time-barred. Further, there have been no intervening legal developments since *Doe 4* that might cause the Court to revisit its rationale for ordering dismissal on Plaintiff's nuisance claims. As in *Doe 4*, the nuisance claims must be dismissed for lack of standing and/or failure to state a claim. For these reasons, and the reasons set forth above, the Crookston Diocese respectfully requests dismissal of counts III, IV, V, VI, and VII of Plaintiff's Complaint.

[3] *See, e.g., Ashley County v. Pfizer*, 552 F.3d 659, 668 (8th Cir. 2009) ("We have located no published decisions from any jurisdiction addressing a pharmaceutical manufacturer's civil liability for government services stemming from the use of pseudoephedrine to manufacture methamphetamine where liability is premised on the manufacturer's sale of products containing pseudoephedrine through legal retail channels."); *Tioga Public School Dist. #15 v. United States Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) ("Nuisance thus would become a monster that would devour in one gulp the entire law of tort …"); *City of Philadelphia. v. Beretta U.S.A. Corp.*, 277 F.3d 415, 420 (3d Cir. 2002) ("The courts traditionally have limited the scope of nuisance claims to interference connected with real property or infringement of public rights."); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 267 (D.N.J. Dec. 5, 2000) ("While the Court does not fault the County for seeking new and creative methods of combating gun-related violence within its borders, public nuisance law does not sweep so broadly as to impose liability on manufacturers of a legal product …"); *In re Lead Paint Litigation*, 924 A.2d 484, 494 (N.J. 2007) ("were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance").

Filed in Ninth Judicial District Court
8/23/2017 2:01 PM
Polk County, MN

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