

Kepler v. Roman Catholic Diocese of Burlington, Vt., No. S0930-05 CnC (Toor, J., Sept. 17, 2009)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

STATE OF VERMONT  
CHITTENDEN COUNTY

---

MICHAEL KEPPLER Plaintiff  v.  ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT Defendant	SUPERIOR COURT Docket No. S0930-05 CnC
PAUL MANGAN Plaintiff  v.  ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT Defendant	SUPERIOR COURT Docket No. S1153-05 CnC
SCOTT REDFIELD Plaintiff  v.  ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT Defendant	SUPERIOR COURT Docket No. S1228-05 CnC

---

RULING ON MOTIONS IN LIMINE

These three cases are scheduled for jury draw on September 28 (one as the lead case, two as backup cases). Multiple motions in limine have recently been filed. The

court addresses each below. The court has reviewed each motion filed in the Keppler case, and presumes from a quick review that all motions other than those that relate to Keppler's own criminal record, substance abuse history, and family members' history are identical in the other two cases. Thus, to the extent relevant this ruling applies in all cases. If the court's presumption is incorrect and there are other motions distinct to the other cases, counsel are requested to draw those motions to the court's attention.

In the interest of providing the parties with rulings on as many issues as possible now, the court is reserving its ruling on several issues that relate to the question of punitive damages so that it may further examine the issues. To the extent that the court below reserves ruling on those issues today, if it has not issued rulings prior to the jury draw date the parties are directed not to raise those issues at jury draw or in their opening statements without express leave of the court.

#### I. MOTIONS FILED AUGUST 3, 2009

##### Testimony /Deposition of Thomas Doyle

Rule 32 does not apply to former trial testimony, only to deposition testimony. Nor does the court find any basis for compelling a deposition to be used at trial in this case. The motion is denied.

##### Exclusion of Accusations Against Other Priests

While prior notice to the Diocese of a pattern of acts of abuse by other priests might be relevant, the mere fact that they occurred does not establish that the Diocese knew or had reason to know that they occurred. *See, e.g., Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P. 3d 1183 (Ala. 2009)(in case against employer for sexual abuse by employee, "only evidence that would have alerted [employer] that [employee] posed a

risk of sexual misconduct with residents should have been admitted”); Kenneth v. Roman Catholic Diocese of Brooklyn, 229 A.D. 2d 159, 161 (N.Y.A.D. 2<sup>nd</sup> Dept. 1997) (to show negligent hiring or supervision of priest, plaintiff must prove that “the employer knew or should have known of the employee's propensity for the conduct which caused the injury”).

Plaintiff does not suggest in its response to this motion that prior to the incidents in this case the Diocese had notice of repeated acts of abuse by other priests, or reason to believe that such acts were widespread and required some institutional action. The evidence is therefore not relevant to the elements of the claims themselves. Although it may be relevant to punitive damages, the probative value of evidence regarding unrelated actions by other priests is substantially outweighed by the danger of unfair prejudice. V.R.E. 403. Evidence of abuse of other children by other priests would be likely to “provoke[e] [the jury’s] instinct to punish” based upon those other acts, which are not the basis for this lawsuit. State v. Bruyette, 158 Vt. 21, 31 (1992). The motion to exclude the evidence is granted.

Testimony by Other Alleged Victims of Abuse by Paquette

The court reserves ruling on this motion.

Personnel Files from other States

The court will reserve its ruling until it has the records before it and in context at trial.

Motion to Preclude Evidence Regarding Punitive Damages

The court will reserve its ruling on this issue.

Evidence as to Diocese Actions to Create Safe Environment

The court will reserve its ruling on this issue.

Motion to Preclude Childhood Photographs

The motion is denied. Given that the case revolves around childhood incidents, the Plaintiff is entitled to have the jury consider the full context of the case.

Testimony of Susan Via

The testimony of Susan Via will be precluded. The issue of what conversations occurred with prosecutors is a collateral one that is likely to confuse the jury.

II. MOTIONS FILED AUGUST 14, 2009

Motion Regarding Assets of the Diocese

The court will reserve its ruling on this issue.

Motion Concerning Remarks at Jury Draw and at Trial

Defendant asks to have defense counsel limited in what can be said at the upcoming jury draw and trial. With regard to jury selection, the issues are too vague for the court to rule at this stage. The court will address this at the jury selection.

Opening statements are designed to briefly tell the jury what the party in question expects to prove. They are not designed to argue to the jury why the other side's case is weak. *See, e.g., State v. Timmons*, 178 P.3d 644, 652 (Idaho. App. 2007)(opening statements "should be confined to a brief summary of evidence counsel expects to introduce in his or her case-in-chief. Counsel should not at that time attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present."); State v. Combs, 642 S.E.2d 491, 500 (N.C.App.)(“An opening statement is for the

purpose of making a general forecast of the evidence, not for arguing the case, instructing on the law, or contradicting the other party's witnesses”), *aff’d* 650 S.E.2d 594 (N.C. 2007).

The court will preclude Plaintiff from discussing the defense case during openings.

#### Requests to Admit

Plaintiff seeks a ruling that certain of its requests for admission be deemed admitted. However, the motion addresses only one of the alleged admissions and does not explain why any of the others (over forty in all) are allegedly inadequate. The court considers it the moving party’s obligation to set forth its arguments, not the court’s. The motion is therefore denied.

#### Plaintiff’s Motions “Regarding Various Matters”

Plaintiff has filed two motions in limine “regarding various matters,” one denominated as Motion No. 2. The first raises topics numbered 1-8, and the second raises topics numbered 9-15. The court will address each numbered item separately.

1. Statute of Limitations: the motion is denied. Defendant is entitled to present its evidence. Whether it is sufficient to get to the jury is not something the court can decide in this context.

2. Impeachment with Criminal Record: Defendant has stipulated that no such evidence regarding Plaintiff will be presented.

3. Reference to the Time Since the Events: No specific basis for exclusion is cited. The jury will be able to do the math regardless, whether it is pointed out to them or not. The motion is denied.

4. Plaintiff's Incarceration: The parties have not explained to the court the nature of the conviction or the probation violation. The court will rule on this at trial after more information is provided.

5. Evidence of Character or Conduct of Plaintiff: This motion merely asks that the court apply Rule 608(b), but does not specify what evidence it asks the court to rule on. The motion is too vague to be ruled upon, and is thus denied.

6. Substance Abuse in Plaintiff's Family: As noted in Defendant's response, the relevance of such evidence will depend upon what is presented at trial about Plaintiff's own substance abuse. The court is not convinced that an expert is required to explain to the jury that alcoholism can run in families. The court will address such matters at the trial.

7. Convictions/Bad Acts by Family Members: Such evidence is irrelevant to Plaintiff's own allegations, but may be appropriate impeachment for bias if the family members testify. The court may limit any such evidence to questions phrased in a less prejudicial way, such as, for example, asking whether the Diocese accused Plaintiff's father of embezzlement as opposed to whether he was convicted of such conduct.

8. Deterrence Issue: The motion is denied. The court of course has not yet heard the evidence, but it does not appear that the argument is improper. Plaintiff's argument about the individual principals being only "rank and file" can be addressed in its rebuttal argument, but is not grounds for exclusion of the argument.

9. Insurance: Defendant has stipulated that it will not mention any lack of insurance.

10. Secondary Gain: The term “secondary gain” is not explained in the motion, and the court is therefore unable to rule on it. The motion is denied and can be renewed at trial with further explanation.

11. Money Damages: This motion seeks to bar Defendant from arguing that money damages do not relieve pain and suffering. The motion is granted because such an argument would be contrary to the instructions juries are given concerning valuing pain and suffering.

12. Good Acts: It is not clear to the court what sort of evidence is at issue here. To the extent that this issue overlaps with the issue of whether the Diocese has taken remedial measures to avoid future abuse, it will be addressed by the court’s ruling on that issue. If other evidence is at issue in this area, the court will address it at trial.

13. Other Verdicts: The court will reserve ruling on this issue.

14. Defendant’s Financial Condition: The court will reserve ruling on this issue.

15. References to Pacquette not being a Defendant: The motion is denied. The jury will need to understand this as part of understanding what they are being asked to decide.

Dated at Burlington this 17th day of September, 2009.

---

Helen M. Toor  
Superior Court Judge