

NO. DV05-05669-M

C. BROWN,
Plaintiff

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IN THE DISTRICT COURT

VS.

DALLAS COUNTY, TEXAS

FIRST BAPTIST CHURCH
OF FARMERS BRANCH,
Defendant.

298th JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE

**TO NONPARTY'S OBJECTIONS TO SUBPOENA FOR DOCUMENTS AND
TO NONPARTY'S MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER**

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TO THE HONORABLE JUDGE:

NOW COMES PLAINTIFF and asks the Court to overrule the objections of Nonparty, the Baptist General Convention of Texas, to the subpoena for documents and to deny Nonparty's motion to quash and motion for protective order, and in support would respectfully show the Court as follows:

I.

BACKGROUND AND SUMMARY

This is a lawsuit involving a minister's sexual abuse of a child and a church's complicity in the cover-up. Plaintiff Brown originally sued the abusive minister Tommy Gilmore, and that suit was filed in this Court. Subsequently, Plaintiff Brown sued the First Baptist Church of Farmers Branch and its music minister, James A. Moore, and that suit was filed in the 192nd District Court as Cause No. 05-06465. The two lawsuits were consolidated in this Court. The perpetrator minister Tommy Gilmore and the church's music minister, James A. Moore, have been nonsuited as individuals. The remaining defendant is the First Baptist Church of Farmers Branch (FBCFB), which is a Southern Baptist church affiliated with the Baptist General Convention of Texas. Plaintiff has subpoenaed

relevant and important documents from the Baptist General Convention of Texas (BGCT), who is the Nonparty before the Court. (Exh. H) The BGCT has no asserted no valid legal or moral ground for keeping secret information in it files relating to a minister’s sexual abuse of a child.

II.

BGCT MAINTAINS CONFIDENTIAL FILE OF CLERGY SEX ABUSERS

“The Baptist General Convention of Texas maintains a confidential file of church incidents related to sexual misconduct of clergy.” This quoted statement about the existence of a confidential file relating to clergy sexual misconduct is taken directly from the BGCT’s own website. (Exh. A at attachment 2) As explained more fully below, Plaintiff has reason to believe that documents relevant to her lawsuit are contained within this confidential file maintained by the BGCT. Plaintiff’s need for these documents, *and the significance of such documents to public safety*, are the primary reasons the subpoena was issued. In a blanket style and with little explanation, the Nonparty BGCT has objected to *all* of the documents requested in the subpoena.

III.

DOCUMENTS RELATING TO MINISTER TOMMY GILMORE

On its website, the Baptist General Convention of Texas describes and explains its confidential file of clergy abusers as follows:

The Baptist General Convention of Texas maintains a confidential file of church incidents related to sexual misconduct of clergy. The Convention relies on local churches to provide information about such cases. *A case is put into the file only when a minister confesses to the abuse of sexual misconduct; there is a legal conviction; or there is substantial evidence that the abuse took place.*

Information concerning instances of Clergy Sexual Misconduct/Abuse should be sent to the office of Minister/Church Relations of the Baptist General Convention of Texas. *Information of this nature will only be received from an elected officer of the church...*Information

will also be received from the officers of Baptist institutions and organizations.

Information related to sexual misconduct of clergy should include such items as: statements of confession by offending clergy; documentation of legal conviction; testimonies or depositions of victims and accounts of church action when confession or conviction are not forthcoming.

(Exh. A at attachment 2) The above description makes clear that the BGCT has in this file information that it receives *from churches* relating to the sexual misconduct of Baptist ministers. And, it places a minister's name in the file when there exists "substantial evidence that the abuse took place." In a BGCT-published booklet called "Broken Trust," the BGCT describes this file as containing "information regarding *known offenders*." (Exh. A at attachment 4 p. 37)

The name of the abusive minister involved in this case, Tommy Gilmore, has been placed in the BGCT's file of "known offenders." This fact was confirmed to the Plaintiff by email from Mr. William Jan Daehnert, the Director of Minister/Church Relations at the Baptist General Convention of Texas. (Exh. A at attachment 1) In response to Brown's specific request for a confirmation that Gilmore had been placed in the BGCT's sexual misconduct file, Daehnert wrote as follows:

...[W]e have placed Tommy Gilmore in our file....[T]his file works in an attempt to protect other congregations from being victimized by predators.

(Exh. A at attachment 1)¹ Thus, the BGCT made its own determination that minister Tommy Gilmore had committed sexual abuse. Because the BGCT's own published policy requires a confession, a conviction or "substantial evidence that the abuse took place" before a minister's name can be placed

¹As shown on its face, Daehnert's email was "cc'd" to David Nabors, the Chief Financial Officer of the Baptist General Convention of Texas, and to Sonny Spurger, who was then the Associate Director of the Office of Minister/Church Relations. (Exh. A at attachment 1) Thus, at least two additional leaders at the Baptist General Convention of Texas were on notice of the BGCT's determination to place Tommy Gilmore's name into its file of Southern Baptist clergy who have committed sexual abuse.

in that file, Plaintiff seeks to discover that “substantial evidence,” or alternatively, the confession or conviction, on which the BGCT relied when it determined to place Gilmore’s name in that file of “known offenders.”

According to its own published policy, the BGCT could not have placed Gilmore’s name in that file based solely on the Plaintiff’s report. As shown above, the BGCT’s stated policy is that it receives information *only* from church officers and from officers of Baptist institutions. Plaintiff Brown fits neither of those categories. Thus, it is apparent that information concerning Gilmore was provided to the BGCT by some other person or persons who must have been church or denominational officers. This is the information that Plaintiff Brown seeks to uncover.

Plaintiff already has evidence that at least two other ministers at First Baptist Church of Farmers Branch knew about Gilmore’s sexual abuse of Brown when she was a minor. In this same lawsuit, prior to the consolidation, music minister James A. Moore signed a sworn affidavit attesting to the knowledge he had about Gilmore’s abuse of Brown as a minor. (Exh. B) Gilmore spoke of it to Moore, and so did Brown herself when, as a kid, she broke down crying at a piano lesson in the church sanctuary. (Exh. B) There is also evidence that, even in the present day, music minister Moore considered what happened between Gilmore and Brown as constituting a “consensual” relationship, notwithstanding the fact that Brown was a minor. (Exh. C) The use of such terminology by music minister Moore, though wrong and untrue, serves nevertheless to confirm Moore’s knowledge of the fact that Gilmore had sexual contact with Brown as a minor.

After *both* Gilmore and Brown had spoken with music minister Moore about Gilmore’s conduct, Moore threatened to present the information to the congregation if Gilmore did not leave First Baptist Church of Farmers Branch. (Exh. B) Thus, minister Moore apparently knew that what Gilmore had done was bad enough that Moore wanted Gilmore gone from First Baptist Church of

Farmers Branch, and yet Gilmore was allowed to move to another ministerial position at the First Baptist Church of Tyler.

If music minister Moore provided any additional statements or other information to the Baptist General Convention of Texas, Plaintiff is entitled to discover that evidence. Likewise, if others at FBCFB provided information to the BGCT, Brown is entitled to discover it. For example, in sworn answers to interrogatories, Gilmore admitted that he had spoken to FBCFB minister Glenn Hayden about the allegations made by Brown as a minor. (Exh. D at p. 3) Though Hayden is now deceased, it is conceivable that FBCFB may have provided the BGCT with Hayden's notes or diaries from that time. Similarly, if some other church provided information to the BGCT concerning statements or confessions made by Gilmore, then that would also be information reasonably calculated to lead to the discovery of admissible evidence, and Brown is entitled to its discovery.

Who knew what about Gilmore and when did they know it? Has he hurt other kids and, if so, how many? Why were other congregations not warned? Why were parents in Gilmore's other churches not told? On what possible basis does the Baptist General Convention of Texas imagine that information concerning an adult minister's sexual abuse of a child can be kept secret? Not only is any such information relevant and discoverable in this lawsuit, but it is also information that affects public safety and should be made known.

There is no clergy privilege for communications relating to abuse of a child. TEX. FAM. CODE § 261.101(c). For the Baptist General Convention of Texas to suggest that some sort of clergy privilege may apply is not only contrary to law, but also contrary to the information that the BGCT itself sets forth on its own website. As the BGCT expressly sets forth: "In any proceeding regarding the abuse or neglect of a child...evidence may not be excluded on the ground of privileged communication" (Exh. A at attachment 2) The BGCT's website further states that "the duty to

report child abuse in Texas is sweeping and makes no exceptions for clergy....” (Exh. A at attachment

2) Finally, the BGCT asserts that the responsibility of the clergy in this regard “is *both* legal and moral.”² (Exh. A at attachment 2)

As a child, Brown was sexually abused by Southern Baptist minister Tommy Gilmore. Having been informed of that abuse involving a child, the Baptist General Convention of Texas has both a legal and moral obligation to make known the information that it has. As a matter of law, the BGCT cannot hide behind any sort of clergy privilege. It cannot keep secret information concerning a minister’s sexual abuse of a child. The fact that it would even attempt to keep such information secret reflects the BGCT’s failure of moral authority as well.³

Despite the BGCT’s determination to place minister Gilmore’s name into the BGCT’s file of clergy sex abusers, Gilmore was able to continue in a ministerial position at a church in Florida until the Plaintiff herself tracked him there and until a reporter for the Orlando Sentinel finally wrote an article about this lawsuit. (Exhs. E and A at ¶ 9) Thus, despite the BGCT’s determination that there was “substantial evidence” sexual abuse of a minor took place (or alternatively its awareness of a confession by Gilmore or a conviction), nothing was done by this the largest state-wide Southern

²It was only in December 2004 that the Baptist General Convention of Texas added information to its website reminding churches of the legal obligation to report to civil authorities when a minister’s sexual misconduct involves abuse of a minor. (Exh. A at ¶ 7) Prior to that, and despite a 44-page book of guidelines for churches’ handling of clergy sexual misconduct, the BGCT’s publication said not a single word about the necessity for reporting to civil authorities when a minister’s abuse involves a minor. (Exh. A at attachment 4) Hence, there is all the more reason to think that the BGCT may have secret information within its files concerning ministers who are known by the BGCT to have abused minors but who nevertheless remain unknown to civil authorities. In other words, given that the BGCT did not even remind churches of the obligation to report to civil authorities until December 2004, there may be many other instances in which churches reported *only* to the BGCT without also reporting to civil authorities as required by law.

³To the extent there may exist some concern about protecting the privacy of other victims who may have been sexually abused by Gilmore, and who may have reported their abuse with an expectation of privacy, the BGCT could conceivably make a much more limited argument for protecting the victims’ privacy by the redaction of their names from any documents. However, it appears that the BGCT is far more concerned with broadly asserting its *own* interest in secrecy than it is with asserting any concern for the privacy of victims.

Baptist organization in the country to preclude this man who abused a minor from continuing as a minister. Indeed, the BGCT did not even assist the Plaintiff in locating this man.⁴ (Exh. A at ¶ 9)

The information concerning Gilmore's sexual abuse of a minor should have been made known long ago, when music minister James A. Moore first learned of it. Yet, Gilmore was able to continue as a minister at another church. Again, the information concerning Gilmore's abuse of a minor should have been made known after church and denominational leaders received Brown's report in July 2004. (Exh. F at ¶ 8) Yet, Gilmore was able to continue as a minister in another state. Again, the information concerning Gilmore's abuse of a minor should have been made known after the Baptist General Convention of Texas made its own determination that there was substantial evidence the abuse took place. Yet, Gilmore was still able to continue as a minister. That the BGCT would even now insist that it still has no obligation to release information concerning a minister's abuse of a minor reflects an "ostrich in the sand" approach that blindly ignores the welfare and safety of kids. It is an approach that is unsupported by either legal or moral principles.

IV.

DOCUMENTS RELATING TO MINISTER SAM UNDERWOOD

Contrary to the BGCT's argument, Plaintiff is certainly not engaged in any sort of random "fishing expedition" for documents relating to current FBCFB minister Sam Underwood. Plaintiff already has evidence that a written report was made to the BGCT concerning minister Underwood's sexual abuse of an adult congregant. (Exh. F at ¶ 2) Not only was a report made to the BGCT concerning sexual abuse by Underwood, but a report was also made to the defendant First Baptist

⁴The national denominational organization - i.e., the Southern Baptist Convention - did not provide any assistance either. To the contrary, the SBC informed Brown that it had no record of Gilmore being in a ministerial position in any church, even though Gilmore was still working in a Southern Baptist mega-church in Florida. (Exh. A at attachment 3)

Under Texas law, it is a serious crime for a minister to use his position of trust to exploit another for sexual purposes. TEX. PENAL CODE § 22.011(b)(10). Yet, despite the report concerning his abusive conduct, Underwood remains as a minister at First Baptist Church of Farmers Branch. Thus, this single Southern Baptist church, the First Baptist Church of Farmers Branch, has had at least four ministers who were involved in or complicit with sexually abusive conduct: (1) Gilmore, a minister who sexually abused a minor; (2) Moore, a minister who kept quiet about another minister's abuse of a minor; (3) Underwood, a minister who sexually abused a congregant; and (4) Hayden, now deceased, a minister who kept quiet about another minister's sexual abuse of a minor.

In connection with considering the report of Underwood's sexually abusive conduct, it is reasonably probable that the BGCT may have received, from church deacons or members, statements or other information that also touched on the matter of how the church had handled the prior report of sexually abusive conduct involving minister Gilmore. In considering the report that was made as to minister Underwood, the BGCT may well have reviewed it in the context of information about other ministers at the same church – i.e. in the context of information about Gilmore, Moore and Hayden – and about the manner in which the church handled the prior matter involving sexual abuse by one of its ministers. Thus, the BGCT's file as to Underwood may well contain information from deacons or other church members who also remarked on Gilmore's conduct. Whether the information about Underwood will itself be admissible at trial is immaterial. "It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 192.3. Therefore, because the BGCT's file concerning minister Underwood is information that is reasonably calculated to lead to the discovery of admissible evidence, it is information that must be produced in response to a

V.

DOCUMENTS RELATING TO OTHER FBCFB MINISTERS AND DEACONS

If the BGCT has documents in its sexual misconduct file relating to any other ministers or deacons of First Baptist Church of Farmers Branch, then those documents are discoverable for the same reasons as the documents relating to Sam Underwood. It is reasonably probable that any statements, correspondence or testimony provided to the BGCT in relation to sexually abusive conduct by other FBCFB ministers and deacons may have included some discussion of or reference to the conduct of the church's prior minister, Gilmore, and to the manner in which it was handled by the church after minister Moore gained knowledge of the sexually abusive conduct. Therefore, this is information reasonably calculated to lead to the discovery of admissible evidence.

VI.

THE BGCT'S BOOKLET, "BROKEN TRUST: CONFRONTING CLERGY SEXUAL MISCONDUCT"

Plaintiff already has a copy of this booklet.⁵ (Exh. A at attachment 4) Plaintiff requested that the BGCT produce the booklet in response to the subpoena so as to make the booklet self-authenticating for purposes of admissibility at trial. The fact that the BGCT would object to the simple production of a published booklet that was widely disseminated merely serves to demonstrate the over-reaching nature of its objections.

The BGCT published the booklet "Broken Trust" in approximately the year 2000 in order to provide guidelines to churches for the handling of reports concerning sexual misconduct by clergy. (Exh. A at attachment 4) The booklet discusses the importance of breaking the code of silence that

⁵The copy that Plaintiff has was obtained from Deborah Dail who obtained her copy directly from the Baptist General Convention of Texas. It is a true and correct copy of the BGCT's booklet. (Exhs. F and A)

churches often maintain when a matter involving clergy sexual abuse is presented. It also discusses some of the harm that is typically caused to victims, both by the abuse itself and by the secrecy, and it discusses the importance of providing counseling to victims. (Exh. A at attachment 4 pp. 15, 17, 36) This sort of evidence is directly relevant to the matters involved in this lawsuit. It goes toward showing the nature of the harm that was done to Plaintiff and her need for counseling. It also goes toward showing the extraordinary failures of the defendant First Baptist Church of Farmers Branch in its handling of the matter.

The BGCT's booklet also goes toward showing why the BGCT itself should not be allowed to keep secret the information in its files relating to ministers who sexually abuse the young and vulnerable. As the BGCT states in this booklet:

Breaking the code of silence is a major step in dealing with this issue. Only as clergy sexual abuse is dealt with honestly and openly will healing, health, and safety be available....

(Exh. A at attachment 4 p. 15) In seeking to compel the production of these documents, Plaintiff is asking this Court to compel the BGCT to exercise the sort of openness and honesty that the BGCT purports to recommend to churches in its own published booklet. For the health and safety of other children, the BGCT cannot be allowed to assert secrecy as to documents that have any bearing on a minister's sexual abuse of a minor.

VII.

OTHER BGCT BROCHURES, BOOKLETS OR PAMPHLETS

For all the reasons set forth above with respect to the brochure "Broken Trust," the BGCT should also be compelled to produce any other brochures, booklets or pamphlets that it may have published relating to clergy sexual misconduct. As the statewide denominational organization, the BGCT has expressly sought to assist churches in dealing with problems related to clergy sexual abuse.

(Exh. A at attachment 4 p. 7) If the BGCT has published other materials related to the issue, those materials constitute information that is reasonably calculated to lead to the discovery of admissible evidence in this case. Therefore, the BGCT must produce them in accordance with the subpoena.

VIII.

ANY POSSIBLE DEFECT IN SERVICE HAS ALREADY BEEN CURED

The Nonparty BGCT complains that the notice to produce was not served at least 10 days before the actual subpoena as required by Texas Rule of Civil Procedure 205.2. However, as shown by Exhibit A to the BGCT's own filing, the Plaintiff did indeed serve on the BGCT a "Notice of Request for Production" on December 8, 2005. Included with that Notice, Plaintiff enclosed a courtesy copy of the subpoena. The courtesy copy was not intended to constitute "service" of the subpoena as should have been obvious from the fact that a blank "officer's return" was attached to it. (See Exhibit A to Nonparty's Objections) Rather, after serving the "Notice of Request for Production," Plaintiff then undertook to obtain service of the subpoena 10 days later by using a process server, but service could never be accomplished because the named BGCT person was consistently gone and could not be found.

When the process server was unable to make service of the subpoena prior to Christmas, Plaintiff did not continue to attempt service during the holiday period, and immediately after the holiday period, the BGCT filed in this Court its Objections to the Subpoena on January 3, 2006. Thus, the problem is *not* that Plaintiff failed to serve a notice to produce at least 10 days prior to service of the subpoena, but rather that the Nonparty BGCT filed its objections to the subpoena before personal service of the subpoena could be accomplished by a process server. In other words, the BGCT was so anxious to make its objections that it simply jumped the gun.

The reason that Rule 205.2 provides for a 10-day gap between service of a notice to produce

and service of a subpoena on a nonparty is so that anyone (party or nonparty) who objects to the production of the documents will have time to move for a protective order before the nonparty produces the documents in accordance with the subpoena. O'CONNOR'S TEXAS RULES - CIVIL TRIALS § 5.3(1) at 439 (2005 ed.). Obviously, neither the Nonparty BGCT nor the Defendant Church have been impeded in their ability to file objections to the subpoena and to move for a protective order. Indeed, it appears that the Nonparty BGCT is under the control of the Defendant Church because they are represented by the same law firm.⁶ Thus, the reason behind the Rule has been fully met because the Nonparty BGCT was readily able to secure counsel to make objections to the subpoena, and because any possible interests of the Defendant Church have been fully protected by the participation of the Church's law firm in making the objections on behalf of the Nonparty BGCT.

At this point, there would be little reason to now effect service of process on the Nonparty BGCT via a process server because, with its January 3, 2006 filing, the BGCT made its appearance in this Court and acknowledged service. The BGCT expressly states: "Plaintiff, C. Brown, has served upon Non-Party, Baptist General Convention of Texas, a subpoena for documentary evidence." (Non-Party's Objections to Subpoena at p. 2) This formal appearance negates any need for other service of the subpoena, and the appearance is made more than 10 days after Plaintiff served the notice to produce. Thus, *even if* there were some defect in service of the subpoena, the BGCT has now waived any defect by acknowledging service and making an appearance on January 3, 2006. *See Corbett v. Spradling*, No. 07-96-0373-CV, 1997 WL 206801 (Tex. App. - Amarillo 1997, writ denied)(recognizing that service can be waived by appearance).

In the event the Court disagrees with the above arguments and concludes both that service

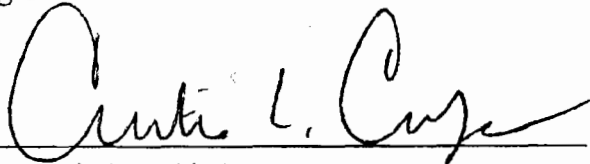
⁶Moreover, the Texas Secretary of State has certified that the current registered agent for the Baptist General Convention of Texas is at the exact same address as the Defendant Church's law firm - i.e., at 500 N. Akard, 3100 Lincoln Plaza, Dallas, TX 75201. (Exh. G)

of the subpoena was defective and that any such defect has not been waived, then Plaintiff requests that she be allowed the opportunity to cure any defect so the matter may be decided on the merits of the arguments. In this event, Plaintiff requests that the Court postpone any ruling on the Nonparty's objections and motions until such time that service of the subpoena can be made.

CONCLUSION

All of the documents sought constitute reasonable discovery to which the Baptist General Convention of Texas has not lodged any legitimate objection. This statewide denominational organization cannot be allowed to keep secret the information in its files relating to a minister's sexual abuse of a minor. Church and denominational leaders who attempt to keep such information secret exist on an island that is void of any legal or moral ground.

By: _____



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CERTIFICATE OF SERVICE

This is to certify that, on the 26 day of January 2006, a true and correct copy of the foregoing Plaintiff's Response to Nonparty's Objections to Subpoena was served by certified U.S. mail, return receipt requested, on counsel for the Nonparty and the Defendant as follows:

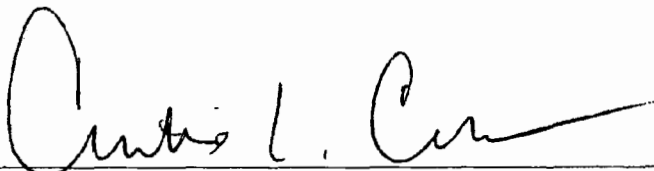
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