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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12) No. 04-37154-elp11
13 ROMAN CATHOLIC ARCHBISHOP OF)
14 PORTLAND IN OREGON, AND SUCCESSORS,)
15 A CORPORATION SOLE, dba the) REPORT AND RECOMMENDATION RE:
ARCHDIOCESE OF PORTLAND IN OREGON,) CLAIM # 154
Debtor.)
_____)

16 This matter came before the bankruptcy court for a hearing on
17 debtor's motion for summary judgment that Claim # 154 be disallowed
18 because it is time-barred under ORS 12.117(1). The claim asserted is a
19 personal injury claim, which the bankruptcy court cannot liquidate for
20 purposes of distribution in a case under Title 11. 28 U.S.C.
21 § 157(b)(2)(b); § 157(b)(5). Having read the submissions of the parties
22 and heard the argument of counsel, I recommend to the United States
23 District Court for the District of Oregon pursuant to 28 U.S.C.
24 § 157(c)(1) that the motion be GRANTED and the claim DISALLOWED for the
25 reasons discussed below.
26

1 BACKGROUND

2 Claimant has filed a claim (Claim #154) against debtor in this
3 bankruptcy case, based on one incident that allegedly occurred involving
4 Father Joseph Baccellieri ("Father B"), who was claimant's music teacher
5 at Central Catholic High School in Portland. Harris Affidavit, Ex. 1,
6 Deposition of Claimant at 70:5-6. The alleged incident occurred at a
7 Lincoln City beach house during the summer of 1973, when claimant was
8 either 16 or 17 years old. Harris Affidavit, Ex. 1, Deposition of
9 Claimant at 80:17-20. Claimant and Father B have different recollections
10 of what happened. Because the evidence on summary judgment is "viewed in
11 the light most favorable to the non-moving party," Horphag Research Ltd.
12 v. Pellegrini, 337 F.3d 1036, 1040 (9th Cir. 2003), only the claimant's
13 version of the story is recounted in this memorandum. Claimant alleges
14 that upon arrival at the Lincoln City beach house, Father B served
15 claimant alcohol. Harris Affidavit, Ex. 1, Deposition of Claimant at
16 84:9-11. Claimant fell asleep on the couch, and at around 3 a.m., awoke
17 to find Father B, naked and masturbating in front of claimant. Harris
18 Affidavit, Ex. 1, Deposition of Claimant at 85:1-6. At that point,
19 claimant jumped up, grabbed his belongings, and left the house. Harris
20 Affidavit, Ex.1, Deposition of Claimant at 85:15-25.

21 Claimant recalls that, after leaving the beach house, he hitchhiked
22 back to Portland. Harris Affidavit, Ex. 1, Deposition of Claimant at
23 87:6. At around 6 a.m., he arrived at the house of a close friend in
24 Portland, where he told his friend about the incident in detail. Harris
25 Affidavit, Ex. 1, Deposition of Claimant at 87:2 - 88:13. After that,
26 claimant would mention his version of the incident to "practically

1 anybody that would listen" among his group of high school friends.
2 Harris Affidavit, Ex. 1, Deposition of Claimant at 92:18. Claimant never
3 told his parents or other Central Catholic teachers about the incident
4 because "it's just a code. It's a kid code thing, you don't rat people
5 out. It's just the unwritten law." Slader Declaration, Ex. 2,
6 Deposition of Claimant at 97:15-23.

7 It is clear that claimant has never forgotten or repressed the
8 memory of the incident. About 20 years ago (about the mid 1980's),
9 claimant recalls a conversation with his brother in which Father B's name
10 came up. Claimant told his brother at that time that "[Father B] is a
11 freak." Slader Declaration, Ex. 2, Deposition of Claimant at 98:25.
12 Then, in the early 1990's, claimant's friend was pursuing a sex abuse
13 claim against Father B. Michael Morey, the friend's attorney, told
14 claimant that he too had grounds to pursue a claim against Father B and
15 the Archdiocese. Claimant's response at that time was that he did not
16 want to pursue a claim because he had not been physically harmed, and
17 that he didn't think he had a right to damages for what was just a "bad
18 incident." Slader Declaration, Ex. 2, Deposition of Claimant at 115:11-
19 18. Claimant even asserts, "I just kind of chalked it up, but I was
20 happy to relate it if it was going to help the other guys who were
21 sexually molested." Slader Declaration, Ex. 2, Deposition of Claimant at
22 115:18-21.

23 Later, after the Archdiocese had filed bankruptcy in 2004 and the
24 issue of priest sex abuse "hit the papers again," claimant disclosed the
25 facts of the beach house incident to his mother. Slader Declaration, Ex.
26 2, Deposition of Claimant at 116:1-6. His mother immediately understood

1 and said "well, now I know why you're so anti-religion and anti-
2 spiritual." Slader Declaration, Ex. 2, Deposition of Claimant at 116:6-
3 8. Claimant asserts that it never occurred to him that the incident
4 could have affected him until he had the dialog with his mother about the
5 abuse, and therefore, claimant's own discovery of the causal connection
6 between Father B's conduct and his injury did not occur until that time.
7 Claimant's Memorandum in Opposition to Motion for Summary Judgment at
8 5:9-19.

9 LEGAL STANDARD

10 The court shall grant summary judgment on a claim "if the pleadings,
11 depositions, answers to interrogatories, and admissions on file, together
12 with the affidavits, if any, show that there is no genuine issue as to
13 any material fact and that the moving party is entitled to judgment as a
14 matter of law." Fed. R. Civ. P. 56(c), made applicable to this contested
15 matter by Fed. R. Bankr. P. 9014(c) and 7056.

16 Ordinarily, claims for personal injuries must be brought within two
17 years. ORS 12.110(1). However, an extended statute of limitations is
18 available in some circumstances under ORS 12.117, which "governs actions
19 based on child abuse." For claims that fall under this statute, the
20 claim

21 shall be commenced not more than six years after that person
22 attains 18 years of age, or if the injured person has not
23 discovered the injury or the causal connection between the
24 injury and the child abuse, nor in the exercise of reasonable
25 care should have discovered the injury or the causal connection
26 between the injury and the child abuse, not more than three
years from the date the injured person discovers or in the
exercise of reasonable care should have discovered the injury
or the causal connection between the child abuse and the
injury, whichever period is longer.

1 ORS 12.117(1)(emphasis supplied). This statute establishes a general
2 rule that child abuse claims must be filed not more than six years after
3 the plaintiff reaches 18 years of age. Jasmin v. Ross, 177 Or. App. 210,
4 214 (2001). The statute also establishes a different time limit for
5 plaintiffs who qualify for a "delayed discovery" exception. Id.
6 Plaintiffs qualify for the extended filing period if they do not discover
7 the injury while under 18; alternatively, they qualify if, while under
8 18, they discovered the injury, but did not discover that the injury was
9 caused by child abuse. Id. In either case, the extended time limit
10 applies only if the non-discovery was reasonable. Id. If a plaintiff
11 qualifies for the extended limitation period, he or she has three years
12 to file from the time the plaintiff discovered or should have discovered
13 the injury or the causal connection between the abuse and the injury.
14 Id.

15 Although debtor initially sought summary judgment based on its
16 assertion that the claim was not for "child abuse" as defined in ORS
17 12.117(2), it has withdrawn that portion of the motion for summary
18 judgment. Supplemental Memorandum Regarding Summary Judgment Against
19 Proof of Claim No. 154 at 1:17-20. Therefore, the only question to be
20 answered on summary judgment is whether Claim #154 is time-barred under
21 ORS 12.117(1).

22 DISCUSSION

23 Debtor filed bankruptcy on July 6, 2004. Claimant filed his claim
24 against debtor on October 28, 2004, when claimant was 48 years old, after
25 actual discovery of his injury and the causal connection between the
26 child abuse and the injury. Claimant explained that he was telling his

1 mother about the Father B incident for the first time, when he realized
2 that the child abuse by Father B was the root of his "anti-spiritual" and
3 "anti-religion" attitude and his inability to have a "close personal
4 reliance on Jesus Christ and God and the Catholic church." Slader
5 Declaration, Exhibit 2, Deposition of Claimant at 116:7-22.

6 Although claimant's actual discovery of his injury and the causal
7 connection between the injury and the abuse happened recently, debtor
8 argues that the claim is time-barred because claimant, "in the exercise
9 of reasonable care, *should have discovered* the injury or the causal
10 connection between the injury and the child abuse," in the early 1990's,
11 when he spoke to attorney Michael Morey regarding the abuse by Father B.
12 See ORS 12.117(1)(emphasis supplied).

13 The term "discovers or in the exercise of reasonable care should
14 have discovered" is language frequently used in statutes of limitation.
15 Such wording creates a "discovery rule," and in light of the similarities
16 between statutes using this rule, it is helpful to look at constructions
17 of the identically phrased discovery rule in other statutes to discern
18 the meaning of ORS 12.117(1). Keller v. Armstrong World Industries, 197
19 Or. App. 450, 459-460 (2005), rev. granted 340 Or. 201 (2006).

20 In Gaston v. Parsons, 318 Or. 247 (1994), the Oregon Supreme Court
21 analyzed ORS 12.110(4), the medical malpractice statute of limitations,
22 which provided that the two-year statute of limitations begins to run
23 "when the injury is first discovered or in the exercise of reasonable
24 care should have been discovered." Gaston, 318 Or. at 251-252. Gaston
25 explains that, under the discovery rule, the test for when the statute of
26 limitations begins to run is an objective test, taking into account

1 factors pertaining to the individual such as "the nature of the harm
2 suffered, the nature of the medical procedure and other relevant
3 circumstances." Id. at 256. "[T]he relevant inquiry is how a reasonable
4 person of ordinary prudence would have acted in the same or similar
5 situation." Id.

6 Although I stated at the hearing that I was inclined to hold that
7 this test is subjective, upon further review, I find that a more accurate
8 characterization is that the test is an objective test that considers the
9 actual facts and circumstances of the injured plaintiff. The statute of
10 limitations will run even if the injured plaintiff, a victim of child sex
11 abuse, has not discovered his injury, if a reasonable victim in the
12 exercise of reasonable care, given the facts and circumstances of the
13 actual plaintiff victim, should have discovered the injury.

14 Debtor's argument that the court should use a purely objective
15 "reasonable person" standard disregards the language used in the
16 discovery rule statutes. The "reasonable person standard" is a legal
17 concept that is distinct from the concept of "reasonable care" under the
18 discovery rule. The reasonable person standard is a uniform standard of
19 conduct demanded of a defendant by the community, and is used in
20 determining whether a defendant is negligent. See Prosser and Keeton on
21 Torts § 32 (W. Page Keeton et al. eds., 5th Ed. 1984). In contrast, the
22 focus under the discovery rule is when an injured plaintiff "discovers or
23 in the exercise of reasonable care should have discovered" an injury
24 caused by a defendant.

25 My reading of Gaston is that the test is objective only in that it
26 does not take into consideration the actual knowledge of the plaintiff

1 when determining what a plaintiff should have known in the exercise of
2 reasonable care. Gaston specifically requires the court to take into
3 consideration "the nature of the harm suffered, the nature of the medical
4 procedure, and other relevant circumstances" of the injured plaintiff.
5 Gaston, 318 Or. at 256. That standard contemplates that the court's
6 analysis will begin with a similarly injured person in similar
7 circumstances.

8 Thus, for the purposes of our analysis, the question is when should
9 the claimant have discovered that he was injured by Father B's conduct
10 had he exercised reasonable care, given the facts and circumstances of
11 this particular claimant.

- 12 1. Claimant, in the exercise of reasonable care, should have
13 discovered the injury in the early 1990's.

14 Debtor argues that claimant failed to exercise reasonable care in
15 discerning the connection between his injury and the alleged abuse.
16 Debtor's Memorandum in Support of Summary Judgment with Respect to Proof
17 of Claim No. 154 at 7:14-16. Debtor asserts that, had claimant exercised
18 reasonable care, he would have been put on notice during the early 1990's
19 of the substantial possibility that he had been injured, when Mr. Morey
20 told claimant that he had grounds to file a claim against Father B.
21 Debtor's Memorandum in Support of Summary Judgment with Respect to Proof
22 of Claim No. 154 at 8:15-16.

23 I agree with debtor. Mr. Morey informed claimant that he had a
24 claim in the early 1990's. The exercise of reasonable care would dictate
25 that, when an attorney tells a person that the person is entitled to
26 damages for the abuse, it would be prudent to make an inquiry as to how

1 the abuse has affected the person. A person in claimant's situation
2 exercising reasonable care would have discussed the matter with trusted
3 advisors, such as parents or a spouse. Instead, claimant did nothing to
4 investigate whether he had been damaged after being advised of his
5 potential claim.

6 a. Oral Argument by Claimant's Counsel

7 At the hearing on this motion, counsel for claimant argued that
8 claimant was unable to make self inquiry at the time he was told by Mr.
9 Morey that he had a sex abuse claim against the Archdiocese and Father B.
10 Counsel argued that,

11 in [claimant's] own mind, he wasn't injured He had no
12 concept that he was injured There was no place for him
13 to go, to make inquiry except inside himself. And the abuse by
itself, by its nature, disables insight.

14 May 15, 2006 hearing on Motion for Summary Judgment regarding Claim #154.
15 Counsel argued further that, "to him [discovery] was impossible, until
16 someone pointed it out to him. And made what was . . . opaque to him,
17 but could be transparent to someone else who had not gone through the
18 same experience." May 15, 2006 hearing on Motion for Summary Judgment
19 regarding Claim #154. Claimant's counsel explained that claimant was
20 only able to discover his injury after his mother pointed it out to him.

21 There are three problems with this argument. First, as a practical
22 matter, claimant's injury was transparent to Mr. Morey, who pointed out
23 to claimant that he had a claim against the Archdiocese and that he had
24 been harmed by Father B's conduct. Even if Mr. Morey did not know
25 specifically how claimant had been injured, based on his expertise as a
26 plaintiff's attorney, he felt that, under the circumstances, claimant

1 would be entitled to damages. Reasonable care required the claimant to
2 have made a self-inquiry at that time, which the claimant did not do.
3 Counsel's argument does not explain why claimant was unable to discern
4 the injury when Mr. Morey pointed it out to him, but that he was able to
5 discover the injury when his mother pointed it out to him several years
6 later.

7 Second, counsel's argument is not evidence. Although it is
8 undisputed that claimant did not actually discover his injury until 2004,
9 there is no evidence in the record that supports counsel's assertions
10 that claimant was completely unable to make a self-inquiry, and there is
11 little or no evidence in the record that claimant exercised reasonable
12 care after discussing the incident with Mr. Morey during the early
13 1990's.

14 Third, the argument is internally inconsistent. On the one hand,
15 claimant's counsel argues that there was no place for claimant to inquire
16 "except inside himself." On the other hand, he argues that claimant did
17 not discover and could not have discovered his injury until his mother
18 pointed it out. Thus, it was a third person, not self-inquiry, that was
19 the key to claimant's discovery of his injury. Claimant could have
20 discussed the situation with his mother in the early 1990's, rather than
21 waiting until some time in 2004.

22 b. This case is distinguishable from *Jasmin*

23 Under certain circumstances, delayed discovery of injuries resulting
24 from child sex abuse could be considered reasonable. In *Jasmin v. Ross*,
25 177 Or. App. 210 (2001), the Oregon Court of Appeals analyzed "reasonable
26 care" under the discovery rule in ORS 12.117(1) and concluded that the

1 plaintiff's failure to realize the causal connection between the sex
2 abuse and injury was not due to lack of reasonable care. In Jasmin, the
3 plaintiff was a woman who had been sexually abused by her uncle between
4 the ages of 10 and 17. Although she knew all along that she had been
5 abused as a child, she did not make the causal connection between her
6 then-present emotional problems and the child abuse for many years. As a
7 result, she did not file a claim against her uncle until she was 30 years
8 old. The Oregon Court of Appeals held that there was "sufficient
9 evidence from which a jury could find that delayed discovery was
10 reasonable." Jasmin, 177 Or. App. at 217. The court took into
11 consideration evidence that the plaintiff had post-traumatic stress
12 disorder ("PTSD"), the fact that she "refused to consider the
13 relationship with her stepuncle as abusive or as the cause of her [mental
14 health problems] and that such a reaction is common among adult survivors
15 of child abuse." Id. The court also took into consideration the
16 plaintiff's psychological problems related to the PTSD, including
17 diagnoses of depression, alcohol abuse, anger outbursts, and other mental
18 health problems. Id. The court concluded that these medical conditions
19 prevented plaintiff from becoming aware of the link between her injuries
20 and the child abuse that she endured. Id.

21 The evidence considered by the Oregon Court of Appeals in Jasmin was
22 specific to the plaintiff in that case. In this case, however, claimant
23 has not provided any evidence that is specific to him that would show
24 that, like the plaintiff in Jasmin, he was somehow prevented by some
25 medical or psychological condition from discovering his injury.

26 Claimant has provided some evidence from an expert stating as a

1 general proposition that abuse victims often do not make the connection
2 between the abuse and the injury, even when it may be apparent to others.
3 Claimant's counsel submits the declaration of Jon R. Conte, Ph.D., an
4 expert on childhood sex abuse and trauma. Dr. Conte states that "many
5 people who suffer conditions such as [depression, drinking to excess,
6 becoming enraged, troubles with authority] place erroneous causality on
7 factors that are actually unrelated to the condition." Slader
8 Declaration, Ex. 4, 5:13-14. For example, the depressed person may blame
9 feelings on a lousy job, or an alcoholic may claim physical addiction,
10 rather than recognizing that he has problems flowing from having being
11 abused in childhood. Slader Declaration, Ex. 4 at 5:13-17.

12 The problem with this evidence is that, although it is generally
13 applicable to victims of childhood sex abuse, it is not applicable to all
14 victims of such abuse. Unlike the Jasmin plaintiff's PTSD evidence, Dr.
15 Conte's declaration is not a specific diagnosis for this claimant.

16 2. The question of when a person reasonably should have known of
17 the injury is not always one for the jury.

18 Claimant's counsel cites to a line of cases that hold that the
19 question of when a person reasonably "should have known" of the causal
20 connection between an injury and the tortfeasor's conduct is a question
21 of fact for the jury. In Minisce v. Thompson, 149 Or. App. 746 (1997),
22 the Oregon Court of Appeals held that the question of "whether [the
23 injury] should have sufficiently alerted plaintiff to trigger discovery .
24 . . is a quintessential jury question." Minisce, 149 Or. App. at 752.
25 In Hoeck v. Schwabe Williamson & Wyatt, 149 Or. App. 607 (1997), the
26 court held that "precisely when a person reasonably should have known

Rule 9032**EFFECT OF AMENDMENT OF FEDERAL RULES OF CIVIL PROCEDURE**

The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.

Rule 9033**REVIEW OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN NON-CORE PROCEEDINGS**

(a) **Service.** In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

(b) **Objections: Time for Filing.** Within 10 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 10 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.

(c) **Extension of Time.** The bankruptcy judge may for cause extend the time for filing objections by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing objections must be made before the time for filing objections has expired, except that a request made no more than 20 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.

(d) **Standard of Review.** The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

Rule 9034**TRANSMITTAL OF PLEADINGS, MOTION PAPERS, OBJECTIONS, AND OTHER PAPERS TO THE UNITED STATES TRUSTEE**

Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, any entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall transmit a copy thereof to the United States trustee within the time required by these rules for service of the paper:

- (a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business;
- (b) the approval of a compromise or settlement of a controversy;
- (c) the dismissal or conversion of a case to another chapter;
- (d) the employment of professional persons;
- (e) an application for compensation or reimbursement of expenses;
- (f) a motion for, or approval of an agreement relating to, the use of cash collateral or authority to obtain credit;