

FILED FOR RECORD
HARRISON COUNTY, TEXAS
APR 7 2008

CAUSE NO. 02-0157

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JOHN ALFRED DOE #1 ET AL

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IN THE DISTRICT COURT

VS.

COPY

HARRISON COUNTY, TEXAS

SHERRY GRIFFIS
BY: *SG*
DEPUTY

NORTHERN TEXAS/NORTHERN
LOUISIANA SYNOD, EARL ELIASON
AND MARK B. HERBENERL

71st JUDICIAL DISTRICT

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO EXCLUDE
EVIDENCE OF DEFENDANT ELIASON'S CONVICTIONS**

Defendants' Motion to Exclude Evidence must be denied. Such evidence is admissible to impeach Defendant Eliason's credibility and, most importantly, it is directly relevant to the Defendants' negligence because Eliason's own sexual addiction impaired and compromised his judgment as a decision making officer of the Synod, especially with regards to the fitness and prior misconduct of Gerald Thomas. For these reasons, Plaintiffs respectfully request that the Court deny Defendants' motion.

A. Eliason's Sexual Addiction and Related Convictions are Patently Relevant to the Defendants' Negligence.

Defendants claim that Eliason's sexual addiction and related convictions for public indecent exposure (masturbating in a public place) "do[] not relate[] to any contested issue in this case." See Def. Motion at 1. This argument contravenes common sense and the testimony of Defendants' own hired expert.

Defendant Eliason has admitted under oath to being a sexual addict whose proclivities include masturbating in public places. He has engaged in these improper activities thousands of times over the past years. Through his deposition, Defendant Eliason described his problem:

- Q. What was the nature of the indecent exposure?
A. Masturbation in a public place.

Eliason Depo. at p.10 ln.6-7.

- Q. And where did it take place?
A. At North Park Mall.

Eliason Depo. at p.13 ln.5-6.

- Q. How many times have you engaged in the activity of indecent exposure such as those that you have been charged with 2002, 1995, and 1987?
A. A number of times.
Q. Over a hundred?
A. Yes.
Q. Over a thousand?
A. I don't know. My therapist has described me as addicted.
Q. Addicted?
A. Yes.
Q. Sexual addict?
A. Sexual addict, yes.

Eliason Depo. at p.13 ln.23 - p.14 ln.10.

- Q. How would you come into contact with them? What was your modus operandi to meet up with people who would engage in this activity?
A. People would come into the restroom and would probably be some eye signals or body language that would indicate they wanted to do this.

Eliason Depo. at p.17 ln.2-7.

- Q. In the restrooms at the mall, how would you avoid detection? Would you go into the stalls or - - I am having a hard time under understanding how you just wouldn't get caught be somebody looking at you. Is it - do you both - would both of you go into the same stall or how would that work?
A. At separate urinals.

Eliason Depo, p. 94, ln. 21 - p. 95, ln. 2.

As acknowledged by Defendants in their motion, Eliason has been arrested while masturbating in public places and convicted for “indecent exposure” on three separate occasions in 1987, 1996 and 2003. *See* Defendants’ motion at 5.

While under the influence of his sexual addiction and at the time that he assigned and recommended Gerald Thomas to Good Shepherd Lutheran Church in Marshall, Defendant Eliason was serving as the Assistant Bishop for the Synod. As the Assistant Bishop, Eliason was responsible for placing, assigning and recommending new pastors to congregations within the Synod’s geographic territory. Defendant Eliason was specifically made aware of Thomas’ threat and risk of harm to children by both his brother-in-law stationed at the Seminary—Alan Sager, and by Thomas’ intern supervisor—Pastor Mel Swoyer. In this regard, Eliason was informed that Thomas had provided alcohol to minors, was in possession of a pornography video, that the minors had stayed the night with Thomas and they had viewed the pornographic video.

Despite all these red flags and warnings, Defendant Eliason highly recommended Thomas to Good Shepherd’s leadership and said absolutely nothing about Thomas’ sordid past. Indeed, Eliason went so far as to state that Thomas was a “good” pastor and both he and Defendant Herbener had “a lot of confidence in Pastor Thomas.” *See* exhibit 07700, attached hereto.

Defendant Eliason’s decision making capacity and judgment regarding the assignment and recommendation of Thomas bear directly on his own negligence and the negligence of all Defendants. In this latter regard, Eliason, as the Assistant Bishop, was the second highest ranking officer within the entire Synod. There can be no dispute that he was in a managerial position and that former Bishop Herbener and the Synod had

delegated to Eliason the duties and tasks associated with the assignment of new pastors, such as Thomas. Thus, Eliason's "*judgment*" is squarely at the heart of the negligence issue as to all Defendants.¹

Eliason's own sexual proclivities and addiction had a direct impact on his decision making capacity. Indeed, Defendants' own expert psychologist has agreed that it was grossly inappropriate for Eliason to be in such a decision making position. In her recent deposition, Dr. Alexandria Doyle stated that Defendant Eliason's judgment was impaired and compromised by his own sexual addiction thereby preventing him from properly evaluating the misconduct of other potential pastors, like Thomas:

Q. Knowing that Earl Eliason has this public masturbation problem, is that someone that you would want on a sexual misconduct committee for the arch diocese or the synod for his area?

A. *I don't think he would be a good person to be helping the synod* or whoever – whatever group it was. *I wouldn't think that that would be helpful to them at all.*

Q. Based upon his own problem of masturbating in public places, under his own testimony, hundreds of times, when asked about thousands, he just replied my therapist says I am a sex addict, is that the kind of person that should be evaluating situations of clergy sexual misconduct and the handling associated with them?

A. I would not put them on that kind of committee and *I can't imagine the circumstances where that would be good for them to be making those kinds of evaluations.*

Doyle Depo at p.84 ln.6-23 (emphasis added).

¹ Defendants claim that no one at the Synod was aware of Eliason's misconduct until after the events giving rise to this lawsuit. Assuming, without admitting, that this fact is true, it is irrelevant. First, Eliason was twice convicted of indecent exposure under Penal Code § 21.08, requiring him to register as a sex offender with the State's Sex Offender Registration Program (SORP). Eliason was so registered. His registration in the SORP either put the Synod on notice of his criminal convictions or, at the least, should have put the Synod on notice of his convictions. A simple background check would have revealed Eliason's convictions. Second, whether the Synod knew about Eliason's sexual addiction is irrelevant because the true issue is whether the addiction compromised or impaired Eliason's judgment as a decision maker for the Synod. Certainly, if Eliason was an alcoholic and intoxicated at the time he made the positive recommendation for Thomas, then his alcohol addiction would be relevant in determining whether or not his judgment was impaired regardless of whether the Synod knew about the addiction.

- Q. Remember the testimony where Mel said that Earl Eliason, the, at this point in time, two-time convicted public masturbator approached him at the synod assembly and said: Mel, we know about the incidents at the seminary – I am sorry: We know about the incident while Gerald Patrick Thomas was on internship. Would you recommend him for a call? Do you remember that testimony?
- A. Yes.
- Q. And Mel Swoyer's answer was: That is not my call, that's your job, Earl. Do you remember that?
- A. Yes, I do.
- Q. Subsequently, Earl Eliason made the judgment based upon whatever knowledge he had in the Wilson incident and/or the seminary incident, to place Gerald Patrick Thomas in the local congregation of Marshall, Texas.
- Q. Do you know that?
- A. I do now. I am not sure I know – know much about him at all, but if you are saying that that is the case, barring not reviewing any documents regarding it, I would assume that what you are saying is true. I wasn't aware of the details of the placement at that end.

Doyle Depo at p. 86 ln.11 – p.87 ln.10.

- Q. Just assuming that that factual scenario becomes evidence and is actual fact, is Earl Eliason the kind of man that should be evaluating clergy sexual misconduct on internship for placement of individuals in rural locations such as Marshall, Texas?
- A. No, he should not. And are you saying that those - - the criminal matters were resolved at the time that he was making that?
- Q. It is a matter of public record. That is how I found them.
- A. I would think not.
- Q. You would agree with me that masturbating in a public place is impaired judgment?
- A. Yes.
- Q. And along with - - it is an illness, obvious, on its face, wouldn't you agree?
- A. Yes.
- Q. Likewise, to allow someone with that level and magnitude of impaired judgment to be in judgment of placing other individuals with similar or tangentially related problems is error?
- A. Yes.

Q. Because his judgment is impaired in those matters?

A. Yes.

Doyle Depo at p.88 ln. 3 – p.89 ln. 4 (emphasis added).

Without doubt, Defendant Eliason's sexual addiction and convictions have a significant bearing on his decision making capacity and judgment regarding Thomas. The second highest-level managerial employee of the Synod acting in the course and scope of his employment making decisions about the misconduct of Thomas while under the influence of his own sexual addiction—these facts are clearly relevant to the liability of all Defendants in this case.

B. Eliason's Convictions are Admissible Under Rule 609.

Defendant Eliason's convictions, in and of themselves, are also admissible under Texas Rule of Evidence 609 to attack Eliason's credibility. This is true for all convictions. Rule 609 of the Texas Rules of Evidence expressly provides that crimes of "moral turpitude" are admissible "for the purpose of attacking the credibility of a witness." See TEX. R. EVID. 609(a). Indecent exposure, including sexually arousing oneself, is a crime of "moral turpitude." See *Woodall v. State*, 77 S.W.3d 388, 394 (Tex. App.—Fort Worth 2002, pet. ref'd); *Polk v. State*, 865 S.W.2d 627, 630 (Tex. App.—Fort Worth 1993, pet. ref'd). As such, Eliason's convictions for indecent exposure are admissible as crimes of "moral turpitude."

Realizing the certain admissibility of these convictions, Defendants attempt to argue that the 1987 conviction should be excluded because of its remoteness in time. See Defendants' motion at 5. This argument is likewise ill-founded. Although it is true that remote convictions, those more than ten years old, are often inadmissible, this is not the case "if the witness' lack of reformation is shown by evidence of an intervening

conviction for a felony or a misdemeanor crime of moral turpitude.” *McClendon v. State*, 509 S.W.2d 851, 855-56 (Tex. Crim. App. 1974) (op on reh’g); *Woodall v. State*, 77 S.W.3d 388, 394 (Tex. App.—Fort Worth 2002, pet. ref’d). The importance of the remoteness rule in Rule 609(b) is further diminished when, as with Eliason, the remote conviction is identical to a non-remote conviction. Eliason’s lack of reformation eliminates any remoteness of his 1987 conviction. In fact, Texas law provides that a pattern of convictions indicating a lack of reform attenuates the possible prejudice due to distant convictions and thus make the older convictions no longer remote. *See Morris v. State*, 67 S.W.3d 257, 263-64 (Tex. App.—Houston [1st Dist.] 2001, pet. ref’d); *Jackson v. State*, 50 S.W.3d 579, 591-92 (Tex. App.—Fort Worth 2001, pets. ref’d).

Defendants’ argument seeking to exclude Eliason’s 2003 conviction for indecent exposure also fails. In this regard, Defendants state that the 2003 conviction is not relevant because it occurred after Eliason’s recommendation of Thomas and the acts complained of by Plaintiffs. First and foremost, that is simply not the test under Rule 609. The purpose of admitting the conviction under Rule 609 is to attack the witness’ credibility *today* in court. If Eliason had been convicted of a felony theft *last week*, such a conviction would be admissible without doubt because it goes to his credibility as a witness today. The Defendants have attempted to misguide the Court’s analysis by suggesting that 609(a) only applies to crimes committed *before* the conduct currently complained of and such just is not the case. Furthermore, Eliason’s 2003 conviction is relevant to show that Eliason could not have been reformed at the time he was making an evaluation of Gerald Patrick Thomas in 1997. Eliason’s conduct demonstrates a habitual

pattern and all three convictions demonstrate an impaired judgment and lack of credibility at all material times in this case.

Contrary to Defendants' assertion, the probative value of this evidence is not outweighed by its prejudicial effect. Plaintiffs' case against the Synod focuses on the mindset, thought processes and judgment of the Synod and its officers in evaluating Gerald Patrick Thomas. Defendant Eliason, as the Assistant Bishop of the Synod, was an integral part of that decision making process, which involved evaluating Gerald Patrick Thomas' prior sexual misconduct in connection with placing him in a position of power and authority in the Marshall community. There is no better means for the jury to evaluate the decisions made by the Synod than for the jury to evaluate the individuals making those decisions. A detailed and complete evaluation of Defendant Eliason requires the Court to admit Eliason's sexual addiction and related convictions as evidence in this case. Although the convictions may be prejudicial to Defendants' case, as is virtually *all* evidence in this case, they are not "unfairly" prejudicial and they are highly probative.² This evidence goes to the heart of Eliason's judgment and credibility. Therefore, these convictions should be admitted as evidence.

Defendants also assert that admitting Eliason's convictions will somehow confuse or distract the jury into believing that Eliason's misconduct resulted in direct harm to Plaintiffs. This is a clear stretch. There is no allegation in this case that Eliason's public masturbation itself caused harm to any Plaintiff and Plaintiffs' counsel have no intention of presenting this evidence in any manner that would imply such injuries to the minor

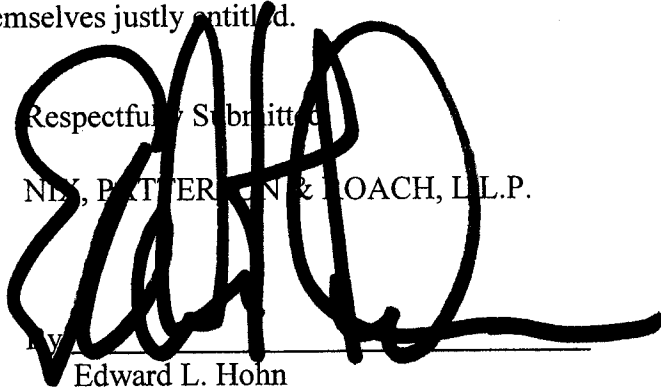
² "The fact that evidence has some prejudicial effect is insufficient to warrant its exclusion. Instead, there must be a demonstration that introduction of the evidence would be *unfairly* prejudicial to the objecting party. Moreover, to be excluded, 'evidence must not only create a danger of unfair prejudice, but such danger must substantially outweigh its relevance.'" *Pittsburg Corning Corp. v. Walters*, 1 S.W.3d 759, 772 (Tex. App.—Corpus Christi 1999, pet. denied).

Plaintiffs. Plaintiffs are confident that this intelligent jury will easily discern this simple distinction.

Therefore, Plaintiffs pray that this honorable Court deny, in its entirety, Defendants' Motion to Exclude Evidence. Based on the foregoing, it is patent that Defendants' Motion to Exclude Evidence is meritless. Accordingly, Plaintiffs respectfully request that this motion be overruled in its entirety, and for such further and other relief to which Plaintiffs show themselves justly entitled.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the foregoing instrument was served upon the following attorneys of record on this the 7th day of April, 2004.

Tracy Crawford
Brian Craft
RAMEY & FLOCK
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A large, bold, handwritten signature in black ink, appearing to read 'E. L. Hohn', written over a horizontal line.

Edward L. Hohn

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NO. 02-0157

JOHN ALFRED DOE #1, ET AL.) IN THE DISTRICT COURT
V.) OF
EVANGELICAL LUTHERAN CHURCH)
IN AMERICA, ET AL) HARRISON COUNTY, TEXAS

VIDEOTAPED AND ORAL DEPOSITION OF
EARL ELIASON
JULY 11, 2003

COPY

EARL ELIASON, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on the 11th day of July, 2003, before Gretchen Shore, CSR, RPR in and for the State of Texas, reported by machine method, at the offices of Ramey & Flock, Tyler, Texas, taken pursuant to the Texas Rules of Civil Procedure; and the provisions stated on the record or attached.

- 1 indecent exposure.
- 2 Q. Where did that arrest take place?
- 3 A. In a public restroom in a mall.
- 4 Q. Were there children in the restroom?
- 5 A. No, sir.
- 6 Q. What was the nature of the indecent exposure?
- 7 A. Masturbation in a public place.
- 8 Q. How did the plainclothes detective see you?
- 9 A. He was pretending to be doing the same thing.
- 10 Q. And you were placed under arrest?
- 11 A. Yes.
- 12 Q. And that was a deferred adjudication?
- 13 A. Yes.
- 14 Q. Did you pay a fine?
- 15 A. Yes.
- 16 Q. Who was your lawyer?
- 17 A. Freelander [phonetic] was his last name.
- 18 Q. He was a male officer; correct?
- 19 A. Yes. The police officer.
- 20 Q. Have you ever been married?
- 21 A. Yes.
- 22 Q. Are you married today?
- 23 A. Yes.
- 24 Q. And if you could tell me her name?
- 25 A. Eileen.