

STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss.

SUPERIOR COURT

CASE NO. 217-2020-CV-00026

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE, et al.

****THIS FILING PERTAINS TO PLAINTIFF MEEHAN'S INDIVIDUAL CASE****
****THIS FILING DOES NOT PERTAIN TO CONTRACTOR DEFENDANTS****

**PLAINTIFF DAVID MEEHAN'S OBJECTION TO DHHS' MOTION *IN LIMINE*
TO EXCLUDE TESTIMONY OF CRIMINAL DEFENDANTS**

Plaintiff, David Meehan, objects to State Defendants' motion *in limine* to exclude the testimony of several criminal defendants at trial (Index # 742), stating in support thereof as follows:

1. State Defendants move to exclude the testimony of their employees criminally charged with abusing Plaintiff at YDC (the "individual employees"). Plaintiff has subpoenaed the individual employees and has noticed them as witnesses for trial. As grounds for their requested relief, State Defendants suggest that the individual employees will likely assert their right against self-incrimination if compelled to testify, and that Plaintiff should therefore be prohibited from calling them as witnesses because any invocation before the jury would be prejudicial to State Defendants. Plaintiff objects.

2. As an initial matter, Plaintiff does not contest the assertion that, if called, the individual employees will likely assert their right against self-incrimination. Plaintiff does not seek an instruction that the jury should take an adverse inference from the fact that the individual

employees may assert their right against self-incrimination if compelled to testify. Rather, Plaintiff only requests a fair chance to present his case to the jury.

There Is No Unfair Prejudice to State Defendants from the Individual Employees' Testimony

3. As a practical matter, evidence of the criminal investigation into the allegations of abuse at the state-operated juvenile facilities has already been introduced to the jury. For example, State Defendants cross-examined witness Rochelle Edmark and others with testimony and investigative reports created in connection with the criminal investigations. Sergeant Kelly Lapointe testified on April 17, 2024, concerning her role in the criminal investigations and introduced affidavits therefrom. Further, the Court has already determined that portions of Jeffrey Buskey's arrest warrant affidavit are admissible, and the jury will be provided with a copy of the redacted affidavit (**Tr. Ex. 001A**).

4. Therefore, it is unlikely that compelling the individuals who are subject to the criminal investigation to testify and likely assert their right against self-incrimination before the jury would cause any unfair prejudice to the State Defendants.¹

The *Libutti* Factors Favor Allowing the Testimony

5. State Defendants call the Court's attention to the four-factor test espoused in *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997) in aid of their argument. New Hampshire has not adopted this test. However, to the extent the Court finds the *Libutti* test persuasive, factors three and four favor admitting the testimony of the individual employees.

6. A Massachusetts case, *Lentz v. Metropolitan Property & Casualty Ins. Co.*, adeptly summarized the *Libutti* holding and observed:

¹ To the extent the State Defendants argue that the prejudice is caused by Plaintiff's ability to ask unrestricted questions, State Defendants' request for *voir dire* is unlikely to resolve this issue.

In *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), the court reviewed cases admitting a nonparty, nonemployee's invocation of the privilege substantively, noting the absence of any definitive rule." "It delineated four nonexclusive factors to be considered in determining the admission of such evidence, including (1) the nature of the relevant relationship, i.e., whether the relationship is such that the witness would be inclined to invoke the privilege on behalf of the party; (2) the degree of control of the party over the witness asserting the privilege, i.e., whether the party's control over the witness regarding the facts and subject matter of the litigation warrant treating the witness's invocation as a vicarious admission; (3) whether the party and the witness have compatible interests in the witness's assertion of the privilege; and (4) the witness's role in the litigation." *Id.* (citing *Libutti*, at 123–124.) "We think the analysis of the *LiButti* court strikes an appropriate balance between the right and the need to present relevant evidence, on the one hand, and the need to provide a safeguard against the inherent difficulty in responding to such powerful evidence, on the other hand. Ultimately, the test is whether any adverse inference sought is reasonable, reliable, relevant to the dispute, and fairly advanced against a party. A judge's decision to admit such evidence will be reviewed for an abuse of discretion.

437 Mass. 23, 28 (2002).

7. The third *Libutti* factor examines whether the party and the witness have compatible interests in the witness's assertion of the privilege. Here, Plaintiff alleges that the acts of State Defendants and the individual employees were aligned in a common plan or design to create a culture of silence, secrecy, and abuse. The testimony of the individual employees is directly relevant to Plaintiff's allegations. Further, State Defendants' assertion that their interests are not at least partially aligned with the criminal witnesses is undercut by the fact that the State benefits from the criminal defendants' silence, because an institution only acts through its agents and employees, and the criminal defendants were agents or employees of State Defendants. The State, of course, has already offered its belief that the criminal defendants engaged in the abusive conduct by charging them criminally for the sexual assaults.

8. The fourth *Libutti* factor examines the witness's role in the litigation. The individual witnesses are integral to the case. They are among the many individuals who State Defendants

hired to work at YDC, failed to supervise, failed to train adequately, failed to investigate, failed to admonish, and failed to terminate. These failures and the environment created and perpetuated in and on the grounds of YDC led directly to the physical and sexual assaults and psychological harm inflicted upon Mr. Meehan by the individual witnesses. State Defendants have, at various times, attacked the credibility of Mr. Meehan by calling the jury's attention to incidents and suggesting to witnesses that these incidents demonstrate that Mr. Meehan was a dangerous child when he was abused by individual witnesses at YDC and suggesting to witnesses called by Mr. Meehan that the individual witnesses would testify differently to events that allegedly occurred at YDC as recounted by those witnesses. It would be prejudicial to Plaintiff to allow for such cross-examination but then prevent Plaintiff from providing some explanation to the jury as to why the individual witnesses did what they did or why they are not available to testify.

9. As evidence in this trial has shown and will show, Bradley Asbury and Gordon Thomas Searles were in supervisory roles, and their knowledge is particularly imputable in some circumstances to State Defendants, as is the knowledge of all employees in certain circumstances. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 272 (1958); *Taylor v. Metro. Life Ins. Co.*, 106 N.H. 455, 460 (1965) (applying RESTATEMENT (SECOND) OF AGENCY § 272); *Torres v. Pisano*, 116 F.3d 625, 637 (2d Cir. 1997) (imputing employee's knowledge of sexual harassment to employer because the employee had a duty to inform employer regarding harassment); *DiStasio v. Perkin Elmer Corp.*, 157 F.3d 55, 64 (2d Cir. 1998) (holding employee's knowledge of the plaintiff's sexual harassment complaints could be imputed to the company not only because that employee was a supervisor, but also because "he had a responsibility to relay sexual harassment complaints to the company under the express policy promulgated by the company"); RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006). Further, based on the evidence that has come in during the trial

thus far, State Defendants' assertion that the alleged abusive acts occurred outside the scope of employment is incorrect. Counsel for State Defendants has established through the course of trial that some of the categories of abusive conduct—for example, the use of isolation or physical restraints—could have been permissible in the right context. The use of excessive force or excessive isolation was plainly foreseeable in light of State Defendants' established policies and procedures. *See, e.g., Daigle v. City of Portsmouth*, 129 N.H. 561, 582, 587 (1987).

10. Accordingly, in addition to the fact that these individual employees allegedly perpetrated acts of abuse against David Meehan, they have knowledge that is significantly connected to other material issues in the case, and Plaintiff should be permitted to call them.

Any Prejudice to Both Parties Could be Mitigated Through an Instruction

11. Notwithstanding the forgoing arguments, should the Court find that there may be unallowable prejudice to State Defendants if Plaintiff calls the individual employees as witnesses, Plaintiff believes that the prejudice to either side could be mitigated by a limiting instruction from the Court. Specifically, Plaintiff believes a fair, equitable, and judicially efficient way to resolve this dispute is to instruct the jury that testimony from the individual employees was not presented because, if called, the individual employees would assert their right against self-incrimination. At that time, the Court could provide the appropriate instruction regarding inferences to be drawn or not drawn from the fact that the individual employees did not testify.

12. For the foregoing reasons, Plaintiff requests this Court deny State Defendants' motion and permit the testimony of criminal defendants or, in the alternative, that the Court instruct the jury that, if called, the individual employees would assert their right against self-incrimination.

WHEREFORE, Plaintiff David Meehan, respectfully requests this Court:

- A. DENY State Defendants' motion *in limine* and admit the testimony of the individual employees;
- B. ALTERNATIVELY, instruct the jury that they did not hear testimony from the individual employees because, if called, the individual employees would assert their right against self-incrimination; and
- C. GRANT any other relief as the Court deems just and proper.

Respectfully submitted,

DAVID MEEHAN,

Dated: April 19, 2024

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CERTIFICATE OF SERVICE

I certify that on this April 19, 2024, I am serving a copy of this document by electronically sending it through the court's e-filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case.

/s/ David A. Vicinanzo

David A. Vicinanzo, Esq.