

IN THE DISTRICT COURT OF KEYA PAHA COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

**JOSEPH “JOE”BAUER, also known as
JOSEPH V. BAUER,**
Defendant.

Case No. 2932

**SECOND
SUPPLEMENTAL ORDER**

DATE OF SUBMISSION: July 30, 1999.

DATE OF DECISION: August 30, 1999.

APPEARANCES:

For plaintiff: no further appearance.
For defendant: no further appearance.

SUBJECT OF ORDER: plaintiff’s motion to determine admissibility of other misconduct (“404 motion”) filed 3/12/99 (regarding matters identified by notice filed 3/2/99).

FINDINGS: The court finds and concludes that:

1. On July 8, 1999, this court entered an interlocutory order regarding the plaintiff’s motion to determine that certain evidence would be admissible at trial pursuant to NEB. REV. STAT. § 27-404(2) (Reissue 1995) (the “Rule 404” motion).

2. On July 16, 1999, the Nebraska Supreme Court announced its decision in *State v. Sanchez*, 257 Neb. 291, ___ N.W.2d ___ (1999). In response, on July 19, 1999, this court entered a supplemental order imposing requirements on the plaintiff to state the specific purposes for which the evidence was proffered as admissible. The supplemental order required the filing of the notice by July 30, 1999, and considering the matter submitted as of that date.

3. As to paragraphs 1, 3, 4, and 5 of the plaintiff’s notice filed March 2, 1999, the court is persuaded that the supplemental notice filed July 30, 1999, sets forth proper purposes for admission and supporting chains of logical inferences for the purposes of identity, intent (as to sexual contact counts only), and motive (sexual contact counts only). The supplemental notice fails to persuade the court of any other proper purpose for the evidence identified in paragraphs 1, 3, 4, and 5 of the March 2 notice.

4. As to paragraph 6 of the March 2 notice, the court is persuaded that the supplemental notice filed July 30, 1999, sets forth proper purposes for admission and supporting chains of logical inferences for the purposes of intent and motive, but that such purposes relate only to the sexual contact counts and would not be admissible as to the counts alleging First Degree Sexual Assault on a Child. The supplemental notice fails to persuade the court of any other proper purpose for the evidence identified in paragraph 6 of the March 2 notice.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plaintiff's motion to determine admissibility of other misconduct, as supplemented by the notice filed March 2, 1999, is granted to the extent that the plaintiff shall be allowed to present evidence in the plaintiff's case-in-chief regarding allegations that:

- a. The defendant began having sex with A.P.G. while she was babysitting his children, commencing when she was 15 years of age in July of 1971 (paragraph 1 of notice);
- b. The defendant was 36 years of age in July of 1971 (paragraph 3);
- c. There were multiple acts of sexual intercourse between the defendant and A.P.G. (paragraph 4);
- d. The acts took place between 1971 and 1974 (paragraph 5); and,
- e. The acts of sexual contact and penetration with the alleged victim commencing in her first or second school year when she was 6 or 7 years old (paragraph 6).

2. The evidence listed in subparagraph a, b, c, and d of paragraph 1 above shall be deemed admissible only for the purpose of showing *identity*, *intent*, and *motive*. The last two purposes apply only to the counts charging Sexual Assault on a Child and shall not be applicable as to the counts charging First Degree Sexual Assault on a Child.

3. The evidence listed in subparagraph e of paragraph 1 above shall be deemed admissible only for the purpose of showing *intent* and *motive*, which purposes apply only to the counts charging Sexual Assault on a Child and shall not be applicable as to the counts charging First Degree Sexual Assault on a Child.

4. The plaintiff shall notify the court, outside the presence of the jury, before adducing evidence of any such conduct, in order that the court may allow the defendant the opportunity to request a limiting instruction outside the presence of the jury.

5. The defendant shall be entitled to a limiting instruction before such testimony regarding the jury's consideration of any such evidence; however, such limiting instruction will be given only upon request and not on the court's own motion.

6. If the defendant desires to request the particular content and/or wording of the limiting instruction or instructions, any such request shall be filed in writing with the court clerk, and copies mailed to opposing counsel and to the trial judge at Ainsworth, Nebraska, at least 10 days prior to trial.

7. Except to the extent granted as set forth above with the above-specified conditions, the motion is denied.

8. This order does not affect that portion of the July 8, 1999, order denying the motion in part, and precluding the plaintiff from offering evidence regarding paragraphs 2 and 7 of the notice and further precluding the plaintiff from offering evidence regarding unspecified acts of misconduct in reliance on paragraph 8 of the notice.

9. This order is interlocutory in character.

10. To the extent of any conflict with this order, the interlocutory order entered July 19, 1999, is modified to conform to this order.

Entered: August 30, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.

Done on _____, 19 ____ by _____.

: Note the decision on the trial docket as: 8/30/99 Signed "Second Supplemental Order" entered regarding admissibility of evidence of prior misconduct.

Done on _____, 19 ____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge