IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

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JOHNSON COUNTY IOWA

MICHAEL KASPER, ROBERT KASPER, and ARDEN KASPER, Plaintiffs,	)	No. 53102
v.	)	
FATHER JAMES ELMER LEU, Individually and as agent of Diocese of Davenport and Roman Catholic Bishop of Davenport; MOST REFEREND GERALD O'KEEFE, all individually and as agents of the Diocese of Davenport; THE ROMAN CATHOLIC BISHOP OF DAVENPORT; and THE DIOCESE OF DAVENPORT, Defendants.	)	RULING

Hearing was held September 11, 1992, concerning the issues raised by Defendants' Motion for Summary Judgment filed July 23, 1992. Plaintiffs appeared by attorneys Peter C. Riley, Chris Bruns and Robert Horak. Defendants, Most Reverend Gerald O'Keefe, the Roman Catholic Bishop of Davenport and the Diocese of Davenport appeared by attorney Charles E. Miller.

STATEMENT OF FACTS

Father Leu was assigned to St. Mary's parish in Lone Tree, Iowa, on April 10, 1985, where he served as pastor. Plaintiffs Michael Kasper and Robert Kasper, as minors, were altar boys at the church and became acquainted with Father Leu. The Kaspers and Father Leu developed a close friendship and began staying overnight at the rectory and accompanying Father Leu on out of town trips. This relationship was encouraged by the boys' mother who believed Father Leu to be a good influence on her sons whose father was often out of town working. Late in 1985, Father Leu began to systematically sexually abuse Plaintiffs at the rectory

and when they accompanied him on trips. This continued until November 1988 when their parents learned of the incidents. The parents contacted Church authorities concerning the sexual abuse. Shortly thereafter, Father Harry Lenanbrink and Monsignor W. Robert Schmidt met with Bishop Gerald O'Keefe to notify him of the incidents. Subsequently, Father Leu resigned from the Lone Tree parish. Father Leu plead guilty to criminal charges and was sentenced to incarceration in a state penal institution.

Michael and Robert Kasper bring this action contending that the doctrine of respondent superior allows them to recover damages from the aforementioned Defendants. They also allege a breach of continuing duty to report, breach of duty to screen and supervise and ask for additional punitive damages. Plaintiff Arden Kasper seeks damages for the breakdown of his marital relationship, damage to the parent/child relationship, and emotional distress.

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The aforementioned Defendants request summary judgment on all counts.

MEMORANDUM OF LAW

Summary judgment is proper when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. First National Bank in Fairfield v. Kenny, 454 N.W.2d 589, 591 (Iowa 1990). Even where the facts are not in dispute, summary judgment is inappropriate where rational minds could draw different inferences. Show v. Soo Line Railroad, 463 N.W.2d 51, 53 (Iowa 1990). The evidence should be construed in the light most favorable to the resisting party. Diamond Products Co. v. Skipton Painting and Insulating, Inc., 392 N.W.2d 137, 138 (Iowa 1986).

The Doctrine of Respondent Superior

An employer is liable for injuries caused by an employee's torts committed within the scope of employment. Jones v. Blair, 387 N.W.2d 349, 355 (Iowa 1986). Therefore, to hold the aforementioned Defendants liable there must be an employer-employee relationship between Father Leu and each of the Defendants. The question of whether a parish priest is an employee has not been addressed in Iowa.

Generally speaking, the most important factor in determining whether one is an employee is who retains control over the work. Peterson v. Pittman, 391 N.W.2d 235, 237 (Iowa 1986). Control, however, is not the only consideration. Id. The Court also looks at such factors as responsibility for payment of wages, intention of the parties, and withholding of income taxes and Social Security. Id.

In this case, Father Leu headed the parish in Lone Tree, Iowa. This parish is one of 112 parishes contained within the Diocese of Davenport. The Diocese of Davenport is headed by Bishop O'Keefe. Bishop O'Keef assigned Father Leu to the Lone Tree parish. Pastors are required to conduct their parish according to Roman Catholic Church and Diocesan mandates. However, Father Leu was authorized to do whatever was necessary to carry out his duties. He set his own hours, maintained his own schedule and purchased necessary supplies at his discretion. Father Leu could hire and fire non-clergy employees. Father Leu could be removed for cause after agreement between the Bishop and others. He was required to file an annual financial report. St. Mary's parish paid his salary and the Diocese did not withhold income tax or social security.

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The Supreme Court of Kansas recently decided a case with similar fact patters. Brillhart v. Scheier, 758 P.2d 219 (Kansas 1988). In Brillhart, the court found that a parish priest was an independent contractor and his negligence could not be imputed to the diocese under the doctrine of respondent superior. Id. The court found that the pastor's day-to-day activities were within his own discretion and control. Id. at 223. While the court mentioned other factors, it found that the right to control test was the deciding test and held it had not been met. Id. It is additionally noted that the dissent opines that there is a material fact issue.

Viewing the facts in a light most favorable to plaintiffs, this issue should not be resolved by summary judgment due to genuine issues of material fact. Father Leu was required to go wherever the Bishop asked him to serve. He was required to follow church canons and diocesan mandates. He could be removed by the Bishop and maintained certain records.

In addition to the foregoing, Plaintiffs must also establish that Father Leu acted within the scope of employment for respondent superior to apply. Scope of employment is generally a

fact question for the jury according to Iowa law. Seybold v. Eisle, 134 N.W. 578, 581 (1912). However, depending on the facts and circumstances, the question as to whether an act departs markedly from the employee's business may be a question for the Court. Sandman v. Hagan, 154 N.W.2d 113 (1968). Where the facts are undisputed and no other inferences are possible, the question may be answered as a matter of law.

An employer is usually only liable for tortious acts of a servant if those acts are committed while the servant is engaged in furthering the employer's business or interests. Sandman, 154 N.W.2d at 118. However, Iowa courts have recognized that employers rarely authorize employees to commit torts, yet if in the scope of employment the employer places the employee in a position to commit a tort, such employer can be held liable. Turner v. Zip Motors, Inc., 65 N.W.2d 427, 430 (1954). There are no Iowa cases specifically dealing with the liability of a diocese for a parish priest's acts of sexual abuse. Both Plaintiffs and the aforementioned Defendants have cited cases from other jurisdictions that have dealt with this issue. For example, in Erickson v. Christenson, 781 P.2d 383 (Oregon 1989), the Oregon Court of Appeals held that if a priest develops a spiritual relationship of trust with the plaintiff in the exercise of his duties, then abuses that relationship, the church can be held responsible. In contrast, other courts have held that such conduct falls outside the scope of a priest's responsibilities. See Mella v. Tamayo, 232 Cal. Rptr. 685 (Cal. Ct. App. 1986); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (en banc); Jeffrey Scott E. v. Central Baptist Church, 243 Cal. Rptr. 128 (Cal. Ct. App. 1988).

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Iowa generally holds that a question of scope of employment is a jury issue. A California case helps to clarify when this question becomes one for the court. See Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991). In Mary M., the court found that a question of law exists where the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude the act was within scope of employment. In this case, Father Leu established a relationship with Plaintiffs through their position as altar boys. He used his position to create a relationship of trust and respect. He admits he was attempting to counsel the boys and that the line between counseling and something more became blurred. In light of the foregoing, this issue is a matter of fact for the jury to determine.

Breach of Continuing Duty to Report

The aforementioned Defendants request summary judgment on the issue of whether they had a mandatory duty to report incidents of sexual abuse. The existence of such a duty may be established by statute or common law. Engstrom v. State, 461 N.W.2d 309, 315 (Iowa 1990). There does not seem to be any Iowa case establishing a duty to report for the clergy. Therefore, if the duty exists, it must be statutory. Iowa Code Section 232.69 imposes a mandatory duty to report on certain classes of persons. The applicable section states as follows:

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> 1. The following classes of persons shall make a report within twenty-four hours and as provided in section 232.70, of cases of child abuse:
>
> > b. Every self-employed social worker, every social worker under the jurisdiction of department of human services, any social worker employed by a public or private agency or institution, public or private health care facility as defined in section 135C.1, certified psychologist, licensed school employee, employee or operator of a licensed child care center or registered group day care home or registered family day care home, individual licensee under chapter 237, member of the staff of a mental health center, peace officer, dental hygienist, counselor, or mental health professional, who, in the scope of professional practice or in providing child foster care, examines, attends, counsels or treats a child and reasonably believes a child has suffered abuse.

Plaintiffs argue that the word "counselor" is intended by the legislature to encompass the clergy. There are no Iowa cases which define the word "counselor" or interpret the legislature's intent. Although, counselor is defined as a member of the clergy in Iowa Code Section 769.15(1)(a), this definition was added after counselor was added to 236.69. In addition, 769.15(1)(a) specifically applies to Section 769.

An Attorney General Opinion discusses the provisions of Section 232.69 and is of some assistance. In an opinion issued on November 4, 1983, the Attorney General stated:

> In conclusion, only those persons specifically defined by statute and satisfying all of the statutory elements of Iowa Code Section 232.69(1) are mandatory reporters required by Iowa law to report suspected cases of child abuse.

Op. Atty. Gen. (Ellis), Nov. 4, 1983.

The fact that this opinion was written prior to the addition of the word "counselor" to the Code does not alter the assistance it gives the Court.

The clergy is not specifically defined in this section. The Church Defendants in this case do not seem to satisfy the elements of 232.69(1). They were not in a position of a counselor to Plaintiffs. They did not "examine, attend, counsel, or treat" a child and reasonably believe abuse had occurred. In fact, the church was notified by the parents of the abuse. Therefore, the Court determines as a matter of law that the aforementioned Defendants do not meet the statutory specifications.

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Breach of Duty to Screen and Supervise

A cause of action for negligent hiring exists under Iowa law when the employer owes a special duty to the injured party. D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580, 583 (Iowa App. 1984). In D.R.R., the relationship between the tenant of an apartment and a company using master keys to install a cable system pursuant to a public franchise was sufficient to create a special duty. Id. at 584. Accordingly, assuming an employer employee relationship, the aforementioned Defendants must owe a special duty to Plaintiffs to sustain a cause of action for negligent hiring. There are no Iowa cases holding that a special duty exists between a church and members of its congregation. Looking for assistance to other jurisdictions, the courts place an emphasis on forseeability. See Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); see also, Erickson v. Christenson, 781 P.2d 383 (Or. App. 1989). These cases found that if it was forseeable that the priest would be likely to harm others than the Plaintiff has a cause of action against the church.

Plaintiffs assert that the aforementioned Defendants had had previous problems with Father Leu and were aware of rumors concerning problems with discipline imposed by him. Examining

the facts in a light most favorable to Plaintiffs, there is a fact question on foreseeability. Therefore, summary judgment is not be proper on this issue.

In addition, the Defendants argue that this cause of action violates the First Amendment. They cite Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991) in support of their position. In Schmidt, the court held that the church could not be regarded as supervising or retaining a clergyman who had joined another denomination although he was still listed as a "pastor emeritus." Id. at 331. The court then went on in what is essentially dicta to add that it would be unconstitutional to determine if ecclesiastical authorities negligently supervised or retained the Defendant. Id. at 332.

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The aforementioned Defendants also rely on several cases with dissimilar fact patterns to support their position. See, e.g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (holding that the First Amendment precludes a minister's claim for gender discrimination) cert. denied 409 U.S. 896 (1972). The Plaintiffs seek to distinguish these cases as intrachurch disputes unlike the case at hand which involves an injury to a third party. This point is well taken. Churches are not and should not be above the law. Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (1985). Churches may be held liable for their torts. Id. The U.S. Supreme Court has noted the difference between intrachurch disputes and secular disputes between a third party and a religious organization. See General Council on Finance v. Superior Court, 99 S.Ct. 35, 38 (1978).

The case at hand is not an intrachurch dispute in which the court should not involve itself. Bringing a negligent hiring cause of action against a church does not involve telling a church who they can hire, but merely imposes civil liability for negligence.

"The United States Supreme Court has distinguished the absolute freedom of religious belief from the limited freedom to act upon those beliefs. Cantwell v. Connecticut, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903-04, 84 L.Ed. 1213 (1940). In Abington School District v. Schempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 O.Ed.2d 844 (1963), the Court stated that a party challenging governmental action as an infringement of his free exercise rights must show that there is a coercive effect against

his practice of religion. When the free exercise clause is raised as a defense, the threshold question is whether the conduct of the defendant is religious. Wisconsin v. Yoder, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533-34, 32 L.Ed.2d 15 (1972)('to have the protection of the [r]eligious [c]lauses the claims must be rooted in religious belief'); see Note, Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageious Conduct be 'Free Exercise'?, 84 Mich.L.Rev. 1269, 1302 (1986). 'In the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact "part of the belief and practices" of the religious group.' Id. (citing Christofferson v. Church of Scientology, 57 Or.App. 203, 245, 644 P.2d 577, 604 (1982)." Destefano v. Grabrian, 763 P.2d 275 (Colo 1988). Therefore, this is not as a matter of law a violation of First Amendment principles.

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Punitive Damages

The aforementioned Defendants argue that there is no basis for an award of punitive damages when no basis for compensatory damages exist.

Iowa Code Section 668A.1 provides that punitive damages may be awarded if "by a preponderance of clear, convincing and satisfactory evidence, the conduct of the Defendant from which the claim arose constitutes willful and wanton disregard for the rights or safety of another." Punitive damages may be awarded against the principle because of an act by an agent if the agent was unfit and the principal was reckless in employing him or if the agent was employed in a managerial capacity and was acting in the scope of his employment. Seraji v. Perket, 452 N.W.2d 399 (Iowa 1990). These two possibilities both involve genuine issues of material fact and are not proper for summary judgment.

Lastly, the aforementioned Defendants claim that the First Amendment precludes an award of punitive damages. This argument cites no new precedent and is also unpersuasive.

The Motion for Summary Judgment is sustained with regard to the issue of breach of duty to report. It is otherwise overruled.

Dated this 22nd day of October, 1992.

August F. Honsell

AUGUST F. HONSELL, JUDGE
SIXTH JUDICIAL DISTRICT OF IOWA

Peter C. Riley
Chris Bruns
Robert Horak

Charles E. Miller

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